



**Gachanja v Unifresh Exotics (K) Limited (Cause 278 of 2019)  
[2024] KEELRC 1914 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1914 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 278 OF 2019  
L NDOLO, J  
JULY 25, 2024**

**BETWEEN**

**NANCY WAIRIMU GACHANJA ..... CLAIMANT**

**AND**

**UNIFRESH EXOTICS (K) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. By her Memorandum of Claim dated 18<sup>th</sup> March 2019, the Claimant proceeds against the Respondent, alleging unlawful and unfair termination of employment. The Respondent's defence to the Claimant's claim is contained in a Reply dated 14<sup>th</sup> June 2019.
2. When the matter came up for trial, the Claimant testified on her own behalf and the Respondent called its Human Resource Manager, James Otieno.

**The Claimant's Case**

3. The Claimant states that she was employed by the Respondent, as Marketing Manager, from 16<sup>th</sup> March 2018 until 10<sup>th</sup> March 2019. She earned a monthly salary of Kshs.85,000.
4. The Claimant claims that the Respondent terminated her employment on account of redundancy, without notice and in violation of due process. The Claimant accuses the Respondent of bad faith. She now claims the following:
  - a. Unpaid salary for 11 days in March 2019 Kshs.31,167
  - b. 1 month's salary in lieu of notice Kshs.85,000
  - c. Housing allowance for 12 months Kshs.153,000
  - d. 12 months' salary as damages for unfair termination Kshs.1,020,000



- e. Leave pay for 7 days Kshs.19,833
- f. Severance pay for 1 year Kshs.42,500
- g. An order of reinstatement
- h. Certificate of service
- i. Costs plus interest

### **The Respondent's Case**

- 5. In its Reply dated 14<sup>th</sup> June 2019, the Respondent admits having employed the Claimant in the position of Marketing Manager, from 16<sup>th</sup> March 2018 until 10<sup>th</sup> March 2019. The Respondent states that the Claimant earned a consolidated monthly salary of Kshs.85,000.
- 6. The Respondent states that it began to incur losses, due to an influx of cheap imported commodities in the market. The Respondent therefore decided to offer its employees alternative duties, on their obtaining terms of employment. In this regard, the Claimant was notified that she would be seconded to Hotel Greenwood for a period of one year, with effect from 1<sup>st</sup> March 2019.
- 7. The Claimant did not however report to Hotel Greenwood and instead sent a text message to the Respondent's Human Resource Manager, James Otieno, indicating that she had decided to leave employment. The Respondent deemed the text message as a formal resignation notice, which it duly accepted.
- 8. The Respondent denies the Claimant's entire claim and further counterclaims pay for 9 leave days taken in 2018 and a further 4 ½ days taken in 2019, totalling Kshs.44,143. The Respondent also counterclaims Kshs.85,000 being one (1) month's salary in lieu of notice.

### **Findings and Determination**

- 9. There are three (3) issues for determination in this case:
  - a. Whether the Claimant has made out a case of unlawful termination of employment;
  - b. Whether the Claimant is entitled to the remedies sought;
  - c. Whether the Respondent has made out a proper counterclaim against the Claimant.

### **Unlawful Termination?**

- 10. On 10<sup>th</sup> March 2019, the Respondent wrote to the Claimant as follows:

“Dear Ms. Gachanja,

Re: Termination Of Contract On Redundancy

We are aware that from last year [2019], the business has been performing dismally due to the influx of cheap imported commodities in the market. Despite the dismal performance, Management has taken reasonable steps to ensure that all employees are retained in the company. In this regard, management has provided alternative duties to all employees rendered inactive by the slowdown in business and willing to take up the new duties and responsibilities, on same terms of employment. Management has taken this decision with



hope that the situation will soon improve. Affected employees have shown appreciation of this gesture and commitment to the company by assumed (sic) the new roles assigned to them.

Although management has on many occasions discussed similar arrangements with you, you have categorically declined the alternative, new job assignment. Your decision to decline the new job assignment was relayed through your text message to Human Resource Office dated March 1, 2019. In the text under reference, you stated that you have declined the new assignment because you have received a better job offer with higher pay than the new job assignment on offer by the company. In the same text, you committed to tender your resignation on Monday, March 5, 2019 and serve one month's notice in accordance with your employment contract. However, to date, you have not honored you (sic) promise, a situation akin to holding the company at ransom and making the work pertaining to the new job assignment suffer.

