



**Haile v CIM Credit Kenya Limited & another (Employment and Labour Relations Cause E6482 of 2020) [2024] KEELRC 1329 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1329 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E6482 OF 2020**

**MN NDUMA, J**

**MAY 30, 2024**

**BETWEEN**

**YOEAL HAILE ..... CLAIMANT**

**AND**

**CIM CREDIT KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**CIM GROUP/CIM FINANCE LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The claimant filed suit on November 20, 2019 against the respondents seeking the following reliefs:
  1. Three months' salary in lieu of notice to terminate the claimant's employment; 28,836 USD.
  2. Damages for wrongful and unfair dismissal; being the equivalent of 24 months salary in the sum of 230,688 USD.
  3. Fifteen days' pro-rata equivalent severance pay for every year of service from April 2017; 15,219 USD.
  4. Salary deducted for the months of April, May and June 2020; 9,648.74 USD.
  5. Two years pro-rated bonus for the year 2020 and 2021; 70,000 USD.
  6. Payment in lieu of 21 days leave; 6,728 USD
  7. Work permit fees in event of cancellation; 3,603 USD
  8. General damages for defamation, emotional distress and suffering.
  9. Costs of this suit
  10. Interest on all the claims above at courts rates.



2. CW1, the claimant adopted a witness statement dated 13/11/2020 as his evidence in chief. CW1 stated that he joined the 2<sup>nd</sup> respondent on 3/4/2017 as a Senior Project Manager earning a consolidated salary of USD 110,000 per year. That he was entitled to annual leave of 25 working days, medical and accident cover and performance bonuses as per the contract of employment. The contract provided for 3 months' termination notice.
3. In terms of the said contract, he was also entitled to payment of performance bonus in terms of civil group performance bonus scheme. Terms of bonus payment in the event of termination are guided by clauses 3(b), (c) and (d) of the contract. The claimant was also entitled to relocation expenses.
4. The job of the claimant was to set up 2<sup>nd</sup> respondent's business in Kenya through coordinating the incorporation of the 1<sup>st</sup> respondent.
5. Upon incorporation of 1<sup>st</sup> respondent, the claimant held the position of Managing Director of the 1<sup>st</sup> respondent from 1/1/2018 until June 2020.
6. That as at March 2020, the claimant's consolidated salary and allowances stood at USD 9,820.79 per month. The contract was for a 24 months period.
7. The claimant said that he worked continuously and diligently at all times.
8. That in April 2020, the respondents, without due cause deducted the claimant's salary and continued to do so for the months of May and June as shown in the pay slips. The deducted amount is USD 9,648.74 USD.
9. On 27<sup>th</sup> May 2020 the claimant received a notice of intention to declare him redundant from the group CEO, Mark Van Beuningen on the ground that the business had been performing poorly and the situation had been aggravated by the COVID 19 pandemic. The notice was for a 30 days period effective on 31<sup>st</sup> July 2020.
10. The notice stated that the performance of the business was poor over the past few months and the onset of the COVID-19 pandemic made the situation worse. That the business was experiencing very difficult financial issues and the projected economic downturn will be prolonged and would present greater challenges.
11. The respondent referred to prior discussions held with the claimant on the subject on 15<sup>th</sup> and 20<sup>th</sup> May 2020. The termination was said to be in terms of section 40 of the [Employment Act](#), 2007 and that the claimant would be paid: -
  - a. One month notice pay.
  - b. Severance pay of fifteen (15) days basic salary for each completed year of service and
  - c. Payment in lieu of leave not used.
12. The respondent intended to consult with the claimant during the notice period regarding the reasons for the business changes, effective date of termination and any assistance that may be extended to the claimant to mitigate the effect of the redundancy. The notice was not copied to the Ministry of Labour. The claimant had served from 3<sup>rd</sup> April 2017 to 31<sup>st</sup> July 2020, a period of three years and 3 months.
13. The claimant states that he was unfairly singled out for termination on grounds of redundancy out of the workforce of sixty (60) employees.



