



**Leah v Iran Medical Clinic (Cause E847 of 2021)  
[2024] KEELRC 2442 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2442 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E847 OF 2021  
K OCHARO, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**GANIRA LEAH ..... CLAIMANT**

**AND**

**IRAN MEDICAL CLINIC ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Memorandum of Claim filed before the Court on 12<sup>th</sup> October 2021, the Claimant sued the Respondent seeking the following reliefs and orders: -
  - a. One month’s salary in lieu of notice- KShs. 60,000.
  - b. Service Pay ½ by 60,000 by 4- KShs. 120,000
  - c. Withheld salary [July, August] – KShs. 120,000
  - d. Payment for Goods Delivered by Veteran Hospital on credit on a guarantee of her Pharmaceutical Technologies Licence- KShs. 98, 500.
  - e. Damages for unlawful termination [calculated as the salary that was to be earned for the remainder of her contract of service for 2021. She resigned on the 9<sup>th</sup> of September 2021- KShs. 240,000.
  - f. Damages for Discrimination on the basis of her pregnancy, race, and religion.
  - g. Costs of the suit
  - h. Interest at Court rates.



2. In response to the Statement of Claim, the Respondent filed a Statement of Defence dated 9<sup>th</sup> November 2022, denying the Claimant's claim and entitlement to the reliefs sought.
3. The matter proceeded for hearing of the Claimants' case on the 20<sup>th</sup> of September 2023 and the Respondent's case on the 26<sup>th</sup> October 2023, when the Claimant and the Respondent's sole witness, testified respectively.

#### **Claimant's case**

4. At the hearing, the Claimant adopted her witness statement as part of her evidence in chief. She stated that she was first employed by the Respondent on 23<sup>rd</sup> December 2017 as a Pharmacy Technologist on the strength of a one (1) year fixed term renewable contract, at an agreed monthly remuneration of KShs. 60000 [ basic salary of Kshs. 50,000/- in addition to Kshs. 10,000/- monthly for her Pharmaceutical Technologist License which covered the Respondent's premises].
5. The Claimant further stated that after the lapse of the first fixed-term contract by effluxion of time, she had successive renewed fixed-term contracts, the last one was renewed in 2021.
6. The contended that the employer-employee relationship between the Respondent and her remained smooth, until 25<sup>th</sup> May 2021, when she proceeded on an emergency maternity leave with the Respondent's permission. Suddenly, in July 2021, the Respondent unilaterally withheld her monthly remuneration.
7. She was forced to contact the Respondent to inquire why her salary was being withheld, only to be surprised with a letter from the Respondent, summoning her at very short notice, for a face-to-face meeting with the Respondent's Director to answer to accusations that had allegedly been levelled against her regarding a mysterious invoice and business card.
8. It was further stated that again, in August 2021, the Respondent continued to withhold her monthly benefits, thereby subjecting her to great difficulty and penury as a young, nursing single mother on maternity leave without another source of income.
9. Despite her maternity status, she made an effort and met the Director. The Director wasn't set to allow the issue to be resolved, as he failed to show her the offending invoice and or allow her to address the issue. He ventured into throwing disparaging remarks against her and 'needy Kenyans' at large, when he carelessly stated that he was in Kenya to assist Kenyans, yet they were busy getting pregnant and proceeding for leave to be paid for work not done.
10. The Claimant asserted that even without paying her monthly remuneration, the Respondent continued to use her licence for the benefit of its business. She was prompted to attend the offices of the Pharmacy and Poisons Board to be helped reclaim her licence. The Board gave her two options, to either get a termination letter or resign.
11. Since she hadn't been paid her remuneration for some time, she opted to resign, and this she did through her email dated 10<sup>th</sup> September 2021. The resignation was not voluntary. She was forced to resign by the circumstance; the Respondent's breach of the contractual term [non-payment of salary]; and her desire to get back her licence.
12. Cross -examined by Counsel for the Respondent, the Claimant testified that as of the termination date, she had worked for the Respondent for close to four years. Part of he duties was to order for medicine for the Respondent's Parklands Branch and dispensing medicine to patients who visited the Respondent's clinic.