Consequently, Management is left with no option but to terminate your contract of service on account of redundancy with effect from March 5, 2019 in complies (sic) with section 40 of the *Employment Act*, 2007. In this regard, you will be paid one month's notice and accrued leave, if any. Please note that since you have not worked for the company for one complete year, you do not qualify for severance pay of 15 days for each completed year of service as stipulated in law.

In the meantime, you are required to hand over all company property currently under your custody to your immediate supervisor to enable you fulfil clearance and payment of final dues, if any.

We take this opportunity to wish you success in your future endeavours.

Yours faithfully,

For: Unifresh Exotics (K) Limited

(signed) (signed)

H.Kotecha Chandrashekhar M. Alate

Director-Projects Jt. Head-HR & Administration”

11. This letter communicates financial difficulties experienced by the Respondent, as a result of an unfavourable business environment. The letter also makes reference to an offer extended to the Claimant, for an alternative job without affecting her obtaining terms and conditions of service. The letter further refers to a text message sent by the Claimant to the Respondent's Human Resource Manager, by which she indicated that she would not be taking up the alternative position and would instead tender her resignation.
12. The text message, which was admitted in evidence in accordance with the law on admission of electronic evidence, states as follows:

“Hi James I have decided to resign n leave after a month's notice will bring you a letter as agreed, I have received job offers with slightly higher pay than you offer n declined so what you are offering is too low n since it's the organization structure, I choose to leave. I know the God I serve is a God of unmerited favour n he will open another door for me, thanks to you and your team for the support may God bless you abundantly, Nancy Unifresh”



13. In the course of cross examination by Counsel for the Respondent, the Claimant admitted having sent this text. The Claimant further testified that she did not report to Hotel Greenwood. There is therefore solid evidence that the Claimant was offered alternative employment by the Respondent, which she declined.
14. The law on redundancy requires the employer not only to issue proper notice but to also consult the employee with a view to exploring the possibility of averting redundancy by for example, finding alternative employment for the employee.
15. This position was firmly established by Maraga JA (as he then was) in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR in the following terms:

“The purpose of the notice under Section 40(1) (a) and (b) of the *Employment Act*, as is also provided for in...ILO Convention No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider ‘measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.’ The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable.”
16. In this case, the employer offered the Claimant alternative employment, which she out-rightly rejected. Having done so, the Claimant cannot now come to court and ask to be compensated for termination of employment on account of redundancy. Parties who seek intervention by the Court must come in good faith and with clean hands.
17. Reading from the Claimant’s text, it is evident that she was attempting to arm twist the Respondent to offer her a higher salary. Given the situation the Respondent was facing, the Claimant’s move was a show of self-centredness, to say the least.
18. I have said enough to support the conclusion that the Claimant has failed to prove a case of unlawful termination of employment. The claims for notice pay, damages, severance pay and reinstatement are therefore without basis and are disallowed.

### **Other Claims**

19. The Claimant also claims house allowance. However, her letter of appointment dated 12<sup>th</sup> March 2018 provided for a gross monthly salary, which would ordinarily be inclusive of house allowance. This claim therefore fails and is dismissed.
20. In countering the claim for leave pay, the Respondent states that because the Claimant did not work for a full year, she was not entitled to leave. With respect, this proposition runs contrary to the law, which provides for prorata leave. At the very least, the Claimant was entitled to nineteen (19) leave days. The Respondent produced leave forms showing that the Claimant had taken 12 leave days. The claim for 7 leave days is therefore valid and is confirmed. The Claimant is also entitled to salary for 10 days in March 2019.

### **The Counterclaim**

21. The Respondent’s counterclaim is based on its allegation that the Claimant was not entitled to annual leave and that she resigned without giving the requisite notice.



22. I have already determined that the Claimant was in fact entitled to prorata leave part of which she duly utilised. With regard to the issue of notice, the Respondent's letter to the Claimant was clear that the termination of employment was initiated by the Respondent, following the Claimant's decision not to take up an alternative position. The counterclaim for notice pay is therefore without basis. The entire counterclaim therefore fails and is dismissed.

### **Final Orders**

23. Finally, I enter judgment in favour of the Claimant as follows:

- a. Leave pay for 7 days x 7) Kshs.19,833
  - b. Salary for 10 days in March 2019 x 10) Kshs.28,333
- Total Kshs.47,666

24. This amount will attract interest at court rates from the date of judgment until payment in full.

25. The Respondent is directed to issue the Claimant with a certificate of service.

26. As the Claimant's claim succeeds only in part, each party will bear their own costs.

27. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 25<sup>TH</sup> DAY OF JULY 2024**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Magua for the Claimant

Mr. Njuru for the Respondent

