



**Mawia v Camusat (K) Limited (Cause 235 of 2020)
[2023] KEELRC 2118 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2118 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 235 OF 2020
L NDOLO, J
SEPTEMBER 21, 2023**

BETWEEN

RUTH MAWIA CLAIMANT

AND

CAMUSAT (K) LIMITED RESPONDENT

JUDGMENT

1. By her Statement of Claim dated 10th June 2020, the Claimant sued the Respondent for unlawful and unfair termination of employment. The Respondent filed a Response dated 22nd July 2020.
2. At the trial, the Claimant testified on her own behalf and the Respondent called Nancy Barongo. Both parties also filed written submissions.

The Claimant’s Case

3. The Claimant was employed by the Respondent in the position of Financial Controller on a two-year renewable contract, effective 24th April 2013.
4. The Claimant claims to have been subjected to harassment and discrimination, in the course of her employment with the Respondent. She accuses her superior, one Ms Aida of treating her in a disrespectful, abusive and condescending manner, thus creating a hostile work environment.
5. The Claimant states that in August 2019, she was summoned by the Human Resource Manager to answer to charges of non-performance. She adds that she made inquiries regarding the specifics of non-performance but none were supplied. All she was told was to consult more with Ms Aida. According to the Claimant, her immediate supervisor, Samuel Kioko had no complaint against her.
6. The Claimant complains of an unfair distribution work and unreasonable deadlines. She further complains of unexplained deductions on her net salary, causing her financial strain.



7. On 2nd March 2020, the Claimant was issued with a new contract. According to her, the new contract indicated a wrong date of her employment and varied terms.
8. The Claimant was particularly concerned about the backdating of the execution date of the contract to 28th April 2015. Being a five (5) year fixed term contract, it would lapse on 29th April 2020. The Claimant accuses the Respondent of fabricating the contract dates to ensure its expiry on 30th April 2020 and therefore set the basis for termination of her employment. The Claimant did not sign the new contract.
9. The Claimant avers that on 8th April 2020, while she was on maternity leave, she received a phone call from the Human Resource Manager, one Ms Nancy informing her that her contract would not be renewed at the end of April 2020. On 9th April 2020, the Claimant was issued with a letter to that effect. She maintains that her contract was to expire in the year 2021.
10. The Claimant states that she secured another job on 22nd April 2020 and on 29th April 2020, the Respondent wrote to her recalling its letter dated 9th April 2020. The Claimant's Advocates responded by notifying the Respondent that the Claimant had secured another job but was amenable to negotiating a new contract with the Respondent.
11. The Claimant lays a claim of unfair termination of employment and now seeks the following remedies:
 - a. A declaration that the Respondent's decision as contained in letter dated 9th April 2020 amounted to unlawful and unfair termination of employment;
 - b. A declaration that the Claimant was constructively dismissed from employment;
 - c. One month's salary in lieu of notice;
 - d. Payment for leave days earned but not taken;
 - e. 12 months' salary being payment for the unexpired term of the contract;
 - f. Damages for unlawful unfair termination;
 - g. Costs plus interest.

The Respondent's Case

12. In its Response dated 22nd July 2020, the Respondent admits having employed the Claimant on a two-year renewable contract. The Respondent however states that the parties did not execute a revised contract upon the lapse of the initial contract on 29th April 2015. According to the Respondent, the Claimant legitimately remained its employee on the terms contained in the employment contract dated 29th April 2013.
13. The Respondent counters the Claimant's claim of discrimination. In particular, the Respondent denies that the Claimant was harassed by Ms Aida.
14. The Respondent further denies the Claimant's averment that she was summoned by the Human Resource Department in August 2019 for non-performance. The Respondent claims to have a policy not to subject a pregnant employee to performance review. The Respondent denies the accusation of creating a hostile work environment for the Claimant.



15. The Respondent also denies the Claimant's claim of unlawful deductions from her salary but admits receiving a query from the Claimant regarding deductions on account of Sacco and bank loans in December 2019. The Respondent adds that the error was promptly corrected.
16. The Respondent admits that the Human Resource Manager, Nancy Barongo sent the Claimant a new contract on 2nd March 2020 for her execution and return. The Respondent explains that its Human Resource Department had embarked on a clean-up exercise of its employee database and adds that the contract issued to the Claimant on 2nd March 2020 was to regularise her employment records. The Respondent avers that the five (5) year contract presented to the Claimant was issued in error and was therefore not executed.
17. The Respondent further admits that Nancy Barongo had a conversation with the Claimant on 8th April 2020 followed by a letter dated 9th April 2020 on non-renewal of the Claimant's contract.
18. The Respondent pleads that on 28th April 2020, the Claimant was informed that the notice of non-renewal of her contract had been rescinded and the Claimant was paid her dues for April, May and June 2020, by virtue of the fact that the letter dated 9th April 2020 was issued in error. The Respondent points out that at the time, the Claimant was on maternity leave that was to end on 2nd June 2020.
19. The Respondent denies the Claimant's claim of constructive dismissal and states that the Claimant was summarily dismissed on 17th July 2020 for absconding duty.

