



REPUBLIC OF KENYA



**Kiprop v Melchizedek Hospital Limited (Cause E134 of 2022)  
[2023] KEELRC 3090 (KLR) (28 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3090 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E134 OF 2022  
JK GAKERI, J  
NOVEMBER 28, 2023**

**BETWEEN**

**DR. ALICEN JERUTO KIPROP ..... CLAIMANT**

**AND**

**MELCHIZEDEK HOSPITAL LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Memorandum of Claim dated 28<sup>th</sup> February, 2022 claiming salary arrears, damages for wrongful dismissal and breach of contract.
2. The Claimant avers that she was employed by the Respondent on 1<sup>st</sup> October, 2020 under a one (1) year contract at a gross salary of Kshs.150,000/= and discharged her duties diligently but was not paid the salary for February and March 2021.
3. That pleas on the Respondent's Human Resource department to pay salary fell on deaf ears as the Claimant's family suffered.
4. It's the Claimant's case that the non-payment of salary for 2 months showed that the Respondent was no longer ready and willing to honour its contractual obligations but the Claimant persevered up to the 20<sup>th</sup> of the 3<sup>rd</sup> month but resigned on 19<sup>th</sup> April, 2021 by giving the one month's notice to the Respondent as she awaited payment of the arrears.
5. That the resignation was actuated by the Respondent's failure to pay the Claimant's salary.
6. It is the Claimant's case that after resignation, the Respondent drew 6 bankers cheques in her name but there was no cash and the Claimant had to pay a penalty of Kshs.12,000/=.
7. That the Respondent did not provide the Claimant with an itemised pay statement.
8. The Claimant prays for:



- a. A declaration that the Claimant was constructively and/or wrongfully dismissed.
- b. Damages as follows;
  - i. Salary arrears for February, March and April and 19 days in May 2021 Kshs.545,000.00.
  - ii. One month's salary in lieu of notice Kshs.150,000.00.
  - iii. Pro rata leave for 7 months 19 days Kshs.66,798.00.
  - iv. 12 months damages Kshs.1,800,000.00.
  - v. Damages for dishonoured cheques Kshs.12,000.00.Total Kshs.2,573,798/=
- c. Cost of the suit.
- d. Interest at court rates from 19<sup>th</sup> May 2021 till payment in full.
- e. Any other or further relief as the court may deem fit to grant.

### **Respondent's case**

9. In its response to the claim dated 10<sup>th</sup> May, 2022 the Respondent admits that the Claimant was its employee as alleged for the duration mentioned, entitled to 21 days leave per year but denies having breached the contract of employment.
10. That its inability to pay was occasioned by the collapse and/or non-payment on time by insurance companies and pleaded with its staff.
11. It denies having constructively dismissed the Claimant as it had explained to her the delay on her salary.
12. The Respondent prays for dismissal of the Claimant's case.

### **Claimant's evidence**

13. On re-examination, the Claimant confirmed that she resigned from the Respondent's employment after having worked for 6 months 19 days and admitted that money to pay salary and other expensed came from monies paid by Insurance Companies.
14. That the Respondent made but did not honour promises to pay the Claimant's salary and was unaware that other employees were also not being paid.
15. The witness confirmed that she wrote two termination letters and did not indicate that the resignation was actuated by non-payment of salary nor had she brought her frustrations to the attention of the employer.
16. That the Claimant resigned because of the dire financial position she was in as she had no money for her family, school fees or transport to the work place.

### **Respondent's evidence**

17. After concluding the Claimant's case on 10<sup>th</sup> July, 2023, the Respondent's counsel informed the court that he would not call any witness and closed the Respondent's case.



