



REPUBLIC OF KENYA



Karimi v Katheri Farmers Co-operative Society Limited (Cause E022 of 2023) [2024] KEELRC 2195 (KLR) (12 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2195 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
CAUSE E022 OF 2023
ON MAKAU, J
SEPTEMBER 12, 2024**

BETWEEN

WINFRED KARIMI CLAIMANT

AND

KATHERI FARMERS CO-OPERATIVE SOCIETY LIMITED RESPONDENT

JUDGMENT

1. The claimant brought this suit on 28th December, 2023 seeking the following reliefs: -
 - a. A declaration that the actions of the respondent amount to constructive dismissal of the claimant.
 - b. A declaration that the respondent violated the claimant's rights as an employee.
 - c. An order compelling the respondent to pay the claimant commensurate salary and all salary increments due to her position of senior factory manager from 2013.
 - d. An order compelling the respondent to pay the claimant all her services and terminal dues.
 - e. An order for General damages for unlawful dismissal equal to one (1) year.
 - f. An order for costs of the suit and interests.
 - g. Any other and or better order as may meet the ends of justice.
2. The Respondent denied the alleged constructive dismissal and averred that the claimant evaded disciplinary hearing and mutual separation and voluntarily resigned from her job. Therefore, it prayed for the suit to be dismissed with costs.



Evidence

3. The claimant testified as CW1. She testified that she joined the respondent on 1st October, 1999 as a Cherry Recorder and rose through the ranks. In 2009, she was promoted to factory manager and in 2013 she became Senior Factory Manager based at the Head Office. In that position, she was in charge of all the four factories and answerable to the CEO/Secretary Manager. However, her promotion coincided with the promotion of Mr. Stephen Gichunge to the position of CEO and her life became hell because the new CEO did not recognise her new position instead he subjected her to move from one factory to another as Factory Manager between 2015 and 2022 and further denied her chance to attend trips like the other factory managers.
4. On 17th July 2023, she was suspended on the basis of vague grounds. Thereafter, she was invited to a disciplinary hearing on 30th August 2023 but the meeting did not proceed and she was asked to leave the meeting. On 12th September 2023, she was invited for another hearing but only her trade union officials were allowed into the meeting which went on from 10.00am to 1.30pm when she was given a show cause letter to respond to the same day. She was unable to meet the deadline and considered the short notice as harassment. As such, she never responded to the letter.
5. She remained in the suspension until 9th November, 2023 when she instructed a lawyer to serve a demand letter but the respondent served the claimant with a letter accusing her of absconding work. Sensing trouble, she tendered a resignation on 14th November 2023 and the respondent accepted the resignation.
6. She contended that the resignation was involuntarily but due to the respondent's conduct including withholding salary from February 2023 and placing her under long suspension. She contended that the work environment had become unbearable. She was also not being issued with pay slip. She had not protested against the above matters because she loved her job. She contended that her salary as Cherry Recorder was Kshs.8,900.00 but when she became Factory Manager in 2009, her basic salary was Kshs.13,500.00. Her salary never changed after she became Senior Factory Manager and therefore she did not get to know the correct salary for that position.
7. On cross-examination, she confirmed that the payslips filed by the respondent belonged to her but she reiterated that she received salary after February 2023. She admitted that she had loan from Capital Sacco and Imenti Sacco (Golden Pillar) and she paid through her business and salary. However, she admitted that she received SMS through her phone stating that her loans were not being serviced.
8. She confirmed that the respondent had four factories each headed by a Factory Manager who were transferable. She contended that there was a position of Senior Factory Manager to which she was promoted and was allocated an office at the Headquarters at Gichugene factory. She was also overseeing the other three factories.
9. Her salary came from the respondent but it was paid through Meru Central Cooperative Union. Her promotion letter to senior factory manager never mentioned salary. For the 24 years she served, she never complained about failure to be issued with pay slips.
10. She contended that her disciplinary process was never concluded as she asked his lawyer to pursue mutual separation. However, she declined to sign the separation agreement because her lawyer never involved her in the negotiation meeting.
11. In re-examination, she confirmed that from 1999 to 2013 she was being given pay slips but thereafter she was not given including the copies filed herein by the respondent.



