



**Trustees of Archdiocese of Nyeri John Pope Paul II Huruma Health
Centre v Wandeto (Employment and Labour Relations Appeal
E006 of 2023) [2024] KEELRC 1250 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1250 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E006 OF 2023
ON MAKAU, J
MAY 13, 2024**

BETWEEN

**TRUSTEES OF ARCHDIOCESE OF NYERI JOHN POPE PAUL II HURUMA
HEALTH CENTRE APPELLANT**

AND

REGINAH NYAWIRA WANDETO RESPONDENT

*(Being an Appeal from the Judgment and decree of the Chief Magistrate's
Court (Hon. Ben Mararo, SPM) dated 23rd May, 2023 in Nanyuki MELRC
No. 12 of 2021) (Before Hon. Justice Onesmus Makau on 13th May, 2024)*

JUDGMENT

Introduction

1. The appeal herein seeks to overturn the lower court judgment on the following grounds: -
 - a. That the trial magistrate erred in law and in fact in by finding that the respondent was constructively terminated from employment yet the same was not pleaded.
 - b. That the trial magistrate erred in law and in fact in failing to consider the entirety of the record and evidence adduced.
 - c. That the trial magistrate erred in law and in fact in failing to consider that the respondent herein terminated her services with the appellant and ended up with a wrong finding.
 - d. The decision of the trial court was against the weight of evidence.



Factual Background

2. The respondent was employed by the appellant under a fixed term contract of two years starting July 1, 2019. Her basic salary was Kes 26,939 plus allowances and the contract was terminable by either party giving one month notice or payment of salary in lieu of notice.
3. By a letter dated April 20, 2020, the appellant sent the respondent on unpaid leave for an indefinite period due to the Covid-19 Pandemic. Subsequently, she was made to write a resignation letter dated June 3, 2020 by the respondent.
4. She averred that the resignation was not voluntary and therefore it amounted to constructive termination. The constructive termination was also evidenced by the unpaid leave for an indefinite period. Therefore, she prayed for declaration that the resignation was involuntary and amounted to unfair/wrongful termination of her employment. She further prayed for damages totaling to Kes 457,216, costs and interest.
5. The appellant filed defence denying that the respondent was its employee. It further denied that it constructively terminated the respondents' contract of employment and averred that, if the respondent was its employee, then she resigned on her own volition through a letter. Consequently, it averred that the respondent did not merit the reliefs sought and prayed for the suit to be dismissed with costs.
6. Both parties gave evidence before the trial court and thereafter filed written submissions. After considering the evidence and the submissions, the trial court (Hon.Mararo-SPM) concluded that the respondent had proved her claim of constructive dismissal. Consequently, he declared the termination unlawful and awarded the respondent compensatory damages of Kes 457,216, certificate of service, costs and interest. The appellant was aggrieved and brought the instant appeal.

Submissions on the Appeal

7. The appellant submitted that the trial court failed to consider its evidence and in particular the resignation letter dated 3rd June 2020 which was proof that the respondent resigned voluntarily by giving one-month notice. It further submitted that the trial court failed to consider payslip and cheque on record which proved that the respondent was paid her salary for the period she was on leave and maintained that the alleged constructive dismissal was not sufficiently pleaded and proved by evidence.
8. The appellant further submitted that the trial court erred by awarding the respondent Kes 457,216 without considering the payment already made vide the payslip and cheque produced as exhibits. Further, that the court erred by awarding Kes 350,412 being salary for the remainder of the contract term.
9. The respondent on the other hand submitted that the trial court was right in finding that constructive dismissal had been proved. She contended that she was forced to resign due to the said actions by the employer.
10. For emphasis, she cited the case of *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga* (2015) eKLR, *Susan Murila & another v Richard Kipkoech Langat & another* (2019) eKLR and *Maxwell Miyawa & 7 others v Judicial Service Commission* (2017) eKLR where constructive dismissal was discussed.
11. As regards the alleged failure to consider the evidence adduced, the respondent submitted that the trial court took into account all the evidence adduced by the witnesses including the pay slip and cheque. She further submitted that after denying receipt of the payment stated in the said pay slip and cheque,



the appellant failed to adduce any evidence to prove that the said payment was indeed received by her. Consequently, she contended that award of compensation was merited and the court should uphold it.

