



Mutahi v County Government of Kirinyaga & 3 others (Cause E048 of 2021) [2023] KEELRC 1992 (KLR) (1 August 2023) (Judgment)

Neutral citation: [2023] KEELRC 1992 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E048 OF 2021
ON MAKAU, J
AUGUST 1, 2023

BETWEEN

DR EUNICE NJOKI MUTAHI CLAIMANT

AND

COUNTY GOVERNMENT OF KIRINYAGA 1ST RESPONDENT

BOARD 2ND RESPONDENT

THE COUNTY SECRETARY, KIRINYAGA COUNTY 3RD RESPONDENT

THE CHIEF OFFICER OF HEALTH, KIRINYAGA COUNTY ... 4TH RESPONDENT

JUDGMENT

1. By a statement of claim dated 7th September 2021, the claimant alleged that her employment as a Medical officer was unfairly and unlawfully terminated by the respondents in September 2020. Therefore she sought the following reliefs:
 - a. A declaration that the claimant's employment was un-procedurally, unlawfully and unfairly terminated.
 - b. A declaration that the Respondents are in breach of the contract of employment comprised in among other documents, the letter of appointment dated 8th July 2019 from the 2nd Respondent to the claimant.
 - c. A mandatory order compelling the Respondents to issue the claimant with a clearance letter confirming that she in no-longer an employee of the 1st Respondent.
 - d. A certificate of service.
 - e. One month's pay in lieu of notice of termination of employment being Kshs.216,670.00.



- f. Twelve (12) months' pay as damages for unprocedural, unlawful and unfair termination of employment being Kshs.2,600,040.00.
 - g. Special damages for breach of contract as particularized hereinabove being Kshs.4,766,740.00.
 - h. General damages on the footing of aggravated and exemplary damages.
 - i. Costs of the suit.
 - j. Interest on (e), (f), (g), (h) and (i) above at court rates from the date of judgment until payment in full.
2. The respondents filed a joint Statement of Response dated 1st December, 2021 denying the alleged termination of claimant's employment and averred that she is the one who absconded duty. They further averred that the claimant performed her work negligently, carelessly, recklessly and endangering lives of patients. Therefore they prayed for the suit to be dismissed with costs.

Evidence

3. The claimant testified as CW1. He adopted her written statements dated 7th September, 2021 and 8th October 2022, and produced as exhibits two bundles of documents dated even dates. In brief, is that she was appointed by the 2nd respondent as a medical doctor Job Group CPSB 07 on 8th July 2019 for a term of 3 years. Her starting salary was Kshs.46,230.00 plus House allowance of Kshs.16,500.00, commuter allowance of Kshs.8,000.00, extraneous allowance of Kshs.30,000.00, call allowance of Kshs.30,000.00, and non-practicing allowance for Kshs.19,000.00 per month. She was also entitled to medical cover.
4. She was first posted to Kimbimbi Sub-county Hospital where she worked until 7th October, 2019 when she was deployed to Kerugoya County Referral Hospital. She was paid all her salary and allowances until August 2020 after which she was removed from the pay roll without any reason or explanation from the respondents. Her visit to the HR Officer to sort out the problem did not bear any fruit.
5. On 13th October, 2020, she wrote a letter to the Principal HR Officer asking for assistance with respect to the unpaid salary. The letter was copied to several offices and they all acknowledged receipt. Thereafter she went to see the Chief Officer in charge of Medical services who told that she had to go for Advisory meeting. She was invited to the Advisory meeting vide the letter dated 15th October, 2020 but the letter did not notify her that the meeting was for disciplinary proceedings nor did it explain his right to be accompanied by another person.
6. The Advisory meeting took place on 21st October, 2020 and she attended without any representative. In her view the meeting was not disciplinary but a cordial meeting to resolve any issues that may have been adversely affecting her performance an response was that her salary had been withheld without and lawful justification, notice or warning. At the end of the meeting, she was told that communication about her salary stoppage would await further discussion and decision by the Advisory committee. She made an audio recording of the proceedings which she transcribed. (See page 1-35 of her supplementary bundle of documents).
7. On 2nd November 2020 she wrote a demand letter to the Principal HR Officer, Health Department for her inclusion to the pay roll within 7 days. The demand letter was not headed to and she wrote another letter to the Principal HR Officer indicating her inability to attend work as a result of withholding of her salary for three months. She also mentioned in the letter the lapse of her medical insurance cover while serving at the Covid-19 ward. On 14th December 2020, the Principal HR Officer responded to



