



**Mbuthia v Catholic University of Eastern Africa (Cause 15 of 2017)
[2023] KEELRC 198 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 198 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 15 OF 2017
J RIKA, J
JANUARY 31, 2023**

BETWEEN

LYDIA M MBUTHIA CLAIMANT

AND

CATHOLIC UNIVERSITY OF EASTERN AFRICA RESPONDENT

JUDGMENT

1. The Claimant filed her Statement of Claim on January 18, 2017. She avers that she was employed by the Respondent University, on December 1, 2014, as Director of University Advancement. Preceding this, she had served the Respondent as Tutorial Fellow, and rose to the position of Lecturer.
2. The Respondent advertised vacancy in the position of Director of University Advancement, while the Claimant was still holding that position, on December 17, 2014. She enquired about this from the Respondent through her letter dated January 16, 2015. There was no response.
3. On 15th and April 24, 2015, the Respondent appointed the Claimant to various Committees, by virtue of her position as Director of University Advancement.
4. Through a letter dated July 6, 2015, the Respondent appointed the Claimant, Director of University Advancement. Without the Claimant's consent, the Respondent alleged to extend, through a letter dated October 16, 2015, the appointment, effective June 1, 2015, to December 31, 2015.
5. The Claimant asked for clarification, in her letter dated November 10, 2015. The Respondent replied on November 16, 2015.
6. She was advised in a letter dated December 18, 2015, that she had been redeployed back to the Faculty of Commerce as a Lecturer, beginning January 1, 2016, for a renewable period of 3 years. Her salary and benefits would be downgraded from Level 18-1 to Level 15-14.



7. The Claimant avers that this downgrading amounted to constructive dismissal. Her efforts to resolve the matter amicably was not successful. She states that she suffered ridicule and mental anguish, and was unable to secure alternative work.
8. She prays for: -
 - a. Unpaid contract value from June 1, 2015 at Kshs 223,804 monthly, for 36 months, at Kshs 6,154,610.
 - b. Annual leave of 15 days at Kshs 111,902.
 - c. Leave allowance at Kshs 47,202.
 - d. Provident contribution at Kshs 441,320.
Total...Kshs 6,755,034.
 - e. Damages for wrongful termination and mental anguish.
 - f. Costs.
9. The Respondent filed its Statement of Response on July 17, 2017. Its position is that it employed the Claimant as Director of University Advancement on December 1, 2014 for 6 months. Appointment was subject to confirmation at the end of 6 months.
10. Re-advertisement of the position was recommended by the Interviewing Committee, for comparative purposes. The Claimant was informed about this.
11. She was advised on July 6, 2015, that confirmation to the position was subject to the approval of the University Council. The letter dated July 6, 2015, was not a confirmation of appointment.
12. The letter of appointment dated November 24, 2014 allowed Parties to terminate the contract by notice of 2 weeks. The Respondent gave this notice, in the letter dated November 16, 2015. The Respondent explained to the Claimant, that the position of Director of University Advancement was redundant, hence her reversal to Lecturer, Department of Commerce. She was receptive to reversal, and did not raise objection. The Respondent is not aware of mental anguish suffered by the Claimant. She absconded, an act which amounted to gross misconduct over which the Respondent would be entitled to summarily dismiss her. The Respondent prays for dismissal of the Claim with costs.
13. The Claimant gave evidence, and closed her case, on November 10, 2021. Eric Omondi, Respondent's Human Resource Manager, gave evidence on February 8, 2022, closing the hearing. The Claim was last mentioned on October 4, 2022, when Parties confirmed filing and exchange of their Submissions.
14. The Claimant told the Court that she joined the Respondent as a Tutorial Fellow, in February 2006. She was appointed Director, on November 26, 2014. She served probation of 6 months and was confirmed on 1st June 2015. She was told appointment was to be approved by the University Council.
15. She was not given opportunity to serve. She was told that the Council had extended appointment up to December 31, 2015. She wrote to the Vice-Chancellor, rejecting this. She was then told to go back to her Faculty as a Lecturer, which was 3 Levels below the Director. Her monthly gross salary as Lecturer was Kshs 132,000. As a Director, it was Kshs 223,000. It was difficult to tell, if the Director's role was declared redundant. The Respondent advertised the position of Planning and Advancement, in March 2016. The Claimant did not resume duty as a Lecturer. She expected her issue would be resolved. She felt ignored and was denied audience.



