Harley Street Fertility Centre Kenya Limited v Sila (Cause E711 of 2023) [2025] KEELRC 1619 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1619 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E711 OF 2023

SC RUTTO, J

MAY 30, 2025

BETWEEN

HARLEY STREET FERTILITY CENTRE KENYA LIMITED ..... CLAIMANT

AND

EMMA SILA ..... RESPONDENT

JUDGMENT

1. It is the Claimant's assertion that the Respondent was employed at its facility as a Clinical Embryologist on 1st December 2020 on express terms that; she would receive formal training from a Consultant Clinical Embryologist from January 2021 to March 2021 in order to work independently in all aspects of clinical embryology; and that in the event she left the Claimant's employment within 36 months from the start date, she would be required to repay the prorated amount of Kshs 2,000,000/= for the training received.

2. It is the Claimant's case that the Respondent underwent formal training from 13th January 2021 to 8th April 2021 by a Consultant Clinical Embryologist and upon completion, the Claimant increased her salary on 1st June 2021 and 1st September 2021.

3. The Claimant avers that despite the express terms of the Respondent's contract of employment on the bond terms, she voluntarily issued a resignation letter dated 16th May 2023.

4. It is the Claimant's contention that the Respondent did not complete the bonding term mutually agreed between the two parties and the Respondent is obligated to pay the prorated amount of the training costs being the sum of Kshs 361,644.00.

5. The Claimant further avers that in complete breach of the employment contract, the Respondent resigned without notice or paying three (3) months' salary in lieu of notice hence Kshs 450,000.00 is due and owing from the Respondent.

6. It is on the basis of the foregoing that the Claimant has sought the sum of Kshs 756,304.00 against the Respondent, together with interest and costs of the suit.

7. Opposing the Claim, the Respondent filed a Memorandum of Response together with a Counterclaim. In her Response to the Claim, the Respondent has denied being trained by a Consultant Clinical Embryologist in the Claimant's facility. According to the Respondent, she was already fully trained before with a Master's of Science Degree in Embryology.

8. The Respondent further contends that immediately the ink dried on the contract of employment, the Claimant breached it and made her work with an unqualified foreigner with no formal training in the field, who was way below her qualifications, not licensed to practise any craft related to medicine in Kenya and not a consultant by any definition of the word. In this regard, the Respondent contends that with her education and expertise, she taught the alleged technician.

9. That she nevertheless signed some sheets to show attendance for fear of losing her job, given the nature of her industry and to keep bread on her table with a harsh superior and a toxic backdrop to boot.

10. It is the Respondent's case that she resigned due to harassment, toxicity, poor working conditions, slavery, underpayment, lack of ethics at the clinic, servitude and bad treatment by Ms. Sweata Shah, who ran the clinic as a one person show.

11. In the Counterclaim, the Respondent reiterated her averments in the Response and further cited the Claimant for discrimination. In this regard, the Respondent avers that a lab assistant, Mr. Jugal Jyoti Borah was being paid Kshs 450,000.00 per month while she earned Kshs 110,000.00 as of April 2023. In the Respondent's view, Mr. Jugal was treated well and paid according to the industry standard despite lacking papers because he was male.

12. The Respondent has further averred that Anaita Shah was paid way better than her from Kshs 135,000.00 to Kshs 190,000.00 at the time of leaving, yet they both did the same job.

13. The Respondent further avers that she was supposed to work for 48 hours per week but ended up working for 54 hours per week at the minimum.

14. According to the Respondent, the Claim herein is a strategic litigation against public participation intended to censor, intimidate and silence her by burdening her with the cost of a legal defense. It is the Respondent's assertion that those who resigned before her were sued in a similar style.

15. It is against this background that the Respondent has sought the following reliefs in the Counterclaim:

    a. A declaration that the resignation letter dated 16th May 2023 was instigated by Harley Street Fertility Centre Kenya Limited's toxic environment, hence amounting to constructive dismissal.

    b. Damages for highhandedness, unreasonableness, and toxicity.

    c. Punitive damages for denial of salary for the 16 days worked in May 2023.

    d. Under payment of Kshs 340,000/= per month for 28 months - Kshs 9,520,000/=

    e. Compensation under the *Employment Act*:

        i. Three Months Pay in lieu of Notice.

        ii. 12 months' pay for unfair termination.

        iii. Overtime of 2 hours for 28 months =Kshs.205,333.33

iv. Unpaid leave not taken in 2023-8.75 days x 110,000/30 =Kshs 32,083.33

v. Salary for the 16 days worked in May 2023 =Kshs 58,666.66

f. Any other relief the honourable court may grant.

g. Costs of the suit.

h. Interest on the above at court rates from the day of the counterclaim until payment in full.

