Muia v Makupa Transit Shade Limited & another (Cause 4 of 2020)
[2022] KEELRC 13007 (KLR) (28 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 13007 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE 4 OF 2020

B ONGAYA, J

OCTOBER 28, 2022

BETWEEN

VICTORIA MUTHONI MUIA ..... CLAIMANT

AND

MAKUPA TRANSIT SHADE LIMITED ..... 1ST RESPONDENT

BOSS FREIGHT TERMINAL CFS LIMITED ..... 2ND RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on February 5, 2020 through C Masinde & Company Advocates. The claimant's case is pleaded as follows. She was employed by the 1st respondent and worked for both respondents as a customer care officer from April 10, 2017 to November 27, 2019, when, her services were terminated per the letter dated November 27, 2019 and duly received by the claimant. The alleged ground for termination was suspicious activity and fraud surrounding the logistics department but which allegation the claimant pleads was not known to her at all. It is her case that she was terminated for calling Davmat Company Limited being the respondents' sister company as per email of October 3, 2019 which was copied to Dennis Keiser, the respondents' Chief Executive Officer (CEO), the respondent's General Manager Joseph Ngugi, and, Philemon Mwele. The transaction subject of the email was completed and the respondents were duly paid by the clients owing to the facilitation by Davmat Company Limited as was practice since March 2018. The email was copied to the respondent's senior managers so that the transaction was not illegal or fraudulent. Further, the claimant's case was that Davmat Company Limited had been conducting business with the 1st respondent since March 2018 when the CEO Dennis Keiser introduced new services which required the company to obtain a customs clearing licence. The respondent lacked such licence and the CEO instructed the claimant to use Davmat Company Limited to clear the goods. The respondent raised the issue of Davmat after terminating the employment of Dennis Keiser and Joseph Ngugi who were former colleagues of the claimant - while the claimant worked for Spedag Interfreight (SPIF) and

where the three former employees left at different times. Further the claimant had a clean record of service without a warning letter and the termination on account of the alleged fraud amounted to character assassination because no criminal charges were preferred in that regard. It is her case that her reputation was injured and she has been unable to secure employment as a customer care officer in the clearing and forwarding sector.

2. The claimant's further case is that the termination was without following the due process of the law for summary dismissal per sections 41, 43 and 44 of the *Employment Act*, 2007. It is pleaded that it was without valid reason, due notice and a hearing. Further, she was not paid her terminal dues.

   The claimant claimed against the respondents as follows:

   a. Damages for defamation Kshs 4, 000, 000.00.

   b. Damages for character assassination Kshs 4, 000, 000.00.

   c. House allowance at 15% being Kshs12, 000.00 x 32 months Kshs 384, 000.00.

   d. 12 months' compensation for unfair termination Kshs 960, 000.00.

   e. Notice pay in lieu Kshs 80, 000.00.

   f. Compensation for 16 years pending retirement age of 60 years Kshs 15, 360, 000.00.

   g. Annual leave for year 2018/2019 Kshs 80, 000.00.

   h. h. Total claim Kshs 24, 860, 000.00.

3. The claimant prayed for judgment against the respondent for:

   a. A declaration that the termination of employment was unfair and unlawful.

   b. The respondent to pay the claimant Kshs 24, 860, 000.00.

   c. Costs of the claim plus interest at court rates.

   d. Certificate of service to issue.

   e. Any other relief the Court deems fit to grant.

4. The respondents filed the defence to the memorandum of claim on March 6, 2020 through AO Hamza & Company Advocates. The 2nd respondent denied it had employed the claimant. The 1st respondent admitted to be the sole employer of the claimant. The 1st respondent pleaded that it dismissed the claimant on account of fraud and dishonesty. The 1st respondent further pleaded as follows:

   a. The claimant was involved in a conspiracy with the CEO Dennis Keiser to defraud the 1st respondent by making the 1st respondent incur costs of the alleged sister company.

   b. The claimant misrepresented that the said Davmat was a sister company to the 1st respondent thereby making the 1st respondent to pay expenses on behalf of the alleged sister company.

   c. Upon discovery of the email communication dated October 3, 2019 the 1st respondent discovered that the said Davmat Company Limited was used to facilitate services of clearing and forwarding for a company known as Ligram for which the 1st respondent was fraudulently debited for all its expenses.

   d. The email communication was part of a series of fraudulent activities that had been on-going and whose main architect was Dennis Keiser.

e. By her action the 1st respondent was exposed to losses and tax liabilities flowing from the claimant's position in the company and the 1st respondent had no option but to summarily dismiss the claimant and her co-conspirators after they failed to satisfy the constituted disciplinary board of their innocence in the fraud.

