



**Aura v Transnile Enterprises Limited (Cause 280 of 2019)
[2023] KEELRC 2640 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2640 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 280 OF 2019
MN NDUMA, J
OCTOBER 19, 2023**

BETWEEN

JOSEPH AURA CLAIMANT

AND

TRANSNILE ENTERPRISES LIMITED RESPONDENT

JUDGMENT

1. The suit is premised on amended statement of Claim dated 29/7/2019. The claimant seeks the following reliefs:-
 - (a) A declaration that the Respondent unfairly and unlawfully constructively dismissed the claimant.
 - (b) Compensation in accordance with Section 49 of the *Employment Act*, 2007 in a sum of Kshs.3,600,000 net being the Claimant's 12 months' salary for the constructive dismissal.
 - (c) Payment of outstanding salary arrears amounting to kshs.1,874,838.71 pursuant to Section 49 of the *Employment Act*.
 - (d) Payment of unpaid house allowance in accordance with Section 31 of the *Employment Act*, 2007, in the sum of Kshs.1,201,560 for a period of (19) months at the standard rate of 15% of the basic pay.
 - (e) Payment of Kshs.300,000/= net being service pay pursuant to Section 36 of the *Employment Act*.
 - (f) General damages for discrimination.
 - (g) Issuance of a certificate of service that complies with Section 51 of the *Employment Act*, 2007.
 - (h) Costs of the suit.



- (i) Interest on the above until payment in full.
2. The respondent filed Amended Statement of Defence dated 15/10/2019 in which the claim is denied in toto. The claimant filed a reply to the amended statement of defence dated 6/11/2019 in which the claim is restated and issues joined.
 3. The claimant (C.W.1) testified that he was employed by the respondent by a contract dated 14/6/2017 in the position of Engineer at a monthly salary of Kshs.300,000.
 4. That the respondent breached the contract of employment by failing to pay the claimant his monthly salary from the month of April, 2018 to 16th January, 2019 in the sum of Kshs.1,874,838.71.
 5. That the claimant made several complaints to the respondent and meetings were held with the directors of the company over the issue of salary arrears but claimant states that he only got false promises.
 6. That the respondent made a deposit of Kshs.980,000 to the claimant's bank Account in November, 2018. The claimant made a complaint regarding the unpaid balance on 5/11/2018. That the respondent's directors kept on making false promises to the claimant that they would pay the balance as soon as possible yet they had sufficient funds in their accounts to pay the salary arrears. That on 14/11/2018, Mr. Abdul Kader Mohammed promised to clear the outstanding salary in one week's time.
 7. That out of frustration, the claimant sought assistance of a labour officer who wrote an SMS to the director Mr. Jamil on 13/12/2018 directing the respondent to pay the claimant the outstanding salary.
 8. Upon receipt of the SMS from the Labour office, the respondent wrote a Show Cause letter dated 12/12/2018 to the claimant asking the claimant to show cause why his employment should not be terminated for being absent from work. C.W.1 stated that he was on his annual leave at the time and was shocked by the false allegation of absence.
 9. The claimant responded to the Show Cause letter on 20/12/2018 and denied the false allegations. The respondent did not pursue the disciplinary case against the claimant.
 10. The Labour Officer wrote to the respondent demanding that the respondent pays the claimant arrear salary and informed the respondent that it was engaged in unfair labour practice by sending a notice to Show Cause to the claimant which was victimization for reporting his matter to the Labour Officer.
 11. Sometimes at the end of 2018, the respondent hired one Engineer David Mugo who was carrying out the roles assigned to the claimant and this led to duplication of duties and conflicts. The respondent did not explain to the claimant why they had hired a person to duplicate his duties. The claimant stated that he felt frustrated, harassed and was in pain and was unable to tolerate the unfair labour practices aimed at him any longer. That the claimant tendered his resignation accordingly upon considering the situation and work environment no longer tenable. The claimant testified that the conduct by the respondent towards him amounted to constructive dismissal, which was unlawful and unfair and seeks the reliefs set out in the Statement of Claim.
 12. The letter of resignation is dated 16/1/2019 in which the claimant demanded payment of arrear salary in the sum of Kshs.1,874,838.71.
 13. The respondent acknowledged the letter of resignation by a letter dated 17/1/2019 and admitted owing the claimant arrear salary and promised to pay the same at the end of the month when processing the payroll for all the other employees. That the respondent had not paid the arrear salary to-date despite paying the rest of the staff. That this conduct amounted to discrimination in violation of



Section 5 of the *Employment Act*, 2007 and Article 27 of *the Constitution*. In January, 2019, the respondent paid salary arrears for the month of October, 2018 to November, 2018 and December, 2018 to all staff except to the claimant. Despite a complaint made to Mr. Jamil, the respondent has failed to pay the arrear salary.

