



**Owade v Chandaria Industries Limited (Cause 1747 of 2017)
[2021] KEELRC 4 (KLR) (13 September 2021) (Judgment)**

Samwel Ajwang Owade v Chandaria Industries Limited [2021] eKLR

Neutral citation: [2021] KEELRC 4 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1747 OF 2017
BOM MANANI, J
SEPTEMBER 13, 2021**

BETWEEN

SAMWEL AJWANG OWADE CLAIMANT

AND

CHANDARIA INDUSTRIES LIMITED RESPONDENT

An employee does not need to justify their resignation.

Reported by John Ribia

Employment Law – resignation – justification - whether an employee needed to justify a resignation by providing reasons – whether an employer had to pay an employee salary for the notice period waived after a resignation – Employment Act, section 38.

Employment Act – resignation – terminal dues – house allowance - what did the court consider in awarding compensation for house allowance – Labour Institutions Act, Act No 112 of 2007; Legal Notice No. 117 of 2015.

Brief facts

The claimant sought terminal dues based on a contract of service against the respondent. The claimant’s case was that he resigned from the respondent’s employment but was not paid terminal dues. He, therefore, sought court orders compelling the respondent to pay terminal dues as set out in the statement of claim.

Issues

- i. Whether an employee needed to justify a resignation by providing reasons.
- ii. Whether an employer had to pay an employee salary for the notice period waived after a resignation
- iii. What did the court consider in awarding compensation for house allowance?

Held

1. An employee did not need to justify a resignation by providing reasons for it. No such obligation arose against an employee. The only requirement the law placed on an employee in order to ensure that resignation was without offense to the law was one that related to notice. An employee must issue



- notice to the employer in terms of section 35 of the Employment Act or pay to the employer an amount equivalent to the salary the employee would have earned if she/he served for the whole term of such notice period in terms of section 36 of the Employment Act.
2. Section 38 of the Employment Act entitled the employer to waive the notice aforesaid by the employee. In the event of such a waiver, the employee would be relieved of the obligation to serve during the period the notice would have lasted. The employer had to nonetheless pay such employee salary for the notice period that was waived.
 3. The claimant issued the respondent with a notice to resign dated November 28, 2015, which was produced in evidence. The respondent accepted the claimant's resignation. From the date of the letter of the respondent accepting the resignation, the respondent indicated that the resignation would take effect immediately thus waiving the notice in terms of section 38 of the Employment Act. The claimant thus validly resigned.
 4. The claimant described himself as a paper converter. However, no evidence was tendered by him or the respondent to indicate what the claimant's actual job description was as a converter. There was however evidence that the entry point of the claimant was that of a general worker. The court would hold him as a general worker.
 5. Under the Wage Order issued under Legal Notice No. 117 of 2015, the basic salary for general workers in Nairobi and its environs was fixed at Kshs. 10,954.70 exclusive of house allowance. Although the Employment Act stipulated that housing was one of the fundamental rights of an employee and that the employer had to either provide physical housing or house allowance to employees, no guideline was provided on how to fix the quantum of the allowance where the parties did not agree. However, the court had evolved a practice to assess this allowance at the rate of 15% of the monthly salary of the affected employee. If the claimant was earning Kshs. 14,498/= against the stipulated minimum wage of Kshs. 10,954.70 then in force, it was reasonable to hold that that amount included housing allowance for the claimant.

Claim partly allowed.

Orders

- i. *The resignation by the claimant was validly undertaken.*
- ii. *The claim for house allowance was declined.*
- iii. *The claim for unpaid leave was allowed at Kshs. 48,000/=.*
- iv. *Interest granted on (iii) above from date of suit till payment in full.*
- v. *Costs awarded to the claimant.*
- vi. *The award is subject to statutory deductions where applicable.*

Citations

Statutes

1. Employment Act (cap 226) sections 35,38 — Interpreted

Advocates

None mentioned

JUDGMENT

1. This is an action by the claimant against the respondent seeking terminal dues based on a contract of service between the two parties. The claimant's case is that he resigned from the respondent's employment but was not paid terminal dues. He therefore seeks court orders compelling the respondent to pay terminal dues as set out in the statement of claim.
2. The claim in this case raises two issues:-