5. The 1st respondent pleaded that the claimant was not defamed, she was not entitled to house allowance, and, the summary dismissal was not unfair.

The 2nd respondent pleaded that it had been wrongfully enjoined in the suit.

The respondents pleaded that the suit be dismissed with costs.

The respondents filed amended statement of response and counterclaim on February 19, 2021. The respondents repeated the pleadings earlier made and the 1st respondent counterclaimed for Kshs 3, 288, 013.00 for loss of revenue due to mismanagement fraudulent actions of the claimant while acting in her position as a Customer Relations Officer. The particulars of fraud were that the claimant colluded with the CEO of the 1st respondent to introduce a non-existent company as the 1st respondent's partner so as to fraudulently divert and misuse the funds belonging to the respondent; issuing emails to transporters, Kenya Ports Authority and shipping lines; making a commitment that that the 1st respondent would absorb all the shipping line costs incurred by the non-existent Davmat Company Limited while knowing that she was not in a position to make such declaration to 3rd parties; and being complicit to actions by the CEO Dennis Kaiser agreeing to be directly involved in affairs that she knew or ought to have known were meant to defraud the 1st respondent's revenue.

6. The 1st respondent further counterclaimed for Usd 2, 000.00 being amount credited to the non-existent company from 1st respondent's account thereby occasioning a loss per the claimed amounts. In making the counterclaim, the respondent pleaded that it would rely on the audited accounts. The respondents prayed for:

a. The claim against the respondents be dismissed with costs.

b. The claimant to compensate the respondent Kshs 3, 288, 013.00 and mismanaged funds of Usd 2000.00.

c. General damages for breach of contract.

7. The claimant testified to support her case. The respondent's witness No 1 (RW1) was one of the Directors Abdiwahid Haji Yerrow and witness No 2 (RW2) was Vincent Omayio Mwancha, Head of Accounts and Finance initially from 2003 – 2016 with a break thereafter and then coming back from December 1, 2019. The respondent witness No 3 (RW3) was CPA (K) Kefa Muregu working with JN & Associates, a firm of auditors. Final submissions were filed for the parties. The Court has considered all the material on record and fins as follows.

8. To answer the 1st issue, the court returns that the 1st respondent employed the claimant as a customer relations officer per the letter of offer dated April 7, 2017. The employment was effective April 10, 2017. The 1st respondent was the sole employer per that letter of offer. Clause 1 on position stated in part that the 1st respondent as employer had a discretion to assign the claimant to perform duties wholly or in part to any of the 1st respondent's associated companies. The evidence for the 1st respondent and pleadings for the claimant confirm that the 2nd respondent was associated with the 1st respondent because they shared directors and the claimant was assigned to work for the 2nd respondent. The court finds that as pleaded for the respondents the 1st respondent was the sole claimant's employer. The court further finds that the 2nd respondent was a necessary party to the extent that it was a company associated

with the 1st respondent at which the claimant was assigned to work. Its presence as a respondent was necessary for the efficient, effective, just, proportionate and complete determination of the suit. The agreed salary was a gross of Kshs 60, 000.00 per calendar month, payable in arrears.

To answer the 2nd issue, the court returns that the contract of service was terminated by the letter of gross misconduct dated November 27, 2019. The reason for termination was stated thus,

> "During our investigations into suspicious activity and fraud surrounding the Logistics Department, evidence was found that you have been misrepresenting the company claiming Davmat as our Sister Company, a fact known to you as being untrue. An email from yourself to Albert Mbwete is attached herewith, as evidence, wherein you request for an authority letter to be issued for Davmat as our sister company.
>
> Your action has brought the company into disrepute resulting in unauthorized use of company funds and loss of revenue. Having taken all of the facts and circumstances into consideration your actions amount to company fraud and dishonesty.
>
> The company has the right to terminate your employment summarily for lawful cause without liability or further obligation under clause 8.b of your contract...."