14. That the respondent irregularly remitted National Hospital Insurance Fund (NHIF) and National Social Security Fund (NSSF) dues for the claimant and failed to remit Pay As You Earn (PAYE). That NSSF was only paid for the month of September, 2017 to January, 2018. NHIF was not paid for the month of July, 2017 and November, 2018 to-date of dismissal.
15. That the Court grants the reliefs sought.
16. The claimant was closely cross-examined by Mr. Mwangi for the respondent. He said he is a Civil and Structural Engineer with more than 10 years' experience and was a competent Site Engineer. He said he was Construction Superintendent on site and oversaw day to day operations and planned daily activities. He said he had no assistant before Mr. Mugo was employed. That he was assisted by Directors of the company. That he supplied monthly statements to resident Engineer on which basis certificates were prepared by himself to allow payment as per agreed milestones.
17. The claimant stated that before April, 2018, the claimant had no salary arrears. That the arrears started accumulating from April, 2018. The claimant admitted that there were delays in payment of Certificate No. 6. That this was caused by contestation of measurement figures. Later on Kenya Rural Roads Authority (KERRA) said it had no money to pay.
18. The claimant said that as a site agent he was under obligation to communicate Construction measurements accurately to the resident Engineer and generate certificates the basis of which payments were made to the respondent. The claimant said it was normal for measurements to be contested and then are mutually agreed upon conduct of joint measurement.
19. The claimant agreed that there were delays in payment to the respondent as a result of contested measurements. The claimant added that, that was resolved and the respondent continued to delay payment of salaries even after the works had been paid for. That the contested measurements were mutually resolved and payments made. The claimant said employment of Mugo rendered his roles superfluous as it was a duplication of roles. That Mugo was hired around 23rd October, 2018.
20. The claimant said he had a good record of work. That he did not have a warning and was never served with a notice to show cause. That the respondent had no complaints on his performance. That the only incidence of delay in respect of Certificate No. 5 was a normal occurrence in the works of a Site Engineer. That the project did not stall at any one time. Work progressed and delayed monies were all paid. That though Mugo initially came as an external consultant, he took over the claimant's roles as a normal employee. The claimant insisted that he was not paid his arrears to date and that he was constructively dismissed from work as a result of non-payment of his salary and tacit replacement by Mr. Mugo.
21. R.W.1 Jamil Abdul Kader adopted a witness statement dated 29th June, 2019. The summary of R.W.1's evidence is that the respondent was a construction company and employer of the claimant. That the company was involved in a series of road construction projects in Kenya where the Government was piloting low volume Seal Road Programme (LSRP) in which the contractor is only paid upon completion of milestones. The project is divided in segment which comprise a percentage of the total project road length completed from earthworks to final bitumen. The Government (KERRA) required the respondent to employ an engineer as its site agent. The site Engineer is the overall Chief Executive Officer of the site. A site Agent is the authorized person to prepare and send a payment



- Certificate to KeRRA. KeRRA confirms that there is compliance with contractual terms upon receipt of the certificate.
22. The claimant was the Site Agent. The claimant had a business plan and a modus operandi for the project in respect of which it was agreed that the respondent would complete the 4th and 5th milestones together as well as undertake and complete earthworks on the 6th milestone with the aim that the payments for the 4th and 5th milestones would enable the respondent complete the 6th milestone which was the most capital intensive milestone of the entire project.
 23. The respondent had only sourced for a loan to complete the 4th and 5th milestones with any excess monies being carried forward to the 6th milestone.
 24. The respondent achieved completion of the 5th milestone by the 9th February, 2018 and the claimant prepared and submitted the interim payment Certificate (IPC) of the sum of Kshs.58,899,878.57 to KeRRA's Resident Engineer on 8/3/2018 for processing and payment.
 25. On 6/4/2019, the Resident Engineer communicated to the respondent that he had finalized on perusing the IPC and that he had established that the amount payable to the Respondent was Kshs.40,422,767. The measurement by the Resident Engineer was at variance with that submitted by the claimant on behalf of the Respondent.
 26. This amount was Kshs.18,477,108.37 which was a very significant amount. The claimant responded to the Resident Engineer via letter dated 16/4/2018 and called out the Resident Engineer for alleged sabotage of the Respondent.
 27. The Respondent Engineer responded via a letter dated 19/4/2018 stating that the IPC had been raised without consultation with the Resident Engineer and that the claimant had failed to submit monthly statement to the Resident Engineer which were necessary under the contract. The Resident Engineer gave notice calling for joint measurement exercise on 5/5/2018. The General Manager Special Projects sided on the matter with the Resident Engineer and instructed the claimant to co-operate on re-measurement. The claimant adamantly refused to conduct a joint re-measurement of the work done and certified under the IPC and he insisted that his measurement was accurate and that he would not change it. The Resident Engineer demanded that the respondent terminated the employment of the Site Engineer insisting that his measurement was correct and that of the claimant was wrong.
 28. R.W.1 stated that the respondent was not keen to terminate the employment of the claimant as this would be disruptive to the project. R.W.1 stated that indeed, the Resident Engineer was right on the issues he had raised and this placed the respondent in a dilemma.
 29. Meetings were held to resolve the difficult stands taken but the claimant refused to attend the meetings with no proper reasons provided. The Resident Engineer moved to impose their measurement on the respondent as per the contract. This forced the claimant to attend the joint measurement exercise albeit with a lot of missed meetings. The respondent was forced to concede on a lot of the measurement in dispute as the delay in receiving payment had placed the respondent on a financial crisis. The General Manager special projects was forced to write a letter dated 18/6/2018 in which he severely reprimanded the respondent for its lack of co-operation in the joint measurement exercise and warned the respondent of consequences should this be repeated. The IPC was eventually certified on 3/7/2018, five (5) months after completion of the 5th milestone and during the closing and opening of the books for the financial year 2018/2019 hence KeRRA was not in a position to pay immediately. This caused the respondent dire financial crisis and was unable to pay creditors and employees. The Respondent was paid for milestone 5 IPC on 28/10/2019, after 9 months delay and the respondent was in full financial mess.



