Case Number:	Cause 1899 of 2013
Date Delivered:	07 Dec 2018
Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Judgment
Judge:	Byram Ongaya
Citation:	Reuben Boro Gitahi v P.M Kamau & 10 others [2018] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Employment and Labour Relations
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1899 OF 2013

REUBEN BORO GITAHI.....CLAIMANT

VERSUS

P.M KAMAU.....1ST RESPONDENT

G.G. KARUU.....2ND RESPONDENT

J.K CHEBOROR.....3RD RESPONDENT

A.S GILANI.....4TH RESPONDENT

P.N. ACHINGA.....5TH RESPONDENT

C.O ATINDA.....6TH RESPONDENT

H.C. WASIKE.....7TH RESPONDENT

G.GITAHI.....8TH RESPONDENT

M.M. KIMONI.....9TH RESPONDENT

C.W. MBOGO.....10TH RESPONDENT

A.K GICHUHI.....11TH RESPONDENT

T/A EARNEST & YOUNG

(Before Hon. Justice Byram Ongaya on Friday 7th December, 2018)

JUDGMENT

The claimant filed a memorandum of claim on 27.11.2013 through Nyabena Nyakundi & Company Advocates. The claimant prayed for judgment against the respondents for:

1) A declaration that the termination of the claimant's employment was unfair and unlawful.

2) The claimant be reinstated to his employment without loss of benefits and continuity of service.

3) In alternative and without prejudice to (ii) above the respondent be ordered to pay the claimant as particularised hereunder:

a) Three months' salary in lieu of notice at Kshs.224, 640 x 3 Kshs. 673, 920.00.

b) Salary for 1st August Kshs. 7, 488.00.

c) Pension for 5 months February – June 2013 Kshs. 10,000 x5 Kshs. 50,000.00.

d) Newspapers for one calendar year Kshs. 12, 500.00.

e) Yearly bonus equivalent to one month's salary Kshs.224, 640.00.

f) Leave days Kshs. 233, 553.70.

g) 12 months' gross salary compensation at Kshs. 224, 640.00 per month Kshs. 2, 695, 680.00.

h) Certificate of service.

i) Total amount Kshs. 3, 897, 787.70.

4) The costs of the suit be met by the respondent.

5) Interest on the above at Court rates.

The respondents filed on 17.02.2014 the memorandum of reply to the memorandum of claim through Ochieng, Onyango, Kibet & Ohaga Advocates. The respondents prayed that the claimant's suit be dismissed with costs.

There is no dispute that the respondents employed the claimant by the letter dated 23.05.2012 to the position of Manager 1 effective 06.08.2012 at Kshs. 224, 640 per month.

The main issue in dispute is whether the claimant resigned from employment or he was dismissed from employment; and whether he is entitled the remedies as prayed for.

At all material times the claimant was assigned to lead a team working from Mombasa to undertake some investigations. There were some security challenges arising during the assignment with the consequence that the claimant decided to travel from Mombasa to Nairobi. In the process the parties' relationship appears to have become strained because the respondents took the view that the claimant had abandoned the assignment in circumstances that were not acceptable; and that the claimant had leaked to or shared with a third party the preliminary report contrary to the respondents' confidentiality policy or requirements.

The evidence is that the claimant wrote a resignation letter dated 01.08.2013 addressed to the respondent's Polly Mwangi, Associate Director for Human Resource, Ernst & Young. The resignation letter stated as follows:

"**RE: Resignation of Position of Manager FIDS**

I am requesting to tender my resignation from the firm with immediate effect due to unavoidable circumstances. I would like the firm to consider waiver of my notice period as required in my engagement/ employment letter.

If this request is accepted i would like my last working day to be 31 July 2013.

Best Regards

Signed

REUBEN BORO GITAHI"

Polly Mwangi received the letter on 01.08.2013 at 09.30am as acknowledged on the letter.

The respondent replied by the letter dated 01.08.2013 addressed to the claimant as follows:

"**RE: RESIGNATION**

Following your request Ernst & Young has agreed to withdraw the letter dated 31st July, 2013 and accept your resignation from your position of manager –FIDS dated 1st August, 2013.

