



**Kagure v Dot Com Bakery Limited (Cause E087 of 2021)
[2024] KEELRC 13372 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13372 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E087 OF 2021
AK NZEI, J
DECEMBER 6, 2024**

BETWEEN

PHARES KAGURE CLAIMANT

AND

DOT COM BAKERY LIMITED RESPONDENT

JUDGMENT

1. The Claimant herein, Phares Kagure, sued the Respondent vide a Memorandum of Claim dated 25th June, 2021 and filed in Court on 13th September, 2021 and sought the following reliefs:-
 - a. A declaration that the termination process carried out by the Respondent was contrary to the [provisions of the] *Employment Act* and was therefore wrongful, unfair and unlawful.
 - b. One month salary in lieu of notice Kshs.130,000/=.
 - c. Prorated leave pay Kshs.68,250/=.
 - d. Service pay Kshs.65,000/=.
 - e. Outstanding salary arrears Kshs.812,173.80/=.
 - f. Unremitted NSSF deductions Kshs.4,400/=.
 - g. Compensation for unfair and unlawful termination (12 months) Kshs.1,560,000/=.
 - h. Certificate of service.
 - i. Costs of the suit and interest.
2. The Claimant pleaded that he was first employed by the Respondent as a Consultant in April 2020 for a daily wage of Kshs.1,500/=, and was subsequently promoted to a permanent status, earning a



monthly salary of Kshs.164,466.67, and worked until February 2021. That he worked continuously during the entire period of employment.

3. The Claimant further pleaded:-
 - a. that during the period of employment, a Director of the Respondent company, one Mr. Ali Seif Mohamed, being one of the Claimant's superiors, regularly mistreated the Claimant, used verbal insults on the Claimant and even threatened his life by brandishing crude weapons; thus creating an intolerable working environment for the Claimant, which was compounded by non-payment of salary and delayed salary payment.
 - b. that during his entire period of employment, the Claimant was never paid his full salary, even at once, and that unpaid salary arrears were as follows:-
 - i. May 2020 Kshs.100,000/=
 - ii. June 2020 Kshs.57,000/=
 - iii. July 2020 Kshs.78,000/=
 - iv. August 2020 Kshs.74,000/=
 - v. September 2020 Kshs.90,000/=
 - vi. October 2020 Kshs.130,000/=
 - vii. November 2020 Kshs.80,000/=
 - viii. December 2020 Kshs.68,000/=
 - ix. January 2021 Kshs.130,000/=
 - x. January 2021 Kshs.5,173/=
 - c. that at a company meeting on 28th January, 2021, the said Director used Italian slurs on the Claimant and invited him to resign if he was unhappy. That the Claimant complained to the Respondent's Human Resource Manager and stated his intention to resign.
 - d. that in January 2021, the Respondent unilaterally changed the Claimant's employment terms and placed him on 6 months' probation, despite the fact that the Claimant had already worked for the Respondent for ten (10) months.
 - e. that the company car assigned to the Claimant was withdrawn without reason.
 - f. that the Respondent stifled the Claimant's productivity at the work place by refusing to implement his proposals for fiscal management and later blaming the Claimant for its woes.
4. The Claimant further pleaded that after the incident of 28th January, 2021 and his complain to the Human Resource Manager, he was issued with a show cause letter over the weekend. That the Respondent's actions were indicative of the fact that the Respondent was no longer [interested] in being bound by the employment contract. That due to the dehumanizing treatment, the Claimant issued a resignation letter dated 1st February, 2021.
5. It was the Claimant's further pleading that his resignation was as a result of frustrations by the Respondent, and that actions of the Respondent amounted to constructive dismissal. That the constructive dismissal was unfair, unlawful and unprocedural. That even after the resignation, the Respondent refused to pay the Claimant's terminal dues and outstanding salary arrears.



