



**Odongo v Masinde Muliro University of Science and Technology (Cause
30 of 2023) [2023] KEELRC 1761 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1761 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
CAUSE 30 OF 2023**

**JW KELI, J
JULY 13, 2023**

BETWEEN

DR GEORGE ODONGO CLAIMANT

AND

**MASINDE MULIRO UNIVERSITY OF SCIENCE AND
TECHNOLOGY RESPONDENT**

JUDGMENT

1. The Claimant instituted this suit on 5/9/2022 by filing the statement of claim dated 2/9/2022 supported by his verifying affidavit of even date. The suit had been triggered by withholding/stoppage of the Claimant's salaries and the subsequent removal of his name from the teaching roster thereby halting his further lecturing duties at the Respondent's institution. Vide the said statement of claim, the Claimant has prayed for the following reliefs:
 - a) The respondent be ordered to release the Claimant's withheld or stopped salaries for the months of May, June, July and August 2022;
 - b) A declaratory order that the claimant is deemed as constructively dismissed by the Respondent;
 - c) An award of damages for the wrongful constructive dismissal under section 49 (1)(c) of the *Employment Act* 2007;
 - d) An award of 3-month salary in lieu of termination notice under section 49(1) (a) of the *Employment Act* 2007;
 - e) An award of general damages for the psychological torture/trauma, financial embarrassment, injury to credit and defamation of character suffered by Claimant;
 - f) Costs of the suit;



- g. Interests on items a, b, c, d and e above from the date of filing suit till payment in full and
 - h. Any other relief that this honourable court may deem just and fit to grant in the interest of Justice.
2. Also filed in this suit are the claimant's list of documents dated 2/9/2022 (comprising of 11 documents that were eventually adopted by the court as plaintiff's Exhibits 1 to 11), the claimant's witness statement dated 2/9/2022 and the Claimants 2nd list of documents dated 27/3/2023 (comprising of 5 documents that were eventually adopted by court as plaintiff's Exhibits 12 to 16).
 3. The claim was opposed. The Respondent filed three key pleadings, namely the respondent's response to claim dated 10/3/2023, witness statement by Benard Ooko dated 5/3/2023 and respondent's list of documents dated 10/3/2023 (comprising of 4 documents that were eventually adopted by court as Defence Exhibits 1 to 4)

Hearing and Evidence

4. The claimant's case was heard orally on the 25th April 2023 with the claimant as the only witness of fact in his case. The claimant produced his evidence as the claim filed, the claimant's list of documents dated 2/9/2022 (comprising of 11 documents that were eventually adopted by the court as plaintiff's Exhibits 1 to 11), the claimant's witness statement dated 2/9/2022 and the Claimants 2nd list of documents dated 27/3/2023 (comprising of 5 documents that were eventually adopted by court as plaintiff's Exhibits 12 to 16).
5. The respondent's case was heard on even date with one witness of fact Benard Ooko who relied on the response to claim dated 10/3/2023, his witness statement dated 5/4/2023 and respondent's list of documents dated 10/3/2023 (comprising of 4 documents that were adopted by court as Defence Exhibits 1 to 4).

Claimant's case in summary

6. The claimant submits that it is not in dispute that the Claimant had been employed by the Respondent in the year 2021 as a lecturer in the department of Criminology & Social Works. It is also not in dispute that the Claimant's gross remuneration as at the time of withholding or stoppage of his salary was Ksh. 170,443.00 as shown on the pay slip for May 2022 produced as P. Exh 2. The very salary for May 2022 remains withheld by the Respondent alongside those for the subsequent months. That he did not receive salary of May and June despite other staff having been paid. That he wrote a formal inquiry letter dated 18th July 2022 which he delivered to the university the same day. In 4 days of the letter on the 21st July 2022, his immediate boss summoned him to his office and gave him a show cause letter by the Office of the Registrar (registration) dated 15th July 2022. He treated the letter as a reaction to his letter as it appeared backdated. He responded to the letter on 27th July 2022. That he still was not paid salary and on 18th August 2022 the chairman of the department gave him a letter by the Deputy Vice Chancellor (administration and finance) gave him a letter which was an internal part-time appointment letter allocating him further duties to be performed at the University Nairobi campus. That he accepted the letter as it is a common and acceptable practice in universities for a permanent and pensionable lecturer in a university to work part-time at same or different universities but under different less favourable arrangements. That around 22nd August 2022, it was brought to his attention that his name had been removed from the lecturing roster for full time which coupled with salary stoppage he treated to be that his lecturing services were no longer needed at the university. That the salary stoppage exposed him to financial embarrassment as he had a loan with checkoff form



authorizing the university to deduct money from his monthly salary and remit to family bank, he had obtained soft loans from individuals who threatened him, some reported to the police and one issued a demand letter (Anthony) and fell into rent arrears. That the stoppage of salary was unreasonable and oppressive.

