



**Ochola v Devine Homes Resort Limited (Cause E022 of 2023)
[2024] KEELRC 2247 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2247 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E022 OF 2023
CN BAARI, J
SEPTEMBER 23, 2024**

BETWEEN

OSCAR MODOCH OCHOLA CLAIMANT

AND

DEVINE HOMES RESORT LIMITED RESPONDENT

JUDGMENT

1. Through an amended memorandum of claim dated 16th May, 2023, and filed in court on 18th May, 2023, the Claimant sued the Respondent alleging unlawful termination of employment and seeks the following reliefs:
 - i. A declaration that his termination was unlawful for failure to comply with the rules of natural justice, the *Constitution* and the *Employment Act*.
 - ii. Kshs 2,870,000/= in unpaid dues and damages.
 - iii. A certificate of service.
 - iv. Costs and interests of the suit.
2. In a Statement of Response and Counterclaim dated 29th May, 2023, the Respondent affirmed that the Claimant voluntarily resigned and sought an order compelling him to return its properties and documents still in his custody. The Respondent equally seeks an order against the Claimant for costs of the suit.
3. In his defence to the Counterclaim, the Claimant generally denied all the averments in the Counterclaim and invited the Respondent to strict proof thereof.
4. The matter proceeded for hearing on 12th February, 2024, when the Claimant testified in support of his case. The Respondent presented their evidence on the same date through the testimony of one



Gabriel Jabongo, the Managing Director of the Respondent, culminating in both parties closing their respective cases

5. Both parties filed submissions on the matter.

The Claimant's Case

6. The Claimant's case is that he was appointed Sales and Marketing Manager on 2nd February, 2021 at a monthly gross salary of Kshs 134,000/= which rose to Kshs 150,000/= by the time of termination.
7. It is his contention that he served diligently until March, 2023 when the Respondent's Managing Director started treating him with contempt necessitating his resignation. He states that he issued notice of resignation on 9th March, 2023 and which resignation was accepted the following day the 10th March, 2023.
8. The Claimant avers that his notice was to lapse on 9th April, 2023 and that he remained in the service of the Respondent for the entire notice period.
9. In response to his resignation, the Claimant states that the Respondent invited him to a meeting on 7th April, 2023 in which it was mutually agreed that he withdraws his resignation. He states further that he continued working after 9th April, but that on 16th April, 2023 he was called to a meeting in which his employment was inexplicably terminated.
10. The Claimant's contention is that his dismissal was illegal as he was not issued with a notice to show cause and neither was he accorded an opportunity to defend himself. Additionally, the Claimant avers that he was not paid his dues, not even the salary for the notice period.
11. On cross-examination, the Claimant admitted having received service pay. He further told court that he was paid in lieu of leave for the year 2021, but was not paid for 2022.
12. It is the Claimant's evidence that he voluntarily resigned from the service of the Respondent. It is his assertion that the Respondent did not issue him with a new contract when they mutually agreed that he continues working.
13. It is his evidence that he was paid a marketing allowance and a consolidated gross pay.
14. He prays that his prayers be allowed.

The Respondent's Case

15. On its part, the Respondent avers that the Claimant issued a 30-day resignation notice effective 9th March, 2023. It is the Respondent's further case that the Claimant's resignation was duly accepted and instructed to follow up on outstanding debts from customers during the pendency of the notice period.
16. The Respondent's further case is that the Claimant was always treated in a professional manner and was paid both house and leave allowances for the full term of his employment.
17. It is the Respondent's further case that the Claimant made away with its critical IFMIS logging details occasioning it difficulties in government tendering. It is its assertion that despite numerous requests to him to avail the sensitive property, the Claimant declined to do so and resorted to blackmail by issuance of monetary demands.
18. The Respondent's case is that the critical details carted away by the Claimant and all of which were vital to its business, include:



- i. The General Manager's file containing sensitive business information.
 - ii. Original copies of all running contracts that he signed with all suppliers and Clients on its behalf.
 - iii. Original LPOs/LSOs of NGOs with Government entities.
 - iv. Joint reconciliation and sign off of all the Respondent's list of assets
 - v. Joint reconciliation and sign off of stock list
 - vi. List of all clients and their contacts
19. The Respondent states that it did not assign the Claimant any duties after 9th April, 2023 and that its Director communicated with him on WhatsApp only in regard to pending debts.
 20. On cross-exam, RW1 told court that the Claimant was paid salary for March, 2023 but the 9 days worked in April were not paid.
 21. RW1 confirmed that he held a meeting with the Claimant on 6th April, 2023 together with other departmental heads. It is his admission that the persons who attended the meeting are not witnesses in this matter on what transpired in the meeting of 6th April, 2023.
 22. It is RW1's evidence that the Claimant was in touch with their accounts office on the payment of his dues. RW1 further admitted that he had not produced an inventory of documents in the Claimant's custody and subject of the counter claim. He states that the Claimant has been sending him messages as received from clients which is evidence that there is no bad blood between them.
 23. He avers that the Claimant was issued with a certificate of service.

The Claimant's Submissions

24. On his unlawful and unfair termination, the Claimant submits that even though he resigned, the resignation was rescinded by the fact that he worked beyond the 30-day resignation period. He draws the court's attention to WhatsApp messages adduced in evidence.
25. On account of the rescission it is the Claimant's submission that his sudden termination on the 16th of April, 2023 was contrary to Section 41 of the *Employment Act*. He cites the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR where the court in highlighting the mandatory nature of section 41 of the *Employment Act* stated that failure to follow its provisions would result in unfair termination.
26. On the claim for pay in lieu of notice, the Claimant cites Section 35 (1) (c) of the *Employment Act* to argue that the dismissal was without notice.
27. On the salary for the 16 days worked in the month of April, 2023 the Claimant urges the court to consider the WhatsApp messages showing that he was on duty, coupled with the fact that the Respondent had not proven payment.
28. In respect of the counterclaim, the Claimant submits that the documents alleged to have been carted away were not specified. The Claimant avows that the Respondent had not discharged its burden of proof as stipulated by Sections 107 and 108 of the *Evidence Act*.
29. In further refuting the Counterclaim, the Claimant submits that he had cleared and handed over all documents as evinced by the clearance form.



30. In respect to the terminal dues the Claimant cites the response to the demand letter in which it was indicated that terminal dues would be paid upon clearance.

The Respondent's Submissions

31. It is the Respondent's submission that the Claimant voluntarily resigned and no duties were assigned post the notice period. The Respondent contends that the resignation having been accepted, there could be no legitimate expectation of repudiation. The Respondent's further submission is that the revocation of resignation had to be express, clear and unambiguous to be valid.
32. It is submitted for the Respondent that it was not the proximate cause of the Claimant's termination of employment. It cites the case of *Keneth Onialo v Majlis Resort Lamu ltd* [2022] eKLR for the holding that the Claimant having voluntarily resigned, Sections 41,43 and 45 of the *Employment Act* were not applicable.
33. The Respondent strongly submits that the oral evidence of termination does not trump the written communication. Additionally, the Respondent submits that the reminder to clear with the company was not the point of separation, but an undertaking aimed at bringing the separation to fruition.
34. The Respondent submits that the Claimant is not entitled to compensation and notice pay on account of having voluntarily resigned.
35. It is the Respondent's submission that Claimant proceeded on leave as evidenced by the signed leave forms and that it duly paid for the leave days not taken.
36. The Respondent finally prays that the Claimant's suit be dismissed and the Counterclaim be allowed as prayed.

Analysis and Determination

37. Having carefully considered the pleadings, evidence, witnesses' testimonies and the parties' written submissions, the issues that arise for determination are:
- i. Whether the Claimant resigned from the service of the Respondent or whether he was dismissed.
 - ii. Whether the Claimant is entitled to the remedies sought.
 - iii. Whether the Respondent has proven the Counter claim.

Whether the Claimant resigned from the service of the Respondent or was he dismissed

38. The major point of contention in this suit is whether the Claimant's resignation was rescinded. It was the Claimant's argument that his resignation was mutually rescinded in a meeting held on 6th April, 2023. The Claimant cites WhatsApp communication between himself and the Respondent's Director (RW1) as proof that he continued discharging his duties past the expiry of the notice period.
39. On its part the Respondent maintains that the Claimant resigned and no agreement allowing him to continue working was ever reached or even discussed.
40. RW1 admitted having held a meeting with the Claimant and other departmental heads of the Respondent on 6th April, 2023, but which meeting did not according to him discuss the Claimant's contract. Further, the WhatsApp messages between the parties herein had only a date of 6th April, 2023 and the messages that followed were undated, hence it is not possible for the Court to say with certainty



that the discussions took place after 9th April, 2023. The WhatsApp messages only indicates the days of the week (Thursday, Friday, yesterday etc) when the communication happened and not the exact dates.

