



**Nzue & 3 others v Riverbank Solutions Ltd (Cause E543 of 2022)  
[2024] KEELRC 1842 (KLR) (12 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1842 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E543 OF 2022**

**SC RUTTO, J**

**JULY 12, 2024**

**BETWEEN**

**PATRICK MUTUKU NZUE ..... 1<sup>ST</sup> CLAIMANT**

**THOMAS MWANIA ..... 2<sup>ND</sup> CLAIMANT**

**EMMANUEL OTIENO OGOMA ..... 3<sup>RD</sup> CLAIMANT**

**ANNE JEPHY NYAOKE ..... 4<sup>TH</sup> CLAIMANT**

**AND**

**RIVERBANK SOLUTIONS LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimants aver through their joint Memorandum of Claim dated 29<sup>th</sup> July 2022, that they were all employees of the Respondent, having been employed on diverse dates in different capacities. It is the Claimants' case that they were employed on permanent and pensionable terms before their resignations as a result of unpaid salaries and unremitted pension. Against this background, the Claimants seek the following reliefs against the Respondent:
  - a. A declaration that the Respondent's action against the Claimants herein particularly withholding of salaries and non-remittance of pension was unlawful and a violation of the Claimants' constitutional rights.
  - b. The Respondent be compelled to pay the claimants the following:
    - i. All outstanding salaries duly owed to each Claimant for the period July to October;
    - ii. The Respondent be compelled to reimburse the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Claimants their unremitted pension deductions or in the alternative the Respondent be compelled to



pay to Britam Pension scheme all the outstanding unremitted deductions due for each Claimant;

- iii. General damages for mistreatment and disturbances;
- iv. Any other just and expeditious relief;
- v. Costs and interests.

2. Opposing the Claim, the Respondent avers that the Claimants' resignations were voluntary and without any attribution to any unpaid salaries or unremitted pensions. The Respondent further avers that at all times, it paid the Claimants' salaries in a timeous manner as contracted save for the year 2020 as its business was impacted negatively by the COVID-19 pandemic and the resultant measures put in place by the Government to contain the pandemic. That it did notify all its employees including the Claimants of the impact of the pandemic and the correlations with the late remittances of their salaries. On account of the foregoing, the Respondent has asked the Court to dismiss the Claim in its entirety with costs.
3. The Respondent further filed a Counterclaim against the 2<sup>nd</sup> and 4<sup>th</sup> Claimants for the sum of Kshs 268,785.35 and Kshs 170,612.00 respectively. The Respondent contends that the 2<sup>nd</sup> and 4<sup>th</sup> Claimants issued resignation notices that fell short of the provisions for termination by a party in their respective employment contracts. Consequently, the Respondent has asked the Court to enter Judgement in its favour for the sum of Kshs 268,785.35 and Kshs 170,612.00 against the 2<sup>nd</sup> and 4<sup>th</sup> Claimants respectively.
4. The Claimants filed a Reply to the Memorandum of Response and Counterclaim, in which they aver that the Respondent created a hostile work environment by failing to pay them their salaries thus prompting their resignations. That they still had to work from home and were still generating revenue for the Respondent hence it was only fair for the Respondent to remunerate them to a certain extent as opposed to withholding all their salaries without due consideration of their individual responsibilities and financial needs.
5. With respect to the Counterclaim, it is averred that the Respondent did not offer to renew the 2<sup>nd</sup> and 4<sup>th</sup> Claimants contracts upon expiry. That further, the Respondent accepted their resignations.
6. In light of the foregoing, the Claimants have asked the Court to allow their Claim and dismiss the Response with costs.
7. The matter proceeded for hearing on 5<sup>th</sup> March 2024 and 20<sup>th</sup> March 2024 during which all parties called oral evidence.

