



**Opande v Kenya National Union of Teachers (Cause 238 of 2020)  
[2024] KEELRC 2785 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2785 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 238 OF 2020  
K OCHARO, J  
NOVEMBER 14, 2024**

**BETWEEN**

**BENTER AKINYI OPANDE ..... CLAIMANT**

**AND**

**KENYA NATIONAL UNION OF TEACHERS ..... RESPONDENT**

**JUDGMENT**

1. Through an amended memorandum of claim dated 23<sup>rd</sup> March 2023, the Claimant seeks judgment against the Respondent for;
  - a. A declaration that the Claimant was constructively dismissed from employment on 19<sup>th</sup> May 2019.
  - b. A declaration that the constructive dismissal of the Claimant was unfair and unlawful.
  - c. An order compelling the Respondent to pay the Claimant her terminal benefits amounting to Kshs. 5, 092, 544.00
  - d. Costs of the suit.
  - e. Interest on a, b, and c above at court rates from the date of filing of this suit till payment in full.
2. The Respondent resisted the Claimant's claim through a statement of response dated 15<sup>th</sup> September 2021. It denied that the Claimant's employment was unlawfully or unfairly terminated. However, it admitted owing her a sum of Kshs. 1,879, 320.60. Per the procedure Rules, the Claimant filed a response to the Respondent's pleadings, dated 14<sup>th</sup> October 2021.
3. At the hearing, the Claimant adopted her witness statement that was filed contemporaneously with the statement of claim as her evidence in chief, and tendered in evidence the documents that she filed under the list of documents dated 27<sup>th</sup> May 2020 and a further list of documents dated 14<sup>th</sup> October



2021, as her documentary evidence. The Respondent's witnesses too adopted their witness statements as their evidence in chief and produced the Respondent's documents filed herein as its exhibits.

### **The Claimant's Case**

4. It was the Claimant's case that she first came into the employment of the Respondent on 1<sup>st</sup> April 2013 under a letter of appointment dated 16<sup>th</sup> May 2013, as an Executive Officer. Her starting salary was Kshs. 65, 315 per month which in the course of time rose to Kshs. 233,638.
5. At all material times, she served her employer, the Respondent diligently and with loyalty.
6. In 2007 together with several other women teachers in Kenya, she formed a welfare association, Kenya Women Teachers Association [KEWOTA], and registered on 25<sup>th</sup> October 2007 under the [Societies Act](#). She became the Secretary of the Association.
7. Apparently, the officials of the Respondent Union started being uncomfortable with the activities of the Association. In April 2019, the officials initiated social media attacks on the Association, alleging that it was undermining its activities and that its registration was sponsored by the employer for that sole purpose. Hatred was fueled against the Association and its officials.
8. On 29<sup>th</sup> April 2019, the Secretary General of the Respondent issued a circular to all its Executive Branch Secretaries telling them that the Association was undermining the Union. Further, the registration of alternate organizations was not going to be allowed. Any Union official forming and registering such organization[s] could automatically cease to be a member of the Union. According to her, this circular was only expressive of the General Secretary's personal opinion.
9. On 9<sup>th</sup> May 2019, she was summoned by the Secretary-General for a meeting with the top three officials of the Respondent. The meeting was slated for 14<sup>th</sup> September 2019. The invitation document didn't however, contain the agenda for the meeting. She attended. Present were, the Secretary General, National Chairman, and Deputy Treasurer. An employee, Idris Ibrahim took the minutes thereof. She was questioned, about the Association, its origin, its officials, and how she was involved with it. She did explain. The officials accused her of being a member of an Association that was undermining and dividing the Union, an accusation she denied.
10. At no time had there been a complaint against her concerning her performance, conduct, and capability to work as an employee of the Respondent Union.
11. In the meeting, she explained to the officials that her membership and involvement with the activities of the Association were aligned to her rights under Articles 38, and 41[1] and [2] of [the Constitution](#) of Kenya.
12. On 15<sup>th</sup> May 2019, she received a letter dated 14<sup>th</sup> May 2019 from the Respondent, giving her an ultimatum to choose between remaining in the Union or the Association. The letter asked her to cease being an official of KEWOTA immediately and commit and undertake in writing that she had ceased fully, on or before 18<sup>th</sup> May 2019. She was also required to deregister herself as an official of the Association from the record of the Registrar of Societies. Otherwise, she could cease to be an official of the Respondent with effect, 29<sup>th</sup> April 2019.
13. Though the letter alleged that a decision on the above-stated matters was reached after the meeting of 14<sup>th</sup> May 2019, to the best of her recollection, there wasn't any meeting of any organ of the Union, more particularly the National Executive Committee, which was the disciplinary organ.



