



**Otieno v Bia Tosha Distributors (Cause 1283 of 2015)  
[2023] KEELRC 1372 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1372 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1283 OF 2015**

**J RIKA, J**

**MAY 31, 2023**

**BETWEEN**

**CHRISTOPHER OTIENO ..... CLAIMANT**

**AND**

**BIA TOSHA DISTRIBUTORS ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed his statement of claim on June 27, 2015. He states, he was employed by the Respondent on or about April 13, 2013, as an Assistant System Administrator. His monthly salary was Kshs 30,000.
2. He states that the Respondent terminated his contract on or about April 30, 2014, without any reason at all.
3. He was not issued a letter to show cause why his contract should not be terminated; there was no notice of termination; and no disciplinary hearing. He was denied salary arrears. He never went on annual leave. He worked for 9 Public Holidays without compensation. He worked from 7.00 a.m. to 9.00 p.m. without overtime pay.
4. He prays for Judgment against the Respondent for: -
  - a. 1-month salary in lieu of notice at Kshs 30,000.
  - b. April 2013 salary at Kshs 30,000.
  - c. Annual leave at Kshs 30,000.
  - d. Service pay for 1 year at Kshs 15,000.
  - e. 56 days of rest day at Kshs 67,200.



- f. Overtime at Kshs 204,750.
  - g. Public holidays at Kshs 10,800.
  - h. 12 months' salary in compensation for unfair termination at Kshs 360,000.
  - i. Weekend pay at Kshs 234,000.
  - j. Damages at Kshs 180,000.  
Total ... Kshs 1,161,750.
  - k. Declaration that termination was unfair and unlawful.
  - l. Certificate of Service to issue.
  - m. Costs.
  - n. Interest.
  - o. Any other suitable relief.
5. The Respondent filed its Statement of Response on September 25, 2015. It is conceded that the Respondent employed the Claimant as System Administrator on April 13, 2013. His salary of Kshs 30,000 monthly, was all-inclusive. The Respondent did not terminate the Claimant's contract; he resigned through a letter dated April 30, 2014, of his own free will. The Respondent was not required in the circumstances to issue a notice, a letter to show cause, or conduct disciplinary hearing.
  6. After resignation, the Claimant was required to hand over Respondent's property, upon which the Respondent would tabulate his terminal dues. He delayed in handing over. After he complied the Respondent tabulated his dues and invited him to collect the same, and the Certificate of Service, which the Claimant did not collect. He did not complete the 2-week notice period indicated in his resignation letter. He is not entitled to the dues detailed in the Statement of Claim. The Respondent prays the Court to dismiss the Claim with costs.
  7. The Claimant gave evidence, and rested his case, on February 23, 2022. The Respondent did not adduce evidence. On July 12, 2022, the Respondent's Advocate informed the Court that his Client has closed its business, and he therefore did not have Witnesses, and closed the Respondent's case.
  8. The record indicates however, that the Claimant's Advocate appeared before the Court on September 20, 2022. In the absence of the Respondent's Advocate, he scheduled hearing of the Respondent's case for February 3, 2023. This was done in error, because the Respondent's case had closed on July 12, 2022, in the absence of the Claimant's Advocate. The error led to closure of the Respondent's case for the second time on February 3, 2022, when the matter came up for hearing of the Respondent's case, erroneously scheduled by the Claimant's Advocate.
  9. The orders issued in error subsequent to July 12, 2022, are reviewed and set aside.
  10. The Claimant adopted his Witness Statement, which is a replica of his Statement of Claim, the contents which are summarized above.
  11. He had a family function in Uganda. He applied for leave of 2 weeks, which was granted. A day before he left, he was advised by the Finance Manager that his leave had been cancelled. He had already made travel arrangements. He asked for a day off, to enable him reverse those arrangements. The Finance Manager declined. The Claimant tried to reach out to the General Manager. She could not be reached. The Claimant cancelled his travel, and was refunded half the fare by the transport company.



12. He was suspended and asked to hand over. He handed over. He reported on April 29, 2014 and was advised that the Respondent was going to process his dues. He was not paid his dues even after he handed over. He worked alone at the office, 7 days a week and on public holidays. He was not paid overtime.
13. On cross-examination, the Claimant told the Court that his duty entailed logging products, taking care of CCTV, installing and upgrading of software as well as preparation of daily reports. He recorded all transactions virtually. He received a warning letter. It did not specify the allegation of insubordination. He was coerced by the Respondent to resign.
14. The issues in dispute are whether the Claimant's contract was terminated by the Respondent unfairly, or at all; and whether he merits the remedies claimed.

