



**Mwandogo v Friends for Life [K] Limited (Cause 286 of 2018)
[2023] KEELRC 1121 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1121 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 286 OF 2018**

**AK NZEI, J
MAY 4, 2023**

BETWEEN

CHAKA MDIMULA MWANDOGO CLAIMANT

AND

FRIENDS FOR LIFE [K] LIMITED RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent on April 30, 2018 *vide* an evenly dated Memorandum of Claim filed in Court on April 30, 2018 and pleaded that he was employed by the Respondent with effect from August 1, 2007 as a field officer, and was subsequently promoted to the rank of Branch Manager on February 1, 2012 and then Operations Manager on August 22, 2012; earning a basic salary of ksh 54,050 and a house allowance of ksh 4,500 at the time of dismissal.
2. The Claimant further pleaded that he resigned from employment on May 1, 2017 due to unpaid salary arrears which had accumulated to ksh 621,575. That for a period of one year, the Claimant worked without receiving any salary from the Respondent, leading to his resignation on May 1, 2017. That non-payment of the Claimant's salary offended Article 41 of the Constitution.
3. The Claimant sought the following reliefs against the Respondent:-
 - a. a declaration that the Claimant was constructively and unfairly dismissed, and is entitled to 12 months' salary.
 - b. an order that the Respondent do pay the Claimant:-
 - i. Half paid salary for April – August 2016 (27,025x5 months)
.....ksh 135,125
 - ii. Salary for September 2016- May 2017 (ksh 54,050x9 months)
.....ksh 486,450



Total ksh 621,575

- c. one month salary *in lieu* of Notice.
 - d. costs of the suit and interest.
4. Other documents filed by the Claimant included an affidavit in verification of the claim, the Claimant's written witness statement dated April 30, 2017 and an evenly dated list of documents listing some seven documents. Documents listed by the Claimant included a letter of employment dated 1/8/2007, a promotion letter dated 15/2/2012, a promotion letter dated 22/8/2012, a resignation letter dated 1/5/2017, the Claimant's salary voucher for January 2015, a demand letter dated 13/4/2018 and a response to the demand letter dated 24/4/2018; substantially admitting the Claimant's claim/demand.
 5. The Respondent filed a statement of defence on May 30, 2018 (dated 23/5/2018) and admitted having employed the Claimant as pleaded by him, but pleaded that the Claimant left employment voluntarily.
 6. The Respondent further pleaded that it had, due to financial constraints, written to the Claimant on April 24, 2018 and proposed to pay his dues by instalments as from July 2018.
 7. The Respondent further pleaded:-
 - a. that it owed the Claimant ksh 418,89, less ksh 22,000 salary advance and ksh 166,000 loan owed to the Respondent.
 - b. that the Claimant was in possession of the Respondent's property which he had failed, neglected or refused to return, being a laptop valued at ksh 40,000 and a Yamaha Motorcycle valued at ksh 220,000.
 8. It is worthy noting that the Respondent's statement of defence did not include a counter-claim against the Claimant.
 9. Other documents filed by the Respondent included a written witness statement of one Mishek Mwirigi Ananiah dated 1st April 2022 and an evenly dated list of documents listing some twelve documents. The listed documents included the Claimant's NSSF statement, NHIF remittance e-slips for the period April 2016-May 2017, P9A forms for the years 2016-2017; ledger account statement, client debt status report and a list of salary advance payments said to have been received by the Claimant, among others.
 10. When trial opened on June 16, 2022, the Claimant adopted his filed witness statement as his testimony, and produced in evidence the documents referred to in paragraph 4 of this judgment. The Claimant further testified that prior to his resignation on 1/5/2017, the Respondent paid his salary in bits for five months and that for nine months, he was not paid any salary. That his salary at the time of resignation was ksh 54,050. That for five months (April-August 2016), the Claimant was paid ksh 25,436 (per month) and for nine months (September 2016-May 2017) he was paid nothing; though he was working. That he was claiming ksh 621,575 in salary arrears.
 11. The Claimant further testified that he tendered his resignation on May 1, 2017 but worked until the end of that month (May) as he had to serve a one month notice. That at the time of resignation, the motorcycle assigned to him had broken down for almost a year, and it had been agreed between him and his employer that the latter would pick it from the Claimant's home as the Claimant had no money to transport it; but that this did not happen.
 12. The Claimant further testified that at the time of his resignation, he had a loan with his employer amounting to about ksh 122,000, but not ksh 166,000 as alleged by the Respondent. That RW-1 had,



