



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 478 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

ARNOLD MUOKI.....CLAIMANT

VERSUS

LOCAL PRODUCTIONS KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The claimant filed a statement of claim dated 10th March, 2017. His testimony is that he was employed by the respondent vide a contract of employment dated 24th May, 2014 as a Human Resource Assistant. He says he started work on 1st June, 2014. He then rose to the position of Human Resource Manager.
2. His gross salary was Kshs.310,000/= per month plus Kshs.5,000/= telephone allowance per month and Kshs.30,000/= fuel allowance. He was also entitled to Kshs.10,000/= as DSTV subscription.
3. The claimant states he executed his duties diligently and excelled in his performance.
4. On 29th February, 2016 the claimant states that he received a two weeks suspension on allegations relating to “handling of interns” and “conflict of interest”.
5. The claimant says he responded vide his letter of 7th March, 2016.
6. He says he was nevertheless subjected to discriminatory and unequal treatment in a disciplinary process which was fundamentally flawed and devoid of tenets and rules of natural justice and fairness. This was on 21st March, 2016.
7. He says his employment was finally terminated vide the letter dated 8th April, 2016.
8. The claimant prays for a declaration that his dismissal was unfair, malicious and unlawful and prays for Kshs.3,720,000/= compensation equivalent to 12 months gross salary.
9. Kshs.540,000/= equivalent to 12 months’ salary as allowances.
10. Exemplary damages, certificate of service, costs and interest on 8, 9, and 10 above and any other appropriate relief.
11. The respondent in their response dated 31st May, 2017 admitted the claimant was employed by the Respondent as their Human Resource Assistant and was then promoted to their Manager.
12. The respondent states that the claimant as an experienced Human Resource Leader was custodian of all respondents’ policy documents and was expected to acquaint himself with the said policies and train employees of the respondent on the policy documents.
13. The respondent further states that the claimant trained the employees of the respondent on the employee handbooks moonlighting and conflict of interest and gift policies.
14. The respondent declares that the claimant was moonlighting in violation of employee’s handbook, the moonlighting policy and conflict of interest and gift policy and that claimant was involved in activities construed as conflicts of interest in violation of these respondent’s policies.

15. The respondent states that the claimant vide his letter dated 29th February, 2016 admitted he was working and consulting for a supplier of the respondent known as Nusu Nusu.

16. The respondent states that he met the claimant on 29th February, 2016 and presented the allegations therein to the claimant and then sent him on a two weeks' suspension with full pay.

17. By their notice to show cause of 14th March, 2016 the respondent states he complied with the legal requirement by using a language that claimant understood, giving the time and place of hearing and giving the reasons they were considering the termination. The claimant was also advised on his right to be assisted by another employee.

18. The respondent proceeds to explain that the disciplinary meeting took place on 21st March, 2016 and tribunal issued its decision based on strength of evidence and served the claimant with a termination letter dated 8th April, 2016.

19. The respondent denies they maliciously terminated the claimant's employment and reiterates that the claimant was well aware of the policies related to moonlighting and conflict of interest. If one had to be involved he had to get a written consent from its Manager.

20. They further aver that the claimant did not sign a declaration of interest form to admit his association with Nusu Nusu as is a requirement of the Company's policies.

The respondent prays the claimant's suit be dismissed with costs to the respondent.

21. The issues for determination are whether:-

(i) Respondent had valid reasons to terminate the claimant's employment.

(ii) Did respondent follow proper procedure to terminate the claimant's employment.

22. CLAIMANT'S SUBMISSIONS

The claimant submissions are that contrary to the respondent's allegation that the claimant was moonlighting with a competing company by the name NUSU NUSU the said allegation has not been proved.

23. His submission is that the moonlight policy stresses on additional jobs that are remunerated or where employee has an employment contract. He avers that he was neither remunerated nor did he have a contract with NUSU NUSU.

The 2nd respondent witness one Mr. Fareed Khimani said in his evidence that there was no salary or remuneration but they had discussed a token and the same has never been paid.

24. The claimant further submits that he had oral permission from his boss Mr. Auka to help Nusu Nusu. He states that Mr. Auka mandated the claimant to help Nusu Nusu clear up their Human Resource issues so that they would not pick staff from the respondent and leave the respondent to pay them for their services to Nusu Nusu. He also submits that the failure to give the written authority was on the Manager of the respondent's company.

25. The claimant in reference to the charge of conflict of interest says there was no conflict since there was no "financial gain". The claimant says he did not sign the declaration of interest form because there was no conflict.

26. The claimant also states he was not given a fair hearing contrary to Section 41(1) and 47 of the Employment Act as well as Article 50 of the constitution.

He says his laptop was also taken before he could respond to the allegations raised against him.

