



Maweo v Ipas Africa Alliance (Employment and Labour Relations Cause E664 of 2021) [2024] KEELRC 1534 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1534 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E664 OF 2021**

MN NDUMA, J

JUNE 13, 2024

BETWEEN

JONATHAN MAWEO CLAIMANT

AND

IPAS AFRICA ALLIANCE RESPONDENT

JUDGMENT

1. The claimant filed suit on 12/8/2021 seeking the following reliefs:
 - a. A declaration that the respondent breached/infringed on the claimant's rights/freedoms.
 - b. A declaration that the claimant was unfairly constructively dismissed by the respondent.
 - c. Reinstatement to work without loss of benefits
 - d. In the alternative to (c) above, payment of the following dues:
 - i. Salary arrears (September 2019 – July 2021) @ 351,789/= Kshs.8,101,147/=
 - ii. Leave days (outstanding 3.75 days) Kshs.497,240/=.
 - iii. Unfair termination (12*351,789/=) Kshs.4,221,468/=..
 - iv. Damages on account disease and injury Kshs.33,771,744/=
 - v. Total Kshs.46,591,599/=
 - e. Costs of this suit
 - f. Any other relief that this honourable court deems just and reasonable.
2. CW1 the claimant adopted a written statement dated 10/7/2021 as his evidence in chief.



3. The brief facts of the testimony by the claimant is that he is a health care worker and was employed by the respondent by a letter dated 23rd September 2015 as a Health Systems Administrator II. The employment took effect on 19th October 2015 with a monthly gross salary of Kshs.283,333.33 inclusive of basic salary and house allowance. CW1 testified that on or about December 2015, the respondent abruptly changed his duty station from Nairobi to Kisumu despite the fact that he had negotiated the employment based on the understanding that his duty station would be Nairobi where his young family was based.
4. That the claimant pleaded with the respondent not to transfer him but the plea was declined and he was forced to leave for Kisumu in early February 2016.
5. CW1 testified that the work environment at the respondent's office in Kisumu was extremely stressful and unconducive for the claimant and other employees as demonstrated by the extraordinary high employee turnover.
6. CW1 testified that during his time, the respondent changed country directors at least 3 times in a span of less than four years. That CW1 had at least four supervisors exiting the organization and saw more than one hundred staff members of the respondent exit.
7. That while at Kisumu he noticed unknown persons follow him from work and spied on all that he did. CW1 reported the situation to the respondent but no action was taken.
8. In early 2019, CW1 got a transfer back to Nairobi because the work environment in Kisumu was unbearable.
9. That in Nairobi, the same situation persisted and at some point CW1 had to report to the police station that he was being followed by unknown people but nothing changed.
10. Around July, 2019, CW1's friends and family members noticed severe mental health deterioration in the claimant and recommended that the claimant see a doctor.
11. CW1 stated that he was not convinced about the diagnosis and sought second opinion at a Mombasa hospital and was diagnosed with paranoid schizophrenia and was immediately admitted and put on medication.
12. CW1 said he left Mombasa hospital and continued treatment at Upper hill Medical Centre. CW1 said that in the said period of sickness while undergoing treatment, he learnt that he had already resigned from his work. This was after his condition had improved and the doctor had advised that CW1 could return to work.
13. CW1 said that while he was away sick, he had the respondent notified that he was unwell and proceeded to send medical reports and doctor's advice.
14. CW1 stated that he tried to follow up to get reinstated by explaining his condition but received no response from the respondent.
15. CW1 said that the condition he developed while working for the respondent had seriously affected him and family. That he had been abandoned by friends and relatives who think he is insane. That people no longer take him seriously and has abandoned social media and to watch television. That he was once a respected member of the society but has now been reduced to an urchin.
16. That the termination of his employment while he was sick between July and September 2019 was unlawful and unfair and prays for the reliefs sought.



17. Under cross-examination by counsel Michi Kirimi for the respondent, CW1 admitted that he understood he could be transferred at work though he protested the relocation to Kisumu. CW1 said he did not protest the transfer in writing. That he was brought back to Nairobi upon his request but not due to lack of work at Kisumu. CW1 said that he was occasionally verbally harassed at Kisumu by a number of staff. CW1 admitted that he was away from office between July to September 2019 when he submitted an email of resignation dated 7/7/2019.
17. CW1 said that the respondent accepted the resignation. CW1 said he was cleared and received final dues and executed a release and discharge on 11/10/2019. CW1 said he later sought to be reinstated after resignation. CW1 said he had resigned due to his mental health condition. CW1 said he received full leave pay. CW1 said he got sick while he was employed by the respondent. CW1 said he could not work due to sickness. CW1 said his sickness was a work injury but had no medical reports which indicates that.

