



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 281 OF 2015**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**DcANIEL JACKSON LUSAKA.....CLAIMANT**

**VERSUS**

**SMOOTHTEL AND**

**DATA SOLUTIONS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed a memorandum of claim on 3<sup>rd</sup> March 2015 praying for terminal dues as follows: -

(i) Salary for September 2012 Kshs.120,000.00

(ii) 5 days' salary for October 2012

( x 120,00) Kshs.20,000.00

Less advance taken (Kshs.20,000.00)

Net total claim Kshs.120,000.00

(iii) Interest to date at 25% per annum

(iv) Costs of the claim.

2. The Respondent filed its response to the memorandum of claim on 9<sup>th</sup> July 2015.

**Claimant's Case**

3. The Claimant avers that the Respondent appointed him as its Finance Manager on 1<sup>st</sup> August 2012 effective 20<sup>th</sup> August 2012. However, on 27<sup>th</sup> September 2012, the Claimant tendered his resignation by giving a 7 days' notice as provided by the written contract of employment dated 1<sup>st</sup> August 2012. He was then serving, a 3 months' probation period. That his resignation letter dated 27<sup>th</sup> September 2012 was received and accepted unconditionally on the same day. He further avers the according to the resignation letter he worked for the Respondent until 5<sup>th</sup> October 2012.

4. That on 2<sup>nd</sup> October 2012, the Respondent's Human Resource Manager sent an email to the Claimant stating that following is resignation, he should abstain from processing any accounting transactions in the Company's records and that management had offered to excuse him from reporting for work from 2<sup>nd</sup> October 2012.

5. Finally he avers that he worked for the Respondent for the month of September 2012 and a further 5 days in the month of October 2012.

**Respondent's Case**

6. The Respondent admitted the Claimant was its employee from 20<sup>th</sup> August 2012, tendered is notice of resignation on

27th September 2012 and it was accepted on the same day unconditionally.

7. The Respondent denies the averment that the Claimant served up to 5<sup>th</sup> October 2012. It also denies the email communication as well as the resignation. It avers that it received a demand letter and denies owing the Claimant any monies.

8. The Respondent neither filed any document nor called a witness but was represented by Counsel who cross examined the Claimant.

### **Evidence**

9. The Claimant rehashed the contents of the witness statement on record and the averments in the memorandum of claim.

10. On cross examination, he testified that the letter of acceptance of resignation required him to clear with the appointed signatories in all departments of the Company and return the clearance form (attached) and hand over notes to the Human Resources Manager for the final exit interview. The letter gave no timelines.

11. He testified that before he could clear, he received an email on 2<sup>nd</sup> October 2012 requiring him to desist from processing any accounting transactions of the Company and that he had been excused from reporting to work effective 2<sup>nd</sup> October 2012. That he was also waggod out of the company system.

12. He further testified that the Respondent did not dispute or change the last day of employment.

### **Submissions**

13. The Claimant submitted that the following three facts were undisputed –

(a) That the Respondent accepted the Claimant's letter of resignation dated 27<sup>th</sup> September 2012 unconditionally;

(b) That the Claimant was relieved from reporting to work on 2<sup>nd</sup> October 2012;

(c) That the Respondent had not paid the Claimant's salary for September and the days worked in October 2012.

14. It was further submitted that the Respondent could not have expected the Claimant to clear yet he was waggod out of the office on 2<sup>nd</sup> October 2012. He was further submitted that the doctrine of promissory estoppel applied to this case. The Claimant relied on the decision in **Carol Construction Engineers Limited & another v National Bank of Kenya [2020] eKLR**.

15. On the impact of the Respondent's failure to testify in the matter, the Claimant relied on Section 107, 109 and 112 of the Evidence Act. The decision in **Ann Wambui Nderitu v Joseph Kiprono Ropkoi & Another [2015] EA 334** was also relied upon to buttress the contention that the Claimant discharged the burden of proof as required by law.