- in paragraph 19 of his filed witness statement, agreed/stated that the loan balance was ksh 122,419. That this was the actual loan balance.
13. The Claimant further testified that he was not interested in the Respondent's motorcycle and laptop assigned to him, that the Respondent should collect them. That the loan balance should, however, be recovered from the money owed to the Claimant by the Respondent.
 14. Cross-examined and re-examined, the Claimant testified that he resigned for personal reasons, and that he did not state the reasons for his resignation in his letter of resignation dated 1/5/2017. That the Respondent was going through financial hardships, a situation which the company had made known to its employees. That during that period, the Claimant continued working as usual. That there was no agreement that employees would forfeit their salary arrears.
 15. The Respondent called one witness, Mishek Mwirigi Anannah [RW-1], who told the Court that he was a director of the Respondent company. He adopted his field witness statement dated 1/4/2022 as his testimony and produced in evidence the Respondent's documents referred to in paragraph 9 of this judgment. The witness further testified:-
 - a. that the Claimant worked for the Respondent from 2007 to April 2017 when he left employment voluntarily.
 - b. that the Respondent company had cash flow problems from April 2016 and that no one in the company got their salary until August 2016 when they all got half salary.
 - c. that the Claimant got a loan of ksh 460,000 and had paid ksh 337,581, leaving a balance of ksh 122,419, which was still outstanding.
 - d. that the Claimant was indebted to the Respondent in the sum of ksh 153,319, the motorcycle and the laptop which he never returned. That the Claimant should be compelled to pay the money and to return the items.
 16. Cross-examined, the witness (RW-1) testified that the Claimant's salary as at April 2016 was ksh 54,050. That the motor cycle assigned to the Claimant was bought in 2010 and had never been valued. That the amount stated as its value was the purchase price. That the Respondent had admitted to owing the Claimant ksh 418,891. That the Respondent had no evidence to show that it paid any money to the Claimant from April 2016 to May 2017; save for some ksh 4,000 advance pay. That the Claimant worked through out that period.
 17. The Respondent [RW-1] further testified that the Claimant resigned on 30/4/2017, and that the witness had never gone to collect the motor cycle and laptop assigned to the Claimant, though he wrote a letter a year after the resignation over the same. That the letter was not shown to have been received by the Claimant.
 18. As already stated in this judgment, the Respondent did not raise any counter-claim against the Claimant. The Respondent admitted in evidence [RW-1] that the Claimant's salary as at April 2016 and as at the time of the Claimant's resignation in May 2017 was ksh 54,050, that the Claimant was paid half salary from April to August 2016, and that the Claimant did not receive any salary from September 2016 upto May 2017.
 19. In view of the foregoing admission and the fact that there is no counter-claim on record, the sole issue that falls for determination is whether the Claimant is entitled to the reliefs sought.
 20. On the claim for twelve months' salary based on alleged constructive dismissal, the Claimant testified that he resigned from employment "for personal reasons". That he had worked for five months on half



pay and for nine months without pay. He further testified that the Respondent company's financial hardships had been made known to its employees, though there was no agreement that employees would forfeit their salary arrears. The Claimant did not demonstrate that he resigned as a direct result of salary unpayment. He had worked for nine months without any salary. There was no direct connection between his resignation and non-payment of his salary. He testified that he did not state the reason for resignation in his resignation letter. I find and hold that the Claimant did not prove that he was constructively dismissed by the Respondent. The claim for twelve months' salary (in compensation) is declined.

21. The Respondent cited the case of *Western Excavating Ecc Ltd v Sharp* [1978] 2 WLR 344 where Lord Denning stated:-

“if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that he no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contact by reason of the employer's conduct.

He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all, or alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once.

Moreover, he must make up his mind soon after the complain of which he complains; for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

22. The claim for ksh 135,125 being unpaid half salary from April 2016 to August 2016, which the Respondent did not deny, is allowed.
23. The claim for ksh 486,450 being unpaid salary for the months of September 2016 to May 2017, which the Respondent did not deny is allowed.
24. The claim for one month salary in lieu of notice is declined. The Claimant resigned voluntarily and served one month notice. His employment was not terminated by the Respondent, constructively or otherwise.
25. The Claimant admitted in evidence to having an outstanding loan balance of ksh 122,419, and asked that the same be recovered from the money owed to him by the Respondent.
26. In view of all the foregoing, and having considered written submissions filed by Counsel for both parties, judgment is hereby entered for the Claimant against the Respondent as follows:-
- a. unpaid half salary from April 2016 to August 2016.....kshs 135,125
 - b. unpaid salary for the months of September 2016 to May 2017kshs 486,450
- Total ksh 621,575
27. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the *Employment Act*, and shall be paid to the Claimant by the Respondent less the admitted loan balance of ksh 122,419
28. The Claimant is awarded costs of the suit and interest at Court rates. Interest shall be calculated from the date of this judgment.



DATED, SIGNED AND DELIVERED AT MOMBASA THIS 4TH 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 Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Simiyu or Claimant

Ms. Ondieki for Respondent

