



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.2159 OF 2014

GABRIEL MAGUMBA.....CLAIMANT

- VERSUS -

XTRANET COMMUNICATION LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th June, 2018)

JUDGMENT

The claimant filed the statement of claim on 09.12.2014 through Makhecha & Gitonga Advocates. The claimant prayed for judgment against the respondent for:

- a) Salary in lieu of notice Kshs.360, 000.00.
- b) Two months incentives pay Kshs.140, 000.00.
- c) Leave days Kshs.73, 500.00.

The claimant has pleaded that he was employed by the respondent as a Chief Operations Officer by the agreement dated 20.11.2013. Further, pay was Kshs. 180,000.00 per month and the contract could be terminated by giving of 2 months' notice or pay in lieu of the notice. Further, the respondent terminated the contract on 20.06.2014 without giving the agreed notice or pay in lieu of notice.

The response to the claim and counterclaim was filed on 28.05.2015 through F.N. Kimani & Associates. The respondent's case was that on 20.06.2014 the claimant voluntarily resigned from employment by tendering a resignation letter and the respondent counterclaimed for Kshs. 360, 000.00 pay in lieu of the agreed two months termination notice. Further, the claimant was paid the incentive for June 2014 on 28.08.2014 and the claim for Kshs.140, 000.00 was unfounded. Further a claim form had to be completed prior to payment of the incentive but which the claimant had not completed. The respondent prayed the claimant's suit be dismissed with costs and the respondent be awarded Kshs. 360, 000.00.

The resignation letter dated 20.06.2014 stated as follows:

“Dear Mr. Njoroge,

I am writing to formally notify you that I am resigning from my position as Chief Operating Officer with immediate effect. Kindly treat this as a one month notice as per my terms of employment contract.

Working with xtranet has been very rewarding and I would like to thank the organisation for providing me with the opportunity to undertake such fulfilling career.

I confirm I have no claims against the company apart from my final dues. I am happy to hand over to the designated successor during this period.

Yours sincerely,

Signed

Gabriel Cicerone Magumba'

The only issue for determination is whether parties are entitled to the reliefs as prayed for. The Court has considered the material on record and makes findings as follows:

1) The claimant signed the resignation letter dated 20.06.2014. The respondent's witness (RW) one Henry Chege Njoroge being the respondent's chief executive officer testified that he accepted the letter as was drawn. The Court returns that the parties opted to terminate the contract of employment in terms of the resignation letter. The termination being by that agreement, the clause on two months notice or pay in lieu of such notice did not apply. Thus the claim for 2 months' pay per statement of claim and the similar counterclaim will fail. While making that finding the Court finds that the claimant being the substantive deputy to RW signed the letter of resignation voluntarily because it was his evidence that they discussed and he agreed to hand over that night of 20.06.2014. There was no evidence of force, coercion, duress or other vitiating factor to defeat the agreement to separate in line with the letter of resignation. The Court finds that the parties decided to agree on the terms of separation as set out in the resignation letter and they are bound accordingly.

2) The claimant prays for 2 months' incentive pay. Parties agreed upon Kshs. 70, 000.00 monthly incentive pay to be documented and reviewed on monthly basis. The claimant pegged the claim as part of pay in lieu of termination notice. The Court has already found that parties agreed to separate per terms of the resignation letter. As the two months' notice in the contractual clause has been found not to have applied, the prayer will fail. The evidence was that incentive was payable based on appraised performance but which never took place with respect to the claimed amounts. It is therefore not justified as prayed for.

3) The claimant has prayed for Kshs. 73, 500.00 in lieu of annual leave days due but not taken. The claimant testified that he had not taken leave from 22.11.2013 to 20.06.2014. He admitted that he had served for about 6 months in the current leave year. Considering that the claimant earned Kshs. 180,000.00 per month, the Court returns that the claim for **Kshs. 73, 500.00** in lieu of earned leave is fair under section 28(1) of the Employment Act, 2007. The evidence by RW was that leave would have been due in December and the claimant had earned 6 months of leave. The claimant is awarded accordingly.

4) The Court has considered the parties margins of success and all circumstances of the case and returns that each party will bear own costs of the suit.

In conclusion judgment is hereby entered for the claimant against the respondent for:

a) Payment of **Kshs. 73, 500.00** by 01.08.2018 failing interest to be payable thereon at Court rates from the date of the suit till full payment.

b) Each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 29th June, 2018**.

BYRAM ONGAYA

JUDGE