



Saro v Evans Sunrise Centre (Employment and Labour Relations Cause E010 of 2022) [2024] KEELRC 977 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 977 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E010 OF 2022**

HS WASILWA, J

MAY 2, 2024

BETWEEN

JUMA MUSA SARO CLAIMANT

AND

EVANS SUNRISE CENTRE RESPONDENT

JUDGMENT

1. This suit was instituted by a Memorandum of claim dated 13th April, 2022. The claimant alleged to have been constructively dismissed and sought compensation for the said termination. The Claimant sought for the following reliefs; -
 - a. A declaration that the claimant was constructively and or wrongfully dismissed.
 - b. An award of damages of Kshs 2,025,833 being 12 months' salary, pro-rated leave pay for 10 months, one month salary in lieu of notice and salary arrears of the month of September and October, 2021.
 - c. Interest on (b) above at Court rates from 31/10/2021 until payment in full.
 - d. Costs and interest thereon at Court rates.
 - e. Any other or further relief as the Honourable Court may deem fit to grant.
2. The claimant stated that he was employed by the Respondent as a Resident Medical Officer vide a two-year renewable contract signed on 11th January, 2021 on a salary of Kshs 130,000.
3. He stated that he diligently discharged his duties however that the Respondent breached his part of the agreement by failing to remit his salary for the month of September, 2021, causing him financial stress. That despite several reminders and follow ups, the Respondent did not pay him, neither did it give any explanation for the non-payment.



4. He avers that he worked for the next month without any pay and on 10th October, 2021, he tendered his resignation that was to take effect from 31st October, 2021.
5. He maintained that the resignation was purely triggered by the non-payment of his salary, as he was no longer able to meet his financial obligations as such was no longer able to continue working for the Respondent. On that note, the Claimant stated that he was constructively terminated.
6. The claimant stated that after resigning, the Human Resource officer, assured him of the payment of his salary arrears but that non was forthcoming, forcing the claimant to file this suit.
7. He stated that the Respondent's actions amounted to unfair labour practices and breach of contract of employment entered into between the parties.
8. The claimant particularized the breach and stated that the Respondent failed to pay his salary for two months, failed to provide the claimant with itemized pay statement or slip, prompted the claimant to resign and in effect constructively dismissed him.
9. The Respondent entered appearance and filed a response to claim and Counterclaim on 6th September, 2022 which was later Amended on 25th January, 2023.
10. In defence, the Respondent stated that at the time the claimant was employed, the medical industry was going through unprecedented Covid-19 pandemic, which caused the Respondent to experience serious cash flow problems arising out of, among other things, the procurement of bulk personal protective supplies for its staff and other medical equipment that were sold at exorbitant prices. On the other hand, that there was reduction of outpatient utilization and hospital admissions, decline of hospital claim by third parties and delay in remittance of payments by the health Insurance providers overwhelmed by unprecedented claims.
11. The Respondent stated that, all these constrains were brought to the attention of all employees including the claimant and were discussed at length during interview and the parties agreed to moderate on these issues in the context of prevailing circumstances in the health care industry.
12. It is stated that the Respondent's director held a series of meetings with its staff in April, 2021, to discuss the financial position of the Respondent and three options were put on the table being; redundancy, voluntary resignation and remaining in employment on understanding that salary would be delayed. That all staff, including the claimant choose the third option. The Respondent maintained that it has been paying its employee albeit late.
13. The Respondent reiterated that the did not withhold the claimant's salary on purpose but due to financial constrains explained in the preceding paragraphs. Hence, the claimant was not constructively dismissed as alleged.
14. On payment of terminal dues, the Respondent stated that the Claimant is the one that refused to sign the discharge voucher to allow for the processing of dues owed to him.
15. On the claim of notice pay, the Respondent stated that the Claimant send unsigned resignation letter via email after, he had exited the Respondent's employ, thus he is the one that ought to pay one-month salary in lieu of notice.
16. On pro-rated leave pay, the Respondent stated that the claimant took several offs which were more than his leave days thus, he exhausted his leave days.