9. The letter stated that the claimant was being summarily dismissed with immediate effect with full pay up to November 27, 2019.

The court therefore returns that the contract of service was terminated by that letter of gross misconduct.

The 3rd issue for determination is whether the summary dismissal was unfair. During the hearing, a consent order was recorded thus, "By consent it was summary dismissal which was immediate with no elaborate notice and hearing." In that view, the court considers that the main issue for determination is whether the summary dismissal properly fell within the provisions of the law and the contract between the parties.

The mutual evidence by the claimant and the respondents' witnesses is that the claimant authored the email dated October 3, 2019 addressed to Mr Mbwete thus, "As we await for the original documents kindly revert with

1. Authority letter for Davmat company ltd – (our sister company) to secure DO with shipping line since shipment shall be cleared from Port.
2. Copy of Marine Insurance Certificate.

Regards/ Victoria"

10. The email was the same one referred to and attached on the letter of gross misconduct. The claimant testified thus, "As a result of my email Davmat was paid but I deny it was my original information; my CEO instructed me. I requested information for a shipment. I have no evidence the 1st respondent was paid." The claimant further testified that as provided in the preamble of the letter of offer of employment dated April 7, 2017, she was required to report or be directed by the General Manager from time to time. The evidence was that in issuing the email of October 3, 2019, the claimant acted without authority as she had not been directed by her immediate supervisor, the General Manager. She further testified that it was the CEO Dennis Kaiser who advised her that Davmat Company Ltd was a sister company to the 1st respondent and further, she testified thus, "I have no reason why I took oral instructions from Dennis and not from my General Manager." She further testified that she had not sued Davmat as a sister company associated with the 1st respondent. She further confirmed that per

clause 8 b theft, dishonesty, fraud or embezzlement or, willful neglect of assigned duty were grounds for summary dismissal. The claimant further testified thus, "Am aware the email I wrote could harm the Makupa Transit, 1st respondent."

11. By that claimant's testimony, the court finds that the claimant has confirmed that as at termination, the 1st respondent had a valid reason to summarily dismiss the claimant. As submitted for the respondent, section 44(3) of the *Employment Act*, 2007 provides that subject to provisions of the act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service. The court finds that the claimant fundamentally breached the contract of service when she allegedly took oral instructions from the CEO instead of the General Manager as was expressly provided in the contract of service. The claimant failed to show that Dennis had given the alleged oral instructions to issue the offensive email and even if it was established as such, she had no contractual obligation to implement the instructions without confirming that Davmat was a sister company. The evidence by the claimant was that she knew Davmat was not such a sister company and the email she issued would injure the 1st respondent. The court finds that the respondent has shown that as at termination, the reason for termination existed as valid per section 43 of the act and it related to the claimant's conduct, capacity, compatibility and the respondent's operational requirements per section 45 (2) of the act – so that it is returned that it was not unfair reason.

12. It is true that the respondent gave no notice and a hearing per section 41 of the act. However, under section 44(1) of the act, the respondent was entitled to dismiss with no or lesser notice than was contractual. A hearing was imperative but that was watered down by the claimant's testimony that she knew the email was averse to the 1st respondent's interests. The court finds that the claimant fully contributed to her summary dismissal.

    To answer the 4th issue, the court returns that the claimant was not entitled to any of the remedies as prayed for except for certificate of service per section 51 of the act and, house allowance as admitted at Kshs 288, 000.00 in the respondent's submissions. Compensation cannot issue because the summary dismissal was not unfair. As for the prayer for compensation for defamation and character assassination, the court returns that the defamatory words have not been established at all because the reason for summary dismissal namely dishonesty has been established. Further and in any event, the letter of summary dismissal was conveyed by the 1st respondent to the claimant within employer-employee relationship. Publication to 3rd parties being a necessary limb to a finding of defamation, defamation as alleged, cannot be said to emerge in the instant case. The claimant offered no evidence to justify the claim for leave and there is no reason to doubt that the respondent paid all due leave days in the final payment that was made and as submitted. Further the court returns that the claimant has not established a good reason attributable to the respondent that may have diminished her capacity to engage gainfully after the termination. Accordingly, the court returns that the claim for loss of earnings to an alleged mandatory retirement age lacked justification and it was not founded on statutory or contractual provision. It will collapse.

