



**Biwott v Mediheal Group of Hospitals (Cause E048 of 2024)
[2025] KEELRC 2741 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2741 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE E048 OF 2024
MA ONYANGO, J
OCTOBER 3, 2025**

**REPUBLIC OF KENYA IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT ELDORET CAUSE E048 OF 2024 MA ONYANGO, J OCTOBER 3, 2025**

BETWEEN

HILLARY BIWOTT CLAIMANT

AND

MEDIHEAL GROUP OF HOSPITALS RESPONDENT

JUDGMENT

1. Vide the Statement of Claim dated 8th July 2024, the Claimant seeks the following orders against the Respondent: -
 - a. A declaration that the Claimant’s employment was procedurally and substantively unfair and amounted to constructive dismissal (sic)
 - b. A declaration that the Claimant is entitled to be issued with a Certificate of service by the Respondent
 - c. The Claimant be paid his dues and terminal benefits as particularized in the claim
 - d. Interests on (c) at court rates until payment in full
 - e. Costs of this suit
 - f. Any other relief that this Honourable Court may deem just and fit to grant
2. The Claimant avers that he was employed by the Respondent as a Hospital Administrator at a monthly salary of Kshs 105,677.



3. He contends that he diligently and faithfully served the Respondent until December 2023 when his employment was unfairly terminated.
4. According to the Claimant, the Respondent wrongfully withheld his salaries from July 2023 and subsequently, without notice, unfairly terminated his employment in December 2023.
5. He contends that the Respondent's action of withholding his salary from August 2023 was intended to frustrate him, amounting to constructive dismissal.
6. The Claimant further avers that throughout his employment, the Respondent failed to pay service pay, leave days, overtime, and dues for work on public holidays.
7. The Claimant maintains that the Respondent's conduct was unfair, malicious, and devoid of procedure.
8. The Claimant particularized his claim against the Respondent as follows: -
 - i. 12 months' salary as compensation for unlawful termination Kshs. 1,268,124
 - ii. 5 months' salary arrears Kshs 528,385
 - iii. 1 month's salary in lieu of notice Kshs 105,677
 - iv. Service pay Kshs 528,385
 - v. Unpaid annual leave dues for 7 years ... Kshs 295,896
9. The Respondent was served but failed to file response to the claim or attend court. The suit therefore proceeded undefended.

The Evidence

10. The Claimant testified on 16th December 2024 as CW1. He adopted his witness statement recorded on 8th July 2024 as his evidence in chief.
11. It was his testimony that he was employed by the Respondent in the year 2019 and that he was last paid his salary of Kshs 105,677 in June 2023.
12. The Claimant contended that he continued working for the Respondent without getting a salary until December 2023.
13. He reiterated his claim and sought compensation of Kshs. 2,926,067.
14. At the close of the Claimant's case, the court directed for written submissions to be filed. The Claimant filed his submissions dated 8th February 2025 which I have considered in writing this judgment.

Determination

15. From the pleadings, the evidence adduced in court and the submissions of the Claimant, the issues that fall for determination are: -
 - i. Whether the Claimant was constructively dismissed by the Respondent.
 - ii. Whether the Claimant is entitled to the reliefs sought.



16. The central question is whether the circumstances under which the Claimant left employment amounted to constructive dismissal.

17. Black's Law Dictionary (Tenth Edition) defines constructive dismissal or discharge as:

An employer's creation of working conditions that leave a particular employee or 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."

18. The Court of Appeal in the case of Coca Cola East & Central Africa Limited v Maria Kagai Lugaga [2015] eKLR while addressing itself to the issue of constructive dismissal observed as follows;

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 gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behaviour 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."

19. Based on the above authority, the question that this court ought to answer is whether the circumstances under which the Claimant left employment would constitute constructive dismissal.

20. In his testimony, the Claimant averred that his last salary was paid in June 2023 but he continued working until December 2023 without further pay. However, among the documents he filed is a pay slip for the month of August, 2023. I am therefore persuaded that his last salary was paid in August and not June, 2023.

21. Withholding of salary strikes at the core of the employment relationship. Section 17(1) of the Employment Act obliges an employer to pay wages as and when they fall due, and subsection (10) criminalizes failure to do so. Further, Article 41 of the Constitution guarantees every worker the right to fair labour practices, which includes timely payment of wages.

22. Kenyan courts have consistently held that non-payment of salary amounts to a repudiatory breach. In *Mokaya v Christ the King Parish & another* (Cause 386 of 2015) [2024] KEELRC 28 (KLR) (25 January 2024) (Judgment) the court held:-

It is the evidence on record that the claimant worked for the respondents, with a good disciplinary record, for the period from January, 2013 to July, 2015. There is no evidence that the respondents were experiencing financial challenges at the time they defaulted in paying the monthly salary to the claimant; there is no evidence of low enrolment in the school; and there is no evidence that the respondents contacted and or discussed the delay or non-payment of the monthly salary with the claimant. Applying the principles set out by the Court of Appeal in *Coca Cola East & Central Africa Limited V Maria Kagai Ligaga* (Supra) to the evidence and the circumstances of this cause, it is clear and unambiguous that the claimant resigned due to the unilateral decision by the respondents not to pay her monthly salary for three consecutive months. Non-payment of salary to an employee who is working as expected and directed is such a fundamental breach of the contract of employment as it subjects an employee to unfair labour practices under Article 41 of the Constitution. Further, non-payment of salary or wages as and when the same falls due and



payable subjects an employee to servitude, undue suffering, and indignity. An employer who is unable to pay working employees shall take remedial measures at the earliest opportunity. Such an employer may negotiate on a mutually agreeable structure of offsetting such arrears or even declare the affected employees redundant under Section 40 of the Act. It is therefore the finding and holding of this court that the resignation of the claimant was neither voluntary nor of free-will but was occasioned by the unbearable working environment that was created by the respondents through non-payment of the monthly salary for three consecutive months as alluded to above. The respondents subjected the claimant to unfair working conditions and practices and failed to meet their legal obligations as employers. They breached a fundamental term of the contract. The evidence of non-payment of the said salaries is on record with the respondents even making a failed attempt to pay the same two years after termination in 2017 when this cause was pending in court. The court has no difficulties in declaring that the respondents by their conduct constructively dismissed the claimant as pleaded.”

