



**Njomo v Interstrat Limited t/a Big Square (Cause E796 of 2021)
[2024] KEELRC 2033 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2033 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E796 OF 2021**

**L NDOLO, J
JULY 25, 2024**

BETWEEN

FIDELIS WAMBUI NJOMO CLAIMANT

AND

INTERSTRAT LIMITED T/A BIG SQUARE RESPONDENT

JUDGMENT

Introduction

1. On 28th May 2021, the Claimant wrote the following letter to the Respondent’s Human Resource Manager:

“Ref: Resignation Letter-Fidelis Wambui Njomo

Dear Dorcas,

Kindly note that I wish to tender my resignation from the company as the chief accountant. My last working day will be 28th August 2021 as per my contract.

I would like to thank the company for the opportunity to serve since Sept 2019 and the management for the support I have got during that time.

I wish the company the best for the future.

Please let me know how to progress with the hand over process.

Kind regards

(signed)

Fidelis Njomo”



2. Thereafter, the Claimant filed a Statement of Claim dated 20th September 2021, accusing the Respondent of making unilateral changes to the terms of her employment contract and failing to pay her full salary. The Respondent filed a Statement of Response dated 18th October 2021, to which the Claimant responded on 3rd March 2022.
3. At the trial, the Claimant testified on her own behalf and the Respondent called its Human Resource Officer, Sandra Odhiambo.

The Claimant's Case

4. The Claimant states that she was employed by the Respondent on 1st September 2019, in the position of Chief Accountant, earning a monthly salary of Kshs.510,000. She adds that she was entitled to a telephone allowance of Kshs.5,000 and a travel allowance of Kshs.25,000 effective 1st February 2020.
5. On 14th May 2020, the Respondent issued a notice to its employees, indicating that the Respondent would implement the following salary changes, in order to sustain its business during the COVID-19 pandemic:
May 2020
 - a. All management staff to be paid 50% of their salary;
 - b. Non-management staff on duty to be paid 75% of their salary;
 - c. All staff on leave to be paid 50% of their salary.June 2020
 - a. All staff on duty to be paid 50% of their salary;
 - b. All staff on leave deemed to be on unpaid leave.
6. The Claimant states that for the months of April to August 2020, the Respondent failed to remit to her the total sum of Kshs.1,020,000 broken down as follows:
 - a. April 2020 – Kshs.255,000
 - b. May 2020 – Kshs.255,000
 - c. June 2020 – Kshs.255,000
 - d. July 2020 – Kshs.127,500
 - e. August 2020 – Kshs.127,500
7. The Claimant avers that thereafter, the Respondent remitted her full salary but failed to remit the deferred payments for the period set out above.
8. By a memo dated 30th March 2021, the Respondent notified its employees that it would reduce the salaries for the Nairobi staff by 50%. The Respondent emphasised that no salary would accrue as a result of the reduction.
9. The Claimant states that she did not agree to the salary reduction without provision for deferred salary dues.
10. For the month of April 2021, the Respondent paid the Claimant 50% of her salary and on 28th May 2021, the Claimant submitted a resignation notice, which was to run until 28th August 2021.



11. On 12th August 2021, the Claimant received an email from the Respondent asking her to sign an approval of the salary reductions set out in the notice and memo.
12. By her return email dated 14th August 2021, the Claimant declined to sign off the documents as they had been sent to her on 10th June 2021, after the salary cuts had been unilaterally implemented and after she had resigned.
13. The Respondent wrote back on 15th August 2021, stating that the Claimant had been a party to the decision to implement salary cuts, thus implying that she had agreed to the salary cuts.
14. The Claimant accuses the Respondent of making unilateral changes to the terms of her employment contract, contrary to the provisions of the *Employment Act*.
15. The Claimant claims that the Respondent had previously paid other employees deferred salary arrears, upon their exit. She therefore terms the Respondent's action with respect to her case, as arbitrary and discriminatory.
16. The Claimant's claim is as follows:
 - a. An order directing the Respondent to pay the Claimant the sum of Kshs.1,275,00 being salary cuts for the months of April 2020, May 2020, June 2020, July 2020, August 2020 and April 2021;
 - b. An order directing the Respondent to pay the Claimant the sum of Kshs.30,000 being Kshs.25,000 travel allowance and Kshs.5,000 telephone allowance for the month of August 2021;
 - c. Costs plus interest.