- her demand letter dated 2nd November 2020 notifying her that her removal from the pay roll was due to allegations of gross misconduct of which the Departmental Advisory Committee had referred to the County Advisory Committee for further deliberations and actions.
8. On cross examination she contended that she was a qualified medical doctor with 7 years of training and 5 years working experience. She admitted that soon after joining the respondent, complaints about quality of her work, abusive language, and inability to work in team started. She further admitted that her inability to work with others led to her mobility across three departments. She also admitted that she was called to several meetings from 14th February, 2020 but she never admitted the allegation of being negligent, absconding duty when on call or lack of interpersonal relation with colleagues. She contended that after giving her side of the story during the meeting of 14th February, 2020 the allegations were withdrawn.
 9. She admitted that there was a meeting on 13th January, 2020 and 17th July 2020 to discuss her performance but she was not invited. She admitted that as at 17th July 2020, the Maternity and Surgical Department supervisor had refused to work with. As a result she moved to work at the Covid-19 ward from July 2020 until 16th November, 2020 when she left. She contended that until 16th November, 2020 she was answerable to Dr. Muraguri.
 10. She admitted that she was never given any termination letter and that she never reported back after receiving the respondents' letter dated 14th December 2020. She admitted that she got employed by the Pumwani Hospital after leaving the respondent. She further admitted that she worked for MP Shah Hospital on locum basis from January 2019 to April 2020 while still in the respondents' employment. Finally he admitted that he was not given termination letter by the respondent.
 11. In re examination, she stated that she wrote apology letter dated 18th February, 2020 in respect of the grievances raised by his department. She however denied ever apologizing or admitting any specific allegation of poor performance, negligence or at all. She contended that the apology was a precondition given to her before deployment to another department which was indeed made immediately after the apology letter.
 12. As regards her resignation from the respondent, she stated that the resignation was not voluntary as it was referenced "constructive dismissal." She contended that the letter indicated the reason for leaving respondents as the stoppage of her salary and lack of medical cover while working in the Covid-19 ward.
 13. As regards working in other hospitals, she stated that she was working on locum basis and that did not affect her work schedule at the respondent because she was only required to work for 40 hours per week. She contended that she stopped locum shifts in April 2020 after the government imposed restriction on movement due to Covid-19 Pandemic.
 14. Mr. Norman Njeru testified for the respondents as RW1. He is the respondents' Hospital Manager with responsibility of maintaining efficiency in operation, discipline and finance. He adopted his written statement dated 1st December 2022 as his evidence. He also produced 11 documents in the list dated 15th November, 2022 and 1st December 2022 as exhibits. From the onset, he testified that the respondents never terminated claimant's employment as no letter to that effect was given to her.
 15. RW1 testified that the claimant was employed as a general medical doctor and her first posting was Kimbimbi sub-county Hospital. He testified further that, she was able to do stitches and was absconding duty. As a result she was deployed to Kerugoya County Referral Hospital on 17th October, 2019 for mentorship and close supervision. She was then placed in the Maternity Department but complaints were raised against her including poor performance, absconding duty, failure to attend meetings and use of phone to attend patients. Dr. Kimani, the Gynecologist in charge was among those



who raised complaints and Nancy Muthike, the deputy Nursing Manager prepared a Report following the complaints.

