



Hassan v Ndhiwa Community Empowerment & Development Program (Cause E082 of 2021) [2023] KEELRC 448 (KLR) (22 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 448 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E082 OF 2021
S RADIDO, J
FEBRUARY 22, 2023**

BETWEEN

ZAHRA HASSAN CLAIMANT

AND

NDHIWA COMMUNITY EMPOWERMENT & DEVELOPMENT PROGRAM RESPONDENT

JUDGMENT

1. Zahra Hassan (the claimant) sued Ndhiwa community empowerment and development program (the respondent) alleging constructive dismissal and breach of contract.
2. The respondent filed a response on February 23, 2022. The claimant filed a reply to the response on May 9, 2022, and an amended memorandum of claim on September 19, 2022. An amended response was filed on September 20, 2022.
3. The cause was heard on November 22, 2022 and January 23, 2023. The claimant, and witnesses on her behalf and the chair of the respondent's board testified.
4. The claimant filed her submissions on February 7, 2023 (should have been filed and served by February 23, 2023 and the respondent on February 6, 2023).
5. The court has considered the pleadings, evidence and submissions.

Background

6. The claimant was engaged as the respondent's managing director with effect from January 4, 2021 and the contract was to end on December 31, 2021.
7. On May 4, 2021, the respondent's chief executive officer/treasurer to the board sent out an email to staff including the claimant informing them of the cutting of funding by the UKAid (DFID) and



warning of possible difficult decisions being made. A similar email was sent to Senior staff and the Board members.

8. The email was followed up with a statement from the chair of the board to the claimant dated August 23, 2021, advising that some employment contracts would be ended towards the end of the year, and some would have the terms reviewed. The statement indicated that new employment contracts would be issued.
9. The claimant was expressly informed that her salary had been adjusted to Kshs 100,000/- (agreed salary had been set at Kshs 130,000/-) effective 1 September, 2021.
10. The claimant sought legal advice and her advocate sent out a demand letter to the respondent on August 29, 2021, stating that the intended salary adjustment was unlawful.
11. The respondent replied to the letter on September 11, 2021, indicating that it would go ahead with the salary adjustments. The respondent wrote to the claimant on the same day on similar lines.
12. The claimant responded on September 13, 2021 raising concerns about staff tax obligations owed to the Kenya Revenue Authority.
13. On September 30, 2021, the respondent paid the claimant Kshs 40,000/- as part of salary for September 2021.
14. On October 4, 2021, the claimant applied for and was granted emergency leave to end on October 8, 2021. On October 10, 2021 the respondent sent an email to the claimant instructing her to resume work on October 12, 2021, in order to attend a meeting with the board
15. However, the claimant did not report on October 12, 2021 despite confirming attendance.
16. When the claimant reported on October 13, 2021, the respondent's board chair issued her with a one-month notice of termination of employment.
17. The letter directed the claimant to handover. She was advised through an email of even date to report on October 14, 2021 to hand over or risk immediate dismissal (the notice was not preceded with a hearing as envisaged by section 41(1) of the *Employment Act, 2007*).
18. Despite the notice of termination, the respondent notified the claimant of her summary dismissal through a letter dated October 19, 2021.
19. The reason given for the decision was that the claimant had failed to report back to work on October 12, 2021 after the emergency leave. The dismissal letter also adverted to the claimant's failure to hand over on October 13, 2021.
20. The claimant handed over on October 22, 2021.

Constructive dismissal

21. Constructive dismissal occurs where the employer makes the work environment hostile forcing the employee to resign. The conduct of the employer may also comprise a fundamental breach of the contract.
22. In alleging constructive dismissal, the claimant contended that her tribulations started when she raised the question of the respondent's failure to pay taxes and statutory deductions.
23. The claimant also asserted that the respondent unilaterally altered her terms of service by varying the remuneration from Kshs 130,000/- to Kshs 60,000/-.



24. Section 10(5) of the *Employment Act*, 2007 requires the employer to consult with the employee before altering certain terms of the contract. The section, however, does not address the consequence of failure to agree to the alteration of the terms of contract.
25. Where the employer alters the terms of the contract without agreement, it would be open to the employee to remain in the employment and sue for breach of contract, or resign and assert constructive dismissal.
26. The claimant here did not resign and therefore, the court finds that this was not a case of constructive dismissal.

Unfair termination of employment

27. The respondent gave the claimant one-month notice of termination of employment on October 13, 2021 and requested her to hand-over.
28. The claimant did not abide with the condition and on October 19, 2021, the respondent notified her of summary dismissal.
29. The reasons given for the decision were, absence from work without lawful cause, failing to obey lawful commands and wilful neglect to perform work.
30. The reasons leading to the summary dismissal of the claimant fall within the category of misconduct.
31. By dint of section 41(2) of the *Employment Act*, 2007, the respondent was required to hold an oral hearing and listen to any representations made by the claimant. The claimant was also entitled to be accompanied by a colleague of her choice.
32. The respondent did not hold an oral hearing as contemplated by the law, and the court finds that its decision failed the procedural fairness test.

Compensation and salary in lieu of notice

33. The claimant was on a one year fixed-term contract lapsing on December 31, 2021.
34. The contract was terminated with about 3 months remaining. The respondent had also informed the claimant and other employees of reduced donor-funding.
35. In consideration of these factors, the court is of the view that the equivalent of 1-month salary as compensation as well 1-month salary in lieu of notice would be appropriate.

Breach of contract

September/October 2021 salary arrears

36. The claimant was entitled as of right to salary arrears for September 2021 and earned wages for October 2021, and the court will allow these heads of the claim in the sum of Kshs 127,667/-.

Unpaid leave

37. The claimant did not lay an evidential foundation to this head of the claim and relief is declined.



Statutory deductions

38. The claimant prayed to be awarded statutory deductions due to the National Hospital Insurance Fund, National Social Security Fund and Kenya Revenue Authority.
39. The statutes establishing the funds/authority have provisions for addressing the unremitted deductions and the claimant should follow up with the bodies.

Certificate of Service

40. A certificate of service is a statutory entitlement and the respondent should issue one to the claimant if it did not issue it.

Conclusion and Orders

41. The court finds and declares that the summary dismissal of the claimant was unfair, and further that the respondent was in breach of contract.
42. The claimant is awarded:
- (i) Compensation Kshs 130,000/-
 - (ii) Pay *in lieu* of notice Kshs 130,000/-
 - (iii) Salary arrears Kshs 127,677/-
- Total Kshs 357,677/-
43. The award to attract interest at court rates if payment is not made within 30 days.
44. Respondent to issue a certificate of service within 21 days.
45. Claimant to have costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 22ND DAY OF FEBRUARY 2023.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For claimant Elizabeth Oloo & Co. Advocates

For respondent O.J. Okoth & Co. Advocates

Court Assistant Chrispo Aura

