



**Varghese v Freightreach Limited (Cause E548 of 2022)
[2024] KEELRC 2692 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2692 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E548 OF 2022
B ONGAYA, J
OCTOBER 30, 2024**

BETWEEN

DENNY VARGHESE CLAIMANT

AND

FREIGHTREACH LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the Memorandum of Claim dated 01.08.2022 through Kinyanjui Kirimi & Co. Advocates praying that judgment be entered in his favour and against the respondent for:
 - a. US Dollars 121,126.00
 - b. Certificate of service.
 - c. An order for accounts in terms of paragraph 11 of the Memorandum of Claim (being on alleged share in respondent's profits per contract of service).
 - d. Cost and interest on (a) above.
2. The claimant pleaded that he claims as follows:
 - i. Sum of US Dollars 4,700 as one month in lieu of notice;
 - ii. US Dollars 28,200 service pay for 12 years of employment;
 - iii. US Dollars 56,400 being the equivalent of his salary for 12 months' salary as damages for loss of employment;
 - iv. House allowance in the sum of Kshs. 90,000 per month for 12 months at Kshs. 1,080,000 (US Dollars 9,391 at the prevailing exchange rate of Kshs. 115 per dollar);
 - v. 40 leave days in the sum of US Dollars 6,268;



- vi. Salary arrears for days worked from April 2022 up to June 2022 at US Dollars 4,700 and for 10 days worked in July 2022, making it a cumulative sum of US Dollars 15,667; and
 - vii. A one-way ticket out of Kenya in the sum of US Dollars 500.
3. The claimant averred that on 17.06.2010, Ayezán E-Gistics LLC, the predecessor of the respondent herein, appointed him as the Regional Director East Africa and issued him with an appointment letter. That when the respondent purchased the company and changed its name from Ayezán Freight Limited to Freightreach Services in 2012, the claimant was not issued with a new employment contract but was issued with an amendment of the letter of employment. The claimant asserted that the terms of his employment were therefore those contained in the letter of employment dated 17th June 2010 and the letter of amendment dated 15.10.2012.
 4. It was the claimant's averment that in May 2022, the company directed him to relocate to Dubai as his new work station without telling him his new designation upon relocation. He stated that the relocation amounted to a demotion and breach of the terms of his employment. He pleaded that when he declined the directive to relocate, his employment was terminated unfairly as there was no valid reason for the same and he was not subjected to due process before termination of his contract.
 5. The claimant's case was that his contract was not for a fixed-term and he served until June 2022 when he was issued with a one (1) month notice of termination of employment. That he was earning US Dollars 4,700 per month when his employment was terminated. In addition, that the respondent's conduct towards him has been callous and actuated by malice and ill will as particularised as follows:
 - i. The respondent brought a person to replace the claimant and take over his duties, long before the termination of his employment; and
 - ii. The respondent refused to pay the claimant his salary and other dues, and at the time of filing this claim, the dues remained unpaid.
 6. The claimant further averred that as per the contract of employment, he was supposed to share in the profits of the company but he has never been involved in the sharing envisaged. He therefore prayed for an order that accounts be taken to ascertain how much, if any, share of profit is due from the respondent to him.
 7. The respondent's Statement of Response and Counterclaim is dated 19.10.2022 and was filed through Kwamboka Marie & Associates Advocates. It counterclaims one month in lieu of notice at USD 4,700 and prayed that the claimant's suit against it be dismissed with costs.
 8. The respondent's case was that upon the claimant's contract being amended on 15.10.2012, he was retained with the same terms save that his salary was increased from US Dollar 3,000 per month to US Dollar 4,000 per month. That the claimant having declined the directive to transfer, it is therefore he who terminated his employment without giving adequate notice to the respondent.
 9. As regards the claimant's relocation, the respondent stated as follows:
 - a. The respondent was guided by the letter of appointment and the law and it referred to the appointment letter that stated that the claimant's responsibilities would be restructured as the station grow.
 - b. That on 26.05.2022, Mr. Shamshudeen Sahed was appointed to take over as Regional Manager Director of East Africa, vide a consultation held by the Vice President, the Regional Finance Manager and the claimant herein, and it was agreed that he would take transfer and report to



the Head Office at Dubai after handing over the Kenya operations. The claimant did not raise any objections during the said meeting.

