



**Mubea v Mombasa County Government & 4 others (Cause
3 of 2018) [2023] KEELRC 1185 (KLR) (18 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1185 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 3 OF 2018**

**AK NZEI, J
MAY 18, 2023**

BETWEEN

FRANCIS WANJOHI MUBEA CLAIMANT

AND

MOMBASA COUNTY GOVERNMENT 1ST RESPONDENT

MOMBASA COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

**COUNTY SECRETARY MOMBASA COUNTY GOVERNMENT 3RD
RESPONDENT**

**DR. KHADIJA SOOD SHIKELY, CHIEF OFFICER OF HEALTH MOMBASA
COUNTY 4TH RESPONDENT**

**DR. MEERA SHAH -SUB COUNTY MEDICAL OFFICER OF
HEALTH 5TH RESPONDENT**

JUDGMENT

1. The Claimant sued the Respondents vide an amended memorandum of claim dated 26/2/2018 and pleaded that he was continuously and uninterruptedly employed in the civil service from 24/9/1979 until the time when the Ministry of Health was devolved, and that upon devolution of the Ministry, he was on 31/12/2013 deployed as a Health Administration Officer in Mombasa County.
2. The Claimant further pleaded that he was, with effect from 1/12/2015, promoted to the grade of Chief Clerical Officer (Job Group “J”) at the department of Health Services, and was transferred to the Medical Officer of Health Nyali/Kisauni Sub County Office on 27/6/2016, with no complaint or warning letter.
3. It was the Claimant’s further pleading:-



- a. that in or about March 2017, the 5th Respondent went to the Claimant's office and demanded that payment be done in cash for expenses incurred in repairing motor vehicle Registration No. GK A 277Q in the months of September and October 2016, and furnished the Claimant with receipts for a sum of ksh. 41,100.
- b. that the Claimant differed with the 5th Respondent on payment of the said expenses as the motor vehicle in issue had not been inspected by the Chief Mechanical and Transport Officer and a report prepared confirming the repairs.
- c. that on 22/5/2017, the 5th Respondent furnished the Claimant with the inspection report and asked him to process the payment and to hand over the cash to her.
- d. that the Claimant refused to process the payment as requested by the 5th Respondent as the receipts furnished to him were not dated and were not supported by ETR receipts, and that the garage where the vehicle had been repaired was not in the list of approved garages.
- e. that as a result of the Claimant being steadfast in not processing payment as asked to do by the 5th Respondent, there developed bad blood, animosity and/or ill will in the working relationship between the 5th Respondent and the Claimant.
- f. that since the Claimant had not gone on his annual leave since being transferred to the Medical Officer of Health Nyali/Kisauni Sub-County, he decided to make an application for the same, and that he on 10/7/2017 applied for leave as from 31/7/2017 to 31/8/2017 by filling the necessary forms and handing them over personally to the 5th Respondent on the same date.
- g. that 10/7/2017, the Claimant raised an imprest warrant and went ahead to write a cheque for the same in favour of the 5th Respondent for office use and submitted the same together with the leave application form delegating his duties to the 5th Respondent, and continued working until 28/7/2017, which was the last day before proceeding on his annual leave, and that no query, reservation and/or objection was raised by the 5th Respondent.
- h. that on 1/8/2017, the Claimant, while on leave, received a text message in his phone from the 5th Respondent enquiring on the Claimant's whereabouts, to which the Claimant responded that he had proceeded on his annual leave. That the Claimant tried to follow up on the issue by calling the 5th Respondent, but the calls went unanswered.
- i. that the Claimant reported back to work on 1/9/2017 and proceeded to the 5th Respondent's office to pick the cheque book and other items that he had handed over to her, and that the 5th Respondent did not raise any query regarding the Claimant's annual leave.
- j. that the Claimant never received his August 2017 salary and when he enquired from the Director of Human Resource, it was confirmed to the Claimant that his salary had been suspended and that the Claimant would get clarification from the 4th and 5th Respondents on the reasons for suspension of his salary. That the Claimant followed up the issue with the 2nd, 3rd, 4th and 5th Respondents and that his letters dated 21/9/2017 and 29/9/2017 on the issue were not responded to, and no reasons were given for the suspension of his salary.
- k. that on 9/10/2017, it dawned on the Claimant that the 5th Respondent was witch-hunting on him with a view to settling an old score of refusing to process payment on receipts of repair of Motor Vehicle Registration Number GK A 227Q when he was handed the letters dated 14/8/2017 and 9/10/2017, which letters eroded the trust and confidence the Claimant had in the 5th Respondent.



