



**Kute v Free Kenya Foundation (Cause 291 of 2018)
[2022] KEELRC 1505 (KLR) (15 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1505 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 291 OF 2018**

**S RADIDO, J
JUNE 15, 2022**

BETWEEN

ZADDOCK ARCHIBALD OCHIENG KUTE CLAIMANT

AND

FREE KENYA FOUNDATION RESPONDENT

JUDGMENT

1. Zaddock Archibald Ochieng Kute (the Claimant) sued Free Kenya Foundation (the Respondent), alleging unfair termination of employment and breach of contract.
2. The Respondent filed a Response on 30 December 2020, and the Cause was heard on 10 February 2022 and 31 March 2022. The Claimant and a former director with the Respondent testified.
3. The Claimant filed his submissions on 11 April 2022, and the Respondent on 24 May 2022.
4. The Issues emerging from the submissions are:
 - i. Whether the Respondent unfairly terminated the Claimant's employment?
 - ii. Whether the Respondent was in breach of contract?
 - iii. Appropriate orders.
5. The Court has considered the pleadings, evidence, and submissions.

Unfair termination of employment/constructive dismissal

6. The Claimant was engaged as a Program Manager with the Respondent on 1 March 2017.



7. On the separation, the Claimant testified that on or around 11 October 2017, a director of the Respondent called him and suggested disengagement. The director offered him Kshs 80,000/-. The Claimant testified that he declined the offers because he had not paid his salary from August 2017.
8. The Claimant alleges constructive dismissal.
9. The Respondent's director testified that the Claimant's employment was not terminated and that he left on 6 October 2017 upon being informed of the lack of financial resources due to a stop of donor funding. The witness produced emails to confirm the narration.
10. For an employee to assert constructive dismissal successfully, there must be evidence that the employer created a hostile work environment causing him or her to leave with or without notice.
11. The Claimant did not place any tangible evidence before the Court that the failure to pay his wages from August 2017 caused him to exercise the option of leaving with or without notice.
12. The Court finds that this was not a case of constructive dismissal.
13. The testimony of both the Claimant and Respondent's witness suggests that the Respondent's sources of funds had dissipated.
14. The Respondent suggested disengagement and offered the Claimant Kshs 80,000/- on the condition he returned the laptop issued to him for purposes of work. The Claimant declined the proposal and had not returned the laptop by the time of the hearing.
15. The suggestion of disengagement, in the Court's view, did not meet the threshold of termination of employment as contemplated in law.
16. It was upon the Claimant to prove at the first instance as contemplated by section 47(5) of the [Employment Act, 2007](#), that there was an unfair termination of employment. He did not meet the standard of proof.
17. The Court, therefore, declines to find unfair termination of employment.

Unpaid leave

18. The Claimant prayed for Kshs 64,380/- said to be accrued leave for 2017.
19. The Claimant started working on 1 March 2017. He served for about 6 months. He went on leave for 21-days.
20. Under the circumstances, the Court finds that apart from the salary due during the leave, the Claimant is not entitled to any commuted leave pay.

Salary arrears

21. The records produced by the Respondent show that in August 2017, the Claimant was paid Kshs 10,000/- leaving a balance of Kshs 70,000/-.
22. The parties disengaged during the first week of October 2017.
23. The Claimant would therefore be entitled to a salary for September 2017, amounting to Kshs 80,000/-.
24. The Court will allow this head of the claim in the sum of Kshs 90,000/-.



Conclusion and Orders

25. The Court dismisses the claim for unfair termination of employment.
26. However, judgment is entered for the Claimant in the sum of Kshs 90,000/- being salary arrears.
27. The Respondent offered to settle the Cause out of Court, but the Claimant was unyielding. Each party to bear its own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 15TH DAY OF JUNE 2022.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Claimant Ben Aduol Nyanga & Co. Advocates

For Respondent Anyango Owino & Associates

Court Assistant Chrispo Aura