Your request for notice waiver is also noted and accepted.

Please return all firm property in your possession to the HR Director immediately.

Your final dues for the period up to and including 31st July 2013 will be released to you after the firm offsets all amounts due to it from you.

Thank you.

Yours faithfully

Forand on behalf of Ernst & Young

Signed

GITAHI GACHANA

CHIEF EXECUTIVE OFFICER/PEOPLE PARNER"

The letter was initially forwarded to the claimant by Polly Mwangi's email of 01.08.2013 at 18:28 with advice to the claimant that the original would be sent by post office box provided by the claimant. The claimant's testimony in Court during cross examination was that the certificate of postage showed his address and the Court returns that on a balance of probability the claimant received the letter through his postal address.

The claimant testified that on 01.08.2013 Polly Mwangi had called him and informed him that a decision had been made on 29.07.2013 to dismiss the claimant. The claimant testified that his reaction was that he'd do a resignation letter so that they separated in good terms. It was his position that if he had been dismissed on 29.07.2013 then there was nothing to resign from. He then wrote a letter to resign on 01.08.2013 and it was his position that that resignation letter had no meaning. He admitted that it was replied to by the respondents.

The claimant stated that he received the dismissal letter dated 31.07.2013 on 01.08.2013 at 04.10pm. The letter stated as follows:

"**Dear Reuben,**

DISMISSAL FROM EMPLOYMENT

Further to the disciplinary committee hearing held on Monday 29th July 2013 at the EY Boardroom on the 4th Floor of Kenya Re Towers, the firm has decided to summarily dismiss you from employment effective today – July 31, 2013.

On your own admission, you without authority, disclosed preliminary findings of an investigation to a 3rd party on 19th July 2013. You further abandoned the Mombasa County Assignment midway without prior notification tyo the assignment Partner.

Having fully considered the explanation you provided at the hearing and your response to the questions asked, we are satisfied that this constitutes gross misconduct.

You are requested to return all firm property in your possession to the HR Director immediately.

Your final dues will be released to you after the firm offsets all amounts due to it from you.

Yours faithfully,

Signed

GITAHI GACHAHI

CHIEF EXECUTIVE OFFICER/PEOPLE PARTNER"

The claimant confirmed that he received an email dated 29.07.2013 inviting him to a disciplinary hearing at 2.30pm the same day and he confirmed that he attended the hearing. At the disciplinary hearing it was established that the claimant had admitted meeting a third party and discussing the preliminary report of the investigations the claimant had been assigned to undertake as the team leader. In his testimony it was also the evidence that he did not advise or inform his seniors prior to leaving the Mombasa assignment on account of the security challenges that emerged. The claimant purported to disown the accuracy of the record of the disciplinary hearing but the Court returns that the record was accurate on a balance of probabilities because prior to the testimony at the hearing of the suit, the claimant had not made attempts to dispute that record by way of pleading or otherwise.

The respondents' witness confirmed that the decision to dismiss the claimant was made on 29.07.2013 and the actual letter written on 30th or 31st July 2013. It was actually dated 31.07.2013 and it was the respondents' evidence that it was not given to the claimant. On the morning of 31.07.2013 the claimant had gone to the office of the respondents' witness (RW) and RW explained to him the outcome of the disciplinary hearing. RW testified that as at 01.08.2013, the decision to dismiss had been made but the letter had not been delivered to the claimant. RW met the claimant on 01.08.2013 and he wrote the resignation letter which was received at 09.30a.m the same date. The letter of dismissal was then not given or delivered to the claimant but the claimant asked to see it and then he took it away without any struggle (as per RW's testimony).

The Court has considered the flow of events. It is clear that the claimant attended the disciplinary hearing and a dismissal letter was drafted. The claimant did not vividly give an account of how he received the dismissal letter and the Court returns that the account by RW was credible. The Court returns that the claimant having been faced with a dismissal decision, he opted and offered to resign. The respondent accepted the resignation. The Court returns that the contract of service was terminated by way of a resignation agreement which essentially amounted to a valid soft landing on the part of the claimant. The claimant cannot validly argue that the decision to dismiss which was not formerly conveyed to him rendered the resignation agreement irrelevant. The Court finds that parties were entitled to negotiate and arrive at valid and lawful agreements at any stage of their interaction or at any time. The claimant has not denied voluntarily signing the resignation letter and the respondents have not denied voluntarily accepting the resignation letter. The parties were bound accordingly and the allegations of unfair termination or dismissal will fail.

