



REPUBLIC OF KENYA



KENYA LAW
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**Cherugut v Kenya Meteorological Society (Cause 1067 of 2017)
[2023] KEELRC 2955 (KLR) (20 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2955 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1067 OF 2017
JK GAKERI, J
NOVEMBER 20, 2023**

BETWEEN

REGINAH CHERUGUT CLAIMANT

AND

KENYA METEOROLOGICAL SOCIETY RESPONDENT

JUDGMENT

1. The Claimant commenced the instant suit against the Respondent on 9th June, 2017 alleging harassment, constructive dismissal and failure to pay terminal benefits.
2. The Claimant's case is that he was employed by the Respondent on 5th January, 2015 as a Clerical Officer at a salary of Kshs.14,000/= which later rose to Kshs.15,000/= per month but no written contract of service was provided despite promises by the employer.
3. The Claimant alleges that the Respondent's agent, one Ms Stella Aura harassed and insulted her severally making derogatory remarks about the Claimant.
4. The Claimant further avers that she was given additional responsibilities such as serving food and running the societies' canteen and shouldered blame whenever M/s Stella Aura and other board members withdrew cash from the societies account.
5. That the Respondent was neither deducting nor remitting National Social Security Fund and National Health Insurance Fund contributions.
6. That she resigned on 13th March, 2017.
7. The Claimant prays for;
 - a. The sum of Kshs.249,500/= comprising;
 - i. Unpaid salary for the days worked in March 2017 Kshs.9,750.00



- ii. Unremitted NSSF dues Kshs.10,800.00
 - iii. Unpaid leave 2 years, 3 months Kshs.33,500.00
 - iv. Severance pay Kshs.15,000.00
 - v. 12 months salary for constructive dismissal Kshs.180,000.00
- b. Compensation for delay of payment.
 - c. Costs of this suit with interest on (a), (b) and (c) above at court rates.
 - d. Any other or further relief as the court may deem fit and just to grant.

Respondent's case

- 8. The Respondent filed a Statement of Response to the claim on 14th August, 2017 admitting that the Claimant was its employee from 15th January, 2015 but denies the other allegations.
- 9. According to the Respondent, the Claimant did not raise any complaint with the Respondent and her performance was wanting and resigned voluntarily after giving a 4 days notice.
- 10. That the Claimant owed the Respondent Kshs.7,700/= as advance salary payment.
- 11. That the Respondent was ready and willing to settle the Claimant's claim.

Evidence

- 12. Although the Claimant's counsel was present in court on 3rd August, 2021 when the matter was mentioned before the Deputy Registrar, the Respondent was absent and none of the parties was present on 14th October, 2021 and 15th November, 2021 and a Notice to Show Cause why the suit should not be dismissed for want of prosecution was issued and was scheduled for hearing on 22nd February, 2022 when the Claimant's counsel was accorded time to file a Replying Affidavit which he did and the Notice to Show Cause was vacated on 21st April, 2022 and directions for pre-trial given.
- 13. The suit was certified ready for hearing on 16th June, 2022 and hearing slated for 27th October, 2022 when the Respondent's counsel was not ready and sought time to peruse the file.
- 14. Hearing was slated for 27th March, 2023 but the Respondent was absent. The court gave the Respondent the last adjournment in absentia and imposed costs for the day and hearing was slated for 12th July, 2023 when the Claimant adopted the witness statement. Neither the Respondent nor its counsel attended the hearing.
- 15. The court declared the hearing closed and gave directions on the filing and exchange of submissions and service of hearing notice.
- 16. The Respondent did not adduce or tender any evidence in support of its averments.

Claimant's submissions

- 17. Counsel for the Claimant isolated one issue for determination namely; whether the Claimant is entitled to the reliefs sought and submitted that she was as she worked for 13 days in March before resignation, respondent was not remitting NSSF dues, thus the provisions of Section 35(5) of the Employment Act, 2007 applied and the Claimant had not proceeded on annual leave.



18. The prayer for payment for service is ambiguous as it is not part of the claims itemised in the Memorandum of Claim.
19. Counsel submitted that the Claimant was entitled to compensation for constructive dismissal.
20. Reliance was made on the sentiments of the court in Milton M. Isanya v Agha Khan Hospital Kisumu [2017] eKLR and Nathan Ogada Atiagaga v David Engineering Ltd [2015] eKLR to urge that the mistreatment and insults the Respondent subjected the Claimant to constituted constructive dismissal.
21. The Respondent's counsel did not file submissions.

Determination

22. The issues for determination are;
 - i. Whether the Claimant's employment was constructively terminated by the Respondent and
 - ii. Whether the Claimant is entitled to the reliefs sought.
23. Before delving into the issues identified above, it is essential to restate the principles that govern undefended suit and/or where the Respondent is not present during the trial and the place of pleadings.
24. It is trite law that pleadings contain averments made by the parties and do not amount to evidence and unless proved or admitted they have no evidential value. (See CMC Aviation Ltd v Cruisair Ltd (No. 1) [1978] KLR, Mohammed & another v Haidara [1972] EA 166 among others).
25. The effect of a parties failure to adduce evidence as was in the instant suit has been addressed in numerous decisions such as Autar Singh Bahra & another v Raju Govindji HCCC No. 548 of 1998 and Trust Bank Ltd v Paramount Universal Bank Ltd & 2 others HCC No. 1243 of 2001 among others.
26. These decisions are consistent that where a party fails to adduce or call evidence to reinforce its case, its pleadings remain unsubstantiated averments.
27. However, the foregoing notwithstanding, the Claimant is still obligated to prove its case to the requisite standard of proof as held in Humphrey Munyithia Mutemi v Soluxe International Group of Hotels and Lodges Ltd [2020] eKLR, where Maureen Onyango J. stated as follows;

