



**Wanjai v Mediamax Network Limited (Cause E607 of 2022)
[2024] KEELRC 1085 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1085 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E607 OF 2022
NZIOKI WA MAKAU, J
MARCH 14, 2024**

BETWEEN

ERIK KIONGO WANJAI CLAIMANT

AND

MEDIAMAX NETWORK LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed this suit against the Respondent claiming unlawful and unfair termination of employment and withholding of terminal dues. He averred that the Respondent offered him a Contract of Employment dated 12th March 2015 which he accepted on 16th April 2015 in the position of a Creative Director. The Claimant avers that he was put on three (3) months' probation which he successfully completed and was confirmed as a permanent employee. Pursuant to the Contract, he was entitled to, among other payments, a gross salary of Kshs. 450,000/- per month and as at the time of termination, he was earning a gross salary of Kshs. 514,100/- per month, as reviewed in August 2019.
2. The Claimant's case was that in April 2020, the Respondent held meetings with the Claimant and other employees and informed them that due to the Covid-19 virus effect, it was intending to reduce their salary by 50%, but that the same would be reviewed periodically after three (3) and six (6) months respectively based on revenue, cash flow and state of business. That on 20th April 2020, the Respondent wrote to him requesting that his gross salary be reduced by half effective April 2020 owing to the effect occasioned by the Covid-19 virus. He averred that he consented to the reduction with the knowledge that it would be for a short period and with periodic review of the situation. That however to his dismay, the Respondent failed to review his salary to the original salary after lapse of the six (6) months and there was also no communication on the same yet there was evidence that the Respondent was becoming financially stable as its business had picked up. The Claimant asserted that he was subjected to financial embarrassment owing to the prolonged reduction of his salary and he struggled to provide basic needs for himself and his family. That he thus incessantly, orally and on email, told the



Respondent to reinstate his full salary because of the hardship he was undergoing, which hardship had led to an agreement with his supervisor that he continues to work from home to help ease the financial burden. He contended that owing to his incessant request for his salary to be reinstated back to normal, the Respondent started a witch-hunt on him with the aim of terminating his employment instead of reinstating his salary. That the aforesaid Respondent's action amount to unfair labour practice.

3. Further, the Claimant narrated that on 29th March 2022, he went to the mandatory weekly commercial meetings convened and led by the Respondent's CEO in the boardroom. That whereas the meeting was slated for between 9.00am to 11.00am, it had not started as at around 11.00am and while he and others waited, the CEO came and told them to excuse themselves from the boardroom since there was another meeting slated at 11.00am in the said venue. He averred that they left without any communication that the aborted meeting would be rescheduled for later in the day. That he thereafter passed by the HR Office to pick a salary review letter that indicated that his salary had been reviewed from Kshs. 257,995/- to Kshs. 285,000/- and at which point he realised the Respondent was not intending to ever reinstate his normal salary. That he immediately proceeded to the CEO's office to express his disappointment and later returned the said review letter to HR where he informed the HR Officer that he had rejected the review and that he would only accept a review of his salary back to the full salary. With the commercial meeting having aborted, he left for home only for his supervisor to call him at around 1.00pm to inform him that the meeting had been rescheduled to that time but the Claimant could not attend as he was already home.
4. It was the Claimant's averment that on 1st April 2022 at around 4.00pm, he shockingly received a show cause letter via email dated 30th March 2022 wherein he was accused of insubordination and negligence in the performance of duty allegedly arising from the aforementioned commercial meeting of 29th March 2022 that did not take place. The Claimant was instructed to respond within 24 hours and he extensively answered to the allegations in a letter dated 1st April 2022. He was then invited to a disciplinary hearing on 28th April 2022, which he attended and as per the minutes of the hearing, he was absolved of the said two allegations in the Show Cause Letter but a new allegation of absenteeism was surprisingly brought up. He stated that he protested the fresh allegation but the panel kept asking him questions on the same and he had no otherwise but to answer and that he did not hear from the Respondent after the said hearing. The Claimant further averred that on 16th June 2022, he received a termination letter dated 13th June 2022 and that from the foregoing, it was clear that the Respondent did not follow lawful procedure before terminating his employment and there was no valid or fair reason for the termination. That even though he thereafter completed the clearing process on 22nd June 2022, the Respondent refused to release his terminal dues. The Claimant therefore prayed for judgment against the Respondent for; 12 months' salary for unlawful and unfair termination, one-month's salary in lieu of termination notice, salary for days worked up to 13th June 2022, deducted salary from October 2020 to June 2022, service pay at the rate of one-month's salary for every year worked, accrued leave days, and issuance of a certificate of service.
5. Respondent's Case

