



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. CAUSE NO. 1963 OF 2015

PAULINE KATHURE KIRAITHE.....CLAIMANT

-VERSUS-

NATION MEDIA GROUP LIMITED..... RESPONDENT

JUDGMENT

1. The suit herein arose from the resignation of the Claimant from her employment with the Respondent company. The facts of the case are that the Claimant was employed by the Respondent on 5.7.2005 as a Training and Career Development Manager earning a basic salary of Kshs. 132,000 plus a car allowance of Kshs. 68000 per month.

2. She served the company diligently until 5.11.2012 when she tendered a resignation letter by giving three month's notice and requesting that her accrued leave be utilized as part of the notice period. By a letter dated 9.11.2012, the Respondent acknowledged Claimant's resignation stating that under Clause 4(c) of her contract of employment the 3 months notice ought to end on 2.2.2013.

3. However, the letter indicated that her 15 accrued leave days would be used to offset part of the notice period so as to release her on 9.11.2012. The letter also indicated that she would be paid her salary upto 9.11.2012 subject to clearing notice period of 70 days or in lieu pay thereof Kshs. 681,007 plus car insurance balance of Kshs. 6,391.70. Finally, the letter gave an undertaking that her pension dues would be paid in line with the trust deed subject to her completing clearance with company.

4. The Claimant did not agree with the conditions for the early release given by the employer vide the above letter but exited on 9.11.2012 and did clearance with all the required departments except the Finance Department which demanded that she pays the said Kshs. 681,007 being salary for the unexpired notice period. The Claimant was aggrieved and brought this suit contending that she was ready to serve through the notice period but the employer forced her out before the expiry of the notice period. The suit therefore prayed for the following reliefs:

- (a) An order declaring that the Respondent's actions of refusal to pay terminal dues to the Claimant amounted to unfair and unlawful labour practice.
- (b) Payment of Kshs. 687,398.70 as stated in the Resignation acceptance letter.
- (c) 15% of house allowance from her basic pay for every month she worked for the Respondent.
- (d) Accrued leave days.
- (e) Bonus payment paid out to staff for the year 2012.
- (f) Interest on 2,3,4 and 5.
- (g) Costs of the suit
- (h) Any other relief that the court may deem fit to grant.

5. The Respondent filed defence and counterclaim contending that after serving the resignation notice, the Claimant requested for a waiver of the notice period because she had secured another job and by the letter dated 9.11.2012, she was given a conditional early release. However, according to the Respondent, the Claimant refused to sign acceptance to the conditional offer and exited on 9.11.2012 to take on her new

job. Accordingly, the Respondent averred that the Claimant breached the contract of employment by exiting without prior notice or payment of salary in lieu. Therefore the Respondent prayed for the suit to be dismissed and its counterclaim for salary in lieu of notice of Kshs. 681,007 plus car insurance balance of Kshs. 6,391.70 be allowed with costs.

6. The suit went to full hearing in which both parties gave evidence and thereafter filed written submissions.

SUMMARY OF EVIDENCE

7. The Claimant testified as CW1. She confirmed that she gave her resignation letter dated 5.11.2012 to her Boss and the Respondent's Group HR Director Ms. Mwikali Muthiani. The letter was giving 3 months notice but to her surprise, her said boss served her with the letter dated 9.11.2012 acknowledging the resignation notice but requiring her to exit on the same day. She contended that she was ready to serve through the notice period but her boss pushed her out in order for her to forfeit salary for the notice period. She further contended that she was given one week for clearance but she got stuck at finance department because she was told to pay salary for the notice period.

8. She contended that her efforts to have the matter resolved amicably were thwarted by the exit of the HR Director and by the company lawyer's refusal to address the dispute.

9. The Claimant further contended that Clause 3 of her Appointment Letter provide for basic salary only and as such she prayed for payment of house allowance at the rate of 15% of her basic pay for the entire period of her service to the Respondent.

10. On cross-examination, she admitted that clause 11(c) of her Appointment Letter provided that either party to the contract could terminate it by 3 months notice or payment of salary in lieu of notice. She further admitted that the letter dated 9.11.2012 by the HR Director indicated that she was to serve 3 months notice but her 15 leave days would be applied to reduce the notice period. She admitted that she had 15 accrued leave days.

