



**Kagwisage v Nyali Children Hospital Limited (Cause 40 of 2020)
[2023] KEELRC 1725 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1725 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 40 OF 2020**

**M MBARÚ, J
JUNE 29, 2023**

BETWEEN

JONAS KAGWISAGE CLAIMANT

AND

THE NYALI CHILDREN HOSPITAL LIMITED RESPONDENT

JUDGMENT

1. The claimant is an adult of Tanzanian nationality. The respondent is a limited liability company registered under the *Companies Act*.
2. The respondent employed the claimant in the position of obstetrician and gynaecologist on a contract dated January 13, 2020 on probation for 6 months. Under clause 4(a) of the contract the respondent agreed to pay the claimant Ksh 400,000 per month. During the course of employment, there were delays in the payment of salary which were staggered in instalments of Ksh 200,000 each in January, February and March 2020.
3. There was no salary paid in April 2020 and as a result the claimant decided to resign from his employment through letter dated May 28, 2020, for a notice of 30 days taking effect on June 30, 2020 and he also claimed the unpaid salary of April 2020.
4. The respondent acknowledged the notice by the claimant on June 30, 2020 and admitted owing him salaries for May and June 2020 and that the April salary would be paid within 7 days which was never paid.
5. The claimant instructed his advocates to demand for his work dues which remained unpaid;
 - a. unpaid salary for April 2020 Ksh 170,000;
 - b. may salary Ksh 400,000;



- c. June salary Ksh 400,000;
total Ksh 970,000.
6. The claim is that the respondent was in breach of the employment contract by failing to pay the monthly salaries under the employment contract for April to June 2020 and efforts to have the matter resolved amicably failed leading to the filing of this suit.
 7. The claimant is seeking the payment of his unpaid dues at Ksh 970,000; costs of the suit; and interests on the payments due with costs.
 8. The claimant testified in support of his case and that he worked diligently for the respondent after securing employment from his home country in Tanzania, he was forced to leave his family and get new accommodations and only work for the respondent and hence was sorely dependent on his salary and when this was not paid in full, he got distressed, he could not support his family and self forcing him to resign through notice dated May 28, 2020 for a month. The respondent accepted the notice and offered to pay part of his owing salaries but failed to do so and the claims made should be awarded with interests and costs.
 9. In response and counter-claim, the respondent's case is that the claimant did not serve them with the required notice before terminating his employment as required under his contract of employment. since filing suit, the respondent has acted in good faith and paid Ksh 570,000 in settlement of the undisputed amount of the claim. The Claimant breached his employment contract by failing to give a 90 days written notice in terms of clause 5 of the employment agreement and the respondent is entitled to notice pay of Ksh 400,000 with costs of the suit.
 10. In evidence, the respondent called Jane Mwendu Musyoka the administrative assistant who testified that the claimant was under a 5 years contract which provided for termination upon 90 days written notice but the claimant terminated it upon a 30 days notice which was in breach of the agreed terms. He has since been paid his owed dues of Ksh 570,000 and the balance of Ksh 400,000 is what he owes in notice pay.
 11. In the year 2020 the respondent was affected by COVID pandemic and all staff were affected with delayed salaries. The claimant was not paid in time due to the financial crisis that faced the respondent but he has since been paid and the balance has been withheld in lieu of the notice period he failed to give and his claim should be dismissed with costs and the counter-claim allowed for the sum of Ksh 400,000.
 12. At the close of the hearing both parties filed written submissions and these are analysed and the issues for determination are whether there the claims made are justified and whether the counterclaim is with merit.
 13. Employment of the claimant by the respondent through contract agreement dated January 13, 2020 is not contested. The contract was to run for five (5) years.
 14. Under clause (2), parties agreed that the claimant would be on probation for a period of 6 months during which his work would be evaluated to ascertain his effectiveness and efficiency and upon satisfactory completion of his probation, then his employment would be confirmed and his salary reviewed to include commission payment on various obstetric and gynaecological procedures.
 15. Effectively, the contract agreement commenced on the date of execution, January 13, 2020. Probation period of 6 months thus was to end on July 12, 2020.



