



**Musili v Growne Plaza Nairobi (Cause 1968 of 2017)
[2023] KEELRC 1035 (KLR) (26 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1035 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1968 OF 2017
JK GAKERI, J
APRIL 26, 2023**

BETWEEN

KENNEDY MUSILI CLAIMANT

AND

GROWNE PLAZA NAIROBI RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by Memorandum of Claim filed on 8th October, 2017 claiming unlawful and unfair refusal to pay terminal dues and/or benefits.

The Claimant's case is pleaded as follows;

2. The Claimant avers that he was employed by the Respondent effective 1st September, 2013 at Kshs.175,000.00 per month inclusive of housing allowance. The contract was terminable by one (1) months' notice or pay in lieu of notice by either party during probation and after confirmation.
3. It is the Claimant's case that his overall performance was satisfactory.
4. That on 1st October, 2015, he was promoted from Front Office Manager to Rooms Division Manager at Kshs.230,000/= per month.
5. That the Claimant resigned on 6th March, 2017 by giving a month's notice after having worked for 3 years and the resignation was accepted via letter dated 8th March, 2017.
6. That the Respondent failed, refused and neglected to pay terminal dues, salary for the month of March 2017 in lieu of notice and 14 days leave, having cleared with departments.



7. The Claimant prays for:
- i. A declaration that the Respondent's refusal to pay terminal dues was unfair and unlawful.
 - ii. Kshs.230,000/= being unpaid salary for the month of March when notice was given.
 - iii. Kshs.123,847/= being 14 days salary for leave days accrued on pro rata basis.
 - iv. Pension with Jubilee Insurance.
 - v. Letter of recommendation.
 - vi. Any other or further relief that this court may deem fit and just to grant.

Respondent's case

8. In its unstamped response to the Memorandum of Claim and Counter-claim dated 8th November, 2017, the Respondent admits that the Claimant was its employee and resigned on 6th March, 2017 as alleged.
9. The Respondent avers that at the time the Claimant resigned, there was an on-going audit of the internal systems and processes due to rampant fraud perpetrated by employees and acceptance of the Claimant's resignation was without prejudice.
10. That the Respondent forwarded the investigation summary report to the Claimant's counsel.
11. In its Counter-claim, the Respondent avers that it conducted an audit of its system and processes which confirmed that the Claimant superintended over financial loss amounting to not less than Kshs.1,813,742/= which it claims from the Claimant
12. That the Claimant was given an opportunity to respond to the audit queries but neglected or refused to do so.
13. The Respondent prays for;
- i. Kshs.1,813,742/=
 - ii. Costs of this suit.

Claimant's evidence

14. On cross-examination, the Claimant confirmed that he did not understand what 'without prejudice' meant. That he was given an opportunity to respond to the audit report but did not as he was no longer an employee of the Respondent.
15. On re-examination, the witness stated that the audit was conducted after the Claimant left employment.
16. It was his testimony that all adjustments made were approved by the General Manager who made all decisions on credit and would sign all documents prepared by the Claimant.
17. Relatedly, the Respondent had a Financial Controller and the Claimant was cleared by all departments.
18. It was the Claimant's testimony that his resignation was accepted with immediate effect on 9th March, 2017.



Respondent's evidence

19. RWI confirmed that the investigation had been on-going from February 2017.
20. RWI stated that he was unaware whether a debt incurred by a guest in February 2017 was paid.
21. That the audit report dated 24th October, 2017 was prepared by one Mr. George.
22. It was the witness's testimony that the Claimant owed the Respondent more than the company owed him.
23. That the Claimant was invited to collect his dues but the witness could not tell who invited the Claimant.
24. He confessed that since he was not the one who prepared the audit report, he was unaware whether money was lost.
25. That the Claimant checked out a guest on 6th February, 2017.
26. RWI testified that a guest could stay at the hotel without payment if someone did it in the system.
27. That the witness was unaware whether the General Manager was aware on the non-payment.
28. Although the witness testified that the Claimant generated the Tax Invoice dated 16th January, 2017, he could not tell when it was printed and whether the credits were more than the charges.
29. The witness admitted that the Claimant was entitled to leave days.
30. RWI, Mr. George Ekuruh testified that he prepared the audit report and took 6 weeks to audit the system from March 2017. That he reviewed the history and could not delete entries, though the Claimant could.
31. The witness was emphatic that he did not report that any loss ensued.
32. That he printed the tax invoice and did not engage the Claimant though he engaged the General Manager in March 2017.
33. That he looked at the entire system and could not answer the question whether money was lost.
34. The witness testified that only 4 pages of the audit report were in court out of 39 pages.