- l. that due to suspension of his salary, the Claimant underwent hardship, and could not even raise fare to go to work, and faced family and social problems and difficulties in discharging his obligations under the contract of employment.
 - m. that on 9/10/2017, the Claimant responded to the letter issued by the 5th Respondent and made a prompt decision to resign from the job as the 1st, 2nd, 3rd, 4th and 5th Respondents had repudiated the contract of employment by suspending his salary without any lawful justification, warning, formal charges and/or disciplinary proceedings, and the working environment was hostile due to witch hunt by the 5th Respondent.
 - n. that on 9/10/2017, the Claimant tendered his resignation to the 5th Respondent.
4. The Claimant further pleaded that the 5th Respondent worked in cahoots with the 4th Respondent to fish for more evidence to implicate the Claimant and to conceal their act of suspending the Claimant's salary without lawful justification, and that they issued the Claimant with two letters dated 11/10/2017 with allegations of un-surrendered imprest and unbanked revenue, to which the Claimant responded through his Advocates on record vide a letter dated 31/10/2017, demanding to be furnished with a supervision report, a copy of the imprest warrant and automated monthly collection report for the alleged unbanked revenue, which the Respondents never furnished, and that no precipitate action has ever been taken against the Claimant by the Respondents regarding the said letters.
 5. It was the Claimant's further pleading that upon resigning on 9/10/2017, he handed over to the 5th Respondent the cheque book and imprest, and that the same is evidenced by handing over report of his office by the Claimant to Dr. Meera Shah.
 6. The Claimant further pleaded that his resignation was involuntary and amounted to unfair constructive dismissal as his salary was suspended by the 1st, 2nd, 3rd, 4th and 5th Respondents and the work environment was hostile due to witch hunt by the 4th and 5th Respondents, and that the Claimant was entitled to treat himself as unfairly and constructively dismissed from employment and to leave his employment immediately.
 7. The Claimant pleaded that the Respondents refused and/or neglected to pay him his benefits and dues despite several demands. The Claimant set out his claim against the Respondents as follows:-
 - a. one month salary in lieu of notice.....ksh. 39,880
 - b. unpaid salary for the months of August, September and nine months worked in October 2017ksh. 76,272
 - c. underpayment for the last one year and eleven months in employment
 - i. 1st December 2015 -1st December 2016 (1-month underpayment salary ksh. 2,718 +house allowance ksh. 3,000 +commuter allowance ksh. 1000 = 6,718X12 months)ksh. 80,618
 - ii. 1st January 2017-1st September 2017 (1 month underpayment ksh. 6,718x9 monthsksh. 60,462
 - iii. 9 days worked in the month of October 2017 (9 days Xksh. 1,054)ksh. 9,948.60

Total ksh. 151,028.60
 - d. compensation for unfair constructive termination of employment contract (ksh. 39,880X12



