



Kariuki v Leo Investments Ltd T/A the Concord Hotels, Beach Villas and Game Lodge & 3 others (Cause 385 of 2019) [2022] KEELRC 3885 (KLR) (2 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 3885 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 385 OF 2019
SC RUTTO, J
SEPTEMBER 2, 2022**

BETWEEN

DAVID NAMU KARIUKI CLAIMANT

AND

**LEO INVESTMENTS LTD T/A THE CONCORD HOTELS, BEACH VILLAS
AND GAME LODGE 1ST RESPONDENT
CAROLINE KABURIA 2ND RESPONDENT
MARTIN MWANGI 3RD RESPONDENT
ZARA CHATUR 4TH RESPONDENT**

JUDGMENT

1. The claimant was employed on December 6, 2019 by the 1st respondent as the Group Financial Controller on a two-year renewable contract. The employment relationship was short-lived as the claimant was terminated on 31st May, 2019, five months into his employment. The grounds for the claimant's dismissal were as follows; exposing confidential documents for the organisation, failure to submit reports as required and failure to protect the organisation from loss of revenue. The claimant has termed his termination as unfair as he avers that he was not given an opportunity to be heard. Consequently, he seeks the sum of Kshs 5,483,722.00 being unpaid salary, illegal deductions from his salary for the month of April and May, 2019, unpaid leave, compensatory damages, notice pay and service pay.
2. The claim was defended with the respondents stating that the claimant was dealt with in accordance with the terms and conditions of his letter of appointment and the relevant law. It further denies that the claimant's termination was unfair, wrongful and contrary to the law. The respondents further contend that the claimant was terminated during his probation period and that what was due to him



at the time of his termination, was availed to him by way of a cheque but he declined to collect the same. As a result, the respondents have asked the Court to dismiss the claim with costs.

3. The matter proceeded for part hearing on November 25, 2021 and later on May 9, 2022 when the defense side presented and closed its case.

Claimant's case

4. At the commencement of the hearing, the claimant adopted his witness statement to constitute his evidence in chief. He further proceeded to produce the documents filed together with his claim as his exhibits before Court.
5. It was the claimant's testimony that he is a seasoned financial accountant with a wealth of experience acquired over a period of over twenty years. He testified that his duties entailed financial management, financial advice and general accounting duties to the 1st respondent. That as he embarked on his duties, he discovered that the 1st respondent's business was in dire need of financial record keeping, policy formulation, formulating standard operating procedures hence he set up a system which surpassed the respondents' expectations. That he further embarked on preparation of the 2019 budget which was approved in April, 2019. That he also embarked on ledger clean ups for 2016, 2017 and 2018 to enable him prepare for the 2018 external audits as the financial records were not up to date.
6. The claimant further testified that the respondents sought to terminate his employment without any reason and/or justification in law through a letter dated May 31, 2019. That prior to his termination, he was never served with any warning letters or oral warning save for a purported warning dated May 15, 2019. He further stated that he was not subjected to any disciplinary process and thus his right to fair hearing and fair administrative action was infringed. That the conduct of the respondents was malicious and discriminatory and intended to punish him just like others before him whose contracts were terminated prematurely.
7. It was the claimant's further testimony that he filed an appeal against the termination but the same was never heard and was dismissed without a hearing. That further, during his employment, he discovered that the respondents had made several deductions of Kshs 11,518.65 from his April, 2019 salary and a further Kshs 23,037.30 from his May, 2019 salary, without any justification. In closing his testimony, the claimant asked the Court to allow his claim as prayed.

Respondent's case

8. The respondents called oral evidence through Mr. Onkoba Osoro, who identified himself as the 1st respondent's Legal officer. At the outset, he sought to adopt his witness statement to constitute his evidence in chief. He also produced the documents filed on behalf of the respondents as exhibits before Court.
9. RW1 testified that the claimant's contract of employment was subject to a six months' probation period. That as per the claimant's contract, the employment was terminable upon each party giving the other seven days' notice. That in the course of the probation period, the claimant was severally notified of his shortcomings in respect to his duties, and several warnings addressed to him, both written and oral. That the claimant failed to rectify the shortcoming identified in the warning letters and the verbal communication thereof, hence he was invited to show cause why his engagement with the 1st respondent should not be terminated during the probation period in accordance with the terms and conditions of his contract of employment.



10. It was RW1's further testimony that the claimant responded to the show cause but the explanation was not satisfactory hence he was issued with a notice of termination. That upon his termination, the claimants' terminal dues were prepared and a cheque No XXXXX for the sum of Kshs 165,021/= was issued by the 1st respondent but he chose not to collect the same and instead, opted to file the instant suit. That the cheque is still awaiting collection at the 1st respondent's office. That as such, the amount claimed by the claimant has no basis in law.

Submissions

11. The claimant did not file submissions in respect of his claim. It is worth mentioning that upon the claimant closing his case, he did not participate in the matter further, hence made no appearance during the defence hearing and subsequent mentions.
12. The respondents submitted that the claimant's engagement was terminated in strict compliance with his letter of appointment and the law, hence his claim has no legal basis.