The Respondent averred in its Statement of Defence that contrary to the Claimant's assertion, he was earning a gross pay of Kshs. 285,000/- as at the date of termination of employment. That since the Claimant executed the salary review letter without coercion and/or undue influence, this signified his unconditional acceptance of the revised terms of employment. It asserted that the Claimant's employment was terminated on account of insubordination and negligence in performance of his duties, including but not limited to; failing to adhere to instructions given to him by his supervisors, absenteeism from work and failure to attend weekly meetings as convened by the Respondent. The Respondent further averred that it appreciated that revenue collection and cash flow slowly improved



around March 2022 and thus reviewed the Claimant's salary upwards as agreed. That it had also promised that the upward review would continue until the Claimant was reinstated to his salary pre-Covid times.

6. It contended that despite this indulgence, the Claimant left the Respondent's offices knowing fully well that he was on the same day required to attend a crucial meeting in the capacity of representative of his department. The Respondent confirmed that it was the said series of events that led to the Claimant being issued with a show cause letter requiring him to answer to the blatant acts of insubordination and neglect of duty. That having not been satisfied with the Claimant's response, it scheduled a disciplinary hearing for him wherein he did not dispute the said allegations and even cited emotional distress as the reason for his conduct. The Respondent noted that the Minutes of the disciplinary can also confirm that the Claimant admitted he could have handled the situation better and that his fit of rage was uncalled for in the circumstances. That despite a case for summary dismissal having been made against the Claimant, it opted to effect a normal termination of contract on account of lack of compatibility.
7. The Respondent's case was that the Claimant's salary review did not amount to unfair labour practice and was simply an option introduced to avert job loss occasioned by effects of slowed economic activities during the Covid-19 pandemic. It denied that it introduced any further allegations as alleged and maintained that the Claimant's terminal dues stated in the Termination Letter, including notice pay, were processed and paid to him. The Respondent averred that the claim for service pay is not due or payable to the Claimant who was a member of National Social Security Fund as shown in his payslip. That in short, the Claimant is not entitled to the claim for compensation as his termination of employment was just and fair and that the suit should be dismissed with costs.

8. Evidence

The Claimant testified that whereas they consented to salary reduction for 3 to 6 months, the Respondent's CEO kept them on half salary from 2020 to 2022, which was over 2 years, despite there being several indicators that the Company was doing well from October 2020. He stated that the Respondent did not produce the Minutes of the meeting where the discussion on salary reduction was had and that the two charges of insubordination and negligence of duty were never proved. It was the Claimant's testimony that the Respondent computed his terminal dues using his half salary and not the full salary and that he was not paid service from the dues he received. Whereas he asserted under cross-examination that he had been coerced to consent to the salary reduction, he admitted that he had not pleaded coercion in his pleadings before Court. He clarified that the Respondent's computation used Kshs. 285,000/- whereas he used Kshs. 514,100/- in his own computation. The Claimant denied that he used rage and explained that after voicing his displeasure to the CEO, he walked away to cool off his emotions before going home.

9. The Respondent's witness, Mr. Julius Cheptei, stated during cross-examination that the periodic review of salaries was to be based on finances. He admitted that the Claimant's salary was never reviewed back to Kshs. 514,100/-. He however denied that the Claimant was paid half salary for two years, asserting that the Claimant was paid gross salary of Kshs. 275,475/- and a net of Kshs. 239,550/- up to February 2021. He noted that the Claimant received a net pay of Kshs. 198,624/- in February 2021 and August 2021 and Kshs. 199,438/- in July 2020.

