



**Matola v Odyssey International Limited (Cause 67 of 2019)
[2024] KEELRC 2578 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2578 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 67 OF 2019
BOM MANANI, J
OCTOBER 24, 2024**

BETWEEN

WILLIAM MAMBO MATOLA CLAIMANT

AND

ODESSY INTERNATIONAL LIMITED RESPONDENT

JUDGMENT

Background

1. This case seeks to determine whether the Claimant lost his employment with the Respondent through constructive dismissal or desertion of duty. It also raises other issues such as whether the Claimant's salary during the currency of his employment with the Respondent was paid in full and whether he is entitled to consultancy fees and overtime pay.
2. The Claimant contends that the Respondent hired his services on April 1, 2015. He contends that his exit salary was Ksh. 130,000.00 per month.
3. The Claimant contends that he served the Respondent diligently and with dedication. He alleges that around February 2017, the Respondent stopped paying his salary.
4. The Claimant contends that this state of affairs persisted until February 2018 when the Respondent paid him arrears for four months. However, it did not indicate when the balance of the arrears would be paid.
5. As a result, the Claimant avers that he was forced to stop working on a date that he cannot recall in the month of March 2018. He contends that he could no longer fund the travel expense to and from work without a salary.
6. The Claimant contends that at the time he stopped working, the Respondent owed him salary arrears of Ksh. 910,000. He avers that although the Respondent did not expressly terminate the contract of



- service between them, its conduct amounted to a fundamental breach of the said contract entitling him to leave employment. As such, he contends that his employment was terminated on account of constructive dismissal.
7. On the other hand, the Respondent denies that it occasioned loss of the Claimant's employment through constructive termination of his contract. The Respondent contends that the Claimant stopped reporting to work without explanation. As such, he terminated his contract after he absconded duty.
 8. The Respondent admits that it occasionally was not able to pay the Claimant's salary as and when it fell due because of financial constraints. However, it denies that it owes him arrears of Ksh. 910,000.
 9. The Respondent contends that its main source of revenue was the County Government of Mandera for which it (the Respondent) was a consultant. However, the said County stopped making regular payment for the services the Respondent offered from around February 2017 thereby causing the Respondent a severe cash crunch. The Respondent avers that the said County Government begun to pay for services erratically, sometimes once a year. As such, it (the Respondent) only received payments from the County in February 2017, February 2018 and January 2019.
 10. The Respondent avers that this is why payment of staff salaries suffered delays. It contends that its members of staff were aware of this challenge and had agreed to occasionally accumulate salary arrears pending availability of funds.
 11. The Respondent contends that it would often settle salary arrears in full once it received funds. However, where this was not possible, it would make partial payments and carry forward the balance. It contends that the payment of Ksh. 390,000.00 to the Claimant in February 2018 was one such lump sum payment of accumulated arrears.
 12. The Respondent avers that its members of staff were aware of the financial challenges which were occasioned by the erratic payments from the County Government of Mandera and often agreed to have payment of their salaries delayed. As such, they had acquiesced to this arrangement and the Claimant is estopped from challenging it.

Issues for Determination

13. After evaluating the pleadings and evidence on record, I am of the view that the following are the issues for determination in the cause:-
 - a) Whether the Claimant's employment was terminated through constructive dismissal.
 - b) Whether the Respondent owes the Claimant salary arrears of Ksh. 910,000.00.
 - c) Whether the Claimant is entitled to the reliefs that he seeks in these proceedings.

Analysis

14. The law on constructive dismissal is now fairly settled. This form of dismissal from employment occurs when an employee quits employment as a result of an intolerable work environment created by the employer. The employee quits in a bid to escape this intolerable environment.
15. Although the act of closing the employment relation arises from the employee's decision to leave, the law considers the contract to have been terminated by the employer. And hence the concept of constructive dismissal.