The Respondent's Case

17. In its Statement of Response dated 18th October 2021, the Respondent admits having employed the Claimant, in the position of Chief Accountant, from 1st September 2019 until her resignation on 28th August 2021. The Respondent states that the Claimant earned an all-inclusive monthly salary of Kshs.510,000.
18. The Respondent acknowledges that a notice was sent out to its employees on 14th May 2020, as stated in the Statement of Claim. The Respondent adds that the said communication was sent out following deliberations between the Respondent's Board of Directors and the senior management, including the Claimant.
19. The Respondent defends the decision to effect salary cuts, pointing to restrictions imposed by the government, in the wake of the COVID-19 pandemic. The Respondent states that these restrictions led to reduced business in its restaurants and consequently, reduced income. The Respondent states that it was unable to meet its operational costs, including staff salaries.
20. The Respondent adds that as a result, the senior management, including the Claimant, had a meeting where the idea of salary cuts was mooted and agreed upon. Thereafter, communication was issued to all staff, notifying them of the imminent salary adjustments. Subsequently, individual letters were sent to the affected staff, requiring them to endorse their consent to the salary variation.
21. The Respondent avers that aside from the fact that the Claimant was part of senior management team that was the author and architect of the salary deductions, the Claimant, in her position as Chief Accountant, was well aware of the Respondent's fragile financial position.



22. The Respondent further avers that throughout the duration of the salary cuts, the Claimant did not object or otherwise indicate that she was not amenable to the salary reduction.
23. The Respondent states that its Human Resource Officer reached out to the Claimant, requesting for signed copies of her 2020 and 2021 salary reduction notices. According to the Respondent, this was part of the Claimant's hand over and exit process.
24. The Respondent denies that the decision to effect salary cuts was taken unilaterally, without consultation. The Respondent further denies making any back payments to any of its employees.

Findings and Determination

25. The Claimant's claim is predicated on reduction of his salary in the months of April 2020, May 2020, June 2020, July 2020, August 2020 and April 2021. It is not in contest that the salary reduction was implemented across the Respondent's entire workforce.
26. It is also not in dispute that the months with respect to which salary cuts were effected, fell within the period when the country, much like the rest of the world, was hit by the COVID-19 pandemic which occasioned an adverse environment for many businesses.
27. The Respondent, which operated within the food business, was adversely affected. According to the Claimant, although the Respondent's business was not on its knees, it was not operating optimally. The Respondent's case is that it was forced to effect salary cuts in order to survive the turbulence brought about by COVID-19.
28. On her part, the Claimant contends that she was not consulted and did not agree to the salary reduction. She however conceded having attended a management meeting at which the issue was discussed. She further admitted having received communication to that effect and as Chief Accountant, she ran a reduced payroll for five (5) months.
29. Section 10(5) of the *Employment Act* requires an employer to consult and notify their employee(s) in writing, of any change in the terms and conditions of employment. The consultation contemplated under this provision does not however necessarily connote agreement.
30. In his decision in *Emmanuel Wambua Muthusi & 6 others v Khoja Shia Ithna Shari Education Board t/a Jaffery Academy* [2020] eKLR Rika J stated the following:

“Section 10[5] does not require that there is agreement on revision of contract, between an Employer and an Employee...The provision does not require that consultation ends up in agreement. All that the Employer is required to do, in changing terms of the contract, is to consult the Employee; revise the contract to reflect the change; and notify the Employee about the change. The word ‘agreement’ does not feature in Section 10(1) of the *Employment Act*. There would be no requirement for notification, if agreement has already been reached. The Employee is free to take the revised contract, or reject it.”
31. In this case, there is evidence that the Claimant was consulted on the salary reduction, not only as a member of the senior management team, but also as an employee. She was further issued with written communication, indicating the details of salary reduction, which she chose not to sign. She however stayed on for 5 months, earning the reduced salary, although she had the option to walk away.
32. Significantly, the Claimant did not object to the salary reduction until her resignation. It is therefore not farfetched to conclude that her claim was an afterthought. Further, the Claimant did not produce



any evidence to back her allegation that some employees were paid the deducted amounts as deferred salary.

33. In the result, I find and hold that the Claimant's claim for the sum of Kshs. 1,275,000 is without basis.
34. The Claimant did not adduce any evidence to support the claims for travel allowance and telephone allowance, which therefore fail.
35. In the end, the Claimant's entire claim fails and is dismissed with an order that each party will bear their own costs.
36. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY JULY 2024

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JUDGE

Appearance:

Ms. Ndirangu for the Claimant

Mr. Attika for the Respondent

