



**Ndung'u v Choice Microfinance Bank Limited (Cause E777 of 2022)
[2024] KEELRC 986 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 986 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E777 OF 2022
BOM MANANI, J
APRIL 11, 2024**

BETWEEN

JOSEPH KUNG'U NDUNG'U CLAIMANT

AND

CHOICE MICROFINANCE BANK LIMITED RESPONDENT

JUDGMENT

1. This is a claim for unfair termination of a contract of service. The Claimant contends that he was forced to resign from the Respondent's employment due to a hostile work environment. Hence, he pleads constructive dismissal from employment.
2. On the other hand, the Respondent denies that its conduct forced the Claimant into resigning from employment. Instead, it accuses him of having engaged in malpractices which allegedly caused it (the Respondent) financial losses. As a result, it (the Respondent) has filed a counter-claim to the suit.

Claimant's Case

3. The Claimant states that he was employed by the Respondent in the year 2015 in the position of Cashier. He was later promoted to the position of Head of Operations earning a monthly salary of Ksh. 100,000.00.
4. The Claimant further avers that he was later, in 2021, promoted to the position of Chief Executive Officer (CEO) of the Respondent. It is his case that this appointment received the approval of the Central Bank of Kenya, the Respondent's regulator.
5. The Claimant contends that despite his elevation to the new position, the Respondent did not issue him with terms of engagement. Consequently, he continued to earn his previous salary of Head of Operations.



6. It is his case that despite all efforts by him to have this issue addressed, the Respondent did not deal with it. Instead, the Respondent allegedly demoted him to the position of Head of Operations. And hence the decision to resign.
7. According to the Claimant, his immediate predecessor as CEO was earning a monthly salary of Ksh. 520,000.00. As such, he expected that his salary would match that of the former CEO.
8. The Claimant contends that the Respondent's decision to demote him to the position of Head of Operations was intended to push him into resigning. Further, he states that the Respondent removed him from the management group communication platform in a bid to embarrass him.
9. The Claimant contends that the Respondent's actions exposed him to great humiliation leaving him with a sense of great frustration. As a result, he was forced to tender his resignation from duty.

Respondent's Case

10. On its part, the Respondent states that the Claimant was first appointed as acting CEO through its letter of 26th March 2019. This appointment attracted a responsibility allowance of Ksh. 50,000.00 and fuel allowance of Ksh. 5,000.00.
11. The Respondent contends that on 3rd January 2022, the Claimant was confirmed as its CEO. However, his terms of service were not the same as those of the outgoing CEO. According to the Respondent, the Claimant's salary was enhanced to Ksh. 100,000.00.
12. The Respondent asserts that it offered the Claimant a handsome responsibility allowance of Ksh. 500,000.00. However, he allegedly rejected this offer.
13. The Respondent denies holding meetings with the Claimant to discuss increment of his salary to reflect the added responsibilities. At the same time, it denies refusing to issue the Claimant with a written contract of service. The Respondent further denies that its conduct forced the Claimant into resigning from employment.
14. In respect of the counter-claim, the Respondent accuses the Claimant of sanctioning inflation of prices for computer gadgets it acquired in breach of procurement laws. It further accuses the Claimant of attempting to cover up this transgression when the matter was being investigated. According to the Respondent, the Claimant's actions constituted corruption and fraud.
15. The Respondent also accuses the Claimant of using his insurance brokerage firm to conduct insurance business with it (the Respondent) contrary to the law. In the Respondent's view, the Claimant's conduct amounted to gross misconduct for which it (the Respondent) was entitled to terminate his services.

Issues for Determination

16. After analyzing the pleadings and evidence on record, I arrive at the conclusion that the following are the issues that fall for determination:-
 - a. Whether the Claimant was entitled to a salary package that was similar to that of the Respondent's former CEO?
 - b. Whether the Claimant's contract was unfairly terminated on account of constructive dismissal.
 - c. Whether the Claimant is guilty of breach of procurement laws, fraud and conflict of interest.
 - d. Whether the Claimant is entitled to the reliefs that he seeks through the Statement of Claim.



- e. Whether the Respondent is entitled to the relief that it seeks through the Counter-Claim.

