

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

ELDORET

CAUSE NO. E050 OF 2024

GLADYS KIPCHUMBA

KIBET.....CLAIMANT

VERSUS

MEDIHEAL GROUP OF

HOSPITALS.....RESPONDENT

JUDGMENT

1. The Claimant filed the Statement of Claim dated 8th July 2024 seeking the following orders:
 - 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 she was employed by the Respondent as a nurse at a monthly salary of Kshs 102,310.
3. She states that she diligently and faithfully served the Respondent until December 2023 when her employment was unfairly terminated.
4. According to the Claimant, the Respondent wrongfully withheld her salaries from July 2023 and subsequently, without notice, unfairly terminated her employment in December 2023.
5. She contends that withholding her salary from August 2023 was intended to frustrate her, amounting to constructive dismissal.
6. The Claimant further avers that throughout her employment, the Respondent failed to pay service pay, leave days, overtime, and dues for work on public holidays.

7. She also avers that she was compelled to take two months' unpaid maternity leave instead of the statutory three months' paid maternity leave.
8. The Claimant maintains that the Respondent's conduct was unfair, malicious, and devoid of procedure.
9. The Claimant particularized her claim against the Respondent as follows: -

- i. 12 months' salary as compensation for unlawful termination.....Kshs. 1,227,720
- ii. 5 months' salary arrears Kshs 511,550
- iii. 3 months unpaid maternity leave salary...Kshs 306,930
- iv. 1 month's salary in lieu of notice Kshs 102,310
- v. Service pay..... Kshs 895,213
- vi. Unpaid annual leave dues for 7 years....Kshs 501,319

10. The Respondent was served but failed to attend court. The suit therefore proceeded undefended.

The Evidence

11. The Claimant testified on 16th December 2024 as CW1. She adopted her witness statement recorded on 8th July 2024 as her evidence in chief.
12. The Claimant contended that she was employed by the Respondent on 10th January 2017 and that she worked for the Respondent until December 2023. It was her testimony that her last salary of Kshs 102,310 was paid in May 2023.
13. She reiterated her claim and sought compensation of Kshs. 3,545,042.
14. At the close of the Claimant's case, the court directed for written submissions to be filed. The Claimant filed her 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. The 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 her testimony, the Claimant averred that her last salary was paid in May 2023 yet she continued working until December 2023 without further pay.
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 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 such 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 case 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 the Claimant avers that her salary was not paid by the Respondent as alleged in the claim. The Claimant however did not mention either in her pleadings or testimony in

court that there was termination of her employment. She did not prove that she terminated her employment due to breach of a fundamental obligation by the employer or that the employer terminated her employment.

25. What seems to have happened in this case is that the Claimant walked out of her employment because her salary had not been paid by the Respondent.

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 by the employer. 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 or 2014*** as follows:

“Constructive dismissal, occurs when an employee resigns because their employers 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. Constructive dismissal must necessarily involve a termination of employment by the employee on grounds of the alleged breach of a fundamental term of contract by the employer. The long delay in payment of salary must be followed by a resignation letter citing the breach of fundamental terms of the contract by the employer to be the grounds for resignation.

28. The Claimant herein did not indicate that she ever sent a letter of resignation to the Respondent. The Claimant's action of walking out of employment without resigning was as much a breach of her employment contract as was the Respondent's failure to pay her salary for the cited months. Two wrongs do not make a right and a person who breaches her contract because the other party has breached the contract cannot claim compensation from the other as both parties are in breach.
29. For these reasons I find that the Claimant has not proved constructive dismissal by the Respondent.

Whether the Claimant is entitled to the reliefs sought.

30. I now turn to the reliefs sought. In her 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 she was constructively dismissed from employment, she is not entitled to this prayer.

ii. A declaration that allowing the Claimant to proceed on only 2 months' unpaid maternity leave was unfair labour practice

No evidence was adduced to prove that the Claimant went on maternity leave for which she was not paid or that she was denied maternity leave when she was entitled to the same. In the absence of evidence, this payer cannot issue.

iii. 12 Months' salary as compensation for unfair termination

The Claimant sought for the maximum compensation under this head. Having not proved unfair or constructive dismissal, the Claimant is not entitled to compensation under this head.

iv. 5 months' salary arrears

The Claimant adduced evidence that she was paid salary up to October, 2024. She is therefore entitled to salary for November and December 2024 only at Ksh.204,620.

v. 3 months' maternity leave salary

This prayer has been dealt with under (ii) above.

vi. One-month salary in lieu of notice

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

vii. 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). She is therefore not entitled to service pay

viii. Leave dues

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

ix. 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.

31. In conclusion, judgment is hereby entered in favor of the Claimant against the Respondent for 2 months' salary arrears in the sum of Kshs. 204,620.
32. The Respondent shall issue certificate of service to the Claimant.
33. The Respondent shall bear the Claimant's costs of this suit.
34. Interest shall accrue at court rates from date of judgment.

**DATED, DELIVERED AND SIGNED
THIS 3RD DAY OF OCTOBER, 2025.**

**M. ONYANGO
JUDGE**