



REPUBLIC OF KENYA



**Kaberi v Finaaccess Limited (Cause E603 of 2023)
[2024] KEELRC 13189 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13189 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E603 OF 2023
SC RUTTO, J
NOVEMBER 22, 2024**

BETWEEN

THOMAS KIMEMIA KABERI CLAIMANT

AND

FINAACCESS LIMITED RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim dated 31st July 2023, the Claimant avers that he was employed by the Respondent as the Head of Commercial and Strategic Partnerships in Nairobi, with effect from 1st February 2022. He was to earn a monthly salary of Kshs 345,000/=.
2. According to the Claimant, he worked in the said position for a period of one (1) year. That during the said period, he conducted himself with utmost diligence and loyalty. He further avers that he was never subject of any disciplinary action which would otherwise indent his impeccable record of service whilst an employee of the Respondent.
3. It is the Claimant's case that during the subsistence of his employment, he was not paid his monthly salary for a period of six (6) months from September 2022 until February 2023. There was no justification that was offered to him by the Respondent, and neither did they take any actions to rectify the said anomaly.
4. That the non-payment of his salary had very dire implications on his life as he fell behind on his monthly bills and could not pay his house rent.
5. That in January 2023, his house rent arrears had piled up and he received communication from his landlady that he needed to pay his rent arrears, failure to which he would be evicted and his household items withheld until the said payment is made.



6. He therefore requested the Respondent to write a cheque to his landlady to settle his rent to avoid eviction.
7. The Claimant avers that the Respondent wrote a faulty cheque to his landlady, which cheque was rejected by the bank. His landlady incurred loss from the penalties inflicted on her for banking a bounced cheque and consequently, she lost trust in him and was evicted from his house. It is the Claimant's view that this as a violation of his right to dignity.
8. That following these circumstances, the Claimant had no choice but to resign from employment seeing that he was fulfilling his obligations under the contract of employment while the Respondent was violating his right to remuneration and making his life unbearable.
9. He tendered his resignation and reminded the Respondent via email about the unpaid salary and reimbursements which they have since refused to pay him.
10. It is the Claimant's contention that he was unfairly terminated from his employment under the circumstances that amount to constructive dismissal.
11. The Claimant further states that the Respondent subjected him to unfair labour practices.
12. Against this background, the Claimant prays for judgment against the Respondent in the sum of Kshs 6,897,000/= being notice pay, six (6) months unpaid salary, unpaid reimbursements and compensatory damages for unfair termination. The Claimant has further prayed for declaratory orders and exemplary damages for constitutional violation of his right to human dignity and right to fair remuneration, as well as the costs of the suit plus interest.
13. The Respondent entered appearance through the firm of MKA Law LLP Advocates and filed a Response to the Statement of Claim dated 22nd April 2024. The Respondent avers that the Claimant was fully aware of the cash flow issues that started around September 2022. That it not only took action to cushion the Claimant but also satisfactorily explained to him the challenges it was facing.
14. The Respondent further avers that it has on several occasions communicated to the Claimant that it is facing cash flow problems but has also undertaken to pay all dues as soon as the same is resolved. That rather than wait for the cash flow issues to be solved, the Claimant opted to unnecessarily sue the Respondent even though it had not refused to honour its obligations.
15. The Respondent further states that it is absurd for the Claimant to claim payment in lieu of notice and compensation for unfair termination yet he opted to resign and was not terminated. Consequently, the Respondent has asked the court to dismiss the Claim with costs.
16. When the matter came up for mention on 30th April 2024, the Respondent was granted seven days' leave to file a witness statement following a request from Mr. Muriuki, its Advocate on record. Subsequently, the matter was scheduled to come up for further mention on 15th May 2024.
17. Come 15th May 2024, the Respondent's Advocate was not present in Court despite the mention date having been taken by consent in Court.
18. Accordingly, the matter was set down for hearing on 18th July 2024. Once again, the Respondent's Advocate was not present in Court on the hearing date. In this regard, the Claimant's Advocates indicated that service had been duly effected electronically through the email address disclosed by the Respondent's Advocates. To this end, the Court was referred to an Affidavit of Service sworn by Byronne F. Ogilla on 15th May 2024.



19. Being satisfied with the return of service, the Court directed that the matter proceed for hearing, the Respondent's absence notwithstanding.
20. The Claimant testified in support of his case. He reiterated the averments contained in his witness statement, which he adopted to constitute his evidence in chief. He further produced the bundle of documents filed alongside his Statement of Claim as exhibits before Court.

Submissions

21. Upon close of the hearing, the Claimant filed written submissions which the court has considered. It is the Claimant's submission that in any employment contract, the subject of remuneration is one of the most fundamental terms of an employment contract. To this end, the case of Geoffrey Miriithi Muthee v XPLICCO Insurance Co. Limited (2022) eKLR was referenced.
22. It has further been submitted that remuneration is the very root of an employment contract and by not paying the Claimant salary for six (6) months, the Respondent unilaterally and fundamentally breached the most essential term of the contract in a manner to repudiate it thereby frustrating him so much that he had no other choice other than to leave his employment. The Claimant buttressed his submissions with the cases of Coca Cola East & Central Africa Limited v Maria Kagai Ligaga (2015) eKLR, Nathan Ogada Atiagaga v Dvaid Engineering Limited (2015) eKLR and Milton Isanya v Aga Khan Hospital Kisumu (2017) eKLR.

Analysis and Determination

23. Flowing from the pleadings filed by both parties, the evidence on record, as well as the Claimant's submissions, it is evident that the issues for determination are:
 - i. Whether the Claimant was constructively dismissed;
 - ii. Whether the Claimant is entitled to the reliefs sought?