### **Claimants' Case**

8. All the Claimants testified in support of their respective cases. At the outset, the Claimants sought to rely on their respective witness statements to constitute their evidence in chief. The Claimants further produced the initial list and bundle of documents as well as the supplementary documents filed on their behalf as exhibits before Court.
9. Mr. Patrick Nzue, the 1<sup>st</sup> Claimant herein was the first to go. He stated that he was employed by the Respondent as a Financial Accountant via a confirmation letter dated 1<sup>st</sup> November 2017.
10. That he worked for the Respondent continuously for three years from 1<sup>st</sup> November 2017 during which period he discharged his duties well and to the satisfaction of the Respondent up to 17<sup>th</sup> February 2020 when his letter of resignation became effective.



11. He further averred that his monthly net salary from April 2020 to December 2020 was computed at Kshs.113,086.60 and in accordance with his employment contract, the Respondent was obligated to pay his salary at the beginning of every month.
12. Mr. Nzue averred that the Respondent failed to remit his salary from July 2020 to October 2020. That the Respondent cleared outstanding salaries for the month of November and December and without proper justification failed to clear outstanding salaries from July 2020 to October 2020.
13. That at the time of his resignation, the Respondent owed him Kshs. 452,346.40 being the sum of outstanding salaries from 2020 to October 2020.
14. During the hearing, he admitted that the Respondent had since remitted his salary to the tune of Kshs 436,945.00 hence the outstanding amount was Kshs 15,401.20.
15. He further averred that during his employment with the Respondent, his pension contributions were consistently deducted on a monthly basis from his gross salary and remitted diligently to Britam Pension Scheme up to March 2019 when the Respondent without notification or proper justification, ceased to make the remittances.
16. That despite non-remittance by the Respondent, the pension deductions were still made from his gross salary up to the time he resigned from the company.
17. It was Mr. Nzue's contention that the Respondent has unlawfully and without reasons known to him, withheld the remissions for his pension contributions to Britam Pension Scheme from March 2019 to February 2021.
18. At the time of his resignation, the Respondent owed him Kshs. 430,387.20 being the sum of unremitted pensions from March 2019 to February 2021.
19. During the hearing, Mr. Nzue admitted that the Respondent had since remitted his pension dues and hence the Respondent does not owe him to that extent.
20. As a result of the Respondent's unfortunate and unlawful actions, he has suffered huge losses as the Respondent deliberately withheld outstanding salaries for a period he diligently worked for him.
21. Mr. Thomas Mwanja, the 2<sup>nd</sup> Claimant herein, stated that at the beginning of his Contract dated 2<sup>nd</sup> March 2015 with the Respondent, he was employed as a Quality Assurance Specialist and gradually rose through the ranks to a Support Engineer.
22. Mr. Mwanja averred that he worked for the Respondent continuously for a period of five years from 2<sup>nd</sup> March 2015 during which period, he discharged his duties diligently and to the expectations of the Respondent up to 31<sup>st</sup> September 2020 when his resignation became effective.
23. He averred that his monthly net salary at the time of his resignation was computed at Kshs135,028.28 and in accordance with his employment contract, the Respondent was obligated to pay his salary at the beginning of every month.
24. It was his contention that the Respondent failed to remit his salary from July 2020 to September 2020. At the time of his resignation, the Respondent owed him Kshs 405,084.84 being outstanding salaries from July 2020 to September 2020.
25. During his testimony before Court, Mr. Mwanja told the Court that after he instituted the suit, the Respondent paid him Kshs 134,529.00 hence he was still owed Kshs 270,056.56.



