



**Waweru v Triple Edge Media Limited (Cause E835 of 2021)
[2024] KEELRC 569 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 569 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E835 OF 2021
JK GAKERI, J
MARCH 14, 2024**

BETWEEN

MAURICE MWANGI WAWERU CLAIMANT

AND

TRIPLE EDGE MEDIA LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on 7th October, 2021 alleging non-payment of terminal dues, unfair labour practices and unfair and unlawful constructive dismissal.
2. The Claimant prays for;
 - i. A declaration that his treatment by the Respondent amount to unfair labour practices, unlawful, unfair and wrongful constructive termination.
 - ii. Compensation for unlawful and wrongful constructive termination of employment.
 - iii. Terminal dues; Salary arrears and reimbursement of costs of services Kshs.561,644.80 Salary in lieu of notice Kshs.165,389.00 21 unpaid leave days (84) Kshs.463,089.20 Service pay Kshs.330,778.00 Total Kshs.1,520,901.00
 - iv. Interest on (ii) and (iii) above at court rates from date of filing till payment.
 - v. Costs of the suit.
 - vi. Any other relief the court may deem just to grant.
3. The Claimant avers that he accepted a 3 year contract as the Respondent's Creative Services Manager on 13th June, 2016 at a gross salary of Kshs.165,389.00 and performed his duties diligently and received a salary increment.



4. That in 2018, he headed a team of creatives in delivering services to Elanco Animal Health who had contracted with the Respondent under a 3 year contract under the East Africa Growth Accelerator Program. That the Respondent had a high staff turnover and he did most of the work himself at no extra cost.
5. That on 31st May, 2019, the Human Resource Manager of the Respondent resigned and there was no one to handle contracts but he continued working despite expiry of his written contract at Kshs.165,389.00 per month and from 13th March, 2020, the employees were working from home which he did and held weekly in-person meetings in June 2020 and drafted a Service Level Agreement in June 2020 and when the Respondent proposed a way forward on 26th August, 2020, he declined the terms.
6. That he is owed Kshs.544,212/= as salary arrears from 2017, personal expense Kshs.62,432/=.
7. It is the Claimant's case that Respondent acknowledged the contract after its expiry and paid Kshs.45,000/=.
8. That the failure by the Respondent to issue a service level agreement amounted to constructive dismissal.
9. The Respondent did not file a response despite service of the claim.

Evidence

10. Other than the written statement which rehashes the contents of the Statement of Claim, the Claimant filed the contract of employment which was effective from 1st June, 2019 to 31st May, 2019 renewable by mutual consent with 3 months' probation. He also provided his job description and draft Service Level Agreement.
11. Also provided as evidence is an email from a M/s Chebet to the Claimant copied to Director of the Respondent dated 26th August, 2020 acknowledging that there indeed were salary arrears owed by the Respondent.
12. He also provided a copy of the demand letter dated 21st July, 2021 and copies of invoices.
13. The Respondent did not tender any evidence or file submissions.

Claimant's submissions

14. Counsel for the Claimant submitted on whether the Claimant was constructively dismissed, entitlement to salary arrears, terminal dues and costs of the suit.
15. On constructive dismissal, counsel submitted that the concept of constructive dismissal was now part of the jurisprudence of this and the Court of Appeal citing the sentiments of the court in Douglas Omonyin Otungu V Board of Trustees, Redeemed Christian Church of God (2022) eKLR citing Western Excavating ECC Ltd V Sharp (1978) 2WLR 344.
16. Reliance was also made on the sentiments of the Court of Appeal in Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga (2015) eKLR.
17. Counsel urged that since the Claimant continued working for the Respondent after the contract expired, there was a working relationship between them and the Respondent rejected the proposed service level agreement, which in counsel's view amounted to constructive dismissal.



