



Nuttall v Gor Mahia Football Club (Employment and Labour Relations Cause 807 of 2016) [2024] KEELRC 708 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 708 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 807 OF 2016**

BOM MANANI, J

MARCH 20, 2024

BETWEEN

FRANCIS NUTTALL CLAIMANT

AND

GOR MAHIA FOOTBALL CLUB RESPONDENT

JUDGMENT

1. The instant action is founded on the alleged constructive dismissal of the Claimant from his position as Head Coach of the Respondent club. The Claimant avers that the Respondent's management subjected him to an intolerable work environment that forced him to tender his resignation. Therefore, he, inter alia, prays that the court finds that his contract was wrongfully terminated.
2. The Respondent does not admit the claim. According to it (the Respondent), the Claimant resigned from employment voluntarily days after he had absconded duty.

Claimant's Case

3. The Claimant avers that on 1st January 2015, the Respondent hired him as its Head Coach for a period of two years at a monthly salary of Ksh. 700,000.00. In addition, the Respondent was to provide him with: housing; medical insurance; a motor vehicle for local use; return air tickets for self and family; airtime allowance; and various bonus payments.
4. The Claimant contends that the Respondent breached the terms of the contract by failing to honour most of the obligations mentioned above. He contends that the Respondent failed to pay his salary as agreed. He further avers that the Respondent failed to provide him with an apartment for housing as earlier agreed. Instead, the Respondent kept him in hotel accommodation under dehumanizing conditions.



5. The Claimant avers that the Respondent did not settle his hotel bills as and when they fell due forcing him to limit his meals to one in a day. Further, the hotel refused to release him on some occasions due to the outstanding bills. The Claimant contends that this treatment subjected him to stress, embarrassment and inconvenience.
6. The Claimant avers that in November 2015, the Respondent's management tried to change his contract by proposing a 50% pay cut instead of giving him a 10% annual increment as stipulated in the contract. He avers that the Respondent's management told him that he had to accept the salary reduction or have his contract terminated.
7. The Claimant avers that in early February 2016, he made a counter-offer to the proposed variation to his contract. However, this counter-offer was allegedly rejected by the Respondent who proceeded to terminate the contract between the parties.
8. On 6th February 2016, the Respondent allegedly had a change of mind regarding the decision to terminate the contract. As a result, it recalled its decision to terminate the contract.
9. It is the Claimant's case that after the Respondent reinstated him, he asked for a meeting to address his grievances. He avers that following this request, the parties held a meeting on 19th February 2016 during which it was agreed that the outstanding grievances by the Claimant would be resolved within seven (7) days.
10. However, matters did not improve. According to the Claimant, the Respondent's chairman began inciting players to sabotage his (the Claimant's) work. As a result, some of the players began displaying open defiance against him thus frustrating his work further. The Claimant avers that the totality of these developments denied him control over the football team.
11. The Claimant avers that because of the failure to provide him with suitable transport, he was unable to enjoy the convenience of free movement. He was allegedly sometimes forced to use motor bikes for transport.
12. According to the Claimant, these events made the work environment intolerable. They left him with a sense of deep frustration which took a toll on his wellbeing.
13. The Claimant avers that sometime in early March 2016, he left the country to visit a friend in Cairo in a bid to break away from the frustrations. He subsequently tendered his resignation from the club on 8th March 2016.
14. It is the Claimant's case that after he resigned from employment, he asked the Respondent to pay his terminal dues without success. As a result, he was forced to institute the instant proceedings to enforce recovery of the dues.
15. The Claimant now prays for: housing refund (Ksh. 1,440,000); car allowance (Ksh. 3,360,000); air ticket funds for self and family (Ksh. 810,000 + Ksh. 3,195,489); various bonuses; medical cover (Ksh. 1,049,000); salary in lieu of notice (Ksh. 770,000); compensation for remainder of his term (Ksh. 10,000,000); laptop (Ksh. 100,000); damages (Ksh. 1,000,000); costs; and interest.

Respondent's Case

16. The Respondent filed a Statement of Defense and Counter Claim dated 1st December 2022. In the defense, the Respondent disputes the Claimant's assertions.



