



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Gendia Adventist Academy & another v Okongo (Appeal
E004 of 2020) [2023] KEELRC 1125 (KLR) (10 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1125 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E004 OF 2020**

**S RADIDO, J
MAY 10, 2023**

BETWEEN

**GENDIA ADVENTIST ACADEMY 1ST APPELLANT
BOARD OF MANAGEMENT, GENDIA ADVENTIST ACADEMY 2ND
APPELLANT**

AND

OLGA APONDI OKONGO RESPONDENT

(Being an appeal arising from the judgment of Hon. B.O. Omwansa in PMCC ELRC No. 1 of 2019 delivered in the Principal Magistrates Court at Oyugis on the 30th day of November 2020)

JUDGMENT

1. Olga Apondi Okongo (the respondent) sued Gendia Adventist Academy and the Board of Management, Gendia Adventist Academy (the Appellants) before the Principal Magistrates Court alleging unfair termination of employment, breach of contract and breach of statutory duty of care under the [Work Injury Benefits Act](#).
2. The appellants defended the Cause and in a judgment delivered on 30 November 2019, the Principal Magistrate entered judgment for the Respondent and awarded her:
 - i. Medical expenses Kshs 114,556/-.
 - ii. Pay in lieu of notice Kshs 16,000/-.
 - iii. Lost income Kshs 64,000/-.
3. The respondent was also awarded costs and interest.



4. The appellants were aggrieved and on 29 December 2020, they lodged a Memorandum of Appeal with the Court contending that:
 - (1) That the trial Magistrate erred in law by failing to acknowledge the principles of the law of evidence that he who alleges must prove by shifting the burden of proof to the Respondents/ Appellants.
 - (2) That the trial Magistrate erred in both law and fact by contradicting himself in the judgment and finding that the Claimant was not terminated from employment only to award a prayer for salary in lieu of notice on grounds that there was constructive termination.
 - (3) The trial Magistrate failed to acknowledge and appreciate the correct application of the doctrine of constructive termination thus arrived at the wrong decision.
 - (4) The learned trial Magistrate erred in both law and fact by misapplying the principles of the law of contract and the *Employment Act* thus arriving at a wrong decision.
 - (5) That the learned trial Magistrate erred in law by failing to appreciate that there cannot be an award for unpaid salary where no finding of breach of contract or unfair termination has been made.
 - (6) That the learned trial Magistrate selectively applied the law by failing to appreciate that the Claimant/Respondent was guilty of gross misconduct by absenting herself from her place of work and was thus liable for summary dismissal even if such measure wasn't taken against her by the Appellants.
 - (7) That the learned trial Magistrate did not appreciate the principle of equity particularly that he who seeks equity must do equity and that one who comes to equity must come with clean hands.
 - (8) That the learned trial Magistrate greatly misdirected himself in treating the submissions of the Appellants very superficially thereby erroneously arriving at a wrong conclusion in law.
 - (9) That the learned trial Magistrate erred in law and fact by failing to take into account the provisions of all relevant land laws.
 - (10) That the learned trial Magistrate erred in law and fact by failing to consider the provisions of articles 40, 48 and 50 of the *Constitution* of Kenya, 2010 hence denying the Applicant (sic) his right as stipulated in the said provisions.
 - (11) That as a result of the foregoing, the learned trial Magistrate erred in law in finding that the Claimant was entitled to any awards pleaded in her Memorandum of Claim dated 16/1/2019.
5. The appellants filed the Record of Appeal on 7 February 2023, and the court gave directions on 8 March 2023.
6. Consequently, the appellants filed their submissions on 29 March 2023, and the respondent on 28 April 2023.
7. The court has considered the Record of Appeal and submissions.

Role of the Court on first appeal

8. This being a first appeal, the court is enjoined to re-evaluate the evidence before the lower court and make its own findings on the evidence and facts but conscious that it did not see the witnesses.



9. The court will bear the above in mind while addressing its mind to the instant Appeal.

Award of Kshs 114,556/- medical expenses

10. The respondent asserted before the Principal Magistrates Court that while at work on 20 February 2018, she was attacked by a contractor who had come to demand payment for services offered (building of classrooms) in 2011.
11. According to the testimony of the respondent, the contractor attacked her when she demanded that he produce records to demonstrate that he had performed the services in contention.
12. The respondent further testified that she sought medical attention at Kendu sub-district hospital and Kendu Adventist hospital. The Respondent produced copies of invoices from Kendu Adventist hospital and a doctor who manager her case.
13. The appellants' second witness was the Deputy Head teacher at the material time. He confirmed that the Respondent was attacked on 20 February 2018 by a person he (the witness) knew.
14. The appellants denied that the respondent was attacked in the workplace.
15. However, their witness admitted that the respondent was attacked in the workplace.
16. Under the *Employment (Medical Treatment) Rules*, 1977, an employer is under a statutory obligation to provide the employee with medical treatment when an illness or injury is contracted at work or in the workplace.
17. The Principal Magistrate did not, therefore, fall into an error of law or fact in awarding the respondent reimbursement of medical expenses (the court notes that the appellants did not directly challenge this award).

