



**Njeri v Engi Consult Limited (Cause E564 of 2020)
[2024] KEELRC 1060 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1060 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E564 OF 2020**

**JK GAKERI, J
APRIL 25, 2024**

BETWEEN

ESTHER NJERI CLAIMANT

AND

ENGI CONSULT LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim dated 10th September, 2020 alleging constructive dismissal and non-payment of terminal dues and compensatory damages.
2. It is the Claimant’s case that he was employed by the Respondent as the Administrative Assistant at Kshs.35,000/= per month and worked from October 2017 to Mid-July 2018 when she resigned owing to financial challenges occasioned by non-payment of salary.
3. The Claimant further avers that she did not proceed on leave for the entire duration of employment and the Respondent did not pay National Social Security Fund deductions.
4. That efforts to resolve the dispute amicably fell through.
5. The Claimant prays for;
 - a. A declaration that dismissal of the Claimant by the Respondent was unfair and unlawful.
 - b. Sum of Kshs.705,062.50 as terminal dues and compensatory damages plus interest thereon.
 - c. Costs of this suit.



Respondent's case

6. In its response to the claim dated 5th April, 2023, the Respondent denies having employed the Claimant, but had joined as a reliever as a staff member was proceeding on maternity leave and the engagement was not continuous.
7. It is the Respondent's case that when Alice Mwaura resumed after maternity leave, the Claimant requested to help out in the office work as she sought alternative employment and the Respondent agreed to pay her a stipend of Kshs.10,000/= and there was no contract of employment between the parties and she left on her own accord without notice or reason and it was her duty to make NSSF contributions.
8. The Respondent prays for dismissal of the Claimant's suit with costs.

Claimant's evidence

9. On cross-examination, the Claimant confirmed that she was employed in October 2017 by word of mouth as M/s Alice Mwaura was proceeding on maternity leave but on her return, the Claimant continued working for the Respondent and denied having been paid a Kshs.10,000/= stipend.
10. The Claimant testified that her salary was Kshs.35,000/= paid through the bank but admitted that she did not file any statement or record of the salary paid.
11. The Claimant confirmed that she had no evidence of any payment made to her by the Respondent in cash or otherwise, but testified that she wrote a letter to the Managing Director of the Respondent on the arrears but had no copy record.
12. It was her testimony that she resigned because she had no money to enable her report to the workplace.
13. It was the Claimant's testimony that she had no evidence of non-remittance of NSSF deductions.
14. That the boss was rude to her during one of the visits to the office.
15. On re-examination, the Claimant testified that her employment was continuous, was paid through the bank and was not paid from March to July 2018.
16. That the Respondent did not give her a payslip.

Respondent's evidence

17. RWI, Mr. Engineer Kamuyu Kahenya confirmed that the Claimant joined the Respondent as a reliever and did secretarial work at Kshs.30,000/= for 3 months paid in cash most of the time but had no documents allegedly sent to counsel.
18. That he did issue a payslip to the Claimant or written contract.
19. RWI could not recall when the Claimant joined the Respondent or left.
20. The witness confirmed that after the secretary resumed duty, the Claimant requested to stay on as she scouted for other opportunities and RWI agreed to pay her a stipend of Kshs.10,000/= per month for the remainder of the duration.
21. The witness admitted that the company had no money to pay.
22. It was his testimony that the Respondent did not owe the Claimant anything by the time she left.



23. RWII, Alice Mwaura confirmed that the Claimant was introduced to her by one Irene Njoki and performed her duties when she proceeded on maternity leave but was unaware of the Claimant's salary and the Claimant worked for 4 months initially. That she resumed in Mid-January 2018 but the Claimant hanged around as she scouted for other opportunities but dealt with the Managing Director directly.
24. According to RWII, the Claimant picked calls, typed letters, picked letters and went to the bank, tasks similar to those that she performed and left in July 2018 without any notice.

Claimant's submissions

25. By 4th March, 2024 when the court retired to prepare this judgment, the Claimant's submissions were unavailable on the portal.