16. In its Reply to the Respondent's Memorandum of Response and Counterclaim, the Claimant has denied the Respondent's averments and put the Respondent to strict proof thereof.

17. The Claimant avers that the Respondent was still undergoing her Masters Degree training when she joined its facility in 2020. That it is therefore false that the Respondent had a Masters of Science Degree in Embryology at the time she joined the Claimant facility. That as at the time she terminated her employment, the Respondent had not provided evidence of completing her Masters Degree in Embryology.

18. The Claimant further avers that the Consultant/Trainer, Mr. Jugal, possesses over 15 years of qualification and holds more than seven (7) years of expertise as a senior embryologist. In the Claimant's view, the issue regarding the proficiency of the contracted trainer does not in any manner or form affect the validity of the Claimant's claim stemming from the bond training agreement.

19. With respect to the Counterclaim, the Claimant has denied the Claimant's allegations relating to untenable working conditions and or toxic environment. According to the Claimant, the Respondent resigned voluntarily from employment for personal reasons.

20. The Claimant has further denied the Respondent's allegations with respect to discrimination and put the Claimant to strict proof thereof. According to the Claimant, Mr. Jugal's monthly earnings of Kshs 450,000.00 were commensurate with his extensive years of practice and expertise in the field. That further, his association with the Claimant facility was solely for the duration of the training of the Respondent under a distinct engagement contract.

21. With respect to Anaita Shah, the Claimant avers that the Respondent held the position of the most junior Embryologist within the Claimant's team. That her compensation was reflective of her limited experience spanning less than three (3) years. The Claimant maintains that the Respondent lacked formal qualification as an embryologist at the time of her resignation. That she remained unable to independently perform certain embryology procedures in the laboratory and her handling of procedures was fraught with numerous errors.

22. The Claimant has further averred that the Respondent was required to work for 48 hours weekly and at no juncture did she exceed the stipulated 48-hour limit. That further, the Respondent initiated discussions with the Claimant regarding a reduction in her contractual working hours from 48 hours and that demonstrating good faith, the Claimant consented to reducing her working hours to 40.

23. During the hearing on 17th February 2025, both parties called oral evidence.

Claimant's Case

24. The Claimant called oral evidence through its Managing Director, Ms. Sweata Shah. At the outset, Ms. Shah sought to adopt her witness statement as well as the initial list and bundle of documents and the supplementary list and bundle of documents filed on behalf of the Claimant to constitute her evidence in chief.

25. It was Ms. Sweata's evidence that upon the Respondent's resignation, the Claimant wrote to her on 18th May, 2023, acknowledging her resignation and advising her on her final dues.

26. Ms. Sweata averred that despite the said letter, the Respondent has failed, refused and/or ignored to acknowledge receipt or even commit to paying the debt notwithstanding constant follow-ups from its Advocates and despite its notice of intention to sue.

27. According to Ms. Sweata, the Claimant has suffered and continues to suffer damages by reason of the said lack of payment.

28. During cross-examination, Ms. Sweata stated that the Respondent was trained by the Consultant from 13th January 2021 to 8th April 2021. That the Consultant has over 15 years' experience. That at the time the Respondent left the Claimant's employment, she had not presented her certificate for her qualification as an Embryologist.

29. Ms. Sweata further denied the assertions by the Respondent that she left the Claimant's employment due to poor working conditions. That further, the Claimant did not deduct the Respondent's salary arbitrarily.

30. She further disputed the assertions that the Claimant files claims as the one herein to prevent employees from filing a suit against the facility.

31. According to Ms. Sweata, the Respondent left the Claimant's employment due to personal reasons and was thankful for the opportunity accorded to her.

Respondent's Case

32. Ms. Emma Sila, the Respondent herein, testified in support of her case, and equally, she sought to adopt her witness statement and the list and bundle of documents filed on her behalf to constitute her evidence in chief.

33. It was Ms. Sila's evidence that in the period between 13th January 2021 to 8th April 2021, she was not trained by any Consultant Clinical Embryologist in the Claimant's facility.

34. According to Ms. Sila, Consultants are the most senior grade of doctors and are responsible for leading a team. That they would have had at least four (4) years of post-graduate training including at least two (2) years in their specialty.

35. Ms. Sila further testified that when her mother was critically sick and admitted in the hospital, Ms. Sweata would shout and belittle her when she went to see her. She did this after informing her supervisor, who was the doctor in charge and a colleague. That Ms. Sweata was very mean and inhuman when her mother died shortly after that. She (Sweata) thought she (Sila) was lying about her mother being sick.

36. Ms. Sila further averred that Ms. Sweata deducted her salary arbitrarily almost every year she worked, claiming that she had overused her leave days. That the deductions were so many and her salary was always negative. That in case she was late even for a minute, her salary would be deducted.

37. Ms. Sila further averred that she went to India to do her MSc in Clinical Embryology for two (2) years.

38. Ms. Sila averred that Ms. Sweata used all manner to tie her to her clinic with a bad contract, even though she was on demand in other clinics. That despite wanting to exploit her skills, Ms. Sweata was not willing to work well with her or even pay her well.

39. As a result of Ms. Sweata's hostility, she was under undue stress, suffered hypertension, anxiety and palpitations. According to Ms. Sila, her resignation was instigated by the Claimant creating a toxic and non-conducive working environment, hence making it a constructive dismissal.

40. That she suffered extensively, was constantly fatigued, had stress and migraines, had little to no enthusiasm for life, and her growth as a human being was stifled.

41. Cross-examined, Ms. Sila stated that she signed the contract of employment voluntarily and was aware of the remuneration.

42. She further stated that she did not complete 36 months in employment as she was pushed out due to the working conditions.

43. Ms. Sila further averred that she verbally enquired about the trainer's qualifications and she was informed that he was trained in zoology. That on her part, she has a Masters degree in Clinical Embryology and is qualified to work as an Embryologist. That she sent her certificate and transcripts to Dr. Murage and Ms. Sweata.

44. Ms. Sila further stated that she wrote to Dr. Murage complaining of the mistreatment by Ms. Sweata.

Submissions

45. Upon close of the hearing, both parties filed written submissions which the Court has considered. The Claimant has submitted that the Respondent was not constructively terminated as she alleges. According to the Claimant, the Respondent willfully elected to resign in circumstances that do not amount to constructive dismissal. In the same breath, the Claimant has maintained that the resignation letter was unequivocal that the Respondent resigned owing to personal reasons. In support of its submissions, the Claimant placed reliance on the case of Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR.

46. It was further submitted that the Respondent was under no legal or moral obligation or duty to please and or spare the Claimant by sugar-coating and failing to disclose the other reason(s) (if any) for her resignation. To buttress this argument, the Claimant invited the Court to consider the case of Achieng' v Africa Diatomite Industries Limited & another (Employment and Labour Relations Cause 13 of 2020) [2023] KEELRC 293 (KLR) (2 February 2023) (Judgment).

47. Referencing the case of Sheikh Ali Senyonga & 7 Others v Shaikh Hussein Rajab Kakooza and 6 Others SCCA NO. 9 of 1990, the Claimant further submitted that since it is the Respondent alleging that she was subjected to discrimination, a toxic work environment, and verbal abuse, to hold that the negative must be proved by the Claimant, would be to impose an unnecessary burden on it.

48. The Court was further invited the Court to note that the Respondent has not adduced any evidence to support her allegations of constructive dismissal or the harassment and abusive behaviour attributed to the Claimant.

49. It was further submitted by the Claimant that the Respondent is contractually obligated to forfeit the training bond in the sum of Kshs. 361,644.00 as expressly provided in the Letter of Offer of Employment dated 1st December 2020. That having resigned before fulfilling this contractual obligation, the Claimant is entitled to enforce its rights under the contract.

50. Still on this issue, the Claimant posited that parties are bound by the terms of a contract freely entered into, unless the contract is shown to be unconscionable, illegal, or contrary to public policy. In support of this argument, reliance was placed on the cases of National Bank of Kenya Ltd v Pipe Plastic Samkolit

(K) Ltd (2002) 2 E.A. 503, (2011) eKLR and Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd (2017) eKLR.

51. The Claimant further urged the Court to find that documents voluntarily signed by an employee remain binding unless proven otherwise. In the Claimant's view, the Respondent has failed to demonstrate any coercion or undue influence that would invalidate her contractual obligations.

52. In further submission, the Claimant stated that the Respondent continued working for over two (2) years after the training period ended, during which she received salary increments and carried out her duties without raising any issue regarding the training. That if the training had not been conducted, she had every opportunity to seek redress but failed to do so. That her silence throughout her employment reinforces the conclusion that the training was properly conducted.

53. It was the Claimant's position that the training bond clause does not constitute an unlawful penalty or restraint of trade.

54. According to the Claimant, it has demonstrated that the training was conducted, the Respondent voluntarily signed the contract, and she resigned before fulfilling her bond period. That the enforcement of the bond training clause is therefore justified.

55. On her part, the Respondent submitted that despite having equal work with other employees, she did not receive equal pay. The Respondent contended that she actually received less pay on the basis of being black. In support of her position, the Respondent placed reliance on the cases of Erastus Gitonga v National Environment Management Authority, Law Society of Kenya (2019) eKLR and Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] KECA 329 (KLR).

56. In the same vein, the Respondent maintained that the basis for her being underpaid was due to her African origin and being female.

57. Referencing the case of Evans Katiezo Aligulah v Eldomatt Wholesale & Supermarket Limited [2016] KEELRC 354 (KLR), it was the Respondent's further submission that she was supposed to work for 48 hours a week but ended up working for 54 hours for the minimal wage the Claimant offered.

58. On the issue of constructive dismissal, the Respondent submitted that she resigned from employment due to the toxic work environment that made it impossible to continue working for the Claimant. On this issue, the Respondent placed reliance on the case of Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [supra].

59. The Respondent further posited that she was able to show that every former employee of the Claimant is usually sued in the same fashion as discernible in the CTS. In her view, this is usually done to silence them and she is no exception.

60. In concluding, the Respondent submitted that the Claimant's actions led to her leaving employment without notice, contrary to the contract and has demonstrated that the Claimant's poor working conditions and a toxic environment led her to resign.

Analysis and Determination

61. Flowing from the record, the Court has singled out the following issues for determination;

    a. Whether the Respondent breached her contract of employment, thus entitling the Claimant to the reliefs sought in the Claim;

    b. Whether the Respondent was constructively dismissed from employment;

c. Whether there is a case of discrimination; and

d. Whether the Respondent is entitled to the reliefs sought in the Counterclaim.

Breach of Contract of Employment?

62. The Claimant's claim against the Respondent stems from two (2) clauses in the Contract of Employment dated 1st December 2020. These clauses relate to reimbursement of the prorated training costs of Kshs 2,000,000.00 and payment of three (3) months' salary in lieu of notice.

63. With respect to the claim for the prorated training costs, the Claimant's case is that the Respondent resigned from employment and did not complete the bonding term mutually agreed in the contract of employment.

64. On this issue, Clauses 10.3.1 and 10.3.2 of the Contract of Employment are relevant and are couched as follows:

10. 3.1 You will receive formal training from a consultant clinical embryologist from January to March 2021 in order to work independently in all aspects of clinical embryology with the embryology laboratory.

10. 3.2 If you leave within thirty six (36) months of your start date you will have to repay the prorated amount of Kenya shillings two million (Kes 2,000,000) for the training that you have received.

65. The above clauses are akin to what is commonly referred to as an employment bond. An employment bond is one of the ways in which employers protect their business interests.

66. As stated by Bimbola Atilola in his book, "Recent Developments in Nigerian Labour and Employment Law (Hybrid Consult Publication 2017)", an employment bond is a device adopted by employers to secure their investments on staff training and development.

67. It is therefore a common phenomenon for employers to incorporate into employment contracts clauses in the form of an employment bond. In his literary piece, "The Legality of Employment Bond Contracts", Abhinav Benjamin defines an employment bond to mean "an agreement between the employer and the employee which provides that the employee shall work for an agreed upon minimum period of time upon joining the business. If the employee quits his/her job before he/she completes this minimum time period, then such an employee will have to pay a particular amount as compensation to the employer."

68. When tied to training expenses, the bond is referred to as a training bond. With respect to training, Abhinav Benjamin states that "The rationale behind this agreement is that the employer seeks to recover the costs he/she faces in training the employee, recruiting a replacement, losses faced until a replacement is hired, etc. by imposing the employment bond liability, the employee will have to think twice before quitting his/her job as the bond serves as a deterrent to prematurely terminating the contract of employment."

69. In the case of Overland Airways Limited v Oladeji Afolayan & Anor [2015]52 NLLR(PT.174) P.214, the National Industrial Court of Nigeria addressed the concept of a training bond as follows "a training bond seeks to compel a current employee whose training has been sponsored by the employer to work for an agreed duration so that the employer could derive the benefits of its investment on the employee."

70. What manifests from the foregoing is that a training bond serves as a mechanism used by employers to protect their investment in employees through training and development by ensuring that the employer draws benefits from the trained employee's skills and experience for a predetermined time. Essentially, it aims at preventing the abrupt termination of a contract of employment after a period of training.

71. In such instances where an employer sponsors the training of their

employees or allows them acquire new skills and qualifications while in employment, the employer expects that the skills and knowledge acquired by the employee in the course of employment will be applied while in service. As this may not always be the case, a dispute as the one herein may arise in the event an employee terminates his or her contract of employment after acquiring new skills and qualifications while in the service of the employer.

