



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1874 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

SAMSON MAINA KAMAU..... CLAIMANT

VERSUS

PANARI HOTEL..... RESPONDENT/APPLICANT

RULING

1. By a notice of motion dated 4th October 2021, the Respondent/Applicant filed an application under a certificate of urgency seeking orders that –

1. Spent.

2. Pending the inter partes hearing and determination of this application, the Honourable Court be pleased to stay further proceedings in this matter.

3. The Honourable Court do admit and adopt the witness statement of Ms. Doris James dated 20th November 2018 and the witness statement of Mr. Edward Steven Mwiti date 20th November 2018 and the contents of these witness statements be read at the hearing by Patrick Marekia and the witness statements be adopted as the Respondent's evidence *herein*.

4. The Honourable Court be pleased to issue any order or directions as it deems fit and fair in the circumstances.

5. The costs of this application be provided for.

2. The application is filed under Sections 3 and 12 of the Employment and Labour Relations Act, 2011, Rules, 21, 18(1)(g) of the Employment and Labour Relations Court Rules, 2016, Order 19(1) of the Civil Procedure Rules Section 1, 1A, 1B, 3, 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Section 35 of the Evidence Act and all other enabling provisions of the law.

3. The application is grounded on the following;

4. That when the matter came up for hearing on 13th August 201 and ready to proceed, the Respondent could not avail all its witnesses as one Doris James was critically ill. In addition, the Judge handling the matter had been transferred to another station and could not hear part of the matter and the same was fixed of hearing on 25th October 2021.

5. That since Doris James resigned on 31st July 2021 on medical grounds and has been critically ill (inability to communicate and memory lapse she could not attend Court to testify and it is unclear when she would recover and the Aga Khan University Hospital had confirmed that the patient was admitted on 1st July 2021 and remains unwell and will require extensive rehabilitation on discharge.

6. Significantly, her evidence is critical as this is a case of sexual harassment and she was the victim. That the Respondent's case is exacerbated by the fact that its other witness, one Mr. Edward Stephen Mwiti died on 28th August 201. He was a Human Resource Consultant who investigated the alleged sexual harassment and prepared a report which implicated the Claimant. That his witness statement and report are critically important to the adjudication of the matter.

7. In the premise, the Respondent's witness Mr. Patrick Marekia should be allowed to adopt, on the Respondent's behalf, the witness

statements of Ms. Doris James and Edward Stephen Mwiti as the Respondent's evidence.

8. It is submitted that the Court has jurisdiction to grant the orders sought pursuant to –

- i. Rule 21 of the Employment and Labour Relations Rules 2016
- ii. Proviso under Section 35(1)(b) of the Evidence Act
- iii. Order 19(1) of the Civil Procedure Rules 2010.
- iv. Section 12(3)(viii) as read with Rule 28(1)(g) of the Employment and Labour Relations (Procedure) Rules 2016.

9. That unless the orders prayed for are granted, the Respondent will be prejudiced and its right to fair hearing will be substantially impaired.

10. The application is supported by the affidavit of Esther Mathenge and Samuel Kihara dated 1st October 2021. In support of the application, the Applicant has annexed the following documents

- i. Resignation letter of M/s Doris James dated 31st July 2021
- ii. Copy of the witness statement dated 20th November 2018 filed in Court
- iii. Copies of the obituary print out and images of the late Edward Stephen Mwiti.
- iv. Copies of the report prepared by Mr. Edward Stephen Mwiti on sexual harassment against Samson Maina and witness statement dated 20th November 2018
- v. Medical certificate from Aga Khan University Hospital dated 1st July 2021 on the indisposition of Ms. Doris James

11. In response to the application, the Claimant filed a replying affidavit attesting that he was the Claimant/Respondent in the matter and had read and understood the contents of the certificate of urgency, notice of motion application and supporting affidavit dated 4th October 2021 and responded as follows: -

