



Mirithu v County Government of Kiambu & another (Employment and Labour Relations Cause E208 of 2022) [2023] KEELRC 2091 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 2091 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E208 OF 2022**

**K OCHARO, J
JULY 27, 2023**

BETWEEN

NAOMI WANJIKU MIRITHU CLAIMANT

AND

COUNTY GOVERNMENT OF KIAMBU 1ST RESPONDENT

KIAMBU COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

JUDGMENT

Introduction

1. Through a Memorandum of Claim dated the 23rd March 2022 and amended on the 18th July 2022, the Claimant instituted a Claim against the Respondents seeking the following reliefs;
 - a. The Respondents be and are hereby ordered and directed to pay the Claimant Ksh. 6,575,358/-.
 - b. The Respondents be and are hereby ordered and directed to pay the Claimant interest on the sum of Ksh. 6,575,358/- at court rates from the date of filing suit until payment in full.
 - c. The Respondents be and are hereby ordered and directed to issue the Claimant with a Certificate of Service.
 - d. The Respondents be and are hereby ordered and directed to pay the Claimant costs of this suit together with interest thereon at court rates from the date of filing of the suit until payment in full.
 - e. Any such other or further relief as this Honourable Court may deem appropriate.
2. The statement of Claim was filed contemporaneously with the Claimant's witness statement dated 28th March 2022 and a list of documents of the even date.



3. Upon being served with the summons to enter appearance, the Respondents did file a Memorandum of Appearance dated the 23rd June 2022. Despite filing the Memorandum Appearance, the Respondents failed to file a Response to the Claim, consequently, on 11th October 2022 the Court directed that the matter proceed as an undefended cause.
4. At the formal proof hearing on 28th February 2023, the Claimant urged the Court to adopt her witness statement as well as the filed documents as her documentary evidence in support of her case. The Court so adopted.

The Claimant's case

5. It was the Claimant's case that on 5th September 2017, the 1st Respondent offered her employment as the Director-Liaison, an offer which she accepted. The contractual monthly salary was set at KShs. 165,210. The contract of employment was for a fixed term of 3 years with effect from 23rd August 2017 to 22nd August 2020.
6. The Claimant stated that she took up her said position on the 9th of September 2017 and worked for the 1st Respondent until May 2019, a period of 20 months when the latter suddenly stopped remitting her salary. The reasons that informed the Respondent's action were not explained to her.
7. The Claimant further stated that upon verbal promises by the 2nd Respondent that her salary would be reinstated and any arrears owed to her settled, she continued to work until November 2019, when had to stop working owing to frustrations as she could no longer continue working without pay.
8. She further testified that her contract lapsed on the 22nd of August 2020 without her receiving any communication from the Respondents concerning, the reason[s] why her salary was being withheld and payment of the same. Her innumerable follow-ups verbally, in writing, and physical visits at the 2nd Respondent's offices didn't bear any fruit.
9. The Claimant pleaded and testified that by stopping her salary in May 2019, the Respondents constructively terminated her employment.
10. Lastly the Claimant contends that as a result of the wrongful and unfair termination, she suffered injury and damages of which she claims as tabulated hereunder:
 - i. Salary for the remainder of the term of contract being 17 months calculated at Ksh 165,210.....Ksh 2,808,570.
 - ii. 12 months gross salary for unfair termination of employment.....Ksh.1,982,520.
 - iii. Service Gratuity calculated at 30% of Ksh. 165, 210 for 36 months.....Ksh. 1,784,268.

The Claimant's submissions

11. The Claimant's Counsel filed written submissions on the 9th of March 2023, distilling three issues for determination:
 - i. Whether the Claimant was constructively dismissed from employment and whether such dismissal was lawful.
 - ii. Whether the Respondents subjected the Claimant to slavery, servitude and forced labour.



