



**Mutua v Buxton Hospital Mombasa Ltd (Cause E054 of 2022)
[2024] KEELRC 1552 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1552 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E054 OF 2022**

**AK NZEI, J
JUNE 20, 2024**

BETWEEN

BENJAMIN MUTUA CLAIMANT

AND

BUXTON HOSPITAL MOMBASA LTD RESPONDENT

JUDGMENT

1. Vide a memorandum of claim dated 24/6/2022 and filed in this Court on 24/6/2022, the Claimant sued the Respondent and pleaded that he was employed by the Respondent as a Chief Administrator on 20/11/2018, earning a salary of Kshs 70,000, which was later increased to Kshs 90,000, that he and held the said position until he resigned due to frustrations arising from the Respondent's failure to pay his dues, which the Claimant enumerated as follows:-
 - a. Balance of salary for May 2020Kshs 32,000
 - b. Unpaid salary for the months of June to December 2020 (Kshs 90,000x 7 months)..... Kshs 630,000
 - c. Unpaid salary for the year 2021 (Kshs 90,000x12 months).....Kshs 1,080,000.
2. The Claimant further pleaded that his employment was unfairly and constructively terminated owing to frustrations due to the Respondent's said failure to pay the Claimant's dues/salary for a period of 19 ½ months, during which period the Claimant was working for the Respondent.
3. The Claimant sought the following reliefs from the Respondent:-
 - a. A declaration that the Claimant was unfairly terminated.
 - b. Compensation for unfair termination of employment (Kshs 90,000 x12 = 1,080,000.)



- c. Balance of salary for May 2020Kshs 32,000
 - d. Unpaid salary for the months of June 2020 to December 2020 (Kshs 90,000x7)Kshs 630,000
 - e. Unpaid salary for the year 2021 (Kshs 90,000x12 moths).....Kshs 1,080,000
 - f. Costs and interest.
4. Documents filed by the Claimant alongside the memorandum of claim included the Claimant's written witness statement dated 24/6/2022 and an evenly dated list of documents, listing 6 documents. The listed documents included a letter of appointment dated 19/11/2018, a job card, a bank statement, a resignation letter dated 29/11/2021 and a demand letter dated 11/5/2022.
 5. The Respondent, through the firm of Mogaka Omwenga & Mabeya Advocates, filed Response to the Claimant's claim and denied the same, only admitting that it had employed the Claimant, but at a salary of Kshs 70,000. The Respondent further averred:-
 - a. that the Claimant's contract was governed by the (Respondent's) Staff Contract Guidelines.
 - b. that the Claimant voluntarily resigned from service (by) a letter dated 29th November 2021, and that it is the resignation which terminated his employment.
 - c. that the Claimant's memorandum of claim does not disclose a reasonable cause of action against the Respondent; and is frivolous, vexatious and an abuse of the Court's process.
 6. Without setting out any counter-claim, the Respondent sought the following reliefs:-
 - a. a declaration that the Claimant resigned voluntarily from employment on 29th November 2021.
 - b. a declaration that the Respondent is not liable to pay the sum of Kshs 1,742,000 (or any part thereof) claimed by the Claimant.
 - c. an order dismissing the memorandum of claim with costs to the Respondent.
 7. On 26/6/2023, the Respondent's aforementioned Advocates filed an application, dated 20/6/2023, seeking leave to cease acting for the Respondent, which the Court allowed on 5/7/2023. The Respondent, though shown to have been served with a notice to attend hearing of the suit on 24/10/2023, did not attend Court.
 8. Hearing proceeded ex-parte on the said date (24/10/2023). The Claimant testified and adopted his filed witness statement as his testimony. He also produced in evidence the documents mentioned in paragraph 4 of this judgment. He clarified that the amount of salary indicated in his witness statement was his net pay. He further stated that during his entire period of employment, he was always either on duty or on call, and never took any annual leave. That the Respondent is a health facility and that the Claimant had to coordinate a lot of things, being the Chief Administrator.
 9. The Claimant's evidence was not controverted and/or rebutted as the Respondent did not attend Court for hearing of the suit. Indeed, the Respondent had not even filed any list of witnesses, witness statements or a list and/or bundle of documents intended to be produced in evidence.
 10. Failure by a Respondent/Defendant to call evidence in proof of matters pleaded by him/her leaves the pleadings as being mere pages of unsubstantiated statements of fact, with no legal weight and/or



import. It was held as follows in *Trust Bank Limited v Paramount Universal Bank Limited & 2 Others*, Nairobi [milimani] HCCC No. 1243 Of 2021:-

“It is trite where a party fails to call evidence in support of his case, that party’s pleadings remain mere statements of fact. In so doing, the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is unconverted and therefore unchallenged.”

