



REPUBLIC OF KENYA



KENYA LAW
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**Wanjeri v Jacaranda Nairobi Hotel (Cause E359 of 2022)
[2025] KEELRC 378 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 378 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E359 OF 2022
AN MWAURE, J
FEBRUARY 14, 2025**

BETWEEN

MONICAH WANJERI CLAIMANT

AND

JACARANDA NAIROBI HOTEL RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Statement of Claim dated 30th May 2022.

Claimant's case

2. The Claimant avers that the Respondent employed her as a receptionist.
3. The Claimant avers that she worked diligently for the Respondent for more than nine years, earning between Kshs.41,114/= and Kshs.64, 893/= on a monthly basis.
4. The Claimant avers that the Respondent had problems with employee payments, as salary used to be delayed, which was contrary to the provisions of the employment contracts.
5. The Claimant avers that the issue worsened in 2020 driving herself and other employees to resign from work without benefits.
6. The Claimant avers that the Respondent sent her on unpaid leave on 30th April 2021 for 6 months, which was extended for a further 6 months on 14th September 2021.
7. The Claimant avers that the Respondent further extended the said unpaid leave for another 6 months up to 15th March 2022 which is contrary to the Employment and Labour laws.



8. The Claimant avers that she was recalled back by the Respondent while on unpaid leave terminating her job without terminal dues.
9. The Claimant avers that the Respondent did not act in accordance to labour laws by sending the Claimant on unpaid leave without consulting or engaging her for more than one and a half years.
10. The Claimant prays that she be awarded.
 - i. Three months' salary in lieu of notice totalling Kshs. 194,679/=
 - ii. 12 months' salary for constructive dismissal totalling Kshs.778,716/=
 - iii. 18 months' salary for unpaid leave totalling Kshs. 1,168,074/=
 - iv. Gratuity pay totalling Kshs.292,019/=
 - v. Damages totalling Kshs.200,000/=
 - vi. Arrears totalling Kshs.1,500,000/=
 - vii. Certificate of service
 - viii. Interest on the above at court rates
 - ix. The Respondent to pay the costs of this claim

Respondent's reply to claim

11. In opposition to the Statement of Claim, the Respondent filed a reply to the claim dated 19th January 2023.
12. The Respondent denies the contents of the Statement of claim and responds as follows:
13. The Respondent avers that it was acting lawfully in paying the Claimant's salaries.
14. The Respondent avers that the COVID-19 pandemic significantly impacted the hotel industry starting in March 2020, prompting the Respondent to implement measures to address the challenges posed by COVID-19.
15. The Respondent avers that the Claimant was not terminated and there is no proof to the same.
16. The Respondent avers that the decision for issuing unpaid leave was necessitated by loss of profit and yet this was arrived by 30th March 2021 much as the COVID-19 pandemic measures had started on about 12th March 2020.
17. The Respondent avers that the Claimant was a union member under the Kenya Union of Domestic, Hotel, Educational Institute, Hospitals and Allied Workers (KUDHEIHA) had issued several communiques to guide the Employer-employee relationships during the COVID-19 pandemic.
18. The Respondent avers that the COVID-19 pandemic is viewed as an act of God, which is not addressed under the *Employment Act*. This situation required both employers and employees to seek ways to survive and to amicably resolve issues in an industry that had been shut down for an extended period.
19. On March 23, 2021, the Respondent avers that the Hotel Owners Association Union, KAHC, and KUDHEIHA Union advised the hotel industry to manage COVID-19 challenges by granting annual and accumulated leave to staff for March and April. After that, staff would take unpaid leave on a two-week rotation until the end of May, to better understand the pandemic's impact on health and



- business. Essentially, the recommendation aimed to reduce staff costs through leave utilization and unpaid leave rotations.
20. The Respondent avers that there was a further communique dated 11th June 2020 where KUDHEIHA Union recommended that to preserve jobs during the COVID-19 pandemic by utilizing unpaid leave with stipends, ensuring unpaid leave does not affect employment status, and continuing medical benefits.
 21. The Respondent avers that the said recommendation emphasized redundancy as a last resort, encouraged open communication, and provided voluntary separation options like resignation and early retirement, fostering collaboration to mitigate negative impacts.
 22. The Respondent avers that another communique was issued dated 4th August 2021 where the union maintained the position of the previous commiques.
 23. The Respondent avers that there was no work thus it does not amount to unfair dismissal or constructive dismissal.
 24. The Respondent avers that the Claimant is not entitled to reliefs sought.
 25. The Respondent avers that the suit is frivolous, bad in law and an abuse of the court process, therefore, should be dismissed with costs.
 26. The claim proceeded by way of formal proof.

