



**Maina v Chemsolve Cleaning Services Ltd (Cause E485 of 2020)  
[2023] KEELRC 1517 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1517 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E485 OF 2020**

**B ONGAYA, J**

**JUNE 16, 2023**

**BETWEEN**

**MARTHA WAIRIMU MAINA ..... CLAIMANT**

**AND**

**CHEMSERVE CLEANING SERVICES LTD ..... RESPONDENT**

**JUDGMENT**

1. The claimant is Martha Wairimu Maina. She filed the the statement of claim dated 02.09.2020 through Messrs Genga & Associates Advocates. There is no dispute that the respondent employed the claimant in August 2018 as an Operations Manager on a two-year contract (ending in August 2020) and at Kshs.120, 000.00 per month. The claimant managed cleaning services the respondent offered to its clients and supervised the staff. At the time material to this suit she had been deployed at the BAT premises.
2. The evidence is that the respondent's client BAT issued a Persona Non-Grata (PNG) against the claimant meaning that the claimant was locked out of the BAT premises upon grounds that she was not managing staff issues as expected at the BAT Likoni Road and Leaf Centres. Her access to BAT premises was deactivated on 15.01.2020. the complaints included delayed staff salaries for December 2019 and lack of proper PPEs amongst other reasons.
3. Further evidence was that the respondent, in the circumstances of the PNG by BAT, suspended the claimant from work as per the letter of suspension dated 21.02.2020. The suspension was with full pay. The claimant was required to co-operate with the investigators. Depending with the outcome of the investigations, she would be afforded an opportunity to defend herself. If found innocent she would resume duty without compromise to her terms of service.
4. By the letter dated 06.03.2020 by the General Manager Francis Njeru, the claimant was invited to a disciplinary hearing at the respondent's head office on Tuesday 10.03.2020 accompanied with a fellow



- employee from within Nairobi. The letter promised an opportunity to be heard and that if the claimant failed to exculpate and serious misconduct was disclosed she could be dismissed. She was to remain on suspension until outcome of the disciplinary hearing.
5. The evidence is that the hearing did not take place and instead the claimant requested to be given a copy of the investigation report about the two allegations of the claimant receiving the PNG and that she was not adding value to the respondent. The claimant's Advocates wrote the email of 13.03.2020 requesting for the investigation report and suggesting the disciplinary hearing on 19.03.2020.
  6. The further evidence is that on 19.03.2020 the respondent could not convene for the disciplinary hearing because the COVID 19 Pandemic was declared in Kenya with Ministry of Health protocols prohibiting in-person physical meetings. On 23.03.2020 the respondent's P.M.Ndungu wrote to the claimant's Advocates forwarding the report as had been requested.
  7. On 26.03.2020 the General wrote to the claimant to take annual leave effective 01.04.2020 and pending the hearing of the disciplinary case. The letter stated that on 10.03.2020 the claimant had requested to be given time to compile her defence which was granted together with information and documents pertaining to the case. The letter stated that since then the respondent had not heard from the claimant and until the claimant communicated, the HR Office had been advised to count her days as leave taken awaiting her communication. She was advised to contact the General Manager if she had something to communicate or discuss.
  8. On 15.05.2020 the claimant wrote to Joyce Wachiuru that she had not received her April Salary and wanted to know why and when to expect it. Joyce replied by her email of 19.05.2020 referring to the letter dated 26.04.2017 which the claimant was called to pick from the on 27.04.2020 but the claimant had declined to sign to acknowledge receipt. The email by Joyce stated that the claimant had taken promising to return the signed office copy of the letter but failed to do so – and that it was upon the contents of that letter that the claimant had not been paid the salary for April, 2020. The letter concluded thus, “It is the hope of the Company that the COVID-19 Pandemic situation will soon settle down and economy particularly of the company gets back on its feet soonest.
  9. By e-mail dated 20.05.2020 the claimant wrote to Joyce stating that the purported disciplinary process was incomplete and no decision had been communicated from the respondent even after the claimant submitted her response to the allegations. Further, unpaid leave would have to be based upon mutual agreement between the parties – employer and employee. The claimant stated, “In light of the foregoing I will only proceed on the same after receiving communication from your end as regards to my suspension and the unpaid leave period clearly defined by yourselves.”
  10. By letter dated 04.06.2020 the claimant resigned from the respondent's employment effective 08.06.2020. she stated that her resignation was as a result of work related frustrations that she was sent on suspension under unclear circumstances on 24.02.2020, she responded to the allegations, and had received no response. While on suspension she had been asked on 01.04.2020 to proceed on annual leave and the leave had ended on 30.04.2020. on 28.04.2020 she received a letter instructing her to go on indefinite unpaid leave without discussion on the suspension and appropriate guidance. Further, for no reason she had not received her April 2020 salary.
  11. The claimant's case is that she has remained jobless. She alleges constructive unfair termination because her resignation from employment was due to being subjected to unfair and unequal treatment contrary to provisions of the *Employment Act*, 2007.
  12. She claimed and prayed for judgment against the respondent for:
    - a. A declaration that the claimant was constructively dismissed.



