



**Odhiambo v The Ark Limited (Cause E461 of 2021)
[2023] KEELRC 1792 (KLR) (24 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1792 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E461 OF 2021**

**B ONGAYA, J
JULY 24, 2023**

BETWEEN

CHARLOTTE ANYANGO ODHIAMBO CLAIMANT

AND

THE ARK LIMITED RESPONDENT

JUDGMENT

1. The claimant filed a statement of claim on June 10, 2021 through Mohammed Muigai LLP. The claimant claimed and prayed for:
 - a. A declaration that the respondent’s refusal or failure to pay the claimant’s salary arrears is a breach of the contract of employment and an unfair labour practice.
 - b. The sum of Kshs 716, 667.00 being the unpaid claimant’s salary dues as particularised at paragraph 16.
 - c. Interest at commercial rates of 13% from 05.02.2021 until payment in full.
 - d. Costs of the suit.
 - e. Any such and further relief as the Honourable Court may deem fit to grant.
2. The respondent employed the claimant by the contract dated February 21, 2019 as a Reservations Manager for a fixed term period of 2 years effective 04.02.2019 to February 4, 2021. It was renewable upon agreement and for a tenure to be agreed upon. The gross monthly salary was Kshs 100,000.00 per month. In April 2020 the Covid 19 pandemic struck the world including in Kenya. The respondent’s hotel enterprise was adversely affected and salary reduction was introduced by the letter dated June 30, 2020 in the terms thus, “The Marasa Lodges Management in consultation with the Executive Committee and Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied (Kudheih Workers), has decided that effective July 1, 2020, you will be paid 30% of gross salary for



the days you will not be working and 55% of gross salary for the days worked. This will be subject to statutory deductions until the 30th of September 2020, however your annual leave/ unavailed off days will not be reduced when at work.” The letter concluded that the management would keep the claimant updated on any developments from time to time. The claimant received the letter on July 23, 2020.

3. The claimant wrote to the respondent the letter dated January 2, 2021 that her contract was ending on February 4, 2021 and she was giving notice to the management that it should not consider renewing it so that her last working day would be on February 4, 2021. She thanked the management for the opportunity to serve and made no demands against the respondent.
4. Per subsequent email conversations, the claimant demanded the payment of the salary cuts effective April 2020 urging that she was not a member of the union and the amount deducted be part of the final dues owed to her.
5. The respondent replied to the demand letter by their Advocates’ letter dated March 19, 2021 the letter on salary reduction captured the agreement between the trade union and the respondent and it applied to both unionisable and non-unionisable employees for similar treatment. Further the claimant had accepted the terms of the pay reduction by signing the letter on pay reduction on July 23, 2020. It was denied that the pay reduction dues were payable as demanded for the claimant. It was further replied that the letter dated June 30, 2020 was extended by a notice to all employees dated October 22, 2020 thus,

“That effective November 1, 2020, all employees not working in the properties will be on their annual leave followed with unveiled off days until end of March 2021. During this period, the employee will be paid their 30% of gross salary subject to the statutory deductions until the 31st of March 2021.”

While those terms of service were subsisting, the claimant opted by her letter dated January 2, 2021 to cease employment effective February 4, 2021.

6. The claimant has particularised her demanded payment by month at paragraph 16 of the statement of claim.
7. The respondent filed the memorandum of response dated July 27, 2021 and through Wamae & Allen Advocates. It is the respondent’s case that due to unforeseeable Covid 19 situation (amounting to an act of God or force majeure) and its impact on the enterprise, the respondent negotiated with KUDHEIHA trade union and the sectoral heads to address the situation. The letter of June 30, 2020 was issued and by her acquiesce the claimant became bound by the terms applicable to the unionisable employees as was communicated to her and as renewed in terms of the letter of October 22, 2020. The due and utilised leave days were by letter dated March 19, 2021 communicated as 2 days at Kshs 8, 548.00. Thus on July 23, 2020 the claimant consented to the pay reduction. The pay cut was implement across the respondent’s establishment. The suit should be dismissed with costs.
8. Final submissions were filed for the parties. The Court has considered the pleadings, the evidence, and the final submissions and returns as follows.
9. The only issue for determination is whether the claimant is entitled to payment of any of the monies cut from her monthly payment and as was claimed and prayed for. The claimant testified that during Covid 19 period the respondent’s hotel enterprise was adversely affected including being shut down. In the circumstance the respondent’s employees worked in shifts of half a month while the other half a month was treated as leave. She then received the letter dated 30.06.2020 and she was paid per terms of that letter including 30% for days not worked and 55% of gross pay for days worked. Prior to the letter



of June 30, 2020, the claimant's testimony was that the supervisor verbally promised that the pay cut would be temporary. She further testified thus,

“I have no evidence in writing about my grievances on deductions up to time I left. It was always verbal. They had increased my salary verbally after 6 months of service.”

10. The Court returns that by her own testimony, effective April 2020 her salary was cut upon her supervisor's verbal promise the same would be temporary and it was due to the Covid 19 situation. Subsequently the pay cut was communicated by letter dated June 30, 2020 and the claimant raised no grievance in that regard. The Court finds that the claimant agreed to the arrangements modifying the contract of employment and in the wake of the Covid 19 situation and its adverse effects. The Court has also considered the proportionality of the terms of the pay cut and finds them to have been fair in the sense that 55% was paid on all days worked (being just in event of low workloads in any event) and then 30% pay for each day not worked. In absence of the claimant's grievances while the contract was subsisting or as at time the pay cut was imposed, the claims and prayers are found to be an afterthought. That is the case especially that even in her letter notifying a wish not to renew, there was no mention of recovery of the purported pay reduction. The upshot is that as urged for the respondent, in circumstances of the Covid 19 situation, parties agreed to the reduction of the claimant's monthly payment either verbally as was communicated by the supervisor and subsequently per the letters on record in that respect. The claimant's case will collapse as unjustified.
11. The Court has considered the respondent's admitted Kshs 8,548.00 being due pay for 2 days of leave and further considered all circumstances surrounding Covid 19 situation and each party to bear own costs of the suit.
12. The suit is dismissed with orders each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 24TH JULY, 2023.

**BYRAM ONGAYA,
PRINCIPAL JUDGE**

