



**Ngare v Pesa Bets Ltd (Cause E369 of 2022)  
[2023] KEELRC 928 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 928 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E369 OF 2022  
BOM MANANI, J  
APRIL 20, 2023**

**BETWEEN**

**MICHAEL MAINA NGARE ..... CLAIMANT**

**AND**

**PESA BETS LTD ..... RESPONDENT**

**JUDGMENT**

1. This is a claim for compensation following alleged unfair termination of the Claimant's employment contract. The Respondent did not defend the case.

**Facts of the Case**

2. The Claimant's case is that on 1<sup>st</sup> November 2019, the Respondent engaged his services as a Customer Service and Marketing Manager. The parties signed a one year contract that ran from November 6, 2019 to November 7, 2020.
3. That on 7<sup>th</sup> November 2020, the Respondent extended the said contract for another one year. The extension was on the same terms as the contract of November 1, 2019.
4. The Claimant asserts that in June 2021, the Respondent suspended him on unsubstantiated grounds. That on resumption of duty on 29<sup>th</sup> June 2021, the Respondent unilaterally re-designated the Claimant to a lower position. That concomitant with the change in roles, the Respondent is said to have stepped down the Claimant's salary from Ksh. 104,335.00 to Ksh. 82,717.00.
5. The Claimant asserts that the Respondent eventually terminated the contract of service between the parties. The termination, whose date the Claimant does not disclose, is said to have been effected through a short message service.



6. It is the Claimant's case that the Respondent's actions violated his right to fair labour practice. He also pleads violation of the rights to fair hearing and fair administrative action.
7. For the avoidance of doubt the Claimant's case is not one of constructive dismissal. He has not pleaded that as a result of the conduct of the Respondent, he was forced to resign. And neither has he presented evidence in this respect.

### **Analysis**

8. The evidence on record shows that the Claimant was first employed by the Respondent under a one year contract from 6<sup>th</sup> November 2019. This fact is self evident from clause three (3) in the contract of employment dated 1<sup>st</sup> November 2019 and signed between the parties.
9. From the letter by the Respondent dated 1<sup>st</sup> November 2019 appearing as document number one (1) in the Claimant's list of documents, his consolidated starting salary was Ksh. 99,200.00 per month. However and as per document number six (6) in the Claimant's list of documents, this amount was increased to Ksh. 104,335.00 per month effective 1<sup>st</sup> August 2020
10. It would appear that on the date the contract of employment was to lapse, the Respondent offered to extend it for a further one year. This extension is evidenced by the Respondent's letter to the Claimant dated 7<sup>th</sup> November 2020 appearing as document number seven (7) on the Claimant's list of documents.
11. According to the above letter the contract between the parties was extended for another one (1) year. The terms and conditions of engagement remained unchanged.
12. The evidence on record shows that on 22<sup>nd</sup> June 2021, the Respondent suspended the Claimant from duty for a period of one (1) week without pay. The allegation was that the Claimant had misapplied funds entrusted to him for promotional activities. This development is evidenced in the Respondent's letter to the Claimant dated 22<sup>nd</sup> June 2021 and appearing as document number nine (9) on the Claimant's list of documents.
13. In his witness statement which he adopted as his evidence in chief, the Claimant avers that the Respondent unlawfully terminated the contract of employment between the parties. However, he does not indicate the date when the alleged termination was done. Neither does the Memorandum of Claim speak to this fact.
14. The Claimant also accuses the Respondent of having reduced his salary from Ksh. 104,335.00 to Ksh. 82,717.00. Although it is not explicit from the evidence when the salary was stepped down, one can only infer from of the witness statement adopted in evidence that the reduction must have been implemented around 29<sup>th</sup> June 2021 when the Claimant states that the Respondent directed him to occupy a different position at the workplace which attracted lower remuneration.
15. From the email correspondence filed in court, it would appear that on 12<sup>th</sup> July 2021, the Respondent asked the Claimant to consider taking some time off if he was not keen on taking up the new role allocated to him. It is unclear how the Claimant reacted to this text.
16. According to further email correspondence supplied by the Claimant, there appears to have been an attempt at a disciplinary session around September 2021. However, there is indication that the meeting may not have taken off as the Claimant indicated he was unavailable due to ailment. This was through his email dated 8<sup>th</sup> September 2021. He has annexed a medical document dated September 3, 2021.



