



**Mokaya v Christ the King Parish & another (Cause 386 of 2015)
[2024] KEELRC 28 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 28 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 386 OF 2015
DN NDERITU, J
JANUARY 25, 2024**

BETWEEN

WINFRIDAH KERUBO MOKAYA CLAIMANT

AND

CHRIST THE KING PARISH 1ST RESPONDENT

CATHOLIC DIOCESE OF NAKURU 2ND RESPONDENT

JUDGMENT

1. In a further amended memorandum of claim dated 3rd February, 2022 filed through Maragia Ogaro & Co Advocates the claimant prays for: -
 - a. UnderpaymentsKshs.154,434,30/=
 - b. Unpaid salaries for 3 months.....Kshs. 40,843.35/=
 - c. Notice pay for constructive dismissal.....Kshs. 13,614.45/=
 - d. Compensation for constructive dismissal.....Kshs.163,373.40/=

Grand Total.....Kshs.372,265.50
2. Together with the claim was filed a verifying affidavit, a statement by the claimant, and a list and bundle of the listed documents in support of the claim.
3. In an amended memorandum of response to the further amended statement of claim dated 20th April, 2022, through Rodi, Orege & Co Advocates, the respondents pray that the claimant’s cause be dismissed with costs for want of merits. Several documents were annexed thereto which were produced



as exhibits during the hearing. A witness statement by Jimnah Kimani Mwangi (RW1) was also filed alongside the foregoing.

4. On 27th April, 2022 the claimant filed a reply to the amended response above reiterating the contents of the further amended claim and pleading that the cause be allowed as prayed. A further list of documents for the claimant was filed on 7th March, 2022 and a further witness statement by the claimant filed on 10th June, 2022.
5. This cause came up for hearing in open court on 24th January, 2023 when the Claimant (CW1) testified and closed her case. The defence was heard on the same day with RW1 testifying and the respondents' case was closed.
6. Counsel for both parties addressed and summed up their respective client's case by way of written submissions. Counsel for the claimant, Mr. Maragia, filed his written submissions on 30th March, 2023 while counsel for the respondent, Miss Kabalika, filed on 24th March, 2023. Counsel for the claimant filed supplementary submissions on 30th March, 2023.

ii. The Claimant's Case

7. The claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by her Counsel, and the same is summarized as hereunder.
8. In her further amended memorandum of claim, the claimant pleaded that she was engaged by the respondents on 1st January, 2013 as a nursery school teacher in Hekima Nusery School, owned by the 2nd respondent but managed by the 1st respondent. As evidence of employment, the claimant annexed a letter dated 24th July, 2015, allegedly from the head teacher of the school, Jane W. Kariuki, confirming that she worked for the school and that she was professionally trained and qualified to teach as such.
9. The claimant pleaded that the engagement was verbal and that she started with a salary of Kshs.6,500/= in January, 2004 which was improved over the time to Kshs.7,860/= as at the time of her resignation on 30th July, 2015. It is the claimant's position that she was underpaid throughout the entire period of her employment and she alleges that her salary ought to have been in the scale of a junior clerk, or at the very least that of a general worker, in the relevant wage regulation orders/gazette notices. It is alleged that the claimant made numerous requests to have her salary reviewed in accordance with the applicable regulations but the respondents ignored and or neglected the said requests. It is alleged that one such request was made in writing but the same was not availed as evidence in court.
10. It is pleaded that in a bid to force the claimant out of employment the respondents failed, refused, and or neglected to pay the claimant her monthly salary for the months of May, June, and July, 2015 which prompted the claimant to issue a letter of resignation dated 30th July, 2015. To her surprise, it is pleaded, the claimant upon resignation was handed a pre-prepared certificate of service dated 24th July, 2015, which according to the claimant is evidence that the respondents deliberately refused to pay her salary in order to force her out of employment. It is pleaded that as at the time of resignation the claimant had served the respondents for 15 years (sic!). This cannot be true as between 2013 and 2015 is only a period of two years.
11. It is the claimant's position that her resignation was caused by the intolerable working environment created by the respondents and more so by the failure of the employer to meet the basic constitutional and statutory duty and obligation of paying her monthly salary as and when the same fell due and payable. It is the claimant's case that her resignation was a result of constructive dismissal by the respondents when they failed to pay her monthly salary.



