



**Odundo v Boda Boda Studios Limited (Cause E503 of 2022)
[2023] KEELRC 995 (KLR) (18 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 995 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E503 OF 2022
NZIOKI WA MAKAU, J
APRIL 18, 2023**

BETWEEN

EVANS ODUNDO CLAIMANT

AND

BODA BODA STUDIOS LIMITED RESPONDENT

JUDGMENT

1. The Claimant averred in his suit against the Respondent that he was employed as a campaign manager on February 22, 2022 until May 23, 2022. He avers that his salary was Kshs 100,000/- a month and that from the date of appointment the Respondent had withheld his salaries thereby constructively dismissing the Claimant as of May 23, 2022 when the Claimant made a demand for payment. The Claimant avers that the Respondent thus cut short his legitimate expectation to work for the Respondent for the term of 1 year on the terms of the letter of appointment dated February 22, 2022. The Claimant avers that by occasioning the breach of contract the Respondent is liable. In addition, he avers that the Respondent failed to remit the requisite statutory deductions being NSSF and NHIF in the Claimant's favour during the time the Claimant worked for the Respondent.
2. The Claimant avers that continuing to work for the Respondent without pay caused him great loss and pain as during the period he worked for the Respondent he was unable to pay rent and school fees for his children who were constantly sent home for school fees. He avers that the Respondent stripped him of his dignity as a breadwinner and sole provider for his family. The Claimant avers that during the tenure of his employ with the Respondent he carried out his duties with outmost precision, diligence and discipline. He averred that he was never reprimanded for any misconduct. He thus claims from the Respondent:-
 - a. Payment of the remainder of the 1-year contract's term – Kshs 1,000,000/-
 - b. 7 days for February 2022 – Kshs 23,333.33



- c. Full salaries for March 2022 and April 2022 – Kshs 200,000/-
 - d. 23 days' salary for May 2022 – Kshs 76,666.66
 - e. 1 month's pay in lieu of notice – Kshs 100,000/-
 - f. Certificate of service.
3. The Claimant also claimed costs and in support of the claim filed a witness statement, whatsapp messages shared between him and one Fred Arungah BBR and a number +2547xxx. The Claimant also annexed a note issued demanding fees (arrears of Kshs 12,900/-).
 4. The Respondent did not enter appearance nor file defence despite service. The matter thus proceeded as an undefended cause.
 5. The Claimant testified that he sued the Respondent who had denied him salary despite working for the Respondent as per the letter of appointment. He stated that after experiencing challenges due to non-payment of salary he stopped working for the Respondent. He stated he would have wished to complete the contract. He said he was not paid till his exit. He thus sought the relief as set out in his claim.
 6. He filed submissions through his advocates on record and in the submissions he submitted that the Respondent constructively dismissed him by refusing to pay his salaries. He submitted that under section 17(1) of the *Employment Act*, an employer is commanded to pay salaries in respect of work done and that section 17(10) prescribes a fine and imprisonment term to an employer who fails to pay wages when they fall due. He submits that constructive dismissal as defined by *Black's Law Dictionary* (Tenth Edition) fits the current case. He cited the case of *Nathan Ogada Atiagaga v David Engineering Limited* [2015] eKLR as well as the case of *Coca Cola East Africa & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR where the Court of Appeal held that the employer's conduct must be effective cause of leaving or termination. The Claimant submitted that by failing to pay his salaries since employment, the Respondent not only constructively dismissed the Claimant but also breached the Claimant's legitimate expectation regarding him finishing his 1-year contract with the Respondent as the campaign manager. The Claimant submitted that he had met the ingredients of legitimate expectation as held in the case of *Teresa Carlo Omondi v Transparency International Kenya* [2017] eKLR. The Claimant submitted that he was thus entitled to the reliefs sought including loss of future earnings. For this he cited the case of *John Nduba v Africa Medical and Research Foundation (AMREF Health Africa)* [2020] eKLR and submitted that on account of the Respondent not having defended the case there is no reason not to allow the Claimant's claim as they are unopposed.
 7. The Claimant's claim is for constructive dismissal. It was averred that there was no payment of salaries thus constructive dismissal. Constructive dismissal is said to occur when an employee is forced to resign from their job due to unbearable working conditions created by their employer. In constructive dismissal, the employer may not directly terminate the employee, but they create an intolerable work environment that makes it impossible for the employee to continue working. Generally, if I may add, constructive dismissal occurs when an employee has no choice but to resign from their job because the working conditions have become unbearable. In such cases, the resignation is considered to be a termination of employment by the employer. The Court concurs with the findings by the Court of Appeal in the *Coca Cola v Maria Ligaga (supra)* case, the holdings in *Nathan Ogada Atiagaga v David Engineering Limited (supra)* and *Teresa Carlo Omondi v Transparency International Kenya (supra)*. Whereas there may be a case for legitimate expectations, the Claimant had not worked for the Respondent long enough to fully fit within the paradigm in *Teresa Carlo Omondi v Transparency*



International Kenya. His contract was for a term, it was partly served and therefore had not gained the notoriety of consistency and expectations of it running its entire course with no impediment.

8. It is the finding of the Court that the Claimant was not paid salary and as a result could not continue serving the Respondent as an employee. He was forced to seek loans to meet his financial obligations and even suffered the indignity of having his child chased away from school for lack of school fees. This is untenable. There was, in my finding, a constructive dismissal of the Claimant. His case meets the classic scenario for constructive dismissal.
9. Having found in his favour, the Court has to consider what relief the Claimant is entitled to. The claims by the Claimant were inelegantly tabulated. In the demand letter the claim was for Kshs 399,999.99 which comprised of unpaid salaries for days worked as well as the 3 months pay. In the claim, they seek payment for the balance of the contract in addition to the sums for days worked in February, March, April and May making a total of Kshs 1,399,999.99 plus costs. The Court having found in favour of the Claimant only awards him the following reliefs:-
 - a. Kshs 23,333.33 for 7 days worked in February 2022,
 - b. Kshs 100,000/- for March 2022,
 - c. Kshs 100,000/- for April 2022,
 - d. Kshs 76,666.66 for 23 days worked in May 2022,
 - e. Kshs 100,000/- being one month's notice,
 - f. Kshs 200,000/- being compensation for unlawful dismissal in terms of section 49 of the [Employment Act](#),
 - g. Certificate of service in terms of section 51 of the [Employment Act](#),
 - h. Costs of the suit
 - i. Interest at Court rates from date of judgment till payment in full on the sums in (a), (b), (c), (d), (e) and (f) above.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF APRIL 2023

Nzioki wa Makau

JUDGE