13. She contended that she didn't have the authority to input the received medicine on the Respondent's system. It was only the manager who could as he was the only one with a password.
14. During the COVID-19 period, specifically on 11<sup>th</sup> April 2020, all the Respondent's staff members didn't report to work. The issue was subsequently discussed and resolved. Nobody was punished.
15. Contrary to what was expressed in the Respondent's letter dated 11<sup>th</sup> April 2020, the staff members had no instructions to work on the public holiday [Good Friday]. They had never before worked on public holidays.
16. She further testified that after proceeding for maternity leave, the Respondent only paid her monthly remuneration for May and June.
17. She testified that in his letter dated 7<sup>th</sup> August 2021, the Respondent's Director indicated that her salary was suspended pending investigations on matters that had been raised against that had been raised against her. In the same letter, she was invited to answer the allegations. Some of the allegations were on some invoices that were alleged to be extra and not integrated into the Hospital System. The alleged invoices were never shown to her at all.
18. There was also another allegation of expired drugs. The allegation couldn't be true as before she proceeded on maternity leave, she did thorough stock-taking of the drugs.
19. As instructed through the above-stated letter, she did present herself to the Director. No document[invoices] were shown to her.
20. Her contract of employment provided for a one-month termination notice. Her resignation took effect immediately, i.e. on 10<sup>th</sup> September 2021, the date of her resignation letter.

### **Respondent's Case**

21. The Respondent presented one witness, Mr. Seyednaser Emadi its Director to testify on its behalf. The witness adopted his statement herein filed and dated 9<sup>th</sup> November 2022 as part of his evidence in chief. The witness stated that at all material times, the Claimant was an employee of the Respondent as a Pharmaceutical Technologist on the terms that were laid out in her first fixed-term contract and which contract was subject to periodic renewal.
22. The witness stated that while away attending to family matters in Iran, Mr. Abdi Meisam, the Respondent's Manager reached out to him and informed him that he had discovered anomalies at the Park Road Clinic, which involved the Claimant. Crumbled original invoices had been found in a dustbin, stock at the pharmacy wasn't aligning with what was in the HIS system of the Respondent and expired drugs were found on the pharmacy shelves.
23. The witness stated further that upon returning to the Country, he on 7<sup>th</sup> August 2021, wrote a letter to the Claimant requesting for a face-to-face meeting to discuss the serious issues that had been raised. The Claimant failed to render any sufficient explanation[s] regarding the allegations that had been raised against her. However, she apologized for her misconduct in writing, promising to be more careful going forward.
24. The witness contended that prior to this, the Claimant committed many infractions including failure to discharge her responsibilities diligently and faithfully. As a result, was subjected to various disciplinary proceedings and reprimanded.



25. Before duly concluding investigations on the matters that had been raised against her, the Claimant tendered a resignation through her email dated 20<sup>th</sup> September 2021. Her action was aimed at frustrating the disciplinary process.
26. The Respondent denies wrongfully or unlawfully terminating the Claimant's employment, withholding her salary, and/or acting in a discriminatory manner against her.
27. Cross-examined by Counsel for the Claimant, the witness stated that he couldn't remember whether the Respondent paid the Claimant her salary for July, August, and September. Pressed further under cross-examination, he stated that the Respondent didn't pay her salary for the months because she failed to give a satisfactory explanation on the issues.
28. The torn invoices were recovered when he was in Iran on leave They were subsequently handed over to the police for investigation.
29. The witness admitted there is no document placed before this court from where his allegation that the Claimant admitted the infractions can be discerned.

### **Analysis and Determination**

30. I have carefully considered the pleadings, the evidence by the Parties, and the submissions by the Claimant, the following issues emerge for determination: -
  - a. Whether the claimant was constructively dismissed from employment by the Respondent;
  - b. Whether the Claimant was discriminated against on the basis of pregnancy;
  - c. Whether the Claimant should be granted the reliefs sought.

### **Whether the Claimant was constructively dismissed from her employment by the Respondent**

31. Constructive dismissal occurs when the employee terminates the contract, either with or without notice, in circumstances in which he is entitled to terminate it with notice by reason of the employer's conduct. On general principles, the employee doesn't need to inform the employer at the time of termination, of his or her reason for leaving employment; the test is simply one of causation, that is to say, the employee's departure was caused by the employer's conduct. See *Weathersfield Ltd vs- Sargent* [1999] IRLR 94.
32. The test of employer misconduct in the context of constructive dismissal implicitly incorporates the common law of contract relating to the employee's right to resign in the face of a repudiatory breach of contract by the employer. The voluminous case law which has developed around the doctrine of constructive dismissal simply indicates that the circumstances giving rise to constructive dismissal are as varied as those of employment themselves. The list cannot be exhaustive.
33. Elaborating on the doctrine of constructive dismissal the Court of Appeal in the case of *Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR identified the principles to be considered, thus:
  - a. What are the fundamental or essential terms of the contract of employment?
  - b. Is there a repudiatory breach of the fundamental terms of the contract through the conduct of the employer?