17. On prayer for compensation, the Respondent stated that the termination was caused by voluntary resignation upon the claimant finding another employment, thus the claim is not warranted and or is exaggerated.
18. The Respondent stated that contrary to allegations that the claimant was constructively dismissed, the claimant had actually secured another employment on 8th October, 2022 in Taita Taveta County Public Service which had offered him a higher salary pay.
19. On the Counterclaim, the Respondent stated that the claimant is the one that breached his contract of employment for failing to serve his contractual notice, signing unsigned resignation letter via email when he had already exited the work place, failed to submit clearance forms and sign discharge voucher for payment of terminal dues and failing to give one-month notice as agreed in the Employment Contract.
20. The Respondent stated that due to failure by the claimant to give proper notice, the Respondent incur more costs in hiring locum doctors to cover its two health facilities and also that the Respondent was inconvenienced and its clinical service operations were disrupted.
21. Based on the foregoing the Respondent prayed for the following reliefs; -
 - a. An Order for payment of Kshs 130,000 being one-month salary in lieu of notice.
 - b. General damages for causing inconvenience and disruptions of the Respondent's clinical service operations.
 - c. Specific damages for costs incurred for hiring locum doctors to cover the two clinics.
 - d. Costs and interest.
22. The Claimant filed a response to defence and Counterclaim and stated that he was employed on 11/1/2021 and worked for about 10 months after Covid-19 pandemic. During his employment, the Respondent informed him of the increased workload occasion by the Pandemic, thus the allegations that there was reduction of patients and cash flow cannot be true.
23. The Claimant denied ever being invited to any meeting or being asked to choose the three option of resigning, redundancy and delayed payments and maintained that the written contract is supreme over any other purported oral agreements.
24. The claimant stated that several months before the resignation, his salary was delayed and only paid after several phone calls and messages. He added that after resigning, he pursued his salary arrears to no avail and at no point was the issue of discharge voucher ever raised, as such the Counterclaim is an afterthought.
25. The claimant stated that he got the current job way after he was constructively dismissed from the Respondent's employ.
26. He stated that it is unfair for the Respondent to employ him during Covid-19 pandemic with the dangers that it posed and in the end refuse to pay him his rightful remuneration.
27. The claimant stated that he inadvertently send unsigned resignation letter on 13/10/2021 via email and upon noticing the mistake, he forwarded a signed copy to the Human Resource office by the name Lynette on 16/10/2021 via WhatsApp.



28. He stated that the failure by the Respondent to pay him his salary when it fell due amounted to repudiation of contract as a consequence, he bore no responsibility of serving the Respondent 30 days' Notice.
29. He maintained that he exited the Respondent's employment on 30/10/2021 and thus the allegations that he resigned after exiting employment is not true.
30. In conclusion, the claimant urged this Court to dismiss the claim Counterclaim herein with costs.

Evidence

31. During hearing, the claimant testified as CW-1 and adopted his witness statement of 13/4/2022 and testified in summary that he was hired by the Respondent on a two-year contract commencing 11/1/2021 but that he resigned on 31/10/2021. He stated that he was employed alongside several employees at the height of Covid-19 pandemic and thus the Hospital was receiving a lot of patients. He stated that during normal days, the hospital could receive about 30 patients but in that period, they used to receive more than 70 patients admitted per day.
32. The claimant testified that he always had to send a reminder to the Respondent to pay him his salary and at times salary could be late for about 3 weeks. He added that at the time of his resignation, he had not received his salary for three months.
33. Upon cross examination, the witness testified that he is currently an employee at Taita Taveta County, a job that he commenced on 12th November, 2021. He testified that he resigned via the letter of 10th October, 2021 due to frustration by the Respondent of failing to pay him salary for two months. He stated that as per his pleadings, he resigned because he had not been paid salary for the month of September and October, though that October salary was not yet due. He clarified that his June and July salary was paid in August, 2021 while September and October salary had not been paid at the time of resigning.
34. The claimant admitted that he did not serve the Notice period and attributed the same to non-payment of salary. He also admitted that all other staff were paid late. He then stated that he was not aware he was to fill a clearance form.
35. On re-examination, the claimant testified that he was owed salary for August and September, 2021.
36. The Respondent on the other had called Doctor Timothy Olwenyi, its directors as RW-1. The witness adopted his witness statement of 9/10/2023. He testified that he first met the Claimant in 2021 when he went for an interview for the job of Medical Doctor and upon hiring him, he performed his duties satisfactorily. He testified that they did not deliberately delay the payment of salary for their staff, rather that their cash flow was grossly affected by the Covid-19 pandemic. He testified that he called a meeting and explained to the employees the challenges the hospital was experiencing and urged them to bear with the Hospital.
37. It is the Respondent's testimony that the claimant left its employee because he got another job in Taita Taveta County on 7/10/2021 and resigned on 10/10/2021 to report to his new job on 13/10/2021, therefore that the claim of constructive dismissal is not justified. The Witness testified further, that the claimant left without proper notice as such that the hospital was left unattended causing them loss which has been laid out in the Counterclaim. He prayed for the counterclaim to be allowed as prayed.
38. Upon cross examination, the Witness testified that the claimant was hired in January, 2021 at the height of the pandemic as such there were reduced patients in hospital. He admitted that salary was delayed for all employee and infact that the salary for August was paid on 11/11/2021. He testified that if