14. Her rights were infringed upon. There was immense pressure from the Respondent's officials. This coupled with the negative social media campaigns against the association and her, her working environment became toxic, forcing her to take a voluntary early retirement on 19<sup>th</sup> May 2019. She communicated the reason for retirement. She gave 6 months' notice.
15. The Respondent communicated to her on 30<sup>th</sup> May 2019, that it had accepted her retirement and asked her to hand over her duties by 31<sup>st</sup> May 2019, effectively terminating her employment on 31<sup>st</sup> May 2019.
16. She was thus constructively dismissed and is entitled to; salary in lieu of notice; salary for May 2019; compensation for six months' terminal leave; compensation for earned but untaken leave days [30 days]; duty allowance ECD training; national holidays refund; welfare refund; lump sum [TME X TYS]; compensation for development of the School Manual & the Executive secretaries Manual; compensation for unfair dismissal, twelve months gross salary; pension; and certificate of service.
17. Cross-examined by Counsel for the Respondent, the Claimant testified that she was involved in the formation of the Association while employed by the Respondent. One of her roles, as her appointment letter reveals, was to recruit members into the Respondent Union. Additionally, per the Respondent's Constitution, it was formed, inter alia, to foster solidarity among teachers.
18. She formed an Association within the teaching fraternity. like KEPSA and KESHA.
19. In the meeting on 14<sup>th</sup> May 2019, she was given two options, remain in the Union, or quit and continue being a member of the Association. She was issued with a letter dated 14<sup>th</sup> May 2019, as a follow-up on this. After receiving the latter, she opted to take an early retirement for the sake of her health.
20. In its letter responding to hers, the Respondent incorrectly accused her of having proceeded on sick leave without authority.
21. She didn't give the four months' notice for early retirement as was required. She didn't issue the same as she was under immense pressure.
22. In her evidence under re-examination, she testified that she was an employee of the Respondent and not an elected official. Her employer didn't at all have any performance issues with her.
23. The Respondent's letter that invited her to the meeting on 19<sup>th</sup> May 2019, didn't express her right to be accompanied by a colleague. Further, it didn't bring out the reasons for the meeting.
24. Her health condition was known to the Respondent. She cited this as the reason for her early retirement.

### **The Respondent's Case.**

25. The Respondent presented two witnesses, Caroline Ndolo RW1] and Idris A. Ibrahim [RW2] to testify on its behalf. RW1 adopted her witness statement filed herein, dated 24<sup>th</sup> April 2022 as her evidence in chief.
26. Rw1 stated that the Claimant was first employed by the Respondent on 16<sup>th</sup> May 2013. Her starting salary was Kshs. 65,315 which rose to Kshs. 233, 638 at the time of her voluntary retirement.
27. Sometime in 2007, the Claimant, formed an association with two elected officials of the Respondent. By operating the Association, she was acting in direct conflict with the duties assigned to her by the Respondent, some of which were directly assigned to her by the Secretary-General. The duties included working hand in hand with the Respondent's National Women Representative in handling issues on women's rights and other incidental issues relating to women members in the workplace, operating