- iii. Whether the Claimant is entitled to the reliefs sought.
12. On the first issue, it was submitted that the Claimant's evidence that the Respondents stopped paying her salary suddenly and that she nonetheless continued working upon premises of the 1st Respondents' County Secretary that all arrears could be settled, promises which were never honoured, constraining her to stop working, was uncontroverted. The Respondents' acts amounted to constructive dismissal of the Claimant from employment which was unlawful. Reliance was placed on the case of *Western Excavating ECC Ltd vs Sharp (1978) 1 ALL ER 713* Where it was held:
- “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 the employer 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 contract by reason of the employer's conduct. His 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.”
13. The Counsel for the Claimant further relied on the case of *Coca Cola East & Central Africa Limited vs Maria Kagai Lugaga (2015)* eKLR where it was held:
- “The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behaviour towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constituted a repudiatory breach of the contract of employment - this is the contractual test.”
14. It was submitted that the facts that led to the Claimant's quitting satisfies both the unreasonable test and the contractual test as espoused by Lord Denning in *Western Excavating ECC Ltd*, and in the case of *Coca Cola East & Central Africa Ltd (Supra)*.
15. The Counsel for the Claimant submitted that it is unreasonable to expect an employee to offer her labours to an employer without being paid salary as agreed. The failure of the Respondent to pay her salary as per her contract of employment constituted a repudiatory breach of the contract of service. The Claimant was entitled to leave as she did. She was constructively dismissed.
16. On the second issue, it was submitted that Article 30 of *the Constitution* of Kenya guarantees the Claimant of the enjoyment of the right not to be held in slavery or servitude. The Claimant's right under this Article was violated in the circumstances of this matter. To buttress this point, reliance was placed on the case of *Jonathan Spangler vs Centre for African Family Studies (2017)* eKLR where it was held:
- “ 112 There is something that a salary does to a man. It gives him job satisfaction. Payment of a salary comes with that spring and gait towards the office to accomplish tasks. The job therefore gives one a dignified self and a purpose to return each day to accomplish more.
113. When then a salary is not paid for work done, the opposite takes place. An employee becomes anxious; demoralized; each day comes with bills and



distress; and eventually, with delays and no pay at all, panic comes in and an employee is reduced to begging, scavenging from fellow workers, friends and well-wishers.

114. Each day the employee continues to report to work with the hope and prayer that the employer will pay and pay all arrears so as to reduce the suffering. The reporting to work then becomes a moment of anxiety and with hope that the pain of yesterday will reduce with receipt of pay. When then such pay does not come for days, weeks, and months, ye the employee faithfully continues to attend to work, such continued work performance is no long voluntary. It is forced upon the employee with the hope of a pay and the arrears due. The context of article 31 of *the constitution* then sets in;

30. A person shall not be held in slavery or servitude.

(1)

(2) A person shall not be required to perform forced labour.

115. Such vassalage is not by a simple work that an employee is held by force and made to work; that an employee is placed in bondage and forced to perform his duties; no, circumstances putting an employee in a position that work stops being dignified but a means to get arrears and due wage, such I find to be in a series of what is servitude. The continuation of work without pay and continued allocation of work and additional duties so as to evade and avoid a redundancy even when one is glaringly present is forced labour.

116. Such is degrading, inhuman and tortuous. Such should not be visited upon any employee who has offered their labors and instead of receiving a salary is instead reduced to inhuman conditions. Such cannot be defined in any other words as the context within which slavery and servitude were conceptualized such were the circumstances envisaged. That no employee should be subjected to slavery and servitude as conditions specifically prohibited under our constitution and conditions that there should be no derogation. Such prohibition is what should happen to all civilized societies which are governed by the rule of law and are democratic such as ours.”

17. Lastly, the Claimant submitted that she was entitled to the salary for the remainder of contract being 17 months. The Claimant placed reliance on the case of *Narry Philemons Onaya-Odeck vs Technical University of Kenya (Formerly, the Kenya Polytechnic University College) 2017* eKLR where the Court awarded the Claimant the salary for the remainder of the contract.

18. The Claimant submitted further that she is entitled to 12 months compensation for the unfair termination. Reliance was placed on the case of *Angela Wokabi Muoki vs Tribe Hotel Limited (2016)* eKLR where the Court awarded the Claimant therein 12 months’ salary as damages for the unfair termination despite the fact that she had worked for only 5 (five) years, having taken into account the employer’s conduct in terminating her employment.

19. The Claimant submitted that an award of Ksh. 5,000,000/- would be adequate for violation of her right not to be subjected to slavery and servitude. The Claimant relied on the case of John Spangler (Supra) where the Claimant was awarded Ksh. 18,000,000/- for constitutional breaches and violations, and the case of *OL Pejeta Ranching Limited vs David Wanjau Muhoro (2017)* eKLR where the Claimant was awarded Ksh.7,500,000/- for violation of his Constitutional rights.



20. Lastly the Claimant submitted that she was entitled to service gratuity as she was not under any pension scheme and her terminal benefits were not determined under the Pensions Act. The Claimant urged this court to be guided by the formula published by the SRC in Gazette Notice No. 2888 of 1st March 2013 which provided that county state Officers serving on a contract are to be paid service gratuity at the rate of 31% of the annual basic pay for every year worked. Reliance was placed on the case of Nelson Kesbei vs Narok County Government & Another (2019) eKLR.