16. As a result the claimant was served with a show cause letter and she responded. However, she never changed but persisted in absconding work, poor interpersonal relationship, poor team work, and abusive language to her juniors. Another report was written on 13th January 2020 about her professional misconduct. The report was forwarded to the County Director of Health who requested for a meeting with the claimant on 29th January, 2020 at the Director's office but she never attended and could not be reached over the phone. Therefore the meeting was rescheduled to 14th February, 2020 at the office of the RW1.
17. She attended the meeting and several allegations were made against her including absconding duty to work elsewhere, failure to attend work when she was on call and instead attending to patient via phone, delaying to reach the hospital from 5pm to 11pm which threatened life of patients and new borns, threatening medical interns, mismanaging a patient who had a wound causing her to stay in the hospital for long period and mismanagement of women in labour at the hospital. The meeting was disciplinary in nature to verify the validity of the complaints and thereafter the claimant wrote a letter dated 18th February 2020 apologizing to Dr. Kimani, the Head Gynecologist for the grievances raised.
18. RW1 further testified that minutes of the meeting were recorded and forwarded to the County Director of Health recommending action to be taken against the claimant. However, Dr. Mburu, Head of Surgical Department offered to mentor on his department. She worked there from February to July 2020 but she was dismissed from the Department for absconding duty on 11th July 2020 when a victim of an accident died. She was called via phone but she never showed up. She was also accused of using abusive language, late reporting for surgery in theater and incompetence.
19. After dismissal of the claimant from the surgical department, a committee was convened to discuss her indiscipline and it resolved that her salary be stopped and her case be referred to the County Advisory Committee. The decision was then communicated to the claimant by the Principal HR Officer.
20. RW1 further testified that none of the Departmental Heads was willing to work with the claimant except in the Covid-19 Isolation Ward where she worked until when she deserted work on 24th October 2020. He testified that he wrote a letter to her because her whereabouts was unknown and she could not be reached via phone. He contended that the claimant's evidence is false and maintained that her conduct was bad, performance poor and she did not relate well with her colleagues and her juniors.
21. On cross-examination, he testified that no meeting was ever called to discuss termination of the claimant's employment. He reiterated that her salary was stopped because she could not perform her duties after all supervisors rejected her due to her discipline issues. He clarified that stoppage of salary did not mean termination of the claimant's employment since the disciplinary process was still continuing.
22. Mr. Moses Murimi Muriithi testified as RW2. He is a Principal HR Officer for the respondents. He adopted his written statement dated 1st December, 2022. His work includes providing technical support to the 4th Respondent. He testified that the claimant was employed by the 2nd Respondent in 2019 and his first posting was Kimbimbi Sub-county Hospital. However, she was transferred to Kerugoya Headquarters because of complaints of indiscipline including absence from work and treating patients using phone calls instead of observing them physically at the hospital. Other complaints included poor relationship with other staff and using abusive language. She also absented herself from work and instead travel to Nairobi to work in other hospitals yet she was engaged by the respondents on full time basis under a 3 years contract.



