



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2628 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

CARRIE MUTHONI.....CLAIMANT

VERSUS

KENYA AIDS NGO'S CONSORTIUM.....RESPONDENT

JUDGEMENT

1. By a Statement of Claim dated and filed in Court on 22nd December, 2016, the Claimant has sued the Respondent herein alleging that her employment was unlawfully and unfairly terminated and the refusal by the Respondent to pay her terminal dues. In her Claim the Claimant prays for:

(i) Declaration that the Respondent's act of constructive dismissal of the Claimant and termination of her employment was unfair, unlawful and devoid of procedure.

(ii) The Claimant be paid her terminal benefits totalling to Kshs.1,270,385.30/- comprising of the following:

- a... One month salary in lieu of notice..... Kshs.30,000
- b... Salary earned for February, March, April, May, June and July 2016..... Kshs.180,000
- c... One month's redundancy notice..... Kshs.30,000
- d... Annual leave due for 2016..... Kshs.30,000
- e... Service gratuity for 10.5 years at 15 days for each completed year of service..... Kshs.150,000
- f... Salary for the remainder of the Contract 10 months at 30,000..... Kshs.300,000
- g... Severance pay for 11 years 15 days x 11 years x 1,153.85..... Kshs.190,385.25
- h... 12 months gross salary compensation for unfair termination Kshs.30,000 x 12..... Kshs.360,000
- i... Certificate of Service

Total Amount due.... Kshs.1,270,385.30

(iii) The Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.

(iv)..... The Respondent to pay costs of the Claim.

(v)..... Interest on the above at Court rates.

(vi) The Respondent be ordered to give the Claimant a Certificate of Service in compliance with Section 51 of the Employment Act,

2007.

2. In response to the Claim the Respondent filed its statement of response dated 23rd January, 2017 and filed in Court on 24th January, 2017 in which the Respondent denied terminating the Claimant's employment as alleged in the Statement of Claim. The Respondent urged this Court to find the Claim devoid of merit and to accordingly dismiss it with costs to the Respondent.

Claimant's Case

3. In her Statement of Claim, the Claimant maintains that she was under the Respondent's employment effective 1st April, 2014 in the position of an Administrative Assistant. She averred that her initial monthly salary was Kshs.10,000/- at the time of her engagement and that the amount was subsequently reviewed upwards and was Kshs.30,000/- at the time of separation.

4. The Claimant contended that she served the Respondent with diligence and to the Respondent's satisfaction until 20th April, 2016 when she was issued with a transfer letter posting her to the Respondent's Kitui Office.

5. The Claimant further contended that the Respondent failed and/or ignored to honour her request for transfer and relocation allowance despite quotations being given to the Respondent and numerous reminders being sent on the issue.

6. The Claimant contended that the Respondent's actions were tantamount to constructive dismissal and thereby making her termination unfair and unlawful.

7. She further contended that the Respondent terminated her employment without notice and contrary to the mandatory provisions as provided under Section 41 of the Employment Act, 2007.

8. The Claimant