18. Both counsels filed submissions, addressed the twin issues of whether the Claimant was constructively dismissed and entitlement to the reliefs is sought.
19. In addition, the Claimant's counsel addressed the impact of the Respondent's failure to call a witness and cited the sentiments of the court in *Autar Singh Bahra & another v Raju Govindji HCCC No. 548 of 1998* and the Court of Appeal in *Daniel Torotich Arap Moi v Mwangi Stephen Muriithi & another (2014) eKLR*.
20. According to the Claimant's counsel, the Claimant had satisfied the requirements of constructive dismissal as itemised by the Court of Appeal in *Coca Cola East and Central Africa Ltd v Maria Kagai Ligaga*, that the Respondent's failure to pay the Claimant's salary for 2 months consecutively constituted a repudiatory breach of the contract of employment.
21. The Respondent's counsel on the other hand urged that the Claimant resigned from the workplace willingly and did not suffer financial distress as she was also working at the Kenyatta National Hospital on a part-time basis.
22. According to the Respondent's counsel, the financial challenges the Respondent was facing were caused by an external force.
23. That the Claimant could not have worked for 2 months without pay.
24. The decision in *Godfrey Allan Tolo v Tobias O. Otieno & another (2022) eKLR* was cited.
25. On the reliefs sought, the Claimant's counsel urged that the Claimant was entitled to all the reliefs prayed for.
26. The Respondent's counsel submitted that the Claimant was not entitled to pay in lieu of notice as she has resigned and failed to prove that the resignation was occasioned by frustration occasioned by non-payment of salary to be entitled to compensation for constructive dismissal.
27. Reliance was made on the sentiments of the court in *D.K. Njagi Marete v Teachers Service Commission (2013) eKLR* on the essence of remedies.

### **Determination**

28. The issue for determination are:
  - i. Whether the Claimant was constructively dismissed by the Respondent.
  - ii. Whether the Claimant is entitled to the reliefs sought.
29. Before delving into the issues herein above, it is essential to indicate and as correctly submitted by the Claimant's counsel that since the Respondent tendered no evidence to prove its case, its response of claim comprises unsubstantiated allegations and are mere averments. It is not enough for the employer to make averments or pleadings on oath, documentary and oral evidence is necessary to substantiate the claims. Needless to emphasize, the Claimant's evidence was uncontroverted.
30. However, that does not necessarily mean that the Claimant has ipso facto proved her case against the Respondent which is dependent on the congency of the evidence relied upon.
31. As correctly observed by Abuodha J. in *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd (2016) eKLR*, the burden of proof under Section 47(5) of the *Employment Act, 2007* does not become any lesser because the suit is undefended or the Respondent is absent during the hearing.



32. It behooves the Claimant to evidentiary prove that the termination of employment was unfair.
33. As to whether the Claimant was constructively dismissed from employment, counsels have adopted opposing positions with the Respondent's counsel maintaining that the Claimant resigned from employment.
34. The principle of constructive dismissal in Kenya is traceable to judicial pronouncements and in particular, the Court of Appeal decision in *Coca Cola East & Central Africa Ltd v Maria Kagai Ligaga* (Supra).
35. The locus classicus articulation of the principle of constructive dismissal are the celebrated sentiments of Lord Denning MR in *Western Excavating (ECC) Ltd v Sharp* (1978) QB 761 cited with approval by the Court of Appeal in the *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga* (Supra) where the Court of Appeal affirmed and adopted the contractual interpretation of the principle of constructive dismissal and proceeded to set out the guiding principles in making a determination as to whether a constructive dismissal had taken place such as the fundamental or essential terms of the contract, repudiatory breach, conduct of the employer, causal link between the employer's conduct and the reason for terminating employment, non-acceptance or waiver by the employee and leaving at the instance among others.
36. In the instant case, is it common ground that the Claimant prepared and submitted two resignation letters to the Respondent dated 19<sup>th</sup> April, 2021 and 23<sup>rd</sup> May, 2021.
37. It is unclear to the court why the Claimant deemed it necessary to submit 2 letters.
38. It is also evident that the Respondent issued six (6) cheques in the Claimant's name dated 15<sup>th</sup> January 2022, 31<sup>st</sup> January 2022, 14<sup>th</sup> February 2022, 25<sup>th</sup> February 2022, 15<sup>th</sup> March 2022 and 31<sup>st</sup> March 2022 and none was honoured.
39. On cross-examination, the Claimant confirmed that she was aware that the Respondent relied heavily on insurance companies to remit monies and the Respondent continuously promised to pay the salary arrears.
40. In both resignation letters, the Claimant expresses her appreciation to the Respondent for the opportunity to work for it and for her growth development and insightful experience.
41. Relatedly, the Claimant gave the Respondent a one month notice and served through and anticipated that her salary for February, March, April and the days worked in May 2021 would be paid by the time her notice lapsed.
42. The Claimant wished the Respondent the best and was ready and willing to assist with the transition in searching for and orienting her replacement.
43. Although both letters make reference to pending payments or unpaid salary arrears, the letters cite no reason for the termination of the relationship.
44. In the courts view, these are not the type of letters an unhappy and disgruntled employee would write to the employer.
45. As decipherable from the letters, there is no link between the unpaid salary arrears and the resignation.
46. Similarly, the Claimant confirmed on cross-examination that she did not indicate the reason for resignation or that it was actuated by non-payment of salary.
47. The witness further admitted that she had not written to the employer about the alleged frustrations.



