



**Kinyua v Catholic Diocese of Maralal (Through Registered Trustees)
 & another (Employment and Labour Relations Cause E044 of 2022)
 [2024] KEELRC 249 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 249 (KLR)

**REPUBLIC OF KENYA
 IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
 EMPLOYMENT AND LABOUR RELATIONS CAUSE E044 OF 2022
 HS WASILWA, J
 FEBRUARY 15, 2024**

BETWEEN

DAVID GICHINI KINYUA CLAIMANT

AND

**CATHOLIC DIOCESE OF MARALAL (THROUGH REGISTERED
 TRUSTEES) 1ST RESPONDENT**

**STEVE LEKASUYAN, THE ADMINISTRATOR, CATHOLIC DIOCESE OF
 MARALAL 2ND RESPONDENT**

JUDGMENT

1. The claimant herein instituted this Suit by a Memorandum of claim dated 1st December, 2022, claiming to have been constructively dismissed by the Respondents by being forced to resign. He prayed for the following reliefs; -
 - a. A declaration do issue that the constant harassment and demands from the 2nd Respondent aimed at coercing the claimant to resign from his position of employment without according him a fair hearing and lacking in proper administrative procedure was unfair and amounted to constructive dismissal.
 - b. A declaration do issue that the constructive dismissal of the claimant’s employment without according him fair hearing and lacking in proper administrative procedure was unfair, consequently void.
 - c. Damages for unfair termination.
 - d. An order do issue directing the release of any money, contributions or remittances due and owing to the claimant by virtue of his employment.



- e. Unpaid salary for the period between January, 2022 to September 2022 being Kshs 283,800 plus interest at Court rates from 30th September, 2022 until payment in full.
- f. 2½ days unpaid leave earned but not taken being Kshs 9,067 plus interest at Court rates from 30.9.2022 until payment in full.
- g. Gratuity earned but unpaid as of 30th September, 2022 being Kshs. 65,738 plus interest at Court rate from 30.9.2022 until payment in full.
- h. Severance pay for the period of 7 years of service being Kshs 306,779 plus interest at Court rate from 30.9.2022 until payment in full.
- i. Gross salary payable for the remainder of the period of the contract of employment being Kshs 1,631,985.
- j. Gratuity payable for the 25 months being Kshs 109,563.
- k. A certificate of service for the period of employment for a period of Five (5) years and Nine(9) months from 2017 to 2022.
- l. Costs of the suit be provided for.
- m. Any other relief that the court may deem fit to grant.

Claimant's case.

2. The claimant stated that he was employed by the 1st Respondent in 2017 and deployed to work in Maralal Catholic Secretariat office. He stated that his contracts were renewed on yearly basis, however after working for about 4 years for the Respondents, he was issued with a three-year contract commencing January, 2021 to 31st December, 2023 to work as the 1st Respondent's Chief Finance Officer(CFO) earning a monthly gross salary of Kshs 98,000.
3. He stated that, he worked diligently and with a lot of Zeal and Zest, causing the Respondent to renew his contract every time it expired. He stated that in January, 2022, the 2nd Respondent was taken up as the Finance Administrator of the 1st Respondent. Upon taking over the said office, the 2nd Respondent reduced the claimant's gross salary from Kshs 98,000 to Kshs 53,000 effective February, 2022. Further that he began harassing the claimant and demanding for his resignation with indication that he had a person in mind to fill that position.
4. The claimant stated that he refused to resign and the 2nd Respondent, the Bishop and the Director of the 1st Respondent made a proposal to him to resign and promised him re-designation within the same Organization. The claimant demanded to be deployed first before tendering his resignation but the Respondents advised him against it stating that re-designation cannot be done when he is still in the said position.
5. He stated that a lot of pressure was mounted on him to resign and on 16th August, 2022, he received an email from the 2nd Respondent, titled "LAST REQUEST", which gave him an ultimatum to resign by 17th August, 2022.
6. Due to the unrelenting demands, harassment and pressure from the 2nd Respondent, Bishop and the Director, the claimant bowed out and resigned, however that the Respondents did not keep its word of re-designating him and instead he was given 30 days to handover his services to the Human Resource department because no one had been hired at the time of his termination.