- the gender desk, overseeing the School Related Gender Violence program, training the Respondent's members on gender-based issues and violence among other duties.
28. The Claimant didn't disclose the establishment of the Association to the Respondent, instead, the latter learned of its existence following numerous complaints from its members about the activities of the Association. A conflict of interest arose as the members of the Association were members of the Respondent.
  29. Furthermore, the Respondent received nationwide complaints from all its female members over what they alleged to be deductions made by the Association. This led to the Respondent issuing a circular dated 29<sup>th</sup> April 2019 informing its officials that no association should be formed, registered, and granted autonomy to exercise mandates that are already provided for by the Respondent as that may erode the cohesion of the Respondent.
  30. Despite the circular sent to all officials of the Respondent, the Claimant blatantly continued her association with KEWOTA. As such, the Respondent had no other choice but to summon her through a letter dated 9<sup>th</sup> May 2019 to a meeting on 14<sup>th</sup> May 2019 to discuss why she had refused to stop her active involvement with KEWOTA.
  31. The witness further stated that when the Claimant appeared for the meeting, she continued to feign ignorance as to why she had been summoned despite numerous communications by the Respondent to her asking her to stop the association with KEWOTA. The Claimant was given humble time to cease her relationship with the Association, but she didn't. She was equally given time to consider her options.
  32. Through her letter dated 19<sup>th</sup> May 2019, the Claimant tendered her voluntary retirement, stating that the retirement was due to health reasons. The health situation had not been communicated to the Respondent at any time. The Claimant didn't not issue the requisite 4 months' notice for early retirement. Nevertheless, in a show of good faith, the Respondent accepted the Claimant's voluntary retirement.
  33. In her letter, the Claimant stated that she was entitled to six [6] months terminal leave as per the terms and conditions of the Respondent's Circular Ref. No. KNUT/ CIR/122/2/88. The Respondent wrote back, clarifying that the circular only applied to gratuity and terminal dues of employees.
  34. The Respondent paid the Claimant her salary for May 2019, into her account on 30<sup>th</sup> May 2019.
  35. She voluntarily retired. She cannot be heard to assert that her employment was unfairly terminated.
  36. Cross-examined by Counsel for the Claimant, the witness testified that payments that were made for the Claimant were directly paid into his account, without a prior notification. Further, the payments were made on 22<sup>nd</sup> November 2022 after the claim herein had been lodged.
  37. The Claimant was entitled to be paid training allowances for the ECD training at the rate of Kshs. 10,000 per day. She was duly paid for all the training that she conducted.
  38. The payment voucher dated 29<sup>th</sup> December 2018 for Kshs. 600,000 was for payment for the training she conducted. However, the voucher lacks specificity as regards how many trainings and for which dates. Ordinarily, she conducted the training following formal instructions by the Secretary-General. The letters of instruction could bear the number of training she was to carry out. However, none of the letters were presented as evidence before this Court.



39. She testified that according to the financial report produced by the Claimant under the further list of documents, in regard to the training for the years 2018 and 2019, the Claimant was to be paid for the days she attended the training. The record held by the shows that all her allowances were settled.
40. The Respondent had a tradition of paying tokens for its officers whenever they attended National Holiday celebrations. The Claimant would be entitled to Kshs. 10, 000. There wasn't any policy requirement that the same be paid. Payments in this regard were discretionarily made by the employer. The Respondent lodged in Court documents to support its assertion that the Claimant was paid for the National Holidays celebrations for 2017-2019. However, it didn't for the period 2013- 2017.
41. The voucher for 2017, doesn't reflect payments for all holidays in 2017.
42. The Union developed the School Representative Manual and Executive Secretary's Manual. The Claimant was among those who were involved in the development. The team was paid for the work.
43. In her evidence in re-examination, the witness stated that the Respondent's letter dated 22<sup>nd</sup> November 2022, addressed to Kenya Commercial Bank, particularized the payments that were made.
44. The Claimant was not paid six months' salary in terminal dues as she retired voluntarily. The Respondent didn't retire her.
45. She had no earned but unutilized or uncompensated leave days. As can be deduced from the Respondent's exhibits, in 2019 she was compensated for the 32 outstanding leave days.
46. The Claimant has sought for SHS. 480,000, allowances for ECD training. The documents presented by the Respondent show that cumulatively she was paid beyond this amount sought, in terms of the allowances. The same applies to the claim for holiday pay.
47. The welfare Scheme was an entity independent of the Respondent. However, she was paid all that she was entitled to from the welfare Scheme.
48. The Claimant's benefits were paid in installments, cumulatively, Kshs. 1,653,163 .40. The letter from the bank is a testament to this.
49. She was not paid for the development of the School Manual, because she did that as part of her duty. However, she was paid a token of appreciation, Kshs. 98,000, an amount that was paid in two instalments.
50. RW2 adopted his witness statement dated 23<sup>rd</sup> February 2023 as his evidence in chief. The witness statement was substantially word by word that of RW1.
51. Cross-examined by Counsel for the Claimant, the witness testified that the Claimant's letter of appointment set out specific roles for her.
52. KEWOTA was an Association, not a trade union. However, there were complaints against the association by members of the Respondent Union. One of the complaints was that Kshs. 200 had been deducted from a member's salary in favour of the Association, without the members' consent. Pressed further, the witness admitted that the petition by the member was dated 2<sup>nd</sup> March 2020, thus long after the Claimant had retired.
53. The Claimant was summoned to the meeting on 14<sup>th</sup> May 2019, through a letter dated 9<sup>th</sup> May 2019. The invitation letter neither had any charges against the Claimant nor an agenda of the meeting. In the meeting, she was confronted with the issue of the Association.