resignation was done in a regular manner and notice period served, the Hospital could not have suffered any loss. the witness maintained that the claimant resigned because he secured another job and not because of late payment.

39. The second Respondent's witness(RW-2) was Justice Owino, the Accounting officer at the Respondent. He adopted his witness statement of 25/1/2023 and upon cross examination, the witness told this Court that the Respondent's management held a meeting with all staff and informed them about the cash flow problems it was facing . He confirmed that the salary for August, 2021 was paid on 29/10/2021 and the salary for September, 2021 was paid on 2/3/2022.
40. RW-3 was Christopher Owiye, the Respondent's Cash officer. He adopted his witness statement of 25/1/2023 and upon cross examination, he testified that he is not privy to the agreement between the claimant and the Respondent. He however reiterated that there was cash flow problem at the time that caused delay in payment of salaries for all employees.

Claimant's Submissions

41. It was submitted for the claimant from the onset that the employment relationship between the claimant and the Respondent is not in dispute. Further that it is not in dispute that the Respondent failed to pay the claimant salary as per the contract of employment. It was argued that it is after the these proceedings had been instituted that the Respondent paid the claimant a sum of Kshs 31,616.65 on 2/3/2023 , leaving salary arrears of Kshs. 228.383.35.
42. On constructive dismissal, the Claimant cited the case of Coca Cola East and Central Africa Limited V Maria Kagai Ligaga[2015] eKLR where the Court of Appeal listed the factors to consider in establishing constructive dismissal as follows;-
 - a. What are the fundamental or essential terms of the contract of employment?
 - b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?
 - c. The conduct of the employer must be a fundamental or 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.
 - d. An objective test is to be applied in evaluating the employer's conduct.
 - e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e. causation must be proved.
 - f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.
 - g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
 - h. The burden to prove repudiatory breach or constructive dismissal is on the employee.
 - i. Facts giving rise to repudiatory breach or constructive dismissal are varied."
43. Accordingly, that the claimant has proved all the ingredients for constructive dismissal i.e. perpetually failing to pay his salary when they fell due and at times delaying the payment in breach of the contract of



employment, this he argued is confirmed by the payment schedule tendered in evidence by the affidavit of RW-2.

44. To reinforce its argument, the claimant cited the case of *Edgar Kiplangat Mutai V James Kipkech Toroitich Kisa & Another* [2022] KEELRC, where Onesmus Makau J held that;-

“Withholding of an employee’s salary without any excuse is a fundamental breach of integral part of employment contract and therefore on that ground alone the Claimant was justified to resign and sue. An employee, in such circumstances is entitled to deem that the employer has chosen to repudiate the contract. Consequently, based on judicial precedents and the facts set out above I find and hold that the Claimant has proved on a balance of probability that his resignation was not voluntary and it amounted to a constructively dismissal by the Respondents.”

45. The claimant submitted that the allegations that the Respondent could not meet its financial obligation as a result of failure by insurance companies to settle the claims was not supported with any evidence. Further, that the allegations that a meeting was held to discuss the financial issues faced by the respondent was also not supported by any evidence. On that basis, the claimant argued that it has established a case of constructive dismissal.
46. On the counterclaim, the claimant submitted that the counterclaim not only seeks to divert the attention of this Court from the real issues but also seeks to engage the claimant on recrimination. He argued that the Respondent alleged that it was facing financial issue that forced it to either declare some position redundant, allow some staff to resign and or delay their salary but in the same Breath they alleged that the resignation by the Claimant caused it to suffer so much so that it was forced to hire Locum Doctors. A statement that is contradictory and cannot be relied on.
47. The Claimant submitted also that since he was not paid his salary for two months that forced him to resign, he was not required under the law to give notice for the resignation because it was not voluntary but constructive. In any event that the Respondent is the one that breached the contract of the Employment. Additionally, that the claimant served notice as from 10/10/2021 to 31/10/2021 when he officially exited the Respondent’s employ.
48. Finally, that the Respondent did not tender evidence in support of its allegations that the claimant resigned because of securing another job opportunity.
49. On reliefs sought, the claimant submitted that the Respondent owes him September and October, 2021 salary, all of Kshs 228,383.35, One month salary in lieu of Notice, of Kshs 130,000, prorated leave pay for the 10 months worked of Kshs 75,833 and maximum compensation for constructive dismissal and in this, he relied on the case of *Kenfreight (E.A) Limited V Benson K Nguti* [2019] eklr.
50. The claimant also prayed to be granted a certificate of service in line with section 51 of the *Employment Act*. On the other hand, he prayed for the counterclaim to be dismissed with costs, while he be awarded costs of this Suit.

