Achieng v Niti Distributors Limited (Cause 1916 of 2017)
[2023] KEELRC 156 (KLR) (31 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 156 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1916 OF 2017

JK GAKERI, J

JANUARY 31, 2023

BETWEEN

DOREEN MILDRED ACHIENG ..... CLAIMANT

AND

NITI DISTRIBUTORS LIMITED ..... RESPONDENT

JUDGMENT

1. By a Memorandum of Claim filed on September 26, 2017, the Claimant sued the Respondent alleging unfair constructive dismissal and discrimination at the work place.

The Claimant's case is pleaded as follows;

2. The Claimant avers that he was employed by the Respondent on June 2, 2004 as a Sales and Marketing Executive on permanent terms until June 5, 2015 and her salary was Kshs.92,000/= by the time she left employment.

3. That she worked ardently and the contract was regularly renewed.

4. The Claimant further avers that sometime in 2011, the Respondent started treating some members of staff favourably depending on their race.

5. It is the Claimant's case that she trained newly recruited employees of Asian origin who were absorbed and were earning Kshs.150,000/=.

6. That the Claimant pleaded for improvement of her terms for 12 months but to no avail and her departure was inevitable.

7. That the Respondent's salary structure was arbitrary and discriminatory which extended to who would be served tea and nothing was done despite the Claimant raising the issue.

8. That sometime between 2013 and 2015, the Claimant took leave owing to the discrimination and the Respondent stopped paying her salary.

9. That the Claimant was constructively dismissed.

10. The Claimant avers that she did not work for a competitor of the Respondent.

11. The Claimant avers that she suffered mental anguish.

12. That the workplace was intolerable and had to leave.

13. The Claimant prays that;

    i. Termination of the Claimant's contract of service be declared unlawful and null and void.

    ii. The Respondent do re-engage the Claimant in work comparable to her previous employment.

    iii. The Respondent reinstates the Claimant and treat her in all aspects as if the employment had not been terminated.

14. In the alternative to reinstatement, the Claimant be paid;

    1. The sum of Kshs.4,498,381.45 enumerated under No. 2 (j).

    2. Interest at court rates from date of filing until payment in full.

    3. Any other statutory entitlement and other remedy as the court may deem just to grant.

    4. Certificate of service.

    5. Costs of this suit.

Respondent's case

15. In its Statement of Defence filed on November 7, 2017, the Respondent denied having engaged the Claimant in June 2004.

16. It also denies that it discriminated the Claimant or that she was frustrated by any of its employees.

17. It is the Respondent's case that the Claimant could not dictate what she would be paid as salary and was paid a commission of certain sales above her net salary.

18. The Respondent denies having altered the Claimant's duties or exposing her to an unbearable working environment.

19. The Respondent further denies having failed to grant audience to the Claimant in respect of terms of service.

20. It is the Respondent's case that the Claimant breached the terms of employment or misconducted herself by;

    i. Working part time for the Respondent's competitor M/S Mustek Computers Limited.

    ii. Working for M/S Emitech Limited.

21. That sometime in May 2013, the Claimant absented herself from employment without notice or justification.

22. It is the Respondent's case that the Claimant deserted employment without notice.

23. The Respondent denies owing the Claimant Kshs.14,346,000/= and prays for dismissal of the Claimant's suit with costs.

Claimant's evidence

24. The Claimant's written statement dated September 15, 2017 which she adopted states that the Claimant left between March and May 2015 yet the claim states that she left on June 5, 2015.

25. On cross-examination, the Claimant confirmed that she left on June 5, 2015 and did so without consent of the employer and had no reason for her absence.

26. That the conditions of employment were too toxic and had no choice but leave. That the written statement made reference to discrimination in relation to the salary.

27. The witness confirmed that she had no evidence that other employees earned Kshs.150,000/= and had not written to anyone about the alleged discrimination and had no supportive documentary evidence.

28. When questioned about the allegations of working for a competitor, the witness stated as follows "I have serious misgivings about that allegation".

29. The witness further confirmed that she received one warning letter dated 17th July, 2013 and replied but had no evidence because her yahoo account had allegedly been locked and she did not explain herself by a response.