12. The respondent's Secretary Manager Mr. Stephen Gichunge testified as RW1. He testified that the respondent has four factories namely Gichungene, Kinjo, Riiie and Kijijone each under a Factory Manager. The factory managers report to the Secretary Managers. He stated that the claimant was promoted to a factory manager in 2009 and denied that she was promoted further to Senior Factory Manager/Assistant Secretary Manager. He clarified that there is no position of Senior Factory Manager in the respondent's Management Structure.
13. He denied the allegation that the claimant was discriminated against or in any way unfairly treated through transfers, and contended that a Factory Manager was transferable from one factory to another. Further, that all the four factory managers were equally affected by the routine transfers/rotations which were not in any way a punishment. He further denied that he had a personal vendetta against the claimant and averred that the claimant never at any one time invoked the available internal dispute resolution mechanism against him or any other officer of the respondent.
14. He clarified that there were various concerns raised against the claimant's work and performance including authorising another employee, John Mukiri to use her System Password to handle stocks and weigh cherry which led to issues with cherry weights recorded; manipulating cherry weight and giving fictitious quantities to herself and member number 3931, Joy Kathure; and reporting poor ratios for other farmers leading to respondent's reputational risk in the market.
15. He denied that the respondent withheld salary from the claimant and averred that no officer of the respondent can interfere with salary of other employees since the same is handled by the HR Department of the Meru Central Coffee Union. He maintained that the claimant's salary was paid every month less statutory deductions and loan deductions.
16. He further stated that the claimant was issued with a show cause letter to a disciplinary hearing and responded by a resignation letter. In that regard, RW1 averred that the claimant is not entitled to the reliefs sought and prayed for the suit to be dismissed.
17. On cross-examination, he denied that he discriminated the claimant by denying her chances to go for trips like the other managers. He contended that the claimant's retirement was to be in 2023 when she was to attain 55 years.
18. He admitted that the letters inviting the claimant to disciplinary hearing did not indicate any charges or allegations against her. He further admitted that suspension was supposed to last for 60 days from 17th July 2023 but she was not called back because disciplinary hearing had not been done. He also admitted that she wrote letter dated 9th November 2023 complaining of prolonged suspension and he wrote a letter to her accusing her of absconding duty.
19. He contended that the claimant was paid salary up to December 2023 and stated that she has not filed her bank statement to disprove the said payment. He admitted that he signed the letter promoting the claimant to Senior Factory Manager but clarified that the claimant was never given a confirmation letter in respect of that position. He averred that the salary increase for new position was to be determined by the Management after confirmation of the promotion. He contended that the claimant refused to sign a mutual separation agreement.
20. Respondent's chairman Mr. Daniel Muringi testified as RW2. He reiterated the evidence by the RW1. He admitted that the claimant was promoted to factory manager in 2009 and thereafter to Senior Factory Manager. However, the position of the Senior Manager was not in the Respondent's Management Structure and the idea of promoting the claimant to the said position was coined by the Secretary Manager and the former chairperson without involvement of the entire Board or following



- the right procedure of creating a new office. Consequently, the said promotion was never confirmed and she continued serving as a factory manager.
21. RW2 denied that the claimant was treated harshly or discriminated against by anyone in the respondent's service, hence her long service in the respondent. He contended that, the claimant worked with RW1 for ten years and she never complained against him about anything. However, there were a number of complaints against the claimant regarding her performance and most of the time, RW1 mitigated for her.
 22. He contended that there were reports of the claimant being rude to farmers and abusing them; posting fictitious weights for members; issuing stocks without stock cards; and granting casual staff access to sensitive work and data.
 23. He contended that the claimant was always given her pay slips without which she would not have obtained loans from various institutions.
 24. He contended that the claimant was suspended for various reasons but the effort to complete her disciplinary process within 60 days stalled due to her theatrics. Her lawyer proposed a mutual separation arrangement but she declined to sign the agreement. She was then served with a show cause letter but she resigned and subsequently sued the respondent for alleged dismissal.
 25. He maintained that the claimant resigned to avoid disciplinary process and as such she is not entitled to any damages. Therefore, he prayed for the suit to be dismissed.
 26. On cross examination, RW2 confirmed that he became chairman of the respondent in 2009 and found claimant still working for the respondent. He stated that he was a member of respondent's Management committee in 2013 when the claimant was promoted to the position of Senior Factory Manager by the former chairman.