23. Similarly, in *Nyabuti v East African Safari Express Ltd*, ELRC Cause E682 of 2022 [2024] KEELRC 2064 (KLR), the Court held that non-payment of salary for three months was sufficient to establish constructive dismissal.
24. In the instant case there is no doubt that the Respondent failed to pay salaries for its employees for some months. The Claimant however did not mention either in his pleadings or testimony in court that there was termination of his employment. He did not prove that the Respondent terminated his employment due to breach of a fundamental obligation of the employer or that the employer terminated his employment.
25. What seems to have happened in this case is that the Claimant walked out of his employment because his salary had not been paid by the Respondent. That means he too breached the terms of his employment.
26. For the court to find that there was constructive dismissal, there must be a termination of employment by the employee on grounds of breach of a fundamental term of employment contract by the employer, in this case, failure to pay salary as and when due. That was the essence of the decision in the case of *Henry Ochido v NGO Co-ordination Board* [2015] eKLR where the court observed as follows:

Constructive dismissal or discharge has been defined by the Court in *Nathan Ogada Atiagaga versus Davis Engineering Cause No.419 of 2014* as follows: “Constructive dismissal, occurs when an employee resigns because their employer’s behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge. Due to the conduct of an employer that make the work environment intolerable, the employee is thus forced to tender his resignation. As submitted by the Petitioner in the case of *Emmanuel Mutisya Solomon versus Agility Logistics, Cause No, 1448 of 2011*, and the basics of a constructive dismissal can be described as... Situation in the workplace, which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee to such an extent that the employee has no other option available but to resign. The concept of constructive dismissal is underpinned on the notion that there is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or highly likely



to destroy or seriously damage the relationship of confidence and trust between employer and employee. Breach of that implied term will entitle the employee to treat him or herself as wrongfully dismissed. The intolerable conditions set by the employer are of the nature that the continued employment of employee is not tenable and he has to resign. Thus, by the conduct of the employer there is a fundamental breach of the contract of employment, such breach has no reasonable cause, and such conduct has severely damaged the employment relationship. Such are matters that an applicant, Petitioner or claimant must address when claiming constructive dismissal.”

27. Applying the principles in the decisions referred to above, a court to find that there was constructive dismissal, there must be a termination of employment by the employee on grounds of alleged, breach of a fundamental term of the employment contract by the employer. The delay in payment of salary must be followed by a resignation letter citing the grounds of resignation to be the breach of fundamental terms of the contract by the employer.
28. The Claimant herein did not indicate that he ever sent a letter of resignation to the Respondent. Breach of contract alone does not terminate a contract of employment. There must be some action that would be construed as a termination of the contract. In this case, it was the walking out of the employment relationship by the Claimant that signified the termination of the contract.
29. The Claimant’s action of walking out of employment without resigning was as much a breach of his employment contract as was the Respondent’s failure to pay his salary for the cited months. Two wrongs do not make a right and a person who breaches a contract because the other party has breached the contract cannot claim compensation from the other as both parties are in breach.
30. For these reasons I find that the Claimant has not proved constructive dismissal of his employment contract by the Respondent.

Whether the Claimant is entitled to the reliefs sought.

31. I now turn to the reliefs sought. In his Statement of Claim, the Claimant sought several reliefs which I will address in separate heads.
 - i. A declaration that the Claimant’s employment was procedurally and substantively unfair and amounted to constructive dismissal

Having found that the Claimant did not prove that he was constructively dismissed from employment, he is not entitled to this prayer.
 - ii. 12 Months’ salary as compensation for unfair termination

The Claimant sought for maximum compensation under this head. Having not proved unfair termination or constructive dismissal, the Claimant is not entitled to compensation under this head.
 - iii. 5 months’ salary arrears

The Claimant pleaded that he was not paid salary for a period of five (5) months. However, he annexed a pay slip for the month of August, 2023. From the evidence on record, the Claimant is entitled to salary for the months of September, October, November and December, 2023 as the evidence on record shows that he received salary for August, 2023. I therefore award the Claimant 4 months’ salary arrears in the sum of Kshs. 422,708.
 - iv. One-month salary in lieu of notice



Having not proved unfair termination, the Claimant is not entitled to this prayer.

v. Service pay

From the evidence on record, and in particular, the Claimant's pay slip for November 2022, the Claimant was a contributing member of the National Social Security Fund (NSSF). He is therefore not entitled to service pay

vi. Leave dues

The Claimant did not adduce evidence in court that he never went on leave during the employment period. This prayer is declined.

vii. Certificate of service

The Claimant is entitled to be issued with a Certificate of Service pursuant to Section 51(1) of the [Employment Act](#) 2007.

32. In conclusion, judgment is hereby entered in favor of the Claimant against the Respondent for 4 months' salary arrears in the sum of Kshs 422,708.
33. The Respondent shall issue certificate of service to the Claimant.
34. The Respondent shall bear the Claimant's costs of this suit.
35. Interest shall accrue at court rates from date of judgment.

DATED, DELIVERED AND SIGNED

THIS 3RD DAY OF OCTOBER, 2025.

M. ONYANGO

JUDGE