16. Further reliance was made on the decision in **Trust Bank Limited v Paramount Universal Bank Limited & 2 others [2009] eKLR** on the effect of failure to call evidence.

17. The decisions in **Edward Mariga through Stanley Mobisa Mariga v Nathaniel David Schuller & another [1997] eKLR** and **Interchemie E. A. Limited v Nakuru Veterinary Centre Limited [2001] eKLR** were also relied upon. These decisions stand for the proposition that where a party renders no testimony in support of its case, its defence remains mere allegations and the other party's evidence stands uncontroverted.

18. It is finally submitted that the Claimant proved its case against the Respondent and should be paid the salary arrears owed by the Respondent.

19. The Respondent did not file submissions.

### **Analysis and Determination**

20. Flowing directly from the pleadings, evidence on record and submissions by Counsel, the only issue for determination is whether the Claimant is entitled to the sum of Kshs.120,000 as claimed.

21. It is not in dispute that the Claimant's salary was Kshs.120,000 per month. It is also common ground that the Respondent did not pay the Claimant salary for September 2012 ostensibly because he did not clear as required by its letter dated 27<sup>th</sup> September 2012 which forwarded the clearance form and hand over notes.

22. The Respondent's letter had no timeline for the return of the clearance form and hand over notices or the date of the final exit interview.

23. The Claimant received the Respondent's letter on Thursday 27<sup>th</sup> September 2012 and reasonably anticipated that he would be in employment till Friday 5<sup>th</sup> October 2012. This was disrupted by the Respondent's email dated 2<sup>nd</sup> October 2012 at 10.13 am requiring the

Claimant to stop processing accounting transactions in the Company's records and not report to work thereafter and was logged out of the Company's system and left.

24. Clearly, the Respondent's email disrupted the Claimant's schedule to clear with all departments and return the form as well handover notes.

25. Whereas the Respondent's anxiety of having an employee who is leaving, processing accounting and related transactions is understandable, non-payment of the September 2012 salary on the ground that the Claimant had not cleared coupled with the manner in which he was forced out of the Respondent Company is not a unfair labour practice.

26. The Respondent interfered with the scheme of things as envisioned by the Claimant and punished him for its conduct. The Claimant contends that the Respondent is estopped by its representation.

27. Significantly, since the Respondent tendered no evidence to controvert the Claimant's case, the Claimant's evidence remains uncontroverted. It was so held in **Edward Mariga through Stanley Mobisa Mariga v Nathaniel David Schulter & another (supra)**.

28. In **Trust Bank Limited v Paramount Universal Bank Limited & 2 others (supra)** it was held that –

*“It is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. The 2nd Defendant and 3rd Defendant's defence were unsubstantiated and remained mere statements. In the same vein failure to adduce any evidence meant that the evidence adduced by the Plaintiff against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was uncontroverted and therefore unchallenged.”*

29. Finally the Respondent did not contest the September 2012 salary for the Claimant. Instructively, the Claimant did not allege that he was treated unfairly by the Respondent other than its neglect, refusal or failure to pay the amount due to him.

30. Since the Respondent's email dated 2<sup>nd</sup> October 2012, relieved the Claimant from reporting to work as he had indicated in his letter of resignation, it acted as a waiver of notice for three days by the employer and the employee is entitled to remuneration for the entire period of notice not served as provided by Section 38 of the Employment Act which states that where an employee gives a notice of termination of employment and the employer waives the whole or any part of the notice, the employer shall pay to the employee remuneration equivalent to the period of notice not served by the employee as the case may be, unless the employer and the employee agree otherwise.

31. In the premise, the Claimant is entitled to remuneration until 5<sup>th</sup> October 2012. The sum of **Kshs.120,000** which the Court hereby awards.

32. **In conclusion judgment is entered for the Claimant for Kshs.120,000/= with costs.**

33. **Interest at Court rates from the date of judgment till payment in full.**

34. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 4<sup>TH</sup> DAY OF NOVEMBER 2021**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**