Respondent's submissions

26. Counsel isolated three issues for determination namely; whether the Claimant was an employee of the Respondent, termination and entitlement to the reliefs sought.
27. As regards employment and terms, counsel submitted that the Claimant's engagement in October 2017 was temporary as a reliever of the Administrative Assistant, M/s Alice Mwaura who was proceeding for maternity leave and performed the latter's duties and worked for 4 months but hanged around after M/s Mwaura's return and left in July 2018.
28. According to counsel, the Claimant was unsure of her salary and RWI confirmed it was Kshs.30,000/= for the first 3 and 4 months and later Kshs.10,000/= per month owing to her diminished responsibilities as the substantive holder of the office was back.
29. That conversion of the temporary contract to term did not arise.
30. That National Social Security Fund and National Health Insurance Fund contributions did not arise owing to the temporary nature of the engagement.
31. On reliefs, counsel submitted that since the Claimant left employment voluntarily, no declaration or compensation was merited and she did not raise the issue of having her stipend raised and had been paid all her dues as RWI and RWII confirmed.
32. Counsel urged that the Respondent had demonstrated that it paid the Claimant all her dues and none was owing and no NSSF contributions were due and her salary was all-inclusive.
33. That the Claimant was not entitled to compensation for unfair termination of employment.
34. Reliance was made on the decisions in Kenya Broadcasting Corporation V Geoffrey Wakio (2019) eKLR and Mawenzi Investments Ltd V Top Finance Co. Ltd & another (2014) eKLR among others to reinforce the submissions.

Findings and determination

35. The issues for determination are;
 - i. Whether the Claimant was an employee of the Respondent and on what terms.
 - ii. Whether the Claimant was constructively dismissed by the Respondent.
 - iii. Whether the Claimant is entitled to the reliefs sought.



36. As regards employment, it is decipherable that the Claimant joined the Respondent in October 2017 to relieve M/s Alice Mwaura who was proceeding on maternity leave, initially for 3 months but M/s Mwaura extended her leave and the Claimant remained the Respondent's Administrative Assistant until Mid-January when M/s Alice Mwaura resumed duty.
37. On remuneration, the Claimant alleged that she was earning Kshs.35,000/= per month paid through her bank account but had no a single document to prove the same. A copy of a bank statement would have effortlessly demonstrated the Claimant's salary and the duration during which she was paid.
38. The Respondent admitted paying her Kshs.30,000/= for the first few months until M/s Alice Mwaura resumed duty.
39. The Respondent admitted that he paid the Claimant's salary in cash but had no supportive evidence.
40. RWI confirmed on cross-examination that when M/s Mwaura resumed duty, the Claimant requested to remain as she scouted for employment elsewhere and paid her Kshs.10,000/= per month.
41. Although the Claimant did not admit it in her evidence she joined the Respondent to relieve M/s Mwaura and was introduced to the Respondent by a 3rd party and was paid Kshs.10,000/= per month until she left employment.
42. Contrary to the Respondent's averment that the Claimant was not an employee owing to the absence of a formal contract of employment and was a temporary employee, evidence on record leave no doubt that the Claimant remained an employee of the Respondent until Mid-July 2018 when she left.
43. The provisions of Section 2 and 8 of the *Employment Act*, 2007 are emphatic that a contract of service need not be formal. It may be oral or in writing, express or implied from the conduct of the parties.
44. Section 8 of the *Employment Act*, 2007 provides that;
- “The provisions of this Act shall apply to oral and written contracts.”
45. Similarly, although the Claimant became an employee of the Respondent as a reliever, thus temporary, she was an employee for the duration she was to serve and was entitled to a salary and subject to all statutory deductions.
46. On the absence of a written contract of employment, the law imposes a duty on the employer to keep and maintain employment records including avilment of copies of payslips given to the employee.
47. As regards the salary paid to the Claimant, the claim for Kshs.35,000/= per month is unsupported by any shred of evidence.
48. Equally, the Respondent tendered no evidence to show that it paid the Claimant Kshs.30,000/= per month, initially and later Kshs.10,000/=.
49. Section 10(7) of the *Employment Act*, 2007 provides that;
- “If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in sub-section (1), the burden of proving or disapproving an alleged term of employment stipulated in the contract shall be on the employer.”
50. In this case, since the Respondent failed to disprove that the Claimant's salary was initially Kshs.35,000/=, it is the finding of the court that the same was Kshs.35,000/=.