7. He contends that the termination of his services amounts to constructive termination and that no reason was given for the said termination.
8. He stated that in the last days of his services he was not given time to clear until the very last day when he was given the form by Linda Lengees from the secretariat office. Upon receiving the clearance forms, he went to each office/ department to clear and hand over the form to the said Linda Lengees. Subsequently, he was paid Kshs. 250,000 but the balance has not been paid to date.
9. It is the claimant's Case that after the said termination, he received communication from the 2nd Respondent, demanding him to go back and mentor/orient the new CFO, failure to which he would not be paid his terminal dues.
10. The claimant maintained that his termination was done in violation of his rights under Articles 47 and 50 of *the Constitution* and Sections 44 and 45 of the *Employment Act*. He added that the reason for termination was never disclosed and he was not subjected to any disciplinary process.
11. He avers that the unexpected and unprecedented termination has caused him mental anguish and economical embarrassment as he had several financial obligations, which he is no longer able to meet.
12. The claimant reiterated that the Respondents unilaterally reduced his monthly gross salary from Kshs. 98,000 to Kshs 53,000 from January, 2022 to September, 2022, therefore that the Respondent owes him salary in arrears for these months amounting to Kshs 208,995. He elaborated that in May, 2022, their salary was increased by 12% hence the salary for the months of May, 2022 to September, 2022 ought to have increased from Kshs 98,000 to Kshs 108,799.
13. He also prayed for payment of leave earned but not taken of 2 ½ days of Kshs. 9,067. Additionally, that he earned Gratuity from the months of January, 2022 to September, 2022 of Kshs 65,738 which was not paid.
14. The claimant urged this Court to compel the Respondent to pay him all the salary he would have earned, has he stayed in employment until his contract expired in December, 2023, adding up to Kshs 1,631,985 and Gratuity for these period of Kshs 109,563 all adding up to Kshs 1,741,549. He prayed further for severance pay for the 7 years worked of Kshs 306,779.
15. The claimant stated that he reported the termination to the labour office by the letter dated 18/10/2022 but this was in vain and the further demand letter dated 8.11.2022 was served on the Respondents but they held their stand.
16. During hearing, the claimant testified as CW-1 and adopted his statement of 18.12.2022. In summary he testified that he was first employed by the Respondent on 1st January, 2017 as an accountant on contract terms with the last contract issued on the 1st January, 2021 for three years but that he was forced to resign before the end of his contract. He told this Court that he sued the 2nd Respondent because he was the Finance Administrator of the 1st Respondent and the person that forced him to resign.
17. He testified that he used to earn Kshs 98,000 until January, 2022 when the Respondent informed him that the diocese does not have money to keep paying him the said amount and unilaterally reduced his gross pay to Kshs 53,000. He told this Court that the 2nd Respondent was the one that mounted pressure on him to resign and therefore that he did not resign voluntarily. He testified further that he was given a cheque of Kshs 250,000 after clearing from the Respondents' employment and maintained that he cleared properly and handed over his clearance form to Linda Lengees.
18. Upon cross examination, he testified that the reduction of salary was made in January, 2022, which he did not write a formal complaint on. That he was forced to resign which he did on the 17.8.2022 and



was given a cheque of Kshs 250,000 being part of the salary arrears. He stated that he had listed several conditions to be fulfilled before he resigned but none was met by the Respondents. He admitted that he did not sign a new contract after the 12% salary increase made at Labour day.

Respondents' case

19. The Respondent's entered appearance on the 22nd March, 2023 and filed a Response to claim on 29th March, 2023 admitting to employing the claimant as its first employee on several contracts as outlined in the claim. They also admitted that the claimant was earning a gross salary of Kshs 98,000 subject to statutory deductions.
20. The Respondents, however, state that the claimant voluntarily resigned from employment as such the allegations of harassment and pressure to resign is farfetched. Further that the allegations that the resignation was subject to re-deployment is not true.
21. The Respondents stated that the claimant did not clear from the 1st Respondent but handed over a blank clearance form to the Human resource department, claiming that he would return to clear. That the failure to clear, curtailed the issuance of the certificate of service and remittance of any monies owing to the claimant.
22. The Respondent maintained that the termination of the claimant's contract is as a result of voluntary resignation which does not require the Respondent to subject the employee to any hearing. Further that the contents of alleged constructive termination have not been established.
23. On the prayers sought, the Respondents stated, with regard to gratuity, that an employee is only entitled to gratuity upon completion of the contract or termination of the same by the employee and therefore since the claimant resigned, he is not entitled to Gratuity.
24. On the prayers for compensation and leave, the Respondents stated that compensation claim is grossly overstated while the leave claim is not denied in entirety.
25. During hearing Rev. Father Stephen Likasuyan, the Finance Administrator and the 2nd Respondent herein testified as RW-1 and adopted his witness statement dated 18.4.2023. He then produced the Respondents' documents which were marked as Exhibit 1-5 respectively. He testified that he received a resignation letter from the claimant on 17.8.2022, which he accepted and had a meeting with the claimant and Bishop and they agreed to pay the claimant Kshs 500,000 as terminal dues, and on 11.10.2022, he issued the claimant with a cheque of Kshs 250,000 leaving a balance of Kshs. 250,000. He maintained that there was no discussion of deployment of the claimant. He stated that they had a meeting in the diocese with the Bishop and the claimant and another one in Nairobi and the cause for resignation was Integrity issue raised in on the diocese, which the claimant voluntarily resigned without any coercion.
26. Upon cross examination, the witness testified that he came to the diocese in November, 2021 and at that time the claimant was serving an ongoing contract. He admitted that in January, 2022, they paid the claimant half of his salary but that there was no amended contract issued. He testified further that after termination, the parties had a meeting and it was agreed that the claimant would be paid Kshs 500,000, which they paid Kshs 250,000 and the balance has not yet been remitted.
27. On further cross examination, he testified that the issue for resignation came after the bishop visited the diocese but could not back up this fact by any evidence. He also admitted that he paid the claimant Kshs 250,000 though he had not cleared, a fact which went against the HR manual, that require an employee to clear from the institution before they are paid their terminal dues. He stated that the