Evidence in court

27. The Claimant adopted her witness statement dated 30th May 2022 together with the list of documents marked as exhibits 1 to 9 as her evidence in chief.
28. Despite the Respondent filing a reply to claim, it did not send any representative to testify in court.

Claimant's submissions

29. The Claimant submitted that she was placed on infinite unpaid leave by the Respondent from 30th March 2021 amounting to constructive dismissal.
30. The Claimant submitted that constructive dismissal occurs when an employee resigns due to actions or conducts by the employer, or the employer's failure to act, which creates intolerable working conditions for the employee.
31. The Black's Law Dictionary defines constructive dismissal as "a termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave."
32. The Claimant relied on the case of Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] KEELRC 920 (KLR) which stated that principles from other jurisdictions can be applied in Kenya due to the right to fair labour practices under Article 41 of *the Constitution*. *The Constitution* should be interpreted to promote human rights and fundamental freedoms, reflecting that it is always relevant and evolving.
33. The Claimant submitted that she was unlawfully sent on unpaid leave in March 2021 and the *Employment Act* does not provide for unpaid leave. The Claimant also submitted that her employment contract did not provide for unpaid leave thus the terms of the employment contract cannot be



- unilaterally changed by the employer. It was the employer’s obligation to engage in consultations with the employee to obtain the employee’s consent before implementing unpaid leave.
34. The Claimant relied on Section 10(5) of the *Employment Act* which obligates employers to consult with employees regarding any changes to the terms and conditions of their employment contracts. In *Kariamburi V Bins (Nairobi) Services Ltd* [2024] KEELRC 1975 (KLR) the court observed that unpaid leave, though not formally recognized by law, has become a practice for urgent personal matters outside regular leave. Since it has no legal basis, it must be implemented through mutual agreement between the employer and employee and cannot be imposed unilaterally by the employer.
35. The Claimant submitted that the fair procedure was not followed and relied on section 41 of the *Employment Act*, *Mary Chemweno Kiptui V Kenya Pipeline Company Limited* (2014) eKLR, and *Gachuhi V Malster International* [2022] KEELRC 3822 (KLR) in support of that proposition.
36. The Claimant also relied on numerous case laws including *Peter Omare Nyangesera V Registered Trustees of Impala Club*, *Boniface Nyaga Njiru V Board of Trustees Gichugu Water & Sanitation Trust* [2014] eKLR, *Humprey Sitati V Board of Management Lenana School* [2020] eKLR, *Harrison Macharia Maina V Leo Design Limited* [2021] eKLR, *Kenya Private Universities Workers Union V KAG East Africa* [2021] eKLR, *David Gichana Omuya V Mombasa Maize Millers Limited* [2014] eKLR, *CMC Aviation Limited V Mohammed Noor* [2015] eKLR and *Lydia Moraa Obara V Tusker Mattresses Limited*.
37. The Claimant also submitted that Respondent did not give sufficient reasons for her termination relying on Sections 43, 45(2) and 47(5) of the *Employment Act*. In *Cooperative Bank of Kenya Limited V Banking Insurance & Finance Union* [2017] eKLR the court held that it considers the validity and justifiability of the reasons for termination.
38. In *Naima Khamis V Oxford University Press (EA) Limited* [2017] eKLR the Court of Appeal observed that:
- “On the first issue, that is whether the termination was lawful, we wish to take note of the provisions of Section 43(1) of the *Employment Act*, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair. Also, Section 45(2) (c) requires a termination be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord the employee an opportunity to be heard as by law required.”
39. The Claimant submitted that she was not consulted on the unpaid leave nor any alteration concerning her employment contract and she was constructively terminated by the respondent without proving that the reasons for terminating were valid.
40. The Claimant submitted that she is entitled to compensation under Section 49 of the *Employment Act* for unfair termination together with general damages for violation of her labour rights as provided under Article 47 of *the Constitution*. In *Joshua Otiego Apiyo V Modern Coast Express Ltd* [2019] eKLR where the court gave maximum compensation as provided under Section 49 of the *Employment Act*.



