



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 14 OF 2018

JAMES CHEGE NYANGWESO.....CLAIMANT

VS

INSPECTORATE (E.A) LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. By his Memorandum of Claim dated 12th January 2018 and filed in court on 15th January 2018, the Claimant pursues a claim for compensation for unfair termination of employment and payment of terminal dues.
2. The Respondent's response to the Claimant's claim is documented in a Reply to Memorandum of Claim filed in court on 16th February 2018.
3. The matter went to full trial where the Claimant testified on his own behalf and the Respondent called its Finance and Administration Manager, Stephen Kimani, Technical and Operations Director, Kyalo Ilunga, Finance and Administration Director, Susan K. Sammy and Operations Manager, Raphael Munyao. Thereafter, the parties filed written submissions.

The Claimant's Case

4. The Claimant pleads that he was employed by the Respondent on 16th January 2015, in the position of Human Resource Manager. His initial monthly salary was Kshs. 30,000 and was increased to Kshs. 60,000 as at the time he left employment.
5. The Claimant worked for the Respondent until 6th June 2017, when his employment was terminated.
6. Regarding the circumstances of the termination, the Claimant states that on 6th June 2017, he received a call from the Respondent's Technical and Operations Director, Kyalo Ilunga inquiring about the whereabouts of documents the Claimant had sent for signing the previous day. The Claimant told Ilunga that he had the documents in his office. The Claimant was asked to take the documents to the Operations Director's office, which he did.
7. The Claimant further states that he was called back and found Kyalo Ilunga and the Finance and Administration Director, Susan Kyalo in the same office. The Claimant was asked why he had taken the documents that were meant for the Finance and Administration Director.
8. The Claimant avers that he explained that he was following up on whether Ilunga had signed the documents. The Claimant added that he found the documents in Ilunga's out tray and took them for custody because the matter was urgent and the Finance Director was out of the office.
9. The Claimant further avers that he explained that he had taken the documents to his office so that he could remind the Finance Director to sign them the following morning.
10. The Claimant goes on to state that Kyalo Ilunga ordered him out of the office, telling him to wait outside for further instructions. The Claimant was called back and told to apologise for what he had done.
11. The Claimant wrote a letter to Ilunga, explaining the circumstances under which he had accessed the documents in question. He stated that he was doing his work, had committed no offence and hence there was no need for him to apologise.
12. The Claimant states that upon handing over his letter to Ilunga, he was told to go home and not come back to work. On 9th June 2017, the

Claimant received an email from the Respondent's Finance Manager, Stephen Kimani forwarding a termination letter dated the same day.

13. The Claimant's case is that the decision to terminate his employment was unfair, unprocedural and unlawful since the requirements laid out in the Constitution of Kenya, the Employment Act and ILO Convention No 158 on Termination of Employment, were not adhered to.

14. The Claimant states that he never went on leave during the entire period of his employment with the Respondent and that he was not paid salary for six (6) days worked in the month of June 2017.

15. The Claimant's claim against the Respondent is as follows:

- a) **One month's salary in lieu of notice.....Kshs. 60,000**
- b) **Leave pay for 2 years.....120,000**
- c) **Salary for 6 days worked in June 2017.....13,846**
- d) **Salary for unexpired term of contract.....1,167,864**
- e) **12 months' salary in compensation.....720,000**
- f) **Certificate of service**
- g) **Costs plus interest**

The Respondent's Case

16. In its Reply to Memorandum of Claim filed in court on 16th February 2018, the Respondent denies the Claimant's entire claim and states that the Claimant was lawfully dismissed for gross misconduct.

17. The Respondent further states that the Claimant's dismissal was executed in accordance with proper procedure. The Respondent maintains that the Claimant was given a fair hearing and allowed a chance to redeem himself by offering an apology but he wilfully chose not to.

18. Regarding the claim for leave pay, the Respondent states that the Claimant was given his statutory leave in accordance with the Employment Act, 2007.