30. The Claimant denied having absented herself from work as stated in her claim in paragraph 1(h).

31. Finally, the Claimant confirmed that she left the Respondent's employment without notice, did not particularise the unlawful deductions or the prorated leave a benefits outlined in sales policy.

32. On re-examination, the Claimant testified that she left on June 5, 2015 and had been paid up to May 2015.

Respondent's evidence

33. RWI, Manish Shah confirmed on cross-examination that he joined the Respondent in 2002 and knew the Claimant who joined in June 2004. He confirmed that the Claimant was earning Kshs.92,000/= by the time she left the Respondent's employment and that when she left, she joined Mustek Computers Ltd and left without notifying the Respondent. That the Respondent even filed a missing person's report with the police dated July 7, 2013.

34. It was the witnesses' testimony that the Claimant worked from Monday to Saturday and did not work on Sunday and the Respondent's salary structure had no categorization between Asians and Africans.

35. The witness confirmed that no notice to show cause was issued to the Claimant but warning letters were.

36. On re-examination, the witness testified that the Claimant was not taken through a disciplinary hearing as the Respondent thought she would come back.

Claimant's submissions

37. According to the Claimant's counsel, the issues for determination were;

    i. Whether the Respondent subjected the Claimant to unfair working conditions.

    ii. Whether the Claimant was constructively dismissed.

iii. Entitlement to the reliefs sought.

38. On the first issue, it was urged that the Claimant had adduced evidence to show that her working conditions changed from 2011, that the Respondent stopped giving itemised payslips (the payslip provided by the Claimant is dated May 2013).

39. That the salary disparity was contrary to section 5 (2) and (3) (b) of the *Employment Act* and Article 41 (2) of the *Constitution of Kenya, 2010* as regards equal treatment. The court was urged to find that the Claimant was unfairly treated at the workplace.

40. As regards constructive dismissal, it was submitted that after 2011, the Claimant was given a new duty of training which altered the terms of the contract. That the work environment became toxic and unbearable and had no option but leave. That the workplace was intolerable. That training and back office duties altered her contract as a Sales and Marketing Executive making her continued employment unbearable.

41. Counsel submitted that the intolerable working conditions amounted to repudiation of the employment and was not granted audience by the Respondent and had no option but quit which was therefore an unlawful dismissal from employment and terminal dues were not paid.

42. Reliance was made on the decision in Communication Workers Union of Kenya V Telkom Kenya Ltd (2018) eKLR on discrimination as was the decision in Stanley Mungai Muchai V National Oil Corporation of Kenya (2012) on constructive dismissal.

43. On the reliefs sought, it was urged that the Claimant was entitled to the reliefs itemised in the Memorandum of Claim including Kshs.5,000,000/= for discrimination.

44. Decisions in Ol Pejeta Ranching Ltd V David Wanjau Muhoro (2017) eKLR, VMK V Catholic University of Eastern Africa (2013) eKLR and Koke Muia V Samsung Electronics East Africa Ltd (2015) eKLR were relied upon to reinforce the submission on underpayment, notice pay, compensation, leave days, off days, pro-rata leave and service pay.

Respondent's submissions

45. The Respondent's counsel addressed two issues, namely; constructive dismissal and untenable remedies.

46. On the burden of proof regarding discrimination, reliance was made on section 5(7) of the *Employment Act*, 2007. It was urged that the provision should be read in the context of other provisions such as section 47 (5) of the Act on the burden of proof of the parties.

47. It was urged that since discrimination was a criminal offence under section 5(6) of the Act, it had be established against the standard of beyond reasonable doubt.

48. Reliance was made on the decision of Mrima J in Ahmed Mohammed Noor V Abdi Aziz Osman (2019) eKLR on the burden of proof in criminal and civil cases.

49. Counsel submitted that the Claimant was required to demonstrate a prima facie case of discrimination before the Respondent was called upon to explain the allegations.

50. It was further submitted that the allegation of discrimination on the basis of race was a mere "say so" as the Claimant led no evidence or call any colleague to corroborate the allegation or evidence of systematic discrimination at the work place.

51. Relatedly, counsel submitted, the Claimant did not make any written complaint of the alleged discrimination which was denied by the Respondent.

