



REPUBLIC OF KENYA



Ndibo & 2 others v Rezial Limited (Employment and Labour Relations Cause E480 of 2022) [2023] KEELRC 2920 (KLR) (16 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2920 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E480 OF 2022
BOM MANANI, J
NOVEMBER 16, 2023**

BETWEEN

IRENE NTHENYA NDIBO 1ST CLAIMANT

BRANICE ADONGO MAYIENGA 2ND CLAIMANT

SOLOMON ONYANGO 3RD CLAIMANT

AND

REZIAL LIMITED RESPONDENT

JUDGMENT

1. This is a case for unfair termination of the Claimants' contracts of service. The Respondent failed to enter appearance and file a defense despite service of pleadings on it. Consequently, the matter proceeded by way of formal proof.

Claimants' Cases

2. The 1st Claimant stated that she was engaged by the Respondent as a Sales Representative on 20th October 2021. She indicated that her salary was agreed at Ksh. 300,000.00 per month.
3. The 1st Claimant averred that her contract was to have run for three years. However, the Respondent prematurely terminated it on 11th November 2021.
4. The 1st Claimant asserted that the Respondent's decision to terminate her contract of service was without lawful cause. She also contended that the Respondent failed to observe due process whilst dissolving the employment relation between the parties.
5. The 1st Claimant averred that the Respondent wrote to her on 11th November 2021 informing her that it was undergoing restructuring. As a result, her job had been lost.



6. The 1st Claimant stated that before she was issued with this letter, the Respondent had not notified her of the intended restructuring. It was the 1st Claimant's case that the Respondent has failed to pay her terminal dues including her salary for part of October and November 2021.
7. The 2nd Claimant averred that the Respondent hired her services as the Head of Membership Department on 20th October 2021. She asserted that her monthly salary was agreed at Ksh. 150,000.00.
8. The 2nd Claimant averred that although she signed a contract of service, the Respondent retained all the copies. As a result, she was not able to furnish the court with a copy of the contract.
9. The 2nd Claimant averred that the Respondent prematurely terminated her employment when it informed her that her job had been lost due to restructuring. She said that the Respondent delivered this information to her via its letter of 11th November 2021.
10. The 2nd Claimant averred that the decision to terminate her contract was unfair since she was not notified of the reason for the alleged restructuring. She asserted that after she was released from employment, the company continued to run and recruited new members of staff to replace her.
11. The 3rd Claimant averred that the Respondent engaged his services as Head of Programs on 1st October 2021. The contract was for a period of three years with a monthly salary of Ksh. 300,000.00.
12. The 3rd Claimant averred that throughout the duration that he served the Respondent, he was not paid his salary. The 3rd Claimant averred that on 31st December 2021, he received an email from the Respondent purporting to change his terms and conditions of employment. It was his case that this development was without consultations with him.
13. The 3rd Claimant stated that this development forced him into tendering his resignation from employment. He averred that the failure by the Respondent to pay his salary caused him extreme financial embarrassment in addition to making him feel that his services were unappreciated.

Issues for Determination

14. After analyzing the pleadings, I consider the following to be the issues for determination:-
 - a. Whether the Claimants' contracts of service were unfairly terminated.
 - b. Whether the Claimants are entitled to the reliefs that they seek through the Statement of Claim.

Analysis

15. As pointed out earlier, although the Respondent was served with summons to enter appearance, it neither entered appearance in the cause nor filed a defense. As a result, the case was heard as an undefended cause.
16. I have looked at the evidence on record and I am satisfied that the Claimants were all employees of the Respondent. The 1st Claimant produced a letter of appointment dated 20th October 2021 showing that she was hired by the Respondent effective 18th October 2021. The letter was signed by her. Further, she produced a letter by the Respondent dated 11th November 2021 terminating her contract of service.
17. On her part, the 2nd Claimant was not able to produce her letter of appointment. However, she produced a letter of termination of her employment dated 11th November 2021. The letter was authored by the Respondent.