12. In her oral testimony in court the claimant reiterated the contents of the pleading as summarized above and relied on her filed statement. She stated that she was employed by the respondents in January, 2013 and that her employment came to an end on 31st August, 2015 when her notice of resignation took effect. She reiterated and emphasized that she resigned as a result of frustration after she worked for three months without a salary.
13. She stated that she was not paid her terminal dues upon what she considers to have been constructive dismissal. She stated that the respondents issued a cheque of Kshs.23,820/= in April, 2017 when this cause was pending in court and the said sum was not adequate compensation and as such she rejected the same and instructed her lawyers to return the same to the respondents' lawyers.
14. She sought to clarify that her gross monthly salary was Kshs.8,400/= and the net was Kshs.7,900/= as at the time of dismissal.
15. She stated that she was a qualified teacher duly registered with the Teachers Service Commission (TSC); she produced her certificate of registration as evidence.
16. In cross-examination the claimant stated that she was an employee of the 2nd respondent under which the 1st respondent operates. She reiterated her evidence in chief as supported with the pleading.
17. She stated that she was issued with a TSC certificate of registration in 2014 as nursery school teachers were not registered as such prior to that date.
18. She stated that she was not given reasons for the failure by the respondents to pay her salary for three months. She clarified that she was in employment until 31st August, 2015 as that is when her notice of resignation took effect. She stated that the cheque issued to her by the respondent in the sum of Kshs.23,820/= was inadequate and that is why she rejected the same. She insisted that her resignation was due to frustration and amounted to constructive dismissal by the respondents.
19. It is on the basis of the foregoing that the claimant is seeking for the prayers set out in the introductory part of this judgment. The submissions by her counsel shall be considered in the succeeding parts of this judgment alongside those by counsel for the respondents.

III. The Respondents' Case

20. The respondents' case is expressed in the amended response to the claim, the oral and documentary evidence adduced through RW1, and the written submissions filed by their joint counsel. The respondents' case is summarized as hereunder.
21. In the filed amended response to the claim the respondents deny all the allegations levelled against them by the claimant and more so that they are liable for the alleged constructive dismissal of the claimant from employment. It is pleaded that the claimant resigned voluntarily and of free-will vide a letter dated 30th July, 2015. It is categorically denied that the claimant is entitled to the reliefs sought and it is urged that this claim be dismissed with costs.
22. It is pleaded that the employees, including the claimant, were informed and were aware of the financial difficulties that the respondents were experiencing which contributed to non-payment of salaries for the months of May, June, and July, 2015. It is pleaded that in July, 2017, while this cause was pending in court, the respondents forwarded a cheque for the salary arrears but the same was rejected by the claimant.
23. It is clarified that the claimant was an employee of the 2nd respondent who owns the school which happens to be situate within the 1st respondent's jurisdiction. It is categorically denied that the claimant



was underpaid at any point during her employment. However, the salary arrears for May, June, and July, 2015 are admitted.

24. In his testimony in court, which was by consent proffered for application in this cause and in Nakuru ELRC 387 of 2015 filed by Jane Wambui Kibe against the same respondents herein, RW1 testified that he was the human resource (HR) manager of the 2nd respondent from June, 2013 to May, 2022. His testimony was fashioned along the contents of the amended response to the claim and his filed witness statement. He also produced the documents filed by the respondents as exhibits 1 to 4.
25. He stated that the claimant was employed as a nursery school teacher and not a general worker or a junior clerk. He stated that there are no salary scales for nursery school teachers and that the pay was based on mutual agreement. It is stated that there was no complain of underpayment during the entire period of employment of the claimant. He admitted that the claimant was not paid salary for May, June, and July, 2015 due to financial challenges that faced the respondents emanating from low enrolment of students in the subject school. He alleged that the claimant and the other employees in the school were informed of the financial crisis that faced the respondents.
26. He admitted to the salary arrears for the three months above mentioned but stated that the cheque in settlement of the same was rejected by the claimant through her lawyer. He insisted that the claimant resigned voluntarily and of free-will and insisted that since the respondents were always ready and willing to settle the salary arrears the cause was filed prematurely and needlessly. However, he admitted that the cheque was sent two years after resignation and while the cause had already been filed and was pending in court.
27. In cross-examination, he admitted that there is no evidence availed in court to confirm that indeed the respondents were in financial strain at the time they failed to pay the monthly salary to the claimant or to confirm the alleged low enrolment in the school in 2015 or at all. He also admitted that the cheque in payment of salary arrears was issued in 2017, two years after the cause had been filed in court.
28. When questioned by the court the witness admitted that non-payment of salary creates a hostile environment such that if it results in an employee resigning the same may be viewed as constructive dismissal.
29. It is on the basis of the foregoing that the respondent is seeking that the cause herein be dismissed with costs. The submissions by counsel for the respondents shall be considered in the succeeding parts of this judgment alongside those by counsel for the claimant.

