



Oweya v Sichangi Partners & Associates Network LLP (Cause E037 of 2021) [2023] KEELRC 1936 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1936 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E037 OF 2021**

M MBARÚ, J

JULY 27, 2023

BETWEEN

VINCENT M OWEYA CLAIMANT

AND

SICHANGI PARTNERS & ASSOCIATES NETWORK LLP RESPONDENT

JUDGMENT

1. The claimant is an adult and the respondent a limited liability company. The respondent employed the claimant as an associate Advocate through letter dated January 1, 2018. The claimant was also issued with letter on terms and conditions of engagement. Employment commenced on 5 February 2018 at a monthly salary of Kshs 136,282.28.
2. The claim is that the respondent, without lawful cause created a harsh working environment for the claimant which affected his productivity and which amounted to breach of contract and impacted negatively on his personal life. The breaches were with regard to the failure by the respondent to pay the due monthly salary, failure to remit office rent timely leading to interruptions by the landlord and failure to avail the claimant with petty cash to attend to duty at various locations from the office yet he was not offered any transport. The claimant raised his concerns with the respondent but no remedial action was taken.
3. By April 2019 the respondent stopped paying the claimant his salaries for 6 months. There was no explanation while other employees were paid their wages and salaries on time. This resulted in discriminatory treatment against the claimant.
4. On 25 April 2019 the claimant voiced his concerns with the Chief Executive officer (CEO) who instead sent the claimant to the Mombasa office and promised to send the claimant to the Chief Executive officer the next week. The claimant then realised that all fellow employees at the Mombasa office had been paid for the entire period he remained without pay.



5. The non-payment of salary crippled the claimant without ability to attend the office to undertake his duties and on 9 May 2019 the claimant resigned from his employment with the respondent. On 13 May 2019 the respondent responded and indicated that his resignation notice would be addressed but since, his terminal dues have not been paid.

The claimant is seeking the following dues;

- a. A declaration that there was constructive dismissal;
 - b. Certificate of service;
 - c. Unpaid salaries Kshs 820,969.68;
 - d. Notice pay Kshs 136,828.28;
 - e. Payment in lieu of taking leave Kshs 182,255.30;
 - f. Compensation for constructive dismissal Kshs 2,781,922.62; and
 - g. Interests and costs.
6. The claimant testified in support of his case that he is an Advocate of the High Court of Kenya and through letter dated January 1, 2018 he was employed as an associate by the law firm of the respondent with effect from 5 February 2018. He worked diligently until the respondent started frustrating his employment by failing to pay his due salaries and for 6 months he went to work without being paid. The claimant noted that all other employees remained on full salary yet he was not paid making it very difficult to attend to his duties, needs and family. He was placed under very harsh working environment taking into account the respondent's office is at Links Road, Nyali in Mombasa yet he was required to attend court in various locations away from the office yet he was not given any petty cash for transport or provided with any means of transport.
 7. The claimant raised his concerns with the respondent's officers who promised to give feedback but there was none.
 8. This forced the claimant to tender his resignation on 9 May 2019 and which notice was acknowledged by the respondent but without payment of his terminal dues.
 9. The claimant testified that he has been affected by the conduct of the respondent against him on the grounds that he was discriminated against since all other employees at his office would be paid and he was not paid his dues salaries for 6 months. He was unable to meet his work requirements due to the respondent failing to pay office rent leading to work disruptions by the landlord.
 10. The respondent entered appearance on 6 May 2021 and filed no response.
 11. On 30 May 2023 both parties attended court and the respondent asked for directions with regard to pre-trial on the basis that the parties were negotiating. The court allowed the respondent 14 days to file a response to the claim and further to attend hearing on 4 July 2023.
 12. On the due date for hearing, 4 July 2023 the respondent had not filed any response and did not attend court for hearing.
 13. At the close of the hearing, the claimant filed his written submissions.
 14. The claimant submitted that the respondent breached his employment contract by failing to pay his salaries for work done. For 6 months he went to work without pay and in the case of *Vincent Omollo Obuom v Catholic Diocese of Nakuru* [2015] eKLR the court held that payment of wages as agreed is



an essential component of the contract of employment. non-payment of wages is in breach of contract of employment.

15. The claimant was then placed under intolerable working conditions and forced to resign from his employment due to the conduct of the respondent as held in the case of *Coca Cola East & Central Africa limited v Maria Kagai Liganga* [2015] eKLR despite the claimant raising his concerns with the respondent through the Chief operations Officer, his issues were not addressed nor paid his salaries which remained owing to date.
16. The claimant submitted that he is entitled to damages for constructive dismissal and issuance of a certificate of service for the duration of his employment with the respondent. The 6 months' salary unpaid should be awarded with interests, notice pay, pay for untaken leave days and costs.