19. The Respondent claims that the Claimant did not hand over the following items belonging to the Respondent Company:

- a) Mobile Phone-Huawei P8 Lite
- b) HP Laptop and all passwords
- c) Cash vouchers
- d) Inventory list of company stationery and PPEs
- e) A printer
- f) Car key for company vehicle KCE 954Y
- g) Insurance and Port Pass stickers for KCE 954Y
- h) File cabinet keys and other keys in his possession (duplicate key for the warehouse)
- i) Staff uniform
- j) Company identification cards
- k) Staff medical cards

Findings and Determination

20. Upon review of the evidence adduced in court, alongside the submissions filed on behalf of the parties, the first issue that emerges for determination is whether the claim herein has been settled out of court. On this issue, the Respondent submits that pursuant to an offer made by the Claimant on 6th April 2018, the claim was fully settled as evidenced by a 'certificate of no dues' dated 12th April 2018.

21. On its part, the Claimant objects to admission of these documents because they were made on a ‘without prejudice’ basis and are therefore privileged. In this regard, the Claimant relies on Section 23 of the Evidence Act which insulates admissions made on ‘without prejudice’ basis from evidential scrutiny.

22. The principle of ‘without prejudice’ serves the purpose of allowing parties to negotiate without apprehension that statements made by them will be used against them in the event negotiations collapse and the dispute ends up in court. The principle is however not a blank cheque for parties to walk out of a firm agreement consciously executed.

23. In the written submissions filed on behalf of the Respondent on 8th July 2021, reference was made to the decision in *Walker v Wilsher (1889) QBD at 337* where Lindley J defined the phrase ‘without prejudice’ in the following terms:

“I think they mean without prejudice to the position of the writer of the letter if the terms he proposes are not accepted. If the terms proposed in the letter are accepted, a complete contract is established, and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one.”

24. In *Lochab Transport Ltd v Kenya Arab Orient Insurance Limited [1986] eKLR* it was held:

“...if an offer is made “without prejudice”, evidence cannot be given on this offer. If this offer is accepted, a contract is concluded and one can give evidence of the contract and give evidence of the terms of that “without prejudice” letter.”

25. Adopting this principle in *Kawamambanjo Limited v Chase Bank (Kenya) Limited & another [2014] eKLR* J. Kamau J stated the following:

“...contents of a communication made “without prejudice” are admissible when there has been a binding agreement between the parties and once a contract is concluded; one can give evidence of the terms of that “without prejudice” letter.”

26. In similar fashion, Njoki Mwangi J in *Mumias Sugar Co. Ltd & another v Beatrice Akinyi Omondi [2016] eKLR* stated thus:

“The approach to without prejudice negotiations and their effect has undergone significant development over the years. Thus the without prejudice principle, or, as it is commonly called, the without prejudice rule, initially focused on the case where negotiations between two parties were regarded as without prejudice to the position of each of the parties in the event that the negotiations failed. The essential purpose of the original rule was that, if the negotiations failed and the dispute proceeded, neither party should be able to rely upon admissions made by the other in the course of the negotiations. The underlying principle of the rule was that the parties would be more likely to speak frankly if nothing they said could subsequently be relied upon and that, as a result, they would be more likely to settle their dispute.”

27. In the instant case, the Claimant made an offer which the Respondent accepted and even went ahead to pay out money in terms of the resultant agreement. It is evident therefore that the parties unequivocally settled this claim and there is nothing more to do.

28. It does not matter how many times the Claimant wrote the words ‘without prejudice’ the intention of the parties is clear that the claim was to be fully settled out of court. Indeed, the Claimant appears to have been aware of this fact and his only motivation in pursuing the claim after settlement was to recover his Advocate’s fees.

29. In the end, I find and hold that this claim was fully settled between the parties and there is no surviving cause of action. The Claimant’s entire claim therefore fails and is dismissed with costs to the Respondent.

30. Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY SEPTEMBER 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Tolo for the Claimant

Mr. Musyimi h/b Mr. Mulwa for the Respondent