6. The Claimant further pleaded that his mistreatment by the Respondent amounted to unfair labour practice by the Respondent and gross violation of the Claimant's human dignity. The Claimant prayed for a declaration in that regard.
7. Documents filed alongside the Claimant's Memorandum of Claim included a list of documents dated 25th June, 2021, listing 8 documents. The listed documents included screenshots of WhatsApp Messages, computation of salary arrears, Audit report for fiscal management, employment contract and job description, a show cause letter, resignation letter and response to the resignation letter.
8. The Respondent filed Response to the Claimant's claim and denied the same. The Respondent pleaded:-
 - a. that the Claimant's tenure as the Respondent's accountant was marred with cash flow problems resulting from the Claimant's failure to submit timely reports to the Respondent on sales collections from customers and the debt level owed by customers. That the Claimant was not diligent, and that as a result, the Respondent incurred losses.
 - b. that the Claimant was not mistreated as claimed by him.
 - c. that there was an incident that took place at the Respondent's premises where the Claimant, without authorisation, took a motor vehicle belonging to a son of the Respondent's Director, drove it and caused an accident. That although the Director's son was understandably upset, the Claimant was not accosted with a weapon during the confrontation. That the incident was resolved and the Respondent's Director issued an apology to the Claimant.
 - d. that the Claimant was responsible for preparing the Respondent's payroll, making payments and generating payslips for the management staff. That the Claimant failed to carry out his duties, and that his failure to receive his monthly payment cannot be attributed to the Respondent.
 - e. that the Claimant authored his own misfortune as he failed to submit all financial records in a timely manner.
 - f. that the Claimant was not at any time assigned a company car during the period that he worked for the Respondent.
 - g. that the Claimant was given many opportunities to correct his errors, and any conflicts that arose during work were resolved amicably. That the Respondent did not drive the Claimant to resign from his post.
9. The Claimant filed a written witness statement dated 30th June, 2021. The Respondent is not shown to have filed any witness statements or any documents apart from its aforementioned Response to the Claimant's claim.
10. At the trial, the Claimant adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 7 of this Judgment. The Claimant testified that having worked for the Respondent for 10 months, without a contract, he was given a contract putting him on probation for 6 months.
11. The Claimant further testified that he felt that his life was threatened because at one time, the Respondent's Director's son stormed his office with crude weapons. It was the Claimant's testimony that the car that he was using was withdrawn, and that there being instances that his work required that he attends duty at night, he felt that he could not move around without a company car.



12. The Respondent did not attend Court at the trial, though shown to have been served, and did not call any evidence.
13. The evidence presented by the Claimant was not controverted, and stands unchallenged as no evidence was presented by the Respondent in defence. It was stated as follows in Trust Bank *Limited – vs – Paramount Universal Bank Limited & 2 Others – Nairobi [Milimani] HCCC No. 1243 of 2021*:-

“It is trite that where a party fails to call evidence in support of his case, that party’s pleadings remain mere statements of fact since in so doing, the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.”
14. In the present case, failure by the Respondent to adduce any evidence meant that its filed response to the Claimant’s claim remained an unsubstantiated statement of fact devoid of any legal or evidential weight; and that the Claimant’s evidence in proof of his claim remained uncontroverted and therefore unchallenged.
15. Having considered the Claimant’s pleading(s) and evidence presented in Court, issues that present for determination, in my view, are as follows:-
 - a. Whether the Claimant was constructively dismissed by the Respondent, and if so, whether the dismissal was unfair.
 - b. Whether the Claimant is entitled to the reliefs sought.
16. On the first issue, the Black’s Law Dictionary (10th Edition) defines constructive dismissal as follows:-

“An employer’s creation of working conditions that leave a particular employee or a group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer’s course of action that being detrimental to an employee, leaves the employee no option but to quit.”
17. The Court of Appeal stated as follows in the case of Coca Cola East & Central Africa Ltd – vs – Maria Kagai Ligaga (2015) eKLR:-

“Constructive dismissal occurs where an employee terminates the contract under which he is employed, (with or without notice) in circumstances in which he is entitled to terminate it without notice, by reason of the employer’s conduct. The employer’s behaviour in either case must be shown to be heinous, so intolerable that it made it considerably difficult for the employee to continue working. The employee initiates the termination believing himself to have been fired. The employee needs to show that the employer, without reasonable or proper cause, conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is regarded as constructive dismissal if the employer’s conduct is a significant breach of the contract of employment and the conduct shows that the employer is no longer interested in being bound by the terms of the contract. The employee’s resignation is therefore treated as an actual dismissal by the employer, and the employee may claim compensation for unfair termination.”
18. The Claimant in the present case pleaded and testified that after working for the Respondent for ten (10) months without a [written] contract, the Respondent in January 2020 gave him a written contract, putting the Claimant on probation for six (6) months. The Claimant further pleaded and