Analysis and determination

41. The court has considered the pleadings on records together with the Claimant's submissions and the issues for determination are as follows:
- i. Whether the Claimant was constructively dismissed
 - ii. Whether the Claimant is entitled to the reliefs sought
42. In *Coca Cola East & Central Africa Limited V Maria Kagai Ligaga* [2015] eKLR the Court of Appeal stated 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 give 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.”
43. The Court of Appeal further gave a breakdown of guiding principles when dealing with constructive dismissal as follows:
- 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 that is 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 conduct himself to be estopped from asserting 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.
44. In this present case, the Claimant's employment was affected by the COVID-19 pandemic which also affected the entire world. The Respondent issued the Claimant a letter to go on unpaid leave which was extended on several occasions until 14th September 2022 as communicated in the Respondent's letter dated 15th March 2022.
45. The principles for constructive dismissal do conform to this case. The claimant had worked for the Respondent from March 2011 and it seems there were no issues she raised during that period.



This was until 2021 when the global pandemic arose and it affected literally everybody in the world. She was sent on unpaid leave from March 2021 to March 2022. She did not raise any complaints during that period.

46. The Respondent kept updating the claimant of the position and extending her unpaid leave. On 30th March 2021 they informed her of the directions given by the government and promised to keep monitoring the situation and to recall her if business picked again.
47. The claimant annexed copies of payslips upto December 2022. There was no explanation about the said payslips which had the heading of Jacaranda and were addressed to her. It is not clear what was the import of the payslips.
48. All in all, the court finds the facts in this case to construe constructive dismissal as the respondent finally did not inform the claimant of the status of her job after the Covid-19 pandemic.
49. There is no proof that the claimant was officially terminated but silence by her employer was proof for constructive dismissal. It is not clear why the payslips were produced in court. None of the parties specify if she was paid as per the payslips.
50. In the case of Esther Wanjiku [Kihura -vs- Amazon Motors Limited Cause No. E830 of 2021](#) the court held: -

“ 39. Back to the case herein, it is apparent that upon sending the Claimant on unpaid leave, the Respondent did not revert to her regarding the status of her employment. I say so because no evidence has been produced to this effect. It would thus mean that from 4th May 2020 up to date, the Claimant is still in the dark regarding her employment status with the Respondent.

40. In the premises and applying the principles set out in the case of Coca-Cola East & Central Africa Limited vs Maria Kagai Ligaga (supra), the Respondent’s action of placing the Claimant on an indefinite and unpaid leave without any communication clearly shows that the Respondent was no longer interested in continuing with the employment contract. Needless to say, this amounted to a significant breach that went to the root of the employment contract. As such, the Claimant was entitled to treat herself as constructively dismissed.

41. It is this Court’s view that regardless of the circumstances, sending an employee on an indefinite and unpaid leave without any communication is unreasonable and unfair.”

51. Similarly in this instant case the court holds this was a case of constructive dismissal of the claimant. She is entitled to have judgment in her favour. So judgment is entered in her favour.

52. She is awarded the following reliefs-

- a. Three months salary in lieu of notice @41,114 =Kshs.123,342
- b. In view of the period in question and considering the Respondent kept the claimant updated of the position the general damages awarded will be equivalent of 4 months.....= Kshs.164,456/=



- c. The prayers for unpaid leave, gratuity, damages, arrears are all mere claims with no proof and are all denied.
- d. Total awarded is=Kshs.287,798/= plus, interest at 14% per annum from date of Judgment till full payment.
- e. Claimant is also awarded costs.
- f. She is to be given her certificate of service within 30 days from today's date.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 14TH DAY OF FEBRUARY, 2025.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