23. RW2 further testified that the claimant continued with misconduct in her new station at Kerugoya Referral Hospital as a result of which she was served with a show cause letter dated 13th January, 2020. Due to her incompetence and misconduct, she caused death to a new born and mismanaged a female patient leading to her expulsion from Maternity Departmental by Dr.Kimani. She was also rejected by the Dr.Mburu from the surgical Department on ground of incompetence, poor team work and use of abusive language.
24. RW2 further testified that after expulsion by Dr.Mburu in the letter dated 17th July 2020, the claimant disappeared and her whereabouts was unknown. He explained the disciplinary procedure for medical doctor to include, first a meeting with a consultant for guidance; second the case is referred to Hospital Advisory committee; third is Departmental Advisory Committee; fourth is County Advisory Committee; and fifth is referral to the County Public Service Board for determination.
25. RW2 testified that the consultants were unable to help the claimant and they referred the matter to the Departmental Committee which further referred the matter to the County Advisory Committee and recommended for stoppage of the claimant's salary. He explained that the reason by the Departmental committee was because she had defied warnings and continued with misconduct. He further explained that the committee did not recommend for redeployment of claimant to the Covid-19 ward or any other department. He denied that the claimant went to serve in the Covid-19 ward and maintained that her whereabouts was unknown from July, 2020 as no communication was received to the effect that she was working at the Covid-19 Ward.
26. He maintained that the respondents never dismissed the claimant and she also never resigned. He stated that when the County Advisory Committee met over the claimant's matter, it wrote a letter dated 14th December 2020 to the Director of HR to stop the claimant's salary because her whereabouts was unknown. He reiterated that stoppage of salary did not mean that her employment had been terminated and clarified that only the County Public Service Board could terminate her services. He testified that the claimant forged a clearance document from the respondent and went to work at Pumwani Hospital. He testified that he could not clear the claimant when her case was still pending before the Board. He maintained that the claimant was not dismissed but absconded duty to go to Pumwani Hospital to work there in breach of the contract with the respondents.
27. On cross examination, he admitted that after stoppage of salary, the claimant wrote a letter and physically delivered it but her whereabouts remained unknown. He testified that the claimant was given letter dated 15th October 2020 inviting her to attend Advisory Committee meeting. He explained that the meeting was not disciplinary meeting but the outcome would have disciplinary consequences. He further stated that the County Public Service Board will consider the Advisory Report and determine the matter after giving the claimant a chance to defend herself.
28. He reiterated that the claimant was employed on full time basis for three years but absconded leading to stoppage of her salary from September 2020. He contended that the stoppage was recommended by the hospital after she was expelled from the Surgical Department and the Director HR effected the recommendation. He admitted that his letter dated 14th December, 2020 stated that the salary stoppage was a disciplinary measure pending decision by the County Advisory Committee. He admitted that the pay to the claimant was up to 31st August, 2020.
29. In reexamination, he stated that the respondents' HR Manual is a public document and it is in the public domain. He reiterated that the claimant disappeared after dropping her letter to the office. He further testified that when the claimant attended Advisory meeting, she was properly briefed about her rights and thereafter she wrote an apology.



30. RW3 was Mr. Tom Nyambisa Nyatika, the respondents' Director HR Management. He adopted his written statement dated 14th November 2022 as his evidence. He admitted that his office implemented the stoppage of the claimant's salary for reason of misconduct of failure to report to duty, lack of professional conduct and poor team work. He stated that the stoppage of salary was in accordance with the HR Manual and the *Employment Act*. He stated that no resignation letter was received from the claimant nor the clearance from the RW2 since her disciplinary proceedings had not been concluded
31. He further testified that the claimant did wrong by going to work for Pumwani Hospital while she was employed by the respondents' on full time basis for 3 years. He further stated that it was wrong for the claimant to audio record the proceedings of the committee without permission.
32. On cross examination, he denied knowledge that the claimant resigned. He contended that had the claimant succeeded in her disciplinary case, she would have been paid the withheld salary. He clarified that the stoppage of salary effective 1st September 2020 was only an interlocutory measure to stop wastage of public resources.
33. In reexamination, he reiterated that as at the time the claimant moved to work at Pumwani Hospital, she had not resigned from the respondents' employment and her disciplinary proceedings at the respondents had been concluded. Finally, he testified that the claimant was not at her place of work as at the time when her salary was stopped and therefore she could not be notified of the stoppage before it was effected.