Defence

18. RW1 Dr. Ernest Nyamoto testified for the respondent. He adopted a witness statement dated 29/5/2021 as his evidence in chief and produced exhibits '1' to '8' in support of his evidence.
19. RW1 said respondent is an organization involved in promotion of reproductive rights and provision of reproductive health technologies for health systems in several countries.
20. That the claimant was initially employed by the respondent as a health system advisor by a contract effective 19/10/2015.
21. That the contract provides that employees agree inter alia to work in such places in Kenya as the employer may from time to time require. That the claimant was redeployed from Nairobi to Kisumu in 2016 and respondent facilitated his relocation by giving him relocation allowance of Kshs.100,000/=, accommodation for him and family for up to two months to allow him to secure accommodation and three paid workdays for relocation.
22. That in 2019, the role of Health Systems Advisor II in Kisumu was declared redundant following reorganization of the structures. Claimant was assigned a role in new structure being a quality of Care Advisor II based at Nairobi and supporting Kiambu and Kajiado Country effective 1st April 2019.
23. On 24/7/2019, the respondent noted that the claimant was absent from work since 22nd July 2019 without permission. The respondent tried to reach out to him on phone but the claimant did not return calls.
24. On 25/7/2019, the respondent's quality of Care Advisor wrote to the claimant an email requiring him to explain his absence by the end of the day. The claimant did not oblige.
25. On 29/7/2019 the claimant wrote an email to the respondent's CEO and HR Director stating that he had been diagnosed with depression. RW1 stated that to the respondent's surprise, the claimant alleged that he had faced discrimination, abuse, harassment and persecution while in employment and sought separation from the respondent. The email was produced by the claimant.
26. That the claimant's docket did not include handling of any sensitive information as he alleged or at all. The job description was referred to in claimant's bundle.
27. Furthermore, the respondent's employees' guidelines have an Employee Assistance Program (EAP) which offers psychological support to employees experiencing stress and facing life's challenges. The costs of the highly confidential program are paid for by the respondent. That the respondent has a



culture of fair labour practices and has an enabling environment for employees in support to employee facing work-related challenges.

28. That the claimant was at all material times aware of this support programme and ought to have utilized it if he had challenges as alleged at Kisumu station.
29. On 29/7/2019, the respondent's HR Director reached out to the claimant to seek particulars of his complaints and offered to support him. The email was produced by the claimant.
30. The claimant responded by an email dated 30/7/2019 stating that he had no hard evidence to support his allegations but sought to go through medication and follow up with the EAP later for support. By an email of the same date, the HR Director requested the claimant to see him once he returned to work to discuss the issues he had raised. The letter was produced by claimant.
31. RW1 states that the claimant did not reach out to the HR Director as requested.
32. By an email dated 7/8/2019, the claimant gave one months' notice of his resignation to take effect on 7/9/2019. By the same email, the claimant indicated that he would be available to assist in his duties and that he would arrange to attend to the clearance process. RW1 stated that the claimant thanked the respondent for the four years he had worked. The letter was produced by the respondent.
33. The respondent accepted the claimant's resignation by a letter dated 8/8/2019 and forwarded to him the clearance form to assist in the clearance process.
34. On 6/9/2019, that HR advisor followed up with the claimant and requested him to plan for his clearance in order to have his final dues paid. RW1 stated to respondent's surprise, the claimant responded stating that he was mentally unwell at the time of resignation and sought to postpone his resignation to 30/10/2019.
35. On 23/9/2019, the claimant reported to the respondent's office to complete the clearance process after which his salary for up to 7th September 2019 was processed and paid to him.
36. RW1 stated that as at the effective date of resignation, the claimant had accrued 18.71 leave days. The claimant's leave days were computed and paid without deducting the days the claimant was absent without permission, payment of full pay up to 7/9/2019, was also paid despite the absence of the claimant from 22/7/2019 without permission.
37. On 6/10/2019, RW1 received a letter from the claimant requesting for reversal of his resignation. This was after he had completed the clearance process and he had ceased to be an employee of the respondent. RW1 said, the respondent had no basis to reverse the claimant's resignation.
38. RW1 stated that the claimant had signed a release and discharge letter dated 4/10/2019 acknowledging receipt of his final dues being:
 - a. One-month salary ex-gratia payment Kshs.351,788.90
 - b. Payment in lieu of leave days not taken Kshs.313,427.17
 - c. Prorated 13th months' pay from January 2019 Kshs.240,945.48Total Kshs.906,167.48
39. The release and discharge letter was produced before court. The claimant was allowed to benefit from his medical cover up to 30/6/2020.



40. RW1 added that the claimant only raised allegations of harassment, discrimination and persecution after he was required to give reasons for his absence without permission.
41. That the claimant said he had no tangible evidence of such mistreatment. That the claimant terminated his employment voluntarily and the respondent was bound to accept it.
42. That there was no basis for considering reinstatement of the claimant. That there is no evidence of constructive dismissal. That the suit be dismissed with costs.

