



**Athman v Kenya Red Cross Society (Cause 1973 of 2017)  
[2024] KEELRC 1114 (KLR) (14 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1114 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1973 OF 2017**

**JK GAKERI, J**

**MAY 14, 2024**

**BETWEEN**

**HOKA ATHMAN ..... CLAIMANT**

**AND**

**KENYA RED CROSS SOCIETY ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Statement of Claim filed on 14<sup>th</sup> October, 2017 alleging Constructive dismissal by the Respondent.
2. It is the Claimant's case that he was employed by the Respondent on 15<sup>th</sup> October 2013, as a Branch Co-ordinator, Thika Branch at a monthly salary of Kshs.30,000/=.
3. The Claimant avers that on the 30<sup>th</sup> May, 2014, he was suspended from employment on allegations of disappearance of receipt books and statements related to a walk.
4. The Claimant also asserts that since his suspension, the Respondent failed or refused to pay his salary.
5. It is the Claimant's case that the Respondent's failure to communicate its decision regarding the suspension amounted to constructive dismissal.
6. The Claimant further avers that he has not secured alternative employment because the Respondent did not lift the suspension or issue a formal termination letter leaving him destitute without a source of income.
7. The Claimant prays for;
  - a. Salary at the rate of Kshs.30,000/- per month effective 1<sup>st</sup> June, 2014 till date of judgment.
  - b. One (1) month's salary in lieu of notice Kshs.30,000/=.



- c. Certificate of service.
- d. Damages for unlawful termination equivalent to 12 months' salary (Kshs.360,000/=).

### **Respondent's case**

8. In Response to the Statement of Claim, the Respondent filed a Memorandum of Response dated 20<sup>th</sup> December, 2017.
9. The Respondent denies the allegations made by the Claimant in the statement of claim.
10. The Respondent states that the Claimant had secured employment with the Kenya Broadcasting Corporation (KBC) at the time of suspension.
11. The Respondent further avers that the Claimant was issued with a Notice to show cause why he should be suspended from duty after losing crucial financial documents but failed to respond.
12. It is the Respondent's case that the claim by the Claimant arose as a result of the Claimant's actions.
13. The Respondent prays for dismissal of the Claimant's claim and a finding that it is not indebted to the Claimant.

### **Claimant's evidence**

14. The Claimant testified that he began working for the Respondent from 15<sup>th</sup> October, 2013 as a Branch Co-ordinator.
15. He explained that he was suspended from employment on 30<sup>th</sup> May, 2014 on allegations of lack of accountability and integrity arising from loss of receipt books and statements collected during a planned walk.
16. It is the Claimant's testimony that he received a show cause letter, to which he responded, and on 26<sup>th</sup> July, 2016 he held a meeting with the Respondent but the outcome of the investigations was never communicated to him.
17. On cross-examination, the Claimant admitted awareness of the loss of receipt books and added that the Treasurer picked the receipt book for audit purposes but the books were never returned.
18. The Claimant testified that following the suspension, he was not informed of the results of the investigations.
19. The Respondent did not call any witness.

### **Claimant's submissions**

20. Counsel highlighted two issues for determination;
  - i. Whether the indefinite suspension and subsequent constructive termination of the claimant was unlawful and unfair.
  - ii. What reliefs, if any, is the Claimant entitled to.
21. On the first issue, counsel argued that if an employer intends to impose suspension, it must do so in accordance with the organization's policies.