11. She contended that although she had secured another job, she was to commence in the following year after serving her notice period.

She denied that she requested to exit immediately and contended that after serving the resignation letter, the HR Director became emotional because she had now become her peer in the industry. She contended that if she wanted to leave before serving the notice period, she would have written a letter just as she did to request for her 15 leave days to be used to reduce the notice period.

12. However, she admitted that paragraph 4 of the letter dated 9.11.2012 indicated that she should be paid salary upto 9.11.2012 subject to clearing of her notice period of 70 days plus car insurance balance but she refused to sign the letter because she never requested to exit by 9.11.2012. She further admitted that she did clearance except with the Finance Department because she was told that she owned notice and car insurance.

13. She contended that as a HR professional, she knew her rights and obligations under the contract of employment. She stated the Respondent had a Performance Management Bonus Policy and she never missed bonus during her service to the Respondent. She further stated that her notice period was to continue to the end of the year and as such she was entitled to bonus for that year. However, she admitted that her Appointment Letter did not provide for payment of Bonus. She also did not have a copy of the Bonus Policy in court.

14. She reiterated that Clause 3 of the Appointment Letter provided for a basic salary of Kshs. 132,000 per month and maintained his claim for house allowance. She admitted that the law allows for payment of a consolidated salary, but she contended that such pay must be expressly stipulated. Finally, she admitted that she never served through her notice period and she never paid salary in lieu of notice plus car insurance balance of Kshs. 6391.70.

15. On Re-examination, she contended that she was prevented from serving her notice period by the employer. She further contended that she was prevented from completing clearance by the employer and demanded for salary in lieu of notice. She denied the counterclaim and stated that the counterclaim is the same salary in lieu of notice she is seeking in her suit. She further stated that her salary of Kshs. 132,000 had been increased at the time of her exit.

16. **Mr. Sekou Owino the Respondent's Head of Legal and Training testified as RW1.** He told the court that the Claimant served a resignation notice on 5.11.2012 and requested for her accrued leave days to be utilized as part of the notice period. He further stated that the Claimant also verbally requested the HR Director for waiver of her notice period and by the letter dated 9.11.2012, she was notified that after reducing the notice period by 15 accrued leave days, the balance of her notice period would be 70 days equalling Kshs. 681,007 which would be off set from her salary. He stated also that the letter notified the Claimant that Ksh. 6391.70 being car insurance balance would also be recovered from her salary. RW1 testified that the Claimant refused the offer to pay salary in lieu of the 70 days notice period and also failed to serve the said notice period. Therefore, he contended that the Claimant breached the contract of service and ought to pay to the Respondent salary in lieu of notice being Kshs. 681,007 plus car insurance balance of Kshs. 6,391.70 for the same reason he contended that the Claimant is not entitled to salary in lieu of notice.

17. He further contended that the Claimant is not entitled to the Claim for bonus because it is only payable on a full year basis after appraisal while the Claimant left before the year ended and before appraisal. He also contended that the Claimant is not entitled to the claim for house allowance because the Respondents operated on consolidated pay.

18. On cross-examination, RW1 admitted that the Claimant resigned vide the letter dated 5.11.2012 giving 3 months notice. He further admitted that he had no written evidence to prove that the Claimant requested to exit earlier in order to take up a new job. He also admitted that he had no evidence to prove that a meeting took place between the Claimant and the HR Director in which the Claimant requested for an early exit.

19. RW1 reiterated that the Claimant failed to complete her clearance by failing to take the clearance form to the Finance Department. He admitted that by the letter dated 9.11.2012 the HR Director indicated that the Claimant would be released on 9.11.2012. He further admitted that the Claimant could not forcefully continue serving after the HR Director told her to exit and clear from the company. He also admitted that the Respondent never demanded the sum counterclaimed before the Claimant filed this suit.

20. Finally, RW1 admitted that the Claimant's Appointment Letter did not mention consolidated pay.

21. On re-examination, RW1 contended that the Claimant was in the HR Department and as such she was fully aware of her rights as an employee. He contended that the Claimant never wrote any letter demanding to serve through her 3 month notice period. He reiterated that he had no evidence that the Claimant requested to exit before completing the notice period. Finally, he contended that the obligation to do clearance is on the employee but in this case the Claimant did not complete her clearance.

