



**Onduso v Waanzilishi Capital Limited (Cause E048 of 2023)
[2023] KEELRC 3406 (KLR) (8 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3406 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E048 OF 2023
SC RUTTO, J
DECEMBER 8, 2023**

BETWEEN

ALEX ONDUSO CLAIMANT

AND

WAANZILISHI CAPITAL LIMITED RESPONDENT

JUDGMENT

1. It is common ground that the Claimant was employed by the Respondent as the Head of Marketing with effect from 4th January 2022. On 7th November 2022, the Claimant issued the Respondent with a resignation notice indicating that he would serve the entirety of the three months' notice period with his last date being 7th February 2023. This was not to be as the Respondent asked the Claimant to commence his 14 days of untaken leave on 1st December 2022. According to the Claimant, the Respondent's action of shortening his notice period was illegal and contravened the mandatory provisions of Section 38 of the *Employment Act*. To this end, the Claimant seeks the following reliefs against the Respondent:
 - a. Kshs 500,000 being the balance of notice pay payable to the Claimant.
 - b. Kshs 4,800,000 being 12 months' salary for unfair termination and unlawful termination of employment.
 - c. Kshs 660,000 being unpaid house allowance.
 - d. Costs of the suit.
 - e. Interest on (a) (b) and (c) above from the date of accrual until payment in full.
2. The Respondent avers that it issued the Claimant with a notice of waiver shortening the notice period pursuant to an oral agreement. The Respondent states that rather than tarnish the Claimant's employment record through summary dismissal, it opted to indicate the reasons for shortening the



notice period was to ensure progression in the business considering the technical and sensitive aspects the job entail. The Respondent contends that the prayers sought in the Memorandum of Claim are untenable and ought not to be entertained. Consequently, the Respondent has asked the Court to dismiss the suit with costs.

3. The matter proceeded for hearing on 25th July 2023, during which both parties called oral evidence.

Claimant's case

4. The Claimant testified in support of his case and for starters, he adopted his witness statement to constitute his evidence in chief. He further produced the documents filed on his behalf as exhibits before Court.
5. It was the Claimant's testimony that following his resignation on 7th November 2022, the Respondent informed him that it had waived the requirement that he serves throughout the notice period and that he was to immediately commence his 14 days of untaken leave days on the 1st of December. He was further informed that he would be paid one month's salary in lieu of notice.
6. According to the Claimant, the Respondent's action of purporting to "shorten" his notice period was illegal. He contends that in view of Section 38 of the Employment Act, as read with Clause 13 (a) of his Employment Contract, he was entitled to payment of the equivalent of his salary up to 7th February 2023.
7. That having worked for 23 days of his notice period in the month of November 2022, for which he was duly paid as part of his November salary, he was entitled to payment of Kshs 900,000 being the equivalent of his salary from the 1st of December 2022 to the 7th of February 2023.
8. That despite issuing a demand to the Respondent for payment of the said amount of Kshs 900,000, it only paid him a sum of Kshs 400,000 on 15th December 2022. The Respondent therefore owes him the sum of Kshs 500,000 being the balance of notice pay payable to him

Respondent's case

9. The Respondent called oral evidence through Mr. Elvis Rogito Nyangeri who testified as RW1. He identified himself as the Respondent's Executive Director and similarly, he adopted his witness statement and documents filed on behalf of the Respondent to constitute his evidence in chief.
10. RW1 stated that he was made aware that during the period when the Claimant was serving his notice period, it was noted that he had, in the past, sent sensitive emails from his official email address to his personal one, contrary to the terms set out in Clause 16 of his Contract of Employment, on confidentiality. RW1 averred that the Claimant was also in breach of Clause 14 of his Contract of Employment.
11. That the foregoing brought the Claimant under the provisions of summary dismissal under Section 44 4(c), (e) and (g) of the Employment Act, 2007 but since he was already serving his notice of termination, the Respondent spoke to the Claimant and they mutually agreed to "shorten" his Notice period to avert further damage caused by his reckless and thankless behavior.
12. RW1 further stated that the Claimant was reckless, careless and negligent in the performance of his duties during the period when he was serving his notice of termination, following complaints from the clients and business associates. He contended that the Claimant never disclosed that he had sent sensitive official company material to his personal address without authority.