DETERMINATION

43. The parties filed written submissions which the court has carefully considered together with the evidence adduced by CW1 and RW1. The issues for determination are:
 - a. Whether the claimant has proved constructive dismissal?
 - b. Whether the claimant has proved discrimination and mistreatment by the respondent?
 - c. Whether the claimant is entitled to the reliefs sought including reinstatement; damages for constructive dismissal and for work injury on account of alleged sickness?
 - d. Who should bear the costs of the suit?
44. The court has closely considered the rival testimony by CW1 vis a vis that of RW1 and it is not in dispute that the claimant tendered a letter of resignation dated 7/8/2019 giving one month's notice of resignation so as to stop work on 7/9/2019.
45. The court is satisfied that at the time the claimant tendered the letter of resignation he had been absent from work without explanation from 22/7/2019 and that the respondent had on 24/7/2019 tried to reach out to the claimant by phone but the claimant had not responded to the call.
46. The court is also satisfied that by a letter dated 25/7/2019, the respondent had written to the claimant by email asking him to explain why he had absconded work. The court is also satisfied that the claimant did not respond to that letter until 29/7/2019 when the claimant wrote an email to the CEO and HR Director stating for the first time that he had been diagnosed with depression.
47. The court is satisfied that it is in that email of 29/7/2019, when the claimant for the first time made allegations of discrimination, abuse, sexual harassment and persecution in a general manner. The claimant had in the same letter made allegations in writing for the first time that he was being followed by unknown persons due to the sensitive information he had by virtue of his work.
48. The respondent had promptly responded to the claimant asking him to give specific particulars of his complains and offered to support him in line with the respondent's Employee Assistance Program (EAP) which the claimant was well aware of.
49. The court is satisfied that the claimant did not provide the requested particulars of alleged harassment, discrimination and surveillance and the claimant had said in his reply dated 30/7/2019 that he had no such particulars.
50. The court is satisfied that there is no evidence provided by the claimant to the satisfaction by the court that the respondent had harassed, discriminated, abused and or unlawfully stalked the claimant in the course of his work at Kisumu and Nairobi.
51. The court is also satisfied that the claimant had not raised any issues concerning his health to the respondent until he absconded work on 22/7/2019.



52. The court is in the whole satisfied that the claimant has not proved to the satisfaction of the court any facts that would lead the court to conclude that the respondent had by its conduct repudiated the contract of employment between the respondent and the claimant as at 7th August 2019 when the claimant, while away from work tendered resignation of his employment giving one month notice of termination effective 7/9/2019.
53. This court has defined circumstances and facts that may be construed to comprise constructive dismissal in various cases including the case of Kenneth Kimani Mburu and Another versus Kibe Mungai Holdings Limited (2014) e KLR as follows:-
 - I. The employer must be in breach of the contract of employment
 - II. The breach must be fundamental as to be considered a repudiatory breach
 - III. The employee must resign in response to that breach
 - IV. The employee must not delay in resigning after the breach has taken place otherwise the court may find the breach waived
54. The Court of Appeal affirmed this position in the case of Coca Cola East and Central Africa Limited and Maria Kagai Ligaga (2015) e KLR
55. The court is satisfied that the facts of this case as adduced by the claimant and countered by the respondent do not disclose a case of constructive dismissal by the respondent against the claimant.
56. Accordingly, the claimant has not only failed to prove that he was harassed, abused, mistreated, stalked and/or discriminated upon by the respondent but in the whole has failed to prove a case of constructive dismissal on a balance of probability. The case by the claimant in this respect must therefore fail and the court finds so.

Reliefs

Terminal benefits

57. The court is satisfied that the claimant was paid all terminal benefits in the sum of Kshs.906,167.48 upon resignation. The court is equally satisfied that the claimant proceeded to sign a release and discharge letter dated 11/10/2019 upon payment of his terminal benefits in acknowledgment thereof. Accordingly the claimant has not proved that he is entitled to any further payment in respect of arrear salary and untaken leave days.
58. Equally, the court having found that the claimant voluntarily resigned and was not constructively dismissed by the respondent finds that the claimant is not entitled to grant of any damages for alleged unfair termination.
59. The claimant only raised matters of his illness after he had stopped coming to work on 22/7/2019. There is no medical evidence or any other evidence before court to prove that the claimant acquired any occupational disease as a direct consequence of his work environment and/or negligence by the respondent. No such occupational disease was reported in terms of work injury Act, 2007 by the claimant to his employer and/or to the Director of Occupational Safety and Health in terms of the said Act.
60. Therefore, the claimant is not entitled to damages on account of work disease and/or injury as claimed or at all.



61. In conclusion, the suit by the claimant has failed in its entirety and is dismissed.
62. The court has carefully considered the circumstance of the claim presented in this case and the evidence tendered by RW1 regarding the nature and mandate of the respondent.
63. The court considers in light of the circumstances this to be an appropriate case for each party to bear their own costs of the suit.

DATED AT NAIROBI THIS 13TH DAY OF JUNE, 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Oyare for claimant

Ms. Kirimi for respondent

Mr. Kemboi, Court Assistant