14. That he was informed that they would revoke his work permit upon termination and would be required to leave the country. That this was during the COVID-19 pandemic and he was a high risk person being asthmatic.
15. That the claimant was coerced to sign agreement accepting lesser salary since he had been rendered desperate by already made deductions for two months.
16. The claimant was not immediately paid his final dues as promised upon signing the agreement. That the termination was malicious, in bad faith and amounted to discrimination. That the “mutual separation agreement and release” was procured to evade the illegal termination. This was a scheme to eject the claimant from the company.
17. That no other person out of the 60 employees had been declared redundant as at the time of filing the suit. That the position of Managing Director was still required to lead the company. The claimant was not given three months’ notice as provided in the contract of employment nor was he paid in lieu of three months’ notice. That this was a summary dismissal in the guise of a redundancy.
18. That the termination was unlawful and unfair and the claimant be paid as prayed. That the claimant was not paid pro-rated bonus for the year 2020 and 2021 in the sum of USD 70,000, was not paid in lieu of 21 days untaken leave in the sum of USD 6,728. The claimant demands deducted salary in the sum of USD 9,648.74. The claimant demands payment of pro-rata equivalent severance pay in the sum of USD 15,219.
19. The claimant seeks compensation for the unlawful termination and refund of USD 3,603 for work permit fees paid. The claimant seeks general damages for discrimination and payment of costs and interests.
20. The claimant was closely cross-examined by M/s. Kirimi for the respondent and was put to him that there was a mutual separation agreement between the claimant and respondents which was freely entered into. The claimant however stated that he was compelled by circumstances to sign the mutual separation but the terms were not favourable to him.
21. That he was at risk due to COVID 19 having been placed in a precarious financial position by the unlawful deduction of his salary. That it was a financial shock for him to be forced to leave the country within one month notice. That he had underlying conditions which put him at higher risk since COVID-19 was worse in the USA at the time. That if he did not sign the separation agreement, the redundancy notice would have taken effect anyway. That the exit package was not fair. That payment was not done immediately upon termination as had been agreed.
22. The claimant denied having received USD 38,000. He said he received less amount. It was put to him that the net terminal payment was USD 25,967.21. The claimant admitted receipt of the amount late. The claimant denied that his late clearance caused delay in payment. The claimant insisted that he is entitled to the reliefs sought. That he was discriminated upon and his position was not redundant.
23. The claimant denied having been placed on a PIP programme. He said he did not sign the document. Claimant agreed that he had proposed salary cuts to mitigate the effect of COVID -19. He said the salary cut plan applied to Kenyan team but not to him. Claimant said he did not agree to the salary cut and that it was effected without his consent.

## **DEFENCE**

24. The respondent called two witnesses in defence of the case. RW1 Mark Beuningen adopted a written statement dated 21/12/2020 and produced a bundle of documents in support of the defence.