Constructive dismissal

18. The Principal Magistrate awarded the respondent the equivalent of one month in lieu of notice on the basis that it was a case of constructive dismissal.
19. The respondent asserted before the lower court that the appellants had constructively terminated her employment because they had declined to approve her request for extended sick leave, withheld her salary for June 2018, denied her access to the school in October 2018 and also advertised her position before informing her that her services were no longer required.
20. The appellants, however, contended that the Respondent had deserted work and consequently, the question of unfair termination of employment or constructive dismissal did not arise.
21. The Appellants' second witness served as the Respondent's deputy. He testified that the he took over the Respondent's duties during her absence and that she did not resume duty after the end of her maternity leave in June 2018. He also testified that the respondent was paid up to July 2018.
22. He also testified that he did not receive any letter from the Respondent seeking sick-leave to forward to the Board.
23. The witness was not cross-examined on the testimony nor was her testimony challenged by the Respondent.



24. A constructive dismissal occurs when the employer makes the work environment intolerable for the employee, or the employer repudiates a fundamental term of the contract, leading the employee to leave with or without notice.
25. By October 2018, the date of alleged separation, the respondent's sick-off had lapsed.
26. The Respondent did not place any evidence before the Principal Magistrate that she applied for sick-leave and was denied or that she made it clear to the Appellants that she was opting to leave at the instance of the Appellants' conduct.
27. The Principal Magistrate, therefore, erred in both law and fact in finding that the respondent's case was one of constructive dismissal, and awarding the equivalent of 1-month salary in lieu of notice.

Unfair termination of employment/desertion of duty

28. Apart from alleging constructive dismissal, the respondent claimed unfair termination of employment in October 2018 at paragraph 3 of the Amended Memorandum of Claim.
29. However, the appellants countered that the respondent had deserted duty.
30. The lower court found that the respondent had not proved unfair termination of employment.
31. The legal distinction between desertion and absence from work without lawful cause is often not appreciated
32. Desertion in employment law constitutes a repudiation of the contract of employment. The deserting employee is in a fundamental breach of the contract and the employer is entitled to dismiss him on the ground of repudiation of the contract. This is because he has no intention of turning up for work.
33. However, a repudiation of contract, as a general rule under the common law, does not terminate the employment contract.
34. The innocent party should accept the repudiation (see *Philomena Aromba Mbalasi v Uni-Truck World Ltd* (2015) eKLR citing with approval *London Transport Executive v Clarke* (1981) IRLR 166).
35. In *Societe Generale, London Branch v Geys* (2012) UKSC 63, the Supreme Court of the United Kingdom confirmed the principle that a repudiated employment contract does not end until the repudiation is accepted by the innocent party, mostly the employer.
36. In the *Geys* decision, the Supreme Court rejected the automatic termination principle that repudiated employment contracts are ended immediately upon repudiation, in favour of the election principle.
37. In other words, the deserting employee does not dismiss himself. The decision to formally end the employment relationship should come from the employer innocent party.
38. Desertion by its nature is more serious than a mere absence as it rotates around an intention by the employee never to return to work.
39. Reporting to work is a fundamental obligation on the part of the employee. It makes desertion tantamount to gross misconduct warranting summary dismissal.
40. However, the employer should make an attempt to comply with the provisions of section 41(2) of the *Employment Act, 2007*.



41. The appellants did not place any evidence before the lower court that they attempted to the Respondent to explain or show cause for his absence from after the lapse of the maternity leave. They were also aware that she had been assaulted and had undergone hospitalisation and treatment.
42. In the court's view of the court, the appellants did not prove desertion on the part of the Respondent.
43. The next question is whether the respondent discharged the burden which was expected of her by section 47(5) of the *Employment Act*, 2007 to prove at the first instance that an unfair termination of employment had occurred before the Appellants would be called upon to justify the termination.
44. The respondent did not disclose in the witness statement which was adopted the particulars of the person who denied her access to the workplace when she returned in October 2018. She did not name the person who allegedly instructed her to drop the criminal charges against her assailant as a condition to being allowed back to work.
45. The respondent, in the view of this court, did not discharge the burden of showing that an unfair termination of employment had occurred.
46. The Principal Magistrate did not fall into error in the conclusion that the respondent had not proved unfair termination of employment at the first instance.

Lost income

47. One of the heads of claim advanced by the respondent was lost income in that the appellants terminated her contract before its end in November 2018.
48. This court can do no better than endorse the holding by the Supreme Court of Uganda in *Bank of Uganda v Tinkamanyire* (2008) UGSC that:

the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law. Similarly, claims of holidays, leave, lunch allowances and the like which the unlawfully dismissed employee would have enjoyed had the dismissal not occurred are merely speculative and cannot be justified in law.

49. The Principal Magistrate fell into an error by awarding the Respondent lost income of Kshs 64,000/-.

Conclusion and Orders

50. The court has concluded that the respondent's case was not one of constructive dismissal.
51. The award of salary in lieu of notice was, therefore, in error and it is set aside.
52. For clarity, the awards mentioned in paragraph 2 above are left undisturbed.
53. Each party to bear own costs of the Appeal. Respondent to have costs before the Principal Magistrate's Court.

DELIVERED VIRTUALLY, DATED, AND SIGNED IN KISUMU ON THIS 10TH DAY OF MAY 2023.

Radido Stephen, MCI Arb

Judge

Appearances



For Appellants Abisai & Co. Advocates

For Respondent Rogo, Okelloh, Wangari & Co. Advocates

Court Assistant Chrispo Aura