resignation was voluntarily and on the same breath admitted to writing the email of 16.8.2022 asking the claimant to resign.

28. On re-examination, he testified that they did not pay the balance of Kshs 250,000 because the claimant had not cleared with the diocese.

Claimant's Submissions.

29. The Claimant submitted on four issues; whether there was constructive dismissal of the claimant herein, whether the claimant is entitled to the unpaid salary, whether the claimant is entitled to the terminal dues sought in the statement of claim and whether the claimant is entitled to costs.
30. On the first issue, the claimant began by defining what is constructive dismissal and stated that constructive discharge or constructive termination occurs when an employee resigns as a result of an employer creating a hostile work environment because the resignation by an employee in such circumstances is not voluntary.
31. Similarly, that in this case, the claimant was constructively dismissed from work as evidenced by the email exchanged between the claimant and the 2nd Respondent on 15th August, 2022, where the he complained about being told to resign having been promised a redeployment to caritas projects as an accountant. He argued that in the same e-mail, the claimant communicated the fact that he was nursing trauma due to harassment and demotion. He also noted that he was not able to write a resignation letter as urged without first getting assurances from the 2nd Respondent office confirming redeployment which had earlier been discussed. That the 2nd Respondent replied to the said email on August 16, 2022 with subject tiled as "LAST REQUEST" Where he reminded the claimant of how himself, the bishop and the Director had called him a month earlier and advised to tender his resignation and goes ahead to reconsider his stand not to tender the resignation because his options were very limited.
32. It was submitted that the email correspondences are a true testament that the resignation tendered by the claimant was not voluntary but forced by the Respondents. Therefore, he urged this Court to find the termination of the claimant's services to have been constructively instigated.
33. On whether the claimant is entitled to the reliefs sought, it was submitted with regard to unpaid salaries that the claimant produced in evidence his February, 2021 pay slip showing he was earning Kshs 98,000 and the pay slip for February, 2022 showed he was now earning Kshs 53,000, a confirmation that the Respondents had reduced his salary, a sum that is now owing to him. He argued that this fact was admitted by RW-2 in his testimony. Further that the Kshs 250,000 that the claimant was paid was factored and deducted from the claim of salary arrears in the claimant's calculation at paragraph 37 of the claim as such the Respondent still owes him salary arrears.
34. On the claim for payment of terminal dues, the claimant submitted that it is trite that unfair dismissal has to be tinkered with payment of dues earned and this includes leave earned but not taken, gratuity, compensation for breach of contract of employment, severance pay, etcetera. On that note, he submitted that it is not disputed that the claimant had not taken a two and a half days' leave as such the same should be paid for.
35. On Gratuity, the Claimant submitted that Gratuity is a lump sum amount that is paid to an employee by an employer as a token of appreciation, on the termination of the employee's service. The same is calculated on the basis of the employees last entitled salary and the number of years of service and he prayed to be awarded gratuity for the period worked.
36. On loss of earnings that would have been paid for the remainder of the contract, the claimant submitted that had it not been for the constructive dismissal, he would have worked till December, 2023 as such



he urged this Court to compel the Respondent to pay him Kshs. 1,631,985/, being salaries for the remainder period of the contract. The claimant also prayed for payment of severance pay, Notice pay and to be issued with certificate of service.

37. On costs of suit, it was submitted that costs follow event as provided for under Order 27 of the Civil Procedure Rules as such he urged this Court to allow the claim as prayed together with costs.