52. It was urged that section 5(7) of the *Employment Act* did not mean that the Claimant makes a claim and the entire burden is on the Respondent, that the Claimant must set the stage for the Respondent to rebut. That without a prima facie case, the Respondent would have no case to answer.

53. It was submitted that the most probable explanation was that the Claimant left the Respondent's employment to work for another company and not because of the alleged discrimination.

54. It was further urged that the Claimant admitted having received an email from the Respondent on absenteeism and if she was away on account of discrimination, this was an opportune time to explain why she left but did not bother and did not respond to the email or letter.

55. Finally, counsel for the Respondent submitted that on a balance of probability, the Respondent's version of events was more credible and had evidential support including the email the Claimant admittedly received while the Claimant's evidence was her word.

56. Counsel submitted that the scales of justice weighed in favour of the Respondent.

57. As regards the prayers sought, the counsel submitted that a party was bound by its pleadings. That paragraph 1 of the alternative prayers at page 5 of the Memorandum of Claim prayed for "Terminal dues as enumerated under clause No. 2 (j) above, thus sum of Kshs.4,498,381.45

58. Counsel urged that clause 2 (j) had no enumeration of dues nor the figure cited above as clause 2 (j) related to the Claimant's denial that she left to work for another company. That the figure of Kshs. 4,498,381.45 appeared nowhere else in the claim.

59. The Respondent further submitted that the Claim on interest on clause 2 (j) (i), (ii), (iii), (iv), (v) and (vi) from date of filing till payment in full was untenable as clause 2 (j) did not quote figures capable of being subject to interest and did not have the sub-clauses (i), (ii), (iii), (iv), (v) and (vi).

60. That prayer (2) in the alternative referred to fictious figures and clauses.

61. The Respondent's counsel urged that parties were bound by their pleadings and special damages prayed had to be pleaded and specifically proved. That the Claimant's pleadings were erratic and unproved.

62. Finally, the Respondent's counsel submitted that some of the prayers were untenable such as salary underpayment pegged at 150,000 which was unsupported by any documentary evidence. Counsel submitted that the figure was arbitrary.

63. On notice pay, it was submitted that the Claimant admitted that she left without notice.

64. That leave days were untenable by virtue of section 28 (4) of the *Employment Act* as was the claim for service pay since the Claimant was a member of NSSF.

Determination

65. The issues for determination are;

    i. Whether the Claimant was constructively dismissed.

    ii. Whether the Claimant absconded duty or deserted the workplace.

    iii. Whether the Claimant was discriminated by the Respondent.

iv. Whether the Claimant is entitled to the remedies sought.

66. As to whether the Claimant was constructively dismissed as alleged, the first port of call is an explanation of the concept of constructive dismissal.

67. According to the Court of Appeal in Coca Cola East and Central Africa Limited V Maria Kagai Ligaga (2015) eKLR, the most authoritative meaning of constructive dismissal is the one articulated by Lord Denning MR in Western Excavating (ECC) Limited V Sharp (1978) ICR 222 as follows;

> " 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 loose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

68. In Coca Cola East and Central Africa Ltd VMaria Kagai Ligaga (Supra), the Court of Appeal domesticated the concept of constructive dismissal and proceeded to lay down the principles relevant to the determination of whether constructive dismissal has taken place.

69. The court stated as follows;

> " 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 behaviour towards him was so unreasonable that he could not be expected to stay – this is unreasonable test. The second interpretation is that the employer's conduct is so grave that it constituted a repudiatory breach of contract of employment – this is the contractual test. The contractual test is narrower than the unreasonable test. The dicta in Western Excavating (ECC) Ltd V Sharp (supra) adopts the contractual approach test and we are persuaded that the test is narrow, precise and appropriate to prevent manipulation or overstretching the concept of constructive dismissal. For this reason, we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment . . . The employee must leave because of the breach but the breach need not be the sole cause so long as it is the effective cause. The criterion to determine if constructive dismissal has taken place is repudiatory breach of contract through conduct of the employer. The burden of proof lies with the employee. The employer's conduct must be such as when viewed objectively, it amounts to a repudiatory and fundamental breach of the contractual obligations . . ."