26. He made several visits to the Respondent's offices to request for the outstanding salaries but the Respondent blatantly neglected his requests.
27. He further stated that the Respondent accepted his resignation and did not indicate that it was claiming any amount from him. That further, at the time, his contract had expired hence they were operating on an oral contract.
28. According to Mr. Mwanja, he has suffered huge losses as a result of the Respondent's unfortunate and unlawful actions.
29. In closing, he asked the Court to compel the Respondent to pay him his outstanding salaries, general damages, interest and costs of the suit.
30. Mr. Emmanuel Otieno Ogoma, the 3<sup>rd</sup> Claimant herein, stated that he was employed by the Respondent as a Software Developer vide a confirmation letter dated 4<sup>th</sup> May 2019.
31. He worked for the Respondent continuously for one year from 4<sup>th</sup> February 2019 during which period he discharged his duties well and to the satisfaction of the Respondent up to 7<sup>th</sup> December 2020 when his letter of resignation became effective.
32. Mr. Otieno stated that his monthly net salary at the time of his resignation was computed at Kshs.52,158.70 and in accordance with his employment contract, the Respondent was obligated to pay his salary at the beginning of every month.
33. It was Mr. Otieno's contention that the Respondent failed to remit his salary for from July 2020 to October 2020.
34. That the Respondent cleared outstanding salaries for the month of November and December and without proper justification failed to clear outstanding salaries for from July 2020 to October 2020.
35. Mr. Otieno told the Court during the hearing that at the time, the Respondent did not owe him anything in terms of salary and pension as the same were paid when he instituted the suit.
36. He averred that his claim against the Respondent is for general damages, interest and costs of the suit.
37. Ms. Anne Nyaoke, the 4<sup>th</sup> Claimant herein, stated that at the beginning of her Contract dated 2<sup>nd</sup> February 2015, she was employed by the Respondent, as a Quality Assurance Specialist and gradually rose through the ranks and at the time of her resignation, she was employed as a Financial Assistant within the same company.
38. She averred that she worked for the Respondent continuously for five years from 1<sup>st</sup> January 2015 during which period she discharged her duties well and to the satisfaction of the Respondent up to 4<sup>th</sup> January 2021 when her letter of resignation became effective.
39. That her monthly net salary at the time of her resignation was computed at Kshs.56,489.60 and in accordance with her employment contract, the Respondent was obligated to pay her salary at the beginning of every month.
40. It was her contention that the Respondent failed to remit her salary from July 2020 to October 2020.
41. The Respondent cleared outstanding salaries for the month of November and December and without proper justification failed to clear outstanding salaries from July 2020 to October 2020.
42. That at the time of her resignation, the Respondent owed her Kshs. 225,958.40 being the sum of outstanding salaries from July 2020 to October 2020.



43. According to Ms. Nyaoke's testimony during the hearing, the Respondent still owed her salary in the sum of Kshs 113,478.40.
44. It was her further evidence that during her employment, her pension contributions were consistently deducted on a monthly basis from her gross salary and the deductions were remitted diligently to Britam Pension Scheme up to March 2019 when the Respondent without notification or proper justification, ceased to make the remittances.
45. That despite non-remittance by the Respondent, the pension deductions were still made from her gross salary up to the time she resigned.
46. She contended that the Respondent had unlawfully and without reasons known to her, withheld the remissions for her pension contributions to Britam Pension Scheme from March 2019 to December 2020.
47. At the time of her resignation, the Respondent owed her Kshs. 181,373.52 being the sum of unremitted pensions from March 2019 to December 2020.
48. During the hearing, Ms. Nyaoke confirmed that she had received the sum of Kshs 181,373.52 from the Respondent hence she was still owed Kshs 181,373.52 in unremitted pension contributions.
49. She further stated that at the time she resigned, her contract of employment had expired hence she did not have a valid contract. That further, when she tendered her resignation, the Respondent did not indicate that she had breached her contract of employment. That instead, the Respondent proceeded to pay her salary for the months of September, October and November.
50. She contended that it is the Respondent who owes her and not the other way round.
51. Closing her testimony in chief, Ms. Nyaoke asked the Court to compel the Respondent to pay her outstanding dues, pension, general damages, interest and costs of the suit.