Analysis and Determination.

21. From the pleadings, the evidence on record as well as the submissions by the Counsel for the Claimant, the following issues present themselves for determination:

- i. Whether the Claimant was constructively dismissed.
- ii. Whether the Claimant is entitled to the reliefs sought.
- iii. Who should shoulder the costs of the suit?

Whether the Claimant was constructively dismissed.

The doctrine of constructive dismissal has not been codified in our statutes, however it has been defined in the jurisprudence, of the Employment and Labour Relations Court, the Court of Appeal and, in other jurisdictions. Although it has no common-law antecedent, it corresponds to the concept of repudiation of the contract of employment by the employer and acceptance thereof by the employee, thus bringing the contract to an end. In my view, constructive dismissal means action[s] on the part of the employer which constrains the employee to exit his or her employment [whether with or without notice] such actions can take a variety of forms and as was held by the Labour Appeal Court of South Africa, in *Jooste v Transnet Ltd* [1995] 5 BLLR 1 [LAC] 4, the circumstances of constructive dismissal are so infinitely various that there cannot be, and is no rule of law saying what circumstances justify and what do not. It is a question of fact for the Court.

22. The authoritative meaning of constructive dismissal was neatly articulated by Lord Denning MR in *Western Excavating (ECC) Ltd. -v- Sharp* [1978] ICR 222 or [1978] QB 761, as follows:

“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 the employer 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 contract 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 that 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 (emphasis ours). (See also *Nottingham County Council -v- Meikle* (2005) ICR 1).”

23. In *Pretoria Society for Care of Retarded v Loots* [1997] 6 BLLR 1046 [LAC], the Labour Appeal Court of South Africa addressed constructive dismissal as follows;

“When an employee resigns or terminates the contract as a result of constructive dismissal such employee is in fact indicating that the situation has become unbearable that the employee cannot fulfil what is the employee’s most important function, namely to work.



The employee is in fact that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable working environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned.”

24. Crosser home in the *Coca Cola East & Central Africa Limited v Maria Kagia Lugaga [2015]* eKLR, the cited by Counsel for the Claimant, on constructive dismissal is the locus classicus.
25. It is not in dispute that the Claimant was employed by the Respondent as a Director-Liaison through a fixed-term contract where she worked diligently for the Respondent until May 2019 when the 1st Respondent suddenly stopped remitting her salary without notification. It is also evident that notwithstanding the verbal promises by the County Secretary that her salary and other arrears were to be settled, the same were not fulfilled. This prompted her to exit as she was frustrated and could no longer work without pay. There were no reasons given to her why there was a salary delay or why the same was not being remitted to her.
26. A contract of employment has been variously defined. However, one considering the definitions in their variety cannot miss to discern the centrality of payment of remuneration as a feature of a contract of employment as an obligation by the employer.
27. Undeniably, a person’s employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity, and a sense of esteem. It is a social reality that the law has changed to recognize. Therefore, where an employer without any justifiable reason stops to pay salary to his or her employee, a conclusion that such an employer is in breach of a fundamental breach of the contract of employment and therefore repudiated the same cannot be difficult to draw. Further, a decision by the employee to leave cannot be said to be unfounded.
28. I have keenly considered the circumstance of this case as well as the Respondents’ conduct and it is my considered view and holding that Claimant was constructively dismissed from employment. The Conduct of the Respondents was not only unreasonable but fundamentally in breach of the contract of employment.

Whether the Claimant is entitled to the reliefs sought

29. Having found as I have hereinabove that the Claimant has proved that she was constructively dismissed, as a result of a wrongful conduct by the Respondents, I now hold that the dismissal was substantively unfair. Imperative to state that the remedies for constructive dismissal are the same as for other forms of dismissal.

I. Salary for the remainder of the contract term

30. The Claimant asserted that she was employed by the Respondent under a fixed term contract of three years. That through the Respondents’ wrongful conduct the contract came to an end prematurely in the circumstances hereinabove brought out. The evidence was not rebutted by the Respondents at all. It was not demonstrated that there existed a rationale for the conduct. This Court is cognizant of the fact that Section 49 of the *Employment Act* provides for the various remedies that may be availed to an employee for procedural or substantive unfairness in the termination of his or her employment. One of the remedies is the compensatory relief of twelve months’ gross salary contemplated under section 49 [1][c] of the Act.



