



**Githachuri v Bosch East Africa Limited (Cause E379 of 2020)
[2024] KEELRC 1319 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1319 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E379 OF 2020**

L NDOLO, J

MAY 30, 2024

BETWEEN

LIVINGSTONE KUNG’U GITHACHURI CLAIMANT

AND

BOSCH EAST AFRICA LIMITED RESPONDENT

JUDGMENT

1. On 18th March 2020, the Respondent wrote to the Claimant as follows:

“Dear Kung’u

TERMINATION OF EMPLOYMENT

Following discussions with all staff on Tuesday, 10th March 2020 and yourself separately on the same date on the Company’s financial performance over the past 12 months, the Company has embarked on a restructuring programme to ensure the business is sustainable. The restructuring programme will see some existing roles merged thus rendering certain positions redundant. It is on this basis that we regret to inform you that your position is one of those that will be redundant and that your employment contract will be terminated with effect from 30th April 2020.

According to Clause 8 of your Letter of Employment, the Company is required to give you one month’s notice (1 calendar month), or to pay one month’s salary in lieu of notice. Based on the effective date of termination of your contract, the Company has granted more notice days than provided in your contract.

Based on the reason for termination of employment, you are entitled to a severance pay of 15 days for every completed year of service. Since you will have worked for a period of three



complete years by your last working day, you will be paid 45 days as severance pay which equates to KES 1,354,664.05, subject to statutory obligations.

Our records show that you will have 15.5 annual leave days due to you by the end of your last working day, which will be paid to you as part of your final dues, less any leave days that will be taken during March and the notice period. Your salary will be paid up to and including 30th April 2020, less any amounts owing to the Company.

As part of clearance, you are required to hand over all the assignments you were handling to the appropriate delegated person, together with all Company's property that may be in your possession. You are required to sign the Clearance Form after handing over all documents and property of the Company before your final dues can be paid. Your final dues will be paid by via (sic) EFT.

We take this opportunity to thank you for the three years and three months' period you have worked with the Company and wish you well in your future endeavours.

Yours sincerely

BOSCH HOLDINGS (PTY) LTD

(signed)

MJ GIBBON

CHIEF EXECUTIVE"

2. This letter triggered the present dispute between the parties. The Claimant states his case in a Statement of Claim dated 10th August 2020 and the Respondent's defence is found in a Response dated 8th December 2020.
3. At the trial, the Claimant testified on his own behalf and the Respondent called John Kithinji. The parties also filed written submissions.

The Claimant's Case

4. By a Staff Agreement dated 13th February 2017, the Claimant was employed by the Respondent in the position of Civil and Structural Engineer. He worked as such until 18th March 2020, when his employment was terminated on account of redundancy. At the time of separation, the Claimant earned a monthly salary of Kshs.625,346.
5. The Claimant accuses the Respondent of violating the provisions of the law, the employment contract and the Respondent's own policies and practice. He therefore claims the following:
 - a. Kshs.125,069 being the portion of his salary for the month of April 2020 unlawfully withheld by the Respondent;
 - b. An order directing the Respondent to account for and remit Kshs.690,430 to the Kenya Revenue Authority being the Claimant's PAYE for the months of January, February, March and April 2020 plus any accrued penalties and interest;
 - c. Kshs.206,756.70 being the Claimant's medical expenses claim reimbursement;
 - d. Kshs.306,577 being the Claimant's mileage claim reimbursement;
 - e. Kshs.25,908 being the Claimant's project expenses claim reimbursement;



- f. Kshs.4,000 being the Claimant's home ownership savings plan remittance;
- g. An order directing the Respondent to provide details of the Claimant's pension fund contributions amounting to Kshs.720,000 and to provide the Claimant with access to the said contributions;
- h. Damages for withheld terminal dues;
 - i. Certificate of service;
- j. Costs plus interest.

