



**MM v Eurocity Hospital Kisumu & another (Cause E007 of 2024)
[2025] KEELRC 81 (KLR) (21 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 81 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E007 OF 2024
NZIOKI WA MAKAU, J
JANUARY 21, 2025**

BETWEEN

MM CLAIMANT

AND

EUROCITY HOSPITAL KISUMU 1ST RESPONDENT

AO 2ND RESPONDENT

JUDGMENT

1. MM (hereinafter referred to as the Claimant) filed a Memorandum of Claim dated 30th January 2024 against Eurocity Hospital and A.O (the Respondents), alleging constructive dismissal. She claimed that her resignation was forced due to frustration caused by sexual harassment and the withholding of her salary. In her claim, she sought two months of salary arrears, damages for unlawful dismissal, and pay in lieu of notice.
2. In their response dated 4th March 2024, the Respondents denied the allegation of constructive dismissal, asserting that the Claimant had voluntarily resigned. They also maintained that they did not owe any terminal benefits to the Claimant. The matter proceeded for hearing on various dates with the Claimant testifying on her own behalf and one witness testifying on behalf of the Respondents. Following the hearings, both parties filed written submissions.

Claimant's Submissions

3. The Claimant submits that non-payment of salary for two months, combined with sexual harassment by the 2nd Respondent, created an unconducive working environment, ultimately forcing her to resign.



In support of her claim, she cites Black's Law Dictionary (Tenth Edition), which defines constructive dismissal 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.”

4. To further buttress her argument for constructive dismissal, the Claimant references Lord Denning's holding in *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344, where Lord Denning states:

“If the employer is guilty of conduct which is a 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, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

5. Additionally, the Claimant draws attention to the Respondents' witness admission that she had not been paid for two months, refers to the uncontroverted evidence of sexual harassment, which she asserts meets the threshold defined in 6 of the *Employment Act* and highlights the Respondents' failure to establish a sexual harassment policy. Regarding damages for sexual harassment the Claimant argues that her dignity was infringed upon, entitling her to Kshs. 1,000,000/-. She relies on the case of *SWM v Hardware Trading Store Ltd & another* [2021] eKLR, where the court awarded Kshs. 500,000/- to the Claimant after finding her claim of sexual harassment substantiated. The Claimant also relies on the case of *Kenya Union of Commercial Food & Allied Workers v Meru Central Dairy Co-operative Union Limited* [2015] eKLR, where the Respondent was criticized for failing to implement a Sexual Harassment Policy.
6. In respect of her terminal dues, the Claimant points to the Respondents' acknowledgment of the non-payment of two month's salary. She asserts that, given the unlawful nature of her dismissal, she is entitled to 12 months' salary as damages, one month's salary in lieu of notice, and a certificate of service.

Respondents' Submissions

7. The Respondents submit that the Claimant has failed to prove constructive dismissal. They emphasize that the Claimant voluntarily resigned by issuing a 7-day notice, citing personal reasons, and not due to any actions instigated by them. They further assert that the Claimant has not met the burden of proving that an unfair termination has occurred, as stipulated by section 47(5) of the *Employment Act*. In relation to the Claimant's allegations of sexual harassment, the Respondents reiterate that she has not established a prima facie case in accordance with section 47(5) of the *Employment Act*. They assert that it was the Claimant's responsibility to provide prima facie evidence of harassment, after which the burden would shift to them to disprove the allegations.
8. The Respondents also contend that the Claimant did not raise any complaints of sexual harassment at the earliest opportunity or at any point during her employment, despite the seriousness of the



accusations. They argue that this failure points to the possibility that the allegations may have been fabricated for her own benefit. Furthermore, they assert that the electronic evidence presented does not amount to sexual harassment. Regarding the Claimant's terminal dues, the Respondents submit that she is not entitled to any compensation, given that she only worked for one month, voluntarily resigned, and provided a short notice of only 7 days. In conclusion, the Respondents request that the claim be dismissed with costs.