Analysis

17. Article 41 of *the Constitution* of Kenya 2010 protects the right to fair labour practices. One of the ingredients of this right is the right to fair remuneration for work done.
18. Section 5 of the *Employment Act* obligates every employer to do away with policies and practices that foster discriminatory treatment at the workplace. As such, employers have an obligation to pay their employees equal pay for work of equal value.
19. Kenya is a signatory to the Equal Remuneration Convention, 1951 (No. 100) having ratified it on 7th March 2001. The Convention requires that mechanisms for job appraisal for purposes of remuneration setting be objective and consistent to remove the opportunity for discriminatory treatment.
20. These provisions effectively bar employers from paying workers who perform the same or similar tasks differentially under the guise of the parties having entered into distinct contracts with distinct terms that were individually negotiated and agreed. If employers were permitted to ride on this narrative, the obligation to ensure equal pay for work of equal value will stand for nothing.
21. The constitutional obligation to fairly remunerate an employee requires that the employer sets salaries for employees based on objective criteria. If this be the case, it is difficult to see how an employer who has been paying one CEO Ksh. 420,000.00 would justify paying his successor Ksh. 100,000.00, less than one quarter of the salary of the outgoing CEO. What criteria did the employer use to devalue the incoming CEO's salary to Ksh. 100,000.00? Was there a marked fall in the value of the CEO's work to justify such a drop in pay?
22. The Respondent does not deny that before it hired the Claimant, it had a Mr. Moses Kingori Ndung'u serving as its CEO. The Claimant produced in evidence the contract of the said CEO which shows that his consolidated monthly salary was Ksh. 420,000.00. The Respondent has not disputed this fact.
23. The Respondent confirms that it hired the Claimant as its substantive CEO to replace Moses Kingori Ndungu. This fact is further confirmed by the Respondent's letter dated 3rd June 2022 which was produced in evidence.
24. In the same letter, the Respondent confirmed that the Central Bank of Kenya had approved the Claimant's appointment. However, it is noteworthy that the letter was silent on the terms under which the Claimant was to serve. It only mentioned that the parties were to discuss the Claimant's responsibilities at a later date.
25. Despite this indication, there is no evidence that the Respondent convened a meeting to address the outstanding matters relating to the Claimant's appointment. There is no indication that the Claimant was issued with a formal contract of service.
26. Sections 9 and 10 of the *Employment Act* obligate an employer who engages an employee for a period that is in excess of three months to reduce the contract into writing. The contract must contain certain particulars including the hours of work, the remuneration of the employee, the employee's leave entitlements among others.
27. The evidence on record confirms that the employment relation between the Claimant and the Respondent in the position of CEO lasted for more than three months. Therefore, the Respondent



- was under duty to issue the Claimant with a formal contract setting out the particulars under section 10 of the *Employment Act*. Quite evidently, this was not done.
28. The Respondent asserts that it offered the Claimant a responsibility allowance of Ksh. 500,000.00 but the Claimant rejected the offer. However, there was no cogent evidence to affirm this assertion.
 29. Under section 10 (7) of the *Employment Act*, the Respondent having failed to reduce the contract between them into writing, it had the duty to provide evidence to affirm its aforesaid assertion. As the record demonstrates, it did not.
 30. In its Statement of Defense, the Respondent affirms the fact that it was paying the Claimant an enhanced salary of Ksh. 100,000.00 as CEO. However, it provides no justification for fixing the Claimant's emoluments at Ksh. 100,000.00 against the emoluments of the outgoing CEO who was earning Ksh. 420,000.00. There is no suggestion that the Claimant's responsibilities were of less value as compared to those of the outgoing CEO.
 31. I do not accept counsel's suggestion that the difference in salaries between the two CEOs was accounted for on the basis of differences in their experience. No evidence was placed before me to suggest that the Respondent's previous CEO was more experienced for the job than the Claimant. Importantly, the previous CEO's salary of Ksh. 420,000.00 is indicated as having been the entry salary. Therefore, the suggestion that the previous CEO's salary may have grown to that level on account of salary increments is unfounded.
 32. On the basis of the evidence before me, it is apparent that the Respondent subjected the Claimant to unfair labour practice by purporting to pay him salary of Ksh. 100,000.00 in the position of CEO when the outgoing CEO who was performing the same work as the Claimant was earning Ksh. 420,000.00. In the premises and absent objective justification for this pay discrepancy, it is apparent that the Respondent underpaid the Claimant for the duration of his term as CEO by the sum of Ksh. 320,000.00 per month being the difference between his monthly pay and the pay that was offered to the previous CEO. It is so declared.
 33. The second question is whether the Claimant's contract of service was unfairly terminated on account of constructive dismissal. The Claimant's case is that he lost his employment through constructive dismissal. Conversely, the Respondent denies this fact.
 34. Constructive dismissal occurs when an employee quits employment because of intolerable conditions of work that the employer has subjected him to. Usually, the employee will resign in order to escape these conditions. However, the law does not consider the employee's decision to quit employment as voluntary. The resignation is considered as forced by the prevailing harsh work environment. As such, the law considers the resultant job loss as occasioned by the employer. Hence the supposition that although the employee left the employment, the employer is deemed to have terminated the contract by forcing the employee to throw in the towel, so to speak (see *Godfrey Allan Tolo v Tobias O. Otieno & another* [2022] eKLR).
 35. The Claimant's case is that after he was appointed as the Respondent's CEO, the parties were to agree on the terms of their engagement. However, this did not happen. As a result, the Respondent kept him on his previous salary of Ksh. 100,000.00 as Head of Operations when he had expected to have the salary increased to Ksh. 420,000.00 so as to match that of the outgoing CEO. The Claimant says that despite efforts to address this issue, the Respondent remained non-responsive.
 36. On the other hand, the Respondent denies that it offered the Claimant a salary increase to match that of the outgoing CEO. On the contrary, it suggests that the Claimant's salary was increased to Ksh. 100,000.00. The Respondent denies that it held meetings with the Respondent to discuss his salary.