16. Under the contract agreement, parties agreed under clause (5) that either party was at liberty to terminate the contract by providing 90 days notice or payment of one months salary in lieu of notice thereof.
17. Also, parties agreed under clause (4) on the remuneration of the claimant at Ksh 400,00 per month to be paid monthly for services rendered.
18. The claimant is a Tanzanian national and was employed exclusively to serve under the respondent. he was therefore bound under clause (9) of the employment contract not to solicit other employment and ensure no conflict of interest while undertaking his duties. He was to remain exclusively at the service of the respondent.
19. In employment and labour relations, unlike commercial contracts, an employer and employee relationship is regulated under the *Employment Act*, 2007 (the Act) read together with the written agreement with regard to terms and conditions of employment. where parties to an employment agreement have agreed to pay a salary monthly, such is lawful and commensurate to the provisions of Section 18(2)(c) of the Act;
 - (2) Subject to subsection (1), wages or salaries shall be deemed to be due—
 - (a) in the case of a casual employee, at the end of the day;
 - (b) in the case of an employee employed for a period of more than a day but not exceeding one month, at the end of that period;
 - (c) in the case of an employee employed for a period exceeding one month, at the end of each month or part thereof;
20. The legal threshold for payment of a salary is daily for a casual employee, monthly and in a case of employment for a period exceeding one month such as the claimant was, at the end of each month.
21. Therefore, in a contract agreement, parties can only enhance these legal minimums and not negate the same. The claimant was under a written contract of employment which required his salaries be paid monthly. There was lapse in payments and staggered payments from January to March at Ksh 200,000 instalments and in April to June 2020 there was no payment leading to the claimant’s resignation through notice dated May 28, 2020 giving one months.
22. From January 2020 at the inception of the employment agreement, the respondent was in breach of the very foundation of the employment relationship. Non-payment of the agreed upon monthly remuneration at Ksh 400,000. The respondent negated the employment contract at inception.
23. The reason given for non-payment of the due salaries is that there were financial challenges affecting all employees. even the witness called by the respondent Ms Musyoka was not paid here salary for several months. The claimant too was not paid just like other employees.
24. However, as noted above, unlike other commercial agreements, in employment and labour relations, personal lives and livelihoods are affected when a salary that is due is delayed, paid in staggered amounts or is not paid at all. The employee is left distressed, unable to settle basic bills such as house rents and house bills and eventually he starts begging. Such is dehumanising, degrading and eventually stripped of all dignity which should not be visited upon any employee as held in *Jonathan Spangler v Centre for African Family Studies (CAFS)* [2017] eKLR.



25. in the case of *CNR; FITM & another* (Respondent) (Cause E204 of 2021) [2022] KEELRC 82 (KLR) (26 April 2022) (Judgment) the court in considering the place of human dignity held that the conduct of the employer which results in the contravention of the employee's inherent human dignity and the right to have that dignity respected and protected is an unfair labour practice. The Claimant ought not have had to choose to resign due to the non-payment of his salaries. Such non-payment of due salaries for work done fundamentally repudiated his entire contract in terms of Section 44(3) of the *Act* and he was no longer bound to the terms and conditions thereof.
26. the reasons given that there was COVID pandemic and financial crisis affecting operations, in employment and labour relations, such matters are well addressed under Section 40 of the *Act* read together with Section 13 of the *Act*. one allows termination of employment due to an operational requirement and the other allow the employer to change the terms and conditions of employment with the written approval of the employee.
27. Faced with a financial crisis due to COVID pandemic, the respondent had recourse to the law. this option was not taken. The respondent opted not to pay due salaries for work done or to stagger these salaries without the approval and consent of the claimant. Such conduct negated the entirety of the contract agreement and the claimant was no longer bound and is entitled to the entity of his owed salaries up to and June 2020. The offer to resign and give notice was honourable and generous of the claimant.
28. The withholding of Ksh 400,000 on the belief that the claimant ought to have given 90 days notice does not hold.
29. The respondent has since paid the due salaries at ksh 570,000 through a deposit with the claimant's advocates. the balance of Ksh 400,00 shall be paid unconditionally.
The claimant shall also be paid 50% of his costs herein.
30. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
 - a. The balance of Ksh 400,000 is due and owing;
 - b. the claimant is awarded 50% of his costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF JUNE, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

