



**Kalume v Tamarind Group (Miscellaneous Application E549 of 2020)  
[2023] KEELRC 739 (KLR) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 739 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E549 OF 2020**

**B ONGAYA, J  
MARCH 24, 2023**

**BETWEEN**

**MATHEW MAJALIWA KALUME ..... CLAIMANT**

**AND**

**TAMARIND GROUP ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed the statement of claim on September 21, 2020 through M/s Martin Maitha & Associates Advocates. The claimant's case is pleaded as follows. By the letter dated June 16, 2017 the respondent employed the claimant effective June 1, 2017 as an Account. By the letter dated January 30, 2019 he was promoted to the position of Unit Accountant, Tamarind Tree Hotel. He was confirmed to that position by the letter dated September 26, 2019 after successful completion of the six months' probation period. He served diligently with a clean record free from disciplinary allegations. On March 25, 2020 the respondent shut down the Tamarind Tree Hotel in line with the Presidential directives issued to combat the spread of Covid 19 disease which was declared a global pandemic. The claimant continued to work from home as directed by the respondent. At the end of April 2020 the respondent unilaterally reviewed the claimant's basic salary from Kshs, 100,000.00 to Kshs 60, 000.00 through a letter alleged to be dated March 24, 2020 and, a further reduction of the basic salary to Kshs 48, 000.00 by the letter dated April 20, 2020. The claimant alleges he was threatened to sign the two letters reducing his salary because he was told he would otherwise not receive salary at all. He states the salary reduction was contrary to the *Employment Act, 2007* as it was essentially the respondent's unilateral decision.
2. The claimant's further case is as follows. On May 6, 2020 he attempted to log in to his email and the respondent's accounting system to continue with his normal duties as assigned but he was unable to do so. The response he received was that his access had been blocked by the system administrator. On the morning of May 7, 2020 the respondent summoned the claimant to a meeting at the Carnivore Restaurant in Nairobi at which he was given a letter dated April 29, 2020 purportedly terminating his



- employment on account of being frustrated automatically. The explanation was that the respondent would cease operations indefinitely because of the adverse challenges brought about by the covid-19 disease and the government directives issued to combat the spread of the covid – 19. Thereafter within 30 minutes the claimant was removed from the respondent’s workplace WhatsApp group. He handed over all company property including the uniform and laptop on Monday May 11, 2020 so that he could not work up to May 31, 2020, the respondent’s designated claimant’s last working day. The claimant was shocked when he saw an advertisement that the respondent was reopening Tamarind Tree Hotel on Tuesday June 2, 2020, a mere day after his contract of service had been deemed terminated.
3. It is the claimant’s case that the termination was unfair and unlawful upon the following particulars:
    - a. The claimant submitted a handed over report by e-mail on May 13, 2020 while respondent was not in fact ceasing operations and it demonstrated malice.
    - b. No justifiable reason for terminating the contract of service was given.
    - c. Termination was without a chance to be heard.
  4. The claimant collected his terminal dues on July 30, 2020 being Kshs 23, 050.00 for 15 leave days and he claims additional 27 leave days due, not taken, and unpaid for. The contract of employment dated June 17, 2017 provided for three months’ termination notice yet he was given only one-month notice and he claims outstanding 2-months at Kshs 200,000.00. The claimant claims Kshs 61, 538.00 accrued pension benefits but which the respondent failed to remit. The claimant further claims as follows:
    - a. Underpayment due to unfair unilateral salary reduction from Kshs 100,000.00 thus March 2020 Kshs 40, 000.00; April 2020 Kshs 52, 000.00; May Kshs 52, 000.00 and, total being Kshs 144,000.00.
    - b. Damages for unfair termination Kshs 1, 200,000.00.
    - c. 27 accrued leave days Kshs 90,000.00.
    - d. Service pay following redundancy  $Kshs 100,000.00 \times 30/30 \times 3\text{-years} = Kshs 300,000.00$ .
  5. The claimant prayed for judgment against the respondent for:
    - a. A declaration the termination was unprocedural and unfair.
    - b. A declaration that the respondent breached the claimant’s statutory obligations under the Constitution and the Employment Act, 2007.
    - c. An order directing or compelling the respondent to pay the claimant terminal dues of Kshs 1, 995, 538.00 as claimed
    - d. Certificate of service to be delivered per section 51 of the Act.
    - e. Costs plus interest.
  6. The respondent filed the memorandum of response dated May 3, 2021 through Obura Mbeche & Company Advocates. The respondent admitted employing the claimant as pleaded for the claimant. The respondent pleaded as follows. The claimant agreed to reduction of his salary by reason of signing the letters of March 24, 2020 as signed on March 25, 2020 and also the one dated April 20, 2020 as signed on April 30, 2020. As at April 2020 the respondent’s business shut down due to effects of covid-19 pandemic and it was unforeseeable situation and the contract of service could not be fulfilled. Thus the termination letter dated April 29, 2020 issued terminating the contract on account of automatic frustration. It is urged that the three months’ notice was not due by reason of frustration.



