



Mwandale v Integrated Science and Engineering Projects Limited (Cause 1618 of 2018) [2024] KEELRC 807 (KLR) (28 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 807 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1618 OF 2018
K OCHARO, J
MARCH 28, 2024

BETWEEN

NICOLE ASHLEY MWANDALE CLAIMANT

AND

INTEGRATED SCIENCE AND ENGINEERING PROJECTS LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant instituted this suit vide a Statement of Claim dated 14th December 2018, seeking: -
 - a. A declaration that the Respondent's withholding of the Claimant's lawful dues is unlawful and unfair;
 - b. An order directed to the Respondent to pay the Claimant damages for unlawful and discriminatory treatment;
 - c. An order for the payment of all lawful terminal dues set out in paragraph 7 of the statement of claim;
 - d. An order for the release of the Claimant's Certificate of Service;
 - e. Payment of damages for unlawful retention of accrued salaries;
 - f. Costs of this suit with interest thereon.
2. Alongside the Statement of Claim dated 14th December 2018, the Claimant filed a Verifying Affidavit sworn on 14th December 2018; the Claimant's List of Witnesses dated 14th December 2018; the Claimant's Witness Statement dated 14th December 2018; and List of Documents dated 14th December 2018.



3. Neither did the Respondent enter appearance nor file a defence in this matter.
4. On 24th July 2023, when the matter came up for directions, counsel for the Claimant sought that the Claimant be allowed pursuant to the provisions of this court's Rules, to rely on the witness statement, documents filed and the Counsel's submissions in support of her case. The Court allowed the plea. The witness statement was adopted as his evidence in chief, and her documents under the List of Documents dated 14th December were admitted as her documentary evidence.

Claimant's case

5. The Claimant's case is that she was employed by the Respondent as a Water Supply Engineer/Assistant Resident Engineer on 15th April 2017, at a consolidated monthly salary of Kshs. 60,000/-.
6. Despite performing her duties diligently and honestly, the Respondent maliciously, unlawfully and unjustifiably denied the Claimant her salary for three (3) continuous months, from April 2018 to July 2018. This action by the Respondent exposed her to economic hardship and social ridicule. She was forced to resign from her employment, and she did so through her resignation letter dated 31st July 2018. It had become untenable for her to remain in the Respondent's employment.
7. The Claimant asserted that even after leaving its employment, the Respondent unlawfully, maliciously and unfairly, failed and or refused to settle her accrued salary and benefits. Further, the Respondent's action was discriminative as the Respondent was paying other employees their salaries, whilst withholding hers without justification. The Respondent's action subjected her to damage career-wise, mental stress and emotional anguish.
8. The Claimant's Counsel filed submissions herein, dated 9th August 2023, submissions which I have duly considered.

Analysis and Determination

9. I have reviewed the Claimant's pleadings, the witness statement and documentary evidence, and the following issues emerge for determination; -
 - a. Whether the Claimant was constructively dismissed from her employment.
 - b. Whether the Respondent discriminated against the Claimant;
 - c. Whether the Claimant should be granted the reliefs sought in her Statement of Claim dated 14th December 2018.
Whether the Claimant was constructively dismissed from her employment.
10. As a preliminary point, I am obliged to state that regardless of the Respondent's failure to enter appearance and/or file a defence, this Court has a responsibility to interrogate the Claimant's evidence to assess whether it aids her in establishing her case to the requisite standards. The fact that a Respondent has failed to enter appearance and file a response or statement of defence, never lessens, a Claimant's legal burden to prove her or his case as required by law. This was expressed in the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR where the Court held that: -

“15. I am of the considered view that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthfully without interrogation for the reason only that it is uncontroverted.



A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.

In *Kanyungu Njogu vs Daniel Kimani Maingi* (2000) e KLR it was held that:

“ when a court is faced with two probabilities, it can only decide the case on a balance of probability if there is evidence to show that probability was more probable than the other.”