70. Among the key principles isolated by the Court of Appeal are that;

> " There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e causation must be proved."

71. Further, "The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach".

72. The court is guided and bound by these sentiments.

73. In the instant case, the Claimant testified that her work place changed from 2011 when some of her colleagues were treated favourably. The statement does not explain what the favours were and to who. That she trained Mahendrakumar, Surechwa, Pratik Shah, Pirito and many others in marketing who were absorbed and paid Kshs.150,000/= and above. That the training altered the terms of the contract.

74. From the statement, it is unclear who requested or directed her to train the alleged persons, when and on what terms. It is unclear what form the training took and the qualification point.

75. There is no evidence that the Claimant was coerced to train anyone, if indeed she did, RWI denied that there was any training at its premises.

76. On the alleged salary disparities, the Claimant led no evidence on how the Respondent remunerated its staff. It is unclear where the figures of Kshs.150,000/= was extracted from.

77. Strangely, the Claimant provided not a single document or whatever form to prove any of the allegations made.

78. The allegation that she pleaded for improvement of terms of service or was denied audience were not supported by any shred of evidence.

79. Puzzlingly, the Claimant had an email account and the only email communication on record provided by the Claimant was from the Respondent cautioning her about absence from work.

80. From the evidence on record, the Claimant had innumerable opportunities to document her tribulations, if any, and forward the same to the Respondent. The court is left wondering why an experienced Marketer could not reduce her complaints or tribulation into writing from 2011 to June 2015.

81. The Claimant adduced no evidence of the official she had talked to about her terms of employment or the one who declined to give her audience. The mantra of he who alleges must prove reigns.

82. It was incumbent upon the Claimant to demonstrate that other employees were earning Kshs.150,000/=, that she trained the persons alleged to have been trained on directions of the employer.

83. Finally, it beats logic why an employee would remain in an intolerable and toxic work place from 2011 to June 2015 without a single complaint.

84. The witness confirmed on cross-examination that she did not write anything about the alleged discrimination. The allegation sounds unconvincing.

85. Even assuming it indeed took place, the Claimant accepted and acquiesced the Respondent's conduct hook, line and sinker and was estopped from alleging the same in 2017 when the suit was filed. She did not leave within a reasonable time to justify constructive dismissal.

86. To the question whether the Claimant was constructively dismissed, the court returns a finding that the Claimant has on a balance of probabilities failed to demonstrate that she was constructively dismissed.

87. As to whether the Claimant deserted the work place or absconded duty, the Claimant testified that she left on June 5, 2015 owing to discrimination. RWI on the other hand testified that the Claimant left to work for another company but provided no evidence to prove the allegations. However, the Claimant did not deny the allegation. She stated that she and serious misgivings about the allegations. That she left without notifying the Respondent a fact she admitted in evidence.

88. Similarly, the Claimant admitted having received a warning letter dated July 7, 2013 on account of continued absence from work. Other letters on record attesting to the Claimant's absence from work in March 2013 and absence in April 2013 are dated April 2, 2013 and April 15, 2013 respectively. Copies of these letters were sent to the County Labour Office and would appear to confirm that indeed the Claimant did not report to the workplace regularly.

89. On its part, the Respondent did not deny that the Claimant left in 2015. Indeed RWI confirmed that they expected the Claimant to return as she had done in the past.

90. According to Black's Law Dictionary 10th Edition, desertion is;

> " The wilful and unjustified abandonment of a person's duties or obligations."

91. As explained in Seabolo V Belgravia Hotel (1997) 6 BLLR 829 (CCMA), desertion occurs when an employee leaves the workplace with no intention of returning or makes up his mind not to return after leaving.

92. In determining this issue, the court is guided by the sentiments of the court in Felistas Acheha Ikatwa V Charles Peter Otieno (2018) eKLR, where the court held;

> " The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered."

93. From the evidence on record, the Respondent took no action after the Claimant left the workplace in June 2017. It neither sent a warning letter nor a notice to show cause or make attempts to get in touch with her.

