



Kahura v Uchumi Supermarkets PLC (Employment and Labour Relations Cause E926 of 2022) [2024] KEELRC 2643 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2643 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E926 OF 2022
BOM MANANI, J
OCTOBER 31, 2024**

BETWEEN

ESTHER MUTHONI KAHURA CLAIMANT

AND

UCHUMI SUPERMARKETS PLC RESPONDENT

JUDGMENT

Background

1. The Claimant has instituted this action to recover her exit dues from the Respondent. She contends that the Respondent engaged her services as a cashier in February 2007 at a monthly salary of Ksh. 22,400.00.
2. The Claimant avers that she rose through the ranks to the position of chief cashier earning a monthly salary of Ksh. 57,514.00. She contends that she served in this position until May 2021 when she resigned. The Claimant states that prior to her employment with the Respondent in 2007, she had worked for it (the Respondent) between 1997 and 2005. However, she was forced to resign from employment in order to seek treatment for an injury which she sustained outside the workplace.
3. The Claimant contends that in 2017, the Respondent began delaying payment of staff salaries. However, it assured the affected employees that the matter would be addressed.
4. She contends that in February 2018, the Respondent stopped remitting the salaries altogether. However, it continued to assure the employees that their salary arrears would be paid in due course and that they should continue working.
5. The Claimant avers that she relied on the aforesaid assurance to continue working. She further avers that in January 2021, the Respondent asked her to proceed on leave and await communication regarding when she was to resume duty. She contends that this direction was given orally.



6. The Claimant contends that whilst she was in the Respondent's employment, she took a bank loan which was to be serviced using her salary. However, the facility fell in arrears after the Respondent stopped paying her wages. She contends that at the time she was sent on leave, the facility had fallen into arrears by approximately twenty two months, a matter which forced the lender to publish her name through a Credit Reference Bureau.
7. The Claimant further contends that the Respondent stopped remitting her statutory deductions including National Social Security Fund (NSSF), National Hospital Insurance Fund (NHIF) and Pay As You Earn (PAYE). As a result, it became impossible for her to continue accessing medical and other services.
8. She contends that despite her efforts to get the Respondent to communicate when she was to resume duty, the latter failed to address the issue. As such and having regard to the extreme financial distress that she had been subjected to, she tendered her resignation from employment as from 26th May 2021.
9. The Claimant contends that the Respondent accepted her resignation. However, it promised to absorb her back once it had finalized arrangements with its creditors regarding the mode of payment of its debts.
10. The Claimant contends that despite these assurances, the Respondent did not absorb her back into employment. Neither did it pay her outstanding dues.
11. The Claimant contends that the Respondent did not make reference to the entitlements of its continuing and former employees when it negotiated settlement of its indebtedness to the secured creditors. As such, it (the Respondent) violated its fiduciary duty to its employees.
12. The Claimant contends that the Respondent held several meetings with the secured creditors without making reference to its employees. As such, it failed to provide mechanisms for accommodating the interests of the continuing and former employees.
13. The Claimant contends that the Respondent's decision to send her on unpaid leave without indicating when she was to return pushed her into resigning from employment. As such, she contends that the Respondent's conduct amounted to constructive termination of her employment.
14. The Claimant prays for inter alia, the following reliefs:-
 - a. A declaration that the Respondent is in breach of the contract of service between them.
 - b. A declaration that the Respondent's decision to send her on unpaid leave without indicating when she was to resume duty which forced her to resign from employment amounted to constructive termination of her contract.
 - c. A declaration that she is entitled to service pay equal to fifteen days for every year worked.
 - d. A declaration that she is entitled to salary arrears for the period between February 2018 and May 2021.
 - e. A declaration that she is entitled to a Certificate of Service.
 - f. An order for aggravated damages.
 - g. Costs of the case.
 - h. Any other relief which the court may deem fit and just to grant.



15. Although the Respondent entered appearance and filed a defense to the cause, it did not call a witness during the trial. As such, the averments in the Statement of Defense remain untested.

Issues for Determination

16. After evaluating the pleadings and evidence on record, I arrive at the conclusion that the following are the issues which require determination in the cause:-
- a. Whether there was an employment relation between the parties to the action.
 - b. Whether the relation was terminated on account of constructive dismissal from employment.
 - c. Whether the Claimant is entitled to the reliefs that she seeks through this action.

