



REPUBLIC OF KENYA



KENYA LAW
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**Achieng v Agimba & another (Cause E180 of 2021)
[2025] KEELRC 540 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 540 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E180 OF 2021
CN BAARI, J
FEBRUARY 27, 2025**

BETWEEN

CHARLENE ACHIENG CLAIMANT

AND

ANNE MUGWERE-AGIMBA 1ST RESPONDENT

**THOMAS ONYANGO AGIMBA T/A AGIMBA & ASSOCIATES
ADVOCATES 2ND RESPONDENT**

JUDGMENT

Introduction

1. The Claimant filed this suit against the Respondent vide a Statement of Claim dated 16th February, 2021, seeking the following remedies: -
 - i. Special damages in the amount of Kshs. 871,533/= and Kshs. 1,055,036/= as particularized in paragraph 23 and 24 together with interest at commercial court rates from the date of filing suit till payment;
 - ii. Remittance of funds to the relevant statutory bodies for the specified time frame;
 - iii. General damages for this suit;
 - iv. Costs of this suit; and
 - v. Any other relief that this Honourable Court deems fit to grant
2. The Respondent filed a Response to the claim dated 19th April, 2021 and filed in Court on 22nd April, 2021, denying the Claimant's claim.



3. The matter proceeded for hearing on 18th November, 2022, when the Claimant herein testified in support of her, adopted her witness statement and produced the list and bundle of documents filed in support of her case. The Respondent's case was first heard on 14th December, 2023, but the witness was stood down during the production of their list of documents, owing to lack of a certificate of electronic record, and subsequently proceeded to conclusion on 9th October, 2024.
4. Both parties filed written submissions on the matter.

The Claimant's Case

5. It is the Claimant's case that she was employed by the Respondents from 3rd September, 2019. She contends that the Respondent failed to issue her with a formal offer Letter, and Contract representing their agreement despite the Claimant exceeding the statutory prescribed time frame of 2 months.
6. It is the Claimant's case that prior to her official employment, the Respondents presented her with a draft contract of employment which was to be executed by both parties. She states that the aforementioned contract included benefits such as transport allowance, mobile allowance, pension, medical insurance and annual leave days, which formed the basis of her joining the Respondent's Firm and offering her services.
7. The Claimant further states that the 1st Respondent did not at any point honour the provisions of the aforesaid Contract and further avers that the 1st Respondent merely used it as a click bait to lure her to employment. She states that her attempts to follow up on the execution of the contract during the first two months of employment proved futile as the 1st Respondent would constantly give false assurances and fail to follow up on the same.
8. The Claimant states that during the end year staff meeting, the Respondents asserted that the Claimant was not entitled to annual leave as she had not completed a year in service, which was contrary to the provisions of the *Employment Act*.
9. It is her case that on or about March, 2020 following the Covid 19 pandemic, the Respondents resorted to the Claimant working from home, but did not in any circumstance mention any reduction in the Claimant's salary. She states that the Respondents failed to remit her monthly salary for March, and further went ahead and paid half of the salary on 10th April, 2020.
10. It is her case that there was no further mention of the remainder of the March salary, which led to unrest with the members of staff of the Respondents as the Claimant alongside the rest of the staff, opted for unpaid leave in the event that the Respondents could not meet pay roll as it had failed to effectively communicate any delays following the staff meeting held on 8th April, 2020.
11. It is the Claimant's case that the Respondents had an earlier history of not paying salaries which traced all the way to the previous year, November, 2019, and the Respondents would more often than not fail to make payment agreed upon date of the 5th day of each month prior to the breakout of the Covid 19 Pandemic, and as such, the late remittance cannot be attributed to the Pandemic.
12. The Claimant states that the Respondents continued to delay payments, and paid half of the salary for the month of April in mid-May, after the Claimant following up on the same, upon lapse of the agreed upon payment date, which was the 5th day of every month. This was despite the fact that the Claimant continued to carry out her daily duties as was expected, and even went above and beyond the Respondents' expectations and worked beyond the prescribed working hours from time to time and even on weekends.



