



Jackson v Jacaranda Hotel Limited t/a Jacaranda Hotel (Cause E065 of 2022) [2023] KEELRC 1331 (KLR) (25 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1331 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E065 OF 2022**

M MBARŪ, J

MAY 25, 2023

BETWEEN

SOLOMON YAWA JACKSON CLAIMANT

AND

JACARANDA HOTEL LIMITED T/A JACARANDA HOTEL RESPONDENT

JUDGMENT

1. On October 15, 2016 the claimant was employed by the respondent as a security officer and was allocated duties at the Jacaranda Indian Ocean Resort, Diani Beach. The claimant was unionised and entitled to gratuity/service pay during employment which run until September 1, 2019 when he was promoted and transferred to Nairobi.
2. The claim is that on March 30, 2021 the respondent directed the claimant to proceed on unpaid leave for 5 months. The claimant issued a one-month notice and resigned from employment due to inability to provide for his family since there was no salary payment since March, 2021. Upon resignation, terminal dues were not paid and there was constructive dismissal due to non-payment of salary for 24 months. The respondent did not pay NSSF dues for 6 months and without any other pension scheme being provided, service gratuity is payable.
3. The claimant is seeking the following dues;
 - a. Unpaid salaries for 24 months Kshs 458,433;
 - b. Service pay for 5 years Kshs 250,000;
 - c. Unremitted NSSF for 6 months Kshs 2,400.
4. The claim is also that there was constructive dismissal which was unlawful and unfair and compensation should be paid at 12 months. For the period the claimant was unionised, service pay should be paid for 2 years from October 15, 2016 to October 15, 2018 at Kshs 53,333,33.



5. The claimant testified in support of his case that his last salary was Kshs 80,000 per month. He worked well for the respondent but in March, 2020 he was sent home on unpaid leave and after writing for 24 months and being unable to take care of his family, he resigned from his employment with effect from April 1, 2022 and this amounted to constructive dismissal since there were no reasons given for the non-payment of due salaries and the claims made should be award.
6. In reply, the respondent's case is that the claimant was sent on leave following a decision of the respondent due to Covid-19 pandemic that paralysed the hotel industry. The containment measures that were issued by the government required that hotels were not listed as essential service provision and only restaurants could provide take away services. The decision to issue unpaid leave was necessitated by loss of business both locally and internationally and hence loss of profits from March 30, 2021 despite Covid-19 having taken effect from the year 2020.
7. While the claimant was a union member before appointment into management, the union KUDHEIHA had issued various communications to the respondent with regard to Covid-19 containment measures and which applied across the board to avoid discriminating any employee. The pandemic presented a unique platform that had not been anticipated under the *Employment Act* and this left employers and employees to find mechanisms of survival as well as amicable resolution of matters in an industry that had been shut down for a long period.
8. The Hotel Owners Association and its registered CBA with KUDHEIHA issued a joint communique on March 23, 2021 and noted all staff with leave days to take them and afterwards to take unpaid leave. Every employee was free to resign from employment through mutual agreement and in another communique by Hotel Owners Association on August 4, 2021 the same position prevailed since the hotel industry had not recovered.
9. The claimant wilfully chose to resign from his employment and gave notice and a case of constructive dismissal does not arise. The claimant was on unpaid leave due to the prevailing economic circumstances and the claim for Kshs 960, 000 is unfounded and should be dismissed with costs.
10. In evidence, the respondent called Anne Wamuyu the assistant human resource manager who testified that the claimant had a written contract from September 19, 2016 to September 1, 2019 when he was transferred to Jacaranda Nairobi and he remained unionized. On January 1, 2020 the claimant was promoted to management level and following Covid-19 and containment measures that affected the hotel industry the claimant and other employee were sent on leave and for 9 months were paid full salaries. The respondent and the union met in a bid to address the prevailing situation and agreed that there would be unpaid leave and employee allowed to resign as the law and CBA had not contemplated such matters of the global pandemic. the claimant resigned out of his own accord and issued notice and the claims made should be dismissed with costs.
11. The claimant resigned from his employment with the respondent through an undated notice which was accepted by the respondent on April 14, 2022 on the grounds of non-payment of his salaries for 24 months. In response, the respondent accepted the resignation and that the claimant would be paid his terminal dues including;
 1. Salary and house allowance up to March 21, 2022;
 2. Leave travelling allowance for one year and pro-rated leave at Kshs 12,082;
 3. Less 199 days' pay on account of leave taken in advance.
12. The response to the claim is that due to Covid-19 pandemic, the respondent had a meeting with the union and in addressing containment measures, various communiqués were issued and which required