- c. The conduct of the employer must be a fundamental or 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.
- d. An objective test is to be applied in evaluating the employer's conduct.
- e. There must be a causal link between the employer's conduct and the reason for the employee terminating the contract i.e., causation must be proved
- f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.
- g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
- h. The burden to prove repudiatory breach or constructive dismissal is on the employee."
- i. Facts giving rise to repudiatory breach or constructive dismissal are varied."

34. In *Stephen Michuki v East African Safari Air Express Limited & another* [2022] eKLR, this Court aptly stated: -

- "79. In order for a claim for constructive dismissal to succeed where the Court applies this test, it must be concluded that the employer's conduct or unilateral change, constitutes a breach of the contract of employment, and second, if it constitutes such a breach, it must be found to substantially alter an essential term of the contract...
- 82. The instant claim is anchored on the fact that the 1<sup>st</sup> Respondent was in breach of a term[s] of the contract of employment that were between it and the Claimant. That the breach flowed from an act that was unilateral and substantial. A breach which was repudiatory in nature, evidencing its intention to no longer be bound by fundamental terms of the contract.
- 83. The Claimant contended that the 1<sup>st</sup> Respondent did not pay him his salary for a whole six months, commencing the first month of his employment with it till the time he resigned...
- 84. Remuneration is undoubtedly one of the most important terms of an employment contract. In fact, this Court has held before that the right to remuneration is the most important right of an employee, considering the immense protection that the *Employment Act, 2007* accords, wages and salaries of employees. Where an employer substantially alters [including by a significant reduction, or change of the manner of payment] of an employee's compensation without their consent such alteration may amount to a fundamental breach of the contract. An employee whose compensation has been altered can successfully claim constructive dismissal.



85. I have no doubt in my mind that under the terms and conditions of the contract dated 1<sup>st</sup> November 2019, and the provisions of the *Employment Act*, the Claimant's salary was one that was payable at the end of every month, without any authority on the part of the 1<sup>st</sup> Respondent to unilaterally depart from this...
88. In the upshot and applying the contractual test, I conclude that by deciding not to pay the Claimant his entitled monthly salary as and when it fell due under the terms of the employment contract and the law, by effecting the non-payment of his salary without first consulting him and or communicating to him amounted to a unilateral act and a breach of the terms of the contract in a substantial manner. There was a repudiatory breach of the contract, therefore.
89. The Claimant was constructively dismissed. This places him on the path to entitlement of one or more of those reliefs normally attracted by a wrongful or unfair termination of an employee, recognised by law.”
35. There is no dispute that the Respondent suddenly without informing the Claimant in advance of the reason precipitating it, ceased to pay the Claimant's monthly remuneration commencing July 2021, up to the time she decided to resign. I carefully listened to the Respondent's witness attempt to justify the Respondent's action but with great respect, the fronted justification didn't make sense at all. Under the salary law, the employer cannot suspend payment of an employee's pending investigations. The Respondent didn't even attempt to demonstrate that its action was based on the contractual terms of the Claimant's contract or its Human Resource Management Procedure manual.
36. Further, if indeed the Respondent believed that the Claimant had committed punishable infractions, nothing could stop him from engaging the process provided for under the *Employment Act*, 2007, to discipline the Claimant. The Post-2007, employment and Labour Relations Regime, set in with expansive rights and protections in favour of employees. Certainly, conduct[s] like the Respondent's won't sit well with it.
37. By reason of the foregoing premises, I am not hesitant in concluding that the Respondent's act of stopping payment of the Claimant's salary as it did was a repudiatory breach of contract. The Respondent by its action evinced the intention not to continue being bound by the terms of the contract. The Claimant was constructively dismissed.

### **Whether the Claimant was discriminated against based on pregnancy, gender, race and religion**

38. Section 5(3) of the *Employment Act* outlaws discrimination based on several factors including race, gender and pregnancy. It provides that:
- “No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—
- (a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status;
  - (b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.”