Claimant's submission

35. The Claimant's counsel identified three issues for determination, namely;
 - i. Whether there was an employer-employee relationship between the parties.
 - ii. Whether the Claimant is entitled to the salary and leave days.
 - iii. Whether the counter-claim had been proved.
36. The first issue was uncontested by the Respondent and nothing turns on it.
37. As regards the 2nd issue, counsel relied on paragraph 2 of the resignation letter and the Respondent's response to urge that the Claimant had by his letter given a one (1) month's notice but the Respondent opted out of the notice issued by the Claimant.
38. Counsel submitted that the Claimant was invited on 7th July, 2017 to clear and did so.



39. That having been cleared by all departments, the Claimant was entitled to final pay.
40. As regards the counter-claim, counsel submitted that although the audit by the Respondent commenced before and continued after the Claimant's resignation, the Respondent did not involve him and thus the Respondent had no issue with him before his resignation.
41. That RWI was unable to establish if money was lost and if the Claimant was responsible.
42. Counsel urged that the counter-claim lacked merit.
43. Reliance was made on the sentiments of Madan J. in *CMC Aviation Ltd v Kenya Airways (cross air Ltd)* [1978] eKLR to urge that averments were not evidenced and had to be proved or disproved.

Respondent's submissions

44. Counsel for the Respondent identified three issues for determination, namely; effect of the resignation letter and entitlement to salary for March 2017, entitlement to *pro rata* leave and counter-claim.
45. On the resignation letter, counsel relied on paragraph (1) of the letter to submit that the Claimant resigned from employment on 6th March, 2017 and the Respondent understood it as such and was accepted on the same day. Counsel urged that the words effective today meant with immediate effect.
46. The decision in *Chadnick Omondi Okumu V Uchumi Supermarkets Ltd* (2022) eKLR as well as the sentiments of Rika J. in *Edwin Beiti Kipchumba V National Bank of Kenya Ltd* (2018) eKLR were relied upon to urge that the Claimant had no claim for salary for the month of March 2017.
47. On notice and/or payment in lieu of notice, reliance was made on the sentiments of the court in *Owade v Chandaria Industries Ltd* [2021] KEELRC 4 (KLR) and *Richard Obiero v Nyali Golf and Country Club Ltd* [2020] eKLR.
48. The court was urged to award one (1) month's salary to the Respondent.
49. As regards prorated leave, counsel submitted that the circumstances in which the Claimant resigned should disentitle him to terminal benefits as he resigned to avoid the risk of disciplinary action against him as he was aware of the audit and the resignation was accepted without prejudice and the report would determine whether terminal dues were payable or not.
50. Reliance was made on the decision in *Kennedy Obala Oaga v Kenya Ports Authority* [2018] eKLR to urge that gross misconduct may disentitle an employee terminal dues.
51. The court was urged to allow the counter-claim.

Determination

52. The issues for determination are:
 - i. Whether the Claimant resigned on 6th March, 2017 or gave a one (1) month's notice as provided by the contract of employment.
 - ii. Whether the Claimant is entitled to one (1) month's salary and pro rata leave.
 - iii. Whether the Respondent's counter-claim is merited.
53. As regards the resignation, while the Claimant's counsel submitted that he had given notice in accordance with the employment contract, the Respondent's counsel submitted that the resignation was immediate.



54. In order to determine this critical issue, it is necessary to paraphrase the Claimant’s letter of resignation.

55. The resignation letter reads:

“Kennedy Musili,

Rooms Division Manager,

Crowne Plaza Nairobi.

To: Mr. Anthony Ngunga,

General Manager,

Crowne Plaza Nairobi.

Date 6th March 2017

Dear Sir,

Ref: RESIGNATION

Please accept this letter as my formal resignation from my role as Rooms Division Manager effective today: reference to the terms and conditions in my contract.