16. The concept of constructive dismissal is not founded on legislation. It is a creature of common law. Therefore, its parameters are set by case law.
17. For constructive dismissal to arise, the employee would ordinarily leave employment through resignation. This means that he either tenders a written resignation or orally informs the employer of his decision to leave employment. In such case, the resignation is considered as express.
18. However and in my view, resignation need not be confined to the express intimation by an employee of his decision to leave employment. It may also be inferred from his conduct. As such, an employee may resign from employment by expressly intimating his decision to leave employment to the employer either orally or in writing or by simply leaving the workplace with no intention to return.
19. Consequently, in determining whether there is a case for constructive dismissal, the court should not merely focus on whether the employee tendered a formal resignation (written or oral). Rather, it should focus on whether the employee's decision to quit, whether express or implied, was triggered by the intolerable behaviour of the employer.
20. Where the employee's departure was occasioned by an intolerable work environment created by the employer, the departure is considered as involuntary on the part of the employee. As such, the law holds the employer responsible for the separation.
21. The conduct of the employer must have been intended (either consciously or subconsciously) to repudiate the contract between the parties. The conduct must point to the employer's reluctance (either consciously or subconsciously) to be bound by the terms of the contract between them.
22. The employer's offensive conduct need not be deliberate or actuated by malice. As a matter of fact, it may be unintentional and involuntary without any ill will. What is critical is that such conduct must render the work environment intolerable for the employee.
23. In underscoring the foresaid, the Court of Appeal in the case of [*Coca Cola East & Central Africa Limited v Maria Kagai Ligaga*](#) [2015] eKLR observed as follows:-

“The criterion for evaluating the employers conduct is objective; the employer's conduct does not have to be intentional or in bad faith before it can be repudiatory (See *Office -v- Roberts* (1980) IRLR 347).”
24. Once the foregoing is established, the employee is entitled to leave the workplace and consider the contract between them as closed. He may do so either by notifying the employer that he has resigned or simply by walking away without the intention of returning to work.
25. I understand the foregoing to be the law on constructive dismissal as developed through judicial precedent. There is no requirement that the employee must tender a formal resignation for constructive termination to crystalize. It is sufficient if he leaves employment with or without notice to the employer.
26. In *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344, the court observed as follows about the concept:-

“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 any notice at all or, alternatively, he may give notice and say 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.” Emphasis through underlining.

27. The above decision underscores the point that an employee whose contract has suffered fundamental breach due to intolerable acts by the employer is entitled to leave employment on account of such breach without notice of any kind to the employer. In effect, he (the employee) is entitled to walk away, without tendering a formal resignation, but with no intention to return to work. Nevertheless, he will still be entitled to plead constructive dismissal of his employment.
28. The reasons why an employee may find the work environment intolerable are innumerable. These include: sexual harassment at the workplace; persistent failure by the employer to pay salary; unilateral decisions by the employer to alter terms of the employment contract; refusal by the employer to allocate the employee work; or demotion of the employee from his position.
29. In the instant case, the Respondent admits that it begun remunerating its employees (including the Claimant) erratically after February 2017. It concedes that the employees (including the Claimant) were forced to wait for long durations before they could receive their pay. The Respondent blames this state of affairs on the failure by its main client to settle its bills on regular basis.
30. The evidence on record points to the Respondent having breached a fundamental term of the Claimant’s contract of service when it began to erratically pay his salary for approximately one year. The Respondent may have had its justification for this state of affairs. However, this did not take away its obligation to ensure that staff salaries were paid as and when they fell due.
31. To have failed to consistently remunerate the Claimant for one year resulted in repudiation of his contract of service. As such, the Claimant was entitled to consider the contract as terminated by the Respondent.
32. The Respondent has suggested that the Claimant absconded duty. However, this is not the case. The evidence on record demonstrates that the Claimant left employment due to the intolerable work environment that he was subjected to as a result of the failure by the Respondent to pay salaries in a manner that was predictable.
33. The Respondent has also suggested that because the Claimant did not tender a formal resignation, his informal departure from the workplace did not result in a resignation to warrant invocation of the concept of constructive dismissal. However and as indicated earlier, resignation need not be express. It can be implied.
34. The Claimant testified that before he left employment, he handed over his docket to the Respondent. He contended that his tasks were handed over to employees who were working under him. It is noteworthy that the Respondent did not controvert this version of the Claimant’s evidence.
35. In my view, the Claimant’s act of handing over his docket implied that he had resigned from employment. It signified his intention to leave the work station with no intention of resuming. In the premises, I find the Claimant’s conduct amounted to implied resignation from employment in reaction to the harsh work environment which had been created as a result of the Respondent’s failure to remunerate him in a manner that was consistent and predictable. As such, I hold that the Respondent terminated the Claimant’s employment through constructive dismissal.