The Respondent's Case

- 6. In its Response dated 8th December 2020, the Respondent avers that a huge portion of the amounts claimed by the Respondent are unjustified, misguided and not due or payable.
- 7. The Respondent states that due to the devastating effects of the COVID-19 pandemic on its business, it was forced to effect a 20% salary reduction for all its employees in South Africa, Kenya, Brazil and the United Kingdom and a 25% salary reduction for all its directors, with effect from 15th April 2020. The Respondent states that prior to the implementation of the salary reduction, all employees were consulted and asked to suggest alternative measures but no suggestion was received from the Claimant.
- 8. The Respondent admits to have had shortfalls in the remittance of PAYE to the Kenya Revenue Authority, which had since been regularised.
- 9. The Respondent states that the sum of Kshs.539,241.10 sought by the Claimant in paragraph 9(c), (d) and (e) of the Statement of Claim had been fully settled. The Respondent adds that the sum of Kshs.4,000 sought under paragraph 9(f) is not due as no deduction in this regard was ever effected from the Claimant's salary for March and April 2020.
- 10. Regarding the sum of Kshs.720,000 claimed by the Claimant in paragraph 9(g) of the Statement of Claim, the Respondent states that there was no agreement between the parties to the effect that the Respondent would remit any contribution to a provident

fund. This claim is therefore denied.

- 11. The Respondent states that the Claimant was issued with a certificate of service on 30th June 2020.
- 12. The Respondent's case is that it has complied with all its contractual and statutory obligations to the Claimant, whose dues have been settled in full.
- 13. Regarding the issue of salary reduction, the Respondent avers that the performance of the Claimant's employment contract was frustrated by force majeure.

Findings and Determination

- 14. The Claimant did not contest the termination of his employment on account of redundancy. He however complained that the Respondent had had withheld his salary and accrued benefits.
- 15. By the time of the trial, the claims on PAYE, medical expenses, mileage, project expenses and home ownership savings plan had been settled. The only claims left outstanding are with respect to withheld salary and pension.



16. Regarding the claim for withheld salary, the Respondent concedes having effected a salary reduction for its workforce, including the Claimant, in order to mitigate the adverse effects of the COVID-19 pandemic. On his part, the Claimant complains that he was not consulted before the salary reduction was effected.
17. There is however evidence that the Claimant received communication from the Respondent on this issue. First, there was an email dated 7th April 2020 by which employees were invited to make suggestions towards mitigation of the negative impact of COVID-19 on the Respondent's business. Secondly, by a subsequent email dated 15th April 2020, details of salary reduction were communicated.
18. Consultation on variation of terms and conditions of employment as contemplated under Section 10(5) of the Employment Act, does not necessarily connote agreement. In this regard, I am persuaded by the decision in *Emmanuel Wambua Muthusi & 6 others v Khoja Shia Ithna Shari Education Board t/a Jaffery Academy* [2020] eKLR where Rika J stated the following:

“Section 10[5] does not require that there is agreement on revision of contract, between an Employer and an Employee...The provision does not require that consultation ends up in agreement. All that the Employer is required to do, in changing terms of the contract, is to consult the Employee; revise the contract to reflect the change; and notify the Employee about the change. The word ‘agreement’ does not feature in Section 10(1) of the Employment Act. There would be no requirement for notification, if agreement has already been reached. The Employee is free to take the revised contract, or reject it.”
19. In the present case, there is evidence that the Claimant was consulted before the salary reduction he now challenges was effected. Granted that he may not have agreed with the reduction, he stayed on although he had the option of terminating his contract at that point. Having not taken the latter option, the Claimant cannot legitimately seek to recover the amount in salary reduction. The claim thereon therefore fails and is disallowed.
20. Regarding the claim for pension, the Respondent states that it did not operate a private pension fund in Kenya. The Claimant himself told the Court that his contract of employment did not make provision for pension and he did not make any contributions in that regard. The claim for pension is therefore also without basis and is disallowed.
21. In the end, the Claimant's entire claim fails and is dismissed with an order that each party will bear their own costs.
22. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY MAY 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Komu for the Claimant

Mrs. Okullo for the Respondent

