



Hassan v Gordon C. Hays (Investments) Ltd t/a Instarect (Cause 545 of 2018) [2023] KEELRC 2666 (KLR) (30 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2666 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 545 OF 2018
B ONGAYA, J
OCTOBER 30, 2023**

BETWEEN

ABDULRAHIM ABDULGAFUR HASSAN CLAIMANT

AND

GORDON C. HAYS (INVESTMENTS) LTD T/A INSTARECT RESPONDENT

JUDGMENT

1. The claimant filed the statement of claim on 05.12.2019 through RBZ Advocates LLP. The claimant alleged un-procedural, illegal and wrongful termination of employment, non-payment of redundancy dues and damages for the un-procedural and wrong termination. The claimant prayed for judgment against the respondent for:
 - a. A finding that the reasons and procedure for termination of the claimant's services was unfair.
 - b. The finding that the claimant is entitled to one-year redundancy dues.
 - c. 12-months' salary compensation Kshs.5,080,000.00.
 - d. Redundancy dues Kshs.212, 000.00.
 - e. General and aggravated damages.
 - f. Costs of the suit.
 - g. Interest on a, b, c, d, e, and f above.
 - h. Any other relief the Honourable Court may deem fit and expedient to grant.
2. The claimant alleged and pleaded as follows:



- a. The respondent offered him employment on 12.05.2018 as Marketing & Sales Manager at Kshs.400,000.00 per month, moto vehicle allowance of Kshs.20,000.00 per month, and telephone data bundles allowance of Kshs.4,000.00 per month.
 - b. On 17.08.2018 he was confirmed in the position.
 - c. On 04.10.2019 he was un-procedurally, unfairly, wrongfully and without justifiable cause terminated from employment. On 03.10.2019 he had been summoned by the Managing Director Peter Hays and informed he had to take substantial pay cut. The claimant was shocked as the respondent's market share had increased in Kenya and Uganda and enterprise was making profits. The claimant's request that the pay cut decision be reconsidered was disregarded and instead, termination letter issued on 04.10.2019. The letter stated that at a meeting held on the morning of 04.10.2019 the respondent had offered the claimant different terms of engagement (per exhibited respondent's letter dated 03.10.2019) but the claimant had rejected that offer per his email of 04.10.2019 at 9.31 am. The termination letter further stated that the respondent was unable to continue in contract per prevailing terms of engagement as requested in the claimant's email. The letter stated, "Consequently, we are left with no other option but to terminate your employment and ask you serve one months' notice period as per your contract, commencing the date of this letter. We note you have three days leave remaining, which you have opted to take from 11th October to 15th October 2019, which we accept."
3. The respondent filed the memorandum of response on 20.02.2020 through Simiyu and Partners LL.P. The respondent admitted to have employed the claimant upon terms pleaded for the claimant. The respondent further pleaded that the claimant was appraised and it was established that the monthly pay was far much higher than the revenues attributable to his performance. Further, instead of immediately terminating the claimant on account of unsatisfactory performance, the respondent invited the claimant to discuss the best way of retaining him in employment in an economically reasonable manner to both parties. Further, after discussion the respondent offered the claimant a monthly retainer of Kshs.150,000.00 and a commission structure that would have seen him earn even more money than before if he worked diligently and with serious commitment. The respondent states the claimant was expected to accept in good faith the arrangement that would be mutually beneficial to both parties but the claimant opted to reject the offer insisting on the prevailing pay that far overshoot the revenues attributable to his performance. The respondent's case was that in such circumstances, there was no alternative but to terminate the claimant's contract of employment by issuing a one-month notice per letter of 04.10.2019. in the circumstances the respondent prayed that the claim be dismissed with costs.
 4. The 1st main issue for determination is whether the termination was unfair. The mutual parties' evidence is that at the material time the respondent desired to vary the remuneration amount and structure from a monthly salary to a monthly retainer plus commissions. As submitted for the parties, obtaining the claimant's consent per the provisions of section 10(5) of the [Employment Act, 2007](#) was the manner to achieve the respondent's desired outcome. The respondent issued the letter of 03.10.2019 making an offer of continued claimant's service upon a monthly retainer of Kshs.150,000.00 and the stated commission structure. The letter stated that the offer was open for acceptance within 7 days. The parties met on the morning of 04.10.2019 and discussed the issue. It is at the same meeting that the respondent's letter of 03.10.2019 was delivered to the claimant. The claimant responded to the letter of offer of change of terms of service by his email of the same 04.10.2019. He stated that he would not accept the change of terms as offered due to his current economic conditions and responsibilities. The claimant stated that the terms were not workable for him and



therefore requested the respondent to reconsider and advise on the decision. It appears the respondent reconsidered and advised per the letter of termination of employment also dated 04.10.2019.

5. It is submitted for the claimant that the termination was unfair because the letter of offer reducing the salary or changing the remuneration structure fell short and below the procedures anticipated under Article 41, 47 and 50 of *the Constitution* because within 6 hours the claimant was terminated without prior adequate notice of the nature and reasons for termination, he was not given an opportunity to make representation, a chance for review or appeal was not accorded, he was not given a chance to test evidence on alleged unsatisfactory performance, and he was not heard. For the respondent, it is submitted that the claimant rejected the mutually fair change in remuneration structure and suggested he be offered to exit but on redundancy package but the respondent did to consider redundancy as there was no intention to down size but only to renegotiate a workable solution.
6. The Court has considered the evidence and returns that indeed parties were renegotiating the remuneration structure in view of the respondent's desired changes that the respondent says made economic sense. The Court considers that the reading of section 40 of the *Employment Act* on redundancy presupposes the employer's decision that the employee leaves employment for reasons not attributable to the employee. The evidence in the instant case is that parties were renegotiating the respondent's proposed change in remuneration structure, and, as submitted for the respondent, without need or intention to get the claimant out of job by reason of the renegotiated pay structure. The Court holds that an employer's decision for better economy of the enterprise without the employer's intention that the affected employee, like in the instant case, be terminated from employment shall not pass for a redundancy situation. If the respondent's decision for better economy targeted the claimant with intention that the claimant's contract of service be terminated, then indeed it would have amounted to redundancy. That not being the respondent's intention, it appears to the Court that the claimant's alleged redundancy and submissions in that regard will collapse.
7. The Court finds that the parties were indeed engaged in renegotiation to vary terms and conditions of service per section 10 (5) of the Act but they failed to arrive at an amicable understanding and the respondent decided to terminate by invoking the contractual termination by one month's notice. It appears to the Court that the respondent adopted a fair termination procedure and the reason for termination appears fair in terms of section 45 of the Act. Section 35 (1) (c) of the Act entitled the respondent to terminate the contract as per the letter of termination dated 04.10.2019 which allowed the claimant to serve the one-month notice period.
8. It was submitted for the claimant that the process was rushed because it commenced with negotiations, then letter of offer of varied remuneration structure and termination letter all within an hour. However, the letter of offer of variation of the terms of remuneration allowed the claimant 7 days to consider acceptance but he rushed and by himself rejected the offer by his email of 04.10.2019 at 9.31am. The Court has found he flatly rejected the offer and in the circumstances the respondent cannot be faulted in swiftly moving to issue the letter of termination because clearly, the parties were parallel and the employment relationship had become untenable.
9. The Court therefore returns that the termination was not unfair and there was no redundancy situation in the instant case.
10. The claimant is not therefore entitled to any of the remedies as prayed for. The suit is liable to dismissal with costs.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the suit with costs.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
MONDAY 30TH OCTOBER, 2023.**

BYRAM ONGAYA

PRINCIPAL JUDGE

