



**Musembi v Paksa Construction Limited (Cause 817 of 2019)
[2023] KEELRC 2625 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2625 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 817 OF 2019
MN NDUMA, J
OCTOBER 26, 2023**

BETWEEN

CATHERINE MBINYA MUSEMBI CLAIMANT

AND

PAKSA CONSTRUCTION LIMITED RESPONDENT

JUDGMENT

1. The claimant filed suit on 4/12/2018 as against the respondent seeking a declaration that she was constructively dismissed from employment by the respondent and that she be paid terminal benefits in the sum of Kshs.320,000 in arrear salary. That the Court compensates the claimant for the unlawful dismissal and grants interest and costs to the claimant.
2. The claimant (C.W.1) testified that she was employed by the respondent on 1/4/2018 as an Accountant and that she worked continuously until 1/8/2019 when she wrote a letter of resignation to the respondent giving the respondent two months' notice of resignation effective 30/9/2019.
3. That upon expiry of her notice, the respondent had not hired someone to replace her and therefore requested to engage the claimant on a three months' contract effective 1/10/2019 to enable the claimant train and hand over to the successor.
4. That sometimes in October, 2019, the claimant received information that one of the employees of the respondent was defrauding the respondent by presenting forged invoices for payment to the respondent's clients. That C.W.1 immediately notified the supervisor and the respondent's director for information. In light of the information, C.W.1 had volunteered, the respondent invited the police to investigate the matter and C.W.1 recorded a statement.
5. C.W.1 also prepared a detailed report of the matter and handed to the respondent.



6. That on 11/11/2019, in a strange twist of events, the police bonded C.W.1 to appear in Court in case they preferred any criminal charges against her. That the police have never charged C.W.1 to-date.
7. On 13/11/2019, the respondent wrote a letter of suspension to C.W.1 requiring her to attend a hearing on 20/11/2019. That on 19/11/2019, C.W.1 through her advocate wrote to the respondent requiring the respondent to pay her salary arrears and to furnish the claimant with particulars and information regarding the nature of the hearing she was to face to enable her prepare herself. That the claimant had no access to any company resources at the time of suspension. The respondent did not respond to the claimant's request.
8. On 20/11/2019, the claimant attended the scheduled hearing at the respondent's premises and one Mellisa Owayo informed the claimant that the respondent had indefinitely rescheduled the hearing in light of the letter of demand dated 19/11/2019 and that C.W1 was to remain in suspension.
9. On 28/11/2019, C.W.1 demanded payment of her salary and lifting of the indefinite suspension since no steps had been taken thus far but that did not happen. C.W.1 states that the indefinite suspension amounted to constructive dismissal and fundamental breach of the contract of employment. The claimant filed the suit and prays to be awarded accordingly.
10. Under cross-examination the claimant admitted that she had resigned from employment on 1st August, 2019 ending the contract on 30th September, 2019. C.W.1 admitted that she then was re-engaged on a 3 months' contract of service with effect from 1/10/2019 and was due to end on 31/12/2019. That the contract was terminable by either party by giving two weeks' notice. That it was during this period when the claimant was suspended upon being suspected for being involved in fraudulent activities and matter was reported to the police. The claimant said that she was entitled to payment of her salary while on suspension which was not paid and no disciplinary action was conducted against her. The claimant stated that she was owed Kshs.330,000 in arrear salary and had not been paid to-date.
11. R.W.1 Osman Batur relied on a witness statement dated 6/2/2020 and bundle of documents marked exhibits '11' to '14'. R.W.1 said that the claimant came to Court before the respondent had conducted a disciplinary hearing against her for suspected fraud. That she had been placed on suspension while the police were investigating the matter. R.W.1 said that the respondent did not give the claimant a notice to Show Cause. That she was placed on suspension and went to Court before the process ended. That the claimant was paid upto October, 2019. That as per the letter of suspension, the claimant was to be paid while on suspension. R.W.1 stated that they did not pay the claimant salary for November, and December, 2019. R.W.1 stated that the claimant was not charged with any offence.
12. R.W.1 admitted that on 19/11/2019, the respondent had received a letter from the claimant's advocates requesting for documents. R.W.1 stated that he did not remember if the respondent provided the documents to the claimant. R.W.1 said that on 3/12/2019, the respondent wrote to the claimant's advocate indicating the issues subject of disciplinary hearing and seeking clarification on the issue of representation to enable the respondent conduct a disciplinary hearing considering that the claimant was still an employee of the respondent although under suspension. R.W.1 said that the claimant's advocate did not respond to their letter until the matter went to Court.
13. The respondent prays that the suit be dismissed with costs.