Analysis

17. If a defendant in a cause files a Statement of Defense but fails to tender evidence, the defense stands unproved. In effect, it remains an unsubstantiated statement on the court file. As such, the court is not entitled to rely on it to determine the dispute (*Netah Njoki Kamau & another v Eliud Mburu Mwaniki* [2021] eKLR).
18. The Claimant states that the Respondent hired her services for the second time in 2007. She contends that prior to this, the parties had been in an employment relation between 1997 and 2005.
19. Although the Claimant contends that the Respondent hired her services for the second time in 2007, she did not provide evidence to demonstrate that the contract between them commenced that year. The letter she produced dated 24th September 2010 suggests that the renewed contract commenced on 1st July 2010. In the premises, I am inclined to hold, which I hereby do, that the parties resumed their employment relation as from 1st July 2010 in terms of the aforesaid letter.
20. The Claimant contends that the Respondent began faltering in paying her salary in 2017 before it totally stopped payments as from February 2018. She contends that this situation persisted until May 2021 when she left employment.
21. The Claimant avers that although the Respondent promised to resolve the issue, it failed to do so. As such, she was forced to tender her resignation from employment as from 26th May 2021. According to her, the Respondent's actions resulted in the constructive termination of her employment.
22. Constructive dismissal from employment occurs when an employee is forced to leave employment as a result of an intolerable work environment associated with the employer's conduct. Although the decision to leave employment is by the employee, the employer is deemed to have terminated the relationship due to his conduct.
23. The circumstances that can occasion constructive dismissal from employment are innumerable. They include persistent failure by an employer to pay an employee's salary (see *Mutai v Kisa & another (Cause E002 of 2020)* [2022] KEELRC 1543 (KLR) (25 May 2022) (Judgment)).
24. The Respondent did not controvert the Claimant's contention that it failed to pay her salary between February 2018 and May 2021 when she resigned. As such, the court is convinced that the Claimant's salary for this duration remains unpaid.
25. The Respondent's failure to pay the Claimant's salary for the duration in question amounted to breach of the contract between the parties. As such, the Claimant became entitled to resign from employment and plead constructive termination of her contract.



26. The Respondent's counsel contends that the Claimant voluntarily resigned from employment. As such, she is not entitled to plead constructive termination of her contract.
27. Counsel refers to the Claimant's resignation letter to anchor his contention. He contends that the said letter does not state that the resignation was triggered by the difficult work environment that the Claimant had been exposed to.
28. I do not agree that for an employee to successfully plead constructive dismissal, she must have alluded to the challenges that forced her into resigning in the letter of resignation. Whilst this may be desirable, it is not the only way of determining the circumstances that informed the decision to resign. The court ought to consider the events surrounding the decision to resign to determine whether it was voluntary or forced by the prevailing circumstances.
29. Having regard to the circumstances under which the Claimant resigned, I have no doubt in my mind that she was pushed into making this decision due to the difficult work environment which the Respondent had exposed her to. Consequently, I find that the Respondent terminated the Claimant's employment through constructive dismissal.
30. The next issue for determination relates to whether the Claimant is entitled to the reliefs that she seeks through this action. The court has already declared that the Respondent irregularly terminated her employment through constructive dismissal.
31. The Claimant has prayed for salary arrears for the period between February 2018 when the Respondent stopped paying her salary and May 2021 when she resigned from employment. It is noteworthy that the Respondent did not controvert the Claimant's contention that her salary was not paid during this period. As such, the court finds that the Claimant's salary for the period between February 2018 and May 2021 was unpaid.
32. The Claimant produced a letter by the Respondent dated 13th February 2015 showing that her salary was reviewed to Ksh. 53,439.00 from that date. As such and absent evidence to the contrary, I hold that the Claimant's monthly salary for the period under review was Ksh. 53,439.00.
33. The record does not suggest that the Respondent remunerated the Claimant between February 2018 and May 2021, a period of approximately thirty nine months. As such, I arrive at the conclusion that the Respondent owes the Claimant salary for this duration in the sum of Ksh. 53,439.00 x 39 = Ksh. 2,084,121.00. Accordingly, I enter judgment for her against the Respondent for this amount.
34. The Claimant has prayed for service pay. However, this benefit is only available to employees who are not registered with the NSSF. In the Claimant's testimony, she confirmed that the Respondent had enrolled her as a contributor to the NSSF. Her only grievance was that it (the Respondent) had stopped making remittances to the agency on her behalf.
35. Although the Claimant contends that the Respondent had stopped making remittances to the NSSF, she did not produce a statement from the agency to verify this contention. In the premises, the court is not able to authenticate this claim.
36. Having regard to the foregoing, I am satisfied on the basis of the preliminary material before me that the Claimant was a member of the NSSF. As such, she is not entitled to claim service pay. Consequently, I decline to grant her request for service pay.
37. The Claimant has prayed for a Certificate of Service. By virtue of section 51 of the *Employment Act*, every employee is entitled to this document once he leaves employment. As such, I order the Respondent to issue the Claimant with a Certificate of Service.