31. In my view, the limit on compensation does not take away the possibility of an employee seeking civil damages in a higher amount where breach of contract by the employer can be established. The right to the statutory compensation is an additional right to an employee whose employment has been unfairly terminated. I draw this conclusion out of the fact that a keen look at the provisions section 49 reveals that the section does not appear to expressly or by implication oust other remedies not contemplated under it. It is my further view that as to whether compensation shall be confined to what Sub-section [1][c], contemplates or not, will heavily depend on what the Court deems “just and equitable in all circumstances”.
32. The term “just and equitable in all circumstances” denotes that compensation must be fair to the employer as well as the unfairly dismissed employee. For instance, it will not be fair to the unfairly dismissed employee for the Court to restrict itself to the statutory compensatory relief, while it is clear in the circumstances of the matter that such restriction would in away benefit the offending party, [the employer] to pay far much less than if the Court didn’t allow the restriction. In my view, if Courts were to overly embrace the restriction, it shall be a recipe for diminishment of the protection and rights of employees, more specifically the right against unfair labour practices. None law respecting employers will not be deterred from violating the protections and rights.
33. Buoyed by the foregoing premises this Court finds itself not impeded, in the circumstances of this matter, to grant the Claimant compensation for the remainder of the contract period [17 months], Kshs.2,808,570.

ii. 12 months compensation for the unfair termination

34. The Claimant also sought compensation for the unfair termination to the tune of Kshs.1,982,520. This Court is alive of the fact that 12 months gross wages or salary is the maximum awardable compensation provided for under section 49 (1) (c) of the *Employment Act* 2007. Granting the relief is discretionary. Whether maximum compensation is awardable or a portion or no compensation depends on the circumstances of each case. Having noted as I have hereinabove that the constructive dismissal was unfair, that the conduct of the Respondents was without any rationale, the length of period the Claimant was engaged at the 1st Respondent’s, the length of period she expected to serve the 1st Respondent and the fact that she had secured another employment opportunity at the Kenya Ports Authority, I am inclined to award the Claimant the compensatory relief at the extent of 7 (seven) months. Ksh. 1, 156, 470.

iii. Damages for the breach of the Claimant’s Constitutional rights.

35. The Claimant extensively submitted on her Constitutional right against Slavery, Servitude and Forced Labour, under Article 30 of *the Constitution* of Kenya, 2010. No doubt, she didn’t plead in her statement of claim that her said right was violated and give specifics how. Consequently, nothing can turn on the submissions as this Court cannot make a determination and or an award on matters not pleaded. The claim under this head is declined.

iv. Service Gratuity

36. Finally, the Claimant sought to be paid service gratuity amounting to Ksh.1,784,268.00 calculated using the Salaries and Remuneration Commission guidelines published in the Gazette Notice No. 2888 of 1st March 2013 which provided that service gratuity for County State Officers shall be calculated at the rate of 31% of the annual basic pay for every year worked.



37. The letter of Appointment dated 5th September 2017, clearly provided that the Claimant's house allowance and other allowances were to be paid in accordance with the SRC- Guidelines. Furthermore, from the payslips presented before this court as documentary evidence, it is clear that the Claimant was not a member of the NSSF or any pension scheme so as to disentitle her of the relief under this head
38. In view of the foregoing premises, I am inclined to apply the Salary and Remuneration Commission-guidelines published on the Gazette Notice No. 2888 of 1st March 2013 which provides:
- i. A State officer, serving or appointed for a fixed term of office, shall be paid a service gratuity at the rate of 31 per cent of the annual pensionable emoluments for the term served.”
- The Claimant is hereby awarded service gratuity for the years served as hereunder:
- $(31/100 \times 165,210 \times 19/12) = \text{Ksh. } 81,090.475.$

Who should bear the costs of this suit

39. The costs of this suit shall be borne by the Respondents herein.
40. The upshot, judgment is hereby entered for the Claimant against the Respondents in the following terms:
- a. Salary for the remainder of the contract term..Ksh. 2,808,570.00.
 - b. Compensation pursuant to the provision of section 49 (1) (c) of the Employment Act 7 (seven) months' gross salary, .. Ksh.1,156,470.00.
 - c. Service Gratuity for the years worked...Ksh. 81, 090, 475.
 - d. The Respondents to issue a certificate of service to the Claimant within 30 days of today.
 - e. Interest on the sums awarded above at the court rates, from the date of this judgment till full payment.
 - f. Cost of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF JULY, 2023.

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OCHARO KEBIRA

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

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



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OCHARO KEBIRA

JUDGE

In the Presence of;

Mr. Ongato holding brief for Otinga for Claimant.

No appearance for the Respondent.