- b. Damages for constructive dismissal Kshs.1, 440, 000.00.
  - c. Unpaid salary for April till resignation date Kshs.272, 000.00.
  - d. Untaken leave days Kshs.96, 000.00.
  - e. Gratuity Kshs. 120, 000.00.
  - f. Costs of the suit.
  - g. Interest on (b), (c), (d), and (e) above; and
  - h. Any other relief the Honourable Court may deem fit to grant.
13. The respondent filed the reply to memorandum of claim dated 05.10.2020 and through P.M. Ndungu & Company Advocates. The respondent admitted employing the claimant on a fixed term contract per letter dated 20.08.2018. It was admitted the monthly salary was Kshs.120, 000.00. The respondent states that it allowed the claimant time to prepare the defence and afforded her the requested documents but she made no communication. In the intervening period COVID 19 Pandemic struck the globe including Kenya The respondent states that it had to emplace many workers on annual leave. On 04.06.2020 the claimant waived her right to disciplinary process and opted to resign. His terminal dues were calculated and a cheque of Kshs. 106, 320.00 prepared but the claimant declined to accept it. It is the respondent's denial that there was constructive termination but that the claimant resigned to defeat the disciplinary process. The claimant resigned and a sum of Kshs. 120, 000.00 was deducted from her terminal dues to recover pay in lieu of notice. The respondent prayed that the claimant's suit be dismissed with costs.
14. The Court has considered all the material on record including the final submissions filed for the parties and the oral testimonies.
15. The 1<sup>st</sup> main issue is whether the separation amounted to constructive termination or not. The evidence is that at all material time the claimant was on paid suspension pending the outcome of the investigations after the PNG by BAT. In the process the claimant requested for information and investigation report to enable her prepare her defence. It appears her advocate wrote the email of 13.03.2020 requesting for the investigation report and suggesting the disciplinary hearing takes place on 19.03.2020. On 23.03.2020 the report was forwarded and the respondent did not convene the disciplinary hearing. The Court finds that the respondent as employer exercised the disciplinary control powers and it was misconceived to purport to shift that role to the claimant by suggesting that the claimant had to convene such disciplinary hearing. The Court finds that while judicial notice is taken that around 19.03.2020 the Covid 19 Pandemic was declared in Kenya, the respondent deliberately shifted the flow of the on-going disciplinary hearing to emplacing the claimant on unilateral leave and further suggesting her April 2020 salary would not be paid per terms of the suspension letter. The Court finds that the procedure adopted by the respondent was unfair in terms of section 45 of the Act. The Court finds that the respondent thereby fundamentally breached the terms of the contract by failing to lift the suspension and conclude the disciplinary process – and instead imposing unpaid leave. The resignation was indeed due to that mistreatment and the Court returns that it amounted to unfair constructive termination.
16. The 2<sup>nd</sup> issue is on the reliefs prayed for. The Court returns as follows:
- a. The claimant is entitled to a declaration that the claimant was constructively dismissed.



- b. The claimant has prayed for damages for constructive dismissal Kshs.1, 440, 000.00. The Court has considered the factors in section 49 of the Employment Act. The claimant had only two months of service to lapsing of the fixed term contract. The claimant otherwise had a pending disciplinary case and the Court has taken judicial notice of the prevailing COVID 19 Situation at the material time which constrained enterprises. The respondent has exhibited letters showing indeed it had to emplace staff on leave. The Court finds 2 months' compensation in salary making Kshs. 240,000.00 is just in the circumstances of the case.
  - c. The claimant is entitled to unpaid salary for April till resignation date Kshs.272, 000.00. The amount was earned per terms of the letter of suspension.
  - d. The claimant prayed for untaken leave days Kshs.96, 000.00. The particulars of that special or liquidated damages were not pleaded at all and no evidence was provided. The prayer is declined. The Court has as well noted that the claimant has been fully paid throughout the suspension period and forced leave period in April 2020. The prayer for leave days will be declined as unjustified.
  - e. The claimant prays for gratuity of Kshs. 120, 000.00. The letter of appointment provided for contributory gratuity scheme. The rate is not stated. The Court returns that as submitted for the respondent, there was no evidence of the contribution and the claimant appears to have remained a member of the pension scheme and NSSF. The prayer is declined as unjustified.
  - f. The claimant is awarded costs of the suit.
- 17 In conclusion judgment is hereby entered for the claimant against the respondent for:
1. The declaration that the claimant was constructively dismissed.
  2. The respondent to pay the claimant a sum of Kshs. 512, 000.00 (less PAYE) by 01.08.2019 failing interest to be payable thereon at Court rates till full payment.
  3. Respondent to pay costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 16<sup>TH</sup> JUNE, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

