



**Ngigi v Direct Specialist Company Limited (Cause 2079 of 2016)
[2023] KEELRC 836 (KLR) (13 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 836 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 2079 OF 2016
BOM MANANI, J
APRIL 13, 2023**

BETWEEN

STANLEY GITHENDE NGIGI CLAIMANT

AND

DIRECT SPECIALIST COMPANY LIMITED RESPONDENT

JUDGMENT

Introduction

1. This is a claim for compensation for unfair termination. The Claimant, who until June 30, 2016 was an employee of the Respondent, asserts that he was forced to resign from employment due to harsh working conditions. In effect, it is the Claimant's case that he was constructively dismissed.
2. The Respondent entered appearance and filed a defense. However and despite service of a Hearing Notice, the Respondent did not participate in the trial. Therefore, the case is essentially undefended.

Summary of Facts

3. The Claimant asserts that in November 2014, the Respondent offered him employment as a Sales and Distribution Manager. The Claimant accepted the offer and signed a letter of appointment dated November 26, 2014. The letter was signed on November 30, 2014.
4. According to the letter of appointment, the Claimant's gross salary was agreed at Ksh 300,000.00 per month. In addition, the Claimant was to be paid variable salary of Ksh 225,000.00 per month but payable quarterly. The latter was subject to the Claimant meeting performance targets agreed between the parties.
5. The Claimant indicates that he diligently worked for the Respondent until the date of his resignation. During this period, the Claimant contends that the Respondent did not pay the agreed variable salary except for one quarter.



6. It is the Claimant's case that the Respondent's refusal to pay the variable salary was in breach of the contract between the parties. That this flagrant breach of the employment contract caused the Claimant extreme hardship and drove him into resigning from employment. Consequently, it is the Claimant's case that his resignation was not voluntary. It was forced by the harsh conditions that the Respondent exposed him to. In effect, the Claimant pleads constructive termination of his contract.
7. At the point of resignation, the Claimant avers that he had outstanding leave days. He prays for judgment in respect of the aforesaid unutilized leave days.
8. The Claimant has also claimed what he describes as gratuity pay at the rate of 15 days per year worked. However, the *Employment Act* provides for service pay.
9. In support of his claim, the Claimant adopted the evidence in his witness statement. He also produced the bundle of documents in the list of documents filed by him on October 7, 2016 as exhibits. The court shall rely on this evidence in arriving at its final determination.
10. The Respondent did not present evidence to controvert the Claimant's evidence.

Analysis

11. I have considered the case by the Claimant. Although he resigned from employment, the Claimant states that this was not voluntary. It was the Claimant's uncontroverted evidence the Respondent failed to pay him the variable salary for five quarters, a matter that the Claimant states exposed him to untold financial stress. The Claimant argues that the failure to pay the variable salary was in breach of the contract between the parties.
12. The Claimant's case was that the Respondent's failure to pay the variable salary resulted in the work environment being unbearable. As a result, he was forced to tender his resignation.
13. In his closing submissions, the Claimant has ably articulated the law on constructive dismissal. Where an employer subjects an employee to intolerable working conditions which force the employee into resigning from employment, the resultant separation of the parties is considered as constructive dismissal of the employee. The employer is considered as having pushed the employee into giving up his employment.
14. The evidence on record demonstrates that the issue of the outstanding variable salary lay at the heart of the collapse of the employment relation between the parties. The email correspondences between the parties demonstrate that despite this being a core component of the contract of service between them, the Respondent paid little attention to it. When the Claimant demanded for the outstanding sum after he resigned, all that the Respondent's management indicated was that the payment was subject to the Claimant having met the set performance targets and that the Respondent was going to scrutinize its records to ascertain the claim. Beyond this, there is no evidence that the Respondent convincingly addressed the matter to demonstrate that the amount had either not been earned or if earned, it had been paid. There was no evidence that the Claimant had failed to meet performance targets set by the Respondent or at all.
15. The email correspondences aforesaid demonstrate that the Respondent failed to address a critical term of the employment contract between the parties. The response by the Respondent is sufficient proof that the Respondent had not been keen to verify and settle the Claimant's variable salary as and when it fell due. This is prima facie evidence of failure by the Respondent to honour a critical obligation under the contract of service between the parties.



16. The failure to address the Claimant's variable salary for five quarters was certainly in breach of a fundamental term of the contract of employment between the parties. This failure certainly exposed the Claimant to financial stress. It rendered the work environment uncertain and unbearable for the Claimant. As a consequence, the Claimant was entitled to consider that the Respondent had repudiated the employment contract between the parties and therefore tender his resignation (see *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR).
17. In his pleadings, the Claimant has claimed for accrued leave pay for 36 days. In the email dated June 30, 2016 tendered in evidence, the Claimant indicated that he had 48 accrued leave days. However, he had committed 11 of these days to serve part of his notice period. He therefore had a balance of 37 days.
18. In the Respondent's response dated June 30, 2016, the Respondent does not deny or confirm this claim. All that the Respondent's management indicates is that they were unsure how the 48 days accrued. Yet, the Respondent is the custodian of the Claimant's employment records including records relating to leave.

Determination

19. On the basis of the material before me I find that the resignation by the Claimant was not voluntary. It was forced by the circumstances that the Respondent exposed the Claimant to. Consequently, the court finds that the Claimant's employment was constructively and unfairly terminated.
20. The Claimant has claimed for outstanding variable salary for five quarters. The amount claimed under this head is Ksh 3,375,000.00. As indicated earlier, the defense did not lead evidence to controvert the Claimant's evidence on the claim. Accordingly, the amount is granted as prayed.
21. The Claimant has claimed for leave pay for 36 days. The amount claimed under this head is Ksh 360,000.00. Again, the Respondent did not lead evidence to controvert the Claimant's prima facie evidence on this claim. Accordingly, it is allowed as presented.
22. The Claimant has also prayed for gratuity of Ksh 225,000.00. This claim was not contested through evidence by the Respondent. Accordingly, it is allowed as presented.
23. Under section 49 of the *Employment Act*, the Claimant is entitled to compensation for unlawful termination. Under this head, I award the Claimant an amount equivalent to his gross monthly salary for six months. This works to Ksh 1,800,000.00.
24. The sum awarded above is subject to the applicable statutory deductions.
25. I award the Claimant interest on the sum awarded above at court rates from the date of this judgment till payment in full.
26. I award the Claimant costs of the suit.

DATED, SIGNED AND DELIVERED ON THE 13TH 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 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.

