



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1232 OF 2014

POOROOSOTUM BHEEKHOOCLAIMANT

VERSUS

LINKSOFT GROUP RESPONDENT

JUDGEMENT

Appearance

Ogada Advocate – instructed by Inamdar & Inamdar Advocates for the Claimant

Thiga Advocate – instructed by Waruhiu K’Owade & Ng’ng’a Advocates for the Respondent

1. Issue in dispute is the failure to pay salary, benefits and allowances duly accrued to the claimant.
2. The Claimant Pooroosotum Bheekhoo was employed by the Respondent as the Group Regional Head – West Africa on 1st July 2011 on a 3 years contract. The respondent, Linksoft Group is a limited liability company operating in multiple countries and having offshore offices registered in Mauritius with its head office located at Methodist Ministries Centre, within Nairobi. The Claimant relocated from Mauritius with his family to take up his employment with the respondent.

The claim

3. The Claimant as the respondent’s Group Regional head-West Africa was issued with his contract of employment on a consolidated salary of Kshs.\$14,000.00 per month, with an annual variable pay of 18% of annual base pay at \$30,240.00 which was to be paid on quarterly basis in arrears. Upon completion of probation, the Claimant was confirmed but his job title was changed to Chief projects & Services Officer but the other terms remained the same.
4. The claim is that the Respondent failed and or refused to pay the monthly salary of \$14,000.00 causing the Claimant great hardship, loss and caused the Claimant to be unable to meet his liabilities due to low cash flow. Such salary was not paid for 7 months in breach of the employment contract and this accumulated to \$98,000.00. The Respondent also refused to pay the annual variable of 18% as agreed, \$77,560 per quarter and on this basis 5 such quarter became due at \$37,800.00. That the annual variable pay was also not remitted as agreed at 100% annual variable target pay where 5 such instalments were due at \$ 7,560.00 all being \$37,800.00.
5. The claim is also that the Respondent failed to pay the Claimant’s children school fees of \$19,179.08 and rent at \$6,279.07 which had been agreed and provided for under the contract of employment. The Claimant had 13 days leave amounting to \$7,583.00 which were not paid. The total

claim of \$179,879.07 has never been settled forcing the Claimant to file suit.

6. That due to the non-payment of salaries for 7 months, the Claimant was forced to resign from his position with the Respondent and he gave notice vide letter dated 28th September 2012 which the Respondent accepted as the Claimant wanted to serve notice period ending 31st December 2012 but the Respondent asked him to exit earlier on 1st November 2012. The Respondent however failed to pay the rent due to the Claimant rented premises causing him great embarrassment. The Respondent also refused to pay the school fees for the Claimant's children causing him great mental anguish and loss with ongoing liabilities. Such refusal to pay salary, rent and school fees lacked any justification and the Claimant holds the Respondent liable.

7. The Claimant is seeking for a declaration the Respondent violated his constitutional rights; the payment of \$179,879.07; to the dues owing with interest at 23% per year and costs of the suit.

8. I evidence, the Claimant filed his witness statement on 25th February 2015 and also made his oral submissions in court. The Claimant thus testified that he is from Mauritius and a specialist in telecommunication; a registered engineer with a MBA in Marketing and in telecom strategy. The Respondent being a limited liability company and operating in multiple countries with offshore offices registered in Mauritius with its head office in Nairobi employed him as the Group Regional head West Africa, on a 3 years contract. The contract was to commence on 1st July 2011 and letter of such appointment was issued and dated 26th May 2011. The Claimant had to relocate to Kenya with his family so as to take up his employment with the respondent.

9. The terms of the employment were agreed by the parties that included a monthly salary of \$14,000.00; an annual variable pay on achieved target at 18% at \$30,240 per year; an annual variable performance pay at 100% target; and other benefits based on the employment being a company house; children's education; medical insurance; life insurance; and annual self and family travel to India and back.

10. The Claimant had a probation period of 6 months which he successfully completed and was confirmed in November 2011 and his position changed to Chief projects and Services officer on similar pay and benefits. He was responsible for the execution of strategy and development of business in West Africa and opening new business in Nigeria, Sierra Leone and Tanzania. In December 2011 the Claimant was asked to take business responsibility in Kenya, Tanzania, Nigeria and Sierra Leone. However the Respondent failed to pay his salaries for May to September 2012 causing the Claimant great anguish and being unable to cater for his basic needs. During this time, the Claimant's father passed away [died] as he could not be able to pay for his medical treatment and despite informing the Respondent of this predicament, the salary were not paid.

11. Due to non-payment of salaries, the Claimant was forced to resign from his position with the Respondent on 28th September 2012 by giving 3 months' notice to end on 31st December 2012. The Respondent accepted the resignation but asked the Claimant to leave early on 1st November 2012. At the end of the notice period, the Claimant had not been paid for 7 months; the 18% annual variable target pay was not paid; the 100% performance pay was not paid; school fees due to his children was not paid and the rents due to his residence were not remitted in time or at all. The Claimant did not take leave for 13 days and despite demands being made, these dues have not been settled.