Respondent’s Submissions

51. The Respondent submitted on three issues; whether there was constructive or wrongful dismissal of the Claimant by the Respondent, whether the Claimant served a proper notice of termination of employment, and whether the parties’ respective claims to the various reliefs are merited.
52. On the first issue, the Respondent submitted that the claimant is seeking for compensation for unfair dismissal when there is no dismissal letter on record. On the contrary that the Claimant separated with



the Respondent following the Claimant's own act of voluntary resignation through a letter dated 10th October 2021.

53. The Respondent defined what Constructive dismissal by relying on the decision by Justice M. Onyango in the case of Sophie Muthoni Njagi v Rift Valley Railways (Kenya)Limited (Nairobi ELRC Cause No. 2066 of 2014)that cited the case of Maria Kagai Ligaga Vs Coca Cola East and Central Africa Limited, where the Learned Judge stated as follows:

“Constructive dismissal occurs where an employee is forced to leave his job against his will, because of his employer's conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed.”

54. The Respondent then reproduced the ingredients as stated in the above cited case and argued that on the face of the claim, the pleadings show that the Claimant's complaint relates to delay in the payment of salary arrears for only one month i.e. the month of September 2021. However, that whereas the Claimant accuses the Respondent of failing to pay his salary arrears for the single month of September 2021, the Respondent's evidence shows that throughout 2021, the Respondent's financial position was in serious turbulence caused by the prevailing COVID-19. As a result of this, the Respondent's payroll periods fluctuated slightly and the payment of salaries of its staff was staggered to the next or second succeeding month as evidence by the Affidavit of Justus Owino (RW-2) dated 25th January 2023 and filed on 8th March 2023.

55. Therefore, that the Respondent remitted the full salaries of its staff at various fluctuating dates that constituted the “new normal payroll period” which was accepted by all the staff of the Respondent who opted to remain in employment during the COVID-19 pandemic. In support of this, the Respondent cited the decision by Riika J in Emmanuel Wambua Muthusi & 6 others v Khoja Shia Ithna Ashari Education Board t/a Jaffery Academy, where the Court held that:-

“..the COVID-19 pandemic has not spared workplaces, and has made it hard for Employers and Employees to meet mutual obligations. Many Employers have resorted to the contractual doctrine of frustration and force majeure, to justify non-performance. Others as observed elsewhere have opted for termination of contracts. The Respondent has taken a softer approach, revising, rather than terminating Petitioners' contracts.”

56. Accordingly, the Respondent urged this Court to be persuaded by the observations and findings of the Court in the above cited case and added that even though the Respondent was faced with financial constrains as a result of Covid-19 pandemic, they only delayed payment of salaries but eventually paid the same in full. This financial strain is depicted by the Respondent's bank account statements, showing especially the months of February and July 2021 when the Respondent's account at the NCBA was overdrawn.

57. Additionally, the respondent urges this Court to take judicial notice in line with sections 59 and 60(1) of the *Evidence Act* of the facts and events that engulfed the Country during the COVID-19 pandemic. Further that given the cordial relationship between the parties, it cannot be said that the Respondent intended to repudiate the employment contract or otherwise wrongfully terminate the contract. In fact, that judging by the conduct of the Respondent, it is evident that the Respondent was committed to continuing its operations and retaining all its staff including the Claimant during the COVID-19 pandemic. This explains why the Respondent even recruited and trained the Claimant in January 2021.