36. The next issue for consideration is whether the Respondent owes the Claimant salary arrears as claimed. From the record, the Claimant's monthly salary when he quit employment in March 2018 was Ksh. 130,000.00.
37. The Claimant contends that the Respondent stopped paying the salary from February 2017. He states that this remained the position until end of February 2018 when the Respondent paid him Ksh. 390,000.00 to cover part of the accumulated arrears. However, it did not indicate when it was going to clear the balance.
38. On the other hand, the Respondent concedes that it stopped making regular payment of salaries to its employees (including the Claimant) in February 2017 when the County Government of Mandera stopped making regular payments to it (the Respondent). It states that after the salary payments in February 2017, it made the next substantial payments to staff in February 2018 when the said County released funds to it. As such, the Claimant was paid Ksh. 390,000.00 during this month.
39. The Respondent has provided evidence of other sporadic payments to the Claimant during the period between February 2017 and February 2018 as the follows: Ksh. 260,000.00 on March 24, 2017; Ksh. 33,000 on March 27, 2017; Ksh. 30,000 on August 6, 2017; and Ksh. 130,000.00 on November 21, 2017. In effect, the evidence on record shows that between February 2017 and February 2018, the Respondent made a total payment of Ksh. 843,000.00 to the Claimant.
40. The Claimant contends that some of these payments were to cover bonus payments which were due to him pursuant to clause four of the contract between them. I have looked at the said clause. From the clause, it is apparent that bonus pay was at the absolute discretion of the Respondent. There is no evidence to suggest that the Respondent intended that these payments be towards bonus as suggested by the Claimant. Absent this evidence, the court cannot attribute the payments to bonus.
41. The parties agree that the Claimant's salary was Ksh. 130,000.00 per month. Therefore, for the period under consideration, he ought to have earned $\text{Ksh. } 130,000.00 \times 12 = \text{Ksh. } 1,560,000.00$. In effect, the shortfall in the Claimant's pay for the period was $\text{Ksh. } 1,560,000.00 - \text{Ksh. } 843,000.00 = \text{Ksh. } 717,000.00$.
42. There is no evidence that was tendered by the Respondent to suggest that these arrears were paid. Under sections 10 (6) and 74 of the *Employment Act*, the employer bears the obligation of keeping employment records in respect of his employees including those on payment of salaries. If there is a dispute regarding any aspect of the contract, the employer ought to produce these records to resolve the matter (*Jackson Muiruri Watbigo t/a Murtown Supermarket v Lilian Mutune* [2021] eKLR).
43. The Respondent did not produce records that are expected to be in its custody to prove that it had settled all of the Claimant's salary arrears. As indicated earlier, it only provided proof of settlement of Ksh. 843,000.00 out of accrued arrears of Ksh. 1,560,000 for the period between February 2017 and February 2018.
44. Although in the Statement of Defense the Respondent initially denied indebtedness to the Claimant in salary arrears, its witness eventually conceded during cross examination that the Claimant was owed Ksh. 717,000.00. This figure is in consonance with the court's computation in the preceding sections of this decision.
45. Therefore, I find that the Respondent is indebted to the Claimant in the sum of Ksh. 717,000 in salary arrears for the period under review. Accordingly, I enter judgment for the Claimant against the Respondent for this sum.



46. Since the court has held that the Respondent terminated the Claimant's contract through constructive dismissal, the latter is entitled to compensation for the unfair termination of his employment. Section 49 of the Employment Act permits the court to award the Claimant such compensation.
47. Having regard to the fact that the Claimant's action did not contribute to the decision to terminate his contract, I award him compensation for the unfair termination of his employment that is equivalent to his salary for a period of seven months, that is to say Ksh. 130,000 x 7 = Ksh. 910,000.00.
48. The Claimant has prayed for consultancy fees and overtime pay. However, there was no cogent evidence to support these claims. As such, they are rejected.
49. The amount awarded to the Claimant is subject to the applicable statutory deductions.
50. I award the Claimant interest on the amount awarded at court rates from the date of this decision.
51. I award the Claimant costs of the case.

Summary of the Award

52. The court makes the following findings and consequent orders:-
 - a. I find that the Respondent unfairly terminated the Claimant's employment through constructive dismissal.
 - b. I find that the Respondent owes the Claimant the sum of Ksh. 717,000.00 in salary arrears. Accordingly, I enter judgment for the Claimant against the Respondent for Ksh. 717,000.00 being for salary arrears.
 - c. I award the Claimant compensation for unfair termination of his contract in the sum of Ksh. 910,000.00.
 - d. The award is subject to the applicable statutory deductions.
 - e. I award the Claimant interest on the aforesaid amounts at court rates from the date of this decision.
 - f. The claims for consultancy fees and overtime pay are declined.
 - g. I award the Claimant costs of the case.

DATED, SIGNED AND DELIVERED ON THE 24TH 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 July 12, 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.