12. The Claimant also testified that upon his employment by the Respondent his salaries were paid to his bank account in Mauritius and even though such salaries would be late, the amount of \$14,000.00 less taxes would be deposited in his account. He was confirmed and allocated new duties. When he took over as Chief Projects Officer the business sites increased to 4773 at \$4,000.00 per site as the Respondent had to invest to get good returns. Issues of cash flow was for the chief executive officer to manage but the Claimant noted that there were financial problems but he was not responsible for such matters as he did his duties very well. The Claimant submitted all his progress reports that were assessed by the Chief Officer and the Board of the respondent. He performed well by meeting his targets and was therefore

entitled to the annual variable pay as well as the variable pay on performance. The Respondent failed to inject capital into the business and some projects failed.

13. With time the Respondent stopped paying for the Claimant's rented premises as agreed in his contract of employment. He felt ashamed while entering the compound to the house knowing well that the rents had not been settled. He was forced to sell some of his personal effects to settle the rent at \$6,279.00.

14. His children schools fees was to be paid in full as there was no limit set. The Respondent only paid Kshs.250, 000.00 despite this not being the full amounts due. The Claimant's two children Doorgesh and Kiran went to Braeburn international School and only Kshs.350, 000.00 was paid. In the first year Kshs.537, 850.00 was paid instead of Kshs.629, 820.00 for the two children. The Respondent was aware of these facts but refused to remit the fees due in time or at all forcing the Claimant to pay the difference to avoid embarrassment. The claim paid Kshs.300, 000.00 after he was issued with notice by the school to settle fees balance. He could not pay immediately as his salary had not been paid and this caused him a lot of anguish and trauma for the entire family. The school fees was paid later after the Claimant had already resigned from his position with the respondent.

15. Before the Claimant resigned, he appealed to the Respondent to advance him his 4 months salary as his mother and dad were ailing and needed medical attention. This plea was not heeded to. His father died on 6th November 2012 due to his health condition getting worse. His mother required constant help and the Claimant was the only one with employment and taking care of his family which he could not without payment of his salary. Had he been paid, he would have had his parents treated.

16. The Claimant was thus forced to resign due to professional ethics that he felt the Respondent business was not being properly managed and also due to the non-payment of his salaries. As a young professional he did not want to be associated with a poor business. He gave 3 months' notice and wanted to remain in Kenya and serve the notice period but was asked to leave early and is thus entitled to pay for the period of notice.

17. In defence the respondents state that the Claimant owes \$Kshs.71,666.00 which relate to a lap top and phone and the Claimant confirmed that he is willing to return the two items as he was using them while in employment.

18. In cross-examination, the Claimant testified that upon completion of his probation period the CEO Mr Wahome was to evaluate him which was not done. He submitted all his reports to his supervisor the CEO and there were not negative comments. He was employed while in Mauritius and the Respondent managed a group of companies which kept on changing names and the Respondent is sued as the employer in the letter of employment. That the Respondent noted through the CEO there were cash flow problems in the business as there were no funds being injected into the business and despite an increase in market share, the revenue was in stagnation. Revenue decrease each quarter as the business was not properly financed and hence losses.

19. The Claimant also confirmed that his contract did not specify how many children would be supported in school or the limit of such support. This was a contract benefit and where the children went to school was not an issue and so he chose Braeburn international School. He had to pay \$19,179.00 after the Respondent failed to pay the school in time.

20. The tenancy agreement was done by the Respondent for the house the Claimant was living in. rent was kshs.150, 000.00 per month. The Respondent would do a cheque for the Claimant to pay the rent. By November 2012 there were rent arrears forcing the Claimant to pay to avoid embarrassment to his family. He paid in cash and did not get a receipt. He used his property to pay the rent.

Defence

21. In defence that was filed on 18th September 2012 the Respondent admitted that they had

employed the Claimant at a monthly salary of \$14,000.00 and the annual variable pay was linked to targets but the Claimant failed to perform such targets and the Respondent suffered loss in regions under the Claimant's supervision and no bonus is due. The Respondent admit owing 5 months' salary for June to October 2012 which arose due to low cash flow. The Respondent also admitted owing rent at kshs.933, 333.80. The school fees payable directly to the school was at a maximum of Kshs.300, 000.00 per child per academic year which was paid. The Respondent also admit owing leave pay at \$5,308.33.

22. The defence is also that the Claimant is owing \$71,666.70 in respect to Respondent property, a laptop and blackberry phone. That the Respondent offered to pay the outstanding dues in instalments but the Claimant refused to reply. The offer to pay in instalment was dictated by the prevailing financial circumstances of the respondent.