- testified that for the ten months that he worked for the Respondent, his salary was never paid in whole at any one time, and was always delayed and/or not paid. This evidence was neither controverted nor challenged by the Respondent.
19. It was the Claimant's further evidence that he felt that his life at the work place was threatened, and gave an example of an incident when a son of the Respondent's Director stormed the Claimant's office brandishing crude weapons. The Claimant also testified that he was subjected to insults and slurs by the Respondent at the work place; and that the company car assigned to him was withdrawn, despite the fact that there were instances when he was required to attend to duty at night. That it was not safe for him to move around at night without a motor vehicle. This evidence was neither controverted nor challenged by the Respondent.
 20. The foregoing actions and conduct by/on the part of the Respondent not only amounted to unfair labour practices by the Respondent, but also amounted to a significant breach of the Claimant's contract of employment and demonstrated that the Respondent was not interested in being bound by the said contract.
 21. It is worthy noting that in any contract of employment, payment of an employee's salary as per the contract of employment is pivotal, as all that an employee has for sale in the employment/labour market is his/her labour and/or expertise. Non-payment of an employee's salary goes to the core of the employment contract and destroys and/or seriously damages an employment relationship.
 22. In view of the evidence on record herein, the Respondent's actions and conduct left the Claimant with no option but to resign. I find and hold that the Claimant's resignation amounted to constructive dismissal, which was unfair, and I so declare.
 23. Having made a finding that termination of the Claimant's employment was unfair, I award the Claimant an equivalent of three (3) months' salary as compensation for unfair termination of employment. The Claimant stated in his filed witness statement, which he adopted as his testimony at the hearing of his case, that he was earning a gross salary of Kshs.164,466.67 at the time of termination, but indicated in his computation of salary arrears that his monthly salary was Kshs.130,000/=. I accept the latter sum, which was not controverted and/or disputed by the Respondent, as the Claimant's monthly salary at the time of dismissal. The equivalent of three (3) months' salary is Kshs.390,000/=:, which I award the Claimant as compensation for unfair termination of employment.
 24. Although the Claimant had not worked for the Respondent for at least thirteen months as provided for in Section 45(3) of the Employment Act, I am persuaded by the decision of Lenaola, J (as he then was) in Samuel G. Momanyi – vs – Attorney General & Another [2012] eKLR where Section 45(3) of the Employment Act, which places a minimum of thirteen months' employment period as a condition for claims of unfair termination, was declared unconstitutional.
 25. The claim for Kshs.812,173.80 being salary arrears, which was not disputed, is allowed.
 26. The claim for one month salary in lieu of notice is allowed pursuant to Section 35(1)(c) of the Employment Act, and the Claimant is awarded Kshs.130,000/= in that regard.
 27. The claim for prorated leave pay was not specifically pleaded, and is declined.
 28. The claim for service pay was not proved. The Claimant did not demonstrate that he was contractually entitled to service pay.
 29. The claim for refund of NSSF deductions was not proved, and is declined. The Claimant did not demonstrate that such deductions were made from his salary and that the same were not remitted to the NSSF. Further, once deducted from an employee's salary, statutory deductions cease to be an



employee's entitlement. They become a statutory entitlement of the Government entity on whose behalf the deductions were made. Such entities, like the NSSF, are empowered by the law to cause remittance of the unremitted deductions. More often than not, prosecutorial powers are given to some of such entities.

30. In sum, and having considered written submissions filed herein, Judgment is hereby entered for the Claimant against the Respondent as follows:-
- a. Compensation for unfair termination of employment Kshs.390,000/=.
 - b. Outstanding salary arrears Kshs.812,173.80/=.
 - c. One month salary in lieu of notice Kshs.130,000/=.
- Total = Kshs.1,332,173.80/=.
31. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the [Employment Act](#).
32. The Respondent shall issue the Claimant with a Certificate of Service within thirty days of this Judgment.
33. The Claimant is awarded costs of the suit and interest on the sum awarded herein at Court rates. Interest shall be calculated from the date of this Judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Claimant

.....Respondent