Findings and Determination

20. There are two (2) issues for determination in this case:
 - a. Whether the Claimant has made out a case of unlawful termination of employment;
 - b. Whether the Claimant is entitled to the remedies sought.

The Termination

21. On 17th July 2020, the Respondent wrote to the Claimant as follows:

“Dear Ruth,

RE: SUMMARY DISMISSAL

The above subject refers.

On 8th July, 2020 the management forwarded to you a Notice to Show Cause requesting that you explain why disciplinary action should not be taken against you for absconding your duties for reasons that you were to report to duty on 2nd June, 2020 but you did not.

The disciplinary meeting was to be held on 14th July, 2020 and the disciplinary committee considered this matter and noted that you were to resume duty on the 2nd June, 2020 after your maternity leave but did not do so and you are neither working from home and/or contacting your supervisors or Human Resource Department for assignment of work.

It was also noted that you started clearance procedure on 26th June, 2020 without knowledge of the Human resource and a whereabouts letter dated 3rd July, 2020 was shared to you and your lawyers to which you both acknowledged receipt but no response was shared as per the specified period. A notice for attendance of a disciplinary meeting dated 8th July was also



shared requesting you to attend the meeting on 14th July 2020 at 10:00 a.m to which you acknowledged receipt but no response was shared as well.

The disciplinary meeting was held on 14th July, 2020 and upon careful consideration of the facts and circumstances of your absence from duty reached a finding that your services be summarily dismissed (sic) for abscondment of duty.

In view of the above your final day of service at the Company will be 17th July, 2020.

You will be paid your final dues in accordance with your employment contract and the employment laws upon calculation less any amount of money you could owe the company or any other liabilities you may hold with the company after ensuring you have cleared with and handed over all company property and equipment to your immediate supervisor as follows:-

21 days of annual leave

The above dues will be subject to statutory deductions and the net amount payable will be transferred to your bank account in the usual manner. You will also be issued with a Certificate of Service in accordance with the provisions of the [Employment Act, 2007](#).

We thank you for the service that you have rendered to the company and we wish you all the best in your future endeavors.

Yours sincerely,

(signed)

Nancy Barongo

HR-CSR and EHS Manager”

22. The reason given for the Claimant’s dismissal is abscondment of duty. From the evidence on record, it emerges that the dispute between the parties was triggered by a new contract issued to the Claimant on 2nd March 2020, with a backdated commencement date. As a follow up to this contract, the Claimant was served with a notice of non-renewal of contract on 9th April 2020.
23. The Respondent concedes that both the impugned contract and the non-renewal notice were issued in error. It is also on record, that the Respondent recalled the non-renewal notice by letter dated 28th April 2020. By this time, the Claimant had secured alternative employment, which according to her, offered better terms. She therefore asked the Respondent to enhance her terms of service but the Respondent declined.
24. The Claimant did not resign but she did not report back to work upon expiry of her maternity leave on 2nd June 2020. She was issued with a show cause letter on account of abscondment of duty to which she did not respond.
25. In its final submissions, the Respondent referred to the decision in Jared Ajimba v Fina Bank Ltd (Industrial Cause No 525 (N) of 2009) where it was held that an employee who declines to participate in a disciplinary process cannot turn around and claim unfair termination of employment.
26. It is on record that the Claimant continued to earn salary from the Respondent beyond 2nd June 2020, when her maternity leave ended. She could not therefore lawfully refuse to participate in a disciplinary process initiated by an employer from whom she continued to earn a salary.



27. The Claimant chose not to respond to this serious failure on her part but instead focussed on the impugned contract and non-renewal notice out of which she attempted to make a case of constructive dismissal. It is however on record that the contract was not executed and the non-renewal notice was withdrawn before commencement of these proceedings.
28. The Claimant herself admitted before the Court that she did not report back to work after expiry of her maternity leave and she did not participate in the disciplinary proceedings initiated by the Respondent.
29. I do not need to say more; having chosen not to participate in the disciplinary proceedings commenced by her employer, the Claimant has no basis to complain that her employment was unlawfully terminated.
30. The result is that the claims for compensation, damages and notice pay are without basis and are disallowed.
31. In the letter of summary dismissal dated 17th July 2020, the Respondent unequivocally states that the Claimant is entitled to 21 days' leave pay.
32. I therefore enter judgment in favour of the Claimant in the sum of Kshs. 64,680 being 21 days' leave pay.
33. This amount will attract interest at court rates from the date of judgment until payment in full.
34. Each party will bear their own costs.
35. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2023

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JUDGE

Appearance:

Mr. Achach for the Claimant

Mr. Chenge for the Respondent

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