Kimani v Langata Hotel Development Ltd (Cause E067 of 2021)
[2025] KEELRC 701 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 701 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E067 OF 2021

S RADIDO, J

MARCH 6, 2025

BETWEEN

ESTHER WANGUI KIMANI ..... CLAIMANT

AND

LANGATA HOTEL DEVELOPMENT LTD ..... RESPONDENT

JUDGMENT

1. Esther Wangui Kimani (the Claimant) sued Langata Hotel Development Ltd (the Respondent) on 27 January 2021 and she stated the Issues in Dispute as:
    i. Unfair termination.
    ii. Contractual breach.
2. The Respondent filed a Response on 13 September 2021, and the Cause was heard on 4 February 2025.
3. The Claimant and a Human Resource Manager with the Respondent testified.
4. The Claimant filed her submissions on 17 February 2025, and the Respondent on 27 February 2025.
5. The Claimant set out the Issues in dispute in the submissions as:
    i. Whether the reduction of the Claimant's salary was voluntary and lawful?
    ii. Whether the termination clause in the Claimant's contract (3 months' termination notice) was complied with?
    iii. Whether the termination of the Claimant's employment was unfair and unlawful?
    iv. Whether the law on frustration of contract was applicable in the circumstances?
6. The Respondent saw the Issues as:

i. Whether the Claimant's reduction of salary was voluntary?

ii. Whether the Claimant's employment contract was unfairly terminated?

iii. What remedies are available to the Claimant?

7. The Court has considered the pleadings, evidence and submissions.

Reduction of salary

8. The Claimant's agreed salary with the Respondent at the time of employment on 1 September 2016 was Kshs 170,000/-. On 29 January 2020, the salary was reviewed to Kshs 195,000/-.

9. On 24 March 2020, the Respondent wrote to the Claimant advising her that following a directive from the Government, the salary had been reviewed to Kshs 112,000/- (a copy of the directive was not produced in Court). The Claimant acknowledged and confirmed the review on 7 May 2020.

10. A month later, on 20 April 2020, the Respondent again wrote to the Claimant informing her of another downward review of the salary to Kshs 84,750/-. The Claimant acknowledged and confirmed the review on 7 May 2020.

11. Unbeknown to the Claimant, the Respondent had on 29 April 2020, prepared a termination notice informing the Claimant of the termination of her employment. The notice was only served on the Claimant on 7 May 2020.

12. The Claimant asserted that the salary reduction was discriminatory because the reduction targeted specific employees and that she was not consulted before the reduction. The Claimant further alleged that she was coerced to accept the salary reductions.

13. The Respondent attributed the salary variations to austerity measures put in place as a response to the declaration of a public health pandemic due to COVID-19.

14. COVID-19 precipitated an unforeseen challenge not only to economic activities but daily human activities and the Government issued several advisories to mitigate the pandemic.

15. However, section 10(5) of the *Employment Act*, 2007 requires an employer to consult with an employee before altering or varying certain employment terms of employment including remuneration.

16. The provision does not require the consent of the employee to the variation, but consultation is key.

17. The Respondent did not place before the Court any material whatsoever to suggest that it consulted the Claimant or informed her in advance of the contemplated variation of remuneration. The failure to consult by itself would amount to a breach of contract/statute.

18. It is instructive that the letters informing the Claimant of the variation of salary were served upon her on 7 May 2020, the same day that she was served with the notice of termination of employment.

19. The Court, therefore, finds that the variation downwards of the Claimant's remuneration did not meet the standard contemplated by section 10(5) of the *Employment Act*, 2007.

20. Regrettably, the Claimant did not plead any relief from this head of the claim and the Court will not grant any relief.

Discharge by frustration

21. The Claimant was a Front Office Manager with the Respondent at its Tamarind Tree Hotel.

22. Upon the declaration of the COVID-19 public health pandemic in March 2020, normal and social life as well as economic activities were significantly affected.

23. In response the pandemic, the Respondent wrote to the Claimant on 24 March 2020 and 20 April 2020 advising her of salary reductions. These letters were only served on the Claimant on 7 May 2020.

24. Significantly, the Respondent had made up its mind on 29 April 2020 to terminate the Claimant's employment. A copy of the notice was also served on the Claimant on 7 May 2020.

25. The Claimant's contract provided for 3 months' notice or pay in lieu of notice of termination. It is not in dispute that the Respondent did not give the notice or offer pay in lieu of notice.

26. The Respondent asserted that the COVID-19 lockdown caused massive cancellations of hotel bookings and this forced it to close the hotel thus frustrating the contract it had with some employees.

27. This Court is now called upon to determine whether the COVID-19 public health pandemic operated to frustrate the contract the parties had.