58. In the circumstances and having regard the conduct of the Respondent in context of COVID-19 pandemic, condemning the Respondent for unlawful or constructive dismissal of the Claimant would appear harsh.
59. On the conduct of the Claimant, it was submitted that both parties have admitted that the Respondent was unable to remit staff salaries immediately after they became due but that the same was paid in full albeit delayed for the 10 months the claimant worked for the Respondent, thus the allegations that the claimant resigned from employed for delayed salary is mischievous and dishonest, Rather that he accepted this as a new normal payroll period due to the prevailing circumstances in the COVID-19 pandemic. explaining why the claimant did not resign in the first month of joining the Respondent's employment.
60. The Respondent attribute the claimant's resignation to securing another job in Taita Taveta County Public Service Board and argued that during cross-examination, the Claimant told the court that he was currently employed at the Taita Taveta County Referral Hospital a job that he commenced on 12th November 2021. This corroborates the averment by the Respondent that the claimant exited its employ to take up the job offer.
61. The Respondent submitted that the Claimant has not explained why he delayed to tender his resignation from February 2021 when salary delays started. Moreover, that he did not resign in any of the subsequent months until October, 2021, when he secured another job, therefore that he cannot claim constructive dismissal. In support of this, the Respondent relied on the case of Sophie Muthoni Njagi v Rift Valley Railways (Kenya) Limited (Nairobi ELRC Cause No. 2066 of 2014) where the Court held that;-

“The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived... when determining whether there is credibility in a claim of “constructive dismissal” the court should take care to examine and assess the tone of the claimant's resignation letter... from the foregoing I find that the Claimant's resignation does not amount to constructive dismissal. In her letter of resignation, the Claimant thanks the Respondent and its management team for a rewarding and fulfilling career. There is no evidence of frustration. From the tone of the letter the Claimant was under no duress from the Respondent.”

62. Similarly, that the Claimant letter did not show any iota of frustration, and thus constructive dismissal cannot be construed thereof. He duplicated the letter that read as follows;-

“Please accept this letter as formal notification that I am resigning from my position as a resident medical officer with Evans Medical Centre. Thank you so much for the opportunity to work in this position for the past 9 months. I've greatly enjoyed and appreciated the opportunities I've had and I've learnt quite a lot, all of which I take with me throughout my career. During my last weeks, I'll do everything possible to wrap up my duties and train other team members. Please let me know if there is anything else I can do to aid during the transition. I wish the hospital continued success, and I hope to stay in touch in the future.”

63. The Respondent stated that in the resignation letter, there no mention of salary delays, frustration, alleged breach of contract or other sentiment of grievance, no hint of disagreement, friction, tension, “bad blood”, hostility or toxic work environment which are at the root of claims of constructive dismissal. On the contrary, that the Claimant offered considerable compliments and appreciation for the opportunity to gain professional experience during the period of his employment by the