13. It is her further case that on or about 4th May, 2020, during a staff meeting, the Claimant alongside other staff members of the Respondents conceded to payment of half of their salaries effective from the month of May. This is noting the fact that the Respondents had unlawfully deducted half their salaries for the months of March and April without the consent of the Claimant.
14. It is her case that the Respondents have never paid her salary accruing in May and have not paid the same to date. She avers further that on or about 5th June, 2020, she went for unpaid leave to concentrate on her Masters' Education as well as focus on other personal interests, receipt of which was acknowledged by the Respondent.
15. The Claimant states that on or about 13th July, 2020, after lapse of the unpaid leave period, she requested the 1st Respondent to settle her arrears to enable her resume her official duties, but the 1st Respondent failed to remit the payments.
16. She avers that on the 15th July, 2020, she lawfully and procedurally resigned from the service of the Respondents. She states that this resignation was effective 15th July, 2020, as she had resumed from her unpaid leave.
17. It is her case that prior to the resignation, she discovered that the Respondent had never remitted the necessary statutory deductions by checking through text message from both NSSF and NHIF. She avers that she brought this to the attention of the Respondents who acknowledged the same, and never made the relevant payments.
18. The Claimant states that vide her resignation letter, addressed to the Respondent, she requested payment of her salary, which was in arrears as well as her unutilized leave days. That the Respondent has neither made any payments nor initiated any discussion on the payments to date.
19. That the actions of the Respondents are a violation of Article 41 (1) of *the Constitution* of Kenya 2010 as well as the *Employment Act* CAP 226 of 2007.
20. The Claimant prays that her claim be allowed.

The Respondents' Case

21. The Respondents case is that the Claimant was duly offered an employment opportunity with their Firm subject to the successful completion of her probationary period of six months. They state that the Claimant was yet to complete her probation period at the time she left the Firm.
22. It is their case that the Claimant performed poorly at work and was marginal at best and she received several verbal warnings on delays of her work.
23. The Respondents further aver that the Claimant was tardy in her behaviour at work, and usually took several days at any given point on the flimsy excuse of illness or bereavement. They aver that she was absent from work from 7th October, 2019 to 15th October 2019 claiming illness, and was also absent on 11th, 19th, 20th, 21st and 24th February 2020, without giving any adequate reason and did not provide any medical report to support her claim.
24. It is the Respondents case that the Firm was changing its structure from a sole proprietorship to a limited liability company during the Claimant's time of employment, and the Companies registry had put a hold on their name, hence rendering it difficult to process statutory deductions.
25. They states that due to the above issue, the Firm paid the Claimant her gross consolidated salary with no deductions whatsoever to allow the Claimant to pay deductions on her own behalf.



26. It is the Respondents' further case that the Firm has a time clock system in place that requires all employees to clock in, and clock out and that the Claimant was usually late to clock in and early to clock out effectively drastically reducing her work hours to the great detriment to the Firm.
27. It is their case that the Claimant's unprofessionalism and absenteeism was always an issue, thus leading the Firm to make a decision not to offer her a full-time contract. They state that on 5th June 2020, the Claimant absconded duty abruptly as she decided to attend an academic course and that she did so without any prior written notice to the Firm, and thus her sudden departure led to many work items going unattended.
28. It is their case that the Claimant left their Firm of her own volition and was never terminated by the Firm despite her glaring gaps and poor performance and work ethics.
29. They state that on or about mid - March 2020, the whole country was directed to go on lockdown due to the COVID 19 pandemic. They aver further that during this time the entire office staff had a meeting where it was agreed that the whole staff would take a pay cut for the period of the lockdown to allow the Firm to keep the full staff rather than put all employees on unpaid leave. That it was agreed further, that this was the best way to ensure that everyone was kept on payroll as they dealt with the effects of a devastating and unprecedented global pandemic. They aver that the Claimant was still on probation at this time.
30. That during this time, there was an incident that led to delay in making salary payments, but this was due to a banking discrepancy and any delay was sufficiently communicated to the staff.
31. The Respondents pray that the claim be dismissed.

The Claimant's Submissions

32. It is the Claimant's submission that she did not at any point consent to her salary being halved for the two months, save for May and neither was there any written agreement on the same, and for this reason, she claims Kshs. 90,000/= being her total unpaid salaries for the three consecutive months.
33. The Claimant sought to rely in case of *Kiboko v Osteria Group (Kenya) Limited (Cause E023 of 2022) [2023] KEELRC 2700 (KLR)* for the holding that:-