### **Respondent's Case**

52. The Respondent called oral evidence through its Executive Director, Mr. Robert Nyaoga. Similarly, he adopted the Memorandum of Response and Counterclaim as well as the witness statement to constitute his evidence in chief. He further sought to rely on the initial list and bundle of documents as well as the supplementary list and bundle of documents filed on behalf of the Respondent to constitute his evidence.
53. Mr. Nyaoga stated that at all times material to this suit, the Respondent paid the Claimants' salaries in a timeous manner save that in the year 2020, when its business was impacted very negatively by the Covid-19 pandemic coupled with the resultant measures put in place by the Government to contain the pandemic including lock-downs, travel restrictions into and out of some counties, and night curfews.
54. That invariably, this unprecedented state of affairs resulted in a poor business environment characterized by reduced work, late payments by the Respondent's customers for prolonged periods of time. That the logical thing was to close the business for some time but the Respondent elected, against all factors and circumstances, to retain its entire workforce rather than lay them off even though they were actually at home and not engaged in any employment or assignments for prolonged periods during the pandemic.
55. He further stated that having elected to bear such an unprecedented and unusual burden of taking care of its staff members under very difficult circumstances to the extent of even paying them, including the



Claimants, while they weren't working, it was therefore reasonable to expect that the payments of the unpaid salaries for every employee would be made in arrears, in instalments, equally and on the basis of income received by the Respondent from time to time until payment in full and without preference to any category of employee(s).

56. In that regard, the Respondent did notify all its employees, including the Claimants of the impact of the pandemic and the co-relation with the late remittance of their salaries vide a letter dated 17<sup>th</sup> August 2021.
57. Mr. Nyaoga further stated that the 2<sup>nd</sup> and 4<sup>th</sup> Claimants issued resignation notices that fell short of the provisions on termination by a party in their respective employment contracts which provided for the issuance of a two months' notice of intention to terminate.
58. According to Mr. Nyaoga, the 2<sup>nd</sup> and 4<sup>th</sup> Claimants' actions led the Company to incur losses since their resignations were tendered without sufficient notice. Accordingly, the Respondent is entitled to a Counterclaim in that regard.
59. It was his further evidence that the Respondent was taking all steps to settle the unremitted pension contributions for all its past and present employees for the period April 2019 - April 2022.
60. Mr. Nyaoga denied that the Respondent had acted maliciously against the Claimants and that the Respondent had worked very hard to remedy this by settling the arrears of not only the Claimants but also those of their other colleagues who are still in employment without preferential treatment to the Claimants.

### **Submissions**

61. It was the Claimants' submission that they cannot be denied their legitimate salary on allegation that the Respondent's business was impacted very negatively by the COVID-19 Pandemic. It was their position that the Respondent was still in consumption of their services which are worth compensation in accordance with the *Employment Act*.
62. The Claimants further submitted that despite the strategic settlement of unpaid salaries and non-remitted pensions with regards to the 1<sup>st</sup> and 3<sup>rd</sup> Claimants, the Respondents did not cover the interests or costs related to recovering the unpaid salaries and non-remitted pensions as their actions were initiated after this suit had been filed.
63. It was further submitted that the Claimants are entitled to the reliefs sought since the Respondent was obligated to pay all its employees all their legitimate salaries for every month and that the Respondent is estopped from relying on expired contracts of the 2<sup>nd</sup> and 4<sup>th</sup> Claimants to withhold their legitimate salaries.
64. With respect to the Respondent's Counterclaim against the 2<sup>nd</sup> and 4<sup>th</sup> Claimants, it was submitted that the same is unmerited as the Respondent held on to their salaries for a period of four months hence creating a hostile working environment which prompted them to find alternative employment for purposes of sustaining their livelihood.
65. Referencing the case of Nicodemus Ochieng Ogutu v Village of Hope Kenya (2018) eKLR, the Claimants maintained that just like any other employer, the Respondent herein was obligated to meet its mandate of paying its employees' salaries and equally remit their pensions to the relevant statutory institution.



