



**Dharmadhikhari v Professional Media Africa Limited (Cause
622 of 2017) [2023] KEELRC 186 (KLR) (30 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 186 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 622 OF 2017
BOM MANANI, J
JANUARY 30, 2023**

BETWEEN

NIRAJ DHARMADHIKHARI CLAIMANT

AND

PROFESSIONAL MEDIA AFRICA LIMITED RESPONDENT

JUDGMENT

1. This is a claim for compensation for unfair termination. The Claimant, who until 31st March 2017 was an employee of the Respondent, contends that the Respondent unfairly terminated his services. Consequently, he prays for an order for compensation.
2. The Respondent has disputed the claim. From the statement of defense filed, it is the Respondent's defense that the Claimant voluntarily resigned from employment in January 2017. That the Respondent's letter of 1st March 2017 was merely documenting the separation of the parties based on the initial resignation by the Claimant.

Claimant's Case

3. The Claimant avers that he was hired by the Respondent on 14th January 2013 to serve in the position of General Manager, Sales and Marketing. It is the Claimant's case that his starting salary was meant to have been Ksh. 300,000/-. However and for unexplained reasons, the Respondent stepped down this pay package to Ksh. 250,000/-.
4. The Claimant avers that he took up the appointment and served the Respondent until 1st March 2017 when he was served with a notice of termination of employment expressed to take effect on 31st March 2017. That despite their separation, the Respondent did not pay the Claimant his terminal dues.
5. The Claimant contends that termination of his contract of employment was unlawful. No reasons were given to him to justify the decision. No warning letter was issued to him beforehand. In



the Claimant's view, he was a victim of personal vendetta by a section of the management of the Respondent.

6. The Claimant states that the termination letter and email correspondence between the parties implied redundancy as the reason for his termination. Yet, there was no genuine redundancy in the Respondent Company.
7. The Claimant prays that he be paid inter alia: his salary arrears from 2013; salary for March 2017; the value of one way air fare to India for him and his family; pay in lieu of annual leave; severance pay; interest; and costs of the case. He also prays that the court grants him any other relief that is appropriate in the circumstances.

Respondent's Case

8. On its part, the Respondent does not deny employing the Claimant. The Respondent avers that although the initial contract between the parties was for two years, they continued with the employment relation thereafter. That however, the parties renegotiated the terms of their engagement, albeit orally and as a result of which the Claimant's salary was reviewed downwards to Ksh. 250,000/- per month before it was eventually adjusted to Ksh. 275,000/- per month.
9. It is the Respondent's case that the Claimant has continually received this revised pay over the years. He is therefore estopped from demanding pay in the sum of Ksh. 300,000/- as initially stipulated in the letter of offer.
10. The Respondent contends that over time, the Claimant's performance significantly dropped. That the Claimant opened business that was in direct competition with the Respondent's business and to which he seemed to have given more attention at the expense of his obligations with the Respondent. The Respondent also avers that the Claimant diverted its business to his new venture.
11. The Respondent avers that the Claimant orally informed one of the Respondent's directors that he would like to resign from the firm with effect from 31st January 2017. That the Claimant asked that this date be considered as his last day at work.
12. It is the Respondent's case that its letter of 1st March 2017 was merely documenting and formalizing the Claimant's earlier decision to resign. In allowing the Claimant to work up to 31st March 2017, the Respondent states that it was merely being accommodative of and compassionate to the Claimant notwithstanding his earlier intimation that he will exit employment on 31st January 2017.
13. The Respondent asserts that it did not terminate the Claimant as he alleges. The Claimant voluntarily resigned from employment. That the Claimant's terminal dues were accordingly computed to include: March 2017 salary; and annual leave dues.

Issues for Determination

14. From the evidence and pleadings, the following are the issues for determination:-
 - a) Whether the Claimant's contract was terminated through resignation or the unilateral decision of the Respondent.
 - b) If the termination was through the unilateral decision of the Respondent, whether it was lawful.
 - c) Whether the parties are entitled to the remedies pleaded.