48. Other than alleging that her parents and siblings at home depended on her for support, there is no scintilla of evidence on record to demonstrate that she was in a dire financial position for the 3 months and 19 days she worked without pay.
49. Although the Respondent's conduct qualified as a repudiatory breach of contract of employment, the Claimant appears to have been aware of the cause of the delay and did not rely on the non-payment of salary as the reason for the resignation.
50. In the Coca Cola East & Central Africa Ltd Case (Supra), the Court of Appeal laid it bare that;
- “ . . . For this reason, we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment. The employee must be able to show that he left in response to the employment conduct (i.e causal link must be shown . . . The employee must leave because of the breach but the breach need not be the sole cause so long as it is the effective cause . . . The burden of proof lies with the employee.”
51. Neither of the two resignation letters is explicit on the reason for termination and none is decipherable from the contents.
52. The Claimant is unclear as to whether the delayed salary arrears had any role to play in the resignation.
53. In the Courts view, the unpaid salary does not appear to have had any contribution as the Claimant adduced no evidence of having demanded the same in writing or expressed her displeasure in any other way.
54. In the court's view, the Claimant has failed to demonstrate the causal link between the non-payment of salary and her resignation as none of the letters use the non-payment of salary as the reason or justification for the resignation.
55. For the foregoing reasons, it is the finding of the court that the Claimant has failed to prove on a balance of probabilities that she was constructively dismissed by the Respondent.
56. The court is satisfied that the Claimant resigned from her position voluntarily to pursue other interests.
57. As regards the reliefs sought, the court proceeds as follows:
- a. Declaration
58. Having found that the Claimant has failed to prove that the Respondent dismissed her from employment constructively, the declaration sought is unmerited.
- b. Salary in lieu of notice
59. Since the Claimant accorded the Respondent the requisite 30 days' notice and served the entire duration, the claim for pay in lieu of notice is unmerited and is declined.
- c. Pro rata leave 7 months 19 days
60. The Claimant was entitled to 21 days annual leave and because the Respondent adduced no evidence to prove that the Claimant proceeded on leave at any point during her employment, the claim for pro rata leave is merited and the same is awarded for the period service of 6 months 19 days.
- d. 12 months damages for constructive dismissal



61. Having found that the Claimant has failed to prove that she was constructively dismissed by the Respondent, the prayer for damages or compensation is unsustainable and is declined.
  - e. Damages for 6 bounced cheques Kshs.12,000/=
62. It is the Claimant's evidence that the cheques issued by the Respondent were dishonoured by the bank and penalties were imposed amounting to the sum of Kshs.12,000/=. The Respondent adduced no evidence to contradict this claim and it is granted.
  - f. Salary arrears for February, March, April and 19 days in May 2021
63. The Claimant adduced sufficient evidence to show that his salary for February, March, April and 19 days in May 2021 had not been paid by the time she left employment and cheques issued in 2022 were dishonoured.
64. The Claimant's claim for unpaid salary is merited and is accordingly awarded.
65. In the upshot, judgment is entered in favour of the Claimant against the Respondent as follows:
  - a. Pro rata leave pay for 6 months 19 days.
  - b. Penalties for bounced cheques Kshs.12,000.00.
  - c. Unpaid salary for the month of February, March, April and 19 days of May 2021.
  - d. Costs of this suit.
  - e. Interest at court rates from the date hereof till payment in full.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28<sup>TH</sup> DAY OF NOVEMBER 2023**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