1. That he was innocent of all the allegations levelled against him by the Respondent and its witnesses
2. That Doris James and Edward Mwiti are the key witnesses of the Respondent with incriminating evidence against him.
3. That Article 50 of the Constitution of Kenya, 2020 gives him the right to cross examine the Respondent especially in a case with damning allegations against him
4. That Samuel Kihara has not tendered any evidence that he is the husband to Ms. Doris James and maybe lying.
5. That the medical certificate produced by Samuel Kihara does not state the nature of Ms Doris James illness and was merely a sick off which states that she is free to resume work after 31st December 2021.
6. That the averment by Mr. Kihara that Ms. Doris James has memory lapse is a mere allegation whose veracity cannot be ascertained as there is no medical evidence to that effect
7. That even assuming that Ms Doris James was not in control of her mental faculties, the proper procedure would be for a petition to seek the management of Ms Doris James under the Mental Health Act.
8. That Mr. Edward Mwiti was a Consultant and the proper procedure would be that of substitution by another person in his firm
9. That the Respondents case has more or less collapsed and is trying to bring in evidence through the back door which would violate the Claimant's constitutional right to fair hearing.
10. That the application be dismissed.

Respondent/Applicant's Submissions

12. The Respondent identifies two issues for determination: –

- a. Whether the witness statements of Doris James and Edward Stephen Mwiti are admissible without cross examination of the witnesses;

b. Whether the Claimant will suffer prejudice if the witness statements are adopted

13. As whether the statements of Doris James and Edward Mwitii are admissible, it is submitted that Rule 21 of the Employment and Labour Relations Court (Procedure) Rules 2016 permit the Court to determine a suit on the basis of pleadings, affidavit documents filed and submissions without an oral hearing. That the Respondent has in support of its case filed witness statements and further supplementary list and bundle of documents.

14. Reliance is also made on Section 35(1)(b) of the Evidence Act which permits admissibility of documents where makers are dead or incapable of giving evidence. Section 33 of the Evidence Act is also reproduced to buttress the submissions as is Order 19(1) of the Civil Procedure (Amendment) Rules 2021 on production of evidence by way of affidavit to be read out in a hearing without necessarily calling the witness or maker of the document.

15. The Respondent further submits that since Doris James is indisposed and cannot attend Court and testify due to memory lapse and inability to communicate effectively and had even resigned on the ground of ill health, it is uncertain when she would be ready to testify. That the statement and investigation report prepared by the late Edward Mwitii are critically important in this matter.

16. Reliance is made on the decision in **Ngoigwa Company Limited v Dorcas Wanjiku Ikinu [2018] eKLR** where the High Court admitted a statement recorded by a deceased person. The holding in **Republic v John Ng'ang'a Njeri [2018] eKLR** was also relied on in support of the submissions.

17. It is submitted that the instant case meets the threshold set out in **Republic v John Ng'ang'a Njeri (supra)**. That the circumstances in the instant case are sufficient for the Court to admit the witness statements of Doris James and Edward Mwitii as evidence in the interest of justice.

18. As regards whether the Claimant will suffer any prejudice if the witness statements are adopted by Patrick Marekia, the Respondent relies on the decision in **Ngoigwa Company Limited v Dorcas Wanjiku Ikinu (supra)** where the High Court expressed itself as follows –

“The Plaintiff has therefore laid the basis of why the said witness cannot be availed in court to testify. The Court finds that the statement of Racheal Wanja Murira, is a statement of facts and therefore admissible. The Court allows its production and further finds that the Defendant will not be prejudiced at all because she will have an opportunity to puncture the said statement during the submissions stage.”

19. That the Claimant will not be prejudiced at all because he will have the opportunity to submit on the statements and it will be for the Court to determine the veracity of the evidence.

20. Finally, it is submitted that if the statements are not adopted, the Respondent stands to suffer great prejudice as it will be deprived the opportunity to prove its case.

Analysis and Determination

21. By the afternoon of 29th November 2021, when this ruling was written, the Claimant/Respondent had not filed submissions contrary to the directions of the Court on 25th October 2021 that:

1. The Claimant had three days to file a replying affidavit
2. The Respondent/Applicant had 7 days to file and serve submissions
3. The Claimant/Respondent had 7 days after service.