months).....ksh. 478,560

- e. a declaration that the 2nd, 3rd, 4th, and 5th Respondents decision to remove the clamant from the payroll in August 2017 was illegal and contrary to Section 41 and 17(10) of the [Employment Act](#).
 - f. An order to prohibit or restrain the 1st, 2nd, 3rd, 4th and 5th Respondent's from withholding the Claimant's gratuity and terminal benefits.
 - g. an order that the Claimant be issued with last pay certificate.
8. Documents filed by the Claimant included his written witness statement dated 8th January 2018 and an evenly dated list of documents listing some 16 documents (Appendix 1-Appendix 16), both filed on 8th January 2018 along with the initial memorandum of claim dated 8th January 2018. The listed documents include the deployment letter dated 31/12/2013, promotion letter dated 31/10/2015, release letter to Nyalı Sub-County Office, receipts from Lee Autoparts dated September and November 2016, Inspection report dated 17/5/2017 from the Ministry of Transport and Infrastructure, a list of approved garages for the financial year 2016-2017 from the Ministry of Transport, application form for annual leave acknowledged on 10/7/2017 by Sub-County Medical Officer, Imprest warrant No. 2453055 received and signed by Dr. Meera Shah on 10/7/2017, correspondence dated 21/9/2017 and 29/9/2017 between the Claimant and the Respondents, letters dated 14/8/2017 and 9/10/2017 respectively from the office of the Sub-County Medical Officer, the Claimant's letter to the Office of the Sub-County Medical Officer dated 9/10/2017 and a resignation letter also dated 9/10/2017, a letter from the 4th Respondent addressed to the Claimant, a letter by the Claimant's Advocates dated 31/10/2017, a handing over report of the Claimant's office to the Sub-County Administrator Dr. Meera Shah, a demand letter dated 10/10/217 and a copy of the Claimant's identity card.
9. The Respondents filed a Memorandum of Response and a counter claim on 2/10/2018. The Respondents denied the Claimant's claim, and stated that the Claimant resigned from employment on his own volition on 9/10/2017. The Respondents further pleaded:-
- a. that the receipts furnished to the Claimant were valid and authentic and that for cash sale such as those, there was no requirement for repairs to be done by a pre-qualified supplier and ETR receipts were not a requirement.
 - b. that any allegation of bad blood between he Claimant and the 5th Respondent was a smoke screen to divert attention from the fact that he Claimant absconded duty and resigned of his own volition.
 - c. that the Claimant proceeded on leave without approval from his superior and effectively absconded duty contrary to the Public Service Commission Human Resource Manual 2017, and that suspension of the Claimant's salary was in line with the manual.
 - d. that the Claimant was duly and formally issued with reasons for suspension of this salary when he reported back to work vide a letter dated 14/8/2017, and that he continued with his blatant insubordination by failing to report to work and/or reporting late on various dates in October 2017, and that the 5th Respondent issued him with a show cause letter dated 9/10/2017, to show cause why disciplinary action could not be taken against him.
 - e. that a supervision of the Port-Reitz Hospital during the 2015/2016 financial year when the Claimant was the Health Administrator was done and upon analysis of the system, it was



discovered that a total of ksh. 365,000 and Ksh. 541,960 as un-surrendered imprest and unbanked revenue respectively was unaccounted for, sums which had been released to the Claimant.

