



**Wanyahora v Mediamax Network Limited (Petition E030 of 2020)
[2022] KEELRC 66 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 66 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E030 OF 2020**

J RIKA, J

MAY 27, 2022

BETWEEN

DANIEL WANYAHORA PETITIONER

AND

MEDIAMAX NETWORK LIMITED RESPONDENT

JUDGMENT

1. In his Petition amended on 28th May 2021, the Petitioner seeks the following orders: -
 - a. Declaration that the Respondent's failure to pay the Petitioner's salary for the months of April, May, June and July 2020 violated the Petitioner's right to fair labour practices under Article 41, and subjected the Petitioner to slavery, servitude and forced labour against Article 30 of *the Constitution*.
 - b. Declaration that the Respondent's act of denying the Claimant salary and assigning his duties to other persons, denied the Petitioner his right to fair labour practices and amounted to constructive dismissal.
 - c. Declaration that failure to offer the Petitioner written reasons for withholding of his salary as well as assigning his duties to another Employee amounted to violation of the Petitioner's right to fair administrative action under Article 47 of *the Constitution* and Section 4 of the *Fair Administrative Action Act*.
 - d. Declaration that the Petitioner is entitled to 12 months' salary in compensation for unfair termination.
 - e. An order of mandamus, compelling the Respondent to pay the Claimant salary for July, August and September 2020.



- f. An order of mandamus compelling the Respondent to pay the Petitioner 12 months' gross salary for unfair and unlawful termination at Kshs. 5,100,000.
 - g. An order of mandamus compelling the Respondent to pay the Petitioner service pay at 15 days' salary for each complete year of service.
 - h. An order of mandamus compelling the Respondent to pay the Petitioner 157.75 annual leave days at Kshs. 2,204,177.
 - i. Certificate of Service to issue.
 - j. Compensation for pain and suffering.
 - k. Costs, interest and any other relief.
2. The Petitioner explains in his Founding Affidavit and Grounds accompanying the Petition, that he was employed by the Respondent on 1st August 2008 as an ICT Assistant. He rose to become the IT Manager.
 3. On 20th April 2020, the Respondent attempted to force its Employees to sign contracts reducing their salaries by 50%. The Employees filed E&LRC Petition No. 59 of 2020, Mercy Milanoi & 36 others [suing on their behalf & 164 others] v. Mediamax Network Limited, challenging this decision.
 4. The Petitioner, unlike his colleagues in the above Petition continued working, albeit without receiving his salary. He declined to take the proposed pay cut. He wrote to the Respondent demanding payment of his salary. There was no response. He experienced difficulties. He was denied the request to work from home. He was compelled to work in circumstances amounting to slavery or servitude.
 5. The withholding of his salary and refusal to allow the Petitioner work remotely, compelled the Petitioner to resign. He indicated in his resignation notice that he did not do so voluntarily.
 6. The Petitioner reiterates that his Petition raises constitutional issues, and is filed at the right forum. The Respondent continued to remit the Petitioner's tax deductions until September 2020, while withholding his salary. The Petitioner explains that his interest was not captured under Petition No. 59 of 2020. He did not sign authority in that Petition, authorizing anyone to represent his interest. He was not privy to that Petition.
 7. Respondent's Chief Executive Officer, Ken Ngaruiya, swore his Replying Affidavit, on 14th September 2021.
 8. It is not disputed that the Petitioner was an Employee of the Respondent, as stated in the Petition.
 9. The CEO states that the Petition is in abuse of constitutional jurisdiction, as the remedies sought are available under the *Employment Act*.
 10. The CEO explains that due to Covid-19 pandemic, it suffered financial loss, and was unable to meet its contractual obligations. It could not pay its Employees' salaries as and when required. It consulted the Employees on measures to be taken, to stay afloat. There was no coercion. It was proposed that the Employees take a pay cut, among other proposals. The Petitioner declined the proposal, insisting to be paid his full salary. The Employees then presented E&LRC Petition 59 of 2020 challenging the proposed pay cut. Delay in paying salary for April, May and June salary was occasioned by the hardline position adopted by the Respondent.
 11. On 10th June 2020, consent order was recorded in Petition No. 59 of 2020, allowing the Respondent to terminate its Employees' contracts on redundancy. Delayed salaries were subsequently paid in