41. Having alleged that the meeting took place it was incumbent upon the Claimant to prove it. No such evidence has been provided. It seems implausible that the meeting ever took place. I say so because the tone of the emails produced in evidence point to the Respondent having somewhat reconciled with the Claimant's exit. The Respondent's email accepting the resignation on 10th March, 2023 and that of 16th April, 2023 advising the Claimant to hand over hotel property, show no indication of a change of heart on the part of the Respondent.
42. This court therefore returns the finding that mutual revocation of the resignation has not been proven on a balance of probabilities.
43. The other argument put forth by the Claimant was that the resignation was revoked by conduct as he was assigned duties way past the notice period. This argument is however countered by the Managing Director's email of the 10th March, 2023 in response to the Claimant's resignation. In the said email, the Managing Director expresses surprise at the Claimant's resignation and urges him to follow up on outstanding debts.
44. Having resigned on 9th March, 2023 the notice period was to lapse on 10th April, 2023. The WhatsApp conversations generally point to follow ups on the outstanding debt in line with the email dated 10th March, 2023. For instance, on the 14th April, 2023 the Claimant states that the 'Kisii amount is already in the account' to which the Managing Director replies 'that is good'.
45. Thereafter, the conversation turns to the Claimant following up on his dues. The assertion that the resignation was rescinded by conduct therefore does not hold.
46. In whole, I return that in the absence of evidence to the contrary, the Claimant wilfully resigned from the service of the Respondent. The assertion that he was unlawfully dismissed thus falls by the wayside on account of his failure to prove that an unfair or wrongful dismissal occurred as stipulated by Section 47 (5) of the *Employment Act*.

Whether the Claimant is entitled to the remedies sought.

Salary in lieu of notice

47. The finding that the Claimant wilfully resigned goes to say that he is not entitled to pay in lieu of notice, and the claim fails and is dismissed.

Unpaid salary for 16 days worked in April 2023

48. The Claimant sought Kshs 80,000/= under this head. The Respondent admitted that the Claimant was not paid for the 9 days worked in April, 2023, which admission entitles him to the claim and which is hereby awarded at Kshs.45,000.00.

Unpaid leave

49. Under this head the Claimant sought Kshs 105,000/=. The Claimant further asserted that the Respondent has not rebutted his claim. The Respondent has produced signed leave forms which have not been controverted. This claim therefore remains unproved and is dismissed.



Compensation

50. Having found that the Claimant voluntarily resigned, this head of the claim is untenable and it fails.

Certificate of service

51. The Claimant was issued with a certificate of service as evinced by the Respondent's documents.

Whether the Respondent has proven the counterclaim

52. The Respondent listed a number of items that the Claimant had allegedly refused or was yet to handover. The Claimant has produced a copy of the handover form in which a number of items have not been verified as returned.

53. Amongst the items is the IFMIS login credentials being the username and password, list of all cooperate clients their contacts and email addresses, and copies of all contracts entered into on behalf of the company.

54. The Respondent averred that the Claimant's failure to return the documents has impeded the Claimant's clearance. This would explain why some items are not verified as returned. Additionally, the handover form has not been signed by all of the Respondent's departments.

55. In line with the foregoing this court finds that the Respondent has proven on a balance of probability that the Claimant is still in possession of company property.

56. This is further buttressed by the WhatsApp conversation in which the Claimant requests for Kshs 5,000/= in return for IFMIS details.

57. The court thus allows the Counterclaim as prayed.

58. The upshot of the foregoing is that the Claimant's case is dismissed with costs to the Respondent and the Respondent's Counterclaim allowed in its entirety.

59. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 23RD DAY OF SEPTEMBER, 2024.

C. N. BAARI

JUDGE

Appearance:

Ms. Raburu h/b for Mr. M.M. Omondi for the Claimant

Mr. Owino present for the Respondent

Ms. Anjeline Wanjofu-CA.