72. The question as to whether a training bond is enforceable depends on the circumstances of each case.

73. Back to the case herein, the record bears that under Clauses 10.3.1 and 10.3.2, set out elsewhere in this judgment, the Respondent was to receive formal training from a Consultant Clinical Embryologist in order to work independently in all aspects of clinical embryology with the embryology laboratory and in the event she was to leave the Claimant's employment within thirty six (36) months of her start date, she was to repay the prorated amount of Kshs 2,000,000.00 for the training received.

74. According to the Claimant, the Respondent received formal training from 13th January 2021 to 8th April 2021 by a Consultant Clinical Embryologist. This position has been disputed by the Respondent who avers that she was already fully trained before with a Masters degree in Clinical Embryology.

75. In support of its position, the Claimant exhibited a copy of a letter of offer dated 23rd November 2020, issued to one Mr. Jugal Jyoti Borah, through which he was engaged to train two (2) junior embryologists in the field of clinical embryology. As per the said letter of offer, Mr. Jugal was engaged for a period of three (3) months to train Emma Sila (the Respondent) and Anaita Shah, who were named as the junior embryologists.

76. Further exhibited by the Claimant was a Consultancy Agreement executed by the Claimant and Mr. Jugal pursuant to the letter of offer.

77. The Claimant further exhibited a copy of a letter dated 8th April 2021 from Ms. Sweata Shah to Mr. Jugal in which she expressed her satisfaction with his methodology and enthusiasm in training the junior embryologists. She further noted that Mr. Jugal had completed his consultancy engagement with the Claimant on 8th April 2021 as per the Consultancy Agreement.

78. The foregoing conflicts with the Respondent's testimony that she did not receive formal training from a Consultant Clinical Embryologist.

79. What's more, the Respondent received a salary increment with effect from 1st June 2021. In the letter communicating the salary increment, it was noted that the Respondent could satisfactorily denude oocytes after the three (3) months' training from January to April 2021 with Mr. Jugal.

80. It is therefore not factual for the Respondent to assert that she did not receive any formal training from Mr. Jugal.

81. Further, the Respondent's assertion that she was already fully trained with a Masters of Science degree in Embryology before joining the Claimant's employment is inconsistent with the record. I say so for the reason that the Respondent forwarded her transcripts with respect to her Masters in Science

Clinical Embryology to Ms. Sweata on 15th March 2022. Indeed, it was pursuant to this academic achievement that the Respondent's salary was reviewed upwards to Kshs 120,000.00 effective 1st April 2022.

82. It is common ground that the Respondent resigned from the Claimant's facility on 16th May 2023. Evidently, this was before the expiry of the 36 months stipulated under clause 10.3.2 of the Contract of Employment dated 1st December 2020.

83. The question that this Court must now answer is whether the Claimant breached the aforementioned Clause 10.3.2 of the Contract of Employment hence liable to repay the prorated training costs for the training she received. Differently expressed, is the training bond clause contained in the Respondent's Contract of Employment enforceable?

84. Discussing the enforceability of an employment bond, Abhinav Benjamin in his literary piece "The Legality of Employment Bond Contracts" opines that an employment bond agreement should be reasonable with respect to two (2) aspects: first, the time period for which the employee has to remain with the employer and second, the compensation payable by the employee on the breach and termination of his contract.

85. On the first aspect of reasonableness, the time period should be reasonable in that the employer cannot force the employee to work for them for years on end. As such, where an employment bond imposes an excessive time period of mandatory employment, the same will be deemed unreasonable and tantamount to an unfair labour practice, which the Court will not condone. In such a case, the Court will not validate a training bond.

86. On the second aspect of reasonableness, the compensation payable by the employee should be adequate and not overly compensate the employer for the cost suffered due to the breach. In this regard, where the damages payable upon breach are excessive enough to be considered a penalty, a court will usually not enforce the training bond clause.

87. To put it succinctly, reasonability is determined by taking into account the bonding period and the amount required to be paid in the event of breach.

88. It should also be appreciated that the relationship between employers and employees is a relationship between two unequals. In a contract of employment, the employer has more bargaining power than the employee, therefore rendering employees susceptible to grave unfair labour practices. This being the case, an employment bond is not a through pass for an employer without limitation.

89. In the case of Overland v Captain Raymond Jam (2015) 62 NLLR (Pt. 219) 525, the National Industrial Court of Nigeria had the occasion to determine whether a training bond could be enforced against a pilot who had changed employer and the consequences of breach of training bonds.

90. In that case, Overland Airways Limited, which is an airline that specialises in commercial and charter flights, sponsored one of its pilots by the name Captain Raymond Jam to undertake a training in the United States of America. Raymond signed two (2) training bonds, with the effect being that he was to remain in the employment of the Airline for 36 months and 12 months, respectively. Raymond gained new qualifications from his training, which included obtaining new licenses.

91. However, despite the terms of the training bonds, Raymond resigned from the Airline while the bond remained in effect. Consequently, the Airline sued Raymond to recover the cost of sponsoring his training. He argued that the training bonds were void and unenforceable because they constituted a restraint of trade and an unfair labour practice. On the other hand, the Airline claimed that the training bonds were entered into freely by both parties and were necessary for the protection of its business

interests. The Court found in favour of the Airline and held that the training bonds were enforceable and did not constitute unfair labour practices.

92. The Court took a similar position in the case of Overland Airways Ltd v. Oladeji Afolayan & Anor [supra].

93. In the case of Satyam Computer Services Limited v Ladella Ravichander MANU/AP/0416/2011, the City Civil Court of Appeal in India upheld the validity of an employment bond and partly allowed the appeal on the basis that compensation payable as per the contractual agreements was excessive. Accordingly, the Court reduced the compensation to a reasonable amount.

94. Drawing parallels with the above persuasive precedents, this Court is of the considered view that in the instant case, the bonding period of 36 months, which is equivalent to three (3) years, is reasonable.

95. Similarly, the Court finds the bond sum stipulated under Clause 10.3.2 of the Contract of Employment to be reasonable. This finding is informed by the direct and attendant costs incurred by the Claimant in engaging the Consultant Clinical Embryologist.

96. As per the Consultancy Agreement, the Consultant engaged by the Claimant herein was to be paid the sum of Kshs 450,000.00 per month. In addition to the monthly consultancy fee, the Claimant was to provide the Consultant with accommodation during the training period, transport to and from work or a car, internet connection, special pass to allow him work in Kenya and return economy class flight from the most convenient port of entry from India to Nairobi and back.

97. Therefore, in view of the training investment made by the Claimant for the Respondent's training, the Court does not find it unreasonable to require the Respondent to pay the prorated amount of Kshs 2,000,000.00.

98. All in all, the Court finds and holds that Clause 10.3.2 of the Contract of Employment is enforceable against the Respondent.

99. As the contract of employment subsisted between 1st December 2020 to 16th May 2023, when the Respondent tendered her resignation from employment, it is evident that she worked for the Claimant for 30 months, which is less than the 36 months stipulated in the contract of employment. Since the bond period was 36 months, it follows that when prorated, the recoverable training costs for the remainder bond period of six (6) months is Kshs 333,333.00. That is the extent of the Respondent's liability with respect to the training bond.

100. The second relief sought by the Claimant against the Respondent is with respect to notice pay.

101. It is the Claimant's case that the Respondent resigned from employment without issuing three (3) months' notice or paying salary in lieu of notice.

102. Revisiting the Contract of Employment, it is apparent that under Clause 11.2, either party could terminate the contract by giving the other party three (3) months written notice or paying salary equivalent to three (3) months in lieu of such notice.

103. As can be discerned from the Respondent's letter of resignation, her resignation was with immediate effect. It is therefore evident that she did not issue the Claimant with the stipulated notice period of three (3) months as required under Clause 11.2 of her Contract of Employment. In addition, there is no evidence that she paid the Claimant salary equivalent to the notice period.

104. The bottom line is that the Respondent did not comply with Clause 11.2 of her Contract of Employment, hence the Court finds that the Claimant is entitled to recover from the Respondent, salary equivalent to the notice period being three (3) months.

105. To this end, the claim for notice pay against the Respondent succeeds to the extent of Kshs 450,000.00.

Constructive dismissal?

106. In her Counterclaim, the Respondent has averred that her resignation was instigated by the Claimant as it created the most hostile, toxic and inhumane working environment. The particulars of toxicity as enumerated by the Respondent include; being shouted at while working by Ms. Sweata; being micromanaged by people with no skills in embryology; being made to work for odd and long hours with no pay; gaslighting by Sweata; being underpaid; being bombarded with threatening emails accusing her of all manner of ills and being threatened with possible litigation if she resigns, which she claims has now come to pass.

107. Disputing the Respondent's assertions, the Claimant has averred that the Respondent resigned voluntarily from employment and for personal reasons.

108. In light of the rival positions advanced by both parties, the key question that begs for an answer is whether the Claimant was constructively dismissed.

109. The Black's Law Dictionary (10th Edition) defines the term constructive dismissal to mean:

> "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."

110. In simple terms, constructive dismissal occurs when an employee resigns due to intolerable working conditions created by their employer, making the resignation effectively involuntary. Notwithstanding such a resignation, the employee can bring a claim against the employer for wrongful termination of employment.

111. Therefore, where an employee leaves a job owing to a hostile work environment or intolerable working conditions, there is said to be a constructive dismissal.

112. What constitutes a hostile work environment is a question of fact and includes but not limited to, reduction in compensation and benefits, demotion, harassment and discrimination, unreasonable transfers or changes in working location, ignoring working environment complaints, excessive changes in shifts and hours.

113. Further to the foregoing, unilateral breach of fundamental terms of an employment contract can be considered as a repudiatory breach, which makes the employee entitled to hold that he or she is no longer bound by the contract.

114. The Court of Appeal addressed the question of constructive dismissal, in the case of Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR, in which the learned Judges of Appeal proceeded to formulate the following as the guiding principles in respect of claims of constructive dismissal:-

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 the 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 repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.

115. Turning to the instant case, the record bears that the Respondent tendered her resignation from the Claimant's employment vide a letter dated 16th May 2023, whose contents I will reproduce hereunder for context purposes: -

> " Dear Sweata,
>
> I am writing to inform you of my immediate resignation from my position as an embryologist at Harley Street Fertility Centre. Please consider this letter as my formal notice of resignation.
>
> After careful consideration and personal circumstances that have recently arisen, I have made the difficult decision to resign.
>
> I am grateful for the opportunities and experiences I have had during my time at Harley Street Fertility Centre. I have learned a great deal and enjoyed working with the dedicated and talented team. I truly appreciate the support and guidance I have received throughout my tenure.
>
> Please let me know if you need my assistance in future, I will always be available to help.
>
> Thank you for understanding and cooperation.
>
> I wish Harley Street Fertility Center continued success in all its endeavors.
>
> Yours faithfully,
>
> Emma Sila."

116. Revisiting the principles formulated in the case of Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [supra] it goes without saying that the Respondent was to prove causation in that there is a causal link between the Claimant's conduct and the reason for her resignation.

117. A perusal of the Respondent's letter of resignation reveals that she cited personal circumstances as having informed her decision to resign. Indeed, she did not state the reason for her resignation as being the toxic and inhumane working environment she has now alleged in her Counterclaim.

118. Evidently, the issues the Respondent now attributes as being the cause for her resignation did not feature anywhere in her letter of resignation. As such, it is not apparent that the Respondent's

resignation was triggered by the toxic and inhumane working environment and more specifically, the instances she has enumerated in her Counterclaim.

119. Quite the contrary, the Claimant's tone in the letter of resignation was a positive one. She was grateful for the opportunities and experiences she had during her time with the Claimant. She also indicated that she had learned a great deal and enjoyed working with the dedicated and talented teams. The Respondent went ahead to appreciate the support and guidance she had received through her service.

120. Essentially, the Respondent's letter of resignation is in sharp contrast with the toxic working environment she has extensively described in her Counterclaim.

121. In the circumstances, I am led to conclude that the reasons now being advanced by the Respondent as being behind her resignation are afterthoughts.

122. Needless to say, the Respondent did not prove that there was a causal link between her resignation and the working environment at the Claimant's facility.

123. All things considered, it is this Court's finding that the Respondent has not demonstrated to the requisite standard that her resignation from the Claimant's employment was involuntary and amounted to constructive dismissal.

Discrimination?

124. The Respondent has averred in her Counterclaim that she was discriminated against by the Claimant in that Mr. Jugal who she has described as a lab assistant, was treated well as he was of Asian descent and paid according to the industry standard. The Respondent contends that while Mr. Jugal was paid a salary of Kshs 450,000.00 per month, she was paid Kshs 110,000.00.

125. The Black's Law Dictionary, (10th Edition), defines the term "discrimination" to mean: "Differential treatment; a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."

126. By dint of Section 5(7) of the Act, the employer bears the burden of proving the fact that the discrimination did not take place as alleged and that the discriminatory act is not based on any of the grounds specified within that Section. This notwithstanding, the Respondent was first required to establish a prima facie case for discrimination in order for the burden to shift.

127. From the record, Mr. Jugal was engaged by the Respondent for three (3) months under a Consultancy Agreement to train the Respondent and Ms. Anaita Shah in the field of clinical embryology.

128. Therefore, the terms of engagement of Mr. Jugal were quite different compared to those of the Respondent who was engaged as an employee, and was required under the contract of employment to undergo formal training from a Consultant Clinical Embryologist.

129. Accordingly, it is evident that the Respondent and Mr. Jugal were not similarly situated and their circumstances were incomparable as to amount to discrimination.

130. Overall, the Court finds that the Respondent has not established a prima facie case of discrimination for the burden to shift.

Whether the Respondent is entitled to the reliefs sought in the Counterclaim

Notice pay and compensatory damages for unfair termination

131. The Court having found that the Respondent has not proved her claim for constructive dismissal, it follows that her claim for notice pay and compensatory damages for unfair termination cannot be sustained.

Overtime pay

132. The Respondent has sought to be paid overtime pay for two (2) hours for 28 months. It is worth noting that the Respondent's claim is global in nature, as she has not precisely stated the dates she worked beyond the hours prescribed by statute.

133. The Claimant on the other hand, exhibited the Respondent's time sheets showing the time she clocked in at work and the time she clocked out vis a vis her expected working hours. Consequently, the time sheets indicate the time the Respondent worked beyond her working hours hence earning her overtime and vice versa. Notably, the Respondent did not dispute the time sheets exhibited.

134. On this issue, the Court will follow the determination in the case of Rogoli Ole Manadiegi v General Cargo Services Limited [2016] KEELRC 1607 (KLR), where it was held that the employee, in claiming overtime pay, is not deemed to establish the claim for overtime pay by default of the employer bringing to Court such employment records. The Court further held that the burden of establishing hours or days served in excess of the legal maximum rests with the employee.

135. I will arrive at a similar finding and hold that the Respondent did not prove entitlement to this relief to the required standard, hence it falls.

Underpayment

136. Under this head, the Respondent has claimed the sum of Kshs 340,000.00. The Respondent did not, however, justify how she arrived at the said sum of Kshs 340,000.00 as her expected monthly salary.

137. Granted, the Respondent exhibited printouts obtained from a career website, indicating the average basic salary of an embryologist in the United States of America as being $ 100,638 and £48,199 in the United Kingdom. However, it should be appreciated that the wages in labour markets are determined by a complex interplay of factors, commonly influenced by varying levels of globalization, cost of living, government policies, economic development, supply and demand for labour and the influence and bargaining power of trade unions.

138. Fundamentally, each country has its own unique labour market structure, which can significantly affect the average wage payable in each industry. For instance, more developed economies generally have higher wages. Similarly, the minimum or average wage in countries with high costs of living tend to be higher.

139. For the foregoing reasons, it is incomprehensible to compare the average salary payable to an embryologist in the United States of America or the United Kingdom, which are more developed economies compared to Kenya, which is still a developing economy.

Unpaid leave

140. The Claimant has sought to be paid leave of 8.75 days. According to the Claimant, the Respondent had utilized her leave in excess of 2.61 days. It is notable that the records exhibited by the Claimant in this regard relate to the year 2021, hence not relevant for the computation of the Respondent's accrued leave at the time of her exit from employment.

141. On her part, the Respondent exhibited her leave records as of 18th March 2023, which indicate that she had 76.55 unutilized hours. As the Claimant was working for 8 hours per day, the said unutilized hours translate to 9.5 leave days.

142. As the Respondent left employment on 16th May 2023, and was entitled to 21 leave days per annum, it follows that by then, she had earned 8.75 leave days. Therefore, this means that as of the date she resigned from employment, the Respondent had utilized her leave days in excess of 0.75 days. This discounts the Claimant's assertions that the Respondent had overutilized her leave days by 2.61 days.

143. In view of the fact that the Respondent did not have outstanding leave days, her claim for 8.75 leave days cannot be sustained.

Unpaid Salary for days worked in May 2023

144. It is apparent from the record that the Claimant does not dispute that the Respondent is entitled to the salary for the days worked in the month of May 2023. As per the tabulations exhibited by the Claimant, this was in the sum of Kshs 83,835.00. As such, the Court finds that the Respondent is entitled to Kshs 83,835.00 under this head.

Orders

145. In the final analysis, the Court makes the following final orders;

a. The Claim is allowed in the sum of Kshs 783,333.00 being prorated training bond and three (3) months' salary in lieu of notice.

b. The Counterclaim is partly allowed and the Respondent is awarded the sum of Kshs 83,835.00 being salary for the days worked in the month of May 2023.

c. The sum in (b) above will be set off against the Claimant's total award of Kshs. 783,333.00, hence the final award due to the Claimant stands at Kshs. 699,498.00.

d. The final award shall attract interest at court rates from the date of Judgment until payment in full.

e. In view of the fact that the Claim has been allowed and the Counterclaim has partly succeeded, the Respondent shall bear 75% of the taxed costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2025.

.....

STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Ms. Nyakoa instructed by Mr. Wandati

For the Respondent Ms. Kioko instructed by Mr. Waigwa

Court Assistant Millicent

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 had 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 *Civil 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.