23. In evidence, the Respondent called Salome Oyuga as their witness. She testified that as the Respondent is a company incorporated in Mauritius as Linksoft international limited and has a sister company Linksoft as was employed by the Respondent herein as the Finance Manager. That on 26th May 2011 the Claimant was employed as the Head of linksoft Group's West Africa region based in Lagos Nigeria based on the Claimant's past experience working in the region. 3 months later the Claimant was moved to Linksoft's Head Office in Kenya as the Chief Strategy Officer that was to also include oversight over the delivery and operations in Africa. The Claimant was entitled to a performance-based pay based on key performance indicators (KIPs) but upon taking up his role as Chief Operations Officer, the Respondent incurred huge losses due to his incompetence and poor oversight role and a number of projects under his supervision like linksoft Sierra Leone, Ghana, Nigeria, Tanzania and Uganda have since closed.

24. The witness also testified that during the Claimant tenure as Chief Strategic Officer the Respondent only achieved 29% growth due to drop in business and in this regard the telecommunication maintenance service where the Claimant was responsible made zero growth. The Claimant presentations to the Board were his forecasts and not actual growth to reflect performance so as to claim the variable payments. That at the height of the Claimant's incompetence and inability to deliver as the Chief Strategic Officer he tendered his resignation on 28th September 2012 and gave 3 months' notice but in a meeting with Respondent CEO the Claimant agreed to reduce his notice period to one month to give him time to organise his departure from Kenya. It was also agreed that the Claimant would handover; his rent would be paid until 31st December 2012; he would use vehicle hired for him by the respondent; use the mobile phone allocated to him; and the Claimant would take responsibility for the children school fees. The Respondent had given the Claimant an annual school fees allowance of Kshs.300,000.00 for each child per year per child and such fees was paid up to September 2012.

25. The witness also testified that the Respondent was not able to pay the Claimant salary due to operational inflows and poor business performance under the Claimant's tenure. He was offered for payment of the due salaries in instalments and asked that these be sent to him in Lagos and he never raised a claim for performance-based pay since he knew he had not met his targets. Any due commission was paid quarterly and while in employment the Claimant did not make such claims. The claims outlined are therefore not due. The school fees due were paid save for \$75 and the due salaries can be paid in 6 months instalments.

26. In her oral evidence, Ms Oyuga testified that the Respondent had several entities in it based in Nigeria, Tanzania, Uganda and Kenya. Linksoft International Mauritius Limited was the appointing authority for the claimant. The Claimant was based in Kenya under the Linksoft Group. The witness was with the Respondent subsidiary Linksoft Group Communications and moved to work with the Respondent in 2012. That the Claimant had set key performance indicators (KPIs) set by the CEO but was never appraised and when his position changed, the changed targets were not put into writing for an appraisal. The annual variable pay as to be paid on annual performance and based on funds available. The Claimant was also not paid his salaries as the Respondent was not performing well financially in 2011 and 2012. The Respondent lost over \$1 million.

7. The witness also testified that the Claimant performed his duties as under his contract. He

increased the sites. The business presence and growth went up by 28% and numbers of sites went up with Rwanda being added as a new site. There are no comments by the CEO on the various reports submitted by the claimant. However some clients like Safaricom reduced their business with the Respondent and this affected overall performance and finances with a reduction of 40%. Such were external factors that went into the balance sheet of the respondent. It was not the sole responsibility of the Claimant for these losses.

28. The dues owed to the Claimant were his salaries. The Respondent offered to pay in instalments but he declined. He could not be paid in full as business was low and clients were not paying. It has since improved and the Claimant should be paid his salary due. The school fees for his children was paid directly to the school on 25th September 2013 the sum of Kshs.320, 000.00. This payment was late due to low cash flow.

Submissions

29. In submissions, the Claimant set out his claim for 7 months' salary all amounting to \$98,000.00 based on the 3 months' notice period he had given and the 5 months admitted by the Respondent has not been paid. The performance linked pay was for 5 quarters from July 2011 to December 2012 all at \$37,800.00 and an annual variable pay all at \$37,800.00.

30. That the Respondent has admitted owing 5 months' salary and 13 leave days and 3 months' rent and school fees at kshs.1,005,000.00. This has not been paid though and should attract interest.

31. The disputed amounts are the November and December 2012 salaries which should not be the case as the Claimant notice period was to end in December 2012. The annual performance pay is due owing to his performance was not challenged and he performed his duties without any challenge. That the payments due should be net and not gross and no taxes should be deducted.

32. The Claimant also submitted that he was good performance and this was never challenged. He resigned due to non-payment of his salary and also upon professional concerns that the Respondent was not undertaking its functions professionally. Where his performance was not good, the Respondent did not bring this to his attention until this case as filed in court. The reports he submitted went to the CEO and he was not given any negative feedback. This should now not be used against him. An employer who fails to manage the performance of their employees cannot tell them that they have underperformed. There must be clear targets and subsequent appraisal to give the employee an opportunity to improve over a reasonable length of time.

That this was a case of constructive dismissal. The Claimant resigned from employment due to non-payment of his salary and professional concerns. This was a case of being forced to leave his employment.

