



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1021 OF 2017

OLIVER MUKUNZA.....CLAIMANT

v

AC NIELSEN KENYA LIMITED.....RESPONDENT

RULING

1. For determination is a motion dated 10 January 2018 by the Claimant seeking orders

1. That this Honourable Court do issue witness summons to Abhik Gupta, Managing Director East and West Africa and Pete Gale, Retailer Lead, Emerging Markets.

2. That the costs of this application be provided for.

2. The Respondent filed a replying affidavit sworn by its Market Development Leader East Africa, Jacqueline Nyanjom in opposition to the application, and the Court took arguments on 5 February 2018.

3. In seeking the issuance of summons, the Claimant contended that the evidence of the proposed witnesses who were his direct Supervisors before termination of employment on the ground of performance were critical to the question of fairness of the termination of his contract.

4. The Claimant also urged that no prejudice would be occasioned to the Respondent were witness summons to issue and that on the contrary, he would suffer irreparable loss if the proposed witnesses were not called.

5. In opposing the application, the Respondent submitted that the application was defective as it had been brought pursuant to a repealed provision of the law (section 20(2) of the Industrial Court Act), that the question of the Claimant's performance was not one of the issues arising for determination, it was not in the province of a Claimant to dictate to a Respondent in a termination dispute to prosecute its defence in a certain way and that it would be costly to bring the 2 proposed witnesses from outside the jurisdiction of the Court.

6. The Court has considered the contentions by the parties.

7. Employment disputes and more so those concerning unfair termination of employment are primarily prosecuted under the aegis of the Employment Act, 2007 and sections 41, 43, 45 and 47 have placed certain legal/evidentiary burdens on the parties.

8. The Act having placed both legal and evidentiary burdens on the Claimant/employee and the Respondent/employer, recourse should only be taken to the Evidence Act and other statutes where the Employment Act, 2007 is deficient.

9. Considering that it is the Respondent/employer who is privy to the reasons for terminating an employment contract, it is incumbent upon the employer to prove those reasons (section 41) and that those reasons were valid and fair (section 45 of the Act).

10. If the Respondent/employer fails to discharge the burden placed upon it, it would be to its own detriment.

11. The burden thus placed on the Respondent/employer in this type of disputes is more onerous than that placed on the Claimant/employee (see section 47(5) of the Employment Act).

12. The burdens imposed by the Act in some ways are a departure from the burden in the Evidence Act that he who asserts must prove, otherwise his/her claim fails.

13. It therefore should not be the concern of a Claimant/employee to insist or demand that the Respondent/employer must prove the reasons for termination of employment, or that the reasons were valid and fair.

14. Logically, where the Respondent/employer fails to discharge the statutory burdens imposed on it, a favourable finding in favour of the Claimant/employee would ensue appropriately.

15. The Court finds no merit in the application dated 10 January 2018 and orders that it be dismissed with costs to the Respondent.

16. In order to facilitate and progress the Cause for hearing on the merits, the Court will hereinafter issue appropriate pre-trial directions as required by the Employment And Labour Relations Court (Procedure) Rules, 2016.

Delivered, dated and signed in Nairobi on this 23rd day of February 2018.

RADIDO STEPHEN

JUDGE

Appearances

For Claimant Mr. Mungai instructed by Mungai Kalande & Co. Advocates

For Respondent Mrs. Wetende instructed by Kaplan & Stratton Advocates

Court Assistant Lindsey