- c. That vide an email dated 30.05.2022, the respondent requested the claimant to do a business proposal or plan for the position, for the overall development of the African Offices at the Head Office in Dubai. The claimant was transferred with due notice and a reason given thereto but he remained away from office. That up to date, the respondent has never received any proposal plan from the claimant.
 - d. The claimant refused to report to his new station and therefore cannot argue that he was demoted. That had the claimant reported on duty, the respondent would then authoritatively know whether the transfer had resulted in the alleged demotion.
 - e. The transfer was not a demotion as the claimant's benefits was not reduced and it was within the mandate of the respondent to deploy its employees.
 - f. The respondent's management held various meetings with the claimant and exchanged communication through email. Even after much persuasion by the respondent's management, the claimant declined the offer to work at Dubai and impliedly informed the respondent to proceed and terminate his services.
 - g. The claimant did not complain and or raise any valid objections when he was informed about the transfer and basically declined the offer to work at Dubai, which was made in good faith and was aimed at ensuring continuity of the respondent's business. That an employee is equally bound by the rule to act with outmost due diligence and in good faith towards the directives issued by the employer.
 - h. The reasons raised by the claimant were not justified to decline the transfer knowing very well that it was for the continuity of the respondent business. The pointers raised by the claimant for rejecting the transfer is shallow and does not show the genuine reasons for declining the transfer to Dubai. Any valid requests for reviews, variations or rescission of the transfer must be clearly set out. The claimant only stated that moving from this location to another will have a lot of impact on the existing business, which is not the true case as he had intended to resign on 02.02.2022 from the very same position.
 - i. The claimant failed to take transfer to the Dubai office so that he could remain in Nairobi and continue with his private businesses. This would have encouraged a conflict of interest.
10. The respondent's further case was that the claimant was given one (1) month notice as per the law and in any event, he owes it two months in lieu of notice. That the claimant having terminated his employment by himself, the need to pay service gratuity never arose. The respondent further averred that the claimant is not entitled to service gratuity as it had been remitting NHIF and NSSF contributions on his behalf. Further, the claimant was paid a consolidated salary, which was inclusive of house allowance. It asserted that the claimant did not have any accrued pending leave days by the time his contract terminated, at which point all his salaries had also been paid. The respondent denied the claim for a one-way ticket and stated that the certificate of service is ready for collection.
 11. It was the respondent's case that the claimant having refused to collect his terminal dues, this suit is an abuse of the court process.
 12. The claimant subsequently filed his Reply to Statement of Response and Defence to Counterclaim dated 03.12.2022, through Kwamboka Marie & Associates Advocates. He prayed for the respondents'



Response and Counterclaim to be struck out and judgment be entered for him as prayed in the Memorandum of Claim.

13. It was the claimant's averment that the respondent's refusal to listen to him indicated its actions were by malice and in bad faith. He contended that the meeting he is alleged to have been consulted in was in fact not consultative and that the respondent had, through emails, made it known that it was unwilling to have the terms of his employment altered to his detriment, without his acquiescence. He stated that the respondent's decision to terminate his contract of employment was unilateral and unlawful and he did not resign or leave employment as alleged.
14. The claimant pleaded that since the contract of employment provided for two (2) months' notice, the respondent's argument that one-month notice was sufficient is frivolous and petty. He denied that he was paid a consolidated salary and reiterated his claims as sought in the Memorandum of Claim.
15. The parties tendered their evidence before the Court and thereafter filed their respective submissions. The claimant testified to support his case and the respondent's witness (RW) was the respondent's President, Phile Mathew. The Court has considered all material on record and returns as follows.
16. To answer the 1st issue, the evidence is that the respondent employed the claimant from 11.06.2010 to 31.07.2022 as a Director in charge of Africa with seven stations under his control namely Freight Reach Kinsasha, Kampala, Kigali, Lusaka, Dar es Salaam, Nairobi and Mombasa. The evidence is that the claimant's last monthly salary was USD 4, 700.00.
17. To answer the 2nd issue, the Court returns that the contract of service was terminated by the respondent's email issued by RW dated 10.06.2022. The reason for termination was that the claimant had declined the respondent's decision that the claimant moves to Dubai Head Office and that he was unwilling to take up responsibilities for other offices in Africa. The email stated that it served as a one-month termination notice and that the claimant was to hand over to one Mr. Shams who had already reported to the Nairobi office.
18. The 3rd issue is whether the termination was unfair. The claimant's case was that the transfer to Dubai amounted to the respondent's unilateral change of the terms of service as related to place of work. The respondent's case is that as the business grew the claimant was contractually liable to be transferred to other stations. What was the contractual provision on place of work? The initial contract was dated 17.06.2010 and it stated, "Your location will be Nairobi Kenya and a detailed Job Description will be given to you when you join us. The overall role in brief will be: To head sales and operations of East Africa, starting with Kenya, Tanzania, Uganda and later any stations we add in East Africa. We may restructure your responsibilities as the stations grow." The amendment to that initial appointment letter was dated 15.10.2012. The pertinent provision stated "Brief role: To head the sales operations of East Africa, Rwanda, Zambia and later stations we add other part in Africa. We may restructure your responsibilities as the stations grow." The Court finds that as urged for the claimant, his place of work or duty station was Nairobi as per the initial letter of appointment and which was not amended at all, because, the amendment only related to the role with respect to stations under the claimant.
19. Did the respondent unilaterally change the duty station to be Dubai? By the email dated 30.05.2022, RW referred to a meeting discussions held at the Nairobi office and stated, "We feel you can do a better job for the overall development of the complete Africa offices based out of head office in Dubai, would appreciate if you can make a business proposal / plans for the same. Regarding Kenyan office operation and business, developments you can hand over to Shams and manage your existing business based out of Dubai. Awaiting your positive feedback on the same." The court has considered the words of that email and finds that contrary to the case urged for the claimant that it was a unilateral transfer decision to Dubai, RW was essentially inviting the claimant to make his views known with respect to