16. It was hard to understand what was meant by extension of appointment. She had already been confirmed. She was not taken through a disciplinary process. She produced her documents on record as exhibits 1-27.
17. Cross-examined, she told the Court that her letter of appointment, states appointment was for 3 years. Appointment was revoked in unclear circumstances. The letters on extension and revocation of appointment are clear on the information needed. She did not accept extension. She did not understand it.
18. She went on approved leave. She asked for extension of leave, to give the Respondent time to resolve the issue. She did not know which office to go back to, at the end of her leave. She wrote on December 21, 2015. She stated that she was receptive to redeployment. She was waiting to be told which new position she was to occupy, and expected it to be on commensurate terms. She did not consider the Respondent, to have terminated her contract. The Lecturer contract was terminated. She had a subsisting contract as Director. Director is a senior position. She was ready to take any other senior position. Senior staff were hired by the Council. The Vice-Chancellor signed letters of appointment. Once he signed, it was treated as done. Redirected, she told the Court that she did not have 2 contracts running simultaneously.
19. Eric Omondi told the Court that the Claimant was appointed as a Lecturer. She was later appointed Director, before the position was declared redundant, and the Claimant reverted to Lecturer. She absconded, after receiving 3 months' notice of redeployment as a Lecturer. Reverting to Lecturer's position was not a demotion.
20. Cross-examined, Omondi told the Court that the Claimant's contract as a Director, was executed by the Claimant and the Vice-Chancellor. It was binding on the Respondent. It was in the same category as previous contract, signed by the Vice-Chancellor. The Vice-Chancellor does not sign, if the Council has not ratified. Her position was declared redundant. She was given alternative work, in accordance with best practice. There was a change in salary from Director to Lecturer. She was advised she could resume in her previous grade. Her salary would be lowered. She said she was receptive to redeployment, but on commensurate terms to her position as Director. The position of Director was advertised before she was appointed. She applied, was interviewed and appointed. She absconded. The Respondent did not initiate disciplinary process. She explained her reasons for not resuming. Parties were consulting. There was no explanation on extension of her appointment. This was not an unfair labour practice. The Respondent acted magnanimously in sending the Claimant back to the lecture hall. The Respondent did not even issue her a letter of termination. Redirected, Omondi told the Court that the Director was an acting position. Reversal to lecturing was not a demotion, but a change of role. She was not asked to leave the Institution on redundancy.
21. The issues are whether, the Claimant was constructively dismissed by the Respondent; and whether she merits the remedies pleaded.

The court finds: -

22. The Claimant was appointed by the Respondent as a Tutorial Fellow, on August 1, 2006, after an interview held on April 19, 2006. Her letter of appointment was signed by the Vice-Chancellor, Rev. Professor J.C. Maviiri.
23. She was appointed an Assistant Lecturer for a period of 3 years, beginning August 1, 2007.
24. She was appointed to the administrative position of Deputy Head of Department, Accounting and Finance, for a period of 3 years, with effect from January 1, 2009. She was to receive a responsibility