38. The Claimant has prayed for aggravated damages. However, this remedy is not anchored on section 49 of the *Employment Act*. For this reason, I decline the request.
39. The award is subject to the applicable statutory deductions.
40. I award the Claimant interest on the principal sum at court rates from the date of this decision.
41. I award the Claimant costs of the case.
42. As I pen off, it is perhaps important that I address one last issue which was raised in the Respondent's submissions. According to counsel for the Respondent, the Claimant's claim should be settled in accordance with the mechanism that was decreed vide *In re Uchumi Supermarkets PLC* [2020] eKLR.
43. The court takes judicial notice of the aforesaid decision. It dealt with the approval of a company voluntary arrangement that was entered into between the Respondent and its creditors under Part IX of the *Insolvency Act* with respect to liabilities that were outstanding as at 2nd March 2020. From the decision, this arrangement was entered into by all categories of creditors of the Respondent to wit: secured creditors; preferential creditors; and unsecured creditors.
44. The Act defines "creditor" to include a person entitled to enforce a final judgment or final order. A "preferential creditor" means a person to whom a preferential debt is owed. A "secured creditor" means a person holding a security on or against the property of the debtor or (any part of it) to secure a debt due or accruing due to the person from the debtor; or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable. "The Court" means the High Court, and if there is an insolvency division of that Court, means that division.
45. The second schedule to the Act categorizes preferential creditors for purposes of prioritizing their payments. Employee fall under the second priority for purposes of settlement of their outstanding salaries.
46. A substantial portion of the Claimant's claim against the Respondent relates to liabilities that accrued prior to 2nd March 2020. Yet, part of it relates to liabilities that accrued after 2nd March 2020.
47. As such, it appears to me that for the Claimant to enforce parts of her claim, she ought to submit to the mechanism that was agreed on in the case of *In re Uchumi Supermarkets PLC* [2020] eKLR. Therefore and in order not to create confusion in the entire process, it is imperative that prior to levying execution proceedings in enforcement of the court's decree, the Claimant shall seek the consent of the supervisor of the company voluntary arrangement that was approved in the aforesaid decision or seek leave of the High Court as would any other creditor pursuant to the provisions of Part IX of the *Insolvency Act*.
48. Parties have the liberty to apply.

Summary of Award

49. After evaluating the pleadings and evidence on record, the court issues the following orders:-
 - a. The court declares that the Respondent irregularly terminated the Claimant's employment through constructive dismissal.
 - b. The court finds that the Respondent owes the Claimant the sum of Ksh, 2,084,121.00 in salary arrears.



- c. Consequently, the court enters judgment for the Claimant against the Respondent for Ksh. 2,084,121.00.
- d. The court declines the Claimant's prayer for service pay.
- e. The court orders the Respondent to issue the Claimant with a Certificate of Service.
- f. The court declines the Claimant's prayer for aggravated damages.
- g. The award of Ksh, 2,084,121.00 is subject to the applicable statutory deductions.
- h. The court awards the Claimant interest on the principal sum at court rates from the date of this decision.
- i. The court awards the Claimant costs of the case.
- j. The decree from this judgment shall be enforced with the concurrence of the supervisor of the company voluntary arrangement scheme which is currently in place or with the leave of the High Court pursuant to the orders in *In re Uchumi Supermarkets PLC* [2020] eKLR.
- k. Parties have the liberty to apply.

DATED, SIGNED AND DELIVERED ON THE 31ST DAY OF OCTOBER, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