18. The 3rd Claimant produced a draft contract of service between him and the Respondent but which was not signed. However, he produced a series of email correspondence with the Respondent's management which prove his employment status with the Respondent.
19. The 1st and 2nd Claimants contended that on 11th November 2021, the Respondent wrote to them individually informing them that their contracts of service had been terminated on account of a restructuring exercise. I have looked at the two letters that the Respondent wrote to the 1st and 2nd Claimants in this respect. The letters state that the two Claimants' contracts had been terminated effective 11th November 2021 due to internal reorganization.
20. The reason that the Respondent gave for terminating these two contracts is what would constitute termination of employment for operational reasons under sections 40 and 45 of the [Employment Act](#). This is also described as loss of employment on account of redundancy.
21. Section 40 of the [Employment Act](#) sets out an elaborate procedure that is to be followed when declaring a redundancy at the workplace. The employer must have valid reason for the decision. Besides, he must follow the procedure for redundancy as set out under the Act.
22. This requires that the employer issues a notice of intended redundancy to the employees or their trade union where they are members of a trade union. The employer must also issue a similar notice to the labour office. The notice must be for a period of one month and ought to speak to the reason and extent of the proposed redundancy.
23. The employer must then select the employees to be terminated in accordance with the selection procedure under the Act. Absent compelling reasons, the employer is expected to follow the first in last out principle in selecting the employees to be released from employment. The employer must also pay the affected employees their redundancy dues in accordance with the law.
24. There is no evidence that the Respondent adhered to this procedure when declaring the 1st and 2nd Claimants' positions redundant. Therefore, the process was unlawful.
25. With respect to the 3rd Claimant, he contends that the Respondent did not pay him salary after he was engaged. From October 2021 when the Claimant was employed to December 2021 when he resigned, he had not been paid any salary.
26. The 3rd Claimant avers that at the close of December 2021, he received an email from the Respondent's management purporting to change his terms and conditions of employment. He contends that the proposed changes were made without his knowledge and input. In reaction to these proposed changes and the difficult work environment that he had been exposed to, the 3rd Claimant indicates that he tendered his resignation.
27. I have looked at the 3rd Claimant's evidence in this respect. It is clear that the Respondent wrote to the 3rd Claimant on 31st December 2021 advising him that it had changed its business model in reaction to the financial challenges that it was experiencing. The Respondent indicated that effective 31st December 2021, all sales officials were going to begin working on commission basis. They were to henceforth be engaged on consultancy basis. The Respondent further stated that effective 31st December 2021, all staff contracts in the sales department were to be deemed as nullified.
28. In effect and by this communication, the Respondent nullified the 3rd Claimant's contract of service on 31st December 2021. The 3rd Claimant was free to migrate to the new model of service delivery, if he elected.



29. The record shows that in reaction to this development, the 3rd Claimant wrote a letter of resignation (email). It is dated the same day.
30. The question is whether the letter of resignation (email) was of any consequence in the circumstance. The 3rd Claimant issued his resignation after the Respondent had issued him with a notice nullifying his contract as a sales representative. Therefore, there was no valid contract of service from which the 3rd Claimant would have validly resigned. At the time the 3rd Claimant was tendering his resignation, the Respondent had already terminated his contract of service. The resignation was therefore of no legal consequence.
31. The email dated 31st December 2021 communicating the Respondent's decision to nullify the 3rd Claimant's contract was without consultations with the 3rd Claimant. Similarly, the 3rd Claimant was not notified of the proposed changes to his contract as required under section 10 (5) of the [Employment Act](#). Therefore, the process to terminate the 3rd Claimant's contract of service and replace it with a commission or consultancy-based contract was unlawful.

Determination

32. The upshot is that the Respondent's decision to terminate the employment relation with the three Claimants was un-procedural and without valid basis. It is so declared.
33. I award every of the three Claimants compensation for unfair termination of their contracts of service that is equivalent to their individual monthly salary for six (6) months as more particularly set out hereunder:-
 - a. Irene Nthenya Ndibo Ksh. 1,800,000.00.
 - b. Branice Adongo Mayienga Ksh. 900,000.00.
 - c. Solomon Onyango Ksh. 1,800.000.00.
34. I order the Respondent to pay the Claimants salaries for the period that they served without being paid. These amounts are as follows:-
 - a. Irene Nthenya Ndibo Ksh. 176,000.00.
 - b. Branice Adongo Mayienga Ksh. 98,000.00.
 - c. Solomon Onyango Ksh. 900.000.00.
35. I award every of the three Claimants interest on the amounts awarded at court rates from the date of this decision.
36. I award the Claimants costs of the case.
37. The award is subject to the applicable statutory deductions.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF NOVEMBER, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimants

.....for the Respondent



ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