SUMMARY OF SUBMISSIONS

22. The Claimant submitted that resignation is a voluntary termination of employment by an employee and it takes effect on the date stated in the resignation letter. She contended that resignation is unilateral legal act and it does not require acceptance by the employer in order to become effective. Therefore, according to the Claimant the employer has no right to reject or to impose any conditions once the employee has unequivocally communicated his/her resignation. For emphasis, she relied on **Kenya Hotels & Allied Workers Union v. Mara Sireia t/a Safari Camp (K) Limited [2016] eKLR**.

23. The Claimant further submitted that under section 38 of the Employment Act, the employer can waive the notice period if the employee is paid salary for the notice period. She conceded that, since she gave 3 months termination notice but the Respondent directed her to exit immediately, then the employer ought to pay her 3 months salary in lieu of notice less 15 leave days commuted as part of the notice period.

24. She further contended that the Respondents did not adduce any evidence to prove that she requested to exist before serving through the notice period. For emphasis she relied on **James Chutha Gather v Nation Media Group Ltd.[2013]eklr**.

25. As regards the claim for House Allowance the Claimant contended that section 31 of the Employment Act entitled her to be provided housing by the employer or be paid a house allowance. She further contended that section 74 of the Act requires an employer to keep written record of which among other things shall include particulars of the employees housing and where the wage rates are deconsolidated, particulars of the house allowance paid to the employee.

26. She contended that her contract provided only for basic pay and no house allowance. She therefore prayed for the claim for arrears of House Allowance to be granted for the entire period of her service.

27. The Respondent submitted that the Claimant's contract of employment that either party could terminate it by 3 months notice of payment of the other 3 months salary in lieu of notice. It further submitted that after the Claimant resigned by the letter dated 5.11.2012, she requested for a waiver of the 3 months notice period after reducing it by the outstanding leave days.

28. It further contended that by the letter dated 9.11.2012 the Claimant required to either serve the notice period or pay if salary equivalent to the notice period, but she failed to comply with the said condition and left immediately.

29. In view of the foregoing the Respondent submitted that the Claimant is not entitled to payment of Kshs. 687,398.70 being a claim for salary in lieu of notice, but she ought to pay it Kshs. 681,007 being salary in lieu of the 70 day which the Claimant did not serve. For emphasis, it relied on **Kenya National Library Services Board v. Beatrice N. Ayoti[2014]eKRL**. It further contended that the provision of section 38 of the Employment Act is not relevant to this case because it never waived the notice period but rather, gave a waiver on conditions which the Claimant failed to comply.

30. As regards the claim for House Allowance, the Respondent reiterated that the Claimants pay was a gross salary as indicated in the payslips produced and therefore, she is not entitled to the said claim. She further contended that the claim for house allowance is time barred because it was a continuing default which ought to be brought to court within 12 months of the cessation of the default. For emphasis it relied on **Postal Corporation of Kenya v Andrew K. Tanui[2019]Eklr**.

31. Finally, the Respondent contended that the Claimant is not entitled to the claim for bonus and accrued leave. It contended that the Claimant's contract did not provide for Bonus and as such the same was a discretionary pay based on employee's performance. On the other hand, it contended that the Claimant consented that her accrued leave days to be part of the notice period. Therefore, it urged the court to dismiss the suit to allow its counterclaim as prayed.

ISSUES FOR DETERMINATION

32. Having considered the pleadings, evidence and submissions, it is common ground that on 5.11.2012 the Claimant served a resignation notice of 3 months on the Respondent and requested that her accrued leave days be used to reduce the notice period. It is also a fact that the Respondent accepted the resignation by the letter dated 9.11.2012 whereby it released the Claimant on the same date and undertook to pay her salary upto 9.11.2012 subject to her clearing Kshs. 681,007 being salary in lieu of the outstanding 70 days of her notice period plus her car insurance balance of Kshs. 6391.70. The issues for determination are:

(a) Whether the Claimant requested for waiver of the notice period or she was forced to exit earlier by the letter dated 9.11.2012.