Analysis and determination

12. This being a first appeal, I have the mandate of re-evaluating the evidence on record and make my own independent conclusions on the issues in dispute. This legal principle was enunciated by the Court of Appeal in the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 thus: -

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must consider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

13. Having considered the record of appeal and the submissions made by both the appellant and the respondent, the following issues fall for determination: -
- a. Whether the respondent voluntarily resigned or she was constructively dismissed.
 - b. Whether the impugned award of damages should stand.

Resignation or dismissal

14. There is on record a resignation letter by the respondent dated 3rd June 2020 which stated that: -

“Termination of Contract With Pope John Paul II Huruma Health Centre

I am writing this letter to kindly inform you that in response to the letter you issued me last month but one dated 20th April, Re: Unpaid Leave, I have decided to terminate my contract with Pope Paul II Huruma Health Centre and will no longer be part of you.

Therefore, according to the Labour Laws am giving you one month notice starting from 3rd June to 4th July 2020.

I therefore expect to be cleared by the end of my notice.

Yours faithfully

Regina Wandeto

15. The letter dated April 20, 2020 basically sent the respondent on unpaid leave for indefinite period starting May 1, 2020. The reason cited for that decision was cash flow problem due to Covid-19 pandemic. The letter advised the respondent to wait until she was called back after return to normal situation.
16. After waiting for one month she wrote the above resignation letter citing the reason as the unpaid leave for indefinite period. Subsequently, she brought suit in the lower court contending that the indefinite



- leave amounted to constructive dismissal. Besides, she averred that she was pressured by the appellant to write the resignation letter.
17. Having considered the evidence on record and the submissions filed, I am persuaded to conclude that the resignation by the respondent was not voluntarily but forced by the conduct of the employer. This is what is called constructive dismissal.
 18. I gather support from the *Black's Law Dictionary* 10th Edition, which defines constructive dismissal as follows: -

“An employer’s creation of working condition that leave a particular employee or a group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment, an employer’s course of action that being detrimental to an employee leaves the employee almost no option but to quit.”
 19. In the case of *Coca Cola East and Central African Limited*, *supra* the Court of Appeal observed that: -

“The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which give rise to the test to be applied. The first interpretation is that the employee could have when the employer’s behaviors towards him was so unreasonable that he could not be expected to stay – this is the unreasonable test. The second interpretation is that the employer’s conduct is so grave that it constitutes a repudiatory breach of the contract of employment -this is the contractual test.”
 20. The appellant submitted that the alleged constructive dismissal was not sufficiently pleaded and proved by evidence and therefore the trial court fell into error when he concluded that the same had been substantiated. It further submitted that the court failed to consider the resignation letter and a pay slip before reaching the said conclusion.
 21. However, I am clear in my mind that the evidence on record support my conclusion, and that of the trial court, that the resignation was not voluntary and it amounted to constructive dismissal. I also find that the trial court considered the evidence adduced by the appellant including pay slip, cheque and resignation letter in his judgment.
 22. The respondent pleaded that the unpaid leave for indefinite period amounted to constructive dismissal. The employer, ought to have negotiated the situation with the respondent before reaching such grave decision. In the alternative, it ought to have either declared her redundant or otherwise lawfully terminated the contract.
 23. Instead, the appellant exposed the respondent to suffering by withholding her pay and denying her the freedom to look for an alternative job. The respondent was therefore left with no option but to quit. The withholding of pay also amounted to repudiatory breach of the contract. Whichever way one looks at the facts of the case, a constructive dismissal is manifested and therefore the trial court was right in concluding that the respondent had substantiated her claim. The court was also right in concluding that the constructive dismissal amounted to unfair and unlawful termination

Award of damages

24. The appellant faulted the trial court for awarding the sum of Kes 457,216 to the respondent. It contended that the court never took into account the money paid to the respondent vide pay slip and



cheque produced as exhibits. The respondent denied receipt of the said sum and contended that trial court made the correct award of damages.