7. That he deemed himself constructively dismissed and communicated that to the employer on the 25th August 2022 vide demand letter of even date. That evidence confirms that during the period of stoppage of salaries, the Claimant continued to actively discharge his lecturing duties at the Respondent's Universities up to around 22/8/2022 when the Respondent removed his name from the teaching/lecturing duty roster which got transmitted by the head of the department to all lecturers in the Department of Criminology & Social works. P. Exhibits 12 to 15 were produced by the Claimant to confirm the foregoing.

Defence case in summary

8. The defence case was summarized from the witness statement of Benard Ooko Dated 5th April 2023 to affect that the Claimant was offered employment by the Respondent by offer letter dated 18th August 2021 which he accepted and signed on the 29th September 2021. That the letter of offer among other conditions stipulated that the Claimant was supposed to have read the terms and conditions as stipulated in the Collective Bargaining Agreement (CBA) and the applicable Human Resource Policies and procedures manual. That the Claimant on being offered employment by the Respondent did not resign from his previous employer Kenya Methodist University where he was a full time lecturer in the department of Education and on permanent and pensionable terms since May 2020 which was a breach of Public Service Code of Conduct and Ethics, 2016 and Code of Conduct and Ethics for Public Universities, 2013 which prohibits public servants from engaging in other gainful employment that may hinder discharge of service.
9. That the Respondent investigated vide its security agent and found that the Claimant was an active employee of the Kenya Methodist University (KEMU). That the Respondent stopped the Claimant's salary on realizing he was holding two positions on permanent and pensionable terms and earning salary on both positions. That the suit was premature as the Claimant approached the court before the disciplinary process started. The Respondent produced D-exhibits 1-4 as its evidence on the foregoing.

Written submissions

10. The parties filed written submissions after the oral hearing. The Claimant's written submissions drawn by Balusi & Smart Advocates were dated 8th May 2023 and received in court on the 17th May 2023. The Respondent's written submissions drawn by Gilbert Tarus Senior State Counsel were dated 17th May 2023 and received in court on 18th May 2023.

Determination

Issue for determination

11. The claimant identified the following issues for determination in the claim: -
 - a) Whether or not the withholding or summary stoppage of the Claimant's salary while he continued to discharge duties and without any formal disciplinary process having been conducted was proper and lawful?
 - b) Whether the conduct on the part of the Respondent towards the Claimant in such as to be regarded as amounting to constructive dismissal of the Claimant?



- c) Whether the Claimant is entitled to the reliefs specifically prayed for and whether this Honourable Court has jurisdiction to grant such reliefs?
 - d) Whether the Claimant can be granted any other or further relief that this Honorable court may deem just and fit to grant in the interest of justice and, if so, which other or further reliefs should be granted?
12. The Respondent identified the following issues for determination: -
- a) Whether the Claimant was constructively dismissed from his employment
 - b) Whether the Claimant was employed in two permanent and pensionable positions.
 - c) Whether the Respondent were justified in stopping the Claimant's salary.
 - d) Whether the Claimant is entitled to the reliefs sought.
13. The court having heard the case and perused the submissions was of the considered opinion that the issues placed before the court by the parties for determination were as follows: -
- i. Whether the Claimant was employed in two permanent and pensionable positions.
 - ii. Whether or not the stoppage of the Claimant's salary while in office without any formal disciplinary process having been conducted was proper and lawful?
 - iii. Whether the conduct on the part of the Respondent towards the Claimant is such as to be regarded as amounting to constructive dismissal of the Claimant?
 - iv. Whether the suit was premature.
 - v. Whether the Claimant was entitled to reliefs sought.

SUBDIVISION - i. Whether the Claimant was employed in two permanent and pensionable positions.

The Claimant's case

14. The evidence was led to show that a written resignation letter had not been tendered in court by the Claimant to demonstrate that he had terminated his full-time employment with KEMU. The Claimant confirmed to court that a written resignation letter did not exist. The question is, should there always be a written resignation letter in all cases where a lecturer ceases to work for a university on full-time basis. This Honourable court has had the opportunity to hear first-hand the evidence as to the peculiar yet permissible practice obtaining in universities across the county with regard to lecturing staff, the practice of a lecturer being contracted by many universities (and therefore being employed by multiple employers) to carry out the lecturing tasks. This is a unique scenario considering the fact that in a commercial set-up such arrangements could be perceived as permitting an employee to work for another employer's competitor. It seems the spirit and notions of competition that obtain in the commercial arena have been jettisoned by our universities for the wider good of the society. A Lecturing career can thus be classified as sui generis in the sense that terms and conditions ordinarily applicable to many employment contracts have, and possible continue to be, varied by practice. The Claimant testified as to the fact that the practice that obtains in the private universities including KEMU is that a lecturer who wishes to change his mode of employment from full-time employment (or permanent and pensionable employment) to part-time employment does not have to tender a letter of resignation because such letter would mean he is severing all employment ties with the university. All that the said lecturer needs or is required to do is simply give notification to his boss that he wishes to restructure his engagements with the university and such restricting gets to be affected. The Claimant restructured his



engagements with KEMU to part-time lecturing that way mainly virtual in nature hence the reasons as to why his work performance at the Respondent's university was never hindered in any way. There was no evidence adduced by the Respondent's witness to controvert the Claimant's testimony which, in light of the sui generis nature of the lecturing employment, this Honourable Court should find to be probable.