39. Section 46 (a) makes termination based on pregnancy and any reason connected with an employee's pregnancy an automatic unfair decision. It states:

“The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty—

(a) a female employee's pregnancy, or any reason connected with her pregnancy”

40. As regards the burden of proof where discrimination is alleged on one or more of those prohibited characteristics, the Court in the case of *Reuben Wamukota Sikulu vs Director of the Human Resource Management, Ministry of Devolution & Planning & 2 others* (2020) eKLR held and I agree that:

“What the employee is required to do is establish a prima facie case, through direct evidence or statistical proof, that he or she was discriminated against on any of the grounds set out in Article 27(4) of *the constitution*, which includes; race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth. To establish a prima facie case, the appellant had a duty to demonstrate he qualified for the position he was denied; show that he suffered an adverse employment action as a result of the discrimination; must provide prima facie proof that other explanations by the employer are not contrived or without basis; that the real reason for denial of promotion was discriminatory and the reasons must bear unreasonableness or other types of malpractices which must be linked to the suffering endured by the employee. Once the employee establishes a prima facie case, the burden shifts to the employer, to show a legitimate explanation for refusing to grant the promotion. Where the employee has demonstrated a prima facie case, a presumption that the employer discriminated against the employee is raised. The employer must then articulate a clear, specific, and non-discriminatory reason for denying the promotion.”

41. I have carefully considered the material placed before this Court by the Claimant, and find no difficulty in concluding that after pleading discrimination and seeking damages on the account, the Claimant didn't lead any evidence to establish that indeed, she was discriminated on, those prohibited grounds or any of them. Legal burdens are dischargeable by the production of sufficient evidence. The Claimant failed to discharge her duty as envisaged in the above-cited decision. Her claim fails at the hurdle, therefore.

**c. Whether the Claimant is entitled to the reliefs sought.**

42. The Claimant asserted that the Respondent unlawfully withheld her salary for July, August, and for the 10 days she worked in September 2021. The Respondent's witness's evidence on this claim, in my view, was in the tone of an admission of the claim. Further, the Claimant's evidence remained uncontroverted. Her claim under this head succeeds.

43. She further claimed a refund of money that she allegedly paid to Veteran Hospital, for the medicines it supplied to the Respondent under her guarantee, but for which medicine the Respondent failed and or neglected to pay. This Claim must fail. The claim was just thrown to Court. No specific amount was sought in the pleadings. She didn't produce evidence to establish her entitlement to the relief.

44. In the circumstances of the Claimant's dismissal from employment this Court cannot be off the mark in concluding that the Claimant is entitled to notice pay under the provisions of Section 35 (1), as read together with Section 36, of the *Employment Act*.



45. Section 49 (1) (c) of the *Employment Act* 2007, bestows on this Court the power to grant a compensatory relief to an employee[s] who has successfully succeeded in his or her claim for unfair termination. It is imperative to state the remedy is equally available to employees who successfully prosecute their claims for constructive dismissal against the employer[s]. However, it should be pointed out that exercising the power is discretionary. It depends on the circumstances of each case.
46. I have carefully considered the Respondent's misconduct that led to the Claimant's resignation, the state in which the Claimant was at the time of the misconduct, depicting the Respondent as so uncaring, the impact of the Respondent's conduct on the Claimant, the length of service of the Claimant, and hold that she is entitled to the compensatory relief, six months' gross salary.
47. In light of the above analysis, Judgment is hereby entered for the Claimant against the Respondent as follows:-
- a. A declaration that the Claimant was constructively dismissed from employment.
  - b. The Claimant be paid:
    - i. Compensation for unfair termination equivalent, Six [6] months' gross salary – Kshs. 360,000/-
    - ii. Unpaid Salary for July-August 2021 – Kshs. 120,000/-
    - iii. Unpaid salary for 10 days in September 2021 – Kshs. 20,000/-
    - iv. One month's salary in lieu of notice – Kshs. 60,000Total – Kshs. 560,000/-
  - c. Interest on (b) above at court rates from the date of this Judgment until payment in full.
  - d. Costs of the suit. Instruction fee is to be computed based on the total amount awarded to the Claimant.
48. It is so ordered.

**READ, DELIVERED AND SIGNED THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2024**

**OCHARO KEBIRA**

**JUDGE**

**In the presence of:**

Mr. Omwanza for the Claimant

No appearance for the Respondent