17. The net effect of this evidence is that the Claimant was still in employment of the Respondent at least up to 8<sup>th</sup> September 2021 when he failed to show up for the disciplinary session because of poor health. If he was terminated from employment, this must have been after 8<sup>th</sup> September 2021.
18. It is noteworthy that according to the extension of contract dated 7<sup>th</sup> November 2020, the Claimant's contract was extended for one year. This means that absent other factors, the contract was to run up to 7<sup>th</sup> November 2021. Consequently, if the Claimant was terminated around 8<sup>th</sup> September 2021, this was just about two months to the lapse of the extended contract.
19. It is also clear to me that the salary reduction to Ksh. 82,717.00 affected the Claimant's salary after June 2021 as the communication to him to take a lesser position was made at the end of June 2021. That would mean that if he suffered under payments, this happened between June 2021 when he was demoted and 8<sup>th</sup> September 2021 just before his employment was terminated.
20. From the record, the Claimant's contract had been renewed on the same terms as the 2019 contract. This means that he was entitled to salary of Ksh. 104,335.00 as he pleads in his Memorandum of Claim. The figure of Ksh. 104,335.00 is supported by the Claimant's documentary evidence contained in the letter by the Respondent to him dated 31<sup>st</sup> July 2020.
21. Under section 10(5) of the *Employment Act*, the Respondent was not entitled to alter this term unless there was consultation on the matter with the Claimant which is documented. I have not seen evidence of this consultation between the parties. Consequently, the purported alteration of the Claimant's position and salary in June 2021 was irregular.
22. The Respondent did not enter appearance or file a defense in the case. In essence and apart from the issues I can gather from the evidence presented by the Claimant, this suit is undefended. Therefore, the Claimant's evidence is largely uncontroverted.

### **Determination**

23. Accordingly, I enter judgment for the Claimant against the Respondent as follows:-
  - a) I declare that the unilateral alterations that the Respondent introduced to the Claimant's contract in June 2021 were irregular and therefore unlawful.
  - b) I declare that the Respondent was not entitled to unilaterally step down the Claimant's salary from Ksh. 104,335.00 to Ksh. 82,717.00. Accordingly, the Claimant is entitled to recover Ksh. 21,618.00 per month from July 2021 to August 2021 being the amount unlawfully deducted from his initial salary. This totals Ksh. 43,236.00.
  - c) As it appears that the Claimant lost his employment following the disciplinary process in September 2021 but his contract was coming to a close on 7<sup>th</sup> November 2021, I will award him salary for the period between September 2021 and close of October 2021. This totals Ksh. 208,670.00.
  - d) The Claimant was working under a fixed term contract whose expiry date was 7<sup>th</sup> November 2021. As a result, there is no legal basis upon which the court can grant him compensation for twelve months over and above the award in c) above. Such award would give credence to a shaky and supposition premise that the Claimant's contract would have outlived its expiry date of 7<sup>th</sup> November 2021.
  - e) I have not been provided with evidence to suggest violation of the Claimant's right to be heard. If anything, there is indication that he was invited for a disciplinary session in September 2021



but failed to attend on account of sickness. Similarly, the prayer relating to violation of the right to fair labour practice is actually remedied by the compensatory mechanism under section 49 of the Employment Act which includes the award in c) above.

- f) I award the Claimant interest on the amounts awarded above at court rates from the date of judgment till payment in full.
- g) I award the Claimant costs of the case.
- h) I order that the Respondent issues the Claimant with a Certificate of Service.

**DATED, SIGNED AND DELIVERED ON THE 20<sup>TH</sup> DAY OF APRIL, 2023**

**B. O. M. MANANI**

**JUDGE**

**In the presence of:**

..... for the Claimant

.....for the Respondent

**ORDER**

**In light of the directions issued on 12<sup>th</sup> 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**