10. Claimant's Submissions

The Claimant submitted that section 10(5) of the *Employment Act*, 2007 provides that where there is change of terms of employment, the employer is obligated to consult with the employee before revising the contract to reflect the change and to then notify the employee of the changes in writing. That it therefore ends that an employer cannot unilaterally change the terms of the employment contract of



an employee, as was done by the Respondent herein, and that considering he did not consent to the reduction of his salary past the six (6) months' period, the same was unlawful. The Claimant noted that the Respondent knowingly and negligently failed to produce the Minutes of the meetings held in April 2020 regarding the reduction of salary owing to effects of Covid-19. He submitted that in the absence of the said Minutes that would have confirmed that the salary reduction was to be for only 3 to 6 months, this Court should consider the Claimant's testimony as he was present in the meetings. The Claimant relied on the case of *Daniel Njuguna Mwangi v De La Rue Currency and Security Print Limited* [2017] eKLR wherein the Court found that the respondent's decision to discontinue payment of overtime compensation to the claimant was not only unilateral but also unlawful. That the Court in the case of *Ibrahim Kamasi Amoni v Kenital Solar Limited* [2018] eKLR also affirmed that the validity of a salary reduction is governed by consent of an employee because salary is a fundamental term of employment whose reduction has negative impact on an employee's livelihood and should not be done arbitrarily or unilaterally by an employer.

11. It was the Claimant's submission that the prolonged deduction of his salary amounted to unfair labour practice which adversely affected his livelihood and violated his constitutional right to fair labour practices. He cited the case of *James Ang'awa Atanda & 10 others v Judicial Service Commission* [2017] eKLR in which Radido J. held that unilateral variation of terms of employment by an employer is an unfair labour practice as contemplated under Article 41(1) of the *Constitution* of Kenya, 2010. That the Court in *Kenya Union of Commercial Food and Allied Workers v Tusker Mattresses Limited* [2020] eKLR asserted that Covid-19 pandemic and its effects do not serve as an act of God amounting to the frustration of the contract between the claimant and the Respondent. The Claimant submitted that section 17 of the *Employment Act* provides that an employer shall pay the entire amount of wages earned or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly in the currency of Kenya and in the modes prescribed. That section 19 of the Act lists down circumstances when salary can be withheld and Covid-19 pandemic is not one of them. The Claimant noted that the sponsorship the Respondent issued was in the form of payment of money, which indicated that the Company was doing well financially. That he was therefore entitled to his original salary from October 2020, which was the lapse of the 6 months to June 2022 when his employment contract was terminated.
12. The Claimant submitted that for a termination of employment to be fair, there must be both procedural and substantive fairness as held in the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR. He argued that in his case, the Respondent failed to follow the lawful procedure before terminating his employment contract as set out under section 41 of the *Employment Act*. That the Court observed in the case of *Donald Odeke v Fidelity Security Limited* [2012] eKLR that it does not matter what offence the employee is accused of, if the employee is not heard, the termination is ipso facto unfair. In this regard, the Claimant noted that in disregard of procedural fairness, he was only given 24 hours to respond to the show cause letter dated 30th March 2022 and the disciplinary hearing held a month later on 28th April 2022. Moreover, the Respondent did not inform him of his right to be accompanied by a fellow employee to the disciplinary hearing. Thirdly, the Respondent brought a fresh allegation of absenteeism during the disciplinary hearing to which he did not have a chance to respond before the hearing. On substantive fairness, the Claimant submitted that as outlined in sections 43 and 45 of the *Employment Act*, a substantive reason is a fair and valid reason for dismissal of an employee and a fair and valid reason is one the employer genuinely believed existed at the time of termination, and which caused the employer to terminate the services of the employee. He cited the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR in which the Court held that before termination of employment contract, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical incapacity. The Claimant argued that



he should not have been blamed for not attending a meeting that never took place and that if at all the meeting took place, no minutes for the alleged meeting was ever produced by the Respondent. That consequently, he is entitled to an award of 12 months' salary for unfair and unlawful termination.

13. Regarding the claim for service pay, the Claimant submitted that the Respondent deducted NSSF contributions from his salary but never remitted to the relevant authority and had not produced any evidence in court showing that they indeed remitted the same. He asserted that he is entitled to service pay as provided for under section 35(5) of the [Employment Act](#) and that the Court can see from his payslips in court that NSSF deductions were made. He referred the Court to the case of [Eddie Mutegi Njora v Mega Microfinance Co. Ltd](#) [2015] eKLR where the Court held that the non-payment of statutory dues to NSSF entitle the employee to service pay and that the duty to deduct and remit it is upon the employer and not the employee. The Claimant further asked the Court to note that he was underpaid his terminal dues and prayed that judgment is entered as sought for in the Statement of Claim dated 23rd December 2021.