- Underpayment as claimed was not due because the claimant agreed to the salary reduction. He took leave and was also paid and the claim for leave is not justified. The respondent prayed that the suit be dismissed with costs.
7. The claimant testified to support his case and the respondent's witness was Maurine Namiroi(RW). Final submissions were filed for parties. The court has considered all the material on record and returns as follows.
  8. To answer the 1<sup>st</sup> issue the Court returns that there is no dispute that parties were in a contract of service and the contract was terminated by the letter relied upon by the respondent.
  9. To answer the 2<sup>nd</sup> issue, the court returns that as submitted for the respondent, the claimant freely signed for the salary reduction. It is not for the court to rewrite the parties' contracts freely entered into. Thus, the claimant's contractual last monthly salary as signed for was Kshs 48,000.00. The court returns that the claims and prayers for underpayment will collapse as unjustified.
  10. To answer the 3<sup>rd</sup> issue, the court returns that the respondent has established a valid reason for termination, namely that the covid -19 situation, and which was unforeseeable, made it impossible for the respondent to retain the claimant in service as the business shut down. The court finds that whereas the claimant alleges that the business reopened three days after taking effect of his termination, there was no material evidence showing that the reopening revived the position he held as tenable. In the circumstances, frustration as a reason for termination is found to have been valid as at the time of termination.
  11. To answer the 4<sup>th</sup> issue for determination, the court returns that the procedure for termination was unfair. The reason for termination being frustration on account of covid-19 situation, the court finds that the same was not attributable to the claimant as it amounted to redundancy as per definition in section 2 of the *Employment Act, 2007*. The respondent was bound to comply with section 40 of the *Employment Act, 2007* and it has not been shown that such compliance was impossible (equally frustrated) as urged for the respondent. The notice to the area labour officer and the claimant on the extent and reasons for redundancy was never served at all. The claimant was not prepared for the separation. It was unfair procedure.
  12. The court has considered provisions of section 49 of the Act on award of compensation for unfair termination. The claimant legitimately expected to continue in employment or to be removed in accordance with the contractual and lawful procedure. He had three years of clean record of service. He had been considerate in understanding the difficult times and conceding to pay cut on two occasions. The only mitigating factor is that the reason for termination was valid. The court has considered those circumstances and award 8 months' compensation making Kshs 48, 000.00 x 12 = Kshs 576, 000.00. The court also awards Kshs 96, 000.00 being the unpaid two months' salaries in lieu of the residual two months' of termination notice. While making that award the court upholds the submission for the respondent that covid-19 situation did not suspend the contractual and statutory due procedures in terminating a contract of service as was held in *Kenya Union of Commercial and Allied Workers -Versus- London Distillers (K) Ltd* [2021]eKLR (Onyango J), *Anytime Limited -Versus- Fredrick Mutobera Omuraya* [2022]eKLR (Baari J) and *Helen Mary Aluoch Havonga -Versus- Spire Properties Kenya Ltd t/a Diani Reef Beach Resort & Spa* [2022] eKLR (Ongaya J).
  13. On leave, the claimant testified that he had accrued 42 leave days and was only paid 15 days so that he claimed 27 days. It is not clear how the claimant arrives at the 27 days as claimed. The record shows he was paid 15 days of leave and took 32 leave days on March 25, 2020. On a balance of probability, the claim will fail as not established.



14. Parties recorded a consent on the claim for pension.
15. The claimant had served for 3 years and is awarded Kshs 72,000.00 in severance payment at 15 days for each year served per section 40 of the Act. He is entitled to a certificate of service.
16. The prayer for declaration that the claimant's statutory obligations were breached will fail as no such obligations were cited or shown to exist and then, breached.
17. The claimant has substantially succeeded and is awarded costs of the suit.
18. In conclusion judgment is hereby entered for the claimant against the respondent for:
  - a. The declaration the termination was unfair for want of due procedure.
  - b. The respondent to pay the claimant a sum of Kshs 744, 000.00 (less PAYE) by May 2, 2023 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
  - c. The respondent to deliver the certificate of service by May 2, 2023.
  - d. The respondent to pay costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS  
FRIDAY 24<sup>TH</sup> MARCH, 2023**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

