



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO. 1346 OF 2010**

**JAMES CHUTHA GATHERE ..... CLAIMANT**

**VERSUS**

**NATION MEDIA GROUP LIMITED .....RESPONENT**

**JUDGEMENT**

This is a claim dated 25<sup>th</sup> October 2010 by the claimant James Chutha Gathere for his terminal dues unpaid by the respondent Nation Media Group limited. The defence was filed dated 23<sup>rd</sup> November 2010 admitting that the claimant was their former employee but that his dues were all paid as due and nothing else arises from them and if there were dues, the same should be set off from the dues owing from the claimant as outlined in the defence.

The claimant stated that he was employed by the respondent as an Agency Sales Supervisor – Nation Digital, on the 4<sup>th</sup> of December 2008 at a gross salary of kshs.120, 000.00 per month which was inclusive of Car allowance. That on 5<sup>th</sup> August 2010, the claimant resigned his position with the respondent by giving one month notice as under his contract and by this time his salary had increased to Kshs.168, 000.00 per month. That on 10<sup>th</sup> August 2010, the claimant requested a waiver of the Notice Period to enable him work until the last day of August 2010 but this request was not granted by the respondent. That on 12<sup>th</sup> August 2010, at 4.28pm, the respondent terminated the claimant employment and asked him to vacate their offices by close of business.

The claimant further stated that his termination was unlawful as it was prompted by a falling out between him and one Shazad Khan the Commercial Manager Digital Division of the respondent over his handing over process as a result of the claimant's resignation. That the respondent could not terminate the claimant without complying with the terms of their contract noting that he had tendered his letter of resignation.

That upon the termination of the claimant, the respondent failed to give him his terminal dues amounting to kshs.658, 200.00 being payment for 3 months notice as per their contract, accrued 17 days leave unspent and his commissions for the month of May 2010 at kshs.86, 000.00.

In evidence the claimant said that he worked for the respondent for one year and then decided to resign and move to a new employer and therefore tendered his letter to the respondent on 5<sup>th</sup> August 2010 as under his contract he was supposed to give a 3 months' notice and this was to take effect on November 2010. That after this letter was submitted the human Resource officer called him and impressed him to

stay. The claimant wrote seeking to have the 3 months notice period be waived and was submitted on 8<sup>th</sup> August 2010. He also sought to use his 17 days of leave pending. However on 12<sup>th</sup> August 2010 he disagreed with the Head Commercial manager on the handover and the Human Resource wrote to him indicating that this was to be his last day at work; he should clear his desk and leave.

That at this point he was earning kshs.168, 000.00 per month after a successful review from his previous kshs.120, 000.00 as well as commissions based on target at 1.5% gross revenue and since he had hit his target, in July he earned a commission of Kshs.86, 000.00 but he did not receive this amount. That his termination on 12<sup>th</sup> August was without the required 3 months notice.

That when the Human Resource wrote to him asking him to leave, he was also required to sign an undertaking that they did not owe the respondent any other dues especially his commissions due. He sought to contact his advocates but this letter was withdrawn from him. That for the 12 days he had worked no pay was given to him and could not effectively clear with the finance office due to the short notice given and since he came to court he had to withdraw the case to be cleared.

That at this time he had a car loan of Kshs.800, 000.00 and the condition was that if he left his employment before clearance, this was to be deducted from his terminal dues. That the balance then was approximately kshs.500, 000.00. That he now claims from the respondent his notice pay for 3 months, 17 days of leave, commission of 1.5%, 12 days worked in August 2010 with interest and costs of the suit.

On cross examination the claimant confirmed that he had resigned from the respondent to take effect from November 2010 as he was required to give 3 months notice and he had also made a request to have this period waived and upon advice from human Resource officer he wanted to have the notice waived as he was not happy with his job. That he was aware if he left without notice, he would have to pay the respondent for the 3 months notice period as under his contract. That his notice to resign was not formally acknowledged. That on 12<sup>th</sup> August the human resource officer did show him his letter but did not receive his pension dues. He had a car loan that was to be removed from the terminal due and a commission on targets was due in August 2010. The claimant also confirmed that he had written his resignation letter dated 6<sup>th</sup> July 2010, remained with it until August 2010 when he submitted it on the 5<sup>th</sup> to serve for the 3 months period which he intended to work until he was advice the Human resource officer to apply for the waiver.

The respondent on the other had stated that under the claimant's employment contract with the respondent, he was required to have 3 months notice to terminate his contract. That at the time he was earning Kshs.100, 000.00 and a car allowance of kshs.20, 000.00 per month. That on 5<sup>th</sup> August 2010 the respondent received the claimant's letter of resignation dated 6<sup>th</sup> July 2010. Subsequently to this resignation, the claimant made a request for waiver of his notice period on 10<sup>th</sup> August 2010 and upon discussions with Human Resource Services manager Mr. Swaleh Shariff, it was agreed that the notice period would be waived and confirmed in an email dated 12<sup>th</sup> August 2010 and that the claimant was not unfairly terminated as the email sent pursuant to his request for waiver of the notice period was based on his termination of the contract with the respondent and as agreed the waiver was to take care of the leave days due and therefore the claimant cannot seek to be paid these days or the 12 days worked in August 2010 as he should have served the 3 months in the first place.

That prior to his departure, the claimant was supposed to clear with respondent, an administrative action, to determine his dues as stated in an email dated 12<sup>th</sup> August 2010 but that the claimant failed or refused or neglected to do so and despite advice to this effect, the claimant have still not been able to clear with the respondent.

The respondent therefore seeks to off-set what is due to the claimant and states that by an agreement between eh claimant and the respondent a car loan was advanced to him at kshs.650, 000.00 for the purchases of motor vehicle registration Number KBJ 175F and the terms of the agreement were that should the claimant cease to be an employee of the company any amounts due to him was to be deducted from the amount due and owing on the car loan. That at the time of resignation, the claimant had not paid

the balance of Kshs.571, 458.40 which amount the respondent claims that it should be paid to them with interest and costs of the suit.

The respondent did not call any witness. They relied on their pleadings.

Parties filed their written submissions. The claimants written submissions are dated 3<sup>rd</sup> June 2013 and the respondent submissions are dated 14<sup>th</sup> January 2013.

Termination of employment can be at the instance of any party upon giving the other notice and where there is a written employment contract; termination can be as under the terms of this contract subject to the same being in conformity with the law. Therefore any party wishing to end their employment relationship is under a duty to let the other party know by issuance of a notice.

I note the parties herein had both agreed to the employment contract dated 4<sup>th</sup> December 2008. This is not contentious. However what is contested is whether the claimant resigned his position and what was due to him or whether he was terminated by the respondent and what was due to him in whichever scenario. Section 35 of the Employment Act stipulate the circumstances under which termination can be effected. When parties have a written contract, the termination shall be as outlined in that written contract and this court will effect such a contract or interpreted the intentions of the parties based when parts of this contract become contentious.

The Employment Act does not mention the word 'resign' or 'resignation' but looking at the provisions of the term 'termination' the word has the same effect and wider meaning. An employee who is under a contract of employment and wishes to terminate his employment relationship with his employer can give notice as agreed between the parties. This notice is important as it sets in motion other termination processes noting that where the terminating party opts to serve for the duration of their notice, this other party must put into perspective any leave days due, days worked over and above the notice period or below the notice period and other work place best practices like handing over report or property that belongs to the other party. This notice period is equally important as the party serving under such notice has a duty to continue work up and until the last day of the notice. The work relationship does not end and the employee is bound to give their best labour, effort and due diligence to the employer until their last day of work.

On the other hand the receiving party of the notice also has a duty to notify the departing party of any procedures that must be adhered to and where the departing party opts not to serve their notice period, to ensure that they pay in lieu of notice. Where it relates to an employee who gives a notice, the employer is expected to acknowledge the notice and commence termination processes with the employee by ensuring that proper handover is done and that the employee continues to give service and good performance as under their contract. A party can also give notice but opt not to serve the term and hence section 36 of the Act becomes operative here;

***36. Either of the parties to a contract of service to which section 35 (5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section.***

The termination notice can also be negotiated by the parties. This is as under section 38 of the Act.

***38. Where an employee gives 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.***

Therefore, a termination notice becomes very important as based on this notice other processes must commence. Acceptance of the notice where an employee must serve the term of notice, acceptance of the notice and payment in lieu of serving the term of notice or acceptance of the notice and a waiver of the

term of notice period or a waiver under terms as agreed between the parties. A notice can also be rejected by an employer on good reason. These are the terminal processes of the employment contract.

However, the duty to explain these procedures and or process rests with the employer even where the employee gives notice to terminate an employment contract. This explanation must be done with certainty and without any ambiguity and failure on the part of the employer to do so and the employee ends up in a situation which creates conflict due to lack of proper instructions, the employer is deemed to be in fault. This is as outlined under section 35 (3) and (4) of the Act;

***(3) If an employee who receives notice of termination is not able to understand the notice, the employer shall ensure that the notice is explained orally to the employee in a language the employee understands.***

***(4) Nothing in this section affects the right—***

***(a) Of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or***

***(b) Of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.***

In this case, the claimant tendered his resignation on 5<sup>th</sup> August 2010, noting that it was his 3 months notice. The claimant's letter of resignation dated 6<sup>th</sup> July 2010 was submitted on 5<sup>th</sup> August 2010 as admitted by the respondent. In this notice the claimant gave his 3 months notice and noted that he had 26 days of leave days outstanding, which he wished to take within the notice period.

Therefore as the party who had terminated his employment contract, he gave the notice due under his contract for 3 months and wished to take his leave within these 3 months. This notice was directed at Shahzad Khan, Commercial Manager Digital, at the department where the claimant was working. It was also copied to Swaleh Shariff and Ian Fernandes. On 10<sup>th</sup> August, the claimant wrote to Swaleh Shariff and noted their conversation of 5<sup>th</sup> August 2010 with a request seeking to have his notice period waived and offered to serve until the end of the month [August] to allow for a suitable handover to Shahzad Khan the Commercial Manager. He ended this communication noting that he looked forward to a positive response.

Indeed on 12<sup>th</sup> August 2010, Swaleh Shariff wrote to the claimant in reference to their conversation noting that the date of the email [12<sup>th</sup> August 2010] was the claimant's last day and that he was required to handover and do clearance with Shahzad before departure at the end of that day. That clearance by other departments was to be done from the next day. This communication from Swaleh Shariff was copied to Shahzad Khan, Mwikali Muthiani and Ian Fernandes.

From this exchange of emails the claimant gave evidence that his intention had been to resign from the employment of the claimant and he went ahead and submitted his resignation letter giving the required notice of 3 months. That following this resignation, there were discussions with the human resource officer who urged him to stay on but noted since he was unhappy with his job he could apply for a waiver of his notice period. On the other hand the respondents through their pleadings and submissions assert that upon receipt of the claimant's resignation letter and his application of waiver of his notice period this was immediately effected and granted and his days served and the leave due put in context of the waived 3 months period.

The conversation between the claimant and the respondent officers on acceptance of his notice and the period to be served or the conditions for the waiver of the notice term was not documented. Only the claimant gave evidence and he indicated his intentions when he resigned was to serve the notice term until November 2010 but the communication from Swaleh Shariff and officer of the respondent was of the effect that he should leave immediately and that he was to clear with other departments the following day.

In the absence of any evidence called by the respondent, I take the evidence of the claimant as the correct position. If this were not the case the respondent would have called their witnesses to controvert the claimants assertions as to the discussions between him and their officers as to the nature of waiver of his notice period as discussed on 5<sup>th</sup> August 2010 when he tendered his resignation.

Even if this were not so, from the pleadings submitted by the respondent, I note the communication from Swaleh Sharrif dated 12<sup>th</sup> August 2010 directed at the claimant is ambiguous and does not shed any light in view of the resignation notice that was sent to the claimant. The letter is not an acknowledgement of the resignation notice and the same is framed as a directive that the claimant should vacate his office by the end of the day being the 12<sup>th</sup> of August 2010 and that he should return the next day to commence clearance with other departments.

This communication does contradict the communication dated 5<sup>th</sup> August 2010 from the claimant as he was clear in his notice that he wanted to serve the term of his notice to November 2010 and that he wanted to use the time remaining to do a handover to Ian Fernandes as well as use his leave days outstanding. I take this to be a reasonable thing to do from a serious employee who has thought through the consequences of his termination notice by offering to make good the remaining time with his employer by ensuring that a proper hand over is done and that instead of seeking to be paid for his leave days due, he was willing to give a plan on how to off-set these days by taking them during his notice period.

Unfortunately the letter from the respondent seems to have given an immediate termination to the employment relationship. Whatever terms of the waiver were agreed upon the claimant's application were not mentioned, all what he was supposed to do was to vacate his office by 12<sup>th</sup> August 2010. This therefore stopped his employment at the instance of the respondent as against his earlier notice seeking to serve his notice period.

Consequently, this immediate termination of the respondent of the claimant services had the effect that he would not meet his obligations noting that he had a car loan unpaid and thus had to pay upfront or risk the same being recovered from his terminal dues. Also the directive to vacate the respondent premises the same date meant that the claimant could not do clearance or handover processes as an employee of the respondent, he had to create his own time that was unpaid to the work of the respondent that was supposed to have been done while serving his notice period. That of clearance and handover of any property of the respondent or a report to the suggested Ian Fernandes.

I therefore find the respondent terminated the claimant's contract of employment; the same was without notice and the respondent must take responsibility. Notice period as agreed in the contract of service was 3 months and I will award the sum. I note the claimant was to produce his pay slip as indicated in his evidence as to his basic pay. The respondent asserts that his pay was kshs.120, 000.00 per month with the benefit of car allowance. This is the amount of his salary. However none of the parties herein produced the pay slip. In law where there is a dispute regarding an employment condition, the duty rests on an employer [the respondent herein] to produce that record to court. This was not done and I take it the claimants last salary with the respondent was Kshs.168,000.00 and I will award this amount for the 3 months he was to serve his notice or be paid when the termination was at the instance of the respondent without notice at Kshs.168, 000.00 x 3 being kshs.504, 000.00.

There were 17 leave days due. At the salary of kshs.168, 000.00 the leave due for the 17 days amounts to Kshs.68, 200.00. I will grant this amount.

The commissions due to the claimant were not challenged by the respondent in any material way. I will therefore award the sum of kshs.86, 000.00 being 1.5% commission due to the claimant from the respondent.

The claimant did not plead unfair termination, equally his evidence did not take this direction that his termination was unfair and therefore the submission that this was such will be declined. No

compensation if therefore due.

Of the amount due to the claimant, he admitted that he had an outstanding car loan that he had not cleared amounting to Kshs.571, 458.40. this will be offset from his total dues.

**I therefore enter judgment for the claimant against the respondent in the following terms;**

- a. **Notice pay amounting to Kshs.504,000.00;**
- b. **Outstanding commission amounting to Kshs.86,000.00**
- c. **Pay for leave 17 leave days at Kshs.95,200.00**

**Total amount 685,200.00**

**Less car loan due at Kshs.571, 458.40**

**Total due amount Ksh.113, 742.00**

- d. **Respondent to Issue a Certificate of Service to the Claimant within 14 days.**

**Delivered in open court this 13<sup>th</sup> day of June 2013**

**M. Mbaru**

**Judge**

**In the presence of:**

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