Submissions

27. It was submitted for the claimant that she was negatively discriminated against by being denied a chance to go on trips with other factory Managers; she was subjected to frequent and unreasonable transfers from one factory to another; her salary was intermittently paid and also, she was denied the attendant salary increments; she was promoted to senior factory manager but she was denied salary increase and the use of office facilities. In view of the foregoing matters, it was submitted that her resignation amounted to constructive dismissal. Reliance was placed on the case of *Godfrey Allan Tolo v Tobias O.Otieno & another* (2022) eKLR (Authority not availed to the court).
28. It was further submitted that the payslips filed as evidence of payment were not genuine but tailor made to defeat the suit. It was submitted that all the said salary postings were done on 13th December 2023(see page 58-65 of the respondent's bundle of documents). Consequently, it was urged that the claimant is entitled to the reliefs sought in her suit plus costs.
29. On the other hand, it was submitted for the respondent that the alleged constructive dismissal does not arise. It was argued that the claimant was subjected to disciplinary process by the employer but she frustrated the same by her theatrics. At one time she proposed mutual separation but later refused to sign the separation agreement. Subsequently, the employer re-ignited the disciplinary process but the claimant served a resignation letter.
30. It was submitted that the said resignation did not meet the requirements of a constructive dismissal. It was further submitted that the alleged unreasonable transfers were in fact normal and affected all the other factory managers; that she was paid salary regularly and was issued with pay slips which she used



to apply loans; and that she has failed to produce her bank statements to disprove the said payment of salary.

31. It was submitted that the claimant resigned to evade disciplinary process before being proved guilty of the misconduct allegations she was facing including fraud and falsification of cherry records among others. Consequently, it was submitted that the claimant is not entitled to the reliefs sought.
32. It was further submitted that the claimant's allegation that her basic salary was Kshs.13,000.00 is untrue since her pay slips indicated that Kshs.19,171 as her salary a confirmation that her salary was increased. It was argued that the claimant did not plead the specific terminal due she is seeking. Further that the claim for general damages is misplaced since she voluntarily resigned.
33. It was submitted that the respondent did not create any working conditions that were intolerable to the claimant and as such there is no relief available to her for constructive dismissal. For emphasis reliance was placed on *Enid Nkirote Mukire v Kenya Yearbook Editorial Board (2022) eKLR* and *Kenya Union of Sugarcane Plantation and Allied Workers v Othira (Appeal E005 of 2023) (2024) KEELRC 843 (KLR) (18 April 2024) (Judgment)*.

Analysis and determination

34. I have carefully considered the pleadings, evidence and submissions presented to the court by the two sides. The employment relationship between them is admitted. The resignation by the claimant is also admitted. The issues for determination are: -
 - a. Whether the resignation amounts to constructive dismissal.
 - b. Whether the claimant is entitled to the reliefs sought.

Constructive dismissal

35. Cambridge Dictionary defines constructive dismissal as: -

“Actions taken by an employer that intentionally make working conditions for an employee difficult or unfair so that the employee feels forced to leave their job.”
36. According to the Black's Law Dictionary 9th Edition, constructive termination means: -

“A termination of employment brought about by the employer making the employee's working condition so intolerable that the employee feels compelled to leave.”
37. Constructive dismissal takes various forms including unilateral variation of the contract of employment; non-payment or delay in payment of salaries, indefinite suspension without pay, failure to assign duties, overworking, negative discrimination, and mistreatment such as verbal abuses. When the employer subjects his employee to the above conditions, the employee may resign or leave the employment without notice and sue for constructive dismissal because the resignation is not voluntary.
38. In this case, the claimant contends that she was forced to resign by the intolerable working conditions including unreasonable and frequent transfers, intermittent payment of salary, prolonged suspension, negative discrimination and mistreatment by the Secretary Manager. The respondent denies all the allegations of intolerable working conditions and maintains that the claimant resigned voluntarily to evade disciplinary hearing.
39. There is no dispute that the claimant was subjected to disciplinary hearing for various allegations of misconduct and negligent performance of duty. The process started with a suspension letter, two



hearings were scheduled but the process was halted to allow negotiation for a mutual separation but the same also failed after claimant declined to sign the agreement.