30. R.W.1 testified that upon receipt of the payment, the respondent prepared its payroll and paid all its employees half of their salary arrears on 1/11/2019 with the claimant receiving Kshs.980,000 as half of his salary arrears. This was to enable the respondent pay part of its obligations to the Banks and other creditors. The advance payment guarantee for the project had lapsed during this period and had to renew the same.
31. That after sorting out all those pending issues, the respondent paid the remaining salary balance of all employees except the claimant as at the time of making payment the Respondent had already initiated disciplinary proceedings against the claimant which would have had an adverse bearing on how much the claimant was entitled to receive.
32. The disciplinary action arose from the claimant absenting himself from work in August, 2019, shortly after the respondent had introduced the claimant's con-site agent, Engineer Mugo, which action had been necessitated by the difficulties the respondent had experienced as a result of inaccurate IPC submitted by the claimant.
33. The claimant communicated in November, 2019 after receiving his half pay that he was to take his 21 days annual leave without seeking approval from the respondent. This led to the Notice To Show Cause that was issued to the claimant to which he responded unsatisfactorily explaining his absence without authority. That this was not done because the claimant took the respondent to the Labour Officer. That the claim has no merit except in respect of payment of arrear salaries which had not been paid at the time of the claimant's resignation. R.W.1 denied that it had replaced the claimant by employing Engineer Mugo and also denied that it had discriminated the claimant in any way as explained. That the claim for constructive dismissal has no merit and it be dismissed with costs.

Determination

34. The parties filed written submissions which the Court has carefully considered together with the evidence adduced by C.W.1 and R.W.1. The issues for determination are:-
 - (a) Whether the claimant voluntarily resigned from employment or was constructively unlawfully dismissed from work.
 - (b) Whether the claimant is entitled to the payment of arrear salary claimed.
 - (c) Whether the claimant is entitled to General damages for discrimination and unlawful dismissal.
35. Where the claimant alleges constructive dismissal and the employer denies that the claimant was dismissed from work, the onus in terms of Section 107 and 108 of the Evidence, Act Cap. 80, Laws of Kenya to prove that the employer fundamentally breached the contract of employment between it and the claimant through unlawful conduct lies with the claimant.
36. In *Western Excavating (ECC) Ltd –vs- Sharp [1978] ICR 221*, Lord Denning MR noted that an assessment of what was a constructive dismissal applied the ordinary 'contract test' so that a dismissal must first be established 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.”



37. This test was adopted by Mbaru J. in Emmanuel Mutisya Solomon –vs- Agility Logistics – Cause No. 1418 of 2011 and by Ndolo J. in Benuel Mariera –vs- Awand Enterprises Limited Mombasa- Cause No. 191 of 2013 where Ndolo J. stated:-

“It is trite law that when an employer by action or omission materially breaches the contract or otherwise makes it impossible for an employee to perform his part of the contract of employment, the contract is deemed to have been constructively terminated by the employer.”