Submissions

34. It was submitted for the claimant that her employment was terminated by the respondents when they stopped her salary from September, 2020 and thereby made to leave employment. It was argued that the said action amounted to constructive dismissal of the claimant. To fortify the above submission, several precedents were cited including Coca Cola East & Central Africa Limited v Maria Kagai Ligaga (2015) eKLR where the Court of Appeal gave the meaning of constructive dismissal.
35. In view of the foregoing matters it was submitted that the claimant is deserving of the reliefs sought. It was argued that the claimant's right to fair remuneration and reasonable working conditions under Article 41 of *the Constitution* was violated by the withholding of her salary. Consequently, it was submitted that the claimant is entitled to compensation as prayed in the suit.
36. As regards the admissibility of the Transcript and screen shots at page 1-35 of the claimant's supplementary bundle of documents, it was submitted that they are admissible evidence because it is accompanied by certificate of Electronic Evidence as required under section 106 B (4) of the *Evidence Act*. For emphasis reliance was placed on several precedents including George Gabriel Kiguru & another v Republic (2022) eKLR.
37. It was further argued that no evidence was adduced by the respondents to dispute the contents of the transcript or screenshots or the accuracy of the information contained therein. For emphasis, reliance was placed on the case of Francis Njeru Zakayo v Chemsolve Cleaning Services Limited (2021) eKLR where a transcript was admitted as evidence.
38. On the other hand, it was submitted for the respondents' that the stoppage of the claimant's salary was justified and it did not amount to termination of her employment contract. It was submitted that there is evidence on record that Human Resource ad hoc committee was convened on 4th August, 2020 to investigate the conduct of the claimant and it recommended that her salary be stopped from 1st September 2020 pending hearing by the Advisory committee. The stoppage was justified because the



claimant was not working after being rejected by all the departments. The claimant was duly notified of the decision as evidenced by the screenshots she has produced as evidence.

39. It was submitted that the decision to halt the salary was within the law and in accordance with paragraph 13 of the PSC Human Resource Manual 2016 and section 65 (2) (a) (v) of the *Public Service Commission Act* of 2017. It was clarified that as at the time the claimant absconded, her salary had been withheld for only 2 months.
40. It was further submitted that the stoppage of salary did not amount to constructive dismissal, and that the burden of proof of constructive dismissal lies with the employee as per the Court of Appeal decision in the Coca Cola East & Central Africa Limited case, supra. It was argued that the claimant never tendered any resignation but just absconded work; and that resignation is a crucial element of constructive termination without which such claim cannot succeed. Besides, it was argued that the stoppage of salary was part of the respondents' disciplinary measure under the HR Manual pending outcome of the Advisory committee and as such it was not irrational or unreasonable. Consequently, the court was urged to find that stoppage of salary was not constructive dismissal or the claimant especially considering that it was only for 2 months.
41. On the contrary, it was submitted that claimant's decision to leave the respondents' employment to work for the Nairobi Metropolitan Services (Pumwani Hospital) was intended to scuttle disciplinary proceedings against her. It was further submitted that during the pendency of her disciplinary case, the claimant sought court orders requiring the respondents to de-register her from their system and pay roll to allow her details to be migrated to the Nairobi Metropolitan Services System. In the respondents' view, the claimant was still in their employment and they had no intention of dismissing her as at the time she filed suit in court.
42. As regards the transcript produced by the claimant, it was submitted that they are inadmissible as they are tainted with illegality and offends section 29 of the Data Protection Act which require that consent be given by the people in the meeting. For emphasis, reliance was placed on Shakunt Rajnikant shah t/ a John Cumming & Company & another (2021) eKLR where the court held that the petitioner had an obligation pursuant to section 29 of the Act to satisfy the court that the respondents were informed that the deliberations were being recorded. In the instant case, it was submitted that the claimant did comply with section 29 of the Act and therefore the transcript should not be admitted whether or not it has any probative value.
43. In view of the matters raised in the above submissions the court was urged to find that the claimant is not entitled to any relief and proceed to dismiss the suit with costs.