- allowance of Kshs 15,000 monthly. This would suggest that she remained an Assistant Lecturer, but with added administrative responsibility.
25. The Respondent had appointed her to the same position with effect from September 1, 2008 in an acting capacity. Appointment on January 1, 2009, was confirmatory.
 26. Her contract of 3 years, as an Assistant Lecturer, expired on July 31, 2010. It was renewed for 3 years, starting August 1, 2010.
 27. On October 1, 2010, she was promoted to the position of Lecturer. On November 8, 2010, she was appointed as an Examination Officer for a period of 3 years. She was advised that in addition to her basic salary, house allowance and travel allowance, she would be paid responsibility allowance of Kshs 40,000 monthly, and telephone allowance of Kshs 8,000 monthly. This appointment seems to have been a substantive appointment, which was in addition to her role as a Lecturer.
 28. On June 6, 2014, she was appointed as a Director, in the Respondent's Board of Directors for a period of 3 years. This directorship is different from her directorship of University Advancement.
 29. She continued to ascend. On November 26, 2014, she was appointed as the Director, University Advancement. The letter of appointment indicates that she applied for the job, was interviewed and appointed for a period of 6 months. The appointment was not expressly indicated to be probationary, but the Claimant would be subject to monthly appraisal, and if successful at the end of the 6 months, she would be confirmed, and placed on a 3- year renewable contract, subject to approval by the University Council. The letter is signed by the Claimant and the Vice-Chancellor, Dr. Pius Rutechura.
 30. On December 17, 2014, the Respondent re-advertised the position of Director, University Advancement.
 31. The Claimant wrote a protest letter to the Respondent, dated January 16, 2015. She stated that she was still on contract, in the re-advertised position, and that there was nothing to suggest she would not be confirmed at the end of the 6 months, considering her record. She wrote that, re-advertisement of her position undermined the confidence her colleagues had in her.
 32. The Respondent does not appear to have replied to this letter, but on April 15, 2015, wrote to the Claimant appointing her to the Nairobi City Campus Expansion Committee. She was told that this was a very important Committee, which was to guide the growth and development of Nairobi City Campus.
 33. The following week, on April 24, 2015, she was appointed to the Advancement Support Committee.
 34. On June 1, 2014, the Respondent appointed the Claimant, as Director of University Advancement, for a period of 3 years. The letter is signed by the Claimant and Vice-Chancellor, Dr. Pius Rutechura. The previous appointments did not require approval of the Council. The Vice-Chancellor was an embodiment of the Council and signed all the letters of appointment, on behalf of the Respondent. Any approval would not be about whether the Claimant had been appointed, or not appointed. Her confirmation was a matter of the law, after completion of the probationary period. The Council could perhaps, discuss and approve other terms and conditions of service, but not the fact of the Claimant's confirmation and appointment for a period of 3 years, in the position of Director of University Advancement.
 35. This letter was, in accordance with the letter of appointment of November 26, 2014, which placed the Claimant on probation of 6 months. The Respondent was satisfied that the Claimant has satisfied the terms of her probation.



36. Although appointed for a period of 3 years, the Respondent still required its Council, scheduled to meet in September 2015, to approve appointment.
37. Strangely, even after appointing the Claimant for a period of 3 years, effective June 1, 2015, the Respondent wrote to the Claimant on October 16, 2015, advising that the Council had, in a meeting held on October 1, 2015, decided to extend the Claimant's appointment as the Director of University, for a further period of 6 months. The extension was said to run from June 1, 2015 to December 31, 2015.
38. The Respondent was plainly wrong, in issuing the letter of October 16, 2015. The Claimant was no longer on probation, and there was no probationary contract to extend.
39. Section 42 of the *Employment Act*, allows an Employer to place an Employee on 6 months' probation. Any extension must not exceed another 6 months. Extension can only be valid, with the consent of the Employee.
40. The Claimant did not give her consent, to the purported extension of probation. Probation was illegal, coming after the Claimant had completed her probation successfully, and issued a contract covering a period of 3 years. She had been assigned to 2 Committees of the Respondent, which the Respondent considered very important, during probation.
41. She protested the attempt to revoke her appointment, and to return her to probation, through a letter dated November 10, 2015.
42. The Respondent replied on November 16, 2015, alleging that the letter dated July 6, 2015 was not a confirmation letter, and that the Council had selected to extend temporary appointment. She was told that she should therefore prepare to go back to the lecture hall. Further, she was told that the Respondent was now in the process of restructuring, and the Director's job would be re-advertised, once the process was complete. She was free to reapply.
43. This again was wrong. Restructuring as advised to the Claimant was a colourable exercise. Re-advertisement of her job was made way back on December 17, 2014, barely a month after the Claimant was appointed to the same position, and placed on 6 months' probation. If there was a genuine restructuring, and a new vacancy, the vacancy would probably have been filled by the time the Claimant was through with her probation and confirmed. What re-advertisement was being made, over 1 year, since re-advertisement?
44. The Respondent then alleged to appoint the Claimant as a Lecturer for 3 years, beginning January 1, 2016. She was to earn a salary of Kshs 132,000 monthly, while her salary as Director, University Advancement, was Kshs 223,000 monthly. She was told that her position as Director had been rendered redundant.
45. The Respondent has not filed any documents, establishing that there was a redundancy situation at the Respondent. The Claimant was not taken through the process of redundancy, contemplated by Section 40 of the *Employment Act*. She was just told that her position had been declared redundant. Positions do not become redundant, simply because an Employer has declared them to be redundant. There must be proof of a valid redundancy situation, and process. The Claimant needed to be shown proof of a redundancy situation, and be accorded the benefit of the process under Section 40 of the *Employment Act*.
46. She expressed her willingness to continue serving, through a letter dated December 21, 2015, but on terms commensurate with, those of Director, University Advancement.