18. As regards salary arrears, counsel submitted that the Respondent had acknowledged that fact by email and the invoices show that the Claimant paid charges in the course of his employment.
19. Counsel additionally submitted on the effect of failure of a party to adduce evidence and cited the decisions in *Gateway Insurance Co. Ltd v Jamila Suleiman & another* [2018] eKLR, *Trust Bank Ltd v Paramount Universal Bank Ltd* [2002] eKLR and *Peter Ngigi & another v Thomas Ondiki Oduor & another* [2019] eKLR.
20. Counsel urged the court to award the sum of Kshs.561,644.80 as prayed for.
21. On terminal damages of Kshs.959,256.20, counsel submitted that since the Claimant had worked for 3 years and was constructively dismissed, he was entitled to the sum claimed and 21 days leave from 2016 to 2020.

Determination

22. The issues for determination are;
 - i. Whether the Claimant's employment was constructively terminated by the Respondent.
 - ii. Whether the Claimant is entitled to the reliefs sought.
23. As regards termination of employment, although the claim is undefended, there is ample evidence to show that the Claimant was an employee of the Respondent as alleged from 2016 to 2020.
24. (See *Humphrey Munyithia Mutemi v Soluxe International Group of Hotels & Lodges Ltd* [2020] eKLR on the Claimant's burden of proof in undefended suits).
25. It is not in contest that the Claimant was an employee of the Respondent from June 2016 to June 2019 under a written fixed term contract renewable by mutual consent
26. After the contract terminated by effluxion of time, the Claimant continued working and receiving his salary sometime less than the contracted sum until sometime in the 2nd half of 2020 during the COVID-19 Pandemic.
27. The fact that the Claimant is only claiming salary arrears for certain months and only part thereof buttresses his testimony that he was indeed working and being paid.
28. For instance, the Claimant has no prayer for salary arrears for the entire 2019 notwithstanding the fact that his written employment contract ended in Mid-June 2019.
29. Neither of the party appear to have noticed that the fixed term contract had lapsed.
30. The Claimant continued rendering services and salary was paid, the amount notwithstanding.
31. Matters appear to have taken a different turn when the Claimant proposed that the parties conclude a Service Level Agreement which the Respondent declined.
32. Did the refusal by the Respondent to accede to the Claimant's proposed Service Level Agreement dated 1st July, 2020 constitute a constructive dismissal of the Claimant?
33. To answer the forgoing question, it is elemental to ascertain the nature of the relationship between the parties as at that date or earlier.
34. It is the Claimant's uncontroverted evidence that he continued rendering services even after the fixed term contract ended and was paid the same salary.



35. The fixed term contract was renewable by mutual consent of the Claimant and the Respondent.
36. The contract makes no reference as to how the renewal would take place, i.e whether it would be in writing or otherwise. It only required “mutual consent”, an agreement.
37. Black’s Law Dictionary, 10th Edition defines Mutual as:

“Generally, directed by each towards the other or others; reciprocal.”
38. Needless to gainsay, an agreement need not be in writing. It may be oral, written or implied from conduct of the parties.
39. In this case, since the parties did not sit to discuss and agree and nothing was written, their conduct is the key to their relationship and as the Claimant continued rendering services as expected and the Respondent paid for those services, there was a contract between the parties on similar terms as the previous agreement.
40. The conduct of parties is unmistakable that there was consensus ad idem between them and the contract had been renewed on similar terms.
41. Having so found, was the Respondent bound to accept the Claimant’s new proposal? The court is not so persuaded.
42. Since the Claimant was already serving under terms mutually agreed as discernible from the conduct of the parties, any alteration of the terms had of necessity to be mutual.
43. From the foregoing, it is the finding of the court that the Respondent’s refusal to accept the Claimant’s proposal was neither an unfair labour practice nor an unlawful or constructive dismissal of the Claimant. The Respondent was merely expressing its view as regards the new proposal as the parties had a subsisting contractual relationship.
44. In his demand letter dated 21st July, 2021, the Claimant cites the non-payment of salary for February, July and September 2017, February and August 2018 and March, May and June 2020. This is the amount prayed for as salary arrears.
45. Notably, the Claimant has not indicated when he resigned or left the Respondent’s work place owing to the frustration due to non-payment of salary as this would have demonstrated whether or not the Respondent had committed a repudiatory breach of the contract of employment to qualify as constructive dismissal.
46. As the Claimant’s counsel correctly submitted, the concept of constructive dismissal is an integral part of Kenya’s labour law jurisprudence as evidenced by the Court of Appeal decision in *Coca Cola East & Central Africa Ltd v Maria Kagai Ligaga* (Supra), where the court not only adopted the contractual approach test but also articulated the guiding principles in determining whether constructive dismissal has taken place.
47. It requires no belabouring that non-payment of salary by an employer runs to the root of the contract of employment, a fact appreciated and expressly provided for by the *Employment Act*, 2007.
48. Section IV of the Act is on protection of wages which underscores its centrality in the employment contract. Failure, refusal or neglect by an employer to pay wages as and when earned and as agreed by the parties qualifies as a repudiatory breach of contract of employment and arguably, the employee may treat him/herself as discharged from further performance and resign with or without notice.