(b) Whether the Claimant is entitled to the reliefs sought in the suit.

(c) Whether the Respondent is entitled to the reliefs sought in the Counterclaim.

VOLUNTARY EXIT OR FORCED OUT ON 9.11.2012

33. The Claimant's case is that by her letter dated 5.11.2012, she gave a resignation notice of 3 months to the Respondent who responded by the letter dated 9.11.2012 accepting the resignation but released her on the same date and told her to clear from the company. According to her, she had no option but to clear as directed although she did not accept the terms given in the letter dated 9.11.2012. Therefore, she maintained that she was forced out of employment by the Respondent before the notice period ended.

34. On the other hand, the Respondent's case is that after serving her resignation notice, the Claimant approached the HR Director and requested for the waiver of the notice period and in response the Director wrote to her the letter date 9.11.2012 accepting the waiver on condition that she pays salary in lieu of notice of the outstanding 70 days being Kshs. 681,007 plus car insurance balance of Kshs. 6391.70.

35. I have carefully considered the evidence and the submissions by both parties. The resignation letter dated 5.11.2012 state as follows:

"RESIGNATION LETTER

This is to hereby give 3 months' notice to resign from my current position of HR Manager . . .

Kindly utilize my pending leave days as part of my notice.

. . .

Regards

Pauline Kirathe

HR MANAGER."

36. The letter dated 9.11.2012 responded as follows:

" . . .confirm that your resignation from the company has been accepted with regrets.

Pursuant to clause 11(c) of your letter of appointment, you are required to serve three(3) months notice up to 2nd February,2013. We will use fifteen (15) of your accrued leave days to offset part of the period, so as to release you on 9th November, 2013.

You will be paid as follows less any money owned by you in your account and statutory deductions:

Salary up to and including 9th November, 2012 subject to clearing your notice period of seventy days (70 days) in lieu of notice [sic] i.e. Kshs. 681,007/- plus car insurance balance of Kshs. 6,391.70/-.

Your pension . . .

Yours faithfully

NATION MEDIA GROUP

MWIKALI MUTHIANI

GROUP HR DIRECTOR

I, of P.O. BoxNairobi have read and understood the terms and conditions stated above and agree to discharge my employment.

Signed: ----- Date -----

Pauline Kirathe

Cc Group Finance Controller"

37. The plain meaning of the above two letters, in my view, is that the Claimant gave notice of 3 months to exit the Respondent company pursuant to Clause 11(c) of her appointment letter. On the face of it, the Claimant was willing to serve the notice period less any accrued leave days. The response by the employer is also clear that the resignation was accepted.

38. However, the response brings out the issue of waiver of the notice. The waiver is pegged on a condition that the Claimant pays Kshs. 681,007, in lieu of 70 days notice period. Although the Claimant disputed the Respondent's allegation that she sought waiver of the notice period from the HR Director, and even imputed bad motive on the HR Director, the correspondences exchanged between the Claimant and Mr. David Kiambi corroborates the evidence by RW1 that indeed the Claimant requested for waiver of the notice period.

39. By the email written on Tuesday November 11 2014 at 11.10 a.m. to Mr. David Kiambi, the Claimant stated as follows:

"Dear David,

. . . When I resigned on 5th November 2012, I gave my required 3 months' notice which after serving notice and trading off of my leave I had requested to leave on 31st December, 2012. This was to allow for my smooth handover as well as enable me to be eligible for the yearly bonus.

Upon resigning, my supervisor, Mwikali Muthiani then felt I need to leave immediately due to the fact I was going to a competitor organization and proceeded to ask me to handover and leave within the week. She proceeded to inform the senior management team of my departure by email, after which I complied and did the handover."

. . .

Kind Regards.

Pauline Kiraithe

HR Director

The Standard Group

P.O. Box 56985-00200

NAIROBI."

40. The said email was written by the Claimant, who also produced it here as an exhibit. Its admissibility and necessity has not been challenged. Therefore, I rely on it to support my view that after tendering a 3 months written notice the Claimant verbally requested the HR Director to waive part of the notice period.