“ . . . in an undefended claim, it is trite that the Claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.”
28. Abuodha J. expressed similar sentiments in Nicholus Kipkemoi Korir v Hatari Security Guards Ltd [2018] eKLR where the learned judge emphasized that the burden of proof on the Claimant does not become any less because the Respondent is absent during the hearing.
29. The court is in agreement with these sentiments and is guided accordingly.
30. In the instant suit, it is common ground that the Claimant was an employee of the Respondent.
31. As to whether the Claimant was constructively dismissed from employment, the evidence on record show that the Claimant resigned by a letter dated 13th March, 2017, a fact she admitted in her evidence.



32. The Claimant's letter is unambiguous that she resigned on account of constant harassment and insults by one M/s Stella Aura as well failure to be provided with a written contract of service.
33. In her written statement, the Claimant states that M/s Stella Aura severally referred the Claimant as "Mjinga", "hatumii akili" and "ana nona nona tu" demeaning and derogative words whose effect is to diminish the Claimant's self-esteem.
34. It is unclear as to when the harassment and insults started but it is apparent that the Claimant had had enough of it.
35. The fact that the Claimant identified the person who was harassing her and exemplified the words or phrases used by the person would appear to suggest that the usage could have been regular and M/s Stella Aura was the Chairperson of the Society which left the Claimant with no option as to where to report the harassment and insults.
36. 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] 2 WLR 344.
37. Similarly, in *Coca Cola East and Central Africa Ltd v Maria Kagai Ligaga* [2015] eKLR, the Court of Appeal affirmed the contractual approach test and articulated the guiding principles in determining whether constructive termination has taken place.
38. The contractual approach test is grounded on there being a repudiatory breach of a fundamental term of the contract of employment, a term that goes to the root of the contract.
39. The Claimant must prove the alleged constructive dismissal.
40. In *Coca Cola East & Central Arica Ltd v Maria Kagai Ligaga* (Supra), the court stated as follows;

“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. Whether a particular breach of contract is repudiatory is one of the mixed fact and law. The criterion for evaluating the employer's conduct is objective; the employer's conduct does not have to be intentional or in bad faith before it can be repudiatory. The employee must be able to show that he left in response to the employer's conduct (i.e causal link must be shown i.e the test is causation).”
41. The court expressed similar sentiments in *Leena Apparels (EPZ) Ltd v Nyevu Juma Ndokolani* [2018] eKLR.
42. Similarly, the court is in agreement with the sentiments of Maureen Onyango j. in *Milton M. Isanya v Aga Khan Hospital Kisumu* (Supra) cited by the Claimant's counsel that;

“In constructive dismissal, the desire to resign is from the employee as a result of a hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tenders resignation.”
43. In the instant suit, the Claimant's resignation letter was clear that she resigned on account of constant harassment and insults by one M/s Stella Aura who did not testify to contradict the Claimant's testimony.



44. For the foregoing reasons, the court is satisfied and finds that the Claimant has established on a preponderance of probabilities that her employment was constructively dismissed by the Respondent.
45. As to whether the Claimant is entitled to the reliefs sought, the court proceeds as follows;
- a. Unpaid salary for the days worked in March 2017
46. The Respondent adduced no evidence to prove that it paid the Claimant for the days worked in March 2017.
The prayer is granted.
- b. Unremitted NSSF contributions
47. The Claimant testified that the Respondent neither deducted nor remitted NSSF contributions. In the circumstances, nothing is recoverable from the Respondent as it did not deduct any from the Claimant's salary.
48. More significantly, enforcement of the provisions of the *National Social Security Fund Act* is vested in the National Social Security Fund board not this court.
The prayer is dismissed.
- c. Unpaid leave 2 years 3 months
49. The Claimant's written statement makes no reference to outstanding leave days and how many they were. The absence of the relevant particulars renders the claim unsustainable.
The prayer is declined.
- d. Severance pay
50. The Claimant's counsel appear to have confused severance pay with service pay.
51. Whereas service pay is payable under Section 35(5) of the *Employment Act*, 2007, Severance pay is only payable in a redundancy under Section 40(1)(g) of the Act.
52. As the Claimant was not declared redundancy, the claim for severance pay is unsustainable and it is dismissed.
- e. 12 months salary for dismissal
53. Having found that the Claimant's employment was constructively terminated, the Claimant is entitled to the remedy under Section 49(1)(c) of the *Employment Act*, 2007.
54. In determining the quantum of compensation, the court has taken into consideration the following;
- i. The Claimant was an employee of the Respondent from 5th January, 2015 to 13th March, 2017, a duration of about 2 years 2 months which is relatively short.
- ii. The Claimant did not express her wish to continue in the Respondent's employment.
- iii. The Claimant had no recorded misconduct or disciplinary proceedings.
55. In the circumstances, the court is satisfied that the equivalent of 3 months' salary is fair.
56. In the upshot, judgement is entered in the favour of the Claimant against the Respondent in the following terms;



- a. Unpaid salary for the days worked in March 2017.
- b. Equivalent of 3 months' salary.
- c. Costs of this suit.
- d. Interest at court rate from date hereof till payment in full.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH 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 15th March 2020 and subsequent directions of 21st 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

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