17. It is the Respondent's contention that it provided the Claimant with a furnished apartment in terms of the contract between the parties. However, the Claimant allegedly rejected the apartment on the grounds that it was sub-standard.
18. The Respondent avers that the Claimant unilaterally moved into a high-end hotel and made a false representation to the hotel's management that the Respondent had approved his stay there. As a result, the Respondent was forced to settle the hotel bills to avoid embarrassment.
19. The Respondent avers that in March 2016, the Claimant absconded from work and took up an assignment with another football team in Egypt. It (the Respondent) contends that the Claimant's action of taking up a new assignment with another football club before he had terminated his contract with it was in breach of the contract between the parties.
20. The Respondent avers that on 8th March 2016, the Claimant voluntarily tendered his resignation. According to the Respondent, this action by the Claimant terminated the contract between them.
21. The Respondent contends that at the time of the Claimant's resignation, he asked to be paid terminal dues of Ksh. 976,132.00. According to the Respondent, this is a confirmation that at the time that the contract between the parties came to a close, all dues to the Claimant had been settled save for the purported Ksh. 976,132.00. Therefore, the several claims in the instant action can only be considered as an afterthought.
22. The Respondent avers that when the Claimant resigned from employment, he did not issue it (the Respondent) with the requisite twenty eight days' notice. According to the Respondent, this was in breach of the contract between the parties. Consequently, it (the Respondent) has counter-claimed for salary in lieu of notice.
23. The Respondent avers that the parties mutually agreed to revise the terms of their contract of 5th February 2015. Consequently, the contract was terminated by agreement on 31st December 2015 and was to be replaced by a fresh contract that was to have been executed around the same time.

Issues for Determination

24. After evaluating the pleadings and evidence on record, I am of the view that the following are the matters that require determination:-
 - a. Whether the Claimant's contract of service with the Respondent was unlawfully terminated.
 - b. Whether the Claimant is entitled to the reliefs that he seeks in the claim.
 - c. Whether the Respondent is entitled to the reliefs that it seeks in its defense and counter-claim.

Analysis

25. At paragraph six (6) of the Memorandum of Claim, the Claimant contends that he resigned from employment on 8th March 2016. He asserts that the resignation was triggered by frustrations that he had been subjected to at work.
26. At paragraph seven (7) of the Memorandum of Claim, the Claimant sets out some of the events that he says frustrated the discharge of his duties. These include the following:-
 - a. That payment of his salary was unduly delayed. He contends that his salary was remitted intermittently from January 2015 when he was engaged until November 2025.



- b. That the Respondent's management failed to renew contracts of critical players for the club without his input thus frustrating his efforts to assemble a strong team.
 - c. That in November 2015, the Respondent sought to adversely adjust his (the Claimant's) contract by, inter alia, purporting to step down his salary by half.
 - d. That the Respondent failed to facilitate his (the Claimant's) relocation to a suitable residential apartment. Instead, it (the Respondent) kept him in hotel accommodation which proved inconvenient as the Respondent often failed to settle the hotel bills on time. Further, the accommodation was not suitable for family living.
 - e. That because of the Respondent's inability to settle the hotel bills as and when they fell due, the Claimant was forced to reduce the meals he could have in a day to one.
 - f. That on some occasions, the hotel(s) declined to allow the Claimant to check out due to outstanding bills thus exposing him to stress and embarrassment.
 - g. That the Respondent's management incited some team members against him (the Claimant) in a bid to sabotage his work.
 - h. That the Respondent failed to live up to the terms of the contract between the parties.
27. It is the Claimant's case that the totality of the above events made the work environment intolerable for him. He avers that the events took a toll on him forcing him to leave the country for Cairo in early March 2016 to visit a friend. Whilst in Cairo, the Claimant states that he tendered his resignation.
 28. The Claimant tendered in evidence the letter of resignation dated 8th March 2016. The letter sets out the reasons why he resigned from employment. Some of the reasons mirror the grievances mentioned above.
 29. It is undoubted that the parties had a difficult work relation. For instance, it is evident that the Respondent was unable to pay the Claimant's salary as and when it fell due. This is evident from both the documentary and oral evidence on record.
 30. The complementary slips which the Respondent produced in evidence dated 20th March 2015 and 10th July 2015 demonstrate that payment of the Claimant's salary kept lagging behind. During his oral testimony, the Respondent's witness confirmed that the Respondent owed the Claimant salary arrears of close to Ksh. 2,690,000.00 as at July 2015. Indeed, it is because of this state of affairs that the Respondent proposed to review the Claimant's contract in November 2015 to reduce his emoluments by 50%.
 31. Payment of salary as and when it falls due is a fundamental term of a contract of service. Thus, persistent delay in remittance of salary constitutes a fundamental breach of a contract of service.
 32. The Respondent's failure to remit the Claimant's salary as and when it fell due certainly resulted in a breach of the contract between the parties. This failure entitled the Claimant to consider the contract between the parties as repudiated and therefore tender his resignation.
 33. The contract of 5th February 2015 required the Respondent to procure a work permit for the Claimant. Indeed, under section 45 (2) of the [Kenya Citizenship and Immigration Act, 2011](#), this obligation lies with the employer.
 34. The evidence on record shows that as at August 2015 (eight months into the contract), the Respondent had not procured this permit. This fact is confirmed by the Respondent's letter to the Claimant dated