33. The Claimant is seeking to be paid his claim with interest as this has been due and owing. He suffered due to the non-payment of his salary and being unable to take care of his family. In the process his father died due to lack of medical treatment and his mother has been ailing. He was embarrassed to reside at a house without the rent being paid and had to sell personal effects to pay. His children were forced to stay in school with huge fees balances due to non-payment by the respondent. He should therefore be compensated for constructive dismissal and interests be paid over the amounts due.

34. The Claimant made reference to the cases of **Jane Samba Mkala versus OI Tukai Lodge limited, Cause No.823 of 2010; Agnes Yahuma Digo versus PJ Petroleum Equipment Ltd, Cause No.2049 of 2011; Simon Muguku Gichingi versus Taifa Society Ltd, Cause No681 of 2012.**

35. The Respondent submitted that the Claimant did not perform his duties to the required standard as during his tenure as the CSO with oversight over the delivery and operations for Respondent African entities, there were huge operational losses which can be attributed to his incompetence and poor oversight role. Most of these entities had to close due to such poor performance and their inability to

service their liabilities, issues which arose during the Claimant's tenure. What the Claimant has presented in his claim as forecasts and not performance indicators of a good record of his work. His KPIs had a huge disparity with actual performance as attested by the Respondent annual accounts. Due to incompetence and poor performance the Claimant tendered his resignation which was accepted and the notice he gave of 3 months agreed to be reduced to one (1) month. The one month was for handing over.

36. The Respondent also submitted that it was agreed with the Claimant that the school fees payable for his children was at Kshs.300, 000.00 per year for each child and this has been settled directly to the school. The due salary could not be paid due to low cash flow and the offer to pay in instalments was rejected and the Respondent are willing to pay for the same together with 13 leave days. There are no due performance-based payments as where due these should have been paid per quarter.

37. That the dues owing 5 months salaries as agreed at a meeting between the Claimant and CEO subject of letter dated 1st November 2012. The annual variable pay was a payment other than the salary and was payable quarterly based on performance. The Claimant was supposed to be appraised to earn this amount. There was no such appraisal or assessment and the pay is not due. The school fees has since been settled. The claim for rent is not supported. The leave pay due is admitted and should be paid less the tax due.

Determination

Who was the employer of the claimant?

Whether the Claimant's rights in employment were violated;

Whether the Claimant is entitled to the salaries and benefits claimed; and

Whether such salaries and benefits should be paid with interest.

The claim for leave days due is admitted at 13 days. This is awarded at \$7,583.00.

38. The salaries due are claimed at 7 months. The Respondent has admitted owing 5 months. The admitted part is confirmed at \$70,000.00.

39. It is trite that all employment contracts should be in writing. This facilitates the parties knowing the terms and conditions of employment and when there is a dispute to refer back to the same. **Section 9 of the Employment Act** makes important provisions with regard to an employment relationship by setting out the requirements of a written contract which is important to refer here.

9. (1) A contract of service—

(a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or

(b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months;

shall be in writing.

(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3).

(3) For the purpose of signifying his consent to a written contract of service an employee may—

(a) sign his name thereof, or

(b) imprint thereon an impression of his thumb or one of his fingers in the presence of a person other than his employer. [Emphasis added].

40. The contract of employment unlike other types of contracts for sale of good is different in that in employment, the terms and conditions of work are agreed upon to be performed by an employee and the rights and responsibilities dues lie within a specific law, the Employment Act. In an employment contract the purposes of having a written contract is emphasised as with it the employee is aware of the duties to be performed and the remuneration, salaries and benefits and well outlined. Such details are to avoid ambiguity and have the employee measured in terms of the set out duties. The Claimant accepted his contract of employment by signing to it signifying he had agreed to be bound by its terms and conditions. The Respondent too through the CEO, Anthony Wahome signed the contract for and on behalf of the employer.

41. In this case the contract of employment is between the Claimant and Linksoft International Mauritius Ltd. The contract is drawn under the banner of *LINKSOFT GROUP*. The Claimant testified that the Respondent was a consortium of entities that had many fields under the Linksoft Group and the Respondent was one such entity. Indeed the Respondent witness Ms Oyuga acknowledged this fact that she was employed under Linksoft Communications under the Linksoft Group and is not under the Respondent entity. The *LINKSOFT GROUP* as the umbrella entity is confirmed by various facts – the Claimant work permit into Kenya is issued under *Linksoft Group*; the fees due to Braeburn School was invoiced to *Linksoft Group*; various communications to the Claimant by the Respondent are made under *Linksoft Group* through the CEO, Anthony Wahome – letter dated 1st November 2012 on the termination of the Claimant and the letter dated 28th September 2012 on the resignation of the claimant. page 260 of the respondent's bundle of documents is done by Salome Oyuga under the *Linksoft Communications Limited* and dated 3rd June 2015, page 222 are minutes of a meeting held under the *Linksoft Group*, the meeting held on 26th July 2012 at page 159, just a few of the documents that show the Respondent was under an umbrella of Linksoft Group.