Analysis and determination

13. From the pleadings, testimonies before court and submissions on record, this Court is being called upon to resolve the following questions;
 - a. Was the claimant's termination unfair and unlawful?
 - b) Is the claimant entitled to the reliefs sought?

Was the Claimant's termination unfair and unlawful?

14. In order to prove a case of fair termination under the *Employment Act*, an employer must prove that there was substantive justification to warrant termination of an employee and that in so doing, it adhered to the requirements of procedural fairness.
15. The relevant provisions on substantive justification are Sections 43(1) and 45 (2) of the *Employment Act*. In this regard, an employer is required to establish that it had a valid and fair reason to terminate an employee's services. Such reasons may relate to the employee's conduct, capacity or compatibility; or may be based on the employer's operational requirements.
16. In the instant case the reasons advanced by the respondents for the termination of the claimant's employment were: -
 - i. Exposing confidential documents belonging to the organisation;
 - ii. Failure to submit reports as required; and
 - iii. Failure to protect the organisation from loss of revenue e.g bar variances.
17. During cross examination, the claimant admitted copying his advocate on the email communication he had sent to the respondents in regards to deductions from his salary. The claimant contended that his advocate is not an outsider hence the reason he copied him in the said email communication.
18. It is not in doubt, that the email communication contains official information regarding the 1st respondent's operations specifically touching on some of its financial aspects.



19. Clause 5 of the claimant's letter of appointment, which ideally constituted his contract of employment, provides as follows: -

“During your service you undertake to serve Leo Investments Limited t/a The Concord Hotels, Beach Villas & Game Lodge faithfully and diligently and not to divulge any confidential information concerning the organisation and its operations. You shall not (except as required in the execution of your duties) either during the continuance of or after the termination of your employment hereunder divulge to any person or persons any information which you may receive or obtain in relation to the company's affairs...you shall also be expected to sign and abide by the company's confidentiality and non-disclosure agreement.” Underlined for emphasis

20. My construction of the above contractual clause is that the claimant had no authority to share or divulge any information touching on the 1st respondent and its operations without authority. In the context of the employment relationship, the claimant's advocate was an outsider hence could be deemed as an unauthorized party. Thus, the claimant was in breach of his contractual obligation when he copied his advocate in the email communication. He had no authority to do so.

21. In the circumstances and noting the fact that the probation period is a stage of discovery between the employer and the employee, the claimant by his own conduct, availed the 1st respondent reason to terminate his employment.

22. Turning to the question of procedure, the claimant has alleged that he was not taken through a disciplinary process prior to his termination. It is not in doubt that the claimant was terminated during his probation period. Section 42(1) of the Employment Act is key hence I will reproduce the same, thus:

[42(1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.”

23. It is notable that the constitutionality of the said provision was successfully challenged in the case of Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party) [2021] eKLR. The three (3) Judge bench determined as follows: -

“To this extent therefore, we find and hold that Section 42(1) insofar as it excludes an employee holding a probationary contract from the provisions of Section 41 of the Employment Act, is inconsistent with Articles 41 and 47 of the Constitution hence null and void.”

24. Accordingly, the said section ceased to have any legal effect from July 31, 2021. Thus, since the claimant's termination was before then, the said statutory provision was still alive as it was yet to be declared unconstitutional.

25. Be that as it may, I note that the claimant was issued with a show cause letter through which he was required to respond to issues in respect of his docket. The claimant responded to the said show cause letter and rendered his explanation, which according to the 1st respondent, was not satisfactory, hence his termination.

26. In the circumstances, the 1st respondent cannot be faulted on account that it did not subject the claimant to a fair process as contemplated under section 41 of the Employment Act.

27. The upshot of the foregoing is that the claimant's termination was not unfair and unlawful.



Reliefs?

28. Having found that the claimant's termination was not unfair and unlawful, the claim for compensatory damages and notice pay is declined.
29. As regards unpaid leave, it is notable that the claimant had worked for the 1st respondent for a period of five months prior to his termination. To this end, he is entitled to unpaid leave on a prorated basis, which upon calculation comes to Kshs 94,791.70.
30. In respect to the claim for deductions from the claimant's salary, the 1st respondent has not advanced any justification as to why it effected said deductions. This notwithstanding, the claimant has only proved deductions for the month of April being the sum of Kshs 11, 518.67. The deduction in the sum of Kshs 23,037.30 has not been proved hence is declined.
31. The claimant is also entitled to the salary for the days worked. It bears from the record that the 1st respondent had processed the same and to that end, prepared a cheque in the sum of Kshs 165,021.00. The claimant is therefore at liberty to collect the same if he so wishes.

Orders

32. In the final analysis, I find that the claimant's termination was neither unfair nor unlawful hence the claim is dismissed.
33. The dismissal notwithstanding, the claimant is entitled to reimbursement of the deductions made from his salary in the sum of Kshs 11,518.67, prorated leave in the sum of Kshs 94,791.70 and the sum of Kshs 165,021.00 as tabulated by the 1st respondent.
34. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF SEPTEMBER, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Aluku

For the Respondents Mr. Mwangi

Court Assistant Abdimalik Hussein

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.



STELLA RUTTO
JUDGE