Issues for determination

44. There is no dispute from the material before the court that the claimant was employed by the 2nd respondent as a medical doctor for a term of 3 years from July 2019 subject to her performance. There is also no dispute that the claimant was accused of misconduct and poor performance and was served with show cause letter and even called to appear before Departmental committee to explain herself. Finally it is a fact that by a letter dated 16th November 2020, the claimant notified the Principal HR Officer Kerugoya County Referral Hospital of her inability to attend to her work station due to her unpaid 3 months' and lapse of her medical cover. The issues for determination are:-
 - a. Whether the claimant was constructively dismissed by the respondents' or she absconded her work.
 - b. Whether claimant is entitled to the reliefs sought.



Constructive dismissal or absconding

45. The claimant's case is that by the respondents withholding her salary from September 2020, they committed a repudiatory breach of her contract of employment and that amounted to a constructive dismissal. However, the respondent's case is that the claimant absconded duty and secured an alternative job to evade pending disciplinary process commenced against her for misconduct and poor performance.
46. I have carefully considered the evidence and the submission filed by both sides including the supplementary submissions filed by the claimant. There is no dispute that the claimant's salary was stopped with effective from 1st September 2020 and as at 16th November 2020 when she wrote her protest letter, the salary for September and October 2020 had not been paid to her. The respondents alleged that the reason for the stoppage of the salary was because the claimant was not discharging her duties and that a decision was being awaited from the County Advisory Committee about her disciplinary case. The respondent further contended that stoppage of salary was an interlocutory measure sanctioned by the HR Manual pending determination of an employee's disciplinary case.
47. I have made several observations from the respondents' case. First, RW1 confirmed in his evidence under oath that the claimant was deployed to work at the Covid-19 Isolation Ward in July 2020 after she was expelled from the Surgery Department. The said admission corroborates the claimant's evidence that from July to November, 2020 she was working in the Isolation ward. The respondents did not call the person who was in charge of the isolation ward during the pandemic to rebut the evidence by the claimant and the RW1. To that extent I find and hold that the claimant was denied her salary while on duty.
48. The other observation I have made is that the Respondents did not produce the County HR Manual to prove that the stoppage of salary pending disciplinary hearing was sanctioned by the HR Manual. However, during the submissions, the respondents referred to paragraph 13 of the Public Service Commission HR Manual, 2016 and section 65 (2) of the *Public Service Commission Act*, 2017 as the basis for the salary stoppage pending a decision by the County Advisory Committee. The claimant, in her supplementary submission objected to the new evidence which was not produced during the hearing and which was not backed by any pleadings. She, therefore urged the court to disregard the same.
49. I agree with the claimant that the reference to the PSC HR Manual 2016, is new piece of evidence which was not produced during the hearing and it was not pleaded in the defence. There is also no proof that the said PSC HR Manual was applicable to the employees of the 2nd Respondent. Without such evidence, I find and hold that withholding the claimant's salary while on duty and pending her disciplinary process was not sanctioned by the law or contract. Even if the claimant had been interdicted from work, she would still be entitled to her salary pending determination of her case.
50. The court appreciates the respondents' frustration while dealing with an indisciplined employee who is also a poor performer, in the face of a lengthy disciplinary process which starts with departmental proceedings, then County Advisory Committee and finally at the County Public Service Board. However, stoppage of salary was not the right option to take because it rendered the hunter to become the hunted.
51. Simply put, the conduct of the respondents amounted to breach of the contract of employment and entitled the claimant to treat the contract as constructively terminated and withdraw her labour. As clearly penned in her letter dated 16th November, 2020, she was no longer unable to attend to her work station due to withholding of her salary for September and October 2020.