42. To therefore septate the Respondent from Linksoft International Mauritius Ltd and deny responsibility would be an unfair labour practice. The documents on record submitted by the Respondent and confirmed by their witness indicate the Respondent Group had various entities in Africa that included entities in Nigeria, Ghana, Sierra Leone, Uganda, Tanzania and Kenya where the Linksoft Group Limited had its head office and registered offices as the other entities were offshore. From the conduct of the parties, the interchanges of the reference documents and evidence on record, the Linksoft Group cannot be extricated out of the ongoing with regard to the employment of the claimant. 43. The Respondent is therefore a proper party herein. Section 13 of the Employment Act, place the duty on the employer to effect any changes on the contract details upon them. It cannot be for the employee to effect such changes.

44. On the question as to whether the Claimant's rights were violated, I refer back to the written contract between the parties. The salary due to the Claimant was well outlined in the contract of employment thus

Salary

- a. *Your consolidated salary shall be USD 14000 per month net of taxes.*
- b. *Annual Variable (performance linked pay) (target) [18% of Annual Base Pay] = USD 30,240 (to be paid in arrears on quarterly basis).*
- c. *Annual Variable (performance link) pay (max @ 100% of target variable pay) to be paid in arrears on quarterly basis)*

Your salary will be paid monthly in arrears on the last working day of each month.

45. In this case the salaries due were paid but the annual variable target and annual variable performance link pay were not paid and are herein contested as not due. The Respondent contest the

annual variable payments on the grounds that the Claimant did not perform well, he was incompetent and unable to deliver his duties well. His performance was so poor that he opted to resign from his position.

46. Work performance is one of the highest requirements of an employee in any employment relationship. The reason as to why a particular employee is contract as against the other is *performance*. *Performance* is so crucial that employers are encouraged to put new employees on probation before they are confirmed into full time employment. the law at section 42 of the Employment Act give certain flexibilities during such a probation period in that an employer can lawfully terminate an employee is of poor performance on short notice and let them off. An employer enjoys the labour of such an employee within the probation period so as to assess their competence, abilities and indeed their performance overall. Where not satisfied, such an employer can extend the probation period for periods of up to 12 months. These are rights open to an employer.

47. Therefore, where an employee is confirmed into full employment upon successful completion of the probation period, it is taken that the employer has assessed, appraised and appreciated the skill and competences of the employee into their business. It cannot therefore be found to be true that soon after confirmation and successful completion of probation, the employer cites poor performance.

48. However, in the event an employee is of poor performance, and this is alleged by the employer, the duty is upon such an employer to prove such poor record of performance. It is not just enough to cite poor performance. More is required of the employer as held in the case of **Frederick Owegi versus CFC life Assurance, Cause No.1001 of 2013;**

*The law now requires that before the termination of an employee the procedure applicable for termination of employment be followed. This is what would amount to procedural fairness as outlined under section 41 and 43 of the Employment Act. Upon an enquiry by an employer of the misconduct, poor performance or capacity questions against an employee, fair procedure must be followed. Where the question regard to an employee performance, **an employer must demonstrate that the employee was aware of the applicable standards of performance, efforts were in place to support such an employee and time was given to allow such an employee to make improvements with constant reviews.** It is not just enough to say that an employee is of poor performance. There must be a demonstration that the employer did more in this regard to bring such a non-performing employee to the status required by an employer. [Emphasis added].*

49. It is therefore of paramount importance that once an employee is found to be of poor performance, that measures be put in place to ensure that such an employee receives support and a timeframe set to ensure an objective assessment for such an employee to improve. Where there is no such improvement and the employer has demonstrated efforts to support such an employee, then the employer is not bound by section 43 of the Employment Act. Such an employer has good grounds to rely in a termination of such an employee. This was the essence in the decision of the Court in the case of **Jane Frances Ominde Munyakoh versus Imaging Solutions Limited, cause No.1491 of 2011.** For an employer to enjoy the provisions of section 43 of the Employment Act with regard to the question of an employee's performance, regard must be given to the policy measures that had been put in place to support such an employee said to be of poor performance. Where there are no guidelines, targets, performance indicators that are framed in time so as to assess an employee against such, an employer who then relies on the ground of poor performance is only running away from the problem – themselves. The duty to set policy guidelines, measurable targets, performance indicators, key result areas is upon the employer.

50. In this case, the Respondent entered into an employment contract with the Claimant and left him to his own devices. Though he was supposed to be supervised by the CEO, there is no record of any assessment by the CEO. The issue of performance is not noted anywhere during the pendency of the employment contract until this suit was filed. The defence that the Claimant was *incompetent and unable to deliver as the CSO* comes too late in the day. While in employment, such *incompetence and inability to deliver* were never addressed as should have. The Claimant was under a fixed term contract and with it there was a termination clause. Where there were good reasons for the termination of the Claimant dues to *incompetence and inability to deliver*, which are serious allegations against the claimant, the

Respondent did nothing. They waited and frustrated the Claimant with non-payment of his salaries so as to make him resign from his position. The resignation was unconditionally accepted. The Respondent was glad to let the Claimant go without assigning any reasons for such quick acceptance of the resignation. To now state that he was of poor performance after the fact is a defence that I find lame and without justification.