Determination

14. The parties filed written submissions and the issues for determination are:-



- (a) Whether the claimant completed the three month's contract of employment entered between her and the respondent on 1/6/2019 and if not whether the said contract was unlawfully terminated.
- (b) Whether the claimant is entitled to the reliefs sought.
15. It is common cause that the claimant was employed by the respondent on 1/4/2019 at a monthly salary of Kshs.110,000. It is not in dispute that the claimant resigned from the said engagement by a letter dated 1/8/2019 giving the respondent two months' notice of termination effective on 30/9/2019.
16. The claimant served the notice and the engagement between the claimant and respondent came to an end.
17. According to the claimant, she was requested by the respondent to hold on for a period of three months to receive her successor and induct her into the job. That the claimant and respondent entered into a three month's fixed term contract on 1/10/2019 which was to end on 30/12/2019. The claimant was however placed on suspension on 13/11/2019 upon being reported to police by the respondent for suspected fraud.
18. It is common cause that the claimant was not charged with any offence by the police. Meanwhile, the respondent failed to pay the claimant salary for November, and December, 2019 while she was under suspension.
19. The claimant remained under suspension until when she filed this suit. Though there were attempts to conduct disciplinary hearing against the claimant by the respondent, no notice to show cause was sent to the claimant to answer any charges preferred against her by the respondent nor was any disciplinary hearing conducted against her. The respondent meanwhile failed to pay the claimant any salary for the month of November and December, 2019.
20. The Court finds that the respondent breached the contract of employment by not paying the claimant for the months of November, and December, 2019. The Court is satisfied that the claimant was paid salary for the month of October, 2019.
21. Accordingly, the Court grants the claimant Kshs.220,000 being arrear salary for the month of November, and December, 2019.
22. In the words of the claimant, she was only asked to hold over and induct a new accountant having resigned from her employment with the respondent. The claimant had no intention of starting a new employment relationship with the respondent for a period longer than the three months' contract from 1/10/2019 to 30/12/2019. The claimant served the entire period of the three months contract albeit under suspension until when she filed the suit. By failing to conclude the disciplinary process against the claimant, the respondent forced the claimant out of the three months' contract unlawfully.
23. The Court finds that the claimant was entitled to payment of one month's salary in lieu of termination notice of three months' contract, since the indefinite suspension persisted until the three months' contract came to end.
24. The Court awards the claimant, one month's salary in lieu of notice in the sum of Kshs.110,000.
25. There was no intention that the relationship between the claimant and the respondent was to continue beyond 30th December, 2019. The Court finds that an award of three months' salary in the sum of Kshs.330,000 is sufficient compensation for the breach of the remaining two months' term of the



contract between the parties and any award of compensation for the premature termination of the three months contract is not warranted in the circumstances of this case.

26. Accordingly, judgment is entered in favour of the claimant against the respondent as follows:-

- (a) Two months arrear salary in the sum of Kshs.220,000.
- (b) One month salary in lieu of termination notice in the sum of Kshs.110,000.
Total award Kshs.330,000.
- (c) Interest at Court rates from date of judgment till payment in full.
- (d) Costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 26TH DAY OF OCTOBER, 2023.

MATHEWS N. NDUMA

JUDGE

Appearance

Mr. Maina for claimant

Mr. Adan for the Respondent

Ekale: Court Assistant