Determination

17. Without any response to the claim, the respondent having been invited by the court and allocated more time to file its responses and failed to oblige, the claims made are not controverted. These shall be analysed on the merits.
18. Constructive dismissal is a concept now developed in Kenya through case law.
19. The test for constructive dismissal does not require that the employee had no choice but to resign, but that the employer made continued employment intolerable repudiating the employment contract as held in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR. In constructive dismissal, what must be present is that;
 - i. the employee terminated the contract of employment;
 - ii. continued employment had become intolerable for the employee; and
 - iii. the employer must have made continued employment intolerable.
20. The none payment of a salary for work done and required to be paid at month end is not only a serious breach of the employment contract but also negate the dignity of the affected employee. The employee who wakes up every day to attend work with the legitimate expectation that he has offered his labours and the reward is a salary at month end is reduced to slavery when such date arrives and there is no pay. This is exacerbated where such non-payment of the due salary continues beyond the one-month contract period.
21. In the case of *Jonathan Spangler v Centre for African Family Studies (CAFS)* [2017] eKLR the court in considering the place of human dignity in employment and labour relations held that the conduct of the employer which results in the contravention of the employee's inherent human dignity and the right to have that dignity respected and protected is an unfair labour practice. The claimant ought not to have chosen to resign due to the non-payment of his salaries. Such non-payment of due salaries for work done fundamentally repudiated his entire contract in terms of section 44(3) of the *Employment Act, 2007*. In the case of *CNR; FITM & another (Respondent)* (Cause E204 of 2021) [2022] KEELRC 82 (KLR) (26 April 2022) (judgment) the court held that the employee was no longer bound to the terms and conditions of his employment contract where the employer failed to pay his due salaries as agreed and every month end.
22. The claimant was under a written contract of employment with the respondent under which terms and conditions were that his salary would be paid monthly. For 6 months he went on without pay. Such was in serious breach of the contract allowing his to summarily terminate his employment contract through notice dated 9 May 2019 and he gave notice to this effect.



23. The essence of section 44(3) of the *Employment Act, 2007* is not only to cover an employer upon the gross misconduct of the employee but to secure the employee too who is faced with circumstances such as the claimant was. The respondent as the employer was in breach of a fundamental part of the employment contract by failing to pay the claimant his due monthly salary for a period of 6 months. The reason for such non-payment of the due salary is not stated as the respondent failed to respond to the claim herein.
24. There was a fundamental breach of the contract and leading to constructive dismissal of the claimant.
25. The claimant is entitled to notice pay and compensation for wrongful and unfair termination of his employment by the respondent.
The claimant was last earning Ksh 136,828.28 which is due in notice.
26. The claimant served for under two years, he was out of employment due to the conduct of the employer and an award of compensation for 3 months is hereby found appropriate. Compensation based on the last salary is awarded at Ksh 410,484.
27. There is no work record to negate the claim for leave days which is hereby awarded at Ksh 182,255.30.
28. On the unpaid 6 months' salary, this is the claim that foundationally led to these proceedings. The due and unpaid salaries are awarded at Ksh 820,969.28 with interests from 9 May 2019 and until paid in full.
29. The claimant testified that he was discriminated against but failed to particularise this aspect of his claim. The only assertion was that in April 2019 he discovered that all other employees at his office had been paid their full salaries while his were not paid. He left this claim bare. No particulars. With the claim for constructive dismissal addressed above, this shall suffice.
30. A certificate of service issue at the end of employment whatever reasons exists leading to termination of employment. The respondent shall issue the claimant with his certificate of employment in accordance with section 51 of the *Employment Act, 2007*.
As the claim is successful, the claimant is hereby awarded costs.
31. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
- a. A declaration that employment terminated through constructive dismissal which is found wrongful and unfair;
 - b. Compensation at Ksh 410,484;
 - c. Notice pay Ksh 136,828.28;
 - d. Unpaid salaries Ksh 820,969.68 with interests from 9 May 2019 until paid in full;
 - e. Payment in lieu of taking leave Ksh 182,255.30;
 - f. Certificate of service; and
 - g. Costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 27 DAY OF JULY 2023.

M. MBARŪ

JUDGE



In the presence of:

Court Assistant: Japhet Muthaine

..... and

