



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1334 OF 2014

MEDIAMAX NETWORK LIMITED CLAIMANT

- VERSUS -

JEFF MWAURA KOINANGE RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 26th October, 2018)

JUDGMENT

The claimant filed the statement of claim on 11.08.2014 through Wainaina Ireri & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the termination of employment was unlawful, unprocedural and in violation of section 36 of the Employment Act and Clause 12.2 of the employment contract.
- b) The claimant to pay the respondent Kshs. 3, 411, 917.81.
- c) Cost of the claim plus interest.
- d) Any other relief that the Honourable Court deems fit and just to grant in the circumstances.

The respondent filed the memorandum of reply and counterclaim on 26.09.2014 through Horeria Kamau & Company Advocates. The respondent prayed for:

- a) The claim to be dismissed with costs and interest until full payment.
- b) The claimant to pay the respondent Kshs. 1, 365, 000.00 with interest from the date of filing the counterclaim until payment in full.

The claimant filed the reply to memorandum of reply and defence to counterclaim on 07.11.2014. The claimant prayed that the counterclaim be dismissed with costs.

There is no dispute that the parties were in a contract of employment. The claimant employed the respondent as a Senior News Anchor by the contract of service dated 13.11.2009. Clause 12 on termination provided as follows:

“12.1 Automatic termination

- a) This contract shall automatically terminate or**
- b) If he voluntarily resigns his office.**

12.2 Termination by Notice

Either party to this agreement can terminate this agreement by providing to the other party six months' notice or pay in lieu thereof.

12.3 Immediate Dismissal

The Employer may by notice terminate this agreement with immediate effect if the Executive...”

The respondent wrote the email of 14.12.2012 addressed to the claimant’s Jaqueline Githinji thus;

“Subject: Resignation

PW,

After Five Fantastic Years at K24, I feel it’s time to move on because I’m a firm believer that sometimes it’s best to move on when one is at the ‘Top’ of their game.

I am therefore herewith tendering my resignation from K24 and giving my notice.

I have had time of my life at K24 and feel the station is no doubt on the up and up and a force to reckon with in the media industry in Kenya and beyond.

I thank you all for making my time at K24 a joy and a pleasure. The team we’ve helped build is one that is and will continue to be ‘second-to-none’.

Here’s wishing you all the very best moving forward.

Sincerely,”

The claimant replied the email by letter dated 12.03.2013 addressed to the respondent thus:

“Dear Jeff,

RE: RESIGNATION NOTICE

We acknowledge receipt of your resignation notice on email dated 14.12.2012 after which you left the company immediately.

However according to the terms of your Employment Contract Clause 12.2 you are required to give six months notice period or six months pay in lieu of notice. The Company is now demanding the six months salary in lieu of notice an amount of Kshs. 3, 900,000.

Regards,

Signed

Granton Samboja

Executive Director”

By an email dated 08.05.2013 by the respondent addressed to Ken Nguraiya of the claimant, the respondent stated thus,

“Dear Ken,

I just wanted to let you know that I have given the statement we agreed on for my payments to my Employer and they will undertake to make the payments on my behalf.

Incidentally, they might just manage to write one check but it may take a few weeks....Please bear with them as I am in New York as we speak but am in constant contact with them in London and will push them to pay as soon as possible.

Thank you for your understanding.

Bests,

Jeff”

By the email of 04.06.2014 the claimant’s advocates wrote to one Nick stating that a down payment of Kshs.2, 000,000.00 would be acceptable within 7 days and the balance in monthly instalments of Kshs.400, 000.00 failing legal action would be taken. On 03.06.2014 the said Nick had written to the claimant’s Rose Muchori thus “ **We wish to confirm the payment of Ksh. 50,000 as part of the Demand note due, we shall be making monthly repayment of 50, 000/= to the Due amount of 3, 900.00. Payment shall be made by the 5th of every month. Please acknowledge payment and send the recurrent invoices to; Jeff Koinange Repayment plan, Nuvison Media Ltd, Po box 72973 – 0200, Nairobi Kenya.”**

The claimant's case is that consequential to the resignation the respondent paid Kshs. 50,000.00 as part payment of the six months pay in lieu of notice and the claim is for the outstanding payment. The respondent's case is that he resigned under clause 12.1 on automatic resignation. The Court has revisited the contract of employment. Clause 12.1 provides that there would be automatic termination or if the respondent voluntarily resigned. On the other hand, clause 12.2 provided for termination by providing to the other party six months' notice. The Court finds that the two clauses are exclusive and unrelated but providing for two parallel modes of terminating the contract of service. The Court considers that nothing prevented the parties from stating that in event of resignation under clause 12.1, the notice in clause 12.2 would have to be served. The Court therefore returns that the parties are bound by the terms of the contract and the respondent by the email of 14.12.2012 clearly resigned and the line **"I am therefore herewith tendering my resignation from K24 and giving my notice..."** must be construed to mean that the respondent had resigned and he was giving notice, that is, informing the claimant or making the claimant aware that he had resigned. In any event the Court has considered the provisions of clause 12.2 and returns that whereas the parties agreed on a six months' notice or payment in lieu thereof, the rate of such payment was not agreed upon and the claimant has no basis to claim that the rate of such payment was to be at the respondent's basic monthly pay which was Kshs.650, 000.00.