The defence case

15. We do submit that the Claimant held two permanent and pensionable terms of employment with both the Respondent and the Kenya Methodist University as confirmed from the investigation report dated 8th July, 2022 produced as Respondent's exhibit marked MM1.
16. The Claimant in his cross examination did confirm that he did not tender any written resignation to Kenya Methodist University after being employed by the Respondent, hence holding two permanent and pensionable terms.
17. The averments by the Claimant that he tendered oral resignation is untruthful and against employment practice.
18. The allegations that the Claimant was engaged in part-time contract with Kenya Methodist University is not supported by any evidence and an attempt by the Claimant to mislead this court as to the true position.
19. The Kenya Methodist University confirmed through its letter to the Respondent's Vice Chancellor that indeed the Claimant was still its employee on permanent and pensionable terms. (See Respondent's exhibit marked MM2.)

Decision

20. The Claimant in his evidence in chief told the court he was engaged with another university on permanent basis and reverted to part-time engagement as soon as he secured a job with the Respondent, that he did not resign as he wanted to continue having other engagements which could have been affected by the resignation.
21. During cross-examination on the issue, the Claimant confirmed he used to work for Kenya Methodist University on permanent and pensionable terms. On being asked if he resigned, the claimant stated ' I did formal notification.' On being asked what was formal notification, the claimant responded, ' section 16(8) of the [Universities Act](#) requires verbal or in writing resignation.'"
22. The Claimant told the court he never tendered a letter of resignation nor receive a letter on his formal notification. He had no evidence of having been engaged on part-time basis at Kenya Methodist University. He was employed by the Respondent vide letter of appointment on 18th August 2021 and joined on 29th September 2021. He received a salary from Kenya Methodist University in September which he stated was on part-time basis but had no such evidence.
23. The claimant cited Section 16(8) of the [Universities Act](#) at the hearing. The court looked into the Act and found the said citation to be non-existent. Section 16 of the Act is on Variation and revocation of charter.
24. The Black's law dictionary defines permanent employment as follows: - 'permanent employment. Work that, under a contract , is to continue indefinitely until either party wishes to terminate it for some legitimate reason.'(Tenth Edition Byran A. Garner).



25. Resignation then becomes a key issue in this case. The Claimant attempted vainly to twist the story by making unsound theories of possibility of notification of another employment without separation. The court holds that those were mere allegations for lack of documentation support. The Respondent produced D-exhibit 2 letter by the Kenya Methodist university authored by the Vice Chancellor Prof. David Gichoya confirming that the Claimant was a full time lecturer in their department of education on permanent and pensionable terms from 29th May 2020. The Claimant was served with the letter before the hearing and did not produce contrary evidence to discredit the said letter. The court on a balance of probability finds and holds that the Claimant never resigned from the Kenya Methodist University as permanent and pensionable employee upon employment by the Respondent on the same terms hence held two positions on permanent and pensionable terms contrary to the Public Ethics Act by unfair enrichment and an act which the court finds amounted to dishonesty by employee.

ii. On the issue as to whether or not the summary stoppage of the Claimant's salary while he continued to discharge his duties and without any formal disciplinary process having been conducted was proper and lawful

26. The Claimant submits that this is a country that upholds the tenets of the rule of law and one of such tenets dictates that a person is to be given the right to be heard whenever any erroneous and adverse decision such as stoppage of his entire salary is contemplated. Salary payment goes to the core of every employment contract and constitutes a key right of every employee. Salary is like oxygen to an employee. The right to payment of remuneration has been entrenched in the second schedule to the Employment (General) Rules, 2014 and cannot be whimsically infringed upon on flimsy grounds or without the invocation of the due process of the law.

14. The Respondent's HR manual only provides for two situations under which an employee's salary can be withheld, namely: when an employee is placed on interdiction or suspension with a view of allowing for full investigation of gross misconduct. Even then, the interdicted or suspended will still be entitled to receive some payments such as full house allowance and half basic salary(see clause D 5.4 of the HR Manual). Withholding or stoppage of the entire salary is simply an inhumane act that constitutes a blatant violation of Article 41 of *the constitution* of Kenya, 2010 which guarantees every person the right to unfair labour practice and fair remuneration.

15. The court holds that the stoppage of the Claimant's salary by the Respondent was not anchored on any labour law or on any term of the employment contract that subsisted between the parties and there can be no justification for such an oppressive act. It is not in dispute that the Claimant had indeed worked for the period, and therefore earned, the stopped salaries.

