



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.2612 OF 2016

GJKCLAIMANT

VERSUS

KPMG ADVISORY SERVICESRESPONDENT

RULING

The claimant by application dated 21st December, 2016 brought under the provisions of section 3 (1), 44 and 45 of the Employment and Labour Relations Act and Rule 16(2) of the Industrial Court (Procedure) Rules, 2010 [rules amended, Employment and Labour Relations Court (Procedure) Rules, 2016] and seeking for orders that;

1. ...

2. ...

3. ...

4. *Pending hearing and determination of this suit, the claimant/applicant be granted by the respondent a peaceful and conducive work environment.*

5. *Pending hearing and determination of this application the respondent be restrained from unlawfully detaining the claimant.*

6. *Pending hearing and determination of the suit the respondent be restrained from accessing information from the claimant's phone number 0711*****.*

7. *Pending hearing and determination of his application, the respondent be restrained from initiating any disciplinary measures against the claimant/applicant.*

8. *Pending hearing and determination of this application inter-parties the claimant be entitled to her monthly salary and allowances*

9. *The forced termination be revoked pending the hearing and determination.*

the application is supported by the claimant's affidavit and on the grounds that the claimant has been diligently working for the respondent for the last 7 years without any disciplinary case until she was asked to resign from her position following investigations on an alleged affair with one of her superiors. The claimant's phone was unlawfully accessed by the respondent and she was then detained by the

respondent. A disciplinary process was commenced and conducted without following the provisions of the law and the claimant is now faced with divorce proceedings and the reality of losing her employment as the sole breadwinner for her child.

In her affidavit, the claimant avers that she joined the respondent 7 years ago and has been promoted through the ranks from a tea girl to a personal assistant for two tax partners – Richard Ndungu and Peter Kinuthia and has been serving the respondent diligently.

On 4th October, 2016 at 2.30pm Ms Jane Mugo the chief operating officer for the respondent went to the claimant and informed her that Mr Josephat Mwaura, the chief executive officer for KPMG East Africa (CEO) had instruction that the claimant should report to him and carry her personal and office phones and lap top, which she did and Mr Mwaura proceeded to intrude into the claimant's personal life as she was going through a divorce. Mwaura informed the claimant that he had received information from her estranged husband that she was having an affair with Mr Ndungu, one of the tax partners she was an assistant to. That Mr Ndungu was paying her car loan and divorce proceedings whereas the car loan is paid through the claimant's salary and the divorce proceedings are with her advocates.

Following the questions and allegations of infidelity, Michael Kimani, the IT Manager came to the claimant and took her phones and lap top Mr Mwaura said this was for purpose of a mapping exercise they were able to access her personal data and the claimant was detained after office hours and Ms Mugo ordering her not to leave the room. The claimant was left without drink or access to her child of tender years. This made her get frightened and feel intimidated. This went on until 1am when her phones were returned after being hacked into. The claimant was then told to resume work on 6th October, 2016.

On 7th October, 2016 mwaura emailed the claimant allowing her back to work and that she was still under investigations.

On 13th December, 2016 at 5pm while the claimant was on her annual leave she got a call from Damaris Lilech, Director of human Resources directing her to report to her on 15th December, 2016 as investigations were going on. The claimant attended and found Ms Mugo, Mr Mwaura and Brian D'Souza and mwaura stated that they had gone through her phone records and that Mpesa money movement from such records were linked to Mr Ndungu and that the claimant should explain cash transactions between her advocates and Mr James Ngochi Ngugi. Such details came to the respondent after the illegal access to her personal phone.

The claimant was asked to resign or be dismissed. The claimant had to consider the facts that she is a single parent following divorce proceedings and that there was no reason as to why she should resign.

In reply, the respondent filed Replying Affidavit sworn by Josphat Leonard Mwaura who avers that as the respondent CEO has authority to reply herein. The respondent has a set of values, policies and code of conduct and the claimant as an employee was bound to adhere. There is the non-fraternization policy to provide a safe a safe working environment and which abhors inappropriate relationships. On various dates in September, 2006 the respondent received 2 complaints alleging the claimant was having inappropriate relationship with a senior member of the respondent and there was fear of physical harm. There were allegations that the senior staffs were financing the claimant's lifestyle which was in conflict with the ethics and professional requirements of the respondent.

The respondent also learnt that the claimant was undergoing through a divorce through information diverged with human resource and other staff an allegations of breach of privacy. A decision had been made to recruit and replace the claimant as she had stopped serving all else save for the senior member she was alleged to be inappropriately involved with.