40. The suspension was vide letter dated 17th July 2023 which cited the reasons but failed to state the duration of the suspension period. Under clause 15 of the CBA suspension period is capped at sixty (60) consecutive days on half pay. However, where the employee is facing criminal charges, the suspension is without pay. There is no evidence to show that the claimant's suspension was lifted after the lapse of 60 days. According to her, she remained on suspension until the day she resigned vide the letter dated 14th November 2023.
41. In this case there is also evidence that salaries were paid intermittently if the payrolls filed by the respondent are anything to go by (see pay roll dated 25th May 2023 and 11th December 2023). It is therefore correct that throughout her suspension period, the claimant was not paid any salary.
42. Having considered the foregoing evidence, I find that the claimant had a valid grievance against the respondent. She was subjected to a prolonged suspension and all her salary withheld. Although the issue of salary affected all the other employees, I have to say that two wrongs don't make a right. The employee was entitled to resign due to the said breaches by the employer which fundamentally made the claimant unable to perform her obligations under the employment contract.
43. In the case of Godfrey Allan Tolo, supra, the court held that;

“For constructive dismissal to be inferred the employee must have resigned within a reasonable time from his employment with or without notice as a result of the employer's hostile working conditions at his work place. The employer must also not have expressed the desire to terminate the employee.”
44. In this case, employer had commenced disciplinary proceedings against the claimant but stalled to pursue an amicable separation. After the failure of the amicable settlement, the respondent revived the disciplinary proceedings and added a new accusation that the claimant had absented herself from work. That new accusation did not go down well with the claimant who had been out on suspension without pay for more than the required period of 60 days under the CBA.
45. In this case, I am satisfied that failure to pay an employee salary for six consecutive months is one of the grounds upon which the court can infer constructive dismissal. The failure to pay salary had nothing to do with the disciplinary proceedings against the claimant.
46. Besides, the failure to recall the claimant from suspension after the lapse of the maximum 60 days is also a good ground upon which constructive dismissal can be inferred especially when no salary was being paid. The suspension letter did not state the period of the suspension and therefore the claimant could not report back to work without being recalled in the same manner she was suspended. It is not correct for the employer to blame for the extended suspension on allegation that she proposed mutual separation. The problem started before that time because, as I have observed, the suspension letter was not specific on the period of the suspension.
47. As regards the general hostility by the Secretary Manager, RW1 denied the same and no independent witness was called by the claimant. In any event, there is evidence that the transfers of factory managers was done across board and did not affect the claimant alone. Consequently, I find that the only two reasons why the resignation of the claimant became constructive dismissal were the prolonged suspension beyond the maximum 60 days and the failure to pay her salary for over six months. Even if the salary was paid, the same was paid after the resignation.



Reliefs sought

48. In view of the above matters, I hold that the claimant is entitled to the declaration that the respondent's actions amounted to her constructive dismissal from the date she resigned. It is also obvious that by the said actions the claimant's rights under the contract of employment and statutes were violated and therefore she is entitled to damages for unlawful dismissal by dint of Section 49 of the Employment Act, 2007.
49. The claimant worked for 24 years before the separation. The court notes that she had performance and disciplinary issues although not proved. At her age, she may not be able to secure another job. Having considered all the foregoing issues, I award her twelve (12) months gross salary for unlawful termination. Based on the pay slip for October 2023, I award her Kshs.27,010 x 12 =Kshs.324,120.00.
50. The claimant has urged the court to compel the respondent to pay her commensurate salary increments due to her from 2013 when she was promoted to Senior Factory Manager. However, the basis for such a request has not been demonstrated. However, I note that the respondent has demonstrated that the claimant's basic salary was increased from Kshs.13,000 to Kshs.19,174 as at October 2023. Consequently, the said prayer is declined.
51. There is also a prayer for terminal dues and service. The claim is not quantified but I note from Clause 18 of the CBA that the claimant is entitled to terminal benefits. Therefore, I direct the respondent to compute the terminal dues payable to the claimant based on Clause 18 of the CBA and file report in court for adoption within 30 days of this judgment.

Conclusion

52. I have found that the claimant has proved a case of constructive dismissal against the respondent and awarded her Kshs.324,120.00 as compensation for the unlawful dismissal. I have also awarded terminal dues for her 24 years of service under Clause 18 of the CBA. Consequently, I now enter judgment for the claimant against the respondent as follows: -
 - a. Declaration that the respondent has constructively dismissed the claimant.
 - b. Award of Kshs.324,120.00 for the unlawful dismissal.
 - c. Terminal dues under clause 18 of the CBA.
 - d. Costs and interest at court rates from the date of this judgment.
 - e. The award is subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NYERI THIS 12TH DAY OF SEPTEMBER, 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