Analysis

15. During the trial, both parties gave oral evidence. In addition, they adopted their written witness statements and produced copies of documents attached to their respective lists of documents as exhibits. The evidence reiterates the contents of the parties' pleadings.
16. Under the prevailing legal architecture in Kenya, an employer is, as a general rule not entitled to terminate a contract of service without justifiable cause. The situation is not exactly the same for an employee wishing to exit employment. Such employee has no obligation to give reasons for his decision. All that he needs to do is to issue the employer with a resignation notice in terms of section 35 of the [Employment Act](#) (EA) or pay to the employer an amount equivalent to his salary for the notice period (see *Owade v Chandaria Industries Limited* (Cause 1747 of 2017) [2021] KEELRC 4 (KLR)).
17. Section 43 of the EA places the burden of proving the validity of the decision to terminate an employment relation on the employer. To be able to discharge this burden, the employer must, in terms of section 45 of the EA demonstrate that he had a valid reason to terminate the employee. Such reason may be that the employee is guilty of gross misconduct or poor performance or that he has suffered physical incapacity that makes it impossible for him to continue being productive at work. Termination of employment may also be necessitated by the employer's operational needs which occasion a redundancy declaration under section 40 of the EA.
18. In addition to establishing any one or more of the foregoing grounds, the employer must demonstrate that he has followed the procedure for release of the employee that is prescribed by law. The procedure for redundancy is significantly different from that of termination for reasons of physical incapacity, poor performance or misconduct. For a discussion of these principles see *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR, *Paul Wachiuri Ndonga v Keroche Breweries Limited* [2018] eKLR and *Emmanuel Limo Chang'oka v Plan International Kenya* [2022] eKLR.
19. The Claimant suggests that the Respondent's letter terminating the contract of employment between them as read with the email correspondence between the parties insinuated that there was a redundancy at the workplace. However, the defense denies this fact. Instead, it is suggested in the statement of defense that the Claimant resigned from employment.
20. Despite the position advanced by the Respondent in its defense, the email by the Respondent to the Claimant dated 20th March 2017 and which was produced in evidence indicates that one of the reasons why the Claimant's employment was terminated was that the Respondent was experiencing financial constraints. As a result, the Claimant had to be let go.
21. However, the Respondent did not provide evidence to demonstrate the nature of the financial constraints it was facing at the time to justify its decision to terminate the Claimant's contract. Second, even if there was a valid reason for declaration of a redundancy, there is no evidence that the procedure for declaration of redundancy set out under section 40 of the EA was followed. Therefore, there is no evidence that the purported redundancy at the Respondent's workplace was proved both on account of existence of the grounds and procedure for redundancy.
22. Away from the alleged redundancy, the Respondent also suggested that the Claimant resigned from employment at the close of January 2017 albeit orally. This information can be discerned from the letter of termination issued to the Claimant dated 1st March 2017.
23. From the said letter, the Respondent appears to suggest that the Claimant had indicated his desire to resign from employment effective 31st January 2017. Yet, both parties agree that the Claimant was still serving the Respondent as at 1st March 2017 when the latter issued him with the separation letter.



24. In law, an employee's resignation takes effect immediately the notice of resignation is issued or on such later date as intimated by the employee. The validity of the resignation does not depend on the employer accepting the resignation notice (see *Kennedy Obala Oaga v Kenya Ports Authority* [2018] eKLR).
25. If indeed the Claimant had resigned on 31st January 2017 as alleged by the Respondent and the parties intended that this marks the close of their relation, it would not be expected that the Claimant would still be on duty on 1st March 2017, almost two months down the line. If the alleged resignation took effect on 31st January 2017 as asserted by the Respondent but the Claimant continued working up to 1st March 2017, then it is reasonable to infer that the parties impliedly revived the employer-employee relation after it had lapsed on account of the alleged resignation on 31st January 2017.
26. In so far as the parties agree that their factual separation occurred on account of the Respondent's communication of 1st March 2017 long after the date of the purported resignation on 31st January 2017, the termination of the contract cannot relate back to the alleged resignation on 31st January 2017. Therefore, the question whether the Claimant lost his employment on 31st March 2017 on account of his earlier resignation does not arise.
27. The above being the position, it follows that the closure of the employment relation between the Claimant and Respondent was for reasons other than redundancy or resignation. Under section 41 of the EA, it was for the Respondent to justify the reason for termination of the contract, whatever it was.
28. The Claimant asserts that on 1st March 2017, he was handed a letter of even date terminating his services with the Respondent as from 31st March 2017. He asserts that he was not given valid reasons for the decision to terminate his employment. He was not given any communication either in the form of a warning or otherwise before the decision to terminate his contract was arrived at. In effect, the Claimant has placed before the court evidence suggesting that his termination was, on the face of it, not in line with section 41 of the EA. This evidence constitutes prima facie evidence under section 47 of the EA demonstrating that the contract of employment was terminated unlawfully.
29. In view of the prima facie evidence pointing to the unlawfulness of the decision to terminate the Claimant's employment, the burden of proof shifted onto the Respondent to justify the termination in terms of section 43 of the EA. In an effort to discharge this burden, the Respondent's witness stated that the Claimant had opened a business that was in direct competition with the Respondent's business. That the Claimant had become negligent at work by failing to collect revenue that was due to the Respondent and sometimes by being absent from work without valid cause.
30. Despite these assertions, no cogent evidence was laid before the court to confirm that indeed the Claimant was running a business that was in direct competition with that of the Respondent. Similarly, no details of the Claimant's alleged absenteeism from duty without justifiable cause were tendered. The only document that the Respondent relies on to suggest unwarranted absence from duty by the Claimant is a text showing that the Claimant had left the country at some point to seek medication in India. Such cannot be evidence of absence without lawful reason.
31. The court having rejected the alleged redundancy and resignation theories by the defense, the Respondent was expected to advance some other valid reason for its decision to terminate its contract of employment with the Claimant. It has failed to do so.
32. With respect to the requirement for due process, there is no evidence that the Respondent raised the questions concerning the Claimant's misconduct with him. There is no evidence that the Claimant