The respondent decided to carry out investigations, o 3rd October, 2016 the senior members was called for a meeting on the complaints made which he denied knowledge of having an inappropriate relationship with the claimant but that he had paid for her wedding honeymoon and offered to cooperate with

investigations. The claimant was also invited to a meeting and willingly gave up her phone to allow matters under enquiry to be investigated. The IT manager got access. The claimant was offered to go home and pick her phones the next day but offered to wait. The claimant made a choice to remain at the office.

On 15th December, 2016 while the claimant was on annual leave she was invited to a meeting with the HOD Forensic, the chief operating officer and the deponent for updates on investigation and clarifications and the claimant agreed to continue with the process of investigations or offer any further responses.

During the investigations there were findings on the character of the claimant that she was rude to other members of staff in her general dealing; while at work she engaged in inappropriate behaviour by sharing pornographic material and offering to engage in sexual acts which was in breach of the set values and policies.

On 19th December, 2016 the claimant met the HOD Forensic and CEO where she was provided with findings from on-going investigations and was informed that her character appeared inconsistent with the expectations of the respondent professionals and she was asked to explain herself to which she replied that she was compliant with the set values and pollicises while at work and cannot comment on her personal affairs outside of work. Disciplinary action was to be meted against the claimant. The claimant was given 2 days to consider her response.

The respondent was then served with court summons. The application herein is thus premature and should not be allowed. The claimant has engaged in repugnant conduct while at work which is unacceptable to the respondent.

The application is premised on the wrong or non-existent provisions of the law and should be dismissed for being incompetent.

Determination

The application herein filed by the claimant is premised on the provisions of section 3(1), 44 and 45 of the *Employment and Labour Relations Act*. This was also pointed out by the respondent in reply to the application.

The claimant has not addressed this lapse in reply or in the submissions.

Indeed this is a flaw apparent to the court. There is no law operative in the Republic under the name *Employment and Labour Relations Act*. We have the **Employment and Labour Relations Court Act, the Labour Relations Act, the Labour Institutions Act and the Employment Act**. The court has Rules as well, the Employment and Labour Relations Court (Procedure) Rules published in August, 2016. To thus apply Rule 16 of the *Industrial Court (Procedure) Rules* is to use rules that have since been published as changed.

I will however address the substance of the application.

It is common cause that the claimant's employment with the respondent is on-going. The orders sought that *the forced termination be revoked pending the hearing and determination* is therefore only anticipatory as termination has not ensured yet.

It is trite that an employer has the prerogative to discipline its employees as appropriate. However the Court can intervene and interfere with such prerogative where there is apparent lack of fairness and where to allow such would result in gross injustice against a party. In *Agnes Ogandi versus KETRACO* [2016] eKLR the court held that;

... [the court will intervene] in an administrative disciplinary process if it is established that the employer has offended fairness or due process and where the procedures applied are found to be in

*violation of clear legal provisions. That such intervention should be in exceptional cases especially where grave injustice might occur or justice cannot be attained through any other means as held in **Booyesen versus the Minister of Safety and Security [2011] 1 BLL, South Africa labour Appeals Court.***

Where there are compelling reasons and where the court is satisfied that disciplinary proceedings initiated by an employer are commenced with ulterior motive and or shrouded with illegalities, such will be stopped to the extent of stopping the illegality. See **Joseph Mutuura Mberia & Another versus Council of Jomo Kenyatta university of Agriculture & Technology [JKUAT] [2013] eKLR;**

Where the Court establishes that such disciplinary procedures are commenced with ulterior motive or the process is shrouded with illegalities, then the Court must intervene to stop the illegalities.

The Employment Act, 2007 has introduced a fundamental change in the work environment which relates to employment and labour relations. An employer is now required to have in place work place policies with best practices in addressing discrimination against employees, sexual harassment, employment practices such a human resource policy/manual, a disciplinary or code of conduct policy, and or any policy that ensure fair and good relations at work and within the shop floor. An employer, due to its nature of business and well aware of the provisions of the Employment Act and proceeds to put in place and workplace policy for its employees which policy is brought to the attention of the employee, such can be used in addressing any matter that arise and is subject to the provisions of such a policy. However, the employer must ensure that such a policy does not go below the legal minimum and its contents do not deny the employee the set legal threshold or does not operate to negate the legal or constitutional rights and protections.

In this regard therefore, section 12 of the Employment Act requires that where an employer has a code/policy/manual with disciplinary procedures and rules or regulations, such are brought to the attention of the Employee.