51. To therefore fail to pay the contract amounts over a reason of poor performance that has no justification is the injustice. The contract amounts were clearly outlined by the parties and each has signed in approval. There was a set salary and a variable payment that was not qualified as the Respondent has stated. Where there was need for the qualification of the payment of the annual variable payments due, the Respondent should have been the first to set out the policy framework, the guidelines for such pay or the regulations that were to govern the payment of such annual variable amounts. To now change the terms for the payment of the annual variable payments on poor performance and low financial status of the Respondent is a practice that is not acceptable in a fair and just society. Had the parties herein intended to have the annual variable payments be based on availability of funds, or on any other factors, nothing was as easy as to reduce the same into writing. What the Claimant had and what is presented before this Court is a contract of employment spelling out the terms and condition of engagement. In the entire defence, witness statements and submissions, I find nothing to suggest that the Claimant failed to undertake his duties. Such duties were well set out under his contract. I find no warning and or notice that he failed to do his allocated duties as directed by his supervisor the CEO. To therefore fail and or refuse to pay the salaries due which included the annual variable amounts is to act in breach of the contract of employment.

52. In the evidence of Ms Oyuga for the respondent, she admitted that the low cash flow and poor financial performance of the Respondent was due to various factors. Some clients did not pay and business went low. The financial results presented by the Respondent for the years 2011 and 2012 are for *Linksoft Group* covering all the entities under the Group. The witness was not able to assign any shortfall upon the Claimant so as to impute the non-performance or poor financial status to him alone. Indeed the witness agreed that the overall performance of the Respondent Group could not be solely attributed or assigned upon the claimant. Indeed these Financial Results are not in the nature of Audit Reports for the Court to appreciate the losses and attribution factors. A group such as the Respondent should have such important reports as financial audits for each year to inform on matters financial. Equally the various board meetings where policy was discussed, nothing arose that attribute the growth or decline of business upon the claimant. In the meeting held on 26th July 2012 on the 25.1 minute, the CEO notes;

Kenya's GDP for the year 2012 had been forecasted at the beginning of the year to be 4.6 per cent. This has since been revised... in a clash between revenue- threatening state regulations and business, East Africa's telecom firms are facing a storm as Kenya moves to slash mobile phone interconnections charges and Rwanda implements new tariff rules. ...

53. The CEO thus proceed to assess the business environment that had affected the Respondent business as a Group. Such are matters that cannot be blamed on the claimant. To do so would be to ignore these very factors that the CEO for the Respondent had noted to the board and it was upon the board, noting such concerns to address itself to the changing business environment. To thus frustrate the Claimant's contract of employment, even where there was evidence that the business environment was not improving for the benefit of the Respondent was to force him into resignation. Where the business environment had changed so drastically as to affect the viability and continued employment of the claimant, the law with regard to ongoing employment contract has a recourse. Such recourse was available to the Respondent to exploit. The Respondent did not use it. What they did instead was to stop paying the Claimant his salaries and never paid the annual variable payments as agreed. No reason was given. Had there been a good reason, such should have been reduced into writing. This should not have been left to the Claimant to guess. The Claimant was under supervision by a very senior officer of the respondent, the CEO. I find inference for the need for a restructuring in the email of Anthony Wahome on 3rd October 2012 when he wrote the Claimant and noted;

... I would have wanted you to provide funding sourcing and guidance and thereafter as a key staff

restructuring the company as I guide. ... You will have an opportunity to be part of Linksoft and would not mind even after notice a 6 month consultancy on funding and structuring assignment ...

54. I therefore find no justiciable reason for the non-payment of all the due annual variable payments for the targets and performance at 18% and at 100%. These were entitlements under the Claimant contract, there is no evidence as to why such amount were not paid as the reason cited of poor performance is simply an afterthought. The failure to pay such dues I find to be an unfair labour practice.

55. On the benefits due to the claimant, the first item was the contested salary of 7 months unlike the admitted 5 months. In this regard, the Claimant resigned from his employment vide letter dated 28th September 2012. With it he gave a notice of 3 months as per his contract. The Claimant offered to serve his notice period. At this point he had not been paid for 4 months and this was part of the reason for his resignation. On the same date, the Respondent CEO accepted the resignation unconditionally and noted that indeed the Claimant had given the required 3 months' notice.

56. Subsequent to the above, on 1st November 2012 the Respondent CEO wrote to the Claimant noting that there had been a meeting the previous day [31st October 2012] and several matters were agreed upon which he did set out in the letter. Part of the stated agreed matters were that the Claimant would exit on 31st October 2012. From the submissions by the respondent, this agreement was understood to mean that the Claimant had forgone his one month notice and that is had been reduced to end on 31st October 2012. On his part, the Claimant contested this assertion noting that his notice period was for 3 months and he should have been paid for the 3 months. The option to reduce the notice period was by the Respondent and not him.