was afforded the opportunity to react to the accusations against him in terms of section 41 of the EA. Clearly, no due process was followed before the Claimant's employment was terminated.

33. The Respondent argues that it convened a meeting with the Claimant on 30th March 2017 during which the procedural issues contemplated under section 41 of the EA were allegedly addressed. From the correspondence that has been tendered in evidence, the purpose of the meeting of 30th March 2017 was to procure a mutual separation package. It was not a disciplinary session in terms of the law. The decision to terminate the Claimant had already been reached and communicated on 1st March 2017. It is incredible that the Respondent would suggest that the meeting of 30th March 2017 was intended to serve the same purpose as the one contemplated under section 41 of the EA.
34. From the foregoing analysis, it becomes clear that the contract of employment between the Claimant and the Respondent was not terminated through resignation by the Claimant. It was terminated through the unilateral but unjustified decision of the Respondent. At the same time, the Respondent's decision was made without regard to the procedural strictures that are prescribed by law. Accordingly, I declare the decision to terminate the Claimant's contract of employment unlawful.
35. The last issue for determination is whether the parties are entitled to the reliefs pleaded. Having found that the Claimant's employment was unlawfully terminated, the reliefs sought by the Respondent cannot issue.
36. On his part, the Claimant has asked for a number of reliefs. These are as set out in the amended Memorandum of Claim.
37. First, he prays for salary for March 2017. There is evidence that although the notice to terminate the contract was issued on 1st March 2017, it was to take effect on 31st March 2017. Meanwhile, the Claimant was required to continue serving during the notice period. He was therefore on duty in March 2017 and was entitled to salary for this period. Indeed, the Respondent's notice dated 1st March 2017 acknowledges that the Claimant was entitled to salary for March 2017. Accordingly, I award the Claimant Ksh. 300,000/- being salary for March 2017.
38. Second, the Claimant has prayed for leave dues. In the Respondent's notice dated 1st March 2017, the Respondent concedes this claim to the extent of Ksh. 192,500/-. This is the same figure prayed for by the Claimant. Therefore, I consider that the prayer for leave dues of Ksh. 192,500/- is uncontested. It is therefore granted.
39. The Claimant has prayed for three (3) months' salary in lieu of notice to terminate his contract of employment. He relies on clause five (5) in the letter of offer dated 14th January 2013 to support this prayer. The clause provides that in the event either party wishes to terminate the contract, he would have to give notice of three (3) months to the other. Alternately, such party will have to pay the other an amount equivalent to the Claimant's salary for three (3) months.
40. I note that the contract of employment between the parties was initially for two (2) years. However, they continued with the employment relation after the lapse of this period. There was no fresh contract to stipulate new terms of engagement between the parties. In the absence of a fresh contract varying their terms of engagement, it is deemed that the parties continued to engage on similar terms as those specified in the contract dated 14th January 2013.
41. The Claimant was therefore entitled to three (3) months' notice before termination. In the alternate he was entitled to be paid salary for three (3) month.
42. I note from the notice of termination dated 1st March 2017, that the Claimant was given one month's notice to terminate his contract. By the notice, the Claimant's employment was to end on 31st March