54. The top officials of the union decided that the Claimant hadn't given a sufficient explanation. Further, it she failed to decide to leave the Association, she was to cease being an employee of the Respondent, as the circular of 29<sup>th</sup> April 2019 could take effect automatically.
55. Further, she was asked to defend herself. In defence, she asserted that she had a right of association and that the Association wasn't rivalling the Respondent Union in any manner.
56. The letter dated 14<sup>th</sup> May 2019, asked the Claimant to commit in writing that she could cease being a member and official of the Association.
57. Her letter for voluntary retirement came in at a time when she was not in office. The letter indicated that she was on medical leave. Contrary to this indication, she wasn't in office because the circular had taken effect.
58. The Claimant's terminal dues were not paid until 2022.

### **Analysis and Determination**

59. I have carefully considered the pleadings, evidence, and submissions by the parties, and distilled the following issues for determination;
  - a. Whether the Claimant was constructively dismissed from her employment.
  - b. Whether the Claimant is entitled to the reliefs sought.

### **Whether the Claimant was constructively dismissed from employment.**

60. Constructive dismissal occurs when the employee terminates the contract, either with or without notice in circumstances in which he is entitled to terminate it without 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, was the employee's departure caused by the employer's conduct? The test of employer misconduct in the context of constructive dismissal 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.
61. As this Court stated in the case of *Stephen Michuki vs- East Africa Express Limited and Another*, [2022] KEELRC 767[KLR], in determining whether an employer evinced an intention no longer to be bound by the contract, two branches of the test have been acknowledged in a vast body of case law. The Court must first identify an express or implied term that has been breached, and then determine whether the breach was sufficiently serious to constitute constructive dismissal. Typically, the breach in question involves changes to the employee's compensation, work assignments, or workplace, that are unilateral and substantial. See *Porter vs- N.B Legal Aid* [2015] I.S.C.R.
62. For a claim of 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. This is the contractual test. See *Coca-Cola East and Central Africa Limited v Maria Ligaga*[2015] eKLR.
63. In the case of *West Excavating [ECC] vs Sharp* [1978] Q.B, it was stated,

“On the one hand, it is said that the words of paragraph [5[2] [c] express a legal concept which is already well settled in the books on contract under the rubric “discharge by breach”. 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."

