



Warui v Urithi Housing Co-operative Society Ltd (Employment and Labour Relations Cause E414 of 2021) [2024] KEELRC 1860 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1860 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E414 OF 2021**

AN MWAURE, J

JULY 12, 2024

BETWEEN

JACKLINE WAKUTHII WARUI CLAIMANT

AND

URITHI HOUSING CO-OPERATIVE SOCIETY LTD RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 19th May 2021.

Claimant's Case

2. The Claimant avers that she was employed as a Legal Manager by the Respondent on a permanent and pensionable basis on 11/03/2019 on a monthly salary of Kshs 170,000 and airtime allowance of Kshs 5,000. She executed the contract of employment dated 25/03/2019.
3. The Claimant avers that her employment was subject to 3 months' probation ending 31/05/2019 after which the Respondent would review her performance and confirm her employment to permanent and pensionable.
4. The Claimant avers that the Respondent would inconsistently pay her salary after unreasonable delay and much follow-ups. The Respondent only paid her Kshs 376,738 and failed to pay a sum of Kshs 287,238 part of her May, June and July salary.
5. The Claimant avers that despite numerous follow-ups and demands, the Respondent wilfully failed, refused and/or neglected to pay her salary arrears necessitating this suit.
6. It is the Claimant's submission that the Respondent's failure to pay her salary on time and/or putting her in a difficult financial situation which amounts to constructive dismissal.



7. The Claimant avers that she sent her resignation from employment *vide* an email dated 05/07/2021 to the CEO who was her immediate boss and to the other directors after which she did an official handover and left her employment.

Evidence in Court

8. The Claimant adopted her witness statement dated 19/05/2021 as her evidence in chief and produced her bundle of documents dated 19/05/2021 as her exhibits 1-5.

Claimant's Submissions

9. It is the Claimant's submission that the Respondent's action of failing to pay her salary on time causing her financial difficulty amounted to constructive dismissal. She relied on the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR.
10. The Claimant submitted that she produced her contract of employment which provides under clause 5 that she was to be paid a net salary of Kshs 170,000. The Respondent failed to pay her salary in breach of the contract which led her to resign; and so this amounted to constructive dismissal.
11. The Claimant submitted that she was entitled to the reliefs sought as she produced her Equity Bank statements dated 19/05/2021 and NSSF Statement of Account dated 19/05/2021 to prove her claim of unpaid salary and unremitted NSSF dues.

Analysis and Determination

12. The main issue for the court's determination is whether the Claimant's employment was constructively dismissed.
13. The Court of Appeal in *Coca Cola East and Central Africa Limited v Maria Kagai Ligaga*, (2015) eKLR, set out the legal principles for determining constructive termination and the principles are 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.”

14. Justice Onesmus Makau J held in the case of *Edgar Kiplangat Mutai v James Kipkech Toroitich Kisa & another* [2022] KEELRC 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.

Based on the facts of this case, the above finding of fact that the Claimant was an employee of the Respondents and that he was constructively dismissed, I make further finding that he is entitled to some of the reliefs sought. For avoidance of doubt I am satisfied that the constructive dismissal, amounted to unfair dismissal within the meaning of Section 45 of the Employment Act.”

15. Section 47(5) of the *Employment Act* provides for the burden of proof in employment disputes as follows:

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

16. The Claimant has proved vide email correspondences between herself and the Respondent that indeed the Respondent withheld her salary.

17. The respondent failed to defend itself or to controvert the claimants evidence. The court therefore, holds the Claimant’s employment was constructively dismissed and she is entitled to the reliefs sought herein for damages for unfair termination due to constructive dismissal.

18. **Reliefs awarded.**

- a. Unpaid salary May, June, part of July 2019 Kshs 287,238/-
- b. One month salary in lieu of notice Kshs 169,000/-
- c. Compensation for unlawful termination due to constructive dismissal @ 1 month equivalent since she only worked for the respondent for a short period Kshs 169,000/-.
- d. Unremitted NSSF dues there is no proof of this and so is declined.
- e. Total award is Kshs 625,238/- plus interest at court rates from date of judgment until full payment



f. Costs are awarded to the claimant.
Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 12TH DAY OF JULY, 2024.

ANNA NGIBUINI MWAURE

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 15th March 2020 and subsequent directions of 21st 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