25. RW1 said he was the Chief Executive Officer (CEO) of the 2<sup>nd</sup> respondent and that the claimant was engaged on a fixed term contract for a period of 24 months from 3/4/2017 as Senior Project Manager. That his job was to support the setting up of 1<sup>st</sup> respondent in Kenya. That the claimant was then appointed to the position of Managing Director of the 1<sup>st</sup> respondent in November 2018. That upon such appointment his fixed term contract came to an end.
26. That in March 2020 the respondents conducted a review of the business operations of the 1<sup>st</sup> respondent which revealed among other things that the 1<sup>st</sup> respondent had been making higher losses than expected. That COVID-19 pandemic made the situation more serious. As a result, the respondents put in place plans for a long term restructuring of the 1<sup>st</sup> respondent to increase operational efficiencies and costs.
27. One of the proposals made was to abolish the role of the Managing Director (MD) and change the reporting lines of all head of department directly to RW1 as the 2<sup>nd</sup> respondent's Group CEO based in Mauritius.
28. The 1<sup>st</sup> respondent held a Board meeting on 7/4/2020 to discuss the situation and analyse the impact of COVID-19 on the 1<sup>st</sup> respondent's operations. The claimant attended as the MD. The projected losses for the 1<sup>st</sup> respondent increased by Kshs, 42,000,000/= with a projected loss of Kshs. 227,849,788/= for the financial year 2020.
29. The claimant had presented the above said projection and proposed reduction of operational expenses including the need for 25% pay cut for all managers. The proposals by the claimant dated 7/4/2020 was produced in court.
30. On 15/4/2020, the claimant communicated the salary cut to the team for an initial period of 3 months and a further extension of 3 months as at 16/6/2020.
31. RW1 denied that the deduction were arbitrary but the claimant had made the case for it to the Board.
32. RW1 held a meeting with the claimant on 15/5/2020 in which he discussed with the claimant restructuring measures including declaring the role of MD redundancy as it fell within the purview of the Group CEO. RW1 proposed a negotiated exit for the claimant as opposed to triggering the formal redundancy process.
33. The claimant informed RW1 that he had contacted a lawyer and requested a formal notification of the intended redundancy and offer for mutual separation. RW1 said he communicated to the claimant the impending restructuring and set out terms of a potential mutual separation. RW1 requested the claimant to respond by 21/5/2020. That by the time, the claimant had been notified of the intention to place him on a performance enhancement plan (PEP).
34. On 21/5/2020, the claimant wrote an email requesting for 7 days to make a proposal for mutual separation agreement. RW1 said he needed an answer by 22/5/2020. The claimant did not respond and so the respondent commenced the formal redundancy process. A notice of intended redundancy was issued to the claimant and copied to the Nairobi Labour Office on 28/5/2020. copies were produced.
35. On 4/6/2020, the claimant told RW1 he was happier with a negotiated exit package and the negotiations of the terms began. A draft mutual separation agreement was shared with the claimant and the claimant raised the issue of potential personal liability post exit and an additional clause to cater for those concerns was put in the agreement as per the emails before court at page 17 to 19 of the respondents' bundle.



36. On 15/6/2020, the parties executed a mutual separation agreement and release dated 15/6/2020. It was agreed that the respondent would pay the claimant a gross amount of USD 38,684 as the total full end final separation pay for the mutual termination of the claimant's employment. The copy of separation agreement was placed before court at pages 20 to 24 of the respondents' bundle.
37. RW1 said all matters were agreed and compromised arising out of the claimant's employment. The package included:
  - i. 4.5 months' salary and payment in lieu of leave days not taken.
38. The claimant released the respondent from any claims whatsoever, in respect of the claimant's employment with the respondent. Separation date was 15/6/2020.
39. RW2, Priye Madhow testified in defence of the respondents and adopted supplementary interim statement dated 29/9/2022 as her evidence in chief. RW2 pointed out that the deduction made from the claimant's payment in the sum of USD 4,303.60 was in respect of statutory deduction and some payments that had been paid out to the claimant twice.
40. That in terms of the separation agreement, the claimant was to be paid upon the employer being fully satisfied with the handing over procedure. That the claimant did not provide all the information or hand over in a timely manner as agreed as shown vide emails at page 54 to 59 of the respondents' bundle. This is what caused the delay in releasing the final package to the claimant.
41. RW2 reiterated that the separation was mutual and did not arise from the PEP plan. The PEP was not implemented due to the COVID-19 pandemic effects on the business.
42. That the claimant's salary was to be deducted according to the proposal by the claimant to cut all managers' salaries by 25%. This included his salary.
43. Counsel for the claimant extensively cross-examined RW1 and RW2 on the evidence adduced and both reiterated their evidence consistently as set out in their written statements. RW2 was the Group Human Resource Manager for the 2<sup>nd</sup> respondent.

## **DETERMINATION**

44. The parties filed written submissions which the court has carefully considered together with the evidence adduced by CW1, RW1 and RW2. The issues for determination are:-
  - a. Whether the respondent had a valid reason to declare the position of Managing Director redundant.
  - b. Whether the claimant signed a mutual separation agreement freely and voluntarily.
  - c. Whether the mutual separation agreement absolved the respondent from any further claim arising from the employment of the claimant by the respondent.
45. In answer to issue no. 1 the testimony by CW1 and RW1 on the financial performance of the 1<sup>st</sup> respondent during the period under review is to the effect that the company was performing poorly and the claimant himself had at meeting of the Board held on 7<sup>th</sup> April 2020 presented projected losses for the 1<sup>st</sup> respondent had increased by Kshs. 42,000,000/= with a projected loss of Kshs. 227,849,788/= for the financial year 2020.
46. The claimant himself had proposed a reduction in operation expenses including the need for a 25% pay cut for all managers.