“The duty of the employer to compensate an employee for services rendered is a cardinal rule in any employment relationship.....”
34. It is the Claimant's submission that by failing to remunerate the Claimant as and when the salaries fell due and without any prior communication of the same, the Respondent breached the contractual obligations owed to her as well as the statutory legal provisions.
35. The Claimant further submits that reliance on the COVID 19 Pandemic by the Respondents has since been overtaken by events as the event was four years ago and the Respondents have made no effort to settle the dues owed to her wherein, companies went on and long reimbursed employees for amounts deducted in lieu of the Pandemic.
36. It is the Claimant submission that by failing to provide a written contract despite her having rendered nearly a year of service, the Respondents acted in significant breach of the provisions of the *Employment Act*. This omission she submits, effectively left her to operate at her own discretion and entitles her to compensation. She placed reliance in the case of *Mark Mugavi Okani v Eveready Security Guards [2019] eKLR* to support this position.



37. The Claimant finally submits that she is entitled to the damages for loss of wages sought herein, in the sum of KShs. 90,000/= together with interest from February 2021 and costs expended and damages of KShs. 100,000/= for failing to issue an itemized statement of changes, KShs. 100,000/= for failure to issue a written contract and a further KShs. 100,000/= for wilful failure to pay wages earned.

The Respondents' Submissions

38. It is the Respondents' submission that though COVID 19 had a negative impact on most businesses cashflow, they took measures to mitigate the burden on their employees and put them on half pay as employees stayed home and did not work. They submit further that they paid all outstanding amounts when they resumed regular office hours in June, 2020.
39. The Respondents submit that as per the offered draft contract, the Claimant was on a consolidated salary, meaning that the remuneration offered to the Claimant would be all encompassing and would cover all statutory deductions owing.
40. The Respondents submit that the Claimant's claim is deeply flawed and seeks prayers on the basis of blatantly flawed allegations. That her particularised damages are not based on any facts or evidence tendered before this Honourable Court.
41. It is their prayer that the Court duly dismisses the Claimant's Memorandum of Claim in its entirety with Costs to the Respondents.

Analysis and Determination

42. Having considered the pleadings, the witnesses' oral testimonies and the rival submissions, the issues that fall for determination are:
- i. Whether the Claimant is entitled to the remedies sought
 - ii. Who bears the costs of the suit?

Whether the Claimant is entitled to the remedies sought

43. Although the Respondents addressed the issue of whether the Claimant was constructively dismissed extensively, it is evident that the Claimant did not at all claim to have been constructively dismissed or even alleged to have been unfairly terminated. Her case is that she resigned from the service of the Respondents to pursue other interests, and not for breach of her contract of service. The issue of constructive dismissal therefore, does not arise and I let it rest.
44. The Claimant's claim is for payment of salary balance for the month of March 2020 of Kshs. 30,000, another balance of Kshs. 30,000 for the month of April 2020 and Kshs. 30,000 for the month of May 2020.
45. Additionally, the Claimant claims payment in lieu of accrued leave days for 11 months (19 ¼) days of Kshs. 57,750; NHIF Payments from September 2019 to July 2020 at Kshs. 1400 per month plus interest, payment of NSSF deductions accruing from September 2019 to July 2020 at Kshs. 720 per month plus accrued interest for late payment, PAYE Payments accruing from September 2019 to July 2020 at Kshs. 9133.33 per month plus penalties accrued at Kshs. 100,463(to be paid to KRA).
46. The Claimant further seeks payments amounting to Kshs. 600,000 for the Respondent's failure to provide a written statement of employment particulars, failure to provide an itemized pay statement,



wilful failure to pay wages earned, failure to remit statutory deductions, failure to issue statement of changes and repayment of remuneration wrongfully deducted.