Defence case

16. We submit that the Respondent was justified in stopping the Claimant's salary for the reasons that the Claimant was earning two salaries on two positions on both permanent and pensionable terms, which is against the Public Service Code of Conduct and Ethics, 2016 and Code of Conduct and Ethics for Public Universities, 2013 which forbids public servants from engaging in other gainful employment that may hinder discharge of service.

17. That before the Respondent could institute any disciplinary proceedings, the Claimant moved to this Court and filed this instant claim and therefore the Respondent could not proceed to institute the disciplinary proceedings.



18. The stoppage of salary was to pave way for disciplinary proceeding and also the fact that the Claimant could not be receiving salary on two employment positions which were both permanent and pensionable.

Decision

19. The Respondent submits that it was justified to stop the Claimant's salary, as the Claimant was earning two salaries on two positions on permanent and pensionable terms, which is against the Public Service Code of Conduct and Ethics, 2016 and Code of Conduct and Ethics for Public Universities, 2013.
20. The Respondent alleges that the stoppage of salary was to pave way for disciplinary proceedings and to stop the Claimant from receiving salary from two permanent and pensionable jobs.
21. The Claimant on the other hand submits that he has a right to work on part-time basis during his free time as long as it does not interfere with his work with the Respondent and the assertion that he was employed on permanent and pensionable basis in two jobs is false. The court already found he held to permanent positions with two employers.
22. The Claimant alleges that stoppage of his salary was against Article 41 of *the Constitution* and in any event, even during Disciplinary processes, an employee is entitled to receive full house allowance and half basic salary (see Clause D.5.4 of the HR Manual and employment (general) (Rules, 2014).

Legal and procedural provisions

23. Article 41(2) of *the Constitution* of Kenya, 2010 grants every worker the right to fair remuneration.
24. Section 17 of the *Employment Act*, 2007 - Payment, disposal and recovery of wages, allowances, etc. provides:-

{(1) Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the currency of Kenya—

- (a) in cash;
- (b) into an account at a bank, or building society, designated by the employee;
- (c) by cheque, postal order or money order in favour of the employee; or
- (d) in the absence of an employee, to a person other than the employee, if the person is duly authorized by the employee in writing to receive the wages on the employee's behalf.

- (2) An employer shall pay wages to an employee on a working day, and during working hours, at or near to the place of employment or at such other place as may be agreed between the employer and the employee.....

(10) A person who—

- (a) subject to section 19, willfully fails to make payment of or to tender the wages earned by or payable to an employee in accordance with subsection (1); or
- (b) contravenes any of the provisions of subsections (2), (3), (4) and (5), commits an offence and shall on conviction be liable



to fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.’

25. The Masinde Muliro University of Science and Technology (MMUST) Human Resource Policies and Procedures Manual (HRP & PM), 2017, Section D.5.4 of the Policy provides for two actions to be taken in case of gross misconduct by an employee which is interdiction and suspension.
26. Section D.5.4.1 (b) of the policy provides that a staff when interdicted is to be paid half salary of basic salary, full allowance and medical benefits while all other allowances are suspended;
27. Additionally, section d.5.4.2, an employee can be suspended and during suspension is entitled to full house allowance, medical benefits and no basic salary.

Analysis

28. From the facts provided by the parties, no disciplinary measures had been undertaken by the Respondent to warrant the stoppage of salary;
29. The Claimant argues that he continued to work for the Respondent and did not receive any salary;
30. The Respondent argues that it stopped the salary of the Claimant so that it could start the disciplinary process.
31. As per *the Constitution*, every worker is entitled to receive their salary for work done. Section 17 of the *Employment Act*, additionally cements this position that an employee is to be paid the entire amount of the wages earned by or payable to an employee in respect of work done by the employee.
32. The Respondent had not commenced any disciplinary process to warrant the suspension of the claimant’s salary, when indeed the Claimant was still performing his duties under the direction of the Respondent.
33. It is no longer acceptable to withhold an employee’s salary as a holding action, pending the outcome of the disciplinary process, and no provision in law permits the withholding of pay without pay, during suspension as a punitive measure.
34. Rika J in *Peterson Ndung’u & 5 Others v Kenya Power and Lighting Company Limited* [2014]eKLR, held that:

“33. Are employees on suspension entitled to receive emoluments that are withheld during the period of suspension pending finalization of disciplinary outcome? The Court’s understanding of the practice of withholding of employee’s emoluments during the disciplinary process is that this is meant to be a procedural practice, not an imposition of a disciplinary penalty. This practice on close scrutiny indeed has no foundation in the *Employment Act*. It has no legal validity. The only legal provision of the Law under the *Employment Act*, 2007, which allows Employers not to pay Employees whose contracts of Employment have not been terminated their wages, is Section 18 (6) of the *Employment Act*, 2007. It states, “No wages shall be payable to an employee in respect of a period during which the Employee is detained in custody or serving a sentence of imprisonment imposed under any Law.” Section 19 which allows for deduction from wages, does not have any provision which would permit an Employer to deduct any money from the Employee or withhold any money, as a disciplinary step or sanction. The other provision of the Law through which an Employee may become dis-entitled to his salary is Section 80 (1) (b) of the *Labour Relations Act* 2007. This Section states that an Employee who takes part in, calls,



instigates, or incites others to take part in a strike that is not in compliance with the Act, is deemed to have breached the contract ‘and is not entitled to any payment or any other benefit under the Employment Act during the period the employee participated in the strike.’ The Claimants were neither detained in custody, nor serving imprisonment imposed under any law, nor engaged in an unprotected strike, in the period between 2nd February 2009 and 4th September 2009, so as to be denied their salaries. It is difficult to justify the practice, as there is no specific legal provision under the Employment Act 2007, suggesting an Employee whose contract of employment is still running, should forfeit his monthly salary while on preventive or administrative suspension.”

And further at paragraph 35, “Part IV of the Employment Act 2007 protects the emoluments of an employee. As long as the Employee’s contract remains in place, there is no reason to deny the Employee his salary. A salary should have no penal element. It is not part of the disciplinary sanctions against the Employee. The only case where forfeiture of salary may be justified, other than in instances given under the Employment Act and the Labour Relations Act, is where after a disciplinary process, the Employer imposes the sanction of suspension on the Employee. The mutual obligation in the employment relationship becomes suspended. In effect, the Employee’s contract is terminated for a period of time as a disciplinary sanction, during which the Employer has no obligation to continue paying the salary, and the Employee has no obligation to give his labour to the Employer. The Employee is effectively reinstated at the end of the penal suspension. Administrative suspensions however, should not result in the imposition of a pecuniary sanction against the Employee. The administrative suspension should be distinguished from the penal form of suspension....” I do uphold the decision as applicable to the instant case which Justice Byram Ongaya in *Bryan Mandila Khaemba v Chief Justice and President of the Supreme Court of Kenya & another* [2019] eKLR quoted with approval that:-

“The Court further follows the holding by Rika J in *Peterson Ndung’u & 5 Others – Versus- Kenya Power and Lighting Company Limited* [2014]eKLR that the withholding of an employee’s pay during the period of suspension has no basis and validity under the Employment Act, 2007. That principle applies as the minimum term and condition of service under the Employment Act, 2007.”

35. Consequently therefore, it was unlawful for the Respondent to stop the Claimant’s salary when he was still working and no disciplinary process had been commenced, which in any event could have entitled the Claimant to a pay of half basic salary in the case of interdiction and other benefits and other allowances with no basic salary , if suspended. There was no interdiction or suspension to warrant the stoppage of salary.
36. An anticipation to undertake disciplinary measures does not amount to commencement of the process of disciplinary, if the Respondent was aware it was to undertake the disciplinary action. The claimant was never suspended. He was thus in employment and entitled to receive salary for the period worked pending the outcome of any disciplinary process of sanction.
 - iii). On the issue as to whether or not the conduct on the part of the Respondent towards the Claimant is such as to be regarded as amounting to constructive dismissal of the Claimant

The Claimant’s submission



37. The Claimant submits that it was not in dispute that he not only ceased to receive salary payments from the Respondent but also got removed from the Respondent's teaching roster without any prior notice of him. The clear oral testimony by the Respondent's witness DW-1 was that one cannot lecture if his name is not on the teaching duty roster. Indeed, the Claimant's name did not feature anywhere in the lecturer's teaching roster as posted by the Respondent's Head of Department (Dr. Evans Oruta) via WhatsApp to all the lecturers in the department that the Claimant worked.
38. The Claimant's name was deliberately omitted from the said roster as a clear communication to everyone that the Claimant's lecturing services would no longer be needed by the Respondent. The removal of the Claimant from the Respondent's payroll coupled with the expunging of his name from the teaching roster can only lead to the inference of constructive dismissal. Such conduct on the part of the Respondent were calculated to subject the Claimant to extreme embarrassment and financial hardship with a view to inducing him to either resign or simply quit the institution. The conduct served as a pointer to him that the Respondent had practically decided to relieve him of his duties and therefore the taking of any processes akin to disciplinary hearings would simply be for purposes of rubberstamping the already taken decision.

