



**Kirui v Kanika International Limited (Cause E001 of 2023)
[2024] KEELRC 478 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 478 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E001 OF 2023
CN BAARI, J
MARCH 6, 2024**

BETWEEN

VIVIAN CHEPKEMOI KIRUI CLAIMANT

AND

KANIKA INTERNATIONAL LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant lodged her claim vide a Statement of Claim dated 3rd January, 2023, and filed on even date. She subsequently filed an amended statement of claim dated 2nd May, 2023, and filed on 3rd May, 2023. Vide the amended statement of claim, the Claimant seeks the following reliefs:
 - i. 1 month pay in lieu of leave.
 - ii. 1 months' pay in lieu of notice.
 - iii. Service gratuity for the year 2021/2022.
 - iv. 4 months unpaid salary.
 - v. 9 months' unremitted taxes.
 - vi. 13 months' unremitted NHIF deductions.
 - vii. 12 months compensation for unfair/unlawful termination.
 - viii. A certificate of service.
 - ix. KRA P9 form for the year 2021/2022.
 - x. General damages for discrimination and sexual harassment.



- xi. costs and interests of the suit.
2. The Respondent filed a Response, and later an Amended Response to the statement of claim on 18th May, 2023. The Respondent generally denies the averments in the claim.
3. The suit proceeded for hearing on 18th September, 2023, when the Claimant testified in support of her case. One of the Respondent's witnesses was also heard on the same day, while another two testified on 3rd November, 2023.
4. Both parties filed written submissions in support of their respective cases.

The Claimant's Case

5. It is the Claimant's case that she was employed by the Respondent as a Clinician on 7th October, 2021 on a two-year renewable contract at a monthly salary of Kshs 125,000/=.
6. It is her case that during the pendency of her employment with the Respondent, she was not included in the payroll, despite numerous pleas to the Managing Director.
7. The Claimant states the Respondent's Managing Director solicited sexual favours from her in exchange for inclusion in the payroll. She further states that her refusal of the Managing Director's sexual overtures was the beginning of her woes, as she was thereafter subjected to constant harassment and forced to administer chemotherapy without protective gear to patients with altered histology results which potentially exposed her to adverse health effects and lawsuits.
8. It is her case that the Respondent stopped paying her salary in the last four months of employment, forcing her to hand in her resignation on 8th December, 2022.
9. It is her assertion that during the pendency of her employment, she did not take her annual leave and the Respondent never remitted statutory deductions. She equally states that the Respondent paid her salary in piece meal which conduct she construed as a repudiation of her contract of service.
10. It is the Claimant's case that her decision to resign after 13 months and 7 days of employment was enforced by the Respondents' Managing Director's conduct.
11. On cross-examination, the Claimant told Court that she received a cheque in October, 2022 and further received Kshs. 50,000, Kshs. 46,000, and a further Kshs. 45,000 through Mpesa from the Respondent's Managing Director named Dr. Palmer, and which she testified were arrears from previous months.
12. The Claimant further told the Court that her claim was limited to payment of salaries for the months of August - November, 2022.
13. The Claimant prays that she be awarded remedies per her statement of claim.

The Respondent's Case

14. The Respondent on its part, avers that the Claimant absconded duty from 5th December, 2022, necessitating a notice to show cause and which was issued and dated 13th December, 2022. It is the Respondent further case that the Claimant ignored the notice to show cause and while it was preparing to invite her for disciplinary hearing, she filed this suit.
15. It is the Respondent case that its Managing Directors' conduct is above reproach and thus the allegations of sexual harassment were disdainful.



16. It is the Respondent's further case that it was never served with the resignation letter dated 8th December, 2022, and only learnt of its existence after the filing of this suit.
17. The Respondent states that it accedes to the claim for leave and non-remitted NHIF dues, and further avers that the Claimant is not entitled to all the other prayers in the statement of claim as she was never dismissed from employment.
18. Mr. Pharrell Omondi (RW1) told this Court on cross-examination that the Claimant was paid directly by the Respondent's Managing Director due to financial difficulties, and hence the reason she was not enrolled in the payroll.
19. It is RW1's further testimony that pay slips were issued on request and that he did not have prove that the Claimant was issued with pay slips after she was put on the payroll in August, 2022.
20. RW1 further states that the Respondent did not terminate the Claimant, but that she absconded duty. It is his evidence that a certificate of service was issued to the Claimant in December, 2022.
21. RW2, one Chillion Ochieng, told Court that he together with RW3 and the Managing Director visited the Claimant's residence in November, 2022, and that their role was to accompany the Managing Director who wanted to convince the Claimant to return to work.
22. It is RW2's testimony that the Claimant had complained of being sexually harassed by the Managing Director and that she was discriminated upon by not being enrolled in the pay roll.
23. It is his further evidence that the Claimant resigned on 8th December, 2022, and was issued with notice to show cause after she had resigned.
24. The Respondent prays that the Claimant's suit be dismissed with costs.