11. In the instant case, this Court must examine whether the Claimant has proved that there existed an employer-employee relationship between her and the Respondent; whether she has proved that she was denied her salary for three (3) continuous months; and whether she has proved that the denial of her salary amounted to constructive dismissal.
12. On whether the Claimant has proved that she was employed by the Respondent, I note that the Claimant placed before this Court a document, Employment Service Contract, a document which in my considered view, speaks to an employer-employee relationship between her and the Respondent. As a result, I return that the unchallenged Contract of Service is sufficient evidence of the fact that there indeed existed an employer-employee relationship between the two.
13. The Claimant stated that the Respondent failed to pay her salary for three continuous months, namely April to July 2018, and as a result of the non-payment, she was forced to resign vide her Letter of Resignation dated 31st July 2018. This evidence remained uncontroverted.
14. In the case of *Stephen Michuki v East African Safari Air Express Limited & another* [2022] eKLR, this very Court held as follows concerning a failure on the part of the employer to pay its employee entitled to remuneration, and its effect, thus;
 84. Remuneration is undoubtedly one of the most important terms of an employment contract. In fact, this Court has held before that the right to remuneration is the most important right of an employee, considering the immense protection that the *Employment Act*, 2007 accords, wages and salaries of employees. Where an employer substantially alters [including by a significant reduction, or change of the manner of payment] of an employee’s compensation without their consent such alteration may amount to a fundamental breach of the contract. An employee whose compensation has been altered can successfully claim constructive dismissal.
15. In light of the uncontroverted evidence by the Claimant that without any justification, the Respondent refused and or neglected to pay her salaries for the length of time hereinabove mentioned, and considering the vitality of remuneration in a contract of service, without hesitation, I hold that the Respondent’s conduct amounted to a fundamental repudiatory breach of contract of employment, which repudiation the Claimant accepted by issuing the resignation letter dated 31st July 2018. On this basis, this Court is rightfully able to conclude and it does hereby, that Claimant was constructively dismissed.
16. This Court’s conclusion hereinabove, further finds support in the Court of Appeal case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR where the principles that should be considered in a case for constructive dismissal were aptly brought forth.

Whether the Respondent discriminated against the Claimant

17. The Claimant avers that the Respondent discriminated against her by paying the salaries of other employees but denying her remuneration, and as a consequence seeks for general damages.



18. According to the Black's Law Dictionary, 10th Edition, discrimination means:

“failure to treat all persons equally when no reasonable distinction could be found between those favoured and those not favoured”.

19. Discrimination in the employment context is prohibited under Section 5 of the *Employment Act* 2007 which provides that: -

“(1) It shall be the duty of the Minister, labour officers and the Industrial Court—

(a) to promote equality of opportunity in employment in order to eliminate discrimination in employment; and

(b) to promote and guarantee equality of opportunity for a person who, is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya.

(2) employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—

(a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status;

(b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

(4) It is not discrimination to—

(a) take affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workplace;

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job;

(c) employ a citizen in accordance with the National employment policy; or

(d) restrict access to limited categories of employment where it is necessary in the interest of state security.

(5) An employer shall pay his employees equal remuneration for work of equal value.

(6) An employer who contravenes the provision of the section commits an offence.

(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged and that the discriminatory act omission is not based on any of the grounds specified in this section.”

20. The above provisions have Constitutional backing in Article 27 (1)-(4) of *the Constitution* of Kenya 2010 that provides that:

“Equality and freedom from discrimination

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.



- (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
- (3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.
- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).”

21. In the Supreme Court case of *Law Society of Kenya v Attorney General & another* [2019] eKLR, the Court delved into the definition of discrimination in great detail, thus;

“We thus make the logical inference that the Petitioner meant that Section 25(1) and (3) of the Act is inconsistent with the former Constitution as it contravened Section 82 of the said Constitution which prohibited discrimination. In addition, this is the Section that corresponds with Article 27 of *the Constitution* 2010.

- (79) According to Black’s Law Dictionary, 8th ed. (Bryan A. Garner, ed.) (St. Paul, MN: West Group, 2004), page 500, discrimination is “the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion or handicap.”

Further, in *Willis vs The United Kingdom* (2002) 34 EHR 547 the European Court of Human Rights defined discrimination as:

“....a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available members of society”. (See *Andrews vs Law Society of British Columbia* [1989] 1 SCR 143, as per McIntyre J.)