64. On the other hand, the Court can declare that there was constructive dismissal where the conduct of the employer more generally shows that the employer intended not to be bound by the contract, it need not identify a specific term that was breached, it shall be enough to find that the employer's treatment of the employee made continued employment intolerable. This approach is on character retrospective. It takes stock of the cumulative effect of the past acts by the employer and considers whether those acts evinced an intention to no longer be bound by the contract, in terms of the Court of Appeal decision [supra], this is the unreasonable test.
65. I note what the Court of Appeal stated of the unreasonable test vis a vis the contractual test. I do not get the Court stating that the unreasonable test is totally inapplicable in our jurisdiction. As to which test is to be applied by the Court, depends on the peculiar circumstances of each case. All that is required of the Court when applying the unreasonable test is an abundance of caution.
66. Before I delve further into this issue, I find it pertinent to point out that to buttress its submissions, the Respondent cited the decision in Jacinta W. *Ndewgwa versus Kenya National Union of Teachers, Nairobi ELRC. Cause No. 260 of 2020*, which in my view, is distinguishable from the instant matter. In the cited case, the Court found that the Claimant wasn't an employee of the Respondent but an official, hence the issue of termination of employment couldn't arise. Her case was mis-anchored, therefore. In the present case, there is no dispute that the Claimant was an employee of the Respondent, who was confirmed into employment under the letter dated 16<sup>th</sup> May 2013 permanent basis.
67. Undeniably, the Respondent's Secretary General issued a Circular dated 29<sup>th</sup> April 2019 addressed to all Executive Secretaries and copied to the National Chairman, National Treasurer, all NEC members, all Branch Chairman, and all branch Treasurers. The Circular read in part;

"RE; Formation of Association Groups and Unions

"it has come to our attention that some of our officials within the ranks and file of the union have clandestinely registered associations that are fully fledged and granted the right of a check-off in liaison with other forces outside the union. A case in mind is the Kenya Women Teachers Association.

The National Executive Council [NEC] whereby wishes to state as follows;

- i. That No Association shall be formed, registered, and granted autonomy to exercise certain mandates that are already provided for in the Union as that shall erode the cohesion of the Trade Union movement [KNUT] where such opportunities have already been offered in the Union.
- ii. All of us are elected and employed to serve the union and must choose to be loyal to the union and serve the union without



undermining it through the formation of alternative associations and organizations.

- iii. In the event of any official/ officer forming such, they shall cease being officials/ officers of the Union forthwith.”

68. On 14<sup>th</sup> May 2019, the Respondent wrote to the Claimant;

“Your involvement in an outfit called Kenya Women Teachers Association [KEWOTA]

“Following the deliberations of the meeting held on Tuesday 14<sup>th</sup> May 2019, in the National Chairman’s Boardroom where you were summoned to shed light on the Kenya Women Teachers Association [KEWOTA], the union resolved as follows;

- i. From the date of this letter you will completely cease being an official of the Kenya Women Teachers Association [ KEWOTA].
- ii. In the event that you continue associating yourself with that group then the contents of the Circular Ref. No. KNUT/Circular/122/14/ 2019 dated April 29, 2019, shall effect immediately.
- iii. You shall commit yourself in writing to the Secretary General that you are not part of the Kenya Women Teachers Association [ KEWOTA]. This letter must reach the Secretary General by Thursday 18<sup>th</sup> May, 2019.
- iv. You must deregister your name from the Registrar of Societies and submit the change of names to the office of the Secretary General.”

69. The voluminous case law that has developed around the concept of constructive dismissal simply indicates that the circumstances giving rise to constructive dismissal are varied as those of employment itself.

70. In his evidence under cross-examination, the RW2, testified that as of 19<sup>th</sup> May 2019, the Claimant was not out of office as a result of medical leave, but because the Respondent’s circular had already taken effect. In essence, he was saying that the Claimant’s employment had come to determination on the 18<sup>th</sup> May 2019 as set out in the letter forestated and that the voluntary retirement that the Claimant expressed through her letter dated 19<sup>th</sup> May 2019 was of no effect. In my view, this evidence, coupled with the contents of the Respondent’s above-stated letter, it is clear that the Respondent expressed the intention not to no longer be bound by the employment contract beyond 18<sup>th</sup> May 2019. The Claimant was therefore constructively dismissed on 18<sup>th</sup> May 2019.