**The Court Finds: -**

15. The Claimant was employed by the Respondent as an Assistant System Administrator, with effect from April 15, 2014.
16. He has exhibited his letter of employment dated April 13, 2013, showing effective date was April 15, 2013.
17. It is improper for the Claimant, or any other Party appearing before this Court to plead "on or about, on or around," with respect to dates which are specified in a document, which has been exhibited before the Court. If the date of employment is expressly stated, it should be pleaded as stated in the relevant document.
18. The Claimant states that he was to go on scheduled leave, on April 28, 2014. A day before he left, the Respondent cancelled his leave, on the ground that there was no reliever. He asked for a day off, to enable him cancel travel arrangements. He did this and returned to work a day later. He was handed a letter of suspension on April 30, 2014.
19. The letter of suspension dated April 29, 2014 states that the Claimant was required to report to work on April 28, 2014, for an urgent meeting. He did not report. He was required to explain his absence, but insisted that he could only explain himself, in the presence of the General Manager. He was suspended for 1 week without pay, from April 30, 2014 to May 6, 2014. He was advised that the suspension letter also served as his 2<sup>nd</sup> warning letter, the 1<sup>st</sup> having issued on June 23, 2013.
20. He states that he returned after 1 week, only to find that the Human Resource Manager had a resignation letter, which the Claimant was required to sign. He was told that he would not be paid his dues, if he did not sign. He signed the resignation letter under coercion. This is contained in paragraphs 13 and 14 of the Claimant's Witness Statement.
21. The letter of resignation is dated April 30, 2014. It is worded as follows: -

" It is my sincere gratitude for time, support and opportunities I received while working with you, over a year. It was great.

In line with HR requirements, kindly accept this as 2 weeks' notice which commence [s] on 6<sup>th</sup> to May 20, 2014.

During this period, my 14 days pending offs, shall operate and serve mentioned notice period, as I won't be physically present in the office.



I have already handed over to the relevant office as at April 29, 2014. In case of any clarification feel free to enquire.

You may subsequently proceed to process my dues as applicable.

Yours faithfully,

Christopher Oyuech Otieno.”

22. The first inference to be made from this letter of resignation, is that the Claimant’s contract was not terminated by the Respondent as pleaded by the Claimant. He resigned. He initiated termination. He does not even plead constructive dismissal. He resigned. He terminated the contract.
23. The second inference is drawn from the Claimant’s explanation that he cleared on April 29, 2014. In his oral evidence, he corroborated the date stated in the letter of resignation, on the date he cleared- April 29, 2014. Why did he clear, then allege that he was coerced to resign the following day? He does not state that he was coerced to clear, and the Court does not agree with him, that he was coerced to resign. He does not state which specific officer of the Respondent coerced him. He states that the Respondent, which is a corporate entity, coerced him to resign. The tone and tenor of the letter of resignation does not suggest any form of coercion, was exerted upon the Claimant. He expressed his gratitude for the opportunity to work with the Respondent. “It was great,” he states. He advises the Respondent to feel free to contact him for any clarification. This is not the tone and tenor of an Employee acting under coercion.
24. In his Statement of Claim, he does not plead coercion or mention resignation; he states at paragraph 4, that the Respondent wilfully and wrongly terminated his contract.
25. The Claimant resigned. He resigned voluntarily. He was not coerced to resign. His contract was not terminated at all, or unfairly, by the Respondent.
26. His Claim has no merit.
27. He was offered terminal benefits comprising salary for the month of April/ May 2014; service pay; leave days; off –days; and notice. After deductions he was offered Kshs 25,075. He had worked for 1 year. The tabulation and offer made by the Respondent appears to the Court reasonable.

It is ordered: -

- a. The Claim is declined with no order on the costs.
- b. The Claimant is at liberty to collect his settlement cheque in the amount of Kshs 25,075 as offered by the Respondent.
- c. No order on the costs.

**DATED, SIGNED AND RELEASED TO THE PARTIES VIA E-MAIL, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31<sup>ST</sup> DAY OF MAY, 2023.**

**James Rika**

**Judge**

