



**Kabucho v Kamuthi Housing Co-operative Society Ltd (Employment and Labour Relations Cause E801 of 2021) [2024] KEELRC 536 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 536 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E801 OF 2021**

**BOM MANANI, J**

**MARCH 7, 2024**

**BETWEEN**

**WINFRIDA WAITHIRA KABUCHO ..... CLAIMANT**

**AND**

**KAMUTHI HOUSING CO-OPERATIVE SOCIETY LTD ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The instant suit challenges the validity of the Respondent's decision to indefinitely suspend the Claimant from employment. The Claimant contends that the impugned decision constituted an unfair termination of her contract of employment.
2. The Claimant avers that she was first hired by the Respondent as a Secretary. However, she was later re-deployed to undertake sales services.
3. It is the Claimant's case that on 11<sup>th</sup> December 2020, the Respondent issued her with a letter suspending her from duty indefinitely. She avers that since issuance of the aforesaid letter, the Respondent has not reverted to her with communication on whether she should resume duty. And neither has it (the Respondent) issued her with a letter terminating her contract.
4. The Claimant avers that her suspension from duty was without pay. Given the fact that the Respondent suspended her indefinitely and without pay, it is the Claimant's case that she was constructively dismissed from employment.
5. The Claimant avers that prior to her suspension, she had been forced to work on half salary for a period of eight (8) months following salary cuts that were occasioned by the Covid 19 pandemic. It is her case that the Respondent did not pay her the salary arrears that resulted from the pay cut.



6. The Claimant has also claimed for: accrued leave for three days; outstanding National Social Security Fund dues; unpaid commission; reimbursement of money paid towards the purchase of a plot; and service gratuity.
7. The defendant filed a statement of defense disputing the entire of the Claimant's case. However, it did not call evidence to substantiate its position in the matter.

### **Issues of Determination**

8. Having considered the pleadings and evidence on record, I am of the view that the following are the issues that require determination in the dispute:-
  - a. Whether the Claimant was constructively dismissed from employment.
  - b. Whether the parties are entitled to the reliefs that they seek through their respective pleadings.

### **Analysis**

9. As indicated earlier, although the Respondent filed a defense to the cause, it did not call witnesses to support the defense. As such, the Statement of Defense counts for nothing.
10. During trial, the Claimant adopted her witness statement. In addition, she gave a detailed account of her case.
11. It was her testimony that immediately the Covid 19 pandemic set in, the Respondent reduced staff salaries by half. It was her case that at the time of the decision, she was earning a gross monthly salary of Ksh. 49,560.00. It is this amount that was reduced to half.
12. The Claimant stated that on 30<sup>th</sup> November 2020, she was transferred from her position to the sales and marketing department. In the new department, she was to be paid on commission basis.
13. The Claimant stated that she was suspended from duty on 11<sup>th</sup> December 2020, just a few days after she had been moved to the sales department. It was her case that she has not been asked to resume duty since then.
14. The evidence on record shows that indeed the Respondent issued the Claimant with a letter dated 11<sup>th</sup> December 2020 suspending her from duty. The suspension was expressed to be without pay and was to remain in force until further notice from the Respondent. Meanwhile, the Respondent specifically prohibited the Claimant from its precincts.
15. There is no evidence that after this decision, the Respondent communicated to the Claimant regarding the suspension. There is no evidence that the Claimant was asked to either resume duty or face disciplinary action.
16. The letter of suspension was explicit that it (the suspension) was to remain in force until the Respondent communicated otherwise. Therefore, the obligation to move the matter forward lay with the Respondent.
17. In any case, since the Respondent was the initiator of the suspension, the decision lay with it (the Respondent) to bring the matter to closure. As the record demonstrates, there is no evidence of any action on the issue after 11<sup>th</sup> December 2020.
18. The decision to suspend an employee from employment ought to be for a specified term. It cannot be indefinite.