52. Based on the line of thought in the numerous precedents cited in the submissions herein, it is clear that where an employer by his conduct, renders the continuation of the employment relationship intolerable for the employee, to the extent that the employee has no other option but to resign, then constructive dismissal is deemed to have occurred. The exit by the employee in such circumstances is not voluntary and it matters not her conduct before the exit. Once it is demonstrated by evidence that the employee left due to the intolerable conduct or breach by the employer, then a case of constructive dismissal is established.
53. In this case the respondents contended that they had not concluded the disciplinary process against the claimant and as such they could not have terminated her employment. Therefore they blamed the claimant for absconding work to work elsewhere. They further argued that the claimant went as far as filing suit and obtained orders to compel them to clear her in order to go and work for the Nairobi Metropolitan Services.
54. In my view the filing of the suit had nothing to do with the constructive dismissal. It only corroborated the decision by the claimant to exit the respondents' service for their intolerable conduct and repudiatory breach of her contract by unlawfully withholding her salary. The respondent contended that withholding claimant's salary for only two months was not a basis to allege constructive dismissal.
55. However, in my view the claimant was entitled to her opinion that two months without salary was unreasonably long period considering that she needed money for transport, housing and other personal needs. Besides being attached to work at a Covid-19 Isolation Ward without a medical cover was exposing the claimant to serious health risk.
56. Having considered the evidence presented to the court and the submissions, I find and hold that the claimant has proved her case of constructive dismissal on a balance of probability. The court does not agree that the exit of the claimant in November 2016 was intended to circumvent the pending disciplinary proceeding. The facts before the court are clear that the claimant left the respondents' employment due to the unlawful withholding of her salary for over two months and failure to renew her medical cover while she was working in a risk isolation ward.
57. The said action was taken against her without any prior hearing. According to her unrebutted evidence, she was secretly omitted from the pay roll from September 2020 and only learned about it when her salary failed to reach her pay point. The claimant filed transcript and screenshots from her phone to support her case but the respondents objected. I have read through them but I do not see much relevance in them. Their admissibility or otherwise does not affect my finding that the claimant has proved a case of constructive dismissal against the respondents.

Reliefs

58. In view of the foregoing, I make declaration that the claimant was constructively dismissed and therefore her employment was unfairly and unlawfully terminated. I further make declaration that the respondents breached the claimant's contract of employment.
59. The claimant prayed for one month salary in lieu of notice plus 12 months' salary as compensation for unfair termination. Section 49 read with 50 of the *Employment Act* gives the court the discretion to award compensatory damages up to a maximum of 12 months gross salary for unfair termination. However, in this case the claimant contributed to her termination through misconduct which saw her expelled from all the Hospital departments except the Covid-19 Isolation Ward. Secondly, it is evident that she was able to mitigate loss by securing another employment. She also served the respondent



for about just one year. Having considered the above factors, I decline to award the claimant any compensation for the unfair termination under section 49 and 50 of the *Employment Act*.

60. The claimant further prayed for special damage of Kshs.4,766,740.00 being salary for 22 months before the expiry of her contract. However, the court awards her only salary for September, October and November 2020 because thereafter she left the respondents' employment. Besides no evidence was tendered to support her claim for the salary for the remainder of the contract term. Further, even if such evidence existed, the claim would still fail because she secured another job soon after leaving the respondents.
61. The claimant also prayed for aggravated and exemplary general damages but the same is not well founded and is declined. I also grant the prayer for certificate of service because it is a right under section 51 of the *Employment Act*.

Conclusion

62. I have found that the claimant's employment was constructively terminated by the respondents by withholding her salary for two months without any legal or contractual basis. I have further found that the said action by the respondents amounted to breach of the claimant's contract of employment and unfair termination thereof. However, I have declined to exercise my discretion to award the claimant compensatory damages due to her history of misconduct during her employment by the respondents. Finally, I have awarded the claimant unpaid salary for the month of September, October and November 2020 equaling Kshs.650,010.00 only plus a certificate of service as prayed. Consequently, I now enter judgment in favor of the claimant as against the respondents' declaring that she was a victim of constructive dismissal, and awarding her a sum of Kshs.650,010.00 plus costs and interest at court rates from date of this judgment. The award is subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NYERI THIS 1ST DAY OF AUGUST, 2023.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