- Respondent and even continued working for 20 more days till 30th October, 2021, A further indication that the working environmental was conducive. Moreover, that having worked for more than 8 months in similar conditions, the claimant waived any right to claim constructive dismissal.
64. On whether the claimant served the Notice period, it was argued that on or about 10/10/2021, the Claimant tendered the resignation letter for a period which was to lapse on 31/10/2021, when Clause 12 of the Employment Contract had provided for Notice period of 1 month. Therefore, that proper notice period was not served.
 65. On the Counterclaim, the Respondent submitted that the Claimant exited the workplace before serving the contractual 30-day notice, hence he ought to either pay or forfeit one month's salary in lieu of notice.
 66. On reliefs sought, the Respondent submitted that the Respondent admitted to receiving Kshs.31,616.65 as partial payment for the month of September, 2021. However that the Affidavit dated 1st July, 2022 sworn by Dr Timothy Olweny, shows that the Respondent made a payment of Kshs 33,616.65 by MPESA Transaction No. QC27ZPV4UH on 2nd March, 2022 leaving a balance of Kshs. 96,383.35, which the Respondent is ready to pay the balance on the understanding that the Claimant signs and submits a Staff Clearance Form that enables the Respondent to determine the Claimant's net dues upon reconciliation and recovery of: Medical supplies received on credit by the Claimant and/or his family members from the Respondent's pharmacy, Medical services received by the Claimant and/or his family members from the Respondent's clinical services, Loans and advances received by the Claimant from the Respondent's staff Savings and Credit Cooperative society and other staff welfare groups, Salary advances received by the Claimant from the Respondent, Pending bills for food and drinks taken by the Claimant at the Respondent's staff cafeteria and Costs of replacing the hospital property or equipment damaged or otherwise not accounted for by the Claimant.
 67. On salary for October, 2021, the Respondent submitted that it deliberately withheld the payment of the said salary because the Claimant had not served its proper notice period of one month as per the employment contract and also in light of the fact that they have counterclaimed against the said money.
 68. On salary in lieu of notice, the Respondent submitted that the claim is unmerited for three reasons. First that the claim is brought under section 49(1) (a) of the *Employment Act*, 2007 which is not applicable because this section only relates to cases of summary or unfair dismissal. A claim for payment of one month's salary in lieu of notice can only be made where the employment was terminated by the Employer, which is not the case herein. Secondly, that a claim under section 49 (1) aforesaid must in the first instance, be prosecuted through adjudication by the Labour Officer and thirdly, that this claim duplicates and aggravates the Claimant's claim for damages since he is also seeking payment of twelve months' salary for constructive dismissal in the subsequent paragraphs of his Claim.
 69. On leave pay sought, the Respondent submitted that the Claimant's claim for payment of Kshs. 75,833/= pro rata leave for 10 months is erroneous and misconceived because the employment contract does not entitle him to a cash payment in place of leave if he resigns before completing twelve months.
 70. On compensation, the Respondent submitted that since the Claimant has not proved the cause of action for "constructive or unfair dismissal" the Claim for damages is not merited. Furthermore, that the claimant has secured another employment before leaving the Respondent's employ.
 71. On the Reliefs sought in the Counterclaim, the Respondent submitted that it is seeking for the forfeiture of Kshs 130,000 being salary for the month of October, 2021, because the Claimant did not serve Notice period before resigning. The Respondent also prayed to be awarded costs of the Counterclaim.



72. I have examined all the evidence and submissions of the parties herein. The main issues for the court's consideration are as follows:
1. Whether the Claimant was constructively dismissed by the Respondent.
 2. If so, whether the dismissal was fair and justified.
 3. If the Claimant is entitled to the remedies sought.

Issue No. 1 – Constructive dismissal

73. The Claimant contends that the Respondent dismissed him constructively by failing to pay his salary in time or when it fell due and this led him to tender his resignation. From the evidence on record, the Claimant tendered his resignation from employment on the 10/10/2021 to take effect from 31/10/2021.
74. The Respondents insisted that the resignation of the Claimant was not prompted by late payment of salary as this was a matter already discussed with their employees in the wake of the Covid 19 epidemic which led to low cash flow by the Respondents. They also aver that the Claimant actually resigned because he got an appointment at Taita Taveta Hospital and not because of their own omission.
75. It is true that the events surrounding this case occurred during the height of the Covid 19 Pandemic. In the period under consideration, it is true that work was affected either positively or negatively depending on the circumstances of the case.
76. It is also a fact that the Respondent delayed in their payment of salaries to the Claimant. This in itself would not be a reason that the Claimant would have relied upon to show they had been constructively terminated.
77. The Respondent also indicated that the main reason for the Claimant resigning was because he got another job. When this matter was put to him, the Claimant admitted that he received another job in Taita Taveta.
78. The Claimant admitted that though he was paid late, all other staffs were also paid late. He also admitted that he started another job in Taita Taveta on 12/11/2021 and this is a clear indication that he had knowledge of this appointment before this date which was the reason he decided to resign from the employment of the Respondent with effect from 30/10/2021.
79. It is my finding considering the facts that the Claimant resigned on his own volition upon receiving another job at Taita Taveta County and not because of frustration by the Respondents. His claim for contractual dismissal must therefore fail.
80. Upon this finding, I must also make a conclusion that the claim for wrongful termination by the Claimant has no merit and is dismissed accordingly.
81. On the counter claim set by the Respondents, the Claimant admitted that he didn't serve his entire notice period having given the notice on 10th October 2021 to 31st October 2021. The notice was less 21 days. I therefore find the counter claim proved to that extend and I award the Respondents this amount at
- $$21/30 \times 130 = 88,100/=$$
- Plus interest at court rates with effect from the date of this judgment.
82. There will be no order of costs.



JUDGEMENT DELIVERED VIRTUALLY ON 2ND DAY OF MAY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In presence of:-

Lungwe for the Claimant - Absent

Prof Wabwile for Respondent - Absent

Fred- Court Assistant