2017. The notice was therefore short by two (2) months. Consequently, I award the Claimant Ksh. 600,000/- to cover the two months shortfall in the notice to terminate.
43. The Claimant has also prayed for salary arrears being the difference between what the parties had initially agreed as the monthly salary (Ksh. 300,000/-) and what was actually paid (Ksh. 250,000/- and thereafter Ksh. 275,000/-). Although he had pleaded Ksh. 50,000/- as the shortfall in salary per month, during his evidence in court the Claimant appeared to indicate that he was underpaid by Ksh. 25,000/- per month for only part of the term that he served the Respondent.
44. The fact that the Claimant was being paid less than Ksh. 300,000/- is confirmed by the Respondent through its pleadings. In its defense, the Respondent states that between March 2013 and June 2014 the Claimant was receiving monthly salary of Ksh. 250,000/-. From July 2014 to the date of termination of his employment, the Respondent pleads that the Claimant was receiving salary of Ksh. 275,000/-. I will therefore consider the figures given by the Respondent as representing the true underpayments to the Claimant.
45. The Respondent justifies the changes to the Claimant's salary on account of an oral agreement between the parties to step down the payments. The Claimant disputes this assertion.
46. Under section 10(5) of the EA, if the Respondent desired to vary the Claimant's emoluments to the detriment of the Claimant, the latter needed to have been consulted on the matter first and the agreed variations ought to have been communicated to him in writing. I did not see any evidence that the Respondent complied with these requirements of the law when varying the Claimant's salary.
47. The Respondent takes the position that the Claimant acquiesced to the reduced payments and therefore lost the right to recover the underpayments. In the Respondent's view, the claim for underpayments has been defeated by the doctrine of laches. I do not agree with this argument.
48. A litigant cannot invoke the doctrines of the law of equity to justify his failure to uphold the law. Equity cannot be resorted to as a platform for avoidance of a statutory obligation for equity follows the law. The Respondent cannot avoid the express statutory obligation under section 10(5) of the EA by pleading acquiescence and laches.
49. It ought to be noted that the Respondent did not plead limitation as a defense in the cause. It is therefore doubtful that the issue of laches can be raised in the manner that is proposed by the Respondent. As was observed in the case of *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR, it is impermissible for a litigant to hang on a defense that was not expressly pleaded to advance his case.
50. In any event, the current suit was filed on 31st March 2017, the date the termination of the Claimant's contract took effect. In terms of the decision in *G4S Security Services (K) Limited v Joseph Kamau & 468 others* [2018] eKLR, this was within three years of the Claimant's termination. The issue of laches does not therefore arise.
51. I will therefore award the Claimant Ksh 50,000/per month between March 2013 and June 2014 to cover the shortfall in his salary for that period. This works out to Ksh. 800,000/.
52. Between July 2014 and February 2017, the Claimant was underpaid by a margin of Ksh. 25,000/- per month. I accordingly award him this sum per month for the duration under consideration. This works out to Ksh. 800,000/-. Therefore, the total award for underpayments between March 2013 and February 2017 is Ksh. 1,600,000/-.
53. As the Respondent did not follow the redundancy procedure in terminating the Claimant, the resultant decision to terminate the Claimant's contract was unlawful. Consequently, the reliefs that



the Claimant is entitled to do not fall under section 40 of the EA. They fall under section 49 of the EA which does not recognize severance pay as one of the remedies for unlawful termination. Therefore, I decline the prayer for severance pay.

54. The prayer for one way air fare for the Claimant and members of his family back to India was not pursued at the trial. There was no evidence tendered in respect of this claim either orally or in the Claimant's written witness statement. Consequently, it is declined.
55. The Claimant has sought for any other reliefs that the court may deem suitable to grant. Under this omnibus prayer, the court is empowered to issue what are often described as consequential reliefs (see *Timsales Limited v Samuel Kamore Kihara* [2016] eKLR and *Nkaduda v County Assembly of Tana River & 4 others* (Constitutional Petition 006 of 2021) [2022] KEELRC 1605 (KLR)).
56. I have already determined that the Claimant was unfairly terminated. An order for compensation for unfair termination is a consequential relief to a declaration that termination of employment was unfair. Consequently, I will award the Claimant compensation equivalent to his salary for three (3) months as compensation for unfair termination. This works out to Ksh. 900,000/-.
57. In making this award, I have considered the principles that guide the award of compensation for unfair termination under section 49 of the EA. I have taken into account the fact that the Claimant did nothing to contribute to the termination of his employment.
58. I award the Claimant interest on the sums awarded at court rates to run from the date of institution of the case till payment in full.
59. The award is subject to the applicable statutory deductions under section 49 of the EA.
60. I award the Claimant costs of the case.

Summary of Award

- a. The Respondent's termination of the Claimant's contract of employment is declared unlawful.
- b. The prayers by the Claimant for severance pay is declined.
- c. The Claimant is awarded leave dues of Ksh. 192,500/-.
- d. The Claimant's prayer for one way air tickets to India for him and members of his family is declined.
- e. The Claimant is awarded salary for March 2017 in the sum of Ksh. 300,000/-.
- f. The Claimant is awarded pay equivalent to his salary for two (2) months in lieu of the notice to terminate, that is to say, Ksh. 600,000/-.
- g. The Claimant is awarded salary arrears of Ksh. 1,600,000/-.
- h. The Claimant is awarded compensation for wrongful termination equivalent to his gross monthly salary of three (3) months, that is to say, Ksh. 900,000/-.
- i. The Claimant is awarded interest on the amounts awarded at court rates to run from the date of institution of the case till payment in full.
- j. The award is subject to the applicable statutory deductions under section 49 of the EA.
- k. The Claimant is awarded costs of the case.

DATED, SIGNED AND DELIVERED ON THE 30TH DAY OF JANUARY, 2023

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