- accordance with the orders of the Court. The Petitioner received his last salary instalment on or about 31st August 2020.
12. The Respondent acknowledges that the Petitioner merited 157.75 leave days, which have since been paid in 3 equal instalments of Kshs. 402,222 on 4th December 2020, 23rd December 2020 and 29th January 2021 respectively. The Petitioner is currently employed by EBRU Africa TV as an IT Manager.
 13. The Respondent is not opposed to the prayer for Certificate of Service.
 14. The Petitioner requested to work from home. He was advised his role could not effectively be discharged remotely. He absconded from 1st July 2020, and resigned on 23rd July 2020. His letter of resignation was backdated to 1st July 2020.

The Court Finds

15. This Court has recently found that disputes arising out of the redundancy situation at the Respondent business, were compromised in Petition No. 59 of 2020. There was a consent Judgment. Other Petitions filed by Employees who were caught up in that redundancy situation, have since been declared by this Court to have been compromised. The Petitioner alleges that he did not donate his authority to the Petitioners on filing of Petition No. 59 of 2020. He did not apply to the Court to strike out his name from that Petition. He is bound by the orders made in Petition No. 59 of 2020, on 10th June 2020.
16. And even assuming the Court is wrong in this conclusion, and holds that the Petitioner is not bound by orders made in the above Petition, his prayers in the present Petition have no merit.
17. The Respondent has demonstrated that its business, like other businesses worldwide, was affected adversely by the disruption that came with Covid-19.
18. It took measures to stay afloat. There was no concurrence with many of its Employees, on the proposal for pay cut. The Employees went to Court and consent Judgment was obtained, endorsing termination through redundancy.
19. Delayed salaries were eventually paid. The Court does not think it would be correct to find that such delay amounted to violation of Article 41 on fair labour practices. There was a reason why salaries were delayed, and why pay cut was proposed. It is not reasonable for any Employee, aware of the financial difficulties occasioned to businesses by the pandemic, to insist on being paid full salary, as the salary falls due.
20. It is a misapprehension of the concept of constructive dismissal, for an Employee to hold that circumstances created at the workplace by external factors such as a pandemic, can be attributed to the Employer. The Respondent did not create the unbearable work environment the Petitioner states he endured, leading to his resignation. He well may not have resigned voluntarily. He was not compelled to resign by the Respondent, but by a situation which was created by an unexpected and external force- Covid-19. His resignation cannot amount to constructive dismissal, a concept well elucidated in the seminal Court of Appeal of Kenya decision, *Coca Cola East & Central Africa Limited v. Maria Kagai Ligaga* [2015] e-KLR.
21. Employees were aware of the reasons for delay in payment of their salaries. These were the same reasons why pay cut was proposed. There is no evidence that any other Employee was assigned the Petitioner's functions irregularly. The Petitioner resigned and someone had to continue discharging his role. There was no breach of any constitutional or statutory right.



22. Resignation did not amount to unfair or unlawful termination. The Petitioner resigned because he did not agree with the measures taken by the Respondent, in response to Covid-19. By the time of his resignation, 1st July 2020, the Court had already decreed that Parties were free to disengage through redundancy. The Petitioner could have opted to exit through redundancy.
23. He has not established the prayer for compensation for pain, suffering and emotional turmoil. No liability is to be apportioned to the Respondent, for an act of force majeure.
24. The Respondent has offered to release the Certificate of Service to the Petitioner.

It is Ordered

- a. The Petition is declined.
- b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 27TH DAY OF MAY 2022.

JAMES RIKA

JUDGE

Court Assistant: Emmanuel Kiprono

Musyoki Mogaka & Company Advocates for the Petitioner

Wainaina Ireri Advocates LLP, for the Respondent