38. In the present case, there is no evidence that the respondent intended to make or made a unilateral alteration or breach of the contract to the detriment of the employee nor is the evidence before Court indicative of unilateral conduct by the employer which had made the working conditions of the claimant intolerable for him to continue working.
39. To the contrary, it is evident that the claimant in his position as the Chief Executive Officer of the project on which the respondent wholly depended on for the payment of all its employees including the claimant had through omission and commission elicited a dispute with the Resident Engineer which resulted in delayed approval of works Certificate and therefore payment for milestone 5 for a period of 9 months. That this delay to which the claimant clearly and substantially contributed to, placed the respondent in financial dire straits resulting in delayed payment of salaries to all employees including the claimant. It is not in dispute that as soon as this dispute was resolved and monies were paid to the respondent, the respondent paid its crucial creditors to secure its operational guarantees and most importantly paid half the salary of all the employees including the claimant. That immediately thereafter, the claimant took unilateral decision to take 21 days leave and as a result was given a notice to show cause why disciplinary action should not be taken against him.
40. At this point, the respondent utilized the balance of the money received from the payment of milestone 5 to arrear salaries for all other employees except the claimant who was now faced with a disciplinary action for absenting himself from work without authority.
41. The Court is satisfied that the respondent has demonstrated that the claimant significantly contributed to the delayed payments by KeRRA which resulted in delayed payment of claimant’s salary. The claimant cannot by stretch of imagination be said to be an innocent party in this regard nor can the non-payment of the salary by the respondent be said to have been deliberate and unilateral.
42. At the time the claimant tendered his resignation, he had significantly contributed to the negative environment that now faced him including a pending disciplinary action for embarking on 21 days leave without approval by the respondent. The claimant did not produce any documentary evidence that he had been granted permission to go on 21 days leave when the respondent heavily relied upon him to generate reports and certificate for the next milestone whilst emerging from a very difficult financial period.
43. The claimant did not prove on a balance of probabilities that the employment of Engineer Mugo was meant to replace him. Indeed, the Court is satisfied the circumstances of the case justified employment of another hand to help the claimant in his vital work as the Site Agent on whom the respondent heavily depended on to successfully complete construction works as planned and get paid as per the contract between the Respondent and KeRRA. The Court is also satisfied that the claimant was not discriminated upon by the respondent moving to deal with the issue of his unauthorized absence whilst preparing to pay his outstanding salary balance.



44. However, the respondent went into error by not paying the claimant his terminal benefits including arrear salary upon his resignation.
45. The resignation by the claimant was voluntary and calculated and was not forced on him by the respondent. This indeed was a pre-emptying move by the claimant to evade the impending disciplinary action underway at the time.
46. In the final analysis, the Court finds that the suit by the claimant for constructive dismissal lacks merit and is dismissed. The claimant is therefore not entitled to any reliefs in this respect.

Terminal Benefits

47. In terms of the letter of appointment, the claimant was entitled to payment of “Net salary of Kshs.300,000. The contract of service did not provide for payment of a house allowance over and above the net salary paid to the claimant. The plea by the claimant that he was entitled to house allowance calculated at 15% of the basic salary in terms of Section 31 of the *Employment Act*, 2007 is without merit. If the contract of service had provided for payment of “basic salary” then this claim would have been tenable based on the contract of employment itself. Payment of net salary is not synonymous with payment of basic salary.
48. According to Concise Oxford English Dictionary, the word net means “(of an amount value, or price) remaining after the deduction of tax or other contributions often contested with Gross.”
49. The contract of employment between the claimant and respondent cannot form the basis for the claim by the claimant for payment of house allowance since the same was not expressly provided nor cannot be implied from the contract itself.
50. The contract did not also provide for payment of service pay. The claimant admitted that he was registered for National Social Security Fund (NSSF) and the respondent contributed to the fund. Failure of the respondent to contribute in any particular month must be specifically pleaded and the amount not remitted be claimed by the claimant. It cannot be a basis for blatant payment of service pay as claimed or at all.
51. The claim lacks merit and is also dismissed.
52. The only viable claim, if it has not been paid to date is for the arrear salary in the sum of Kshs.1,874,838.71 net.
53. The respondent is ordered to pay this amount.
54. In the final analysis, judgment is entered in favour of the claimant against the respondent as follows:-
 - (a) Payment of arrear salary in the sum of Kshs.1,874,838.71 net of any deductions made.
 - (b) The amount is payable with interest at Court rates from date of filing suit till payment in full.
 - (c) Costs of the suit.
 - (d) The respondent to issue the claimant with a Certificate of Service within 30 days of this judgment.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 19ST DAY OF OCTOBER, 2023.

MATHEWS N. NDUMA

JUDGE



Appearances

M/s Kogai for claimant

Mr. Mwangi for Respondent

Ekale – Court Assistant