94. In the words of Onyango J. in Judith Atieno Owuor V Sameer Agriculture and Livestock Ltd (2020) eKLR,

> " Further, even if she had absconded, she is by law entitled to fair disciplinary process as set out in Section 41 of the *Employment Act , 2007*. No evidence was availed to the court to support there having been a disciplinary process or notice issued prior to termination. It is the duty of the Respondent to show this court it did accord the Claimant a fair hearing prior to termination."

95. Evidently, the plea of desertion was not established.

96. As apparent from the provisions of the *Employment Act*, 2007 and elaborated upon by case law, for a termination of employment to pass the fairness test, there must have been substantive justification

and procedural fairness (see Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR, Walter Ogal Anuro V Teachers Service Commission (2013) eKLR).

97. For the foregoing reasons, it is the finding of the court that the Respondent has failed to demonstrate that termination pf the Claimant's employment was fair within the meaning of Section 45 of the *Employment Act , 2007* .

98. As to whether the Claimant was discriminated, parties adopted opposing positions. While the Claimant submitted that she was discriminated on remuneration, the Respondent submitted that she was not.

99. The Claimant testified that after training certain persons, they were employed and were earning Kshs.150,000/= and above while her salary was Kshs.92,000/= per month.

100. Noteworthy, the allegation of discrimination was not captured in any form other than in paragraphs 6 and 7 in the Claimant's statement.

101. Needless to emphasize, an allegation of discrimination is very serious as it inter alia implicates the provisions of Article 27 of the *Constitution of Kenya, 2010* and Section 5 (3) and 5 (5) of the *Employment Act , 2007*.

102. In Magare Gikenyi J. Benjamin V County Government of Nakuru and 4 others (2020) eKLR, Mbaru J. stated as follows;

> " A claim that there is discrimination against any person must be given its due weight with sufficient evidence. Failure to prove has potential to create a serious dent in employment and labour relations. It is not sufficient to allege there is discrimination against an employee at the workplace. Such an allegation must be proved."

103. Similarly, in Samson Gwer & 5 others V Kenya Medical Research Institute & 3 others (2020) eKLR, the supreme Court of Kenya expressed itself as follows;

> " The Petitioner's case is set around the constitutional right of freedom from discrimination (Constitution of Kenya 2010, Article 27). It is already the standpoint of this court, as regards standard of proof that this assumes a higher level in respect of constitutional safeguards than in the case of the ordinary civil-claim balance of probability. The explanation is that, virtually all constitutional rights safeguards bear generalities or qualifications which call for scrupulous individual appraisal for each case. This is the context in which the right claim in the instant case founded upon racial discrimination is to be seen."

104. Section 5 of the *Employment Act* provides;

1. . . .
2. An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.
3. No employer shall discriminate directly or indirectly against an employee or prospective employee or harass an employee or prospective employee –
    a. on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status.

b. in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

4. . . .

5. An employer shall pay his employees equal remuneration for work of equal value.

6. . . .

7. In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged and the discriminatory act or omission is not based on any of the grounds specified in this section.

105. Intriguingly, the Claimant's allegation that she was discriminated on the basis of salary from 2011 is not founded on any material. The allegation that the persons she trained were earning Kshs.150,000/= and above is too generalised and lacks cogent supporting evidence. It is not alleged who was earning this amount from when, that they had similar job descriptions and targets as hers.

106. From the evidence on record, there is no material upon which the court could make a finding that the Claimant was treated differently from other employees as regards salary.

107. As to whether the Claimant is entitled to the reliefs sought, the court proceeds as follows;

i. Having found that termination of the Claimant's employment was unfair, a declaration to that effect is hereby issued.

ii. Re-engagement

108. Since the Claimant has been out of the Respondent's employment for more than 5 years, which is a long period of time and circumstances have changed, the remedy of re-engagement would in inopportune in this instance and the court is not satisfied that it is an appropriate remedy in the circumstances.

The prayer is disallowed.

iii. Reinstatement

109. Similarly, in light of passage of time since the Claimant left the Respondent's employment and guided by the provisions of Section 12 (3) (vii) of the *Employment and Labour Relations Court Act , 2011* read together with Section 49 (3) (b) of the *Employment Act , 2007*, the court is satisfied that the remedy of reinstatement has been overtaken by events and is accordingly unavailable to the Claimant.