41. Having found that the Claimant sought waiver of part of her notice period, I must also find that the letter dated 9.11.2012 gave her a conditional waiver being that she pays Kshs. 681,007 in lieu of 70 days, which remain outstanding after utilizing her 15 days leave plus of course the 5 days served from 5.11.2012 when the notice was served.

42. The Claimant alleges that she declined the conditional waiver but went on with the clearance because the letter dated 9.11.2012 had effectively forced her out of the Respondent before time. That view is obviously not correct. In my view the letter merely gave her an option to accept or reject. The letter as copied above had an acceptance clause below the Author's signature, which she neither signed the acceptance nor did she continue serving. Instead she did partial clearance and reported to her new employer after noticing that she would miss salary for that month. Consequently, it is clear as the day, that the Claimant was not forced out by the Respondent but she voluntarily left the Respondent's employment with 70 days of her notice period still outstanding and without paying salary in lieu, contrary to clause 11 (c) of her contract of service and section 36 of the Employment Act.

RELIEFS SOUGHT

43. In view of the foregoing holding, I decline to make a declaration that the Respondents action amounted to unfair and unlawful labour practices. For the same reason, I find that the Claimant is not entitled to payment of salary in lieu of notice as prayed.

44. As regards the claim for House allowance, at the rate of 15% of the basic salary for all the years she worked for the Respondent, section 31 of the Employment Act obligates an employer to provide reasonable housing accommodation to each of his employees near his work station or pay to the employee sufficient house allowance for rent of reasonable accommodation in addition to the employee's salary or wages. However, subsection (2) allows the employer to pay a consolidated salary by incorporating the housing allowance as part of the basic wage or salary.

45. The Respondent contended that it is her policy to pay consolidated salaries to her employees. I have considered the payslips produced as exhibits and it is clear that they refer to the remuneration paid as gross pay made up of a basic of Kshs. 291,860 plus car allowance of Kshs. 96000. The Claimant never raised any complaint about non payment of House Allowance for all the years she served the Respondent yet in her own words, she is a HR professional who know her rights as an employee. Therefore, I find that the component of the remuneration described as basic was indeed a consolidate salary inclusive of house allowance, and dismiss the claim for house allowance.

46. As regards the claim for accrued leave days, the court finds no merits in the same noting that vide the resignation letter, she authorised

the employer to utilize the accrued leave days as part of the notice period. It is also notable that by the letter dated 9.11.2012, the employer utilized 15 leave days to reduce the notice period and Claimant admitted in evidence that she had only 15 days leave outstanding. Consequently, I also dismiss the claim for accrued leave for the reason that besides the lack of particulars, the Claimant has tendered no evidence to prove that there were more than 15 days leave outstanding as at the time she exited.

47. Likewise the claim for bonus lacks particulars. In addition the claim was made on the basis that the Claimant's notice period was expected to end after 31.2.2012. However, the Claimant voluntarily left the Respondent before the end of the year and before the employer could exercise its discretion whether or not to pay the bonus for the year ending on 31st December 2012. Consequently, that claim also falls on its face.

COUNTERCLAIM

48. Having found that the Claimant breached her contract of service by exiting when 70 days of her notice period were still outstanding, I must hold, as I do, that the Respondent is entitled to payment of Kshs. 681,007 being salary in lieu of the 70 days of the resignation notice not served by the Claimant. The Respondent is also entitled to the claim for Ksh. 6391.70 being car insurance balance which has not been disapproved by the Claimant.

CONCLUSION AND DISPOSITION

49. I have found that the Claimant was not prevented from serving her notice period by the Respondent but she voluntarily left on 9.11.2012 to join a new employer. I have also found that she is not entitled to reliefs sought in her claim. Finally, I have found that Respondent is entitled to the reliefs sought by its counterclaim and consequently, I enter judgment in favour of the Respondent against the Claimant in the following terms:

- (a) The Claimants suit is dismissed.
- (b) The counter claim is allowed by awarding the Respondent Kshs. 687,398.70.
- (c) Costs and interested from the date hereon.

Dated, signed and delivered in Nairobi this 5th day of February, 2021.

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment 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.

ONESMUS N. MAKAU

JUDGE