57. The letter dated 1st November 2012 is done by the respondent. It sites a meeting held on 31st October 2012. Such details for the meeting are the ones said to have been reduced into writing by the Respondent in form of a letter sent to the claimant. Where an essential part of a contract of employment is changed, where there is mutual agreement, both parties must consent. It cannot be unilateral. Where there was agreement to the changes to the notice period given by the claimant, noting that such notice was per the contract of employment, the Respondent should have made haste to have such an agreement approved by the Claimant in writing.

13. (1) If, after the material date there is a change in any of the particulars required under sections 10 and 12, the employer shall give to the employee a written statement containing particulars of the change.

58. While noting the circumstances under which the Claimant tendered his resignation, the CEO should have been keener to ensure the agreements, meetings and matters that arose were done by mutual consent. The letter sent to the Claimant dated 1st November 2012 has not been acknowledged and there is not confirmation by the Claimant that indeed he agreed to the notice period being reduced. Where there was a misunderstanding as to what was meant with regard to the exit coming earlier than 31st December 2012, this benefit should go to the claimant. The error of judgement or the mistake of failing to reduce the agreed issues into writing should not be visited upon the claimant. The notice period was for 3 months, the Claimant offered to serve his notice period and should be paid for the same. The unpaid salaries should therefore be computed at 7 months and not 5 months. These salaries are due and owing.

59. The benefits due to the Claimant were set out under his contract. These included;

- *Company house*
- *Children education*
- *Medical insurance*
- *Life insurance*
- *Annual self and family India travel*

60. Such benefits have no conditions attached to them. They come as given. The Claimant notice period ended on 31st December 2012. All rents due up and until the 31st December 2012 are due and owing.

Where he paid in cash or used his personal effect to settle the rent due, this was a benefit under his contract and the equivalent cash due should be reinfused. Equally, the children education is not qualified. This was an open benefit. It had no conditions attached to it. The defence that the Claimant was entitled to Kzhs.300, 000.00 per child annually is not supported by any policy, regulations or notice brought to the attention of the Claimant or the Court or that the Claimant was aware of at the time of signing his contract. Good labour practice, what an employer in such a case does is to attach the policy framework that regulate work benefits to the employment contract. Such a policy guide must also be referred to under the employment contract so as to form the basis of using its terms upon the employee. In this case, no such policy is attached, mentioned or indicated as having been brought to the attention of the Claimant while he signed his contract or upon reporting for work. To refer to the due amounts for school fees when the Claimant had left employment and then refuse to effect the due school fees payable for his children is in essence meant to frustrate the contract of employment. The school fees invoiced to the Claimant with regard to his children attending Braeburn School are due and owing to be paid by the Respondent under the contract of employment. Such fees should not be qualified and conditions attached to them as this was an open benefit; where a policy existed to regulate such benefits, such policy is not attached in defence.

61. On the question as to whether the salaries and benefits due should be paid with interest, the Claimant submitted that a 23% is due on his salaries and benefits due. The respondent has acknowledged that there were salaries due and these were not paid in good time due to cash flow problems. Such cash flow problems have been blamed upon the Claimant who is said to have been of poor performance. Based on the above analysis, such an assertion has been established as an unfair labour practice. It should not have been used to deny the Claimant his remuneration after offering his labour as required of him under the contract of employment. Where the respondent continued to retain such dues, has since kept them and not paid the claimant despite the business improving, such dues should be paid with interest.

62. The Offer to pay the salaries and benefits due in instalments was not accepted. I however note that the Claimant's salary was paid by direct bank deposits in his account. Where such salaries were due and owing, the duty was on the Respondent to remit such due salaries per the practice and ensure that the claimant was paid in full. To offer to settle such dues and then seat back and wait is to frustrate the claimant as their former employee which is an unfair labour practice. Such dues should have been remitted without undue delay. The Respondent has kept these funds to themselves until this judgement. This should attract due interests to date.

Remedies

63. Admitted 13 days leave amount to \$7,583.00.

64. Upon the finding that the Claimant's rights in employment were violated he is entitled to his due salaries not paid for 7 months factoring the admitted 5 months and the balance of 2 months coming from the two months which included November and December 2012. Such dues all amount at \$14,000.00 a month all being \$98,000.00.

65. The annual variable performance pay for 5 quarters is due based on the contract of employment at 18%. The Respondent admitted that they did not pay these dues and on the finding that such denials are not justified, the sum of \$30,240.00 is due. Equally the sum of \$37,800.00 is due with regard to the contract amount of annual variable pay for 5 quarters.

66. The contract made provision for housing that was to be paid for by the respondent. The rents due and amounting to \$6,297.07. This is awarded to the claimant.

67. The children school fees being a benefit and having not been paid in full is due. The Claimant is entitled to monies spent in paying school fees for his children. He paid Kshs.634, 820.00 per semester for his two children each. There were 3 such semesters that being $Kshs.634, 820 \times 2 \times 3 = 3,808,920.00$. The two children were in this school for the duration of the claimant's contract and they attended the second semester 2011/2012 at \$5,819.00; third semester 2011/2012 at \$5,819.00; and first semester 2012 at \$7,541.08. The Respondent admitted paying Kshs.300, 000.00 per year for each child.