The Respondent's submissions

39. The issue of constructive dismissal was defined by the Court of Appeal in the case of Coca Cola East & Central Africa Limited v Maria Kagai Lugaga [2015] e KLR as follows:-

“The key element in the definition of constructive dismissal is that the employee must have been entitled to 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 behavior 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 constitutes a repudiatory breach of contract – this is the contractual test”.
40. Applying the above principles on constructive dismissal to the circumstances of the Claimant, it was the Respondent's submission that the Claimant had not been constructively dismissed by the respondent and that the Claimant's case was still pending disciplinary, the Claimant having been issued with a notice to show cause why disciplinary proceedings should not be instituted against him for being an employee of both the Respondent and Kenya Methodist University on permanent and pensionable terms.
41. That the Claimant had not proved that that Respondent breached any fundamental terms of employment contract and it is indeed the Claimant who breached the employment contract by not resigning from his former position at Kenya Methodist University.
42. That the Respondent issued a notice to show cause against the Claimant dated 15th July, 2022 and instead of the Claimant responding on the same decided to approach the Honourable Court with this instant suit.

Decision

43. The facts of the case are not in dispute that the Claimant's salary was stopped and not paid for the months of May, June, July and August 2022. The Claimant was issued with a show cause letter dated 15th July 2022 which he stated he received on the 21st July 2022.



44. The Claimant deemed himself as constructively dismissed by the University on 25th August 2022 when he communicated to the employer vide demand letter dated 25th August, 2022. The demand letter by the advocate, having noted the stoppage of salary and lack of allocation of lessons to the Claimant stated as follows:- ‘ our client deems himself as constructively dismissed by yourselves and he accordingly legally ceases forthwith to be an employee of MMUST from the date hereof and should be so regarded for all purposes.’

45. I had the opportunity to address my mind on the doctrine of constructive dismissal just last week in Judgement in Kakamega ELRC Appeal No. 18 of 2023 Burendwa Secondary School v Henry Amusala Ashikhoba (unreported. Judgment delivered on 7th July 2023) which decision I uphold to apply in the instant case. In that decision I observed as follows:- ‘The court finds that the Learned Magistrate, the appellant and the Respondent all relied on the doctrine of constructive dismissal as defined by the Court of Appeal in Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR. The court took an excerpt from the decision at paragraph 30 which is reproduced below:-

“30. The legal principles relevant to determining constructive dismissal include the following: -

- a. What are the fundamental or essential terms of the contract of employment”
- b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer”
- c. The conduct of the employer must be a fundamental or 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.
- d. An objective test is to be applied in evaluating the employer’s conduct.
- e. There must be a causal link between the employer’s conduct and the reason for employee terminating the contract i.e., causation must be proved.
- f. An employee may leave with or without notice so long as the employer’s conduct is the effective reason for termination.
- g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
- h. The burden to prove repudiatory breach or constructive dismissal is on the employee.”
- i. Facts giving rise to repudiatory breach or constructive dismissal are varied.”

Applying the set-out principles above, an employee may without giving an employer notice, leave employment, if the conduct of the employer makes the working environment intolerable or difficult for the employee to continue working. The employee can either choose to give notice or not. In the instant case the respondent did not give any notice and continued to earn salary. The lower court held he absconded duty. This position is set out at Paragraph 28 of Coca Cola case (supra), where the court quoted that:-



“28. In this appeal, we have considered the local and persuasive foreign authorities cited by counsel. The authoritative meaning of constructive dismissal was 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).”

However, looking at the other principle under the said judgment :

“The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach”. An Employee is required after leaving his employment, terminate the employment through resignation to bring the employment relationship to an end, specifying his reasons for leaving employment to have been occasioned by the employer’s conduct. In *Coca Cola* case at Paragraph 27; “.....The employee initiates the termination, believing herself, to have been fired. The employee needs to show that the employer, without reasonable or proper cause conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is regarded as constructive dismissal if the employer’s conduct is a significant breach of the contract of employment and that the conduct shows the employer is no longer interested in being bound by the terms of the contract. There is no practical difference in terms of effect, between the statutory and the common law concept on constructive dismissal; it is unlikely that an employer is in fundamental breach of the contract of employment, but all the same is found to have acted fairly. It is very unlikely that a common law breach occurs without amounting to a statutory wrong. The employee’s resignation is therefore treated as an actual dismissal by the employer and the employee may claim compensation for unfair termination..... The onus of proof in this form of employment termination, unlike in other termination, lies with the employee. While under Sections 43 and 45 of the *Employment Act 2007* the duty in showing that termination was fair is on the employer, constructive dismissal demands the employee demonstrates that his resignation was justified.....”It goes therefore without saying that, even after an employee leaves work without giving any notice, what is required of them is to terminate the contract through resigning within a reasonable time to prevent the assertion by an employer that the employee in fact breached the contract on their part. In the instant case the Respondent never terminated his contract. The Respondent submits he filed a case in court. The learned magistrate found that the Respondent absconded duty and continued to earn salary. The court finds that the respondent never terminated his contract with the Appellant. The court in *Lear Shighadi Sinoya v Avtech Systems Limited* [2017] eKLR held that:-

“On the question of constructive dismissal, this is a case where an employee is placed by the employer under intolerable conditions forcing her to resign from employment. The duty is upon the employee to demonstrate such intolerable circumstances and conditions for the court to make a finding that indeed, placed under such conditions, the employee was



justified in tendering resignation. Such a claim must be pleaded and evidence advanced to this effect.”