37. The Respondent's contention that it did not hold any meetings with the Claimant affirms the fact that it violated its own commitment to the Claimant as communicated in its letter of 3rd January 2022 to discuss his terms and conditions of engagement. There is evidence that the Claimant's predecessor was earning Ksh. 420,000.00 per month for the same work of CEO. Therefore, the Claimant legitimately expected that the Respondent will pay him this amount or offer a cogent justification for paying a lesser sum. Such expectation was anchored on the Respondent's constitutional and statutory obligation to ensure fair labour practice for its employees by, inter alia, facilitating equality of pay for work of the same or similar value. There is no evidence that the Respondent did this.
38. The Respondent's insolence in this respect was an obvious source of frustration for the Claimant. The Respondent's conduct suggested to the Claimant that it (the Respondent) did not value his work.
39. Failure to pay an employee salary that matches the value of his work constitutes a breach of a fundamental obligation in the contract of service between the parties that an employee should be fairly remunerated. Such conduct constitutes repudiation of the contract of service by the employer.
40. In this case, the Respondent did not offer the Claimant an explanation for the pay disparity between him and the former CEO. This conduct subjected the Claimant to unnecessary mental anguish and thus an unfavourable work environment.
41. Although the Respondent has denied having been non-responsive to the Claimant's requests in this respect, there is evidence to support the Claimant's contention that indeed the Respondent failed to treat the issue seriously. It is noteworthy that when the Claimant wrote to the Respondent on 21st September 2022 indicating that this was one of the reasons he was considering resigning, the Respondent did not bother to respond to the letter.
42. The letter of resignation raised a myriad other complaints by the Claimant. First, he asserted that when he insisted on the Respondent addressing the pay disparity issue, the latter reacted by demoting him to his earlier position of Head of Operations. It is noteworthy that the Respondent did not respond to the Claimant to deny the assertion. As a matter of fact, the Respondent's witness confirmed that the Claimant was moved from the position of CEO to another position even though she was allegedly not able to confirm whether this constituted a demotion. However, on cross examination, she confirmed that the latter position was lower than the CEO position.
43. The evidence on record supports the Claimant's contention that he was subjected to a work environment that was uncondusive. He was therefore justified to resign and plead constructive dismissal as he indeed did. As such, I arrive at the conclusion that his contract was unfairly terminated through constructive dismissal.
44. The Respondent has accused the Claimant of conflict of interest by using his agency to do insurance business with it. Good corporate governance generally frowns upon employees of a company trading with it. However, this is not to say that this is absolutely forbidden. What the law requires is for employees to disclose their interest in any dealings that the company may be involved in. Once this is done, it is for the Board of the Company to either permit the transaction or forbid it.
45. Indeed, the Respondent's Human Resource Policy Manual echoes this position. Clause 27.6 on conflict of interest provides as follows:-

"The Bank does not expect any member of staff to subordinate his duty to his private interests and neither shall a member of staff put himself in a position where his duty and private interest conflict, nor use his official position to further his private interest.