In order to ease the transition after my departure, I am happy to assist you with any training tasks during my final weeks on the job. I intend to leave thorough instructions and up-to-date records for my replacement.

I would like to take this opportunity to thank Crowne Plaza Nairobi for the knowledge and experience I have gained by working here. I am very grateful for the time I have spent on our team and the professional relationships, I’ve built. It’s been a pleasure working for you, and I wish this organisation and the team the best in future.

Sincerely,

Signed

Kennedy Musili”

56. From the foregoing, it is decipherable that:

- i. The Claimant’s resignation letter was premised on the terms and conditions of the contract of employment between the parties dated 29th July, 2013.

Clause 8 of the contract provided for termination by either party’s one month’s in writing or pay in lieu of notice.

The Claimant was aware of this provision and it would appear that he premised his resignation on it on all fours. By making express “reference to the terms of conditions in my contract” the Claimant, it is surmisable was referring to clause 8 of the letter of Appointment on the one (1) month’s notice and as he did not pay the one (1) month’s salary and as it demanded by the Respondent in its letter dated 9th March, 2017, the Claimant was entitled to assume that Respondent understood the contents of letter he contemplated. If the resignation was immediate as the Respondent’s counsel submitted, the second paragraph of the Claimant’s letter would be ineffectual. This paragraph would appear to reveal that the Claimant envisioned remaining in employment for the next few weeks which explains his offer to assist in the training tasks for a smooth transition. The undertaking to leave “thorough



instructions and up-to-date records for my replacement” is unambiguous that the Claimant was not in hurry to leave and appear satisfied that he had done a good job and wanted the same sustained.

- ii. The last paragraph of the letter shows that the Claimant appreciated the opportunity he had been accorded by the Respondent to serve as its employee and wished it well in future.
- iii. The entire letter creates an impression that the Claimant was leaving the Respondent’s employment a happy person who was ready and willing to assist in ensuring a smooth transition.

If the resignation was immediate as counsel for the Respondent invited the court to believe, it is inconceivable how the Claimant would offer to assist training and giving thorough and up-to-date records while out of the Respondent’s office and employment.

- iv. The second paragraph of the Claimant’s letter is written in a futuristic manner which is inconsistent with the Respondent counsel’s submission that the resignation was immediate.
- v. Finally, the Respondent’s letter of “acceptance” of the Claimant’s resignation, made no reference to clearance which was undertaken 4 months later. Contrary to the Respondent counsel’s submission that the Claimant resigned on account of the on-going audit, the Claimant admitted that he was aware of the audit but had not been questioned by anyone or inquiries made. RWI confirmed on cross-examination that the investigation had been going on since February 2017. RWI, on the other hand confirmed that he was engaged and commenced the audit in March 2017 but was reticent on the actual date of engagement.

57. From the record, there is no evidence to demonstrate that the Claimant resigned on account of the on-going audit. At any rate, he had neither been questioned nor implicated as his comment on the “acceptance” of his resignation attests.

58. More significantly and puzzling, the Claimant was cleared by all departments on 7th July, 2017 long after the audit had been completed.

59. For undisclosed reason(s) the Respondent cleared the Claimant and the only outstanding issue was terminal dues. It is unclear why he was not confronted with the queries on the date of clearance.

60. Indeed, there are no formal charges or queries against the Claimant on record. As RWI confirmed, the Audit report was purposely a defence to the Claimant’s case as opposed to an indictment on his part.

61. Finally, the Respondent’s acceptance letter dated 9th March, 2017 was of no consequence as the Claimant’s resignation had already taken effect and required no acceptance (with or without conditions) nor rejection.

62. The court is guided by the sentiments of the court in [*Edwin Beiti Kipchumba V National Bank of Kenya Ltd*](#) (*Supra*) as follows;

“Resignation by an employee from employment, is basically termination of employment at the instance of the employee. It is a unilateral act. The [*Employment Act*](#) does not require the employer to accept a notice of termination issued by the employee for that notice to take effect”.

63. For the above-stated reasons, the court is satisfied and finds that the Claimant has demonstrated that the Respondent denied him the opportunity to serve the notice period as envisaged by his letter of resignation which entitles him to pay for one (1) month.



