



**Diella v Jet Spa Limited (Cause E642 of 2022)  
[2024] KEELRC 356 (KLR) (23 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 356 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E642 OF 2022  
SC RUTTO, J  
FEBRUARY 23, 2024**

**BETWEEN**

**JADA DIELLA ..... CLAIMANT**

**AND**

**THE JET SPA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant avers through her Statement of Claim dated 7<sup>th</sup> September 2022, that she was employed by the Respondent as a Spa Manager with effect from 1<sup>st</sup> August 2021. She avers that she dutifully and satisfactorily performed her duties as a Spa Manager in accordance with the employment contract. According to the Claimant, the Respondent failed to fulfill its contractual obligations and made inconsistent and incomplete payments of her monthly salary.
2. It is her case that on 29<sup>th</sup> March 2022, the Respondent prevailed upon her to resign. She contends that as a result of the procedural and substantive infractions on the law, the Respondent unfairly terminated her employment contract. On account of the foregoing, the Claimant has sought the following reliefs against the Respondent:
  - a. A declaration that the Claimant has the right to be treated fairly and justly, fair access to justice and equal protection of the law.
  - b. A declaration that the termination of the employment was constructive, wrongful, unfair and in breach of the *Employment Act* 2007.
  - c. A declaration that the actions of the Respondent violated the Claimant’s constitutional right to fair labour practices.
  - d. An order directing the Respondent to issue the Claimant with a Certificate of Service.
  - e. Kes 300,000 being salary unpaid for the months of August and September 2021.



- f. Kes 637,444 on account of salary underpayment for being Kes 132,000, Kes 126,972, Kes 28,972, Kes 68,500, KES 140,000 and Kes 141,000 for the months of October 2021 to March 2022, respectively.
  - g. Kes 1,800,000 being the equivalent of 12 month's salary on account of unlawful termination.
  - h. Kes 279,375 on account of pro-rated leave days earned but unpaid.
  - i. Kes 2,000,000 being her entitlement for the use of her image.
  - j. Kes 150,000 on account of 1 month's salary for payment in lieu of notice.
  - k. Kes 1,000,000 being compensated for breach of the Claimant's rights to fair labour practices.
  - l. Costs of this Cause.
  - m. Interest on the sums in prayers (e) (f) (g) (h) (i) (j) and (k) until payment in full.
3. The Respondent did not enter appearance nor file a Defence despite being served with the Notice of Summons and Statement of Claim.
  4. In this regard, the Claimant filed an Affidavit of Service sworn by one Silvester Kitheka on 23<sup>rd</sup> September 2022, confirming that he had effected service of the Notice of Summons and Statement of Claim upon the Respondent. Subsequently, the Court being satisfied with the return of service, certified the matter undefended and the same was set down for formal proof hearing on 14<sup>th</sup> November, 2023.

#### **Claimant's Case**

5. The Claimant testified in support of her case and at the outset, sought to adopt her witness statement and the list and bundle of documents filed together with her Claim, to constitute her evidence in chief.
6. It was the Claimant's evidence that sometime in August 2021, the Respondent represented to her that it was in the process of setting up a new luxury spa in Kenya and was willing and capable of employing her. She placed reliance on the Respondent's representations, attended recruitment interviews, was offered and accepted employment with the Respondent as a Spa Manager with immediate effect for an agreed gross monthly salary of Kshs 150,000.00.
7. She further stated that the Respondent informed her that it would conduct staff trainings from September 2021 incorporating international brands such as Barbor, LCN and ChiDesk, and thereafter commence operations from October 2021.
8. Among the salient terms of the employment contract were that the contract would commence on 1<sup>st</sup> August 2021 and that the Respondent would pay her the sum of Kshs 100,000.00 for the first 3 months and then Kshs 150,000.00 thereafter. This was exclusive of house allowance among other allowances and benefits.
9. She dutifully and diligently attended the trainings, and despite the fact that the Respondent did not commence its main operations as expected, she facilitated the preparatory operations. She dedicated all her time and energy to the Spa despite a number of unfulfilled promises.
10. The Claimant further averred that the Respondent neglected, failed and/or refused to execute her contract but employed her on a monthly salary basis.