- f. that the Respondents counter-claimed ksh. 38, 880 against the Claimant being one month gross salary in lieu of notice of resignation from employment. The Respondents also prayed for costs of the counter-claim. The Respondents' counter-claim is not shown to be verified by any affidavit in accordance with the applicable rules of procedure.
10. Other documents filed by the Respondents included a written witness statement of one Kassam Yusuf dated 2/10/2018 and an evenly dated list of documents listing three documents. The listed documents included the Human Resource Policies and Procedure Manual for the Public Service 2017, the *Public Service Commission Act* 2017, and 4th, & 5th Minutes of Human Resource Committee held on 3/10/2017 at SC MOH's Office Utange.
 11. When trial opened on 25/10/2021, the Claimant adopted his filed witness statement as his testimony and produced the documents mentioned at paragraph 8 of this judgment in evidence. The Claimant further testified:-
 - a. that he was posted to Nyali/Kisauni Sub-County as Health Administrator in June 2016 and that his duties included procurement, sound budgetary management, financial management, finance, revenue collection, overseeing staff and patients and security, and was incharge of 13 health facilities scattered across the sub-county. That as the head administrator, he was auditable and accountable for every penny. That for every repair done on a government vehicle, an inspection must be done by the Regional Mechanical Engineer to ascertain the damages or spares required, and an ETR receipt is a requirement, hence his refusal to pay ksh. 41,100 to his boss based on undated cash sale receipts. That this led to an exchange between the Claimant and his boss (the 5th Respondent) and bad blood.
 - b. that from that day, the 5th Respondent stopped the Tea Boy from serving tea in the Claimant's office, disconnected him from office internet and removed him from the group WhatsApp.
 - c. that there is no set period within which one must apply for leave, that it is a matter of negotiation between an employee and his immediate supervisor (boss). That the Claimant filled three copies of leave forms and submitted two copies of the of the same to his immediate boss (the 5th Respondent), and could not tell whether or not the 5th Respondent had approved it unless and until he saw her copy of the leave form. That the Claimant was not the custodian of leave forms once submitted.
 - d. that the Claimant had no proof of salary increment upon promotion.
 - e. that the Claimant's name was deleted from the payroll in August 2017, and that the Claimant's letters dated 21/9/2017 and 29/9/2017 asking why were not responded to.
 - f. that the Claimant resigned involuntarily, with immediate effect and without notice.
 12. The Respondents did not call any evidence. On 25/10/2022, Counsel for the Respondents informed the Court that the Respondents were closing their case without calling any witness. The Respondents' case was accordingly closed and the Court directed both parties to file written submissions. The Respondents did not file any submissions, despite being granted an opportunity by the Court to do so.
 13. As already stated in this judgment, the Respondents did not call any evidence. Their defence and counterclaim were therefore not substantiated. The evidence adduced by the Claimant was neither



rebutted nor controverted. The Claimant's evidence stands unchallenged. It was held as follows in *Trust Bank Limited v Paramount Universal Bank Limited & 2 Others*, Nairobi [Milimani] Hccc No. 1243 of 2021:

“it is trite where a party fails to call evidence in support of his case, that party's pleadings remain mere statements of fact. In so doing, the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.”

14. It was held as follows in *Chrispine Otieno Caleb v Attorney General*[2014] eKLR:-

“Although the defendant has denied liability in an amended defence and counter-claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claim made by the defendant in his defence and counter-claim are unsubstantiated. In the circumstances, the counter-claim must fail.”

15. Turning to the Claimant's case, and having considered the pleadings filed and evidence adduced by the Claimant, issues that present for determination, in my view, are as follows:-

- a. Whether the Claimant's employment was constructively terminated by the Respondents.
- b. Whether the Claimant is entitled to the reliefs sought.

16. The Blacks Law Dictionary 10th Edition defines constructive dismissal as follows:-

“An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”

17. The Claimant pleaded and testified that while being an employee of the first Respondent (Mombasa County Government) and upon applying for and proceeding on his annual leave on 31/7/2017, the Respondents without any lawful justification, formal charges and without subjecting the Claimant to any disciplinary proceedings, suspended the Claimant's salary and deleted his name from the payroll. The Claimant pleaded and testified that this was caused by his refusal to process cash payment in favour of his immediate supervisor (the 5th Respondent) in March 2017 regarding repairing of motor vehicle Registration Number GK A 277Q in the months of September and November 2016. The Claimant testified that being an auditable person, he refused to process the cash payment as asked by the 5th Respondent because the cash sale receipts presented to him were not dated, there were no ETR receipts thereon, and there was no inspection report by the Regional Chief Mechanical Engineer on the motor vehicle said to have been repaired. That his refusal led to an exchange between him and the 5th Respondent, and that this led to bad blood between the Claimant and the 5th Respondent, who resulted to witch hunting on the Claimant.

18. The Claimant further pleaded and testified that suspension of his salary led to hardships on his part, to a point that he could not raise fare to go to work. That his letters dated 21/9/2017 and 29/9/2017 seeking to be told the reason for suspension of his salary were not responded to by the Respondents, and that he resigned with immediate effect on 9/10/2017. It was the Claimant's pleading and evidence that his resignation was involuntary and that he was constructively dismissed by the Respondents. This evidence by the Claimant was neither rebutted nor controverted by the Respondents.