47. Her proposal was rejected. She was advised that the Lecturer's position was not equivalent to that of the Director, and could not attract the same salary.
48. The Claimant went on extended leave, during which Parties agree, there were consultations, which did not yield resolution to the dispute. She did not go back to work, and in March 2016, the Respondent advertised for a position renamed Head of Planning and Advancement.
49. The Court agrees with the Claimant that the letter dated December 18, 2015, redeploying the Claimant to the position of a Lecturer, amounted to constructive dismissal and unfair labour practice. Although unfair labour practice in Kenya has not been defined through an Act of Parliament, comparative jurisdictions agree, it means any unfair act or omission, that arises between an Employer and an Employee. Inexplicable demotion, attempted extension of probationary period after confirmation, and a colourable redundancy exercise targeted at an Employee, all fit within the conduct of an Employer, that is deemed to amount to unfair labour practice.
50. The Respondent appointed the Claimant as Director, University Advancement, on December 1, 2014. She fulfilled the terms and conditions of the contract. The Respondent demonstrated it did not consider itself bound by the contract, first by advertising for the position while the Claimant was still serving probation in the same position. She was led to believe that upon completion of probation, she would be confirmed. She was appointed to Committees, central to the mandate of the Respondent. She was indeed confirmed in writing, on July 6, 2015, and placed on a 3-year renewable contract.
51. The Vice-Chancellor and the Claimant signed the contract appointing the Claimant on July 6, 2015. The contract was formally and substantively valid, under Sections 9 and 10 of the [Employment Act](#). There was nothing under the [Employment Act](#), that was left to be done, to validate the contract.
52. The Respondent further demonstrated its unwillingness to abide by the terms of the contract, by its attempt to revert the Claimant to probation, through the letter dated October 16, 2015. When this did not work, she was told that there was a restructuring process, where her position had now become redundant. The Respondent demonstrated its unwillingness not to be bound by the contract of employment executed with the Claimant, on more than one occasion. It by doing so, constructively dismissed the Claimant. She resigned, believing herself to have been dismissed.
53. She went on leave hoping the impasse would be resolved, but it was not. She did not return and effectively resigned, believing that the Respondent was no longer willing to honour the contract of July 6, 2015. The facts fit well, within the principles of constructive dismissal, laid down by the Court of Appeal, in [Coca Cola East & Central Africa Limited v. Maria Kagai Ligaga](#) [2015] e-KLR.
54. The Claimant prays for compensation based on contract period of 3 years. Her salary was Kshs 223,804 by the time she left.
55. She had served at least 1 year as Director, University Advancement by the time she left employment. Appointment was effective December 1, 2014, and included the period of probation. She had a balance of 24 months in her 3-year contract. Her record was clean. She had risen through the ranks, served in many positions and committees and was even appointed Director, in the Respondent's Board of Directors. Her disciplinary and performance records were beyond reproach. Cumulatively, she served for a period of about 10 years, from 2006 to 2016. As held by this Court in Cause Number 630 of 2019, [Timothy Oluoch Deya v. Safaricom](#), damages for constructive dismissal are different from statutory compensation for unfair termination, and are not capped at equivalent of the Employee's 12 months' salary. The Claimant prays for damages for constructive dismissal and unfair labour practice. The Court agrees that she suffered constructive dismissal and unfair labour practice. The Court grants her



damages for constructive dismissal and unfair labour practice, equivalent of 15 months' salary, at Kshs 3,357,060.

56. She did not lead evidence to establish the prayers for leave, leave allowance and provident contribution. She took annual leave, applied for extension which was granted, and did not resume duty after the extension. These prayers are declined.
57. Costs to the Claimant.

IN SUM, IT IS ORDERED: -

- a. It is declared that the Claimant was constructively dismissed, and subjected to unfair labour practice.
- b. The Respondent shall pay to the Claimant damages for constructive dismissal and unfair labour practice, at Kshs 3,357,060.
- c. Costs to the Claimant.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 31ST DAY OF JANUARY 2023.

James Rika

Judge