13. The 5th issue is whether the counterclaim should be allowed. The trite law is that special damages are specifically pleaded and then strictly proved. Per RW1's testimony and that by the claimant, the claimant did not report to the CEO but was contractually to report to the general manager. Further, the evidence is that the letter of gross misconduct dated November 27, 2019 did not quantify the amount of loss attributable to the claimant's conduct leading to the loss. RW 1 testified that after the email leading to the dismissal, a loss now claimed was incurred and the loss had been going on for a long time. RW 1 further testified that the CEO Dennis promised heaven but after his employment the losses came. Further, "Dennis was employed after the claimant had been employed. She was not a signatory

to respondent's accounts or payment procedures. Accountants were in place to sign for accounts and payment procedures. Mr Vincent Mwancha was Chief Finance Manager handling all payment procedures. I confirm he still works for respondents. Following loss discoveries his employment was not terminated at all." The court finds that by that evidence, RW1 confirmed that the claimant was not involved in payment procedures and it is difficult to attribute the amount claimed or any part thereof to her. Further, by inference, it becomes doubtful that the loss claimed was incurred if the Chief Finance Officer involved was, in unexplained circumstances, not found culpable at all.

14. Further, even if Vincent Mwancha as Chief Finance Manager had a break in service per his own evidence, the court finds that the 1st respondent has failed to establish a coherent formula apportioning the amount claimed as properly attributable to the claimant. RW2 confirmed that payments had to be approved by the CEO for Kshs 50, 000.00 and above and by Head of Department (HoD) involved for below Kshs 50,000.00 – and it was not the case that the claimant was the CEO or HoD. On the other hand, RW3 testified that the loss was attributable to deviation by management from normal authorized 1st respondent's operations whereby the CEO caused taking up by the 1st respondent of charges or costs usually taken by clients – being charges for transport, shipping line deposits, demurrage, and clearing and forwarding all of which were to be paid by the client and not the respondent). The deviation per RW3 was that the deviant management led by the CEO made clients to believe that the 1st respondent would absorb such costs but which was not the case. RW3 testified that the audit report did not capture the departments or offices that were culpable. With respect to loss of Kshs 3, 288, 013.00 in the counterclaim attributable to Davmat transaction in issue, RW3 testified that another company known as Ligram had been paid and the CEO signed for the payment. Further, RW3 testified that it was the CEO who changed the mode of operation causing the deviation that amounted to operations outside the respondents' scope of enterprise and therefore the losses.

15. The court has considered the evidence and returns that while it is submitted for the respondent that the claimant failed to oppose the counterclaim, the same has not been proved. Further, the separation was on November 27, 2019 and the counterclaim was filed on February 19, 2021. The respondents' witnesses testified that the losses had been going on for a long time. The court returns that the injury was a continuing injury whose cause of action was limited to 12 months from cessation thereof on November 27, 2019 per section 90 of the act. Thus, the claim was equally time barred when the counterclaim was filed. As the claimant failed to file a response to the counterclaim, each party to bear own costs of the counterclaim. The claimant has partially succeeded in his claim for house allowance. He is awarded 25 % costs of his claim.

In conclusion, judgment is hereby entered for the parties with orders:

1. The 1st respondent to pay the claimant a sum of Kshs 288, 000.00 by December 1, 2022 failing interest to be payable thereon at court rates from the date of filing of the suit till full payment.
2. The 1st respondent to deliver the certificate of service by December 1, 2022.
3. The 1st respondent to pay 25% of the claimant's costs of his suit.
4. The counterclaim is dismissed with orders each of the parties to bear own costs of the counterclaim.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 28TH OCTOBER, 2022.

BYRAM ONGAYA

JUDGE