affected employees to take leave and thereafter to take unpaid leave. It is acknowledged that from January 1, 2020 the claimant joined management and was not covered under the unionised employees. The communique with the union in this regard required direct communication to the claimant since his interests were not addressed by the union.

13. Even where the respondent was faced by unique and a strange phenomenon not contemplated under the *Employment Act*, 2007 (the Act), the available option in dealing with employees where an operational matter arose exists under the provisions of section 40 of the Act. In any case, to review an employment contract of an employee who was not unionised, recourse was section 12 and 13 of the Act. The subject employee and the claimant in this case should have been informed of any change(s) to his employment contract. To send the claimant on leave, unpaid leave and then allow him to resign from his employment due to non-payment of his salaries while employment subsisted, without a proper application of section 40 of the Act in this regard, the claimant was forced to resign due to non-payment of his salary as part of his employment contract terms. For this reason, under section 44(3) of the Act, the respondent was in breach of a fundamental provision of the law. non-payment of salary.
14. Termination of employment was at the instance of the employer who placed the claimant as the employee under intolerable working conditions. There is no written agreement between the parties allowing the non-payment of due salary. Such was imperative taking into account the circumstances the respondent found themselves under and resulting in the need to send the claimant on unpaid leave.
15. The Court of Appeal in the case of *Coca-Cola East Central Africa Limited v Maria Kagai Ligaga* (2015) eKLR held that an employee is entitled to leave his employment when the employer's behaviour towards him is so unreasonable that the employee cannot be expected to stay. The employer's conduct must be so grave that it constitutes a repudiation of the contract of employment. The breach must go to the very root of the contract. This position is reiterated in the case of *Emmanuel Mutisya Solomon v Agility Logistics* cause No 1448 of 2011.
16. Without any written agreement with the claimant to forgo the payment of his wages, the communique issued between the respondent and the union is not binding on him. Failure to pay due wage on the face of operational challenges faced by the respondent did not justify the action taken of sending the claimant on unpaid leave for a period of 24 months on the face of available legal safeguards under section 40 of the Act.
17. Employment terminated through constructive dismissal, such is unfair and the claimant is entitled to compensation and payment for the period he remained in the service of the respondent.
18. For unfair termination of employment, a one month pay at Kshs 80,000 is hereby found appropriate taking into account the claimant was allowed to resign.
19. The claimant is hereby awarded pay due from February, 2020 to March, 2021 all at Kshs 458,433.
20. On the claim for gratuity/service pay, the claimant held a unionised cadre position until January 1, 2020. He testified that his NSSF dues were being remitted save for 6 months. Where gratuity/service pay was due while unionised, upon promotion on January 1, 2020 and until he filed suit on August 22, 2022 such continuing injury should have been addressed within the meaning of section 90 of the Act read together with section 35(5) and (6) thereof. Where an employer has provided pension payments to NSSF, service pay is not due. Where there is a continuing injury within employment, such must be addressed within 12 months from the date the cause of action arose.
21. On the claim for the unremitted NSSF dues for 6 months, such are not transferable to the employee as these relates to remittances to the statutory body. Where the respondent has not made remittances, the sanction is not a refund to the employee.



22. As the claim has succeeded to a large extent, the claimant is entitled to 50% of his costs.
23. Accordingly, judgment is entered for the claimant against the respondent in the following terms;
 - a. A declaration that there was constructive dismissal of the claimant by the respondent resulting in unfair termination of employment;
 - b. Compensation awarded at Kshs 80,000;
 - c. Unpaid salaries Kshs 458,433;
 - d. 50% costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 25TH DAY OF MAY, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine/ Rahma

..... and