Analysis and Determination

25. Having considered the pleadings, the witnesses' testimonies and the rival submissions, the issues for determination are: -
 - a. Whether the Claimant was constructively dismissed.
 - b. Whether the Claimant deserves the reliefs sought.

Whether the Claimant was constructively dismissed

26. The Claimant's assertion is that she resigned from the service of the Respondent due to continued non-payment of salary, piecemeal payments, and failure by the Respondent to enrol her on the pay roll, which act/omission she termed discriminatory. It is on this basis that she alleges that she was constructively dismissed.
27. The *Black's Law Dictionary (Tenth Edition)* defines constructive dismissal or discharge as:

“An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”



28. The Court of Appeal in *Coca-Cola East & Central Africa Limited v Maria Kagai Lugaga* (2015) eKLR, had this to say on constructive dismissal:

“The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer’s behaviour towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer’s conduct is so grave that it constitutes a repudiatory breach of the contract of employment- this is the contractual test.....”

29. In the South African case of *Pretoria Society for the Care of the Retarded v Loots* the Court reiterated that the first test in establishing constructive dismissal is whether, when resigning, there was no other motive for resignation, denoting that the employee would have continued the employment relationship indefinitely had it not been for the employer’s intolerable conduct.

30. The Court went on to state that when an employee resigns and claims constructive dismissal, he is in fact affirming that under the intolerable situation created by the employer, he can no longer continue to work, and has construed that the employer’s behaviour amounts to a repudiation of the employment contract.

31. The issue for this Court is whether non-payment or piecemeal payment of salaries constitutes unilateral acts that amounts to breach of employment contract, and if so, whether these acts and/or omissions on the part of the Respondent, could reasonably be perceived as having substantially changed essential terms of contract as to amount to constructive dismissal.

32. In support of constructive dismissal and further to the non-payment of salary, the Claimant testified that sometime in May, 2022, the Respondent’s Managing Director grabbed and hugged her tightly. It is her case that on yet another occasion, the same Managing Director (MD) invited her to his office and asked her to sit on his lap.

33. It was the Claimant’s further testimony that the MD became furious when she declined his sexual overtures and ordered her to be administering chemotherapy without protective gear. She states that the Managing Director compounded the problems by altering negative malignancy results and forcing her administer chemotherapy.

34. The Claimant produced a resignation letter dated 8th December, 2022, summarising the issues leading to her resignation.

35. The Managing Director who the Claimant accused of sexually harassing her, did not testify in this matter. Further, RW2 confirmed that the Claimant, while in the employ of the Respondent complained of sexual harassment by the institutions Managing Director.

36. D.K.N Marete J in *Mokaya v St. Leonard’s Maternity Nursing Home Limited* (Cause 53 of 2017) [2018] KEELRC 929 stated thus on sexual harassment:

“Cases and instances of sexual harassment are extremely personalized and difficult to prove. More often than not, these would not be documented but comprise of overt and covert overtures by the offending party. It is therefore expected that when this arises, action should be taken towards reporting or raising the same with the powers that be, the employer or



his agents. Sometimes the prevailing environment may not be facilitative of this. It would therefore be unreasonable to employ the standard burden of proof on this kind of matters.”

37. Section 6 of the *Employment Act* defines sexual harassment as follows:

- “(1) An employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker—
- (a) directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express—
 - (i) promise of preferential treatment in employment;
 - (ii) threat of detrimental treatment in employment; or
 - (iii) threat about the present or future employment status of the employee;
 - (b) uses language whether written or spoken of a sexual nature;
 - (c) uses visual material of a sexual nature; or
 - (d) shows physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee’s employment, job performance, or job satisfaction.”

38. The Court of Appeal in *Ooko & another v SRM & 2 others* (Civil Appeal 195 & 197 of 2019 (Consolidated)) [2022] KECA 44 (KLR) defined sexual harassment as a type of employment discrimination consisting of verbal or physical abuse of a sexual nature, including lewd remarks, salacious looks and unwelcome touching.

39. In the circumstances of this case the Respondent’s evidence only pointed to a mere denial of sexual harassment. The denials are however from people other than the alleged perpetrator.