19. An indefinite suspension exposes an employee to unnecessary anxiety and mental anguish and amounts to an indirect punishment to him (*Kenya Magistrates and Judges Association v Judicial Service Commission & 2 others* [2020] eKLR). It is a practice that employers must refrain from as it amounts to an unfair labour practice.
20. Where an employer suspends an employee indefinitely for an unduly long duration, he (the employer) implicitly expresses his desire not to be bound by the terms of the contract. This action amounts to repudiation of the contract of service especially where it is accompanied by the withholding of the entire of the employee's salary.
21. Such conduct implicitly aims at subjecting the employee to an intolerable work environment. If it leads to the employee giving up on the contract, he (the employee) will be entitled to plead constructive dismissal from employment (*Susan Njeri Warui v Postal Corporation of Kenya* [2022] eKLR).
22. Whilst the employer has the prerogative to suspend an employee from duty to enable investigations, this power ought to be exercised sparingly and only as a measure of last resort. Further, the power should be invoked only in the clearest of cases and for the shortest time possible.
23. The Respondent's decision to indefinitely suspend the Claimant from duty infringed on her right to fair labour practice. As a result, it amounted to repudiation of the employment contract between the parties. It is so declared.
24. The Claimant has stated that during the Covid 19 pandemic, her salary was reduced by half. However, the Respondent did not pay the accrued arrears after the pandemic eased.
25. In cross examination of the Claimant, the Respondent, through its counsel on record, tried to dispute this claim. However, the Respondent's letter suspending the Claimant from duty acknowledges the fact that she (the Claimant) had been on half pay for seven (7) months as at 30<sup>th</sup> November 2020.
26. Under Part IV of the *Employment Act*, an employee's wage is a protected entitlement. The employer has no right to make deductions from it except as authorized by the law or with the consent of the employee.
27. The Respondent did not provide evidence to demonstrate that the Claimant acceded to the reduction of her salary by half. Further, there was no evidence that she waived her right to claim the half salary that had been withheld. Therefore, this amount remained a debt due from the Respondent to the Claimant.
28. The Respondent did not provide evidence to demonstrate that it paid the Claimant these arrears after the pandemic eased. In the premises, I arrive at the conclusion that the aforesaid sum remains unpaid. Accordingly, the Claimant is entitled to recover it.
29. As regards service pay, there is evidence that during her term of service, the Claimant was registered as a contributor to the National Social Security Fund. She produced in evidence a statement from the above Fund showing that the Respondent had been remitting dues on her behalf until July 2020.
30. Under section 35(5) of the *Employment Act*, an employee who has been in service of an employer for a period of one year and more is entitled to service pay for every year that she has worked. However, by virtue of section 35(6) of *the Act* this benefit does not accrue to employees who are members of a registered Provident Fund, Gratuity Scheme or the National Social Security Fund. Therefore, having been a member of the National Social Security Fund, the Claimant is disqualified from praying for service pay.



31. The Claimant has prayed for commission payments. She avers that she made some sales on behalf of the Respondent between 2019 and 2020 for which she was to receive some commissions. However, no particulars of the sales were given. And neither did the Claimant provide proof of the agreed commission payments if at all. As such, this claim was not proved.
32. The Claimant has also alleged that the Respondent had been deducting some cash from her salary towards payment of the purchase price for a plot. She alleges that the Respondent had been deducting Ksh. 7,000.00 from her salary monthly for this purpose.
33. What I understand the Claimant to be saying is that in addition to the employment relation between the parties, the two had entered into a separate arrangement through which the Respondent had offered the Claimant a piece of land which she was paying for through a monthly check off system. This latter transaction, if at all, was distinct from the employment relation between the parties. It was an ordinary land sale transaction between the two.
34. As a land sale, the transaction was subject to the applicable law on sale of land. Under section 3 of the [Law of Contract Act](#), for the purported transaction to be enforceable, the parties ought to have reduced it into writing. There is no evidence that this was done. In the premises, the court cannot be asked to enforce it.
35. The court has declared that the Claimant's services were constructively terminated. Therefore, she is entitled to compensation for unfair termination.

### **Determination**

36. Having regard to the foregoing, the court makes the following findings and orders:-
  - a. The court declares that the Claimant's contract of service was constructively terminated.
  - b. The court finds that the Claimant is entitled to compensation for unfair termination of her contract. Having regard to the manner in which the said contract was terminated and considering the anxiety that the process exposed the Claimant to, she is awarded compensation that is equivalent to her salary for a period of ten (10) months, that is to say, Ksh. 49,560.00 x 10 = Ksh. 490,560.00.
  - c. In making the above award, I have considered the guidelines under section 49 of the [Employment Act](#). In particular, I have taken into account the lengthy period that the Claimant had served the Respondent.
  - d. The court finds that the Claimant is entitled to recover her half salary for the seven (7) months that she was put on half pay. This works out to Ksh. 24,780.00 x 7 = Ksh. 174,460.00.
  - e. The court declines to award the Claimant service pay.
  - f. The court declines to award commission pay.
  - g. The court declines to order reimbursement of amounts allegedly paid by the Claimant to the Respondent towards the purchase of a plot.
  - h. The court awards the Claimant interest on the amount awarded in b) above at court rates from the date of this decision and in d) from the date of institution of the suit.
  - i. The award is subject to the applicable statutory deductions.
  - j. The court awards the Claimant costs of the case.



- k. Any other relief that was sought but which has not been expressly granted under this section is deemed as having been declined for want of proof.

**DATED, SIGNED AND DELIVERED ON THE 7<sup>TH</sup> DAY OF MARCH, 2024**

**B. O. M. MANANI**

**JUDGE**

**Order**

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