19. The Claimant's letter dated 21/9/2017 and addressed to the 4th Respondent reads:-

“Re: August 2017 Salary

I did not get my August 2017 salary nor did I get my payslip. I am therefore humbly requesting from your esteemed office the reason as to why I never got my salary since no explanation has been availed to me.

I also humbly demand that the same be re-instated back without any further delay.”

20. The foregoing letter is shown to have been received by the Respondents on the same date that it was written (21/9/2017). The Claimant served the Respondents with a reminder dated 29/9/2017, and resigned from his employment vide a letter to the Respondents dated 9/10/2017 and served on the Respondents on the same date. The resignation letter states in part:-

“Re: Resignation from The Service

.....after a considerate and careful meticolation of what has been going on brought by embarrassing and distressing environment at my place of work, I do hereby tender my immediate resignation which is effective from the date of this letter without any further notice...”

21. The Claimant pleaded and testified that his resignation was involuntary, and that he was constructively dismissed by the Respondents. Suspension of an employee's salary, for whatever reason, is a disciplinary action which should never be taken without following due process. Due process involves service of a formal charge/ memorandum of accusation on the employee and giving him an opportunity to be heard. This is a cardinal principle of the rules of natural justice.

22. The essence of a salary is to compensate an employee for work done or services rendered. Suspension of payment of the same without lawful justification and without following due process is unfair and unjust, and consigns the affected employee to servitude and indignity, as a salary not only comprises the employees basic pay, but allowances as well, which include housing allowance pursuant to Section 31 of the *Employment Act* in cases where the employee is not housed by the employer. The salary further caters for other statutory obligations like the employee's contribution towards his health care through statutory deductions to health insurers like the National Hospital Insurance Fund (NHIF). There cannot be such remittances if the salary is suspended.

23. Payment of an employee's salary is a crucial and pivotal term of every contract of employment, and any employee whose salary is unjustly withheld or suspended by an employer has a right to consider himself constructively terminated. His resignation simply formally signifies his departure.

24. On what constitutes constructive termination of employment, the Court of Appeal stated as follows in the case of Coca-cola East and Central Africa Ltd v Maria Ligaga[2015] eKLR:-

“constructive dismissal occurs where an employee terminates the contract under which he is employed, (with or without malice) in circumstances in which he is entitled to terminate it without notice, by reason of the employer's conduct. The employer's behavior in either case must be shown to be heinous, so intolerable, made it considerably difficult for the employee to continue working. The employee initiates the termination believing himself to have been fired. The employee needs to show that the employer, without reasonable or proper cause conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is regarded as constructive dismissal if the employer's



conduct is a significant breach of the contract of employment and that the conduct shows that the employer is no longer interested in being bound by the terms of the contract. The employee's resignation is therefore treated as an actual dismissal by the employer and the employee may claim compensation for unfair termination."

25. It is my finding that the Claimant's employment was constructively terminated by the Respondents; and that the termination was unfair.
26. On the second issue, I find and hold that the decision by the 1st, 2nd, 3rd, 4th and 5th Respondents to remove the Claimant's name from the payroll in August 2017 without following due process was illegal and contrary to section 17(10) of the Employment Act, and I so declare.
27. I allow the claim for ksh. 76,272 being unpaid salary for the months of August and September 2017 and the days worked in October 2017 as prayed. I also allow the claim for ksh. 39,880 being one month salary in lieu of notice.
28. I award the Claimant the equivalent of ten months' salary being compensation for unfair termination of employment. This being ksh. 39,880x10 = 398,880.
29. The claim for salary underpayment was not proved, and is declined.
30. Finally, and having considered submissions filed by the claimant, judgment is hereby entered for the Claimant against the Respondents jointly and severally for:-
 - a. Unpaid salary for August and September 2017
and days worked in October 2017.....ksh. 76,272
 - b. One month salary in lieu of noticeksh. 39,880
 - c. Compensation for unfair termination
of employment ksh..... 398,800Total ksh.514,952
31. The Claimant shall be paid terminal dues in accordance with his contract of service.
32. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.
33. The Claimant is awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH MAY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A

signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:



N/A .for Claimant

Mr. Mungoma for Respondent