The court deduced from the above that an employee must prove they resigned from the employment for a claim on constructive dismissal to stand. Additionally, in *Lear Shighadi Sinoya*(Supra) the court held that: -

“.....The claimant is also at fault. Despite noting that she had not been paid, for her to allege constructive dismissal, this was not to be resolved by failing to attend work without her letter of resignation. Failure to attend work is addressed under section 44 of the *Employment Act* as a matter subject to summary dismissal as it is classified as an act of gross misconduct. Where the claimant found her unable to attend work due to non-payment of her due salaries, she had every right to serve her letter of resignation citing the reasons for the same. To keep out of work and do nothing left the claimants claim for constructive dismissal exposed and compromised.” Where an employee fails to issue a notice of resignation, they are considered to be in employment and their contract of employment in enforce. The contract of employment can only come to an end on termination or through resignation as the case is.” The facts in this matter were different but the jurisprudence on constrictive dismissal remains.”

46. In the instant case the Claimant relied on the demand letter notice to state he had ceased to be an employee. The court then asked itself whether the demand letter amounted to resignation of employment. The court finds that the demand letter sufficiently communicated the intention of the claimant that he had terminated the employment relationship. The court of appeal in *Board of Governors, Cardinal Otunga High School, Mosocho & 2 others v Elizabeth Kwamboka Khaemba* [2016] e KLR upheld a decision of the court where the termination was notified through an advocate’s demand letter.

47. In the instant case the court found the claimant had by his conduct contributed to the act of the employer stopping his salary, issuance of a show cause letter and failure to allocate classes. The Claimant repudiated terms of the contract by failing to resign from the other employer and consequently the court holds that his case did not meet the test of constructive dismissal despite his notice of the cessation of employment vide the demand letter.

On the issue as to whether the Claimant is entitled to the reliefs sought and the collateral issue as to whether this Honourable Court has jurisdiction to grant the said reliefs

48. The claimant relied on the decision of the Court of Appeal with regard to the issue of jurisdiction in *Paramount Bank Limited vs Vaqvi Syed Qamara & Another* (2017) e KLR where the court expressed itself as follows:-

“The preamble to *Employment and Labour Relations Court Act* states that the court is established to hear and determine disputes relating to “employment and labour relations” and “for connected purpose”. Among its powers under section 12, the court hears and determines all disputes relating to and arising out employment and labour relations. It follows therefore that the ELRC is clothed with jurisdiction to entertain not only employment and labour disputes but also any incidental issue (s) that may arise or is connected to employment or labour relations”

49. The Claimant submits that it follows that this Court can validly adjudicate upon and grant all the reliefs sought by the Claimant including the prayer for an award of general damages for the



psychological torture/trauma, financial embarrassment, injury to credit and defamation of character suffered by the Claimant as framed in the statement of claim. That financial embarrassment and injury to the Claimant's credit reputation were the natural, probable and foreseeable consequences of the prolonged stoppage of his entire salary by the Respondent. At Paragraphs 17 to 21 of written witness statement by the Claimant who testified as DW-1, he has clearly documented the manner and circumstances in which he has had to suffer financial embarrassment, injury to credit and psychological trauma as a result of the Respondent's breach. That a look at one of the Claimant's exhibits, namely P. EXH-8 (Family Bank Check-Off Loan Form) confirms as follows:-

- i. That the Claimant took a loan of 4,100,000/- from Family Bank in May, 2022 to be repaid by way of deduction from salaries payable to Claimant by the Respondent.
 - ii. That the officials of the Respondent had countersigned the said loan form as a way of giving an assurance that the Claimant indeed an employee of the Respondent and that loan repayments would be deducted from the salaries he would be receiving from the Respondent.
 - iii. That in fact, the very defence witness Mr. Benard Ooko who testified as DW-1 had appended his name, signature and Respondent's stamp on the said loan form in his capacity as the "Personnel Officer duly authorized to sign for the employer who is the Respondent.
 - iv. That the Respondent can therefore be said to have been very much alive to the negative consequences of loan default that would attend to the stoppage of the Claimant's salary; and
 - v. That the Respondent in fact knew exactly where and how hard the Claimant would be pinched if his salary was to be stopped such that it can even be presumed that the Respondent, represented by the said Mr. Benard Ooko as its personnel officer duly authorized to sign the said loan form, deliberately sought to crystallize the said negative consequences by stopping the Claimant's salary. The timing of the stoppage lends credence such presumption.
50. That in arriving at the quantum of damages payable to the Claimant for the psychological torture/trauma, financial embarrassment, injury to credit and defamation of character suffered, the Court be guided by the principle of judicial precedence including the judgment rendered by the Court of Appeal in *CFC Stanbic Bank Limited v Otieno-Omuga & Ouma Advocates* [2019] e KLR where the High Court's award of Kshs. 6,000,000/- was moderated to Kshs. 3,000,000/- as regards the Claimant's circumstances, the extent and intensity of financial embarrassment, injury to credit and psychological trauma is much wider compared to that obtaining in the case of *CFC Stanbic* (supra) hence the award, and in his view, ought to be not less than Kshs. 4,000,000/- .
51. That the Claimant's reasoning is that he has been constructively dismissed by the Respondent and he has invited this Honourable Court to agree with his reasoning by issuing a declaratory order to that effect. In the response to the statement of claim, the Respondent has objected to the Claimant's reasoning and seems to maintain the position that it has not dismissed the Claimant.
52. Further considering the evidence on record including the particular evidence to the effect that the Claimant has never been issued with any warning, suspension or interdiction letter and that he has been and still remains available and willing to continue lecturing on full-time basis at the Respondent's university should his name be reinstated on the teaching roster. He prayed that should this Honourable Court be inclined to uphold the Respondent's position, it should in the same breath be pleased to grant the undermentioned concomitant additional reliefs which will then fall under the prayer for "any other or further relief that this Honourable Court may deem just and fit to grant in the interest of justice", namely:



1. An order declaring that the Claimant remains to be an employee of the Respondent to date and is therefore entitled to receive full salaries.
2. An order lifting the stoppage of salary and compelling the Respondent to pay the Claimant all salary arrears, being the unpaid salaries accruing as from the month of May, 2022 to date. That doing so will serve to foster the tenets of fair labour practice, create a level playing field where equality of contracting parties is espoused and impel adherence to the rule of law in the employment arena.

The Respondent's submissions

53. The Respondent submits that the Claimant had not tendered any evidence to the effect that he was psychologically tortured, financial embarrassment, injury to credit and defamation of character hence general damages to that effect. The said damages are also not part of the reliefs provided under section 49 of the *Employment Act*, 2007. That the Claimant has not proved that he was constructively dismissed by the Respondent. Lastly, the Claimant cannot seek to introduce new reliefs and or orders at submission stage as parties are bound by their pleadings.
54. The respondent submits that the Claimant has failed to prove that he was constructively dismissed by the Respondent and the Claimant should have waited for disciplinary proceedings to conclude before approaching the Court for redress and urged the court to dismiss the claim with costs.

Decision

55. The court has so far found the Claimant held two positions of employment on permanent and pensionable basis having failed to resign after acceptance of employment with the Respondent. (c-exhibit 1 being offer of appointment accepted by the claimant in writing on the 29th September 2021). The court found that the conduct by the claimant was in breach of the employment contract and further of the *Public Officer Ethics Act*. The court further found that pursuant to the demand letter the claimant stayed away from work.. The court further held that the Claimant's case did not meet the threshold of constructive dismissal as he repudiated the contract by conduct of failing to resign from permanent employment of with Kenya Methodist University. The court further found the stoppage of payment of salary from May to August 25 2022 was improper, as the disciplinary process was not complete and no sanction was in place.
56. On the reliefs sought, the court having found the stoppage of salary was improper the same is awarded as prayed for months of May, June, July and August 2022.
57. The claim for constructive dismissal failed and that would also apply to the claim for notice pay.
58. On the claim for general damages for psychological torture/trauma, financial embarrassment, injury to credit and defamation the court found that the Claimant repudiated the contract with the respondent by failing to resign from previous employment. He still enjoyed salary for full time employment as per D- EXHBIT 2 being letter by the Vice Chancellor of Kenya Methodist University. The claims for financial embarrassment or injury to credit, defamation were hollow in the circumstances. The employer stated the truth that he was holding two positions of employment and if he suffered any credit issues the same were his own doing for being greedy to work on permanent basis with two employers. The conduct was an act of dishonesty by an employee and ground for termination of contract.
59. Consequently, the claim for general damages is dismissed. The court finds that the claimant having left work as per demand letter and his salary having been stopped, the employment relationship between



the parties came to a halt. It is now almost 1 year since then and obviously the relationship based on dishonesty could only have led to one outcome of termination of employment.

60. In conclusion, the court finds and determines that the employment of the Claimant with the Respondent stands terminated and enters judgment to the Claimant against the Respondent being:
 - a. payment of salary for the months of May, June , July and August 2022 as per last pay slip of May 2022 (C-exhibit 2 being Kshs. 170,443.00) minus honoraria of Kshs. 5000 thus Kshs. 661,772.00/- subject to statutory deductions.
61. Due to the conduct of the Claimant with the Respondent, I decline to grant interest and costs in the suit. Each party to bear own costs.
62. Right of appeal in 30 days .
63. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA THIS 13TH DAY OF JULY 2023.

JEMIMAH KELI,

JUDGE.

In The Presence Of:-

Court Assistant : Lucy Wesonga

For Appellant : Tuwei

For Respondent:- Absent