- However, should a member of staff find that he is officially called upon to deal with any matter or issue in which he has a personal interest, such an employee is duty bound to disclose his interest to the management at the earliest opportunity.”
46. The foregoing is also alluded to in clause 5.0 of the Respondent’s Board Charter. Whilst this provision does not encourage the Respondent’s Board members to conduct business with it, it does not outlaw the practice. Instead, it obligates those who have any dealings with the Respondent which may result in conflict of interest to disclose it to the Board.
 47. The record does not suggest that when the Claimant’s firm offered to procure insurance services for the Respondent, the Respondent’s Board of Directors objected to the process. It is therefore surprising that the Respondent would now seek to use this as a weapon to fight off the instant action by the Claimant.
 48. Regarding the overpriced computer gadgets, the investigation report does not show that this was a case of fraud. Rather, it was a case of variance in prices which the supplier accounted for on the basis of differences in the grades of the equipment that were supplied. No evidence was provided to discount the vendor’s position that the grade of computers that were supplied to the Respondent were higher. As such, I am unable to rely on the investigation report to find that the procurement of the impugned computers was fraudulent.
 49. Importantly, although the Respondent has invited the court to find that the Claimant’s conduct violated the provisions of the *Public Procurement and Asset Disposal Act*, there was no evidence that was tendered to demonstrate that its (the Respondent’s) procurement processes are covered by the Act. By virtue of section three (3) of the Act, this piece of legislation regulates procurement and asset disposal for State organs and public entities. There is no evidence to suggest that the Respondent falls in this category of entities. Absent this evidence, it is not possible for the court to arrive at the conclusion that the Claimant’s actions violated the Act.
 50. The Claimant has prayed for a series of reliefs. In respect of the first relief, the court has already declared that the Respondent underpaid the Claimant by a margin of Ksh. 320,000.00 per month for the duration of his service as its CEO. The evidence on record shows that the Claimant was substantively appointed to this position in early January 2022. He tendered his resignation on 22nd September 2022. Thus, at the time that he resigned from employment, he had served as the Respondent’s CEO for nine (9) months.
 51. The foregoing means that the Claimant was underpaid as CEO for nine (9) months. That brings the underpayments to $\text{Ksh. } 320,000.00 \times 9 = \text{Ksh. } 2,880,000.00$. Accordingly, I enter judgment for the Claimant for the above sum to cover the underpayments.
 52. The Claimant has prayed for damages for wrongful termination of his contract of service. As was declared earlier, the Claimant’s contract was wrongfully terminated through constructive dismissal.
 53. Under section 49 of the *Employment Act*, an employee whose contract is wrongfully terminated is entitled to compensation for wrongful termination. As such, I reach the conclusion that the Claimant is entitled to this relief.
 54. I note that before his decision to resign, the Claimant had worked for the Respondent for approximately eight (8) years commencing from 2015. Having regard to this long duration of service, I am minded to award him compensation that is equivalent to four (4) months of what ought to have been his exit monthly salary, that is to say $\text{Ksh. } 420,000.00 \times 4 = \text{Ksh. } 1,680,000.00$.



55. The Claimant has prayed for house allowance for the duration that he served as the Respondent's CEO. However, looking at the contract that he has relied on to advance his case, it is clear that the sum of Ksh. 420,000.00 that was paid to the CEO that he replaced was consolidated. Having regard to this fact, I am reluctant to order for payment of house allowance as a standalone benefit.
56. The Claimant has prayed for a Certificate of Service. This is a statutory entitlement under section 51 of the Employment Act. As such, I order that the Respondent issues him with this certificate.
57. There was neither a prayer for interest nor costs in the Statement of Claim. As such, it is presumed that the Claimant abandoned these reliefs.
58. Any other relief in the Statement of Claim that has not been awarded is deemed as declined.
59. The Respondent has prayed for a declaration that the Claimant was guilty of gross misconduct for the various alleged procurement malpractices. However, since the court has absolved the Claimant in this respect, this request fails. Concomitantly therefore, the secondary reliefs at paragraphs b), c), e) and f) in the counter-claim also fail.
60. Since the Claimant has succeeded in the main claim, prayer d) in the Respondent's counter-claim necessarily fails.
61. The Claimant shall have costs of the counter-claim.
62. Summary of Award
 - a. It is declared that the Claimant was underpaid by the Respondent during his tenure as the Respondent's CEO in comparison with the CEO whom he replaced.
 - b. It is declared that the Claimant's contract of service was unfairly terminated through constructive dismissal.
 - c. There is no cogent evidence to support the Respondent's claim that the Claimant acted in breach of procurement laws or fraudulently or in breach of the regulations against conflict of interest.
 - d. The Claimant is awarded the sum of Ksh. 2,880,000.00 to cover underpayment of salary for the duration that he served as the Respondent's CEO.
 - e. The Claimant is awarded the sum of Ksh. 1,680,000.00 as compensation for unfair dismissal from employment.
 - f. The claim for house allowance is declined.
 - g. The Respondent is ordered to issue the Claimant with a Certificate of Service.
 - h. The Respondent's counter-claim is dismissed.
 - i. The Claimant is awarded costs of the counter-claim.
 - j. The award is subject to the applicable statutory deductions.
 - k. Any other relief that was sought but which has not been expressly granted is deemed as having been declined.

Dated, signed and delivered on the 11th day of April, 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

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