14. Respondent's Submissions

The Respondent submitted that the testimony of its witness was elaborate and indicative it adhered to the procedural aspects provided for under sections 41 and 45 of the [Employment Act](#) 2007. It noted that contrary to the Claimant's submissions, the last paragraph of the invitation letter did notify the Claimant of his right to attend the disciplinary hearing with a representative of his choice. That Minute 1 of the Disciplinary Hearing further shows that at the start of the hearing, Respondent highlighted to the Claimant of his right to have his preferred representative attend but the Claimant opted to forgo this right. The Respondent argued that it also informed the Claimant of the decision to terminate his employment and of his right to appeal against the decision and further explained to him the reasons for the termination. Moreover, it submitted that the grounds in the letter of dismissal were consistent with those in the show cause letter and in the charges brought against the Claimant during the disciplinary hearing.

15. On whether termination of the Claimant's employment was substantively fair, the Respondent noted that the Claimant had admitted to storming the CEO's offices to protest his salary review, which was inappropriate. That clause 14 of the Claimant's Employment Contract provided that if dissatisfied with any aspect of employment, he was to initially approach the head of the department and if the grievance was not addressed satisfactorily, he was to write to the HR & Administration Manager and then follow up to have the grievance addressed. That however, in this case, the Claimant chose to confront the CEO instead of following the specified procedure. The Respondent cited the case of [Abraham Gumba v Kenya Medical Supplies Authority](#) [2014] eKLR in which Rika J. held that:

“Insubordination was defined by the Mississippi Supreme Court in the case of *Sims v. the Board of Trustees Holly Springs Municipal Separate District School*, 414 SO. 2d 431 [Miss. 1982], as “a constant or continuing intentional refusal to obey direct or implied order reasonable in nature, and given by and with proper authority.” Insubordination may also occur where the Employee engages his Manager or Supervisor in an un-appropriate verbal confrontation.

Under the [Employment Act](#) 2007, both forms of insubordination are captured under Section 44 [4] [d] and [e]...”

16. It was the Respondent's submission that having shown that its decision to terminate the Claimant's employment was fair in both procedural and substantive aspects, the prayer for general damages for unfair termination is without basis. It asserted that it had already paid the Claimant one month's salary



in lieu of notice of Kshs. 285,000/- among the dues it paid him. The Respondent argued that according to the law, the last salary drawn by an employee should be utilized in calculating terminal dues. That therefore the Claimant's assertion that salary in lieu of notice should have been at Kshs. 514,100 is inaccurate, as that figure does not represent his final salary. The Respondent further submitted that the Claimant admitted in his testimony that he received payment for salary for days worked and for accrued leave, both up to 13th June 2022. That the Claimant is ineligible for service pay as per section 35(6) of the Employment Act, which explicitly excludes the payment of service pay to employees who are members of NSSF. It also notified the Court that the Claimant was issued with Certificate of service dated 23rd June 2022 when he visited the Respondent's offices on 4th October 2022 to collect the final dues cheque dated 26th September 2022.

