



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAIROBI
CAUSE NUMBER 1483 OF 2015

BETWEEN

MIRIAM WAKIO KABURO.....CLAIMANT

VERSUS

1. KEVIAN KENYA LIMITED

2. DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENTS

RULING

1. The Claimant filed her Statement of Claim on 21st August 2015. She states that she was employed by the 1st Respondent as a Storekeeper, on 1st November 2011.
2. She was arrested and prosecuted on a charge of stealing by servant. The 1st Respondent was the complainant. She was tried and acquitted in Chief Magistrate's Court at Kibera, Criminal Case Number 2914 of 2014.
3. The 1st Respondent dismissed her on account of the allegation of stealing.
4. She claims compensation for unfair termination and damages for malicious prosecution from the Respondents.
5. On 5th April 2019, the Court ordered that the Claim is considered and determined under Rule 21 of its Procedure Rules, 2016.
6. Judgment was reserved for 28th June 2019. Unfortunately, the Trial Judge was suspended, and Judgment could not therefore be delivered as slated.
7. The 1st Respondent has filed an Application dated 16th March 2021, asking the Court to review and set aside the order on hearing under Rule 21; the hearing is reopened; the 1st Respondent is allowed to file a Witness Statements, Documents and Submissions; and that the Claim is heard orally.
8. The 1st Respondent relies on the Affidavit of its Advocate, Daniel Musyoka, sworn on 6th March 2021, who explains that at the time the orders on the mode of hearing and disposal issued, his Law Firm had just taken over the brief on behalf of the 1st Respondent, from another Law Firm.
9. On receiving instructions, the Advocate states, he realized there was need for the 1st Respondent to present Witness Statements, Documents and Submissions. He had asked for leave from the Court, to present these. He states also, that the Claimant pursues damages for malicious prosecution, a prayer which requires thorough interrogation through evidence, which needs to be presented orally.
10. Both Respondents have filed Notices of Preliminary Objection, on the ground that the Court does not have jurisdiction to entertain the prayer for damages for malicious prosecution.
11. The Claimant is opposed to the Application and Objection. She relies on her Replying Affidavit sworn on 18th December 2019. She states that the 1st Respondent was represented at the time the Court issued its order on determination under Rule 21. On jurisdiction, she submits that the 1st Respondent was the complainant, and the Court is seized of jurisdiction to hear the Claim on both counts of unfair

termination and malicious prosecution.

12. The Court directed that the Application and Objection are joined, considered and determined on the strength of Submissions. Parties confirmed filing of their Submissions at the last virtual session on 4th June 2021.

13. Ruling was reserved for 30th September 2021, but has been prepared and is ready for delivery, well in advance of the given date. The Court has directed the Registry to issue notices to the Parties, for delivery on the date shown below.

The Court Finds: -

14. The Court has jurisdiction to hear the related prayers on unfair termination and malicious prosecution. There are several decisions of the E&LRC establishing this, but the Court of Appeal decision, cited by the Claimant, **Barclays Bank of Kenya Limited v. Julius Kiema Kenga & Another, [2019] e-KLR**, shall suffice.

15. On the mode of hearing, the Court notes that there does not appear to have been clear consensus that the matter proceeds under Rule 21.

16. Although the Court was within its discretion to direct that hearing proceeds under Rule 21, all necessary Witness Statements and Documents appear not to have been filed.

17. The 1st Respondent asked for leave to file Witness Statements and Documents, while the Claimant similarly asked for leave to file further Documents if need be.

18. This would suggest that the Claim was not ripe for Judgment.

19. Rule 21 allows the Court to make determination on the basis of Pleadings, Affidavits, Documents and Submissions before it. These ought to be before the Court, before Judgment date is given. The Court is likely to be hampered in preparing its Judgment, if for instance, Parties have not filed their Affidavits, Documents and Submissions as directed. At the time the order for delivery of Judgment was made, it appears not all requisite Documents and Witness Statements were on record.

20. The 1st Respondent's current Advocates had just come of record.

21. ***The Court is satisfied that the Application filed by the 1st Respondent has merit.***

22. It has come to the attention of the Court, that the 1st Respondent filed an Application dated 29th January 2018, seeking that the Claim is transferred to the Chief Magistrate's Court at Milimani for trial and disposal.

23. This Application does not appear to have been prosecuted. The Claimant earned a monthly salary of Kshs. 23, 500, and the Court does not see any good reason, why her Claim cannot at first instance, be heard at the Chief Magistrate's Court.

24. ***The Court, on its own motion, orders that this Claim is transferred to the Chief Magistrate's Court Milimani, for hearing and disposal.***

IN SUM, IT IS ORDERED: -

a. Preliminary Objection, on jurisdiction is declined.

b. The orders made on 5th April 2019 are reviewed and set aside.

c. The 1st Respondent is granted leave to file Witness Statements and Documents within 14 days of this Ruling.

d. The Claimant and the 2nd Respondent may file and serve additional Witness Statements and Documents if need be, within 14 days of receiving 1st Respondent's Witness Statements and Documents.

e. The Claim is transferred to the Chief Magistrate's Court Milimani for trial and disposal.

f. Parties shall obtain a hearing date before the Chief Magistrate's Court on an accelerated basis, considering that the Claim was filed in 2015.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT CHAKA, NYERI COUNTY, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 20TH DAY OF AUGUST 2021.

JAMES RIKA

JUDGE