51. As to whether the Claimant's salary changed after M/s Mwaura resumed duty, it is discernible that the issue was discussed between RWI and the Claimant and the Claimant admitted that she would be receiving a small amount in cash in an envelope but adduced no evidence of payment.
52. From the evidence on record, it is unclear as to whether the Claimant and Respondent agreed that the Claimant's salary would be reduced to Kshs.10,000/= per month as she continued rendering certain services as RWII confirmed.
53. Was the Kshs.10,000/=, all she would receive for a 30 days toil? The Respondent tendered no agreement to show that the change had been agreed upon.
54. The Claimant's case is further strengthened by the fact that by letter dated 13th July, 2020, the Claimant demanded salary arrears for February to Mid-July 2018, a letter which though received by the Respondent on 17th July, 2020, was not responded to.
55. The Respondent did not deny owing the Claimant the amount claimed and equally did not respond to the counsel's letter dated 3rd August, 2020 and received on 4th August, 2020.
56. A response by the Respondent would have demonstrated its position on the alleged salary arrears and the alleged employment generally.
57. The Respondent opted to ignore both letters.
58. In the absence of credible evidence of an agreement between the Claimant and the Respondent to prove that the terms of engagement changed after M/s Alice Mwaura resumed duty, it is the finding of the Claimant that the Claimant remained an employee of the Respondent at Kshs.35,000/= but was paid Kshs.10,000/= per month owing to the financial challenges the Respondent was facing as admitted by RWI, on cross-examination.
59. The Respondent thus owes the Claimant Kshs.25,000/= for the duration it paid her Kshs.10,000/= per month.
60. On constructive dismissal, the concept of constructive dismissal was aptly captured by Lord Denning MR in *Western Excavating (ECC) Ltd V Sharp (1978) Q.B 761* as follows;

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving notice or at all or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract”.
61. In Kenya, the principle of constructive dismissal was explained and domesticated by the Court of Appeal in *Coca Cola East and Central Africa V Maria Kagai Ligaga (2015) eKLR* where the court not only adopted the contractual approach test but also enunciated the guiding principles for determining whether a constructive dismissal has taken place.



62. Under the contractual test, the party alleging constructive dismissal must demonstrate that the employer's conduct amounted to a repudiatory breach of the contract of employment.
63. The essential guiding principles are; fundamental or essential terms of the contract of employment, whether a repudiatory breach of contract has taken place, whether the employer's conduct runs to the root of the contract, objectivity, causal link between the employer's conduct and the resignation, reason for terminating the contract, leaving with or without notice, absence of evidence of acceptance, waiver, acquiescence or conduct implicating estoppel and discharge of the burden of proof.
64. The court is guided accordingly.
65. The pith and substance of constructive dismissal is that the employee must prove that the employer has committed a repudiatory breach of the contract of employment by acts or omission whose effect is to render the existence of an employment relationship between the parties untenable to the employee.
66. That the conduct of the employer made it impossible for the employee to perform the contract of employment and thus leaves immediately.
67. It must have been sufficiently frustrating to justify the resignation.
68. (See *Benuel Mariera V Awand Enterprises Ltd (2014) eKLR*, *Emmanuel Mutisya Solomon V Agility Logistics Cause No. 1448 of 2011* among others).
69. The evidence on record reveal that the Claimant was paid the agreed salary upto the return of M/s Alice Mwaura.
70. The sum of Kshs.10,000/= per month appear to have commenced in February 2018 and continued until June 2018 as the Claimant left around mid-July 2018 as her letter to the Respondent states.
71. It follows that the Claimant waited for more than 5 months to make up her mind and left the 6th month.
72. The salient question is whether the Claimant had acted at the instant.
73. No doubt non-payment of salary by an employer or payment of a lesser amount runs to the root of the contract as exemplified by the provisions of the *Employment Act, 2007* as regards salary and wages.
74. An employee is a person "employed for wages or a salary."
75. More significantly, Part IV of the *Employment Act* is devoted to the protection of wages.
76. In view of the centrality of wages or salary in an employment relationship, the court is persuaded the payment of Kshs.10,000/= to the Claimant by the Respondent amounted to a repudiatory breach of the contract of employment but for the delay in leaving employment.
77. One of the critical elements of constructive dismissal is that the employee must leave at the instant otherwise he/she is deemed to have waived his/her right to assert the dismissal, having affirmed the conduct, acquiesced or is estopped by his conduct.
78. In his case, the Claimant waited for too long to leave and had by her conduct affirmed the Kshs.10,000/= and was estopped from alleging otherwise.
79. Relatedly, the Claimant left without notice in Mid-July 2018, she made no attempt to explain her case to the Respondent in writing to show her frustrations with the status quo.
80. The letter on record was written more than 2 years later. The letter is phrased as a resignation letter written 2 years later and did not jolt the Respondent into action.