Respondents' Submissions.

38. The Respondents on the other hand submitted on three issues; whether there was constructive dismissal, whether the Claimant is entitled to the prayers sought in the Memorandum of Claim and which party should bear the costs associated with the legal proceedings in this matter.

39. On the first issue, it was submitted that the Claimant resigned voluntarily from the employment through a letter referenced "Resignation Letter" written to the Finance Administrator, the 2nd Respondent herein. This fact was buttressed in the testimonies of CW-1 and RW-1 during the hearing though the claimant alleged that he resigned due to pressure and harassment.

40. The Respondents maintained that resignation is legal and a way of separation between an employer and an employee. In this they relied on the case of ELRC Cause No 878 of 2017 Josephat Otongo Anyonga Vs Falcon Signs Limited, where Justice Judge B.O.M Manani when delivering his judgment in paragraph 10 stated; -

"Resignation is one of the modes of terminating the employer-employee relationship. It is a tool which is available for the employer to separate from the employee...Being a unilateral act, the employee who wishes to sever the employer-employee relation can elect to serve the employer with a resignation. The resignation may be expressed to take effect either immediately or at a later date as indicated by the employee...Once the employee communicates the decision to resign from employment, the contract of employment is effectively terminated. The validity of the resignation is not dependent on the employer accepting it."

41. The Respondents submitted that the Claimant is tasked under Section 109 of the *Evidence Act* to prove that he was harassed, coerced and or pressured to resign. In support of this, they relied on the case of Steve Mutua Munga versus Homegrown Kenya Limited and 2 Others [2013] Eklr, where the Court adopted the definition of the term coercion from the Black's Law Dictionary 8th Edition, that defined coercion to comprise compulsion by physical force or threat of force. Elements of coercion also include where a person acts out of fear of actual or threatened confinement.

42. Similarly, that the claimant has not tendered any evidence or pleaded any elements of the coercion alleged in his claim as such cannot raise such issue in his testimony as the Claimant is bound by his pleadings. To buttress this argument, the Respondents relied on the case of Daniel Otieno Migore vs South Nyanza Sugar Co.Itd [2018] Eklr where the Court held that: -

"It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which the proceedings derive from. It hence follows that any evidence adduced in a matter that tends to be at variance with the pleadings must be disregarded."

43. On whether the claimant is entitled to the reliefs sought, the Respondents submitted that upon resignation of the claimant, the parties agreed to pay the claimant Kshs. 500,000, in which 250,000



was paid to the claimant and the balance of 250,000 was withheld until the claimant clears with the 1st Respondent. On that note, the Respondent admitted to owing the Claimant a sum of Kshs 250,000 which they are willing to pay upon receiving a duly filled clearance form from the claimant.

44. On the claim for leave, the Respondents maintained that the claimant utilized all his leave days as such nothing is owing under this head.
45. On the claim for severance pay, the Respondents submitted that severance pay is only payable to an employee whose employment has been terminated because of redundancy as provided for under Section 40(1)(g) of the *Employment Act*, 2007 and reiterated by the case of *Freight in Time Limited versus Rosebell Wambui Munene* [2018] Eklr, where the Court held that:-
- “In addition, Section 40(1) of the *Employment Act*, prohibits, in mandatory tone, the termination of contract of service on account of redundancy unless the employer complies with the following seven conditions...”
46. Accordingly, that since the claimant resigned and not declared redundant, he is not entitled to any severance pay.
47. It was submitted further that the claimant is not owed any money for the remainder of the contract or gratuity thereof, because he voluntarily resigned before the end of the contract as such gratuity is not payable before the completion of the contract.
48. On costs, it was submitted that section 12 *Employment and Labour Relations Court Act*, 2012, grants this court discretionary power to award costs to the successful party in a civil suit. Consequently, that it is just and reasonable for the claimant to bear the costs incurred throughout the litigation process. In this they cited the case of *Patel v. Patel* [2016] Eklr.
49. In light of the foregoing legal principles, statutes, and case laws, the Respondent maintains that the claimant should bear the financial consequences associated with pursuing this legal action because his claims is devoid of legal merit and deserving to be dismissed.
50. I have examined all the evidence and submissions of the parties herein.
51. The issues for this court’s determination are as follows;-
1. Whether the claimant resigned voluntarily or was constructively terminated.
 2. Whether the claimant is entitled to the remedies sought.