- 28th August 2015 in which it stated that it had applied for the permit and was awaiting completion of the process.
35. In his evidence, the defense witness stated that the work permit was eventually procured. However, there was no indication when this was done.
 36. At paragraphs 4 and 5 of his Memorandum of Claim, the Claimant states that the Respondent did not provide him with the work permit. There is no evidence to demonstrate that the Respondent shared a copy of the work permit with the Claimant.
 37. The Respondent may have eventually procured the work permit as it asserts. However, given the significance of the instrument to the Claimant's presence in the country, it was instructive that the Respondent furnishes him with a copy of the permit. The failure to share the work permit with the Claimant exposed him to unnecessary anxiety rendering his work experience in the country unpleasant and uncondusive. This fact is confirmed by the Claimant's email to the Respondent dated 12th March 2015 in which he reminded the Respondent that he (the Claimant) had been reminded by the immigration department about the absence of the work permit.
 38. The Claimant gave evidence that he was forced to live in a hotel environment against his wishes. It was his contention that he would have preferred to live in an apartment as opposed to a hotel as this would have enabled him to: launder his garments more affordably; have meals at his convenience; and stay with family.
 39. On its part, the Respondent asserted that the Claimant was given an apartment but rejected it. According to the Respondent, instead of settling for the apartment, the Claimant booked himself into expensive hotels thereby causing it (the Respondent) to incur heavy expenses in keeping him there.
 40. The Respondent's position on this issue does not find support in the evidence on record. The Claimant's email to the Respondent dated 24th March 2015 shows that he asked the Respondent to get him an apartment for his accommodation. As a matter of fact, he indicated that he had not taken possession of the apartment that he had been allocated earlier because of want of approval by the apartment owner. There is no evidence that he rejected this apartment for being substandard as asserted by the Respondent.
 41. It is evident that because of the delay in procuring an apartment for the Claimant, he was forced to continue staying in hotels. The Claimant's evidence that he was subjected to humiliating treatment in the hotel establishments he was living because of delayed settlement of bills by the Respondent has not been controverted.
 42. Constructive dismissal arises in instances where an employee is forced to tender his resignation from employment due to intolerable conditions of work. In *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344 the court described the concept as follows:-