13. He further averred that the Claimant has not disclosed the fact that since he was already serving his Notice Period, the parties agreed orally to shorten the Notice Period instead of invoking the Summary Dismissal procedure which would have been applicable under the strict application of the law.
14. Given the mutual oral agreement to shorten the notice period, and the Respondent having settled all dues covering the said period, it does not owe the Claimant any further dues.
15. RW1 further stated that having been informed by his advocates on record, which information he verily believes to be true that the provisions of Section 38 of the *Employment Act*, 2007 are not applicable to the true circumstances of this case.
16. According to RW1, the Claimant is not entitled to any remedy for unfair termination as the termination of employment was through his voluntary resignation.

Submissions

17. The Claimant submitted that having worked for 23 days of his notice in the month of November 2022 for which he was duly paid as part of his November salary, he is entitled to payment of his salary for the period running from 1st December until 7th February 2023, when his notice period was to end.
18. It was the Claimant's further submission that the Respondent's action of withholding the sum of Kshs 500,000 was in total breach of the mandatory provisions of Section 38 of the *Employment Act*.
19. The Claimant further posited that the screenshots sought to be adduced by the Respondent are of no probative value and should not be considered by the Court since they were produced in breach of Section 106 B of the *Evidence Act*.
20. In further submission, the Claimant stated that the purported shortening of his notice period and the action of maliciously withholding his notice pay entitlement amounted to unfair labour practice on the Respondent's part and an unfair termination of his employment. In support of this position, reliance was placed on the case of James Chutha Gatherer vs Nation Media Group Limited (2013) eKLR.
21. The Claimant further submitted that his contract of employment did not provide that his salary was consolidated to include housing allowance hence he is by law entitled to house allowance. To buttress this argument, the Claimant invited the Court to consider the determination in the case of Vipingo Ridge Limited vs Swalehe Ngoge Mpitta(2022) eKLR.
22. On the Respondent's part, it was submitted that the Claimant's actions brought him under the provisions of summary dismissal under Section 44 (e) and (g) of the *Employment Act* but since he was already serving his notice of termination, it magnanimously chose to shorten his notice period to aver further damage caused by his reckless and thankless behaviour.
23. Citing the case of Stephen O. Edewa vs Lavington Security Limited (2019) eKLR, the Respondent termed the Claimant's claim for house allowance as yet another poorly veiled attempt at unjustly enriching himself. It was the Respondent's position that the Claimant's conduct falls short of the maxim of equity that he who comes to equity must come with clean hands. On this score, reliance was placed on the case of John Njue Nyaga vs Nicholas Njiru Nyaga & another (2013) eKLR.
24. With regards to the admissibility of its electronic evidence, the Respondent submitted that the fact that the Claimant did not raise any issue with the production of the said evidence before the hearing can be construed as acquiescence on his part. The Respondent further urged that the Court is enjoined to do substantial justice to the parties and disregard technical procedures.



Analysis and Determination

25. Following from the pleadings by both parties, the evidentiary material placed on record and the rival submissions, this Court is being called upon to resolve the following issues:
- i. Whether the Claimant was unfairly and unlawfully terminated from employment;
 - ii. Admissibility of the electronic evidence submitted by the Respondent;
 - iii. Whether the claimant is entitled to the reliefs sought.

Whether the Claimant was unfairly and unlawfully terminated from employment

26. It is not in dispute that the Claimant tendered his notice of resignation as the Respondent's Head of Marketing on 7th November 2022. The same was to take effect on 7th February 2022. Therefore, it is apparent that at that point, the Claimant had unequivocally signified his intention to cease being an employee of the Respondent.
27. The Black's Law Dictionary (10th Edition) defines the term resignation to mean: -
- “The act or an instance of surrendering or relinquishing an office, right or claim. A formal notification of relinquishing an office or position; an official announcement that one has decided to leave one's job or organisation, often in the form of a written statement.”
28. Clause 13(a) of the Claimant's contract of employment, provided for voluntary resignation subject to the employee giving three months' notice or paying three months' salary in lieu of notice. The Claimant in this case opted to exercise this option by resigning voluntarily from the Respondent's employment and serving three months' notice period.
29. Therefore, it is evident that the contract of employment between the parties came to an end at the instance of the Claimant following his resignation. The shortening of his notice period by the Respondent did not amount to termination from its end.
30. In any event, the Claimant had resigned and the Respondent had lost jurisdiction over him and hence there is no way it could terminate his employment.
31. On this issue, I adopt the position taken in the South African case of *Lottering vs Stellenbosch Municipality*, (2010) 31 ILJ 2923 (LC), where it was held as follows: -
- “That the resignation is a final unilateral termination of the employment contract and once the applicant had submitted the first resignation that was the end of the contract.”
32. The total sum of my consideration is that the Claimant was not unfairly and unlawfully terminated from employment as his employment relationship with the Respondent ended through his resignation.