66. On its part, the Respondent submitted that the 2<sup>nd</sup> and 4<sup>th</sup> Claimants' resignations were in flagrant breach of their employment contracts in respect of termination by either party which provides for a two months' notice period and or payment of two months' salary as compensation for any damage that may have been caused by such termination.
67. That having considered that the 2<sup>nd</sup> and 4<sup>th</sup> Claimants did not give the Respondent sufficient notice and the Claimants having admitted as much, it therefore follows that the Respondent is legitimately entitled to the compensation as asserted in the Response to Memorandum of Claim and Counterclaim. In support of this position, the Respondent invited the Court to consider the determination in the case of *Wanjala v Gillys Security and Investigation Services Limited (Cause 522 of 2017)* (2024) KEELRC 140 (KLR) (6 February 2024) (Judgment).
68. The Respondent further submitted that the Claimants have not pleaded and/or advanced any evidence to demonstrate any of the alleged mistreatments and disturbances and or that they suffered any economic injuries so as to warrant compensation by damages. On this score, reliance was placed on the case of *D.K. Njagi Marete v Teachers Service Commission* (2013) eKLR and *Hema Hospital v Wilson Makongo Marwa* (2015) eKLR Civil Appeal No 72 of 2014.
69. The Respondent further argued that from the facts of this case, it is undisputed that there exists no case of unlawful and/or unfair termination from employment. That therefore, the Claimants have failed to demonstrate any losses occasioned by the Respondent's conduct warranting any compensation. The Respondent contended that it is clear that the instant claim for damages is only intended to punish it.
70. The Respondent maintained that it has, at all times material to this suit, acted in good faith and has been keen on settling the Claimants' arrears. In that regard, the Respondent had paid all the salary arrears and remitted pension arrears before the suit was heard.

### **Analysis and Determination**

71. Flowing from the pleadings filed by both parties, the evidence, as well as the rival submissions, the following issues stand out for determination:
  - i. Whether the Claimants are entitled to the reliefs sought;
  - ii. Whether the Respondent's Counterclaim is merited;

### **Reliefs?**

72. Before I delve into this issue, I find it worth mentioning that in as much as the Claimants have submitted extensively on the issue of constructive dismissal, it is notable that this issue was not pleaded. It is trite law that parties are bound by their pleadings. In the event the Claimants were of the view that they had been constructively dismissed by the Respondent, nothing stopped them from pleading as much.
73. It is also trite that submissions cannot take the place of evidence. To this end, the issue of constructive dismissal is extraneous to this suit and does not arise for consideration. As such, the Claimant's submissions to that extent are immaterial.
74. That said, I now turn to consider the reliefs available to the Claimants.



## **Unpaid salary**

75. All the Claimants stated that at the time they resigned from employment, the Respondent owed them unpaid salary. During the hearing, the 1<sup>st</sup> Claimant stated that the Respondent still owed him the sum of Kshs 15,401.20, while the 2<sup>nd</sup> Claimant stated that the Respondent still owed him the sum of Kshs 270, 056.56. On her part, the 4<sup>th</sup> Claimant stated that she was still owed the sum of Kshs 113,417.40 being unpaid salary. As stated herein, the 3<sup>rd</sup> Claimant confirmed that all his salary arrears had been settled by the Respondent at the time of the hearing. As such, he does not have a claim against the Respondent in that regard.
76. It is worth noting that the Respondent has not disputed owing the Claimants unpaid salary. In the Respondent's defense, its business was impacted negatively by the COVID-19 pandemic coupled with the resultant measures put in place by the Government to contain the pandemic. The Respondent further acknowledged that it had acted in good faith and had settled the Claimants' salary arrears.
77. Notably, the Claimant's testimony is supported by the evidence on record. To this end, the claim for unpaid salary by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Claimants succeeds and they are entitled to the sum of Kshs 15,401.20, Kshs 270, 056.56 and Kshs 113,417.40 respectively.