71. It was common cause that the Association was formed way before the Claimant became an employee of the Respondent. The Association that the Respondent gave the Claimant an ultimatum to cease having a relationship with. The question that then springs up, is, what could be the place of this action by the Respondent in light of the provisions of Articles 3, 10, 38, and 41 of *the Constitution*? The Respondent comes out as an employer who cared not about the fact that; Article 3 bound it to respect *the Constitution*; Article 10 of *the Constitution* enjoined them to respect social justice, and human rights; Article 38 of *the Constitution* bestowed upon the Claimant the right to associate, which right could only be qualified as per law allowed and; Article 41 guaranteed the Claimant a right to reasonable working conditions.



72. As per Article 19 of *the Constitution* of Kenya, 2010, the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and promote social justice. Where an employer blatantly infringes on an employee's constitutional right[s] or, unlawfully threatens to curtail the right[s], as the Respondent did in the circumstances of this matter, the employee can rightfully have a basis of walking out of employment with or without notice. The employee can successfully sue for constructive dismissal.
73. By reason of the foregoing premises, I find that the Claimant was constructively dismissed on 18<sup>th</sup> May 2019 I agree with the evidence of RW2, that her letter of 19<sup>th</sup> May 2019 was of no effect.
74. It will be remiss of this Court if it doesn't point out that the Respondent didn't with sufficient evidence support their assertion that through its activities, the Association was rivalling it. Further, the Claimant was conflicted.

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

75. The Claimant sought inter alia compensation under Section 49[1][c] of the *Employment Act*, to the maximum extent contemplated therein. This Court is cognizant of the fact that a grant of the compensatory relief contemplated under the provision is discretionary. The extent of the grant too. The extent is normally attracted by the peculiar circumstances of each case. I have considered the conduct of the Respondent that this court has found as amounting to constructive dismissal of the Claimant; the fact that the Respondent didn't care that its act[s] was an infringement or threatened to infringe upon the Claimant's constitutional rights and constitutional dictates and; that she lost her job as a result of her activities connected to her right of association, and find that she is entitled to compensation under the stated provision to an extent of six months' gross salary.
76. The Claimant sought specific amounts under the heads; duty allowance -ECD-training [Kshs. 480,000]; National holiday refunds [ Kshs. 120,000]; Welfare refund [Kshs. 354,336]; Development of the School Representative Manual & the Executive Secretaries Manual [ Kshs. 400,000]. All these reliefs were in character special damages, and as such, they needed to be specifically proved. I have carefully considered the Claimant's evidence in support of the claim for the reliefs and I am not hesitant to conclude that the same was, to say the least, scanty and incoherent, the same couldn't specifically prove the figures and disabuse the Respondent's evidence in regarding the payments thereof. I decline to award these reliefs sought.
77. Further, I note that the Respondent's evidence that the Welfare Scheme was an independent entity from itself and that therefore, the Claimant could only direct her guns on the claim for welfare refunds against the welfare, was unchallenged a further reason why the claim under the head is rejected.
78. The Claimant sought four months' salary in lieu of notice. From her pleadings and evidence, one isn't able to see where the entitlement flows from. In the absence of this, I can only note that the Claimant's employment was terminable by twenty-eight days' notice under Section 35 of the *Employment Act*. The same was not issued in the circumstances of this case. The Claimant is therefore entitled to pay in lieu.
79. In the upshot, Judgment is hereby entered for the Claimant in the following terms;
- i. A declaration that she was constructively dismissed from employment on 18<sup>th</sup> May 2019.
  - ii. Compensation for unfair dismissal, six [6] months' gross salary, Kshs. 1, 401, 828.
  - iii. One month's salary in lieu of notice, Kshs. 233, 638.



- iv. Costs of this suit.
- v. Interest on the sums awarded above at court rates from the date of this Judgment till full payment.

**READ SIGNED AND DELIVERED THIS 14<sup>TH</sup> DAY OF NOVEMBER 2024.**

**OCHARO KEBIRA**

**JUDGE**

**In the presence of**

.....For the Claimant

.....For the Respondent