IV. Submissions By Counsel

30. In the written submissions counsel for the claimant identified three broad issues for determination – What was the status and nature of employment of the claimant by the respondents? Did the resignation of the claimant amount to constructive dismissal? Is the claimant entitled to the reliefs sought?
31. It is submitted, and rightly so, that it is not in dispute that the claimant was an employee of the respondents as a nursery school teacher for the period from January, 2013 to July, 2015. The evidence on record indicates that the claimant was at first employed as untrained teacher but was subsequently trained in a college apparently managed and or owned by the respondents. She was subsequently issued with a certificate of registration by the TSC in 2014. It is submitted, therefore, that the claimant was always engaged by the respondents as a nursery school teacher during the entire period of employment.
32. It is submitted that the attempt by the respondents to settle the salary arrears in 2017, when this cause was pending in court, is adequate evidence and proof that indeed the respondents failed, refused, and or neglected to meet their obligation as employers culminating in the constructive dismissal of the



claimant who was forced to resign. It is submitted that this is a classic case of constructive dismissal and the court is urged to find and hold as such.

33. Further, it is submitted that while the respondents had the option of declaring the claimant redundant, they failed to exercise and follow that lawful option and the consequent resignation by the claimant was out of frustration and the unbearable and intolerable working environment created by the respondents which amounted to constructive dismissal.
34. Counsel for the claimant has cited *Peter Kaburu Karanja V Kirinyaga Construction (K) Limited* (2020) eKLR and *Coca Cola East & Central Africa Limited V Maria Kagai Ligaga* (2015) eKLR in establishing the ingredients and circumstances that may constitute and or amount to constructive dismissal. It is vehemently submitted that failure by the respondents to pay the agreed monthly salary was such a fundamental breach of the contract and effectively ended the relationship by way of constructive dismissal.
35. The submissions on the reliefs shall be considered in a succeeding part of this judgment as hereunder.
36. Counsel for the respondents identified the only issue for determination by the court as – Whether the claimant is entitled to the reliefs sought. The other issues on terms of employment are impliedly admitted.

V. Issues For Determination

37. Upon thorough and careful examination and consideration of the pleadings filed, the oral and documentary evidence tendered from the claimant and RW1, and the submissions by counsel for both sides the court identifies the following issues for determination –
 - a. What was the nature of employment of the claimant by the respondents?
 - b. Was the Claimant constructively dismissed or did she resign voluntarily and of free-will?
 - c. Is the Claimant entitled to the reliefs sought in the claim?
 - d. Who meets the costs in this cause?

VI. Resignation Or Constructive Dismissal?

38. The terms of engagement of the Claimant by the Respondents are not in dispute. It is mutually admitted that the claimant was engaged by the respondents as a nursery school teacher from January, 2013 to July, 2015. The evidence on record is that she resigned for non-payment of her monthly salary for three months, May, June, and July, 2015. The evidence on record is that she resigned vide a letter/ notice dated 30th July, 2015 which took effect from 31st August, 2015.
39. As at the time of her resignation, the claimant was earning a net monthly salary of Kshs.7,860/=. It is not in dispute that no terminal benefits were paid to the claimant upon termination, let alone the salary arrears.
40. The elementary duty and obligation of an employee is to supply labour and obey lawful orders from the employer and those placed in authority by the employer. On its part an employer has a duty and obligation to allocate work to the employee and pay the wages, salaries, and remuneration for the labour supplied as agreed and as and when the same falls due and payable. It is also the duty of the employer to reduce an oral contract into writing – See Sections 7 – 10, & 17 of the *Employment Act* (the Act).
41. It is the evidence on record that the claimant worked for the respondents, with a good disciplinary record, for the period from January, 2013 to July, 2015. There is no evidence that the respondents



were experiencing financial challenges at the time they defaulted in paying the monthly salary to the claimant; there is no evidence of low enrolment in the school; and there is no evidence that the respondents contacted and or discussed the delay or non-payment of the monthly salary with the claimant.

42. Applying the principles set out by the Court of Appeal in *Coca Cola East & Central Africa Limited V Maria Kagai Ligaga (Supra)* to the evidence and the circumstances of this cause, it is clear and unambiguous that the claimant resigned due to the unilateral decision by the respondents not to pay her monthly salary for three consecutive months. Non-payment of salary to an employee who is working as expected and directed is such a fundamental breach of the contract of employment as it subjects an employee to unfair labour practices under Article 41 of *the Constitution*. Further, non-payment of salary or wages as and when the same falls due and payable subjects an employee to servitude, undue suffering, and indignity.
43. An employer who is unable to pay working employees shall take remedial measures at the earliest opportunity. Such an employer may negotiate on a mutually agreeable structure of offsetting such arrears or even declare the affected employees redundant under Section 40 of *the Act*.
44. It is therefore the finding and holding of this court that the resignation of the claimant was neither voluntary nor of free-will but was occasioned by the unbearable working environment that was created by the respondents through nonpayment of the monthly salary for three consecutive months as alluded to above. The respondents subjected the claimant to unfair working conditions and practices and failed to meet their legal obligations as employers. They breached a fundamental term of the contract.
45. The evidence of nonpayment of the said salaries is on record with the respondents even making a failed attempt to pay the same two years after termination in 2017 when this cause was pending in court. The court has no difficulties in declaring that the respondents by their conduct constructively dismissed the claimant as pleaded.

VII. Reliefs

46. Having held that the Claimant was constructively dismissed by the respondents for the reasons analyzed and alluded to in the foregoing part of this judgment, the court shall now consider each of the reliefs sought as hereunder.
47. Prayer (a) is for gross underpayments allegedly for the entire period of employment calculated at Kshs.154,434.30. It is important to note upfront that under Section 90 of the Act the court can only remedy employment and labour relations wrongs falling within three years of the cause of action. The evidence on record is that the resignation of the claimant took effect from 31st August, 2015. Counting backwards, the court can only remedy wrongs arising from August, 2012 to the date of resignation. This means that all the claims and reliefs by the claimant are within the three-year limitation period and thus justiciable.
48. However, there is an issue raised by counsel for the claimant that calls for attention and interrogation. In his submissions, counsel for the claimant has argued and urged that the claimant ought to have been paid in the category of a general worker, in the very least, as at all the material times no scale and regulation was specifically applicable to a nursery school teacher. It is submitted that the TSC was not employing nursery school teachers and did not provide for their registration. Counsel has argued that since the claimant was not working in the public service she ought to have been paid at least, in the minimum, as a general worker. It is submitted that paying the claimant below the minimum wage of a general work was unfair labour practice under Article 40 of *the Constitution*.



49. Counsel has cited *Ignatius Karingo & 4 Others V Star of Hope International School* (2022) eKLR to the effect that whatever is negotiated between teachers in private sector should not go below the minimum wage in the public sector. Counsel has submitted the relevant wage regulation gazette notices pleading that the claimant ought to have been paid at least the minimum wage of a general worker.
50. Counsel for the respondents cited the same decision above in support of the argument that since there is no applicable notice on salary payable to nursery school teachers in the private sector, the salary was based on a valid and negotiated monthly salary between the claimant and the respondents. It is submitted that there is no evidence that the claimant complained of underpayment at any point during her employment and as such the claim now in court is an afterthought intended to unjustly enrich herself. The court is urged and dissuaded from interfering with the mutual contract that existed between the parties in regard to the salary agreed and paid over the time of subsistence of the employment relationship. It is further submitted that the claimant's salary was improved from time to time over the period of employment from the starting monthly salary of Kshs.6,500/= in 2013 to the last of Kshs.8,400/= in 2015.
51. In his supplementary submissions counsel for the claimant has insisted that *Ignatius Karingo Mghana & 4 Others V Star of Hope International Foundation* (*Supra*) cited by counsel for the respondents is distinguishable from the instant cause as the employees in that case were paid above the minimum wage of a general worker. It is submitted that it would be travesty of justice if this court was to uphold that it was okay for the claimant to be paid below the minimum wage of a general worker just because the claimant agreed on the same with the respondents.
52. The court has considered the arguments for and against the application of the minimum wage of a general worker to an employee whose minimum wage is not provided for, whether in public or private sector. It is no secret that the demand for jobs in our economy is overwhelmed by the surplus labour. There are many persons, young and old alike, without jobs notwithstanding that they hold papers but lack experience due to the limited opportunities. In those circumstances, it would be foolhardy to assume that the employers and employees may negotiate terms and conditions on an even platform. The pendulum is unfairly and undoubtedly tilted in favour of the employers due to the limited job opportunities. That is the mischief that the wage regulation guidelines and notices are intended to cure to avoid and eliminate exploitation and unfair labour practices involving unreasonably low wages and salaries and other unfair terms and conditions of employment. The government as a representative and agent of the sovereign has a duty and indeed an obligation to protect employees, and employers alike, whether in public or private sector from exploitation and unfavourable employment relations. It is on that basis that minimum wage regulations and guidelines are issued and published by the cabinet secretary in-charge of such matters.
53. In a skewed and uneven labour market the forces of demand and supply may not work as the limited job opportunities render the market distorted and the employers are likely, in a capitalistic market, to lower wages leaving the necessitous labourers scrambling over the few opportunities available. The wage regulations apply as guidelines for minimum wages payable both in public and private sector and as such where the minimum wage for a certain category is not specifically provided for, the scale for the general worker shall apply. It is dangerous and exploitative to leave the forces of the market to determine the payable wages to such categories as the employees shall suffer from unreasonably low wages.
54. Both counsel agree that as a nursery school teacher there was no specific category of wages that was applicable to the claimant. It is also agreed that for the material period, January, 2013 to August, 2015 the TSC did not engage nursery school teachers and as such the claimant had no specifically regulated



category of wages applicable to her. It is on this basis that counsel for the claimant is pleading that the category of a general worker be applied to her.

55. Justice is about fairness and as observed above the labour market in Kenya is uneven due to the limited opportunities and excessive supply of labour. It is for this reason and other circumstances alluded to above that this court is persuaded by the argument from counsel for the claimant that it shall be fair and just to apply the minimum wages of a general worker to the claimant. Certainly, the claimant did more than is expected of a general worker by impacting knowledge and discipline in young minds. The court shall therefore apply the minimum wages of a general worker to the claimant.
56. In regard to prayer (a), therefore, the claimant is awarded the underpayments from January, 2013 to August, 2015, calculated at Kshs.83,287/=.
57. Prayer (b) is for salary arrears for May, June, and July, 2015 based on the minimum salary for a general worker as argued above. It is not in dispute that the claimant was not paid for the three months and attempt to pay the same in 2017 was thwarted by the claimant as the cause was pending in court. The same is awarded as claimed at Kshs.40,843.35.
58. Prayer (c) is for notice pay following the constructive dismissal. It is also argued that the claimant remained on duty until 31st August, 2015. Either way, the claimant is awarded the notice pay at Kshs.13,614.45.
59. Prayer (ac) is for a declaration that the claimant was constructively dismissed by the respondents. This should have been the first prayer as any relief, including the foregoing, may only follow that declaration. However, the court found as much in a preceding part of this judgment and as such a declaration is hereby made as prayed.
60. Prayer (d) is for compensation for the constructive dismissal. The claimant is seeking the maximum compensation equivalent to 12 months' salary under Section 49(1)(c) of the Act. The factors that this court should consider in making an award under this head are catered for under Section 49(4) of the Act. As noted elsewhere in this judgment the claimant resigned following unconducive working environment created by the respondents who failed, refused, and or neglected to pay her monthly salary hence amounting to constructive dismissal as declared above.
61. The court has found and held that no evidence of misconduct was established against the claimant. The respondents have not expressed an interest in re-engaging the claimant. There is no doubt that the respondents treated the claimant in a most unfair and unlawful manner. The claimant was denied due process and there was no lawful reason for the constructive dismissal. She was denied an opportunity for growth and livelihood after serving the respondents for about three years.
62. Considering the entire evidence and circumstances of this cause, the court finds and holds that an award of six months' gross salary shall be fair compensation in the entire circumstances of this cause. The court awards compensation for constructive dismissal equivalent to six months gross salary calculated as – Kshs13,614.45 *6= Kshs.81,686.70. This award is subject to statutory deductions.

VIII. Costs

63. Costs follow the event and therefore the claimant is awarded costs of this cause. There is no reason for this court departing from this established principle.

IX. Disposal

64. In final disposal of this cause, this court issues the following orders: -



- a) A declaration be and is hereby issued that the resignation of the claimant was as a result of unconducive working environment created by the respondents amounting to constructive dismissal.
- b) The claimant is awarded a total of Kshs.219,431.50 made up as follows –
- i. Underpayments.....Kshs. 83,287.00
 - ii. Salary arrearsKshs. 40,843.35
 - iii. Notice payKshs. 13,614.45
 - iv. Compensation for constructive dismissalKshs. 81,686.70
- TotalKshs.219,431.50
- c) Costs of the cause to the claimant.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 25TH DAY OF JANUARY 2024.

DAVID NDERITU

JUDGE