In our own jurisdiction, the Court of Appeal in *Barclays Bank of Kenya LTD & Another vs Gladys Muthoni & 20 Others* [2018] eKLR held as follows;

“.....Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions... whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.... Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex ... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

- (80) Discrimination therefore entails the unjust or prejudicial treatment of different categories of people in the same circumstances.”



22. The question that this Court must answer, therefore, is whether there was a “distinction” or “different treatment” or “prejudicial treatment” between the Claimant and other employees of the Respondent. With great respect, as regards her claim that she was discriminated against by the Respondent, the Claimant just made a bald assertion, one that was not supported by any evidence. The Claimant has not stated with specificity which employees were paid their salaries during the period that she did not receive hers, therefore, leading no evidence of the alleged differential treatment. Consequently, I return that the Claimant has not proved her claim on discrimination to requisite standards.

Whether the Claimant is entitled to the reliefs sought in her Statement of Claim dated 14th December 2018.

23. In the absence of evidence that the Claimant’s salary for May- July 2018 was paid, I find that the Claimant is entitled to the sum of Kshs. 180,000/-, being her unpaid salary for the three months.

24. The Claimant claimed that for the whole period, 1 year, and 3 months, she was in the service of the Respondent, and she did not take her annual leave[s]. Therefore, at the time of separation, she had earned but unutilized leave days for which she was entitled to be compensated. Time and again, this Court has held that under section 28 of the Employment Act, annual leave for an employee is a statutory right to enjoy, and the employer’s obligation to accord. Where an employee claims that for a specified period, he or she was not allowed to proceed on his or her annual leave, the employer becomes burdened as the keeper of records under Section 74 of the Employment Act 2007, to produce Court records showing that the Claimant proceeded on her annual leave, in order to defeat the employee’s allegation. However, the Respondent failed to do so.

25. In the upshot, the Claimant’s claim under this head succeeds.

26. The Claimant claimed general damages for unlawful retention of her salaries. The Claimant has not explained in her pleadings or evidence, the basis for this claim under law. At best, she could claim for interest on the withheld salary from the time the salary accrued till payment in full. This could compensate her for any prejudice or loss suffered by the Respondent keeping the money from her. Regrettably, the Claimant did not couch her claim in a manner that could allow this Court to grant such interest. I am therefore not convinced that the Claimant is entitled to the damages sought under this head.

27. I now turn to consider whether the Claimant is entitled to a compensatory relief for unfair termination, having found that she was constructively dismissed. Section 49[1][c], bestows on this Court, the authority to grant an employee who has successfully assailed her or his employer’s decision to terminate her employment as being unfair. However, it is worth stating that the grant is discretionary and often influenced by the circumstances of each case.

28. In *Stephen Michuki v East African Safari Air Express Limited & another (Supra)*, in the context of constructive dismissal, the Court held that:

“ 89. The Claimant was constructively dismissed. This places him on the path to entitlement of one or more of those reliefs normally attracted by a wrongful or unfair termination of an employee, recognized by law.”

29. I have carefully considered the circumstances under which the Claimant’s employment was terminated, the Claimant was forced to exit as the Respondent was in a fundamental breach of the contract of service, the length of service of the Claimant to the Respondent, and fact that the Claimant didn’t contribute to the circumstances that fueled the separation, and come to the conclusion as the Claimant is entitled to the award, to the extent of 3 months’ gross salary as compensation.



30. It is trite law that per Section 51 of the *Employment Act* 2007, the Claimant should be issued with a Certificate of Service.
31. In the upshot, judgment is hereby entered for the Claimant in the following terms: -
- a. A declaration that the Claimant was constructively dismissed from employment by the Respondent.
 - b. The Claimant be paid the following dues: -
 - i. Salary for May – July 2018 Kshs. 180,000/-
 - ii. Compensation for earned but untaken leave days
3 months @ 2000/- X 1.75 X 3 Kshs. 50,500/-
 - iii. Compensation for unfair
Termination @ 60,000/- x 3 Kshs. 180,000/-
 - c. The Claimant be issued with a Certificate of Service within 30 days of this Judgment.
 - d. Interest on (b) above at Court rates from the date of this judgment until payment in full.
 - e. The Respondent shall bear the costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28th DAY OF MARCH, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Okondo holding brief for Ms Guserwa for the Claimant

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

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OCHARO KEBIRA

JUDGE