49. However, for the court to find that constructive dismissal has taken place, it is enjoined to interrogate the employee's conduct as well to ascertain whether the employee has either waived the right, acquiesced to the breach or taken too long to act or committed other acts or omissions which would estop him/her from alleging constructive dismissal as aptly captured by Lord Denning in *Western Excavating (ECC) Ltd v Sharp (Supra)*.
50. In the instance case, it is clear that the non-payment or payment of less salary started in 2017 and persisted in 2018 and recurred in 2020, perhaps owing to the COVID-19 Pandemic.
51. The Claimant was by 2020 accustomed to the Respondent's breach but acquiesced in the same and is estopped from asserting that the state of affairs was different.
52. From the foregoing, it is the finding of the court that the Claimant has failed to prove on a preponderance of probabilities that his employment was constructively terminated by the Respondent.
53. With constructive dismissal out of the way, the Claimant has not alleged or demonstrated that he was unfairly or unlawfully terminated from employment in violation of the provisions of the [Employment Act, 2007](#).

Whether the Claimant is entitled to the reliefs sought

a. Declaration

54. Having found that the Claimant has failed to demonstrate that he was constructively dismissed from employment by the Respondent or was unfairly or unlawfully terminated, the prayer for a declaration is unmerited and is declined.

b. Salary arrears and reimbursement of costs

55. The Claimant prays for specific amounts for particular months of the year when he was paid less than what he had earned as agreed and has shown that the Respondent admitted vide email dated 26th August, 2020 that it owed the Claimant salary arrears and would continue paying the same with staff salaries as funds trickled in owing to the uncertainties created by COVID-19 Pandemic.
56. The claim for salary arrears is granted as prayed. The balance is Kshs.561,644.80.

c. Compensation for unlawful, wrongful and constructive termination of employment

57. Having found as above, this prayer is unsustainable and is declined.

d. Pay in lieu of notice

58. The Claimant led no evidence to prove his entitlement to pay in lieu of notice.
The prayer is declined.

e. 84 days leave (2016 – 2020)

59. Other than praying for the sum of Kshs.463,089.20, the Claimant laid no basis for this prayer.
60. He adduced no evidence that he did not proceed on leave for the entire duration of the contract or was denied by the Respondent and why he did not apply for a statutory right, which was expressly



provided for in the contract of employment. If the Claimant is to be believed on this prayer, he did not proceed on leave for a single day, applied and it was declined or did not bother about it.

The prayer lacks particulars and is declined.

f. Service pay

61. Analogous to the prayer for leave, the Claimant adduced no evidence of entitlement to service pay.
62. More significantly, Clause 7 of the Contract of Employment entitled pension scheme provided that the Respondent had a contributory pension scheme which disentitles the Claimant service pay by virtue of the provisions of Section 35(6)(c) of the *Employment Act*, 2007.
63. Similarly, the Claimant tendered no evidence to demonstrate that the employer was not remitting NSSF deductions which is a mandatory pension scheme for all employees.

The prayer is declined.

64. In conclusion, judgement is entered in favour of the Claimant against the Respondent in the following terms;
 - a. Salary arrears Kshs.561,644.80.
 - b. Costs of this suit.
 - c. Interest at court rates from date hereof till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14TH DAY OF MARCH 2024

DR. JACOB GAKERI

JUDGE

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 *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.

DR. JACOB GAKERI

****JUDGE***

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