17. The Respondent further submitted that the Claimant is also not entitled to the claim for deducted salary, as the salary review was mutually agreed upon between him and the Respondent without any provision for reimbursement of the adjusted costs. In that respect, the Respondent argued that the Claimant's testimony that he was coerced to execute the consent for salary review lacks sincerity because all employees of the Respondent who opted to remain in employment took the offer for salary reduction by appending their signatures on the review letters. Furthermore, the reduction of the salary complied with the provisions of section 10(5) of the Employment Act as it sought the consent of the employees before effecting the reduction. The Respondent relied on the case of James Angama & 10 others v Judicial Service Commission [2017] eKLR, cited with authority in the case of Joseph Ngungu Wairiuko v Tassia Coffee Estate Limited [2022] eKLR, wherein the Court stated that authorities also envisage that an employee's consent to the variation may be express or implied and can be inferred from conduct such as remaining at work after revised terms have been imposed. The Respondent urged this Court to therefore decline to award costs and interests to the Claimant and dismiss the Claim in its entirety and that each party bears its own costs.
18. The provisions of section 41 of the Employment Act are instructive.
19. The Claimant was issued a show cause letter dated 30th March 2022 on 1st April 2022 at around 4.00pm. In it, he was accused of insubordination and negligence in the performance of duty which allegedly arose from a commercial meeting of 29th March 2022. It is evident that meeting did not take place as the CEO kept the staff waiting for a few hours before it was called off. The Claimant was required to respond within 24 hours. This was done and in his words, he extensively answered to the allegations in a letter dated 1st April 2022. He was subsequently invited to a disciplinary hearing on 28th April 2022, which he attended. From the record of the proceedings which are the minutes of the hearing, the Claimant was absolved of the said two allegations in the show cause letter. However, a new allegation of absenteeism was surprisingly brought up at the meeting. The Claimant thereafter on 16th June 2022 received a termination letter dated 13th June 2022. The Claimant completed the clearing process on 22nd June 2022 but the Respondent is yet to release his terminal dues. In the case of Donald Odeke v Fidelity Security Limited (*supra*) it was held that it does not matter what offence the employee is accused of. If the employee is not heard, the termination is ipso facto unfair. From the foregoing, it is clear that the Respondent did not follow lawful procedure in terms of section 41 of the Employment Act before terminating the Claimant's employment. Given that the Claimant was accosted with new allegations after the erudite explanations given in relation to the documented reasons for the show cause, it is clear there was no valid or fair reason for the termination which I hold to have been unfair and unlawful in the extreme.
20. The Claimant's salary was reduced sometime in April 2020 on account of the Covid pandemic. The salary reduction was for a period of 6 months. There was no evidence adduced of a consultative meeting for the reduction of the salary beyond the 6 months and the reduction beyond this period was clearly



contrary to the provisions of the law. The Claimant was entitled to his full pay in 2021 and 2022. Additionally, there was non-remittance of his NSSF contributions this ipso facto placed the Claimant in a position where he was effectively not a contributor to NSSF as there was no remittance. There was no difference between the Claimant and an employee who is not registered for NSSF. As such, the Claimant would be entitled to severance pay as he was in law, not a member of NSSF since membership connotes payment of deductions when in employment.

21. What reliefs is the Claimant entitled to? He sought 12 months' salary for the unlawful and unfair termination, one-month's salary in lieu of notice, salary for the days worked in June 2022, salary unlawfully deducted from October 2020 to June 2022, service pay at the rate of one-month's salary for every year worked, accrued leave days, and the issuance of a certificate of service. Regarding the compensation due, the Court being mindful that the remedy of reinstatement or re-engagement is unavailable to the Claimant and thus has to order compensation instead. I have found that the termination was manifestly unfair and unlawful. The Claimant was accosted with new allegations on alleged absenteeism and it was clear the panel had it in for the Claimant. It was evident the aim was to terminate the Claimant at whatever cost. Having taken into account all factors, the order that commends itself for me to make is an order for the full 12 month's salary compensation in terms of section 49 of the [Employment Act](#).
22. The Claimant is entitled to one-month's salary in lieu of notice, payment of salary for the days worked in June 2022, refund of the salary unlawfully deducted from November 2020 to June 2022, service pay at the rate of 15 days for each completed year of service, accrued and unpaid leave days as well as the issuance of a certificate of service. And the Claimant will have costs of the suit.
23. In the final analysis I enter judgment for the Claimant for:
 - a. 12 month's salary as compensation – Kshs. 6,169,200/-
 - b. One-month's salary in lieu of notice – Kshs. 514,100/-
 - c. Salary for 13 days worked in June 2022 – Kshs. 222,776.66
 - d. Kshs.4,795,890/- being refund of salary unlawfully deducted for 21 months.
 - e. Service pay at the rate of 15 days for each completed year of service for 7 years – Kshs. 1,799,350/-
 - f. Accrued and unpaid leave days – 43.75 days – Kshs. 749,729.16
 - g. A certificate of service strictly in terms of section 51 of the [Employment Act](#).
 - h. Costs of the suit.
 - i. Interest at court rates on the sums in (a), (b), (c), (d), (e) and (f) above from the date of judgment till payment in full

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MARCH 2024

NZIOKI WA MAKAU

JUDGE