- the intention that he moves to Dubai. The email further set out the respondent's design of how the claimant would continue being in charge of the Africa stations while stationed in Dubai. In that regard, the claimant was invited to draw a proposal and to provide feedback. By email dated 30.05.2022 the claimant replied thanking RW for offer of the new assignment. The reply referred to the discussions in Nairobi and at which the claimant had declined the offer. The claimant stated in the email that he had developed the market since 2011 and moving would impact the business; 95% of Dubai market were traders for Africa for whom he did not have much experience and his moving would result in his poor performance; and, he did not have much interaction with trader sales team in Dubai. He awaited a response.
20. RW responded by the email of 01.05.2022 stating to the effect that relocation to Dubai was important to enhance performance. By the email dated 01.06.2022 the claimant took the view that he was being transferred to Dubai unilaterally while his contracted station of duty was Nairobi. Further, the email stated that his role in Dubai had not been disclosed. The email stated that the contract could only be changed with mutual agreement. The email stated, "If you want me to exit, just follow the correct procedure of termination of contract."
21. The respondent says it held a meeting on 10.06,2022 at which the claimant attended and the minutes are exhibited. The claimant denies that a meeting took place but looking at the flow of things, the Court returns that on a balance of probability, the meeting took place. The minutes state that the meeting was convened to review short and long term plans for respondent's growth of Africa stations and further, "It was noted that Mr. Denny Varghese has been approached severally to take up a higher position based at the HQ in Dubai which he declined and the management also took note that he had requested on mail to be terminated. It was unanimously agreed that Mr. Denny Varghese be relieved of his duties and his dues be settled upon serving notice and full handover of company properties." The Court has considered the evidence. It is returned that the respondent did not unilaterally change the place of work from Nairobi to Dubai. The proposal was made and indeed the claimant in his own words stated he declined the offer. There is no doubt that the respondent genuinely desired to effect the transfer especially that the claimant had resigned from DRC, Uganda, Rwanda, Zambia and Tanzania management and there was no replacement yet. The claimant's case that the transfer amounted to a demotion has not been shown at all because he was given an opportunity to draw a plan and proposal for his proposed new station in Dubai. The Court finds that the claimant actually requested to be terminated per contract as he was not going to take up the transfer to Dubai. The respondent proceeded to terminate the employment by serving the termination notice. The Court finds that the respondent adopted a fair procedure and the reason for termination was fair as per section 45 of the *Employment Act*, 2007. The parties appear to have decided to separate per contract in view of lack of agreement to change the work station for the claimant from Nairobi to Dubai. The only dispute then arose on computation of the claimant's final dues, the headings being as stated by the respondent in the document on final settlement dated 11. 06.2022, and, the dispute being the base monthly salary used to compute the settlement. To confirm that dispute, the claimant endorsed on the final settlement document thus "Not accepted. The working is not as per mu contract/actual salary." Accordingly, no unfair termination has been established.
22. The respondent proceeded to issue a certificate of service and computed the terminal dues. The Court finds that the respondent appears not to have used USD 4, 700.00 as last monthly salary as was required. The claimant correctly rejected the final dues and filed the suit. There being no unfair termination, the claim for compensation in that respect is declined. The residual dispute is about the correct final dues. The headings were set out in the final settlement from Nairobi office dated 10.08.2022.
23. To answer the 4th issue, the Court returns that the claimant is awarded final dues as follows:



- a. The contractual notice period was 2 months. He was given one-month notice. He is awarded USD 4,700.00 as prayed in lieu of notice.
 - b. The employer awarded 15 days gratuity for each of 12 months served making USD 4, 700/ 2 times 12 thus USD 28, 200.00 as prayed for.
 - c. House allowance and compensation for unfair termination are found unjustified. The salary was consolidated per the contract and there was no dispute or grievance in that regard throughout the service. The Court has found that the termination was not unfair.
 - d. The employer in final computation admitted 40 days of leave and is awarded at USD 6, 268.00 as prayed and submitted for the claimant.
 - e. The claimant is entitled to USD 6, 267.00 being salary for April to 10th July being USD 15, 667.00 as claimed and submitted for the claimant.
 - f. Air ticket to India USD 500.00 is acknowledged in respondent's final computation.
 - g. The respondent has exhibited the certificate of service and the same appears to have been issued.
 - h. Looking at margins of the success, the respondent to pay the claimant's costs of the suit.
24. To answer the 5th issue, the Court returns that the counterclaim will fail because the respondent terminated the contract of service and is not entitled to a month's payment in lieu of notice as claimed.

In conclusion, judgment is entered for the claimant against the respondent for:

1. The respondent to pay the claimant terminal dues of USD 55,334.00 by 01.12.2024 failing interest at court rates to be payable thereon from the date of filing the suit until full payment.
2. The dismissal of the counterclaim with costs to the claimant.
3. The respondent to pay the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 30TH OCTOBER, 2024.

**BYRAM ONGAYA
PRINCIPAL JUDGE**