40. The Claimant’s testimony was not rebutted as the person accused of the harassment did not deem it necessary to testify in the matter. It is also true that the persons who testified in the Respondent’s defence, admitted that sexual harassment is an act that takes place in private, and hence they cannot therefore prove that it did not happen.

41. This leads me to the conclusion that the Respondent failed to disprove the Claimant’s allegations of sexual harassment.

42. I thus conclude by finding that the Claimant has proved the claim of sexually harassment on a balance of probability.

43. Without a doubt, non-payment of salaries, coupled with sexual harassment, are acts that amount to breach of an employment contract, and which could reasonably be perceived as having substantially changed essential terms of contract as to amount to constructive dismissal.

44. I therefore find and hold that the Claimant has proved a case of constructive termination.



Whether the Claimant is entitled to the reliefs sought.

Payment in lieu of leave not taken

45. The Claimant has sought Kshs 125,000/= on account of leave not taken. It is the employer's obligation to keep employee records, and such records include leave application forms.
46. The leave form produced by the Respondent indicates that the Claimant sought to go on leave between 20th December, 2022, and 31st January, 2023, which is a period after the Claimant had resigned from the service of the Respondent.
47. I hold that the Respondent has not proved that the Claimant utilized her leave days, and the claim is thus merited and is allowed as prayed.

Salary in lieu of notice

48. The Claimant resigned from the service of the Respondent, and although the resignation has been held to amount to constructive termination, it does not entitle her to notice pay.
49. The claim lacks merit and is dismissed.

Service gratuity for 1 year.

50. Service gratuity is a benefit that has to be expressly provided in the contract of employment. The Claimant's contract of employment has no provision for payment of gratuity.
51. Further, the evidence before Court shows that parties made deductions in respect of the NSSF. In the premise the claim for gratuity is for dismissal.

Unpaid salary

52. The Claimant refuted payment of salaries for the months of August to November, 2022, amounting to Kshs. 500,000.
53. The Respondent stated that it paid the arrears as evidenced by the cheques dated 26/10/2022 for Kshs 95,000/= and 3/1/2023 for 190,000/, and Mpesa payments of Kshs 50,000/= and 45,000/=.
54. On cross-examination, the Claimant told Court that she received a cheque in October, 2022, and further received Kshs. 50,000, Kshs. 46,000, and a further Kshs. 45,000 through Mpesa from the Respondent's Managing Director named Dr. Palmer.
55. The Claimant denied receipt of the payment said to have been made in January, 2023, and no further evidence was led to prove that the payment was made.
56. The amount the Claimant admitted receiving is Kshs. 236,000. I will thus proceed to award the difference as full payment was not proved.
57. The Claimant is thus awarded Kshs. 264,000 being salary arrears.

Unremitted statutory dues

58. The Claimant averred that the Respondent deducted, but did not remit NHIF and taxes. As regards NHIF the Respondent acknowledged non-remittance in the response to claim and promised to settle the same.



59. In respect of taxes the Respondent produced a P9 form showing that taxes were paid from January to December, 2022.
60. Should the Respondent have deducted and not remitted any dues, there are avenues for enforcing payment including the imposition of penalties, in the NHIF Act and the relevant KRA regulations. The Claimant should invoke the provisions by making an appropriate report.
61. The claim fails and is dismissed.

Compensation

62. The Claimant sought 12 months salary as compensation for constructive termination. Having held that the Claimant was indeed constructively terminated, and considering her length of service with the Respondent, and the opportunities available to her for securing comparable employment, I deem an award of five (5) months' salary sufficient compensation for the unfair termination, and its hereby awarded.

General damages for Sexual harassment

63. The court held that the Claimant on a balance of probability proved a case of sexual harassment. Section 12 (3)(v) of the [Employment and Labour Relations Court Act](#) empowers this Court to make an award of damages in any circumstances contemplated under this Act or any written law.
64. In the circumstances, I award the Claimant Kshs 500,000/= for sexual harassment.

Disposition

65. In the final analysis, the Court enters judgment for the Claimant as against the Respondent, and awards the Claimant the following reliefs:
 - a. Salary in lieu of leave at Kshs 125,000/=
 - b. Unpaid salaries at Kshs. 264,000/=
 - c. 5 months' salary as compensation for constructive termination at Kshs 625,000/=
 - d. General damages for sexual harassment Kshs. 500,000/=
 - e. Costs of the suit and interest until payment in full.
66. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 6TH DAY OF MARCH, 2024.

C. N. BAARI

JUDGE

Appearance:

Mr. Kirui present for the Claimant

Mr. Mbeka present for the Respondent

Arwin Odhiambo- C/A