Constructive dismissal?

24. The gist of the Claimant's case is that the Respondent did not pay him salary for a period of six (6) months beginning September 2022 until February 2023, when he tendered his resignation. Accordingly, the Claimant has cited the Respondent for constructive dismissal.
25. In its Response to the Claim, the Respondent has averred that the Claimant was aware that it was experiencing cash flow problems around September 2022 and that it had undertaken to pay the Claimant's dues as soon as the same was resolved.
26. What can be deduced from the Respondent's assertions is that, it does not deny that the Claimant's salary is still outstanding.
27. The question that begs an answer is whether failure to pay the Claimant's salary amounts to constructive dismissal.
28. Constructive dismissal occurs when an employee is forced to leave his or her employment not on their own accord, but because of the employer's conduct.



29. In the leading case of Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR the Court of Appeal had this to say with respect to constructive dismissal:

“What is the key element and test to determine if constructive dismissal has taken place? The factual circumstances giving rise to constructive dismissal are varied. The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer’s behavior towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer’s conduct is so grave that it constituted a repudiatory breach of the contract of employment - this is the contractual test.” Underlined for emphasis

30. The learned Judges of Appeal proceeded to formulate guiding principles in respect of claims of constructive dismissal key among them being that, 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.

31. In this case, it is unequivocal that the Claimant’s salary was unpaid over a considerable period of time. Indeed, the Respondent did not tender evidence before this Court to contradict the Claimant’s position or prove that the said salary had been settled. Its only defense was that it was experiencing cash flow challenges and that it had undertaken to pay the Claimant’s dues.

32. The duty of the employer to compensate an employee for services rendered is a cardinal rule in any employment relationship. This position is aptly captured under Section 17(1) of the Employment Act and reads as follows;

Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service...

33. Therefore, and applying the guiding principles set out in the case of Coca-Cola East & Central Africa Limited vs Maria Kagai Ligaga (supra), it goes without saying that the Respondent’s action of not paying the Claimant’s salary as and when the same fell due amounted to a fundamental breach going to the root of the contract of employment.

34. Indeed, the Respondent’s actions demonstrated that the Respondent no longer intended to be bound by one or more of the essential terms of the contract.

35. In view of the foregoing, the Claimant was entitled to treat himself as constructively dismissed hence reserved the right to leave the employment of the Respondent.

36. It is this Court’s view that regardless of the challenges the Respondent was experiencing at the time, failure to pay the Claimant’s salary for a period of six (6) months is unreasonable and amounts to an unfair labour practice.

37. Granted, the Respondent may have experienced cash flow challenges. Be that as it may, there were many options it could exercise when it became impossible to resolve the situation within a reasonable time. Case in point is a declaration of redundancy.

38. Indeed, the Employment Act provides for mechanisms and avenues through which an employer can exit an employment contract where its operational requirements demand so. Why did the Respondent not exercise this option as opposed to retaining the Claimant in its employment with no salary coming



through? I say so noting that the Respondent has not indicated let alone suggest that the Claimant was not discharging his duties as contractually agreed during the period his salary remained unpaid.

39. What's more, the Respondent's action of withholding the Claimant's salary constituted an unfair labour practice and was in essence, a violation of Article 41(1) of *the Constitution*. This is bearing in mind that the actions and omissions of the Respondent exposed the Claimant to pecuniary embarrassment and other attendant consequences.
40. The total sum of my consideration is that the Respondent's actions amounted to constructive dismissal hence the Claimant was unfairly and unlawfully terminated from employment.

Reliefs?

41. As the Court has found that the Claimant's termination from employment was unfair and unlawful on account of constructive dismissal, he is entitled to compensatory damages under Section 49(1) of the *Employment Act*, 2007. Accordingly, he is awarded compensatory damages equivalent to three (3) months of his gross salary. This award has taken into account the length of the employment relationship which I note was considerably short as well as the fact that the Respondent's actions exposed the Claimant to unfair labour practices contrary to Article 41(1) of *the Constitution*.
42. The Claimant is further awarded one (1) month's salary in lieu of notice as the Court has found that he was constructively dismissed hence unlawfully terminated from employment.
43. The claim for unpaid salary for a period of six (6) months similarly succeeds, there being no evidence that the Respondent has settled the same. In any event, the Respondent has not denied owing the Claimant salary for the said six (6) months.
44. The claim for unpaid reimbursements is declined for the reason that it constitutes a specific claim. The law is settled that a claim for special damages must not only be specifically pleaded but must also be strictly proved with as much particularity as the circumstances permit. In this case, the Claimant did not indicate what constituted the said reimbursements and proved by way of evidence that he was entitled to the same. In the circumstances, the Claimant did not discharge his legal burden of proof to strictly prove his claim.

Orders

45. In the final analysis, Judgment is entered in favour of the Claimant against the Respondent as follows;
 - a. A declaration that the Claimant was constructively dismissed from employment by the Respondent hence was unfairly and unlawfully terminated.
 - b. The Claimant is awarded the sum of Kshs 345,000.00 being one (1) month's salary in lieu of notice.
 - c. The Claimant is awarded compensatory damages in the sum of Kshs 1,035,000.00 being equivalent to three (3) months of his gross salary.
 - d. The Claimant is awarded the sum of Kshs 2,070,000.00 being unpaid salary for six (6) months.
 - e. The total award is Kshs 3,450,000.00.
 - f. Interest on the amount in (e) at court rates from the date of Judgment until payment in full.
 - g. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2024.



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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Mr. Owino instructed by Mr. Ogilla

For the Respondent No appearance

Court Assistant Millicent

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