11. Still on the same issue, it was held as follows in *Chrispine Otieno Caleb v Attorney General* [2014] eKLR:-

“Although the defendant has denied liability, in an amended defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff’s case stand unchallenged, but also that the claims made by the defendant in his defence and counter-claim are unsubstantiated. In the circumstances, the counter-claim must fail.”

12. In my view, issues that fall for determination herein are:-

- a. whether the Claimant was constructively dismissed by the Respondent.
- b. whether the Claimant is entitled to the reliefs sought.

13. On the first issue, the Claimant pleaded and testified that for 19 ½ months, he worked without being paid his salary by the Respondent, and that for this reason, he resigned vide a letter dated 29/11/2021. This was neither denied nor rebutted by the Respondent. the Court of Appeal stated as follows in the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR:-

“Constructive dismissal occurs where an employee terminates the contract under which he is employed, (with or without malice) in circumstances in which he is entitled to terminate it without notice, by reason of the employer’s conduct. The employer’s behavior in either case must be shown to be heinous, so intolerable, that made it inconsiderably difficult for the employee to continue working. The employee initiates the termination believing himself to have been fired. The employee needs to show that the employer, without reasonable or proper cause conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is regarded as constructive dismissal if the employer’s conduct is a significant breach of the contract of employment and that the conduct shows that the employer is no longer interested in being bound by the terms of the contract. The employee’s resignation is therefore treated as an actual dismissal by the employer, and the employee may claim compensation for unfair termination.”

14. Payment of an employee’s salary is an integral part of every employment contract, and under Section 10(2) (h) of the *Employment Act*, every written contract of employment must contain:-

“(h) The remuneration, scale or rate of remuneration, the method of calculating the remuneration and details of any other benefit.”

15. In the present case, failure by the Respondent to pay the Claimant’s salary for a record of 18 ½ months amounted to a repudiatory breach of the Claimant’s contract of employment by the Respondent, and was a clear indicator that the Respondent was not interested in, and had no intention of being bound by the terms of the said contract. The Claimant was entitled to consider himself as having been fired.



His resignation on 29/11/2021 should be treated as an actual dismissal, and an unfair one. I find and hold that the Claimant was unfairly dismissed by the Respondent, and I so declare. The Claimant is entitled to claim compensation as he has done.

16. On the second issue, I award the Claimant the equivalent of eight (8) months' salary as compensation for unfair termination of employment. The Claimant pleaded and testified that his monthly salary at the time of termination was Kshs 90,000. The equivalent of eight months' salary is Kshs 720,000, which I award the Claimant, being compensation for unfair termination of employment.
17. The claim for Kshs 32,000 being the balance of the Claimant's salary for May 2020 is allowed. Likewise, the claim for Kshs 630,000 being unpaid salary for the months of June, July, August, September, October, November and December 2020 is allowed. On the claim for Kshs 1,080,000 being unpaid salary for the year 2021 (Kshs 90,000x12), it is my finding that the Claimant worked for eleven months in 2021 as his resignation letter is dated 29/11/2021. I award him Kshs 990,000 being his unpaid salary for 11 months in 2021.
18. In sum, judgment is hereby entered for the Claimant against the Respondent as follows:-
 - a. compensation for unfair termination of employmentKshs 720,000
 - b. balance of salary for May 2020.....Kshs 32,000
 - c. unpaid salary for the months of June, July, August, September, October, November and December 2020.....Kshs 630,000
 - d. unpaid salary for 11 months in the
 - e. year 2021 (January to November 2021).....Kshs 990,000Total Kshs 2,372,000
19. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the [Employment Act](#).
20. The Claimant is also awarded costs of the suit and interest at Court rates. Interest shall be calculated from the date of this judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20TH JUNE 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant

.....Respondent