Issue No. 1

52. The claimant has submitted that he never resigned voluntarily but was forced into this act.
53. He relied on the evidence of the Email communication between him and the Finance Director of the respondent, the 2nd respondent herein on 16th August 2022 at 1.06pm which states as follows;-

“Hello David, it is now more than one month after myself, the Bishop and the Director called you to my office advising you to tender your resignation letter considering the interest of the Diocese in connection to its relation to partners. From your letter 15th August you indicated that you are not able to write the resignation letter. Am humbly requesting you to reconsider this decision because my options are very limited. I further request you to reply this letter before 12:00 tomorrow on the 17th August 2022.”



54. The claimant responded to this Email at 2.58pm stating as follows;

“Following our earlier discussion on the above issue, kindly allow me to state the following;

I am not able to formally write the above subject letter without a written assurance from your office of my redeployment. (We have had a discussion on the issue of the how).

As I earlier stated in our meeting where the above subject was mooted, my main reason for staying behind as my colleagues left was mainly to ensure a smooth transition in my finance department owing to the obvious fact that very little information was handed over during the transition. My stay however was to be on condition that the office had to appreciate my presence. That happened until recently when otherwise was decided resulting to the suggestion that I resign.

I appreciate Fr. Steve’s suggestion that I could stay on and be attached to Caritas projects as an accountant and that the process will clear my name (of which I know I am not culpable as perceived because none of the audit reports mentioned my name in person), BUT again, a formal engagement is necessary to keep me waiting.

Following the advertisement of my position, I am not sure the capacity in which I am in office. (This has been traumatizing and has greatly affected my working).

Consequently, I have made a decision to take my annual leave for 20 days, (leave days so far earned), effective 16th August 2022 (mainly to nurse the trauma and my demotion), a period within which I believe your office will have given a substantive way forward.

May I take this opportunity to assure your office that I will always put the interest of the Diocese first as I have proved before I return would expect the office to reciprocate.”

55. From this conversation above, it is apparent that the 2nd respondent was pushing for the resignation of the claimant.

56. They even told him that he should consider that decisions as his options were limited.

57. The attitude of the respondents obviously pushed the claimant to resign and therefore the resignation was not voluntarily.

58. This push by the respondent definitely falls under the pervue of a constructive termination which is defined in Blacks Law Dictionary 9th Edition as follows;

“A termination of employment brought about by the employer making the employees working condition so intolerable that the employee feels compelled to leave.”

59. It is indeed true that the instant case, it is the employer’s conduct and insistence that led the claimant to tender a resignation letter which letter is also clear that the resignation followed a discussion with the 2nd respondent on the same.

60. It is my finding therefore that the claimant was unfairly and unjustly constructively terminated and his resignation from employment was not voluntarily.



Issue No. 2

61. The claimant sought various remedies from the respondent. First and foremost, the claimant indicated that his salary was reduced from January 2022 to September 2022 wherein he was previously paid kshs. 98,000/= and then the salary was dropped to 53,000/=.
62. This fact is evidenced by the payslips of the claimant which show this reduction and which the respondents have not denied.
63. In the circumstances, I find for the claimant and award him the unpaid salary within this period = 98,000 – 53,000 (x 7) up to August 2022
= 45,000 x 7 = 273,000/=
64. Another prayer for the claimant is for payment of 2 ½ days unpaid leave earned but not taken being 9,067/= plus interest. The respondent did not respond to this prayer which I find is proved and I award the claimant accordingly.
65. Another prayer is for payment of gratuity earned but not paid as at 30th September 2022 being kshs.65,738/=. On this, the claimant sought to rely on his contract of service which indicated that he was entitled to gratuity payment upon completion of the contract.
66. Gratuity, was not payable where an employees' service had been terminated for gross misconduct. Gratuity was payable for the whole contract period if termination was for any other reasons. It is clear then from the contract of the claimant that he is entitled to gratuity for the entire contract period as prayed and I award him accordingly kshs.65,738/= as prayed.
67. Prayer for payment of severance pay is not payable as severance pay is only paid where there is a redundancy situation. In the case of the claimant, the prayer for severance pay does not arise.
68. The claimant also sought to be paid his salary for the remainder of the contract period. Indeed, the claimants contract was cut short by the conduct of the respondent which was unfair. In the circumstances it is my finding that the claimant is entitled to payment of his salary and gratuity for the remainder of the contract period as prayed being 1,631,985/= and 109,563/= respectively.
69. The claimant should also be issued with a certificate of service.
70. The total awarded to the claimant is therefore kshs.2,089,350/= less statutory deductions plus costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED IN OPEN COURT THIS 15TH DAY OF FEBRUARY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kihoro Kimani for the Claimant - present

Kihara for the Respondent – present

Court assistant - Fred

