



Oyombe v Economic & Social Rights Centre (Haki Jamii) (Employment and Labour Relations Cause E553 of 2023) [2025] KEELRC 2303 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2303 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E553 OF 2023**

BOM MANANI, J

JULY 31, 2025

BETWEEN

SANDRA PHILISTA OYOMBE CLAIMANT

AND

ECONOMIC & SOCIAL RIGHTS CENTRE (HAKI JAMII) RESPONDENT

JUDGMENT

Background

1. The Claimant has instituted this suit alleging that the Respondent constructively dismissed her from employment. As such, she seeks the various reliefs that are set out in the Statement of Claim.
2. The Claimant contends that the Respondent employed her as a Program Manager – Land, Housing and Litigation with effect from 16th May 2022. She avers that the contract was for a fixed term of one year but was renewable.
3. The Claimant further avers that the contract required her to serve a probationary term of three months in the first instance. She avers that her salary per month during the probationary period was agreed at Ksh. 180,000.00.
4. The Claimant contends that the Respondent was to confirm her contract after the lapse of the probationary period. She further contends that the Respondent was to increase her salary to Ksh. 200,000.00 once the contract was confirmed.
5. The Claimant avers that the Respondent was to also provide her with other benefits including a medical cover and pension. She contends that the parties agreed that they were to both contribute to her pension. She avers that she was to contribute an amount that was equivalent to 10% of her salary per month and the Respondent was to match this contribution with an equal amount.



6. The Claimant contends that despite these provisions in the contract, the Respondent did not confirm her employment after the lapse of the probationary period. She further contends that the Respondent neither remitted her pension money nor increased her salary as had been agreed. She also contends that the Respondent failed to issue her with a medical cover.
7. The Claimant avers that she made several attempts to have these matters addressed by the Respondent but to no avail. Consequently, she contends that she was forced to tender her resignation from employment. As a result, she pleads constructive termination of her employment.
8. The Respondent does not admit the claim. It contends that although the contract between the parties provided for: increment of the Claimant's salary; enrolment of the Claimant to a medical scheme; and contribution to the Claimant's pension fund after confirmation of her contract, this was subject to availability of funds.
9. The Respondent further contends that there was no time limit within which it was to confirm the Claimant's employment, the relation between them having been for a fixed term. It avers that the lapse of the probationary period in the contract did not result in the automatic confirmation of the Claimant's employment.
10. The Respondent avers that the Claimant did not engage her line manager regarding confirmation of her contract. It contends that all the while, the Claimant directed her inquiries about the issue to the wrong individuals.
11. The Respondent further asserts that the various benefits mentioned in the Claimant's contract were to accrue after the contract was confirmed. It avers that since the contract was not confirmed, the benefits did not crystalize.
12. The Respondent avers that confirmation of the Claimant's contract was going to have immense implications on its finances. As such, it contends that only its Board of Directors could sanction the decision.
13. The Respondent contends that the Claimant did not raise any challenges she experienced whilst discharging her duties when the contract was at its prime. It contends that she only raised the purported challenges in her letter of resignation in a bid to create a non-existent cause of action after she realized that the contract was drawing to a close. As such, it (the Respondent) reads mischief in her action.
14. The Respondent avers that the Claimant voluntarily resigned from employment shortly before her contract was to expire on account of effluxion of time. It contends that she did not apply for the contract to be renewed. As such, it avers that she is not entitled to the reliefs that she seeks.
15. The Respondent contends that the Claimant having served to the tail end of her contract cannot turn around to claim constructive termination of the contract. In the Respondent's view, this is a mischievous attempt by the Claimant to, so to speak, reap where she did not sow.
16. The Respondent avers that it had a valid medical insurance cover which was taken in 2021. However, it alleges that just before it hired the Claimant, the medical insurance service provider was placed under statutory management. It contends that being a donor aided agency, it could not procure a new medical cover to substitute the earlier cover since it operates on a tight budget.
17. However, the Respondent avers that it entered into an arrangement with its members of staff under which it was to reimburse them money spent towards medication upon presenting proof of such expenditure. The Respondent avers that many of its members of staff embraced and utilized this arrangement.



18. The Respondent accuses the Claimant of having failed to perform her duties diligently. It contends that as a result of the Claimant's negligence, members of the public who were to benefit from its programs were unnecessarily inconvenienced.
19. The Respondent accuses the Claimant of having failed to do a proper handover after she resigned. It further accuses her of having failed to give a three months' notice of her intention to resign contrary to its Human Resource Manual. As such, it counter-claims for Ksh. 360,000.00 from her on account of notice pay.

Issues for Determination

20. After evaluating the pleadings and evidence on record, the following issues arise for determination:-
 - a. Whether the Claimant's contract was constructively confirmed after the lapse of the three months probationary period.
 - b. Whether the Claimant's contract was terminated unfairly on account of constructive dismissal.
 - c. Whether the Claimant is entitled to the various reliefs she claims through these proceedings.
 - d. Whether the Respondent is entitled to the reliefs it claims through the counter-claim.

Analysis

21. The evidence on record shows that the parties entered into a one year fixed term contract of service which was to run from 16th May 2022 to 14th May 2023. The contract had a probation clause which required the Claimant to work for three months before her engagement could be confirmed. There is no provision in the contract for extension of the probation period beyond the three months that were agreed on.
22. Section 42 of the *Employment Act* recognizes that parties to a contract of service can engage on probationary terms in the first instance. The provision caps the probation period to twelve months split into two equal portions of six months each.
23. An employer who wishes to include a probationary term in an employee's contract of service is entitled to do so for a maximum of six months in the first instance. This period may be extended by a further six months but only with the concurrence of the employee.
24. Although the law caps the first phase of a probationary contract to six months, parties to a contract of service have the liberty to agree on a lesser probationary term. Where this happens, the parties will be bound by the lesser term.
25. In the instant case, the parties agreed that the Claimant was to serve on probation for three months. As indicated earlier, they did not provide for extension of the term.
26. Further, there is no evidence that the Claimant agreed to extension of the probation period, if at all. As such, at the expiry of the three months' probation, the Respondent was duty bound to either confirm or terminate the Claimant's contract.
27. The Claimant's case is that the Respondent neither confirmed nor terminated her contract after she completed the probationary phase of her employment. Consequently, she contends that the contract is deemed to have been confirmed by operation of law.
28. On the other hand, the Respondent contends that it was under no obligation to confirm the Claimant's contract after the lapse of the three months since the contract did not set timelines for



such confirmation. In the same vein, the Respondent contends that the contract was not automatically confirmed upon the lapse of the probationary term.

29. The Respondent further argues that the Claimant's contract could only have been confirmed by its Board of Directors owing to the financial implication that come with confirmation of contracts of service. It contends that confirmation of the contract was subject to availability of funds to meet the Claimant's increased wages.
30. The Respondent also contends that the Claimant did not lodge her request for confirmation of the contract with appropriate personnel. It contends that she opted to deal with junior members of staff on the issue when she knew that they had no power to confirm the contract. As such, it contends that the contract was never confirmed.
31. As indicated earlier, the contract between the parties provided for a three months probationary term with not provision for extension of the term. Further, even if the Respondent was entitled to extend the term, there is no evidence that the Claimant gave her consent to such extension. In effect, the Respondent was bound to either confirm or discharge the Claimant from employment after the lapse of the three months.
32. The Claimant was under no obligation to request the Respondent to confirm the contract. The obligation lay with the Respondent to either confirm or discharge the contract. As such, the Respondent's contention that the Claimant did not seek confirmation of the contract from the appropriate personnel counts for nothing.
33. When the Respondent acquiesced to the Claimant's continued service after the probation period had lapsed, it impliedly confirmed her engagement. As such, her contract was constructively confirmed by operation of law.
34. Discussing the subject in his publication titled "*Employment Law Guide for Employers*" second edition, page 66, George Ogembo states as follows:-

"Probation cannot be extended for more than one year in aggregate. Upon the conclusion of the probationary period (or extended period as the case may be) and the employer does not expressly confirm or dismiss the employee, he automatically converts into a permanent employee. An employer should procure the consent of an employee for deferment of confirmation to a particular date not in excess of one year in aggregate.

An employee serving his probationary period has legitimate expectation that the employer will communicate on his status before the expiry of the probation period. Should there be no such communication and the employee continues working, the employer is estopped from re-opening up the issue of probation at a later stage since a presumption is made that the employee was confirmed upon expiry of the probation period."

35. The next issue relates to whether the Claimant's contract of service was improperly terminated on account of constructive dismissal from employment. Presently, statute law in Kenya does not address the issue of constructive dismissal from employment. The matter is, in large part, governed by case law.
36. Constructive dismissal from employment arises when an employee resigns from employment owing to an intolerable work environment created by the employer. Even though it is the employee who terminates the contract of service through his act of resigning from employment, the law considers that it is the employer who terminated the contract because of subjecting the employee to an intolerable work environment (see *Trustees of Archdiocese of Nyeri John Pope Paul II Huruma Health Centre v*



Wandeto (Employment and Labour Relations Appeal E006 of 2023) [2024] KEELRC 1250 (KLR) (13 May 2024) (Judgment)).

37. When an employer's conduct amounts to an implied repudiation of a fundamental term of the employment contract, the employee is entitled to plead constructive termination of the contract. As such, he may walk away from the engagement with or without notice to the employer (see Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] KECA 394 (KLR)).
38. In the instant case, the contract between the parties provided that the Respondent was to increase the Claimant's salary from Ksh.180,000.00 to Ksh. 200,000.00 after her contract was confirmed. In addition and after confirmation of the Claimant's contract, each of the parties to the contract was to contribute the equivalent of 10% of the Claimant's salary to her pension savings. Further, the Respondent was to place the Claimant on a functional medical cover.
39. The evidence on record shows that the Respondent did not confirm the Claimant's contract after the lapse of the probationary period. However, it let her to continue working thus impliedly confirming her employment. As such, the Respondent became obligated to: increase the Claimant's salary to Ksh. 200,000.00; set up the Claimant's pension scheme; and incorporate the Claimant into a functional medical scheme after her contract was confirmed by operation of law.
40. There is no evidence that the Respondent discharged this obligation under the contract. As a matter of fact, the Respondent does not deny that it did not increase the Claimant's pay to Ksh. 200,000.00. It further does not deny that it did not set up a pension fund for the Claimant.
41. Instead, the Respondent offers various justifications for its failure to comply with the foregoing requirements. First, it contends that it did not do so because the Claimant's contract was not confirmed. Second, it asserts that it did not effectuate the two benefits because their implementation was subject to availability of funds. By this, I understand the Respondent to be saying that the benefits were not operationalized because of absence of funds.
42. With regard to the medical cover, the Respondent asserts that when it entered into the contract of service with the Claimant, the staff medical cover it had procured had been suspended by the service provider's regulator without its knowledge. It denies responsibility for failure to provide the Claimant with a functional medical cover because it contends that its budget could not permit it to procure an alternative medical insurance service provider. However, it did not tender cogent evidence to anchor the alleged budgetary constraints.
43. The foregoing demonstrates that the Claimant did not live up to the terms of the employment contract between the parties. It failed to increase the Claimant's salary to Ksh. 200,000.00 after her contract was constructively confirmed. It failed to activate the proposed pension scheme for the Claimant and failed to release its agreed share of the pension remittances. It also failed to provide the Claimant with a functional medical cover.
44. The contract between the parties did not render the above benefits subject to availability of funds as asserted by the Respondent. The only items that were subject to availability of funds were: salary review above Ksh. 200,000.00; and renewal of the Claimant's contract. As such, the Respondent's assertion that the benefits were subject to availability of funds is unfounded.
45. As regards the medical cover, it is apparent that on 5th April 2022, a public notice was sent out communicating the placement of the Respondent's medical insurance provider under statutory management. As such, the Respondent is deemed to have had knowledge of this development when the said notice was issued to the public on the aforesaid date.



46. The evidence on record shows that the parties entered into the employment contract in May 2022 after the Respondent's medical insurance service provider had been placed under statutory management. Therefore, the Respondent was duty bound to provide the Claimant with an alternative medical insurance cover since the contract between them contemplated provision of medical insurance. The Respondent cannot plead inability to do so on account of events which occurred before the parties entered into the employment contract.
47. In effect, it is apparent that the Respondent breached the terms of the contract between the parties by failing to: give the Claimant a salary increment of Ksh. 20,000.00; provide the Claimant with a functional medical insurance cover; and activate the Claimant's pension scheme. Such breaches amounted to repudiatory breach of the Claimant's contract of service.
48. By this conduct, the Respondent demonstrated its reluctance to be bound by the terms of the contract between the parties. As such, the Claimant was entitled to walk away from the contract with or without notice and plead constructive dismissal from employment.
49. It does not matter that the Claimant walked away at the tail end of her contract. The fact of the matter remains that she still resigned within the term of the contract on account of the Respondent's repudiatory breach of her contract. As such, the court finds that the Claimant's employment was terminated on account of constructive dismissal from her employment.
50. The Claimant has sought various reliefs in the suit. These include: a declaration that her contract of service was unfairly terminated on account of constructive dismissal from employment; salary for the month of April 2023, underpayment of salary from August 2022 to March 2023; refund of money she spent in procuring a medical cover; payment of unremitted pension funds; compensation for unfair termination of her contract of service; a certificate of service; interest; and costs of the suit.
51. The court has already found that the Respondent constructively dismissed the Claimant from employment. It is so declared.
52. The Claimant prays for compensation for the unfair termination of her contract. It is noteworthy that she tendered her involuntary resignation from employment in April 2023, one month before her contract was to come to a close through effluxion of time. Although the contract had a renewal clause, there is no evidence that she had applied for its renewal as contemplated. As such and absent such application, the court finds that her contract was bound to terminate on 14th May 2023.
53. The Claimant cannot seek compensation for the unfair termination of the contract which is equivalent to her salary for twelve months when it is evident that the contract was terminated one month before it was due to terminate through effluxion of time. There is no basis for the court to grant such a remedy given that at the time the contract was irregularly terminated, there was no agreement between the parties that it was to be renewed.
54. Having regard to the foregoing, the Claimant can only claim compensation for unfair termination of the contract that is equivalent to one month's salary. As such, the court awards her the sum of Ksh. 200,000.00 being compensation for the unfair termination of her contract.
55. The Claimant also prays for her salary for the month of April 2023. However, since she only had one month to the closure of her contract and has been awarded compensation that is equivalent to that period, she cannot simultaneously seek an additional amount in the nature of salary for April 2023. If the court awards this sum, it will be sanctioning double compensation since the only lost time which the Claimant suffered and which has been compensated was one month. As such, the request for salary for April 2023 is declined on this account.



56. The Claimant has further claimed for salary underpayments for the period between August 2022 when her contract was constructively confirmed and end of March 2023 when she issued her notice of resignation. As pointed out earlier, the Respondent ought to have increased the Claimant's pay to Ksh. 200,000.00 after 16th August 2022. However, it continued to pay her Ksh. 180,000.00.
57. In effect, the Claimant was underpaid by Ksh. 20,000.00 per month for the aforesaid duration. As such, the court enters judgment for her for Ksh. 140,000.00 to cover salary underpayment for the aforesaid period.
58. The Claimant has prayed for the unpaid pension contributions from the Respondent. The contract between the parties was clear that the Respondent was to contribute an amount that is equivalent to 10% of the Claimant's monthly salary towards her pension. The fact that the Claimant did not contribute her portion cannot absolve the Respondent from discharging this obligation under the contract.
59. There is no evidence that the Respondent remitted the aforesaid amount to the proposed pension fund. As such, the court awards the Claimant the amount of Ksh. 180,000.00 to cover the Respondent's contribution to the fund.
60. The Claimant has prayed for reimbursement of the money she paid to an insurance provider to secure a medical cover after the Respondent failed to provide her with a functional medical cover. She provided proof of payment of Ksh. 124,761.00 to APA Insurance Company Ltd.
61. It is important to note that the Claimant spoke to this matter under oath. She said that although the receipts she tendered in evidence do not show that the payments were to secure a medical cover, this was the purpose of the payment. As such, the court believes her testimony in this respect.
62. The Respondent was under obligation to provide the Claimant with a functional medical cover. As such, it is under obligation to reimburse her the expenses she incurred in seeking alternative cover after it failed to discharge its obligation under the contract. In the premises, I enter judgment for the Claimant for the sum of Ksh. 124,761.00 being reimbursement of the amount she paid towards securing an alternative medical cover.
63. The amount awarded to the Claimant shall attract interest at court rates from the date of institution of the suit.
64. The amount is subject to the applicable statutory deductions.
65. The Respondent is ordered to provide the Claimant with a Certificate of Service.
66. The Claimant is awarded costs of the primary suit.
67. The Respondent has claimed from the Claimant an amount that is equivalent to her salary for three months in lieu of notice. However, this claim fails for a number of reasons.
68. First, although the Respondent's Human Resource Manual requires employees serving on fixed term contracts to give notice of three months to terminate their contract, the parties to the instant contract varied that requirement by reducing the period to one month. As such, it is not open to the Respondent to revert to the clause in the Human Resource Manual to demand for payment of three months' salary in lieu of notice.
69. Second, the Claimant's right to resign from employment on account of the intolerable work environment subsisted for the entire duration of the contract between the parties including on the last day of the contract. At the time she issued notice to resign in April 2023, the balance of her contractual



term under the contract was only one month. As such, it is not practicable to expect her to have given notice of three months.

70. Having resigned just about a month to the last day of her contractual term, the best she could do in the circumstances was to give notice which was equivalent to the balance of her term. As such, the court finds that the notice she gave was appropriate in the circumstances of the case.
71. Third, an employee who is leaving employment on account of constructive dismissal is entitled to leave with or without notice (see *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] KECA 394 (KLR)). As such, the Claimant was not duty bound to give the Respondent notice of her departure.
72. For the foregoing reasons, the court arrives at the conclusion that the Respondent's counter-claim is without merit. As such, it is dismissed with costs to the Claimant.

Summary of the Findings and Award

73. After evaluating the evidence on record, the court makes the following findings and attendant orders:-
 - a. The court finds that the Respondent irregularly terminated the Claimant's contract of service through constructive dismissal from employment.
 - b. The court awards the Claimant compensation for the unfair termination of her contract which is equivalent to her salary for one month, that is to say, Ksh. 200,000.00.
 - c. Since the balance of the Claimant's contractual term at the time her contract was terminated was one month and since she has been awarded compensation for this period, she cannot at the same time claim for salary for the remaining one month. To do so would be tantamount to seeking double compensation. As such, the claim for salary for April 2023 is declined on this account.
 - d. The Claimant is awarded underpaid salary of Ksh. 140,000.00.
 - e. The Claimant is awarded Ksh. 124,761.00 as reimbursement of the amount she expended towards securing alternative medical cover.
 - f. The Claimant is awarded Ksh. 180,000.00 on account of unremitted pension funds by the Respondent.
 - g. The court awards the Claimant interest on the amount awarded at court rates from the date of institution of the suit.
 - h. The amount awarded to the Claimant is subject to statutory deductions, where applicable.
 - i. The Respondent is ordered to issue the Claimant with a Certificate of Service.
 - j. The Respondent's counter-claim is dismissed.
 - k. The Claimant is awarded costs of both the primary suit and the counter-claim.

DATED, SIGNED AND DELIVERED ON THE 31ST DAY OF JULY, 2025

B. O. M. MANANI

JUDGE

In the presence of:



.....for the Claimant

.....for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