28. Frustration of contract is a common law doctrine.

29. The core of frustration is the fact that through no fault on their part or supervening events, an employer and employee cannot fulfil their contractual obligations and the parties get discharged from the contract.

30. Within the employment arena, the Court has not been able to get any authority on whether COVID-19 served as a frustrating event.

31. In Kwanza Estates Ltd v Jomo Kenyatta University of Agriculture & Technology (2024) KESC 74 (KLR), the Supreme Court considered the effect of the COVID-19 public pandemic as a frustrating event within the context of a lease/tenancy.

32. The Court stated:

> We acknowledge that the respondent entered into the contested lease agreement to teach and train self-sponsored students. Additionally, the respondent's Nakuru CBD campus was heavily dependent on income from self- sponsored students. During the lockdown, the respondent, like many other higher learning institutions, was forced to close its doors albeit temporarily.
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> The temporary closure of institutions of higher learning by the Government caused the respondent some financial hardship. However, we are of the considered view that this did not amount to an absolute impossibility of performance in the legal sense, especially once restrictions eased and the respondent, along with all learning institutions reopened and resumed normal learning. This is well demonstrated by the fact that once it vacated the petitioner's premises, the respondent moved to another location within Nakuru City. It is a pertinent demonstration of the fact that the pandemic and lockdown measures by the government did not amount to the impossibility of performance. Further, the government restrictions did not bar the respondent entirely from teaching and training self-sponsored students, but only from using the traditional method of in-person teaching. One of the positives from the pandemic was the significant shift towards moving services online, and education was no different.
>
> As a result, we are of the considered view that financial hardship alone, even one stemming from an extraordinary event like the COVID-19 pandemic, does not automatically discharge a tenant's rental obligations. Consequently, this Court arrives at a conclusion that in the circumstances of the present

appeal, the Covid-19 pandemic did not constitute a frustrating event, that would allow the respondent to be discharged from further performance under the lease.

33. From comparative jurisdictions, frustration as a doctrine within the employment field was discussed in Hall v Wright (1859) 120 ER 695; Notcutt v Universal Equipment Co (London) Ltd (1986) 1 WLR 641; Morgan v Manser (1948) 1 KB 184 and Williams v Watsons Luxury Coaches Ltd 1990 ICR 536 EAT.

34. Locally, the Government realised the effects of the COVID-19 public health pandemic and it issued several advisories to the general public and business enterprises.

35. The Government, Central Organisation of Trade Unions and Federation of Kenya Employers also entered into a Memorandum of Understanding on 30 April 2020 to guide employers, trade unions and employees.

36. The Respondent herein faced considerable financial hardship occasioned by multiple cancellations of hotel bookings. In the Kwanza Estates case, the University faced a similar situation.

37. The Supreme Court, however, held that the financial hardship alone emanating from the COVID-19 public pandemic did not automatically discharge the University's obligations as a tenant.

38. This Court is of the same mind and finds that the COVID-19 public health pandemic did not serve as a frustrating event of the Claimant's contract.

39. It reaching the conclusion, it is not lost to the Court that the Tripartite partners had provided guidance in the Memorandum of Understanding and that the Respondent had the option of terminating the Claimant's contract on account of redundancy.

Unfair termination of employment

40. Under the contract, the Respondent could determine the contract by giving a 3-month notice or pay in lieu of notice. The Respondent did not comply with the contractual terms.

41. The Respondent did not notify the Claimant of contemplated termination on grounds of operational requirements or ask her to make representations as contemplated by sections 35(1), 41 and 43 of the *Employment Act*, 2007.

42. The Court finds that the Respondent terminated the Claimant's contract unfairly.

Compensation

43. The Claimant served the Respondent for about 4 years.

44. The Claimant also proved a breach of contract/statute in relation to salary reduction but did not plead a relief for the breach.

45. The Court has found a breach of contract with respect to the salary reduction but has not granted a relief

46. In consideration of the above factors, the Court is of the view that the equivalent of 5 months' gross salary as compensation would be appropriate (gross salary was Kshs 195,000/-).

Breach of contract: Accrued leave

47. The Claimant claimed Kshs 61,675/- as accrued leave but she did not lay an evidential foundation to this head of the claim either in the witness statement adopted as part of evidence or during oral testimony and relief is declined.

Conclusion and Orders

48. The Court finds and declares that the Respondent unfairly terminated the Claimant's employment.

49. The Claimant is awarded:

    (i) Compensation Kshs 975,000/-.

50. The award to attract interest at court rates from the date of judgment.

51. The Claimant to have costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN NAIROBI ON THIS 6TH DAY OF MARCH 2025.

Radido Stephen, MCIArb

Judge

Appearances

For Claimant Kimani, Kiarie & Associates Advocates

For Respondent Obura Mbeche & Co. Advocates

Court Assistant Wangu