47. In respect of the claim for salary balances for the months of March, April and May, 2020, Section 17(1) of the *Employment Act*, 2007 requires that an employer pays an employee the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the currency of Kenya.
48. The Respondents' argument is that in mid - March 2020, the whole country was directed to go on lockdown due to the COVID 19 pandemic, and that during this time, their entire office staff had a meeting where it was agreed that the whole staff would take a pay cut for the period of the lockdown to allow the Firm to keep the full staff, rather than put all employees on unpaid leave.
49. The Respondents' further explanation on the non-payment of the Claimant's salary, is an alleged incident of a banking discrepancy that resulted in a delay which they argue was sufficiently communicated to the staff. The court notes that the Respondent did not lead any evidence to show that they paid the Claimant her salary balances when the banking discrepancy was resolved or at all.
50. The Claimant had to instead severally demand for the payments, but her demands bore nor fruits. The Respondents' assertion that the Claimant together with her other employees agreed to half salary as a result of Covid.19, is not backed by any evidence save for the month of May, 2020 which the Claimant admitted having agreed to half pay.
51. Further, the Respondents' argument that the Claimant was absent from duty on various days without reason, is not supported by any evidence. No notice to show cause or warning letters were issued to the Claimant, even when the Respondents is clearly aware that absence from duty is a lawful ground to dismiss an employee.
52. It thus follows that the Respondents has not led any credible evidence to justify non-payment of the Claimant's full salaries for the months of March and April, 2020.
53. An employer must communicate with her employees, especially when it has difficulties meeting her obligation to remunerate her workers.
54. The *Employment Act* demands that employees are consulted when there is need to alter the terms of their employment contracts. It is not however mandatory that an employee agrees to the alteration. In the instant case, parties agree that such a discussion was had when the Covid.19 pandemic struck. It is however unfortunate that the Respondents did not deem it necessary to present the minutes of the deliberations as prove of such consultations. In the case of *Ibrahim Kamasi Amoni v Kenital Solar Limited* [2018] eKLR, the court held thus:-

“.....For a reduction of salary to be valid, an employer ought to obtain the approval of an employee by communicating the reduction to an employee in a letter and causing the letter to be accepted by the employee. This is because salary is a fundamental term of employment whose reduction has negative impact on an employee's livelihood and should not be done arbitrarily or unilaterally by an employer.”

55. For the reason foregone, I find the Respondents liable to pay the Claimant her half salaries for the months of March and April, 2020 which amount was not remitted, and in the absence of an agreement that the Claimant would serve on half salary or in the alternative, communication indicating the Employers' resolution to put her amongst others on half salary.



56. Further, the Respondents' repeated assertions that the Claimant was still under a probationary contract, does not in any way render her less entitled to her employment benefits. She was by law entitled to be treated in every way as any other employee.
57. I thus find and hold that the Claimant has proved on a balance of probability that the Respondents owe her half salaries for the months of March and April, 2020, and which is hereby awarded as prayed.
58. The claim of May, 2020 salary balance fails on the Claimant's admission that she agreed to work on half salary.
59. On whether the Claimant is entitled to recover in respect of statutory deductions, the Respondents told court that they paid the Claimant a gross salary (without deductions) on the ground that their Firm was transiting from a Sole Proprietorship to an LLP hence was not in a position to make deductions. The Claimant did not in any way controvert the assertion that she received gross salary.
60. Further, statutory deductions accrue to the entities on whose behalf they are deducted, and the laws under which the deductions are provided, give modalities for their recovery. Statutory deductions are not the property of an employee, hence the Claimant cannot rightfully lay claim to them.
61. This claim thus fails on this ground, and is dismissed.
62. The Claimant further seeks payments amounting to Kshs. 600,000 for the Respondent's failure to provide her with a written statement of employment particulars, failure to provide an itemized pay statement, wilful failure to pay wages earned, failure to remit statutory deductions, failure to issue statement of changes and repayment of remuneration wrongfully deducted.
63. On the claim for payments amounting to Kshs. 600,000 on account of failure to provide a written statement of employment particulars, failure to provide an itemized pay statement, wilful failure to pay wages earned, failure to remit statutory deductions, failure to issue statement of changes and repayment of remuneration wrongfully deducted, other than the payment of remuneration wrongly deducted, which has already been addressed, the rest of the prayers herein, are not available to the Claimant under a civil claim. None of these claims is envisaged under Section 49 of the *Employment Act*.
64. Further, Section 17 (10) of the *Employment Act* which the Claimant bases the claims on, provides Kshs. 100,000 as a penalty if found guilty of failing to make payment to an employee. This is available as a penalty and not money awardable to an employee.
65. The claims are thus not founded on any legal basis and are for dismissal.
66. In the final analysis, the Claimant's claim partly succeeds, and I make the following orders:-
- a. That the Respondents pay the Claimant half salaries withheld in the months of March and April, 2020 in the sum of Kshs. 60,000/-
 - b. The claim having partly succeeded, the Claimant is awarded the costs of the suit plus interest from the date of judgment until payment in full.
67. Judgment accordingly.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2025.

C. N. BAARI

JUDGE



Appearance:

Ms. Mathangari present for the Claimant

N/A for the Respondent

Ms. Esther S- C/As