The Court has considered its opinion against the principle of soft landing in **Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013 at Nakuru [2013]eKLR** where in the judgment it was stated thus, **"The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer's discretion, it is the court's considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination."**

The Court returns that in the instant case the parties entered a conscious decision, despite the disciplinary hearing and the respondent's decision to dismiss the claimant, to otherwise separate by way of the resignation agreement. The parties were bound

accordingly and the agreement on soft landing by way of the resignation agreement that was concluded ended the contract of service. The Court has followed its opinion in **Prof. Joseph Mungai Keriko –Versus- Kirinyaga University College [2018]eKLR**, thus, "**First, the Court returns that the parties to the contract of service evaluated their respective positions. They agreed to separate. The terms of their separation were constituted in the resignation letter by the claimant and the acceptance thereto by the Chairman of the respondent's Council. The parties are bound by the terms of the separation. The Court will not rewrite the parties' contract of separation. It was submitted for the claimant that the Court should examine the procedural deficiencies such as lack of a show cause letter and an evaluation that the allegations in the suspension letter had not been established as at the time of termination and as envisaged in sections 41, 43 and 45 (2) (c) on substantive and procedural fairness prior to termination. The Court returns that once parties agreed to separate in the manner they opted to do, the disciplinary process that had commenced was thereby frustrated by the parties' own agreement to separate by way of the resignation agreement. The claimant voluntarily accepted to resign and there was no established factor to diminish the claimant's free will to resign. There is no reason to doubt the flow of events as documented at the meeting of 02.05.2013 leading to the resignation. The resignation was voluntary and valid after parties opted to enter the separation agreement by resignation."**

The Court has also considered the record of the disciplinary hearing and returns that considering the material before the Court including the parties' evidence, it was clear that as at the time of intended dismissal, it had been established that the claimant had indeed shared the preliminary report with a third party and therefore breached the respondents' policy on confidentiality. Thus the respondent had established compliance with section 43 of the Employment Act, 2007 on validity of the reason for termination. It could be that the claimant was given a shorter notice to appear for the disciplinary hearing and not given an opportunity to appear alongside a co-employee of his choice as per section 41 of the Act. However, the procedural deficiencies would not serve a significant purpose in view of the overriding resignation agreement. The Court finds that the separation was not unfair.

In view of the findings the Court returns that the claimant's prayers for reinstatement, compensation for 12 months and notice pay were not justified.

For the other remedies as prayed for the Court returns as follows:

a) It has been submitted for the respondents that the pay for 1st August 2013 **Kshs. 7, 488.00** and certificate of service are due to the claimant and the claimant is awarded accordingly.

b) The claimant was confirmed in February 2013 and he could join the staff retirement benefits scheme in January or July whichever was earlier from the date of confirmation. The respondents submitted and the claimant has not objected that he joined the scheme in July 2013 as per policy so that the pension claimed for 5 months January to July Kshs. 50,000.00 prior to joining the scheme is not justified. The Court finds as much and the prayer is declined.

c) There was no contractual provision on the newspapers and the prayer will fail as not justified. Similarly prayer on bonus was not proved or justified and it will fail.

d) Pending leave days had been paid and the prayer was not justified at all.

The Court has considered the margins of success and returns that parties will bear own costs of the suit.

In conclusion judgment is hereby entered for the parties with orders:

a) The respondents to deliver the claimant's certificate of service by 31.12.2018 and to pay the claimant a sum of **Kshs. 7, 488.00** by 31.12.2018 failing interest to be payable thereon at Court rates from 01.08.2013.

b) Parties to bear own costs of the suit.

Signed, dated an**d delivered** in cour**t** a**t Nairobi** thi**s Friday 7th December, 2018.**

BYRAM ONGAYA

JUDGE