



**Mwau v Xplic Insurance Company Limited (Cause 748 of 2018)
[2023] KEELRC 1147 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1147 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 748 OF 2018**

**B ONGAYA, J
MAY 12, 2023**

BETWEEN

PHILIP MUSEMBI MWAU CLAIMANT

AND

XPLICO INSURANCE COMPANY LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the statement of claim on May 18, 2018 through Muoki & Company Advocates. The claimant pleaded and it is not in dispute that the respondent employed him by a contract of employment dated October 18, 2016 as the Chief Marketing Officer at Kshs 500,000.00 per month. Upon successful completion of three months' probationary service, he was confirmed in employment and his salary increased to Kshs 650, 000.00 per respondent's letter dated February 10, 2017. By the letter dated March 30, 2017 the respondent promoted the claimant to the position of Acting Principal Officer for a period of 6 months effective March 10, 2017 and pending recruitment of a substantive Principal Officer – the 6 months ending on September 10, 2017. However, by the letter dated May 4, 2017 the claimant wrote resigning as the Acting Principal Officer thus, "I refer to the above and to my appointment letter on which stipulates that I should give one (1) month's or one month's salary in lieu of notice. I wish to submit my resignation and request my April 2017 salary go to serving the notice bit. I wait to be paid my March 2017 salary."
2. It is the claimant's case that upon appointment as Acting Principal Officer on March 10, 2017 as reconfirmed by the Insurance Regulatory Authority on March 30, 2017, his salary was increased from Kshs 650, 000.00 to Kshs 1, 300, 000.00 per month per his pay slip for April 2017 duly exhibited. It is his further case that upon resignation, he was asked by the respondent's chairman to remain in the office until May 15, 2017 and the respondent agreed to pay his full salary for May 2023 per the claimant's email dated May 5, 2017. The claimant has pleaded that he left employment on May 23, 2017 as agreed upon with the respondent but he was not paid his terminal dues. Further the respondent owed him



outstanding March salary Kshs 89, 833.00, full salary for April and May 2017, and, 15 accrued leave days. The claimant prayed for judgment against the respondent for:

- a. A declaration that the claimant is entitled to his terminal dues of Kshs 3, 186, 406.50.
 - b. A declaration that the respondent has breached the terms of the contract of employment, the employment laws and provisions of the Constitution.
 - c. Payment of terminal dues in the sum of Kshs 3, 186, 406.50.
 - d. Any other reliefs that the Court may deem just and expedient in the circumstances.
 - e. Costs of the claim.
3. The respondent filed the response to the statement of claim on August 2, 2018 through Mwangangi Nzisa & Associates Advocates. The claimant while purporting to deny the employment relationship as pleaded for the claimant, further stated that the claimant was paid all his final dues and any delay was due to the financial difficulties the respondent was undergoing. The respondent denied the claims and prayed that the suit be dismissed with costs.
4. The claimant testified to support his case. The respondent did not call a witness. Final submissions were filed for the parties. The Court has considered all the material on record. The correspondence shows that the claimant was employed by the respondent as urged for the claimant until resignation.
5. The main issue for determination is whether the claimant is entitled to the amounts of money as claimed. The Court returns as follows:
- a. The respondent has at the hearing through Counsel and in the submissions conceded to owe the claimant Kshs 89, 833.00 being outstanding salary for March 2017 now awarded.
 - b. By the resignation letter dated May 4, 2017 the claimant surrendered April 2017 salary in place of a month's resignation notice and the Court upholds the respondent's submission in that regard.
 - c. The claimant claims Kshs 1, 142, 360.50 being May 2017 salary. The claimant by his own email and oral testimony alleges it was agreed he remains in office until May 15, 2017. In a contradictory manner he states that he actually left on May 23, 2017 and again, his resignation letter states he had resigned by surrendering his April 2017 salary *in lieu* of the agreed termination notice. Now, which is which? Further, the claimant has not offered evidence of the work done in May 2017. His contradictory account on the date he last worked which is inconsistent with the effective date of resignation cannot be trusted. The Court finds that the contract of service effectively ended within the terms of the resignation letter and after which the parties separated. The Court finds that the claimant having resigned he never thereafter worked for the respondent and the claim for May 2017 salary is not justified. In any event, by his own account the claimant does not state that he worked full month of May 2017 and the Court finds that the claim as made for full monthly payment was unfounded.
 - d. The claim for 15 leave days ought to have been particularly pleaded and strictly proved being one for liquidated damages. The claimant has not pleaded and proved the period of service to which the leave days claimed accrued and not taken or compensated for. As urged for the respondent the claimant never mentioned outstanding leave days in the resignation letter suggesting that the only money owed by the respondent and available to set off the payment in lieu of notice was the April 2017 salary. By the resignation letter the claimant authored the terms of the separation without mention of the alleged leave days and he is bound accordingly.



The Court finds that the claimant has failed to show that the respondent owed him the alleged leave days and the prayer will fail.

- e. The Court finds that the respondent breached the law and the contract only to the extent that outstanding salary for March 2017 which was due had not been paid.
 - f. The Court has considered the margins of success and the respondent to pay claimant's costs of the suit.
- 6 In conclusion judgment is hereby entered for the claimant against the respondent for
1. Payment of Kshs 89, 833.00 by June 15, 2023 failing interest to accrue thereon at Court rates from April 1, 2017 until payment in full.
 2. The respondent to pay costs of the suit.

Signed, dated and delivered by video-link and in court at Nairobi this Friday 12th May, 2023.

**BYRAM ONGAYA,
PRINCIPAL**