81. Relying on the formulation of constructive dismissal by Lord Denning MR in *Western Excavating (ECC) Ltd V Sharp (Supra)* as elaborated and applied by the Court of Appeal in *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga (Supra)*, the court is not persuaded that the plea of constructive dismissal is available to the Claimant in the instant suit.

Whether the Claimant is entitled to the reliefs sought

82. Having found as above, the court proceeds as follows;

i. Declaration

83. Having found that the Claimant has failed to prove that her employment was constructively dismissed by the Respondent, the declaration sought is unmerited and is declined.

ii. Unpaid and unremitted NSSF dues

84. The Claimant adduced no evidence of the unremitted or unpaid dues.
85. The witness adduced no evidence to prove that any deductions were made from her monthly salary and/or were not remitted to the National Social Security Fund (NSSF). She tendered no evidence to establish that she was a member of the NSSF.
86. A blank NSSF statement would have proved non-remittance of deductions.
87. The prayer lacks proof and is declined.

iii. Unpaid house allowance

88. The Claimant tendered no evidence to prove that the salary of Kshs.35,000/= per month was not inclusive of house allowance.
- The prayer is declined.

iv. Pay in lieu of untaken leave

89. In her written statement, the Claimant stated that she did not proceed on leave for the duration served and is thus entitled to pro rata leave from October 2017 to Mid-July 2018. It is unclear how the sum of Kshs.18,375/= was arrived at.
90. The Claimant is entitled to pro rata leave for the duration served, Kshs.18,375/=.

v. Unpaid off-days

91. The Claimant adduced no evidence of his work schedule including reporting and exit times and off-days.
- The claim lacks supportive evidence and is declined.

vi. 12 months compensation

92. Having found that the Claimant has failed to demonstrate that her employment was constructively terminated by the Respondent in July 2018, the prayer for compensation is unsustainable and is dismissed.



vii. Outstanding salary arrears from February 2017 to Mid-July 2018

93. Having found that the Claimant remained an employee of the Respondent even after M/s Alice Mwaura resumed duty and rendered identifiable services in the office, such as being sent to the bank, typing of letters, picking calls and collecting letters among others, she was entitled to full remuneration and is awarded the unpaid salary arrears for February, March, April, May, June and July 2018 computed as follows;

Kshs. $(35,000 - 10,000) = 25,000 \times 5 \text{ months} = \text{Kshs.}125,000 + 17,500 = \text{Kshs.}142,500/=$.

94. In conclusion, judgment is entered in favour of the Claimant against the Respondent in the following terms;

- a. Unpaid salary arrears Kshs.142,500.00
- b. Pro rata leave Kshs.18,375.00
Total Kshs.160,875.00
- c. Interest at court rates from date hereof till payment in full.
Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH DAY OF APRIL 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