- a) Whether an employee must justify a resignation to the employer.
 - b) In the event of a valid resignation by an employee, what entitlements is he/she entitled to against the employer?
3. It is not disputed that the claimant was employed by the respondent on 20th June 2010 as a Converter. It also appears not in contest that the claimant tendered his resignation from employment on 28th November 2015. Indeed, the claimant produced a letter dated 28th November 2015 evidencing his communication to the Respondent that he was quitting employment on medical grounds.
 4. What I gathered from the evidence as presented by the respondent's witness is that there was a dispute as to whether the claimant resigned on account of his failing health or some other ulterior reason. To buttress this, the respondent tried to lead evidence to dissuade the court from finding that the claimant validly resigned on medical grounds. As can be discerned from the respondent's pleadings, it is suggested that by the claimant failing to undergo a medical review by the respondent's doctor to ascertain the chest problem that was allegedly the basis of the claimant's resignation, the claimant did not fulfill his part of a proper exit. Nonetheless, the respondent appears to suggest that it accepted the resignation.
 5. The position in relation to whether an employee needs to justify a resignation by providing reasons for it is now well settled in law. No such obligation arises against an employee. The only requirement the law places on an employee in order to ensure that a resignation is without offense to law is one that relates to notice. He/she must issue notice to the employer in terms of section 35 of the [Employment Act](#) or pay to the employer an amount equivalent to the salary the employee would have earned if she/he served for the whole term of such notice period in terms of section 36 of the Act.
 6. However, section 38 of the Act entitles the employer to waive the notice aforesaid by the employee. In the event of such waiver, the employee will be relieved of the obligation to serve during the period the notice would have lasted. The employer must nonetheless pay such employee salary for the notice period that is waived.
 7. In this cause, the claimant issued the respondent with a notice to resign dated 28th November 2015. The same was produced in evidence.
 8. The respondent produced a letter dated 30th November 2015 indicating that it accepted the claimant's resignation. From the letter, the respondent indicated that the resignation would take effect immediately (30th November 2015) thus waiving the notice in terms of section 38 of the [Employment Act](#). The court therefore finds that the claimant validly resigned.
 9. The resignation having been valid was the employer obligated to pay the claimant the terminal dues claimed in the statement of claim? The claimant in his statement of claim and subsequent testimony in court claimed for the following:
 - a) House allowance for 4.5 years of Ksh 97,200.
 - b) Unpaid leave dues of Ksh 48,000.
 - c) Interest on the aforesaid amounts.
 - d) Costs of the suit.
 10. The claimant stated in evidence that his salary on exit was Ksh 14,498. The respondent produced the claimant's August 2015 pay slip showing basic pay of Ksh 14,498. In the absence of evidence to the contrary, the court holds that the claimant's exit salary was Ksh 14,498.



11. The claimant describes himself as a paper converter. However, no evidence was tendered by him or the respondent to indicate what the claimant's actual job description was as a converter. There is however evidence that the entry point of the claimant was that of a general worker. The court will therefore hold him as such.
12. Under the wage order issued under legal notice no 117 of 2015, basic salary for general workers in Nairobi and its environs was fixed at Ksh 10,954.70 exclusive of house allowance. Although the Employment Act stipulates that housing is one of the fundamental rights of an employee and that the employer must either provide physical housing or house allowance to employees, no guideline is provided on how to fix the quantum of the allowance where the parties do not agree. However, the court has evolved a practice to assess this allowance at the rate of 15% of the monthly salary of the affected employee.
13. If the claimant was earning Ksh 14,498 against the stipulated minimum wage of Ksh 10,954.70 then in force, it is reasonable to hold that this amount included housing allowance for the claimant. The court therefore declines to award the claim for house allowance.
14. The claimant has claimed unpaid leave for the 4.5 years he worked. The respondent concedes this claim with the disagreement arising only in relation to the amount to be paid. The Claimant claims for Ksh 48,000 while the Respondent offers Ksh 46,839.69 a difference of about Ksh 1,160. Since both parties appear to have a common agreement that this amount is due save for the slight discrepancy in the figures, I will say no more on the right to recover the amount.
15. Accordingly, unpaid leave is assessed at Ksh 48,000. This amount will attract interest at court rates from the date of institution of the case till payment in full. It is also subject to statutory deductions where applicable.
16. Costs are granted to the claimant.
17. Summary of the award:-
 - a) The resignation by the claimant was validly undertaken.
 - b) Claim house allowance declined.
 - c) Claim for unpaid leave allowed at Ksh 48,000.
 - d) Interest granted on b) above from date of suit till payment in full.
 - e) Costs to the claimant.
 - f) The award is subject to statutory deductions where applicable.

DATED, SIGNED AND DELIVERED ON THE 13TH DAY OF SEPTEMBER, 2021

B O M MANANI

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.



B O M MANANI
JUDGE