27. The other issue raised by the claimant is that his boss Mr. Auka Gecheo should not have been present at the hearing of his disciplinary session and his presence demonstrated bias.

28. The claimant therefore submits that the respondent failed to prove the offences of conflict of interest and moonlighting and therefore his termination was not valid or fair.

29. He says he is therefore entitled to his prayers and the court should declare his termination unfair, malicious and unlawful.

30. He prays for:-

(a) 12 months equivalent compensation

(b) 12 months allowance

(c) Exemplary damages

(d) Certificate of service costs

(e) Interest

(f) Any other appropriate relief the court may deem fit and just.

31. **RESPONDENT'S SUBMISSIONS**

The respondent in its submission state that they established a valid reason to terminate the claimant's employment.

They state that they had a lot of problems with moonlighting as they would contract a company to perform a certain role and their employees would proceed to that company and gainfully consult or perform the job on contract from the respondent company. The respondent would then pay double salaries to their employees.

32. Clause 3.4 of employees handbook provided the employees should not engage in activities that conflict with the interest of the respondent.

33. The moonlighting policy defined moonlighting as holding additional jobs outside normal working hours. Moonlighting was prohibited and it included remunerated employment or consulting outside the company. The only exemption to this is if the employee got written consent of the Manager or Departmental head.

34. The same policy went further to provide that if one was involved in moonlighting and failed to disclose he was exposed to disciplinary action.

35. The conflict of interest policy also provided that an employee was expected to disclose any conflict of interest in a declaration form. Failure to disclose conflict also rendered employee liable to disciplinary action.

36. The respondent proceeds to submit that the claimant was the Head of Human Resource Department and yet proceeded to moonlight without the authority of the Manager and did not declare the conflict. They submit that in view of the above the respondent had valid reason to terminate the claimant's employment.

37. The respondent further states they followed the right procedure as they gave the claimant a notice to show cause letter. They gave him time to respond to the charges raised against him and thereafter disciplinary hearing was conducted and claimant was offered an opportunity to defend himself and invite a representation of his own choice.

So they submit that the claimant's termination was procedurally fair.

38. **DETERMINATION**

The court has considered the evidence adduced by the claimant and the respondent and the respondent's witness. It has also considered the submissions by the respective parties and the law referred thereto. The two main issues for consideration are:-

(i) Was there a valid reason to terminate the claimant's employment.

(ii) If there was a valid reason or not was the right procedure followed.

39. **THE FIRST ISSUE IS THE REASON FOR TERMINATION** The claimant was the Human Resource Manager of the respondent. He admitted during cross examination that he was well versed with the policies of the organization. He also admitted that he used to train the other staff members about those policies.

(a) The respondent's business code of ethics 3.4 – conflict of interest provides.

“Employees shall not compete with the company or have any interest in suppliers, customers, competitors or business associates of the company either directly or indirectly”.

The question is, did the claimant breach this policy. He offered to assist the respondent's competitors in Human Resource Consultancy. He also raised invoices for consultancy services from the respondent in June, 2015 and July 2015 amounting to Kenya Shillings Six Hundred Thousand. The respondent witness Mr. Auka says claimant actually raised invoices toKshs.900,000/=.

40. The other policy of the organization is the moonlighting policy. This is defined in their policy as a term used to refer to holding of additional jobs outside of “normal working hours” and comprises but not limited to the following among others;

(i) Remunerated employment or consulting in work or an activity that is external to the company in which the employee has an employment contract.

41. In the Employment Act a contract of service is defined as an “*agreement whether oral or in writing and whether expressed or implied to employ or to serve as an employee for a period for a term and includes a contract of apprenticeship or indentured learnship but does not*

include foreign contract of service”.

42. The moonlighting policy further provides:-

“supersport will not permit any employee to take an outside job with a company in the same or related business as supersport”.

43. Once again the question to ask is did the claimant take a job with Nusu Nusu a competitor of supersport? He admitted that he assisted Nusu Nusu with their Human Resource process and helped them to hire a Human Resource Manager. He says the process with Nusu Nusu took about four months. He admits he was given a token of appreciation but does not disclose how much he received.

On this issue the court finds the claimant even though he did not have a written contract with the respondent nevertheless he offered them services as a consultant for four months. He raised invoices of Kshs.300,000/= per month for two months if not three months. I would not take Kshs.300,000/= per month as a token of appreciation whether it was paid or not. That was a big fee for services rendered. I am persuaded the claimant who in his letter of appointment was mandated to “make decisions within the organizational policies, operating framework and best practices” breached the company’s policies on conflict of interest and moonlighting policies.

44. It was abundantly clear from the policy that any moonlighting would only be undertaken with the written consent of the Manager and furthermore it was to be at the discretion of the Manager. The claimant should have made sure he got a written consent from Mr. Auka his Manager. If he had such a written authority this matter would have been very different.