11. It was her further testimony that the Respondent only made some inconsistent and incomplete payments, some through their Equity Bank Mobile platform, Absa Bank mobile platform, or directly through their staff members – Samuel Gathia, Cheril Okoth, Cecilia Murumbi and Faith Imbili, while some payments were made in cheque or cash by Louis Pamba, Geoffrey Birundu or the Accountant.
12. That on or around 29<sup>th</sup> March 2022, the Respondent prevailed upon her to resign, after failing to fulfill the payment obligations for over 5 months, and after she had raised her concerns. These concerns included inter alia missing salary payments for the months of August and September 2021 and unexplained deductions to the salary paid for other months.
13. That upon her resignation, the Respondent restricted access to the company email address through which she had sent her resignation hence could not present the said resignation to the Court as evidence.
14. She further stated that during her employment, the Respondent used her image for its advertisements, without her prior consent.

### **Submissions**

15. It was submitted on behalf of the Claimant that she was constructively dismissed hence the termination of her employment was unfair. It was further submitted that the Respondent neglected to pay the Claimant her full salary for the first month and in various months that followed. That as such, she was frustrated and this led to her resignation. In support of the Claimant's case, reliance was placed on several authorities including *Herbert Wafula Waswa v Kenya Wildlife Services (2020) eKLR*, *Godfrey Allan Tolo v Tobias O. Otieno & another (2022) eKLR* and *John Kiningi v Damco Logistics Limited (2021) eKLR*.

### **Analysis and Determination**

16. Flowing from the pleadings before Court, the evidence on record and the Claimant's submissions, the issues falling for the Court's determination are: -
  - i. Whether the Claimant was constructively dismissed; and
  - ii. What reliefs if any, avail to the Claimant?

### **Constructive dismissal?**

17. It is the Claimant's case that the Respondent prevailed upon her to resign from employment hence she was constructively dismissed. She has further averred that the Respondent paid her incomplete salary and in a manner that was inconsistent.
18. In support of her case, the Claimant exhibited copies of her Mpesa statement, bank statement and a payment voucher bearing the Respondent's name.
19. From the records exhibited, it is evident that the Claimant's salary was not paid in full and even so, the payments were made in a manner that was quite sporadic. As stated herein, the Respondent did not file a Defence nor participate in the trial hence the Claimant's evidence was uncontroverted.
20. Constructive dismissal arises when an employee terminates his or her employment because of frustration by the employer. This may occur by the employer breaching fundamental terms of the employment contract or making the environment at work unbearable to the employee, thus forcing the employee to terminate the contract.



21. In the case of Coca cola East & Central Africa Limited vs Maria Kagai Ligaga [2015] e KLR, the Court of Appeal cited with approval the English case of Western Executive (ECC) Limited v Sharp [1978] 1 CR 222 in which Lord Denning held that: -

“If the employer is guilty of conduct which is a significant breach that goes to the root of the contract of employment or which shows that the employer no longer intends to be bound by the one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice.”

22. Applying the above determination to the instant case, it is clear that the Respondent’s conduct of underpaying the Claimant’s salary amounted to repudiation of a fundamental term of the employment contract.

23. The duty of the employer to compensate an employee for services rendered is a cardinal rule in any employment relationship. This position which is aptly captured under Section 17(1) of the *Employment Act*, reads as follows;

Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service...

24. It is therefore apparent that the Respondent not only breached the employment contract when it withheld part of the Claimant’s salary but also breached a mandatory statutory provision.

25. Needless to say, the Respondent’s conduct went to the root of the employment contract and it was a clear indication that it no longer intended to be bound by the essential terms of the contract of employment. Therefore, the Claimant was entitled to treat herself as constructively dismissed.

26. In light of the foregoing, I arrive at the inevitable conclusion that the Claimant was unfairly and unlawfully terminated from employment through constructive dismissal.