68. Annexure 13 and 12 of the Claimant's documents indicate that that entire school fees has since been paid in full. The last such payment was on 25th September 2013 way after the Claimant had left the Respondent employment. Other payments were on 22nd July 2013; 15th may 2013, 4th and 28th February 2013 – all after the claimant had terminated his contract with the respondent. The memorandum of claim was filed 24th July 2014, approximately one (1) year after such last payment of the school fees. In the evidence of the claimant, he should have put these payments in settlement of the school fees due into account. With such settlement, to award the Claimant sum of \$19,179.00 will be a double payment. Costs of the suit shall however be awarded due to the time period taken to pay up such amounts.

69. In evidence and submissions the Claimant was seeking for compensation for moral damage at 50% of the rest of his contract. This was however not pleaded. In the final submissions, the Claimant at paragraph 45 set out that he was constructively termination, was not paid his salaries and benefits as per his employment contract. The moral damage and the issue of constructive termination were not pleaded at all! Such renders these claims a fatal blow as this is a crucial rule in our pleadings. The other party must know the case against them and not be ambushed in evidence. As grave as the claimant presented his case and the fact that his father died due to lack of medical treatment that the Claimant could not afford and that his mother health condition deteriorated due not non-medical attendance, the claims to support and go with such evidence is lacking. See **Mariana Onica and Another versus Sky Aero Limited, Cause No.1815 of 2014; Emmanuel Mutisya Solomon versus Agility Logistics, Cause No.1448 of 2011; and Nathan O Atiagaga versus Davis Engineering Ltd, Cause No.419 of 2014.**

70. Noting the circumstances under which the Claimant was forced to resign, a claim for constructive dismissal should have been the first prayer in his memorandum of claim. This left such a claim exposed.

71. Equally, the all-powerful prayer that could have invited the Court discretion is lacking. The payer as under section 12 (3) (viii) of the Employment and Labour Relations Court Act;

Any other appropriate relief as the Court may deem fit to grant.

72. Such a prayer where made, give the Court the wide scope within which to award even where specific remedies are not sought. This is not the case here.

73. Equally, the Respondent pleaded that the Claimant was owing \$71,666.70 for a laptop and phone issued to the claimant. These pleadings are made in defence to the claim and not set out as a counter-claim for the Court to make such an award. The rule of exchanging pleadings have not changed. Where there is a good claim against the claimant, such must be set out as a counter-claim for the Court to award and remove from the total dues owed to the claimant. To make such a deduction on the pleadings and evidence adduced would be to punish the Claimant who filed his claim in good time to assert his rights and the Respondent in reply should have filed their claim to enable the Claimant reply and defend the same. The Rules of exchanging pleading have not changed. Where the respondent has a good claim against the claimant, nothing stops them from claiming the same to enable the claimant defend it. See **Thomas Mbiya Odundo versus the Managing Director, Add sales Limited & Another, Cause No.861 of 2012 and Catherine Wanja Njeru versus Kenya post office Savings Bank, Cause No.53 of 2011;**

... The withholding of the terminal dues on the grounds that were subject of her termination and particularly where the Respondent has not filed a counter-claim for the same is double punishment. These dues should be unconditionally released to the claimant.

74. Interests due on the awarded amounts shall be computed at Court rates. Such computation of interest should be computed as of 31st December 2012 being the last day of employment until payment in full.

75. The Claimant's contract was made in the current of United States Dollars (USD). The Claimant has since left Kenya and his work permit cancelled as noted by the Respondent CEO in his letter dated 1st

November 2012. The salaries and benefits dues were paid in United States Dollars to the Claimant's bank account No. 072 012 232 held with Standard Chartered Bank, Mauritius and in the name of Prakash Bheekhoo and Pooroosotum Bheekhoo. Noting such matters, the dues owing shall be paid in United States Dollars instead of Kenya shillings.

76. The contract of employment having been made and executed in Kenya, the Employment Act apply. All payable salaries and benefits are subject to the provisions of section 49(2) of the Employment Act.

(2) Any payments made by the employer under this section shall be subject to statutory deductions.

Conclusion

In conclusion, judgement is hereby entered for the Claimant against the respondent.

The Claimant is awarded salaries and benefits dues as follows;

- a. **13 days leave at \$7,583.00;**
- b. **7 months' salary \$98,000.00;**
- c. **Annual variable (performance linked Pay target) for 5 quarters \$30,240.00;**
- d. **Annual variable (performance link) pay for 5 quarters \$37,800.00;**
- e. **House rent \$6,297.07;**
- f. **Amounts due under (a), (b), (c), (d) and (e) above shall be paid with interest at Court rates from 31st December 2012 until payment in full;**
- g. **The amounts dues above shall all be subject to the provisions of section 49(2) of the Employment Act; and**
- h. **The Claimant is awarded costs of the suit.**

Delivered in open Court at Nairobi and dated this 22nd day of October 2015.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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