Admissibility of the electronic evidence by the Respondent

33. In the course of the hearing, the Respondent's witness sought to produce copies of screenshots of emails allegedly shared by the Claimant in breach of his contract of employment. This was opposed by the Claimant's Advocate on grounds that the same were not accompanied by an Electronic Evidence Certificate as required under Section 106 B of the [Evidence Act](#).



34. Having reviewed the said screen shots, it is apparent that the Respondent sought to adduce the same so as to prove that it had a right to summarily dismiss the Claimant from its employment under Section 44(4) (c), (e) and (g) of the *Employment Act*.
35. As I have found that the employment relationship was terminated at the behest of the Claimant through resignation, it follows that nothing turns on the electronic evidence sought to be adduced by the Respondent.
36. Therefore, it is illogical and superfluous for the Court to determine the admissibility of the said electronic evidence.
37. That said, I turn to consider the reliefs, if any available to the Claimant.

Reliefs

Balance of notice pay

38. The Claimant has sought the sum of Kshs 500,000/= being payment of the balance of his notice period. He has based his claim on the fact that the Respondent shortened his notice period by two months hence he is entitled to the balance thereof. According to the Respondent, it settled the Claimant's dues for the months of November and December as per the waiver notice in full hence does not owe the Claimant any dues.
39. Pursuant to Section 38 of the *Employment Act*, an employer may waive the whole or any part of the notice, in instances of resignation provided it pays the remuneration payable for the notice period not served by the employee as the case may be, unless the employer and the employee agree otherwise.
40. In this case, the Claimant's notice period as per Clause 13(a) of his contract of employment was three months. From the record, he only served notice for 23 days and thereafter, the Respondent waived the remaining notice period by two months and opted to pay him one month's salary in lieu of notice.
41. Therefore, the Claimant's outstanding balance for the notice period not served and which remained unpaid was one full month and 7 days being, January and 7 days in February 2023.
42. Having opted to waive the notice period by two months, the Respondent was required under Section 38 of the *Employment Act* to pay the Claimant the balance of the notice period upto 7th February 2023.
43. It is also notable that the Respondent's assertions that the shortening of the notice period was by mutual agreement of both parties was not supported by evidence. If anything, the wording of the Respondent's letter dated 29th November 2022 does not imply mutuality. Indeed, it is apparent that the decision to shorten the notice period emanated from the Respondent.
44. To this end, I return that the Claimant is entitled to salary for the month of January 2023 and 7 days in February 2023.

House Allowance

45. The Claimant has sought to be paid the sum of Kshs 600,000/= being unpaid house allowance. In its defence, the Respondent avers that the Claimant's salary was gross hence was consolidated.
46. Clause 5 of the Claimant's contract of employment provides as follows:

“ You will earn a gross monthly salary of Kshs 400,000.”



47. The Black's law dictionary, 10th Edition defines gross income as the "Total income from all sources before deductions, exemptions, or other tax reductions...Also termed as gross earnings."
48. A clear construction of the definition above, is that the term "gross" refers to all income payable. Presumably, these includes allowances. To buttress this finding, I gather support from the case of Samson Omechi Ongeru vs Tusker Mattresses Limited [2018] eKLR, where the court found that "Gross monthly pay comprises of basic pay together with house allowance but does not include other work dependent on allowances such as bonus or car allowance and overtime."
49. I will arrive at a similar finding in this case and hold that the Claimant's salary was inclusive of house allowance. As such, the Claimant's prayer in that respect is denied.

12 Months' salary for unfair termination

50. The Claimant has sought to be paid the sum of Kshs 4,800,000 on account of unfair termination. As the Court has found that the Claimant was not unfairly and unlawfully terminated from employment, this relief does not lie.

Orders

51. In total sum, Judgment is entered in favour of the Claimant against the Respondent and he is awarded the sum of Kshs 493,333.00 being the balance of his notice period upto 7th February 2023. Interest shall apply on the said amount at court rates from the date of Judgment until payment in full.
52. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Omino

For the Respondent Mr. Omari