## Reliefs

27. As the court has found that the Claimant’s termination was unfair and unlawful on account of constructive dismissal, she is entitled to compensatory damages under Section 49 of the *Employment Act*, 2007. To this end, the Court awards her damages equivalent to four (4) months of her gross salary. This award has taken into account the length of the employment relationship as well as the conduct of the Respondent leading to the termination of the employment contract.

28. The Claimant is also entitled to one (1) month’s salary in lieu of notice as the Court has found that her termination through constructive dismissal was unlawful.

29. The Claimant is further entitled to the sum of Kshs 637,444.00 being the amount due to her on account of salary underpayment. In the same vein, the Claimant is entitled to unpaid salary for the months of August and September 2021 there being no evidence that the same was paid.

30. The Claimant is further entitled to leave pay for the six-month period she served the Respondent.

31. The Claimant has also averred that the Respondent used her image to market their services without her consent. In support of her case, the Claimant exhibited copies of the Respondent’s brochures and pamphlets bearing images which she claimed were hers. This position was not controverted by the



Respondent noting that it did not file a Defence nor participate in the trial. This being the case, the Claimant is entitled to damages which the court assesses at Kshs 1,300,000.00. In arriving at this award, I have considered several authorities. Case in point is Ann Njoki Kumena v KTDA Agency Ltd [2019] eKLR in which the Plaintiff was awarded general damages of Kshs.1,500,000.00, N W R & another v Green Sports Africa Ltd & 4 others [2017] eKLR in which the Plaintiff was awarded general damages of Kshs.750,000.00 and further, Wangechi Waweru Mwendu v Tecno Mobile Limited; Rogers Ouma t/a Ojwok Photography (Third Party) [2020] eKLR, where the Court awarded damages to the Plaintiff in the sum of Kshs 500,000.00 having taken into account that the Plaintiff is a singer, songwriter and rapper and has previously endorsed campaigns and brands for different corporate entities.

32. The Claimant has further sought damages for breach of her right to fair labour practices. As I have found herein, the Respondent underpaid the Claimant's salary without lawful justification. The Respondent's action constituted an unfair labour practice and was in essence, a violation of Article 41(1) of *the Constitution*. This is further taking into account the fact that the actions and omissions of the Respondent exposed the Claimant to pecuniary embarrassment and other attendant consequences. Accordingly, she is entitled to compensation.

### Orders

33. In the final analysis, I enter Judgment in favour of the Claimant against the Respondent in the following manner: -
- a. A declaration that the Claimant was constructively dismissed from employment by the Respondent hence was unfairly terminated.
  - b. A declaration that the Respondent violated the Claimant's right to fair labour practices.
  - c. The Claimant is awarded one month's salary in lieu of notice being the sum of Kshs 150,000.00.
  - d. The Claimant is awarded compensatory damages in the sum of Kshs 600,000.00 which sum is equivalent to four (4) months of her gross salary.
  - e. The Claimant is awarded the sum of Kshs 200,000.00 being unpaid salary for the months of August and September.
  - f. The Claimant is awarded the sum of Kshs 637,444.00 being salary underpayments from the month of October 2021 upto March 2022.
  - g. The Claimant is awarded the sum of Kshs 52,500.00 being unpaid leave for six (6) months.
  - h. The Claimant is awarded the sum of Kshs 1,300,000.00 being compensation for unauthorized use of her image.
  - i. The Claimant is awarded the sum of Kshs 500,000.00 being compensation for breach of her right to fair labour practices.
  - j. The total award is Kshs 3,439,944.00.
  - k. Interest on the amount in (j) at court rates from the date of Judgment until payment in full.
34. The Claimant shall also be entitled to a Certificate of Service in line with Section 51(1) of the *Employment Act*. This shall be issued within 30 days from the date of this Judgment.
35. The Claimant shall have the costs of the suit.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2024.

.....

STELLA RUTTO

JUDGE

**Appearance:**

For the Claimant Ms. Dave

For the Respondent No appearance

Court Assistant Millicent Kibet

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

STELLA RUTTO

JUDGE