12. Statement on disciplinary rules

(1) A statement under section 10 shall—

(a) Specify the disciplinary rules applicable to the employee or refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the rules;

(b) Specify the person to whom the employee may apply—

(i) If dissatisfied with any disciplinary decision relating to the employee; and

(ii) For the purpose of seeking redress of any grievance relating to his employment and the manner in which an application shall be made; and

(c) Where there are further steps to be taken consequent to any such application, explain the steps or refer the employee to the provisions of a document which is accessible to the employee which explains the steps.

I find the claimant was issued with the respondent Code of Conduct and policy documents regulating her conduct while at work. Such are in tandem with the law as she gave her consent to the application and use by the respondent.

However, where the claimant misconducted herself while at work, even where such misconduct was gross, and the respondent wished to subject her to the disciplinary code in place, such must be done within the confines of the law and the constitution.

I take it the claimant while at work was allowed to have her personal phone and also had an office phone.

Search of a personal phone by an employer with the consent of an employee has to stop the moment the employee says the same should stop. The use of data and information sourced from a personal phone is similar to doing a body search and using the information obtained. Up and until the claimant withdrew her consent from such, the search and use of information obtained should have stopped. In any event, information obtained from the person of a person whether from the body or personal phone cannot be used adversely against an employee without the same being brought to her attention and the reason for use being given. This would negate the right to privacy under the constitution;

31. *Every person has the right to privacy, which includes the right not to have—*

- (a) Their person, home or property searched;*
- (b) Their possessions seized;*
- (c) Information relating to their family or private affairs unnecessarily required or revealed; or*
- (d) The privacy of their communications infringed.*

In her affidavit, the claimant avers that she was called by her seniors to a meeting and was asked to bring her phones and lap top. There was her personal phone. She was directed to surrender the same following allegations and complaints made against her of infidelity and inappropriate conduct with a senior employee. The claimant was detained as her phone records and data were accessed by another employee.

The directions given to the claimant were from her superiors. Failure to take lawful directions and instructions from an employer is a matter that can attract the sanction of summary dismissal. At the point the claimant was directed to surrender her personal phone with other workplace gadgets, was it made clear to her that the data sourced was to be used against her? In the presence of her superiors, was the claimant aware of her right to privacy and was this protected by the employer?

Such I find are weighty matters that can only be gone into at a full hearing. However what is clear to the court and based on material available at this instance, the use by the respondent of information sourced from the claimant's personal phone whether allowed by the policy or code of conduct, such is contrary to article 31 of the constitution. The communications between the claimant and any other person or persons from her phone unless, such are sent to her workplace communications or sent to persons at her workplace and they have made a complaint are protected; such personal communications and data are protected.

In **Bernard Murage v Fineserve Africa Limited & 3 others [2015] eKLR** the court is relying on the case of **Kennedy versus Ireland (1987) I.R 58 held;**

It is clear in that case that the right to privacy must ensure the preservation of the dignity and freedom of the individual in a sovereign, independent and democratic society. In his view;

“The dignity and freedom of an individual in a democratic society cannot be ensured if his communication of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with.”

The information sourced of and from the claimant's personal phone shall be expunged from the record, what is available for the disciplinary hearing shall only relate to her work phone and work lap top and other evidence that the respondent has of the claimant by the use of its workplace policies and code of conduct. All information obtained from the claimant from her personal phone shall be returned in soft or hard copies and shall not form part of her work records unless the claimant wishes to use the same in her case voluntarily. The use of any personal data, information and communication of the claimant must be with the unequivocal consent of the claimant that is well informed and sourced. The purpose for the use of such data and information must be issued and obtained in writing to ensure there is no infringement of the right to privacy protected under the Bill of Rights and under article 31 of the constitution.

On the application dated 21st December, 2016;

(a) The respondent is hereby restrained from accessing information from the claimant's phone number 0711*** and where such information has been obtained and data drawn, such shall be expunged and removed from the work records and the soft or hard copies returned to the claimant;**

(b) The claimant shall submit herself to the internal disciplinary process unconditional;

(c) The respondent shall inform the claimant the allegations against her in writing to enable her prepare her defence as appropriate;

(d) The claimant shall be accorded a conducive work environment to undertake her duties unless there is any matter that arise outside of these proceedings that require the respondent to address as appropriate; and

(e) Attention is brought to the respondent of the provisions of section 46(h) of the Employment Act.

Costs in the Cause.

Dated and delivered in open court this 30th day of March, 2017

M. MBARU

JUDGE

In the presence of:

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