64. The Respondent appear to have misconstrued the Claimant's letter.
65. The foregoing disposes of the 1st issue and the second as it partly relates to the one month salary.
66. I will now proceed to determine whether the Claimant is entitled to pro rata leave.
67. The Claimant prays for salary for 14 days leave accrued on pro rata basis.
68. From the written statement, it is unclear as to when the days accrued and why they are fourteen (14).
69. Under Clause 9 of the contract of employment, the Claimant was entitled to 26 working days, paid leave, excluding offdays and public holidays.
70. Although neither the written nor the oral testimony particularizes the essentials of the leave days claimed and when they accrued, the claim was not expressly denied by the Respondent and more significantly, RWI admitted on cross-examination that the Claimant was entitled to leave days.

The prayer for leave days is granted.

71. As regards the Counter-claim, the Respondent is claiming the sum of Kshs.1,813,742.00 as financial loss during the period the Claimant was a Manager.
72. In his response to the Counter-claim dated 26th October, 2020, the Claimant denied having superintended over the alleged loss or other wrong doing and prayed for its dismissal with costs.
73. In support of the claim, the Respondent provided an unentitled document signed by RWII on 24th October, 2017 and a Tax Invoice dated 16th January, 2017 and printed by RWII on an unknown date.
74. The alleged audit report is to all intents and purposes not a report but a 4 pages of document.
75. For unexplained reason, the Respondent found it unnecessary to file the 39 page report which would have contextualised the alleged loss during the Claimant's superintendence. The 4 pages on record lack coherence and are difficult to contextualize and analyse. By opting not to file the audit report, the Respondent denied itself critical evidence in prosecuting its counter-claim.
76. Similarly, the Tax Invoice is a standalone document and lacks a contextual basis or supportive evidence.
77. Neither the 4 pages nor the Tax Invoice clearly show the total amount allegedly lost, how the loss occurred and how it was captured in the Respondent's books of accounts. This position is reinforced by RWI's testimony that he could not tell whether money was lost. He could not confirm whether credits were more than charges. Similarly, RWI could not confirm whether loss occurred. Finally, RWII wondered why the report he prepared was not in court.
78. On cross-examination, the Claimant confirmed that the General Manager approved all adjustments and made all decisions regarding credit. As regards billing, RWII testified that while the Barman billed for the Bar, the Front Office billed transport and guest rooms.
79. According to the witness, the Claimant was guilty for having been the supervisor at the time.
80. As regards deletion, RWII testified that 3 folio windows were deleted and led to revenue loss. However, the witness could not explain when the alleged deletions took place, by whom or how much was lost.
81. In sum, neither the two (2) documents on record nor the oral evidence availed by the Respondent demonstrate with clarity how the sum of Kshs.1,813,742.00 was allegedly lost by the Claimant.
82. This finding is consistent with the mantra that he who alleges is duty bound to establish the allegations.



83. Section 107 of the *Evidence Act*, provides;
1. Whether desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
84. Section 108 provides that;
- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
85. Finally, Section 9 is emphatic that;
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that proof of that fact shall lie on any particular person.
86. Applying the foregoing provisions to the facts of the instant suit, it is the finding of the court that the Respondent has on a balance of probabilities failed to prove that the Claimant was responsible or caused the alleged loss of Kshs.1,813,742.00 and the sum is irrecoverable from him. The Counter-claim is accordingly declined.
87. The Claimant is awarded costs of the counter-claim.

Reliefs

88. Having found that the Claimant has established his case against the Respondent and the Respondent has failed to prove its counter-claim, the court proceeds as follows;
- i. A declaration is hereby issued that the refusal by the Respondent to pay the Claimant's terminal dues is unfair and unlawful.
 - ii. The Claimant is awarded Kshs.230,000/= being the one month notice period.
 - iii. 14 days accrued pro rata leave.
 - iv. Respondent shall facilitate the Claimant to access his pension in accordance with the deed between the Administrator and the Respondent.
 - v. Certificate of service to issue by dint of Section 51 of the *Employment Act*, 2007.
 - vi. As regards the letter of recommendation, there is no obligation on the part of the employer to give a former employee a recommendation letter. The prayer is declined.
 - vii. Costs of the Counter-claim.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 26TH DAY OF APRIL 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article



159(2)(d) of the [Constitution](#) which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the [Constitution](#) and the provisions of Section 1B of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