22. Regrettably, the Court did not benefit from the wisdom, insights and perspective of Claimant/s/Respondent's Counsel on the relevant law and facts.

23. I have considered the application herein, the rival affidavits and the relevant law and the issue for determination is whether the Applicant/Respondent merits the prayers sought in the application. In other words whether the witness statement of Doris James and that of Edward Mwitii together with the investigation report prepared by the latter may be produced by another witness due to the disposition of Doris James and unavailability of the latter following his demise on 28th August 2021. The Claimant relies on various provisions of law to urge that the Court has jurisdiction to make the orders sought.

24. On his part the Claimant/ Respondent relies on the replying affidavit exclusively and posits that the two witness statement and the report should not be admitted as they are critical to the claim and their admission will not only compromise his right to fair trial (especially cross examination) but will be introducing evidence through the back door.

25. No doubt the evidence of the two witnesses is critical to the matter before the Court. However, contrary to the Respondent/Claimant's averment that the Applicant/Respondent's case has collapsed, the law has in-built mechanisms that ensure that if direct evidence is unavailable, there is a second best to ensure justice is done more so in cases of incapacity and death.

The Law

26. First, **Regulation 21 of the Employment and Labour Relations Court (Procedure) Rules 2016** provides that: –

The Court may, either by an agreement by all parties, or on its own motion, proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties.

27. This provision is explicit on the powers of the Court to proceed on the basis of the documentation on record either by agreement of all parties or on its own motion. This Rule is routinely used by the Court to expedite administration and of justice.

28. Second, the proviso to **Section 35(1)(b) of the Evidence Act** on the admissibility of documentary evidence as to facts in issue provides that –

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

29. Relatedly, **Section 125(1) of the Evidence Act** provides that:

All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease (whether of body or mind) or any similar cause.

30. Under subsection (2) mentally disordered person or a lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving rational answers to them.

31. Evidently, disease of the mind or body is sufficient ground on which the Court may excuse a person from testifying.

32. Thirdly, **Order 19(1) of the Civil Procedure Rules** provides that –

Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:

Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

33. Under **Order 19 Rule 2(1)** Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.

34. Finally, **Rule 28(1) of the Employment and Labour Relations Court (Procedure) Rules 2016** provide that:

The Court shall, after considering all relevant facts and supporting documents presented to it and in accordance with the procedures set in these Rules—

a. where the suit was originated by a statement of claim, petition, judicial review application or appeal, deliver a judgment;

b. in any other proceedings, deliver a ruling.

Provided that, subject to these Rules and to any other written law, the Court may at any time in the conduct of its proceedings issue—

a. ...

b. ...

c. ...

d. ...

e. ...

f. ...

g. any other order to meet the ends of justice.

35. The Applicant/Respondent contends that Ms Doris James is admitted in hospital and thus incapable of testifying. In addition, the witness

whose written statement is on record has memory lapses and is incapable of communicating effectively on account of the illness. The medical certificate from The Aga Khan University Hospital dated 1st July 2021 state that she was admitted on 1st July 2021 and is due to discharge on 31st December 2021 and will thereafter require extensive rehabilitation. The certificate is signed by one Douglas Gaiho as the Medical Officer.

36. The Claimant/Respondent on the other had avers that the medical certificate on record does not state the nature of illness and is merely a “*sick off which states that she is free to resume work after 31st December 2021*”.

37. Although the Court agrees with the averment as it relates to actual illness, it disagrees with the statement on sick off and resumption of work. The document on the face of it states that the patient is currently admitted at the facility and would require extensive rehabilitation on discharge.

38. Relatedly, evidence on record dated 31st July 2021 indicate that Ms Doris James resigned from employment on medical grounds. The Claimant/Respondent has not contested the resignation letter which is dated after the admission as the medical certificate shows.

39. In the absence of evidence to the contrary, there is no material on record to show that M/s Doris James is free to resume work after 31st December 2021 nor is there evidence that the witness will be communicating effectively after 31st December 2021.