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any



length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

43. The totality of the evidence on record demonstrates that the Claimant was subjected to a difficult work environment. The persistent failure to remit his salary on time, the failure to notify him whether his work permit had been procured, the release of players from the club without consulting him and the difficulties he experienced associated with housing rendered the work environment intolerable for him.
44. The Respondent has asserted that it is the Claimant who terminated the contract of service by resigning. The Respondent further contends that the Claimant was in breach of the contract by taking up employment with another football team.
45. The Claimant did not resign voluntarily. The conditions of work pushed him into resigning. Therefore, his resignation amounted to constructive dismissal by the Respondent.
46. The allegation that the Claimant had taken up employment with a foreign team prior to resigning was not cogently supported. The Respondent relies on newspaper reports to advance this narrative. Yet, the Claimant has denied that he took up employment with a foreign team as reported.
47. In the absence of confirmation by either the Claimant or the foreign team that the newspaper report was accurate, the court cannot rely on the report to find that the Claimant took up a new appointment. This is particularly in view of the fact that the Claimant has expressly denied that he took up the alleged appointment. If the Respondent hoped to establish this fact, it ought to have secured persuasive evidence to prove it including a copy of the purported employment contract from the foreign football club.
48. The Claimant has prayed for various reliefs as set out above. However and as rightly stated by the Respondent, most of these reliefs are not sustainable.
49. In his letter of resignation dated 8th March 2016, the Claimant stated as follows:-

“Kindly facilitate the payment of Ksh. 976,132 being the outstanding amount the club owes.”
50. This statement is a clear demonstration that at the time of his resignation, the Claimant believed that the Respondent owed him Ksh. 976,132.00. Therefore, the plethora of claims in the Memorandum of Claim (except for damages for unfair termination, interest and costs of the suit) can only have arisen as an afterthought. For this reason, they are rejected.
51. The Claimant has prayed for compensation for the remainder of his contractual term. At the time of his resignation, he had approximately ten (10) months to finalize his two year contract.
52. The *Employment Act* does not recognize compensation of an employee for the balance of his contractual term as one of the possible reliefs that a court can grant. However, the law permits the grant of compensation that is equivalent to the employee’s gross salary for up to twelve months. It is nevertheless noteworthy that the balance of the Claimant’s contractual term was less than the twelve months that is contemplated under the Act.
53. Having regard to the fact that the employment relation between the parties was short term and that they had hardly been in the relation for more than one year, I am minded to award the Claimant compensation that is equivalent to his salary for four months. This works out to Ksh. 700,000.00 x 4 = Ksh. 2,800,000.00. I also grant the Claimant interest on the aforesaid sum at court rates from the date of this decision.



54. The Respondent has counter-claimed for salary for one month in lieu of notice. It is the Respondent's case that the Claimant ought to have issued it with a twenty eight days' notice that he was going to resign. Since he did not do so, he is bound to pay it (the Respondent) salary in lieu of notice in terms of section 36 of the Employment Act.
55. As indicated earlier, the Claimant lost his employment on account of constructive dismissal. Therefore, he was under no obligation to issue the Respondent with notice to terminate the contract. If he opted to give such notice, that would have been at his election but not out of an obligation founded on law. As a matter of law, the contract between the parties was terminated by the Respondent and not the Claimant.
56. The above position has been restated in a series of cases. In Western Excavating ECC Ltd v Sharp (1978) 2 WLR 344 the court observed that an employee who is forced to resign from employment because of the employer's intolerable behavior has no obligation to issue notice of his resignation.
57. In Coca Cola East & Central Africa Limited v Maria Kagai Lugaga [2015] eKLR, the court expressed itself on the issue as follows:-
- “The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behaviour towards him was so unreasonable that he could not be expected to stay- this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constitutes a repudiatory breach of the contract of employment- this is the contractual test.” Emphasis added by underlining.
58. Having regard to the foregoing, the Respondent's counter-claim for pay in lieu of notice is unmerited. It is declined.

Determination

59. The upshot is that:-
- a. The court finds that the Claimant's contract of service was unfairly terminated through constructive dismissal of the Claimant.
 - b. The Claimant is awarded compensation for unfair termination of his contract of service that is equivalent to his gross salary for four months, that is to say Ksh. 2,800,000.00.
 - c. The amount is subject to the applicable statutory deductions.
 - d. The Claimant is awarded interest on this amount at court rates from the date of the decision.
 - e. The other claims by the Claimant are declined for the reasons set out in the judgment.
 - f. The Respondent's counter-claim is dismissed.
 - g. Since the Claimant acted in person, he is only entitled to recover disbursements incurred in prosecuting the claim and defending the counter-claim but not costs as contemplated under the Advocates Act.

DATED, SIGNED AND DELIVERED ON THE 20TH DAY OF MARCH, 2024

B. O. M. MANANI



JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