47. The claimant himself communicated to the 1<sup>st</sup> respondent's team on 15/4/2020 salary cuts for an initial period of 3 months and a further extension of 3 months as at 16<sup>th</sup> June 2020.
48. The salary cuts were implemented accordingly including with respect to the claimant himself. It is disingenuous for the claimant to have proposed a salary cut for all his counterparts but did not expect the same to apply to himself. The court does not sympathize with the protestation by the claimant in this respect. The salary cuts were lawfully applied across the board to mitigate the financial losses 1<sup>st</sup> respondent was experiencing which losses were projected to increase due to the effects of COVID-19 pandemic.
49. RW1 further tendered credible evidence that due to his role as the Group CEO of the 1<sup>st</sup> and 2<sup>nd</sup> respondent, it was prudent to abolish the position of Managing Director of the 1<sup>st</sup> respondent and allow RW1 to provide leadership of the Group from Mauritius.
50. The court is satisfied that this was a prudent measure to further reduce the losses the 1<sup>st</sup> respondent was experiencing and seen in the context of COVID-19 pandemic when most of staff did not report to the office.
51. The respondent proved it had a valid reason within the meaning of section 2 read with section 40 of the *Employment Act*, 2007. The respondent demonstrated that it had issued a one month notice of declaration of redundancy of the position held by the claimant to the claimant himself and to the Labour office Nairobi.
52. With regard to the issue of the pay cut, the court is well guided by the decision cited by the claimant at Emmanuel Wambua Muthesi and 6 others versus Khoje Shie Iture Asheri Education Board the Jaffrey Academy [2020] eKLR, which case confirms that an employee has a right to accept or reject the pay cut on his pay.
53. In the present case, the pay cut was proposed by the claimant himself, was approved by the Board of the 1<sup>st</sup> respondent and was implemented by the claimant himself. The claimant could not be exempted from the measure without the 1<sup>st</sup> respondent being guilty of taking a discriminatory measure. This finding by the court is supported by the Court of Appeal decision in the case of 748 Air Services Limited versus Theuri Munyi [2017] eKLR.
54. The claimant was aware of the reason for the pay cut made on his salary for three (3) months and did not object to the pay cut in writing until he separated from the respondent.
55. The circumstances leading to the signing of the mutual separation agreement and release are material in the construction and implementation of the agreement. The notice of redundancy sent to the claimant and the Labour office was the precursor to the agreement and so the execution of the agreement does not detract from the very reason for the separation, which was abolition of the office of the Managing Director held by the claimant. The separation was for operational reasons and not due to the fault of the claimant.
56. It follows that the terms and conditions of the separation agreement must be in conformity with the employment contract itself and the minimum requirements under section 40 of the *Employment Act*, 2007. Any clause in the agreement which is not in conformity with the minimum requirements under section 40 is null and void.
57. In this respect, the separation package of USD 38,684 translated to 3.5 months' pay and was computed as follows:-
  - a. Payment for days worked in June 2020 at USDD 5,042



- b. Payment of equivalent severance pay of USD 14,418 and
  - c. Payment of an additional sum of USD 19,224.
58. The court notes that the claimants gross salary which figure is used to calculate terminal benefits was USD 9,612 + USD 472 car allowance = USD 10,084. Therefore, the minimum package in terms of section 40 of the [Employment Act](#) and the letter of appointment of the claimant should have been:-
- a. Three months' salary in lieu of notice USD 30,252.
  - b. Severance pay calculated at 15 days salary of three years completed service USD 15,126.
  - c. Payment in lieu of 21 days untaken leave 7,058.80
  - d. USD 5,042 for days worked in June.
59. The respondent failed to address sufficiently the claim for bonus, set out by the claimant for the year 2020 and 2021 in the sum of USD 70,000.
60. The bonus payment is provided under clause 1(e), 2(e) and 3(b) (c) and (d). The claimant adduced evidence to demonstrate that he was entitled to payment of performance bonus in the event the company gives the claimant notice of the termination of contract before expiry of the contract.
61. RW1 testified that upon being appointed the Managing Director of the 1<sup>st</sup> respondent, the fixed term contract of the claimant expired. RW1 did not produce any document to prove that assertion. The court finds that the promotion of the claimant from the position of Senior Project Manager to Managing Director did not nullify the terms and condition of service between the claimant and the 1<sup>st</sup> respondents set out in the letter of 17<sup>th</sup> March 2017, except those terms that were introduced in favour of the claimant regarding the elevated position of Managing Director.
62. Therefore, the claimant was entitled to payment of performance bonus in terms of clause 2(e) based on the number of months he had remained in the employment of the company. The claimant computed the bonus payable in this respect to be USD 70,000 being two years, prorated bonus for the year 2021 and 2021.
63. The respondent in the statement of response to the statement of claim only offered a bare denial to its claim at paragraph 26(e) of the statement of response that:-
- Bonuses are purely discretionary and are in any event not made when the business is making a loss.”
64. Nowhere else, is the claim of bonus set out in the evidence adduced by the claimant in his testimony and prayers addressed by the respondent.
65. RW1 did not address the matter in his witness statement dated 21/12/2020 nor did RW2, address the issue in her supplementary interim statement dated 29/9/2022.
66. The court finds that, bonus paid to the claimant upon premature termination of his contract of employment was not discretionary as seen from clause 2(e) read with clause 3(b) (c) and (d) of the letter of appointment dated 17/3/2017.
67. The court is satisfied with the computation made by the claimant in the absence of a counter computation and awards, the claimant USED 70,000 performance bonus as claimed.



68. On the question whether the separation agreement was entered into freely and voluntarily, Having considered the cited authorities of Bricks & Tiles Limited & 5 others versus Arvid Shah and others [2019] eKLR, and *Economic International Limited versus Shandy Taikai Power Engineering Company Limited, Civil case E527 of 2020* [2021] and the Court of Appeal decision in *Patel & another versus MSC & another (suing as the guardians of PSP (Civil Appeal 182 of 2019)* [2022] KECA 364 (KLR) the court finds as did the Court of Appeal that:

It should also be appreciated that apart from specifically pleading undue influence, coercion and fraud, the same was to be specifically proved by cogent evidence and not on the balance of probabilities as wrongly held by the trial court. Proof has to be higher on a balance of probabilities but slightly lower than pure beyond reasonable doubt.”

69. In the present case, the court finds that the claimant entered into the separation agreement freely and voluntarily, having been advised by his lawyer and taken time to consider the predicament that faced him including that he had already been served with a termination notice on grounds of redundancy.

70. The respondents however held the wrong view that this agreement absolved them from abiding by the terms and conditions of the employment contract and the provisions of sections 40 of the *Employment Act*, 2007.

71. The agreement did not substitute the actual reason for the separation which was redundancy. Any terms agreed upon thereafter must be in conformity with the termination clause contained in the contract of employment and section 40 of the *Employment Act*, as demonstrated above.

72. The court finds that the claimant was not discriminated upon as alleged or at all. The termination of employment on grounds of redundancy was lawful, however the respondent violated the employment contract between the parties in implementing the separation on grounds of redundancy.

73. Accordingly, the judgment is entered in favour of the claimant against the respondents as follows:-

- a. Three months' salary in lieu of notice USD 30,252.
- b. Severance pay calculated at 15 days salary for three years completed service USD 15,126.
- c. Payment in lieu of 21 days unutilized leave USD 7,058.80
- d. USD 5,042 for days worked in June
- e. Prorated performance bonus for the year 2020 – 2021 USD 70,000  
Total award USD 127,478  
Less amount paid USD 38,684  
USD 88,794
- f. Interest at court rates (on USD) from date of service till payment in full.
- g. Costs of the suit

74. For the avoidance of doubt, all other claims made by the claimant in the statement of claim lack merit and are dismissed.

**DATED AT NAIROBI THIS 30<sup>TH</sup> DAY OF MAY, 2024**

**MATHEWS NDERI NDUMA**



## **JUDGE**

Appearance:

M/s Joy Anambi for claimant

M/s. Kirimi for respondent

Mr. Kemboi, Court Assistant