9. The court has considered the pleadings as well as the submissions of parties together with the evidence adduced to come to this determination. The Claimant had a burden to prove her dismissal was as pleaded. She asserts she was constructively dismissed. In constructive dismissal, this Court and the Court of Appeal have enumerated the following factors to be critical in establishing constructive dismissal. See *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR where the Court of Appeal (*Visram, Azangalala, Otieno-Odek JJA*) held thus:-

30. The legal principles relevant to determining constructive dismissal include the following:

- 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. [Emphasis supplied]
10. The elements of constructive dismissal are present in this case. The Respondents clearly created the circumstances forcing the Claimant to resign. The Claimant had been in employ of the Respondent and cites the non-payment of salary as a driving factor. That is partly what led her to issue a 7-day notice to vacate her employment with the Respondent. There is also an allegation of sexual harassment which is the other factor. Sexual harassment is traumatising to the victim and is never acceptable. Granted the very grave nature of the allegations of sexual harassment, there must be tangible evidence or sufficient inferences to enable a Court make a finding in favour of the victim. The victim in these cases should document as much as possible the incidences by way of memos, notes, diary or confiding in a friend. The text messages, emails, or calls made should be also preserved as much as possible and each incident reported to the management or an external agency (Police, counsellor/therapist, doctor etc). The victim should where other electronic evidence is available secure such evidence as soon as practicable and avail this as evidence of harassment.



11. In this case, there is a recording given as Exhibit 3. The certificate of electronic evidence is dated 22nd April 2024 and the captured audio recording was made from a Samsung A73 phone serial number R5CT446J9BR on 8th December 2023 at 12.24pm and subsequently uploaded to a computer make HP ProBook 450 G3 serial number 5CD6081NF5 on 14th April 2024 at 3.00pm. The Court has listened to the recording in the presence of the Court Assistant.

12. There is a part of the conversation which goes like this:

Claimant: Eeeh si ndio nasema like today is the first time I was thinking about it because they kept sending reminders.

2nd Respondent: Are you going?

Claimant: I don't know. It depends, it depends on you (laughing).

2nd Respondent: Tunaenda na wewe. Tunaenda na wewe. So, M

Claimant: mmmh

2nd Respondent: I love you so much. M you're my, yaani, you are one girl that I just saw once and I was fallen. Na M sitaki kukulimit by the way. I will do everything. Wacha tu nisort. Kitu yenye ilikuwa inanisumbua ni hii, si imerudi, na hii pesa pia siwachi.

Claimant: Gani? Hiyo 1 million?

13. Later there is a portion that goes thus:

Claimant: Iyo ya kuonja tu, sasa ndio nasema, me I'm still on that. You start paying me juu I need to pay my rent then we can talk about anything else.

2nd Respondent: But si saa hii tushaongea?

Claimant: Sasa si unitumie pesa.

2nd Respondent: What I want us to do, I am sure of getting 10k. But kama 10k.

Claimant: 10k will not help me. (Inaudible) Actually even 20k is on the lower side. The rent is actually 23k. But I can look for that.

2nd Respondent: Yeah, you told me that. Sasa tukienda outing tunaenda wapi?

Claimant: We Unataka kunipeleka wapi?

2nd Respondent: Najua Kisumu hujui vizuri lakini....

Claimant: Najua Kisumu vizuri. I have been around for very long.

2nd Respondent: Oohh, sure. So you tell me. Ukifanyia mtu sex utafeel vizuri wapi?

Claimant: I will think about it. I will think about a good place.

2nd Respondent: Okay. Lakini sio ndani ya tao? Claimant: Hapana. Not in town.

2nd Respondent: Si tufanye hivi, nikuache urudi kwa nyumba. I know as a lady there is something you want to change what what what nikifigure out iyo 10k alafu I'm calling you in...eeeh..or I let you call me immediately you are done but you do it within less than 30 minutes.

Claimant: I'm not getting the money first?

2nd Respondent: No, you will get the money before utoe suruali



Claimant: No I need to...I'm not leaving my house before I pay that rent

2nd Respondent: (Inaudible) listen to me, what I'm telling you is real.

Claimant: No, I'm not...

2nd Respondent: I'm not telling you anything fake.

Claimant: I've not said you're telling me anything fake, but I need to get what has brought me here today.

2nd Respondent: Now please listen to me, hii ni something ni ya watu wakubwa, mmh

14. And another portion:

Claimant: Wapi? Hapo? Unataka kunipeleka wapi?