40. As regards Edward Stephen Mwit, documents on record show that he signed his witness statement on 20th November 2018 and prepared and filed a report on sexual harassment claims against Samson Maina Kamau (the Claimant/Respondent) and interviewed both the accuser and the accused on 3rd June 2017. Although the report is signed on every page as required for purposes of authentication, it is not dated. However, it is not contested at this stage.

41. In opposing the production of the report by the Respondent’s witness, the Claimant/Respondent avers that the same may be produced by another person from the deceased’s firm.

42. Granted that this is the general procedure, the documents on record show that he was requested by the Managing Director of the to investigate the alleged sexual harassment claim made by Doris James against the Claimant/Respondent as an independent and neutral investigator and the request was in writing (the letter was not attached).

43. It is evident from the report that he conducted the investigation himself and authenticated every page. As a seasoned Human Resource Practitioner, he must have been alive to the obligation to ensure confidentiality of the parties and held the meetings in his private office as the report indicates.

44. In sum, any other person can produce the report since in view of the Court, the investigator and maker of the report is deceased. Such a witness can only read the report but cannot attest to its truthfulness or otherwise. It is for the Court to determine its probative value, if any, in the totality of the evidence before it.

45. As to the averments of Samuel Kihara that Doris James suffers from memory lapse, the Claimant/Respondent states that this is a mere allegation since it is not supported by medical evidence.

46. The Court is in agreement with the Claimant/Respondent that the allegation of memory lapse and communication is not supported by medical evidence, the admission to hospitalisation notwithstanding.

47. However, the Claimant/Respondent’s allegation about the witness not being in control of her faculties is off the mark. The Applicant/Respondent, has not adverted to the issue of mental health of witnesses.

48. On admissibility of the statements of Doris James and Edward Mwit, the Court is in agreement with the statutory provisions relied upon by the Respondent/Applicant. Specifically, Section 33 and 35(1)(b) of the Evidence Act and Order 19(1) of the Civil Procedure (Amendment) Rules 2021 as well as Rule 21 and 28 of the Employment and Labour Relations (Procedures) Rules, 2016.

49. In **Republic v John Ng’ang’a Njeri (supra)** the Court express itself as follows –

“There are certain situations where statements of witnesses who are not available can be admitted as evidence. This only applies where such statements meet three criteria:

- a. The witness must be unavailable (through death; physical infirmity; mental illness; absence from the jurisdiction, and so forth);
- b. The statement must have sufficient indicia of reliability; and
- c. The statement must be admissible vide a statutorily created exception to the hearsay rule or where the statement or evidence has been subjected to cross-examination or an opportunity for such cross-examination was made available to the Accused Person or that the statement was given under oath.”

50. The Court is in agreement with these sentiments and as submitted by the Respondent and the instant case meets the requirements enunciated in **Republic v John Ng’ang’a Njeri (supra)**.

51. Although the Claimant/Respondent avers that adoption of the statements would violate his constitutional right to a fair hearing since he would not cross examine the witnesses, both instances are provided by the law where a witness is deceased or is labouring under an inability that compromises his capacity to testify Court. The Claimant however does not allege that the testimony would prejudice him. The Respondent/Applicant on the other hand submits that the absence of two of its key witnesses as well as their statements would compromise its ability to prosecute its case and could occasion injustice on its part.

52. In the course of determining applications of this nature, Courts are enjoined to carefully balance the interests of the parties to the suit under the overarching obligation to administer substantive justice. The Court is satisfied that substantive justice will not be served if the statements of Doris James and Edward Mwit, who are key witnesses in this case are excluded from the proceedings.

53. Consequently;

i. The witness statement of Edward Stephen Mwit and the report of the investigation be adopted by Mr. Patrick Marekia.

ii. Granted that the suit will be heard sometime in 2022, the Applicant/Respondent is directed to file a Doctor's report on the condition of the witness by 30th January 2022 for the Court to make a determination as to whether the witness will testify or her witness statement should be adopted during the hearing.

iii. Parties to bear their own costs.

54. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7TH DAY OF DECEMBER 2021

DR. JACOB GAKERI

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 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.

DR. JACOB GAKERI

JUDGE