22. Counsel cited the decision in *Timon Otieno Mboga v Kenya Forest Service* (2015) eKLR, where the court held that;
- “The *Employment Act*, the Industrial Act or any other labour law for that matter do not provide for suspension. The *Employment Act* however provides at section 12 that every employer which employs more than 50 employees must have a statement on disciplinary rules..... issues such as interdiction and suspension therefore ought to be provided for in the statement of disciplinary rules”.
23. Counsel submitted that the Claimant’s salary was immediately stopped for an indefinite period and contends that the suspension should have been for a defined duration.
24. In *Donald C. Avude v Kenya Forest Service* (2015) eKLR the court held that;
- “....Suspension should be for a determinate period where such suspension is without pay otherwise it will constitute inhuman treatment”.
25. Counsel submitted that Section 19 of the *Employment Act* outlines 9 occasions when an employer may make deductions from the wages of an employee and no provision allows an employer to deny a suspended employee his monthly salary.
26. Counsel contended that withholding an employee’s salary cannot be considered a disciplinary measure as salaries are protected under Part IV of the *Employment Act* even during suspension.
27. Counsel relied in the holding in *Peterson Ndungu & 5 others v Kenya Power and Lighting Company Limited* (2014) eKLR where the court held;
- “The courts understanding of the practice of withholding of the employee’s emoluments during the disciplinary process.... On scrutiny indeed has no foundation in the *Employment Act*. It has no legal validity”.
28. Counsel urges that there is no provision under the *Employment Act*, 2007 that allows an employer to withhold the monthly salary of an employee whose contract is still in effect during preventive or administrative suspension.
29. It is the Claimant’s submission that his indefinite suspension and subsequent constructive termination of employment was unfair, unlawful and against fair labour practices.

### **Respondent’s Submissions**

30. Counsel for the Respondent highlighted three issues for determination;
- i. Whether the Claimants suit is competent
  - ii. Whether the claimant has raised new issues in their written submissions dated 7<sup>th</sup> March, 2024
  - iii. Whether the Claimant is entitled to the reliefs sought.
31. The Respondent’s counsel submits that it raised a preliminary objection on the 22<sup>nd</sup> March, 2024 on the grounds that the matter is statute barred on account of Section 90 of the *Employment Act*, 2007.
32. In his submissions, counsel stated that the Claimant was suspended on the 30<sup>th</sup> May, 2014 and the suit was filed on the 4<sup>th</sup> October, 2017 which date is outside the three year limitation period.



33. It is the Respondent’s submission that the court lacks jurisdiction to determine the suit. Reliance was made on the holding in *Michira & 41 others v Aegs Kenya Limited t/a Leopard Beach Hotel* (cause E088 of 2023) (2023) KEELRC 22551(KLR) where the court held as follows;

“To file a claim in August 2023 following a cause that arose in April 2020 is outside the limitation period, both for claims under continuing injury or claim arising out of an employment contract. This is a matter addressed in the law on the facts presented, the objections by the respondent are with good foundation and the claim herein is statute barred and filed contrary to the provisions of section 90 of the *Employment Act, 2007*. The court is denied the requisite jurisdiction to proceed further”.

34. The Respondent contends that the claimant sued the wrong party as in the statement of claim identifies the Respondent as “Kenya Read Cross Society”. It stated that the suit is only competent if proper parties have been identified and relied in the holding in *Apex International Ltd and Anglo Leasing and Finance International Finance Limited v Kenya Anti-Corruption Commission* (2012) where the court quoted the words of Mukhtar J. of the Supreme Court of Nigeria in *Goodwill and Trust Investment Ltd v Will and Brush Ltd* (2011)LCN/B820 SC;

“It is trite law that to be competent and have jurisdiction over a matter proper parties must be identified before the action can succeed, the parties must be shown to be proper parties whom rights and obligations arising from the cause of action attach.....”

35. Counsel argues that if the incorrect naming was an error, the claimant should have amended the statement of claim to reflect the correct name.

36. The respondent urges the court to allow the preliminary objection and dismiss the claimant’s case.

37. On the second issue, counsel for the Respondent argues that the Claimant did not plead constructive dismissal and urges the court to disregard the assertion of constructive dismissal raised in the claimant’s submissions.

38. Regarding the reliefs sought, the respondent maintains that the claimant has not discharged his burden in proving unfair termination.

### **Findings and determination**

39. The issues for determination are;

- i. Whether the Claim is statute barred.
- ii. Whether the suspension of the Claimant was wrongful, unreasonable and unfair.
- iii. Whether the claimant is entitled to the reliefs sought.

40. The Respondent’s counsel submitted that a preliminary objection had been raised on the 22<sup>nd</sup> March, 2024 asserting that the matter is statute barred under Section 90 of the *Employment Act, 2007*.

41. This issue raised by the Respondent in its submissions pertains to the jurisdiction of the court to entertain the matter before it, and its prudent to address it.



42. The Respondent avers that the statement of claim was filed on the 4<sup>th</sup> October, 2017 while the Claimant was suspended on 30<sup>th</sup> May, 2014 which date is outside the 3 year limitation period stipulated under Section 90 of the *Employment Act*, 2007.
43. Section 90 of the *Employment Act* states:
- “Notwithstanding the provisions of Section 4(1) of the *Limitation of Actions Act* Cap 22, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of aa continuing injury or damage within twelve months next after the cessation thereof.”
44. It is trite that the limitation period starts to run from the time of the cause of action arises.
45. When did time start running in the instant case?
46. This is an important issue as it is determinative on whether the Claimant’s suit is statute barred.
47. Significantly, the Respondent tendered no evidence as to when it terminated the Claimant’s employment and its counsel uses the date of suspension as the date of termination which is patently not the case.
48. It is trite law that only serving employees may be suspended or interdicted.
49. Regrettably, the Claimant was suspended for an indefinite period.
50. Relatedly, evidence on record shows that the Claimant was communicating with the Respondent about his suspension for example in June 2014, July 2014 August, even as late as 26<sup>th</sup> September, 2016.
51. Having suspended the Claimant for an indefinite period, the Respondent cannot argue that it terminated the Claimant’s employment on that date as the Claimant was entitled to continue regarding himself as an employee of the Respondent. Without a formal termination letter, it behooves the Respondent to prove when time started running.
52. The foregoing is fortified by the decision in *Sava v Kitui Cottages and Guest House* (Cause 1280 of 2017) (2022) KEELRC 1499 (KLR), where the court observed;
- “Ordinarily the Claimant would not have been expected to have a cause to complain right from the time he was placed on suspension whether in writing or verbally as employment had not been terminated by then.
- In the circumstances the claimant cannot be deemed as having been time barred by the time it was instituted in court as the cause of action was yet to arise”.
53. In the instant case the claimant was suspended on the 30<sup>th</sup> May, 2014 on allegation of lack of transparency accountability and integrity as the virtues of the Respondent, pending the meeting of BMC for ratification and final decision.
54. The Claimant held a meeting with the Respondent on the 26<sup>th</sup> July, 2016 but the outcome of the meeting was never communicated to him despite several enquires via email.
55. Evidently, the cause of action did not arise on the date the claimant was suspended as he was still undergoing the disciplinary process and the process was never finalized by the Respondent. Arguably, the cause of action arose when the Claimant felt aggrieved and filed the suit in court.



56. Even assuming that the Claimant ought to have acted within a reasonable time of about 6 months from the date of suspension, then the time started running at the end of November 2014 and the action is not statute barred having been filed on 4<sup>th</sup> October, 2017.
57. On the second issue, the Claimant contends that the indefinite suspension amounted to constructive termination which was unlawful and unfair. The Respondent on the other hand submits that the Claimant did not plead constructive dismissal and urges the court to ignore and disregard the Claimant's submissions.
58. The principle of constructive dismissal was articulated by Lord Denning in *Western Excavating (ECC) Ltd v Sharp* (1978) QB761 as follows;
- "If the employer is guilty of conduct which is significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employers conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or alternatively he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for if he continuous for any length of time without leaving, he will loose his right to treat himself as discharged. He will be guarded as having elected to affirm the contract".
59. The principle of constructive dismissal was domesticated in Kenya by the Court of Appeal in *Coca Cola East and Central Africa Ltd v Maria Kagai Ligaga* (2015) eKLR by adopting the contractual approach test.
60. Similarly, the Court of Appeal formulated the guiding principles for determining constructive dismissal, which include; the fundamental or essential terms of the contract of employment, whether there is repudiatory breach, whether the conduct of the employer is fundamental and goes to the root of the contract, causal link between the employers conduct and termination of contract, employers conduct was effective cause whether or not the notice is given, employee must not have accepted or waived or acquiesced or conducted himself as to be estopped from asserting the repudiatory breach and the burden of proof is borne by the employee.
61. In the instant case, the Claimant states that he was placed on an indefinite suspension. It is clear that since the Claimant was put on suspension, he held a meeting with the Respondent on 26<sup>th</sup> July, 2014 but no feedback on the suspension was given.
62. In the court's view, the circumstances of this case entitled the Claimant to consider himself as constructively dismissed by the Respondent.
63. It is also noteworthy that during the suspension, the Respondent did not pay the Claimant's salary, a fact the Respondent did not contest.
64. From the evidence before the court, it is discernible that the Claimant cooperated during the suspension but the Respondent failed to inform him of the outcome of the disciplinary process.
65. For a termination of employment to be lawful, the employer must demonstrate that it had a valid and fair reason for the termination and conducted it in accordance with a fair procedure. These requirements are captured in Sections 35, 41, 43, and 45 of the *Employment Act*, 2007.



66. In *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR, Ndolo J. underscored the need to establish a substantive justification for termination and procedural fairness for termination to pass the fairness test.
67. Section 45(1) of the *Employment Act* provides that:
1. No employer shall terminate the employment of an employee unfairly
  2. A termination of employment by the employer is unfair if the employer fails to prove –
    - a. That reasons for termination was valid
    - b. That the reason for termination is a fair reason.
68. Section 47(5) of the *Employment Act*, 2007 provides that;
- For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for termination of employment or wrongful dismissal shall rest on the employer.
69. The Respondent tendered no evidence to show that it had a reason to terminate the Claimant’s employment.
70. In assessing whether due process was followed, the court is guided by the provisions of Section 41 of the *Employment Act*, 2007. The elements of procedural fairness were enumerated by the Court of Appeal in *Postal Corporation of Kenya v Andrew K. Tanui*(2019) eKLR where the court held;
- “It is our view that Section 41 provides the minimum standard of a fair procedure that an employer ought to comply with...
- Four elements must be discernible for the procedure to pass;
- i. An explanation of the grounds of termination in a language understood by the employee
  - ii. The reason for which the employer is considering termination
  - iii. Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made
  - iv. Hearing and considering any representations made by the employee and the person chosen by the employee”
71. In the circumstances of this case, it is the finding of the court that the Respondent has failed to discharge its burden under Section 45 of the *Employment Act* or demonstrate compliance with the provisions under Section 41 of the Act. The indefinite suspension of the Claimant on the 30<sup>th</sup> May, 2014 amounted to unfair termination for want of substantive justification and procedural propriety.

**Whether the Claimant is entitled to the reliefs sought.**

**a. Salary at the rate of Kshs.30,000/= per month from effective 1<sup>st</sup> June 2014 till the date of judgment.**

72. In determining, what the Claimant was entitled to during suspension, the contract of employment would have been helpful but none of the parties availed a copy.



73. Significantly, the Respondent neither denied the non-payment of salary nor the suspension.
74. Needless to emphasize, placing an employee on an indefinite suspension without pay is an unfair labour practice under Article 41 of the Constitution of Kenya, 2010. A suspension must be justified and its duration defined to minimise the employee's anxiety. The Claimant is awarded Kshs.180,000/= being the full salary for 6 months due to him during suspension.

**b. One (1) month's salary in lieu of notice**

75. The Claimant was not issued a notice of termination as he was merely placed on suspension and is thus entitled to one (1) month's salary in lieu of notice unless the same was paid.

**c. 12 months compensation**

76. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to the relief under Section 49(1)(c) of the Employment Act, 2007.
77. The court has considered that the Claimant was an employee of the Respondent for a short time, about 6 months, expressed his desire to remain in employment and did not contribute to the termination of his employment.
78. In the circumstances, the court is satisfied that the equivalent of 2 months' gross salary is fair.

**d. Certificate of service**

79. The Claimant having worked for the Respondent for a duration of 7 months is entitled to a Certificate of Service by dint of section 51 of the Employment Act, 2007, certificate to be issued to the claimant within 30 days from the date of judgment.
80. In conclusion, judgment is entered in favour of the Claimant against the Respondent in the following terms;
- a. Six (6) months salary unpaid during suspension Kshs.180,000/=.
  - b. One month's salary in lieu of notice, if unpaid.
  - c. Equivalent of 2 months' salary.
  - d. Certificate of service
81. Parties shall bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF MAY 2024**

**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**