25. I have perused the impugned judgment and noted that the trial court did not indicate how he arrived at the sum of Kes 457, 216 which he described as compensation. However, upon perusing the pleadings, it is clear that the learned magistrate merely lifted the figure from the Memorandum of claim. With due respect, that was an abdication of duty. A court of law has a duty to consider, and justify the award of damages in his/her judgment.
26. Paragraph E of the statement of claim particularized the claim as follows:
- i. Kes 58,402 being unpaid salary for May and June, 2020.
 - ii. Kes 29,201 being salary in lieu of notice.
 - iii. Kes 29, 201 being unpaid leave.
 - iv. Kes 350,412 being salary for the remainder of the contract.

The total sum claimed was therefore Kes 467,216. It follows that the award the court awarded ought to have been broken down into subheadings including salary in lieu of notice, unpaid salary, leave and then compensation for unfair termination. I now proceed to do so.

27. Since the termination of the claimant's contract was unfair and therefore unlawful, he is entitled to salary in lieu of notice plus compensation by dint of section 49(1) of the Employment Act, 2007. She pleaded salary of Kes 29,201 per month and the respondent produced a pay slip for June 2020 indicating the respondent's basic salary as Kes 26,939, house allowance Kes 3000, risk allowance Kes 2,262 and Responsibility allowance Kes 4000 totaling to Kes 36,201 per month.
28. The respondent used a lesser gross salary in her claim than the amount of Kes 36,201. She is bound by her pleadings and therefore I award her one-month salary in lieu of notice being Kes 29,201 as prayed. The award is in line with her contract which provided for termination notice period of one month.
29. As regards compensation, the respondent prayed for salary for unserved period of her contract. However, the jurisprudence emerging from the court now is that an employee can only get a maximum of 12 months compensation under section 49 of the Employment Act.
30. According to the statement by Sister Alice Sirengo, which was adopted by DW1 as her evidence, the respondent worked for the appellant from July 2015 until when she exited after serving the resignation letter dated June 3, 2020. The length of service was therefore five years and she had no record of indiscipline. The separation was also not caused by any misconduct on her part. She also had legitimate expectation to continue working and earning salary for one year before her contract term lapsed. Putting all the above factors into consideration, I award her six (6) months salary as compensation for unlawful termination being Kes 29,201 x 6 = Kes 175,206.
31. The claim for salary for May and June is also merited and I award the same because the respondent remained in employment until end of her termination notice on July 4, 2020. The appellant produced a payslip and cheque for payment of Kes 36,201 less statutory deductions but there is no evidence that the same was given to the respondent. The payslip is not signed by the respondent and there is no evidence that she acknowledged receipt of the cheque. Consequently, the claim was not rebutted by the appellant.
32. As regards the claim for leave, I find that the claimant was on leave in the whole month of May. Since her problem was lack of pay, the issue is now sorted by the award of the salary for May and June 2020. Consequently, the award of leave accrued is set aside.



Conclusion

33. I have found that the trial court was right in concluding that the respondent had proved his case of constructive dismissal. However, I have found that the trial court fell into error by awarding the respondent a global sum of Kes 457,216 as compensation without any particulars and justification. Consequently, the appeal succeeds partially and the impugned judgment is set aside and substituted with the following orders: -

- a. The respondent's resignation was not voluntary and it amounted to constructive dismissal by the appellant.
- b. The appellant shall pay the respondent:
 - i. Notice.....Kes 29,201.00
 - ii. Compensation.....Kes 175,206.00
 - iii. May and June 2020 salary.....Kes 58,402.00Total Kes 262,809.00
- c. The award is subject to statutory deductions.
- d. Since the appeal has partially succeeded, each party will bear own costs of the appeal.
- e. The award of certificate of service, costs and interest by the trial court are not disturbed.

Dated, signed and delivered at Nyeri this 13th day of May, 2024.

Onesmus N Makau

Judge

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

5 Nyeri ELRC Appeal No.E006 of 2023