110. In the alternative, the Claimant prayed for;

i. Terminal dues as enumerated in Clause No. 2(j) above Kshs.4,498,381.45. Regrettably, the clause referred to by the Claimant's counsel does not exist and as correctly submitted by the Respondent, the figure cited by the Claimant is not reflected in the body of the Memorandum of Claim dated 13th September, 2017 or witness statement.

111. It is trite law that a party is bound by its pleadings as drafted and presented to the court. But more significantly, pleadings are not evidence. They are averments.

112. The claims enumerated in paragraph 2 (m) of the Memorandum of Claim ranging from salary underpayment Kshs.5,568,000/=, notice pay Kshs.150,000/=, leave days Kshs.945,000/=, off days Kshs.55,000/=, pro-rata leave Kshs.153,125/= and service pay Kshs.675,000/= were curiously ignored in the prayers and evidence.

113. The court is guided by the sentiments of Madan JA (as he then was) in CMC Aviation Ltd V Cruisar Ltd (1987) KLR 103,

> " The pleadings contain the averments of the three parties concerned. Until they are proved or disapproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of 'evidenced' in Section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation is proved or disapproved. Averments are matters of the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain unproven pleading in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averment are not on oath. Averments depend upon evidence for proof of their contents."

114. Section 107 (1) of the *Evidence Act* provides that;

Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

115. In addition, Section 108 provides that;

> The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

116. Finally, Section 109 provides;

> The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.

117. Relatedly, other than clause M(i) which involved general damages for the alleged discrimination, the other claims are species of special damages and as explained in innumerable decisions such as Coast Bus Service Ltd V Murunga & others CA No. 192 of 1992 and Mohammed Ali & another V Sagoo Radiators Ltd (2013), special damages must be specifically pleaded and proved.

118. In Hahn V Singh (1985) KLR 716 ,the court stated;

> " . . . special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequence of the act complained of and may both be interfered from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the act themselves."

119. Neither the Claimant's written statement nor her oral testimony in court made reference to the claims in clause 2 (m) of the Memorandum of Claim. However, on cross-examination, the Claimant admitted that she left the Respondent's work place and was thus not entitled to pay in lieu of notice claimed.

120. Similarly, with regard to the alleged underpayments (96) months, unutilized 189 leave days, 11 off days and pro-rata leave, the Claimant admitted that she had not provided the particulars of evidence to establish the claims.

121. On service pay, the Claimant admitted that she was a member of the National Social Security Fund (NSSF) and thus exempted from service pay pursuant to section 35 (6) (d) of the *Employment Act*, 2007.

122. In sum, the Claimant tendered no evidence to establish the claims enumerated under clause 2(m) as clause 2(j) referred to in the prayers addressed another issue. It is unclear to the court what the sum of Kshs.4,498,381.45 referred to.

ii. Compensation

123. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to the relief provided by Section 49(1)(c) of the *Employment Act*.

124. In determining the quantum of compensation, the court has considered the fact that;

i. The Claimant was an employee of the Respondent for a duration of about 11 years which is a long period and wished to continue as evidenced by the prayer for reinstatement or re-engagement.

ii. The Claimant failed to disapprove the fact that she was a habitual absentee as evidenced by an email and three letters all dated in 2013 and a missing person's report to the police.

On cross-examination, the Claimant stated that she may have been absent from work due to sickness. She could not tell the reason why she was absent.

iii. That Claimant admitted in evidence that she left the Respondent's work place without notice and did not explain herself by a response to the respondent. In addition, the Claimant stated that her yahoo account was locked yet she received an email through the account on 17th July, 2013 at 4.52 p.m and did not respond.

iv. The Claimant did not expressly deny that she left the Respondent's employment to work for a competitor.

125. For the above-stated reasons, the court is satisfied that the equivalent of one (1) month salary is fair, Kshs.92,000/=.

126. Noteworthy, the remedy of reinstatement is unavailable owing to passage of time.

127. In conclusion, judgement is entered for the Claimant against the Respondent as follows;

a. Declaration that termination of the Claimant's employment was unfair.

b. Equivalent of one (1) month's salary.

c. Costs of this suit.

d. Interest at court rates from the date hereof till payment in full.

e. Certificate of service.

128. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY 2023

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE

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