## **Unremitted pension**

78. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Claimants have further averred that the Respondent deducted pension contributions from their salaries but failed to remit the same to their respective pension accounts.
79. The Respondent did not rebut the Claimant's assertion to this effect and once again, the Respondent attributed its failure to remit the Claimants' pension contributions on the effects of the COVID-19 pandemic. The Respondent further averred that the issue was cross-cutting as it affected all its employees.
80. As stated herein, the 1<sup>st</sup> and the 3<sup>rd</sup> Claimant confirmed during the hearing that the Respondent had since remitted all their outstanding pension dues. On the other hand, the 4<sup>th</sup> Claimant stated that the Respondent was yet to remit the sum of Kshs 181,373.52 into her pension account. This position was not refuted by the Respondent.
81. In light of the foregoing, the Respondent is hereby directed to remit the 4<sup>th</sup> Claimant's pension to the tune of Kshs 181,373.52.

## **B General damages**

82. The Claimants have further sought general damages against the Respondent for mistreatment and disturbances. As crafted, this relief is not clear and does not appear to flow from the Claim. As it is, the Claimants have not cited the Respondent for mistreatment and disturbance. Granted, the Respondent may have withheld the Claimants' salaries and failed to remit their pension dues on time. Be that as it may, the Claimants have not sought general damages in that regard or for unfair labour practices. As such, this relief is declined.

## **Whether Counterclaim is merited**

83. As stated herein, the Respondent has sought against the 2<sup>nd</sup> and 4<sup>th</sup> Claimant the sum of Kshs 268,785.35 and Kshs 170,612.00 respectively, on grounds that they resigned in flagrant of their respective contracts of employment which required them to give two months' notice.



84. Disputing the Counterclaim, the 2<sup>nd</sup> and 4<sup>th</sup> Claimants have averred that at the time they resigned, their respective contracts of employment had expired hence they were serving under oral contracts of employment.
85. It is common ground that at the time all the Claimants resigned from employment, the Respondent had failed to pay their salaries and remit their pension dues as prescribed under their respective contracts of employment. Therefore, it is not surprising that the Claimants opted to tender their resignations from the Respondent's employment.
86. Taking into account the circumstances under which the Claimants left the Respondent's employment, it would be unconscionable to order them to pay the Respondent salary in lieu of notice.
87. In the premises, the Counterclaim is declined.

### **Orders**

88. In the final analysis, the Claim is allowed and Judgment is entered in favour of the Claimants in the following manner:

#### 1<sup>st</sup> Claimant

- a. The 1<sup>st</sup> Claimant is awarded the sum of Kshs 15,401.20 being outstanding salary.
- b. Interest shall apply on the amount in (a) at court rates from the date of filing the suit until payment in full.

#### 2<sup>nd</sup> Claimant

- a. The 2<sup>nd</sup> Claimant is awarded the sum of Kshs 270,056.56 being outstanding salary.
- b. Interest shall apply on the amount in (a) at court rates from the date of filing the suit until payment in full.

#### 4<sup>th</sup> Claimant

- a. The 4<sup>th</sup> Claimant is awarded the sum of Kshs 113,417.40 being outstanding salary.
- b. The Respondent is hereby directed to remit pension contributions in the sum of Kshs 181,373.52 to the 4<sup>th</sup> Claimant's pension account. This shall be done within 30 days from the date of this judgment.
- c. Interest shall apply on the amount in (a) at court rates from the date of filing the suit until payment in full.

89. The Counterclaim against the 2<sup>nd</sup> and 4<sup>th</sup> Claimants is disallowed with costs.

90. The Respondent shall bear the costs of the Claim.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF JULY 2024.

**STELLA RUTTO**

**JUDGE**

**In the presence of:**

For the Claimants Ms. Otieno

For the Respondent Mr. Olala



**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**

**11**