2nd Respondent: I will take you to an island where I will put you up a home

Claimant: Where?

2nd Respondent: An island kwenye uko tu (both laugh). Alafu nakununulia, nakununulia nini, inaitwa speed boat

Claimant: Ya kuenda uko.

2nd Respondent: Ukitaka kutoka

Claimant: Mimi nilishashindwa na maisha ya kukaa kwa island. Huoni venye nilitoroka Mbita mbio?

2nd Respondent: Eeeh

Claimant: Maisha ya huko ya maboat, those places are very rural

2nd Respondent: I have a plot of land somewhere very far

Claimant: Where?

2nd Respondent: Nikupeleke uko tuanze maisha huko.

Claimant: You know that is how women kill their husbands.

2nd Respondent: Not luos.

Claimant: Aaah

2nd Respondent: Maybe the kikuyus na wakamba. Wakamba pia wakiskia mtu..

Claimant: Tunaroganga. We kataa tu kunilipa pesa.

2nd Respondent: Yule mwingine, yule mwingine mwenye, yule alikua pia ni Mwendu, yule wa mavoko, si unamkumbuka iyo news. (Both laugh) Si aliwekwa ndani, lakini sio wajaluo. Wajaluo hawananga hizo vitu. Lakini mimi nikikupea sex mara moja utakwamia. Hiyo ndio shida.

Claimant: You are that sure of yourself.

2nd Respondent: Am telling you am so sweet and nice.

Claimant: Okay.

2nd Respondent: And it is sharp. Sio ile ya wakamba yenye wanaifanya mbio mbio.

Claimant: Ulijulia wapi? Hiyo simu am sure iko na pesa. Why don't you just send me 20k? Iyo simu haiwezi kua imekosa pesa. Why don't you just send me twenty thousand?



2nd Respondent: Hii pesa yenye iko hapa, you can see what it is

Claimant: Send 11.

15. In this case there IS evidence indicative of sexual harassment of a kind that is deeply disturbing. The 2nd Respondent knew the Claimant was owed money by the 1st Respondent and even went as far as indicate he would make arrangements for payment of her dues before, they had sexual intercourse. The Claimant had expectation that her unpaid salary would be paid. This is what one would expect once the employee renders services to the employer. Instead she was asked to engage in sexual intercourse with AO in order to have her money paid. The sequence in the recording does not seem altered at all, the conversation flows save for the few places where it is a bit inaudible due to background noise. The conversation was tellingly heavy with innuendos and clear asks for sex – repeatedly. Boasting about his sexual prowess among other things, the 2nd Respondent, in my considered view, abused his position to the detriment of the Claimant. Her dues were eventually never paid, presumably because the Claimant did not accede to the request to be available for sex with the 2nd Respondent.
16. The Court returns that there was constructive dismissal of the Claimant and indeed, the Claimant had no option but to give a hurried 7 day notice in order to escape the clutches of the 2nd Respondent and the recalcitrant 1st Respondent who had failed to protect her against the 2nd Respondent. There is a series of WhatsApp messages between the Claimant and another director of the 1st Respondent. These clearly indicate there was sexual harassment allegations against the 2nd Respondent there were supposed to be in a class action. There is a failure demonstrated the 1st Respondent's inaction in the face of the demands for it to pay the Claimant her wages. Further there was a refusal to remedy the wrong once the Claimant's lawyer wrote to the Respondents seeking the resolution of the matter in terms of the demand letter issued.
17. The Court finds the Respondents jointly and severally liable for the damages caused to the Claimant. The Court finds in favour of the Claimant as follows:
 - a. Kshs. 200,000/- being 2 month's unpaid wages.
 - b. Kshs. 100,000/- as notice pay.
 - c. Kshs. 1,500,000/- damages for the sexual harassment.
 - d. 6 month's compensation in terms of section 49 of the [Employment Act](#) for the wrongful termination – Kshs. 600,000/-
 - e. Costs of the suit.
 - f. Interest on the sums in a) and b) above at court rates from the date of filing suit till payment in full.
 - g. Interest on the sums in c) and d) above at court rates from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF JANUARY 2025

NZIOKI WA MAKAU, MCIArb.

JUDGE