45. In his submissions the claimant says that it was upto the Manager to give the written consent. Well the Manager could not have given a written consent because he was not aware that the claimant was involved in moonlighting for pay with Nusu Nusu.

46. The Manager Mr. Auka Gecheo confirmed he asked claimant to work with Nusu Nusu to resolve issues of staff being contracted to work for Nusu Nusu but he says he was not aware claimant was raising invoices to Nusu Nusu for services.

47. The respondent witness No.2 one Mr. Fareed who was the Director of Nusu Nusu stated they gave the claimant consultancy to streamline their human resource strategies and they would pay him. He says he is not sure how much they paid him.

48. The first respondent witness Mr. Auka however says claimant raised invoices amounting to Kshs.900,000/=. The invoices annexed in the list of documents are for Kshs.600,000/=.

49. Finally the claimant was expected to sign a declaration of interest form in case he was involved in services outside his organization. This again is provided in the conflict of interest policy paragraph 4.2 and in particular the **third bullet** on paragraph 4.2.2.

Examples of interest that should be declared include “Any other interest or relationship which may actually or potentially result in a conflict of interest”.

50. The claimant to quote him in his oral hearing admitted he was not only familiar with the companies policies but that he used to train the same to the staff. He cannot allege the policies were not availed to him during his disciplinary hearing as he was not only aware of them but as the Human Resource Manager should have been in possession of the same. And yet he breached the same and exposed himself to disciplinary hearing.

In the case of **GEORGE OKELLO MONYOLO VS UNILEVER KENYA LIMITED CAUSE NO.56 OF 2018** the court held that claimant failed to adduce evidence in support of a case of unlawful termination of employment as he failed to satiate his burden of proof as required in Section 47 of the Employment Act which reads as follows:-

“for any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrong dismissal has occurred will rest on the employee while the burden of justifying the grounds for termination of employment or wrongful dismissal shall rest on the employer”.

51. I find the respondent has proved on balance of probability a valid ground to terminate the claimant’s employment and so hold as such.

52. On issue of the procedure followed by the respondent the following was observed:-

(i) The claimant was first served with a suspension letter dated 29th February, 2016.

The respondent raised issues in their suspension letter including mishandling interns by the claimant. That charge for mishandling interns however was dropped as the respondent declared he was satisfied with the claimant’s explanation in his response of the notice to show cause of 7th March, 2016.

53. The claimant was invited for a disciplinary hearing and was asked to bring a representative of his choice. The meeting took place on 21st March, 2016. The claimant was invited on 14th March, 2016.

54. In the meeting he was again asked if he wished to invite a representative of his choice but he did not wish to do so.

55. After the disciplinary meeting on 21st March, 2016 the respondent said they took time to consider the matter and finally gave him the termination letter on 8th April, 2016. The respondent took pain to explain the process taken and the reasons for the termination of employment.

I am convinced therefore that on this score the respondent complied with Section 41 of the Employment Act as to the procedure followed which provides as follows:-

Section 41 of Employment Act -

“subject to Section 42(1) an employer shall, before terminating the employment of an employee or grounds of misconduct, poor performance or physical incapacity explain to the employee in a language the employee understands the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representation of his choice present during the explanation”.

56. The claimant’s complaint in his submissions about the disciplinary meeting was that the Manager Mr. Auka was present. He stated that the presence of his Manager introduced bias against him because Mr. Auka is the one who allegedly gave him oral consent to work with Nusu Nusu.

I considered that point critically and found the evidence of Mr. Auka both in his involvement during the disciplinary meeting and his evidence in court did not raise any bias in the claimant’s evidence. He merely explained the perimeters of the work he had given the claimant to assist Nusu Nusu and confirmed he had not given him any written consent to offer remunerative services to Nusu Nusu.

57. I find the respondent satisfied the requirement of Section 41 of the Employment Act as far as the procedure was concerned.

58. **CONCLUSION**

The court has found that the respondent had valid reasons to dismiss the claimant and further that they followed the procedure provided in law. I therefore proceed to dismiss the claimant’s case.

The claimant was paid his terminal dues including

- (i) His salary upto 8th April, 2016.
- (ii) One month salary in lieu of notice.
- (iii) Number of leave days earned till 8th April, 2016.
- (iv) All other dues including pension dues.

The claimant has prayed for allowance equivalent to 12 months of Kshs.540,000/=. It is not proved what it was about and so I will not comment on it.

The court is aware costs follow the event but will use its discretion to order each party bear its own costs since claimant had offered services to the respondent for about two years in a senior position and is not clear if he has secured another employment so far. The respondent will avail the claimant’s certificate of service immediately.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 29TH DAY OF OCTOBER, 2021.

ANNA NGIBUINI MWAURE

JUDGE

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 has 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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE