



**Abdulkarim v Horizon Contact Centres Limited (Cause E515 of 2021)
[2024] KEELRC 1508 (KLR) (14 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1508 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E515 OF 2021**

**J RIKA, J
JUNE 14, 2024**

BETWEEN
FARHEEM MOHAMED ABDULKARIM CLAIMANT
AND
HORIZON CONTACT CENTRES LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed her Statement of Claim, dated 26th May 2021.
2. She states that she was employed by the Respondent, in a Managerial Capacity, in 2012.
3. Her salary was Kshs 423,785. For a period of 7 months, dating from June 2020, she was paid Kshs 317,839. Deduction was not justified.
4. She was due for a 20% salary increment in April 2020, which was not implemented.
5. In December 2020, she informed the Respondent that she was unable to report to work, due to financial challenges she encountered, after the irregular deductions.
6. In January 2021, the Respondent orally terminated her contract. There was no notice, and no reasons given, to justify termination. She was not heard.
7. She prays for: -
 - a. Declaration that termination was unfair and unlawful and in violation of the Claimant's constitutional rights under Articles 41 and 47 of the Constitution.
 - b. Salary arrears from June 2020 to January 2021 at Kshs 763,719.
 - c. 58.5 days of annual leave.
 - d. 12 months' salary in compensation for unfair termination at Kshs 483,785 per month.



- e. Certificate of Service to issue.
 - f. Costs.
 - g. Interest.
 - h. Any other suitable order.
8. The Respondent filed its Statement of Response, and Counterclaim, dated 3rd December 2022. Its position is that the Claimant abandoned her work, without lawful cause. She was not denied annual leave. She was paid off for any unutilized annual leave days.
 9. Variation in remuneration payable to the Claimant, among other Employees, was occasioned by Covid-19. The Respondent scaled down its business operations, and could not continue discharging contractual obligations, as agreed before the onset of Covid-19 pandemic.
 10. The Respondent consulted Employees, and it was agreed they take 25% pay cut, or take unpaid leave, to obviate termination of contracts. The measures taken were in the interest of the Respondent and all Employees, including the Claimant. The measures affected all, including the CEO.
 11. The Respondent went out of its way, in entering certain mitigating arrangements with the Employees' banks and landlords, whereof the Employees were granted moratoria, in meeting their debts to the banks and landlords. The measures were not taken arbitrarily; Employees, including the Claimant, were consulted.
 12. The Claimant's duties had diminished, and were mostly taken up by the CEO and the Human Resource Manager, Salary due pre- Covid-19 was not sustainable. She headed the Finance Department, and was aware about the Respondent's financial position.
 13. The Claimant unilaterally left employment. The Respondent did not terminate her contract. She demanded payment of terminal dues, which the Respondent paid.
 14. Without prejudice, the Respondent states that it was entitled to summarily dismiss the Claimant for absconding duty. She was summoned to work by the CEO. She declined invitation, which amounted to insubordination.
 15. The Respondent states that it was compelled to incur additional expenses, upon the Claimant absconding. It hired a temporary replacement to discharge the Claimant's duties. She did not issue notice. The Respondent counterclaims Kshs 317,839 in notice, and general damages for loss occasioned to the Respondent upon the Claimant absconding.
 16. The Claimant filed a Reply to the Statement of Response, and Response to the Counterclaim, dated 30th December 2021. She denies that salary reduction was consensual. She denies the contents of the Counterclaim.
 17. The Claimant gave evidence and rested her case, on 15th December 2022. Group Finance Controller Narendra Sabalkar, former CEO Neezam Solomons and former Human Resource Generalist Douglas Kariuki, gave evidence for the Respondent on 8th November 2023, closing the hearing. The Claim was last mentioned on 1st March 2024, when the Parties confirmed filing and exchange of their closing submissions.
 18. The Claimant adopted her witness statement dated 22nd April 2021, and bundle of documents dated 26th May 2021 and 30th December 2021 [exhibits 1 and 2], in her evidence-in-chief.



19. She explained that she was the Finance Manager, employed in 2012. The Respondent handled inbound and outbound calls such as those relating to sale of insurance policies. The Respondent was engaged by communication companies. The deductions on the Claimant's salary from June 2020 were illegal. She did not accept pay cut. Business was doing well, because most people were at home. GoTV and DSTV who were Respondent's clients, were doing well, because most people were compelled by Covid-19 to stay home, watching TV. The Respondent assisted these clients in enlisting new subscribers. The Claimant was not consulted at all, on the pay cut. On 5th January 2021, her contract was terminated by word of mouth, without notice and hearing. Because of her position as Finance Manager, she did not take her annual leave. Even when she applied for it, it was not granted.
20. Cross-examined, she told the Court that she joined the Respondent as an Accountant, in 2012. She was promoted. She worked alone in the department for long. Narendra came from SS Mehta, a sister company. He did not assist the Claimant, and she could not go on annual leave. She claims 58.5 annual leave days, based on excel sheets. She did not exhibit the sheets.
21. She did not receive terminal dues, as computed by the Respondent. The Respondent sent some funds to her bank account, in February 2021. Her last day at work was 2nd December 2020. She sent a message to the CEO informing him of her inability to go to work, due to financial constraints. She was paid her salary of November 2020, at Kshs 335,597. She was not able to get transport with this pay. She lived at South C. The workplace was along Mombasa Road. It was a walking distance.
22. She was not aware of agents who were released, due to Covid-19 pandemic. GoTV and Dstv terminated the contracts of some of their Employees. Revenue went down.
23. Salary cuts were made with the knowledge of the Employees, but without their consent. The CEO communicated to the Employees. There was a consultative staff meeting held in May 2020 on the subject. The Claimant did not attend the meeting, although her name was included in the list of attendees. Another meeting was held in October 2020. She was not invited to this meeting. The Claimant was advised about the deductions, but did not give her consent.
24. She last worked on 22nd December 2020. She called the CEO, and informed him that she would not be reporting, because she was having financial challenges. Leave was supposed to be applied for and given formally. She did not apply for any leave before she left.
25. Termination was oral. She did not recall the exact words the CEO uttered, in terminating her contract. On this particular occasion, she borrowed money from a friend, to finance her transport. She did not receive any letter of termination from the Respondent.
26. Group Finance Controller Narendra, relied on his witness statement, original, further and supplementary documents filed by the Respondent, in his evidence-in-chief. He adopted the contents of the Statement of Response and the Counterclaim.
27. He appointed the Claimant in 2012. There was a salary cut for everyone, necessitated by the financial challenges imposed by Covid-19. Her salary before Covid-19 was Kshs 423,785. After the cut it was Kshs 335,497 monthly. She consented to deduction. The financial position was bad. The Respondent did not recover. It ceased operations. The Claimant left employment voluntarily in December 2020. The Respondent nonetheless paid her outstanding annual leave at Kshs 347,000.
28. On cross-examination, Narendra told the Court that he mentored the Claimant. The Respondent did not exhibit financial record, to support its position that Covid-19 affected its finances. The Respondent paid her annual leave in January 2021 in good faith. Redirected, Narendra told the Court that salary deductions were not recoverable, after Covid-19.



29. Former CEO Neezam served the Respondent between 2013 and 2022. He confirmed that the Claimant served as the Finance Manager. She oversaw data, payroll, billing of customers, and management of cash-flow.
30. Covid-19 threw the Respondent in a financial spin. All Employees took a pay cut. The decision was made after the Respondent held meetings with the Employees. The meetings involved the Respondent's legal and human resource departments.
31. The Claimant designed the model for salary cuts. The CEO and Narendra supported her. Everyone including Neezam, was affected.
32. The Claimant reported to work inconsistently, alleging that she had transport challenges. The Respondent met her in January 2021. She was of the view that her salary should be restored in full.
33. The Respondent was disadvantaged during her absence. It had to engage an external person to assist, especially with preparation of the payroll.
34. At the meeting of January 2021, the Claimant demanded that she is paid her terminal dues. The CEO advised her to consult Human Resources department and clear. She specifically told the CEO that if her salary was not restored fully, she would not continue working. She left employment this way.
35. There was no provision for 10% pay increment in her contract. After she quit she was paid all her terminal dues. The Respondent later found copies of job application letters the Claimant had written to potential Employers. She had been seeking employment with the Respondent's competitors.
36. Cross-examined, Neezam told the Court that the Claimant was a senior Employee, who reported to him and Narendra. Payroll was prepared by the Claimant. The CEO went without a salary during the Covid-19 pay cuts. He did not have his pay slips to support this. The Claimant designed the pay cut model. The Respondent did not exhibit financial statements to support its position, on the effect of Covid-19. The Claimant could not be taken through a disciplinary process, because she was not available. Redirected, he confirmed that the Claimant was in senior management, and that it was her, who indicated her inability to continue working.
37. Human Resource Generalist, Douglas Kariuki, told the Court that salary cut was fair. It was made after consultations. The Claimant did not dispute deductions at the time. One could take the pay cut or proceed on unpaid leave. The Claimant left employment of her own volition. She did not seek leave of the Respondent. She was paid terminal dues.
38. Cross-examined, Kariuki told the Court that the Claimant worked remotely, at some point. Data security required that the Respondent gives its approval, if the Claimant wished to work remotely. She attended the meetings where it was agreed that Employees, take a pay cut. Kariuki did not know if the Claimant was issued N.T.S.C or taken through a disciplinary hearing, for absencing herself. Redirected, Kariuki told the Court that the Claimant had not been authorized to work from home.
39. The issues are whether the Claimant left employment voluntarily, or whether her contract was terminated by the Respondent; if terminated by the Respondent, whether termination was fair; whether the Counterclaim is merited; and whether Parties merit the respective remedies sought.

The Court Finds: -

40. It is common evidence that the Claimant was employed by the Respondent in the year 2012, as an Accountant.



41. She was promoted to the position of Finance Manager. Her salary was Kshs 423,785 monthly. It is agreed that from around June to December 2020 when she left employment in contested circumstances, the Claimant's salary had been reduced to Kshs 317, 839.
42. End of employment: The Claimant holds that her contract was terminated by word of mouth, by the Respondent through its CEO. The Respondent holds that the Claimant absconded, having informed the CEO that she did not wish to continue working, if her salary was not restored to Kshs 423,785.
43. The Court is persuaded by the position taken by the Respondent. There is evidence that the Claimant had been sourgraping, ever since the Respondent implemented its salaries cut, under the Covid-19 business sustainability measures.
44. She emphasized in her evidence that she was suffering financial stress due to the salary cut. She wrote to the CEO complaining that she had hefty loans to redress. She told him that she had recently lost her father, and she was the sole breadwinner for her family. She told him that she was experiencing severe financial constraints and creditors were constantly at her door.
45. She confirmed before the Court that she failed to report for duty, for lack of transport. She was absent without the leave of the Respondent, or other lawful cause.
46. Her explanation on her failure to report to work, was unconvincing. She confirmed that she lived not very far from the workplace. She lived at South C estate. The workplace was within a walking distance, along Mombasa road. Even if the Claimant had exhausted her salary, it is inconceivable that she could not reach the workplace for lack of transport. Notably, she had been paid her November 2020 salary at Kshs 335,497. How is it that a Finance Manager, having received this reasonable salary, did not reserve a small percentage of this salary, for her matatu fare to the workplace, which was across her residence, on Mombasa road?
47. She appears to have become disillusioned with the continued deduction made on her salary, and was clearly demotivated. She complained about the deduction, as well as the unfulfilled promise for 10% annual increment, which she stated was due in April 2020. Instead of an increment, she was confronted with a 20% reduction in monthly salary. She was disillusioned and opted to stay at home, and eventually, expressed her inability to continue working, if there was no reversal to her full contractual remuneration.
48. It is not true therefore that her contract was terminated by the Respondent. There was no letter of termination issued by the Respondent. There was no evidence of oral communication made to the Claimant by the CEO, advising her to cease working. To the contrary, the Claimant reacted to her contractual frustration, by unilaterally determining to abandon her post, leaving the Respondent with the burden of outsourcing the payroll function.
49. Termination was instigated by the Claimant, and accepted by the Respondent.
50. Unfair, unlawful termination and unfair labour practice: The Claimant does not advance the argument that she was frustrated by the Respondent into resignation, which could perhaps have laid some foundation for considering, if she was constructively dismissed by the Respondent. She held onto the argument that the Respondent terminated her contract orally. As the Court is persuaded that termination was not at the instance of the Respondent, it follows that the Respondent cannot be held accountable for unfair and unlawful termination. The Court does not see how an Employee who opts to keep away from the place appointed for the performance of her work, without the leave of her Employer or other lawful cause, justifying non-attendance on the flimsy ground of lack of transport, can succeed in claiming violation of her Article 41 rights. The Claimant suggested through cross-



- examination of the Respondent's witnesses, that she was working virtually when it was alleged she was absent. This was an afterthought. She did not have the authority to work remotely, and this explanation seems inconsistent, with her position that lack of transport, rather than Covid-19, kept her away from work. There is no evidence that the Respondent was engaged in unfair labour practice.
51. It was not necessary for the Respondent to plead that the Claimant loved chewing and spitting out an Indian made tobacco, called gutka, at the workplace, during office hours.
 52. Chewing and spitting out gutka, a tradition beloved of India, does not seem to the Court in any event, to have amounted to an employment offence that would justify termination. Her chewing of tobacco could have been triggered by her work-related stress. But such evidence, intended to persuade the Court that termination was based on valid reasons, was unnecessary, the Claimant having instigated termination.
 53. The prayers for declaratory orders [a] and [b], and compensation for unfair termination [e] have no merit.
 54. Arrears of salary: The Claimant was aware about the financial constraints Covid-19 imposed on businesses, and in particular her Employer's business. Her evidence that the Respondent had improved business, because most people stayed at home watching GoTV and Dstv, who were Respondent's clients, and who enjoyed improved subscriptions, was unconvincing. She also conceded that GoTV and Dstv, had terminated the employment contracts of employment of about 40 of their Employees. Most businesses took a hit, and it is hard to buy the Claimant's submission, that the Respondent was doing well financially, amidst the Covid-19 economic depression. She was the Finance Manager, and the architect of the Covid-19 salary cut structure at the Respondent. All Employees, from the CEO to the bottom of the pyramid, took a pay cut, to enable the business stay afloat. The CEO told the Court that he did not receive a salary, for close to 1 ½ years. Eventually the business did not recover, and ceased operations. The Claimant crafted the Covid-19 salary structure, and implemented it from June 2020, until she became exasperated in December 2020, demanding that she alone, goes back to the full contractual remuneration preceding Covid-19.
 55. Her salary had been reduced to Kshs 317,839 in June 2020. In November 2020, it had been revised to Kshs 335,497. There was a gradual reversal of salary cut, but the Claimant appears to have become impatient, opting to walk out in search of what the CEO suggested, were greener pastures.
 56. The Court does not think that salary reduction was a unilateral decision made by the Respondent. It was a decision made in consultation with the Employees, including the Claimant.
 57. The prayer for arrears of salary is declined.
 58. Counterclaim: The Respondent seeks 1-month salary in lieu of notice from the Claimant. This prayer is not sustainable. The Respondent offered notice to the Claimant, as shown in the last pay slip issued to the Claimant, exhibited as 'HCC1' in the documents filed by the Respondent. It is inconceivable that an Employer pays notice to the Employee by its right hand, and demands notice from the same Employee through the left hand. The counterclaim for notice pay is rejected.
 59. Whereas it could be true that the Respondent outsourced payroll services in the absence of the Claimant, particulars of loss and damages suffered by the Respondent in procuring external services, were not provided to the Court. The counterclaim for general damages is unsupported, and details of the person who was engaged by the Respondent to fill in for the Claimant, are unknown. The name of the person was not disclosed neither were the terms of the person's engagement.
 60. The Counterclaim is rejected.



61. The Parties were not able to continue with the employer–employee relationship, in light of the challenges that came with Covid-19 pandemic. There was a meeting involving the Claimant and the CEO in January 2021, where the Claimant’s position was that she would not continue working, if her salary was not restored in full, and the Respondent was not ready to restore the pre-Covid-19 salary. The Claimant sought and was paid terminal dues. She initiated a proposal to cease working. The Respondent accepted. In the end termination would be deemed to have been consensual, with no justification for demands of any nature, from either party to the other.

It is Ordered: -

61. ...
- a. The Claim is declined.
 - b. The Counterclaim is declined.
 - c. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 14TH DAY OF JUNE 2024.

JAMES RIKA

JUDGE

Court Assistant: Emmanuel Kiprono

Gathuku & Partners, Advocates for the Claimant

Gitonga, Kinyanjui & Company Advocates for the Respondent