By way of persuasion and guidance, the Court reckons that section 35 of the Employment Act, 2007 clearly stipulates the rate of pay in lieu of a termination notice and the Court returns that in absence of agreed rate of payment, such vague clause would not be amenable to implementation one way or the other. The Court returns that the parties are bound accordingly.

The Court has considered the correspondence between the parties after the resignation. It is submitted for the claimant that the respondent accepted to pay the six months notice and in fact made a down payment of Kshs.50, 000.00. The Court considers that the authority of the said Nick to represent the respondent in the matter was not established and in any event, the Court returns that the parties must have been acting in clear misconstruction of the effect of the respondent's resignation within the meaning of the contract of service. The Court further returns that the parties will be bound by the provisions of their contract of service and not their subsequent misconstruction of the contract.

While making that finding the Court has considered **Sensations Limited –Versus Carlene Kalunde Lombo [2013]eKLR** where Onyango J stated, **"Section 3(1) of the Employment Act however provides that the Act shall apply to all employees employed under a contract of service and section 3(6) provides that the terms and conditions of employment set out in the Act shall constitute the minimum terms and conditions of employment. For this reason section 35(1) (c) of the Employment Act as read together with section 36 apply to the respondent. The respondent's defence to the effect that she is not liable to give notice or pay in lieu thereof is without merit."** The Court has also considered **Brookhouse Schools Limited –Versus- Dorcas Njeri Gichuhi [2016]eKLR** where Ndolo J held that where no notice period was imposed upon the employee under the contract of service, then the only obligation placed upon the employee was the one month notice requirement under section 35(1) of the Employment Act, 2007. The Court follows the cited decisions as the sound law on the subject. However, in the instant case the claimant as the employer agreed that the respondent as the employee could resign at any time or suddenly terminate by way of resignation and thus, the respondent was entitled to resign as he did and in view of that express contractual provision, it cannot be forced upon the parties that the respondent was under an obligation to serve a one month notice or pay one month salary in lieu of notice under section 35 of the Employment Act, 2007. The Court returns that in the present case, the parties clearly agreed that the claimant could resign suddenly or serve a notice and he opted to suddenly resign.

It was urged for the respondent that there must be equality of arms in matters of contracts of service. However the Court holds that the statutory policy and philosophy of minimum terms and conditions of service is clearly meant to protect the employees and not the employers so that the employer can by a contractual provision relinquish any favourable minimum statutory provision. That was what happened in clause 12.1 when the claimant agreed that the respondent could voluntarily resign his office – and in so doing it cannot be said that such surrender by the claimant of the need by the employee to serve a notice or pay in lieu of notice as envisaged in section 35 as read with section 36 of the Act, was unlawful; not so! because such minimum protection was in favour of the respondent as the employee and not in favour of the claimant as an employer and who was entitled to surrender the minimum protection in favour of the respondent.

The Court holds that the statutory policy and philosophy of minimum terms and conditions of service is provided for in section 3 (6) of the Employment Act, 2007 which states that subject to the provisions of the Act, the terms and conditions of employment set out in the Act shall constitute minimum terms and conditions of employment of an employee and any agreement to relinquish, vary or amend the terms therein set shall be null and void.

Thus in the instant case it must be that the claimant consciously and by agreement allowed the respondent to suddenly resign and which was a better term of service in favour of the employee and not an infringement upon the minimum terms of service under section 35 as read with 36 of the Act. The Court holds that it will always be lawful for the employer to confer upon the employee more favourable terms of service beyond the statutory minimum terms or conditions of service and conferring the employee terms and conditions of service below the minimum statutory provisions will always be unlawful – the law of statutory minimum terms and conditions of service being a law about inequality of arms.

The respondent has counterclaimed for pay in lieu of annual leave throughout the 5 years of unbroken service. The claimant resigned on 14.12.2012 and filed the counterclaim on 26.09.2017.

The Court returns that the claim for accumulated pay in lieu of annual leave, if any, was in the nature of a continuing injury and the time of limitation was 12 months from the cessation of the injury as per section 90 of the Act. The cessation of the injury was upon resignation on 14.12.2012 and the prescribed 12 months of limitation period lapsed on or about 14.12.2013. Accordingly the Court returns that the counterclaim for pay in lieu of accumulated leave will fail as it was time barred.

In conclusion, judgment is hereby entered for the parties for:

- a) The dismissal of the claimant's suit.
- b) The dismissal of the respondent's counterclaim.

c) Each party to bear own costs of the proceedings.

Signed, dated and delivered in court at Nairobi this Friday 26th October, 2018.

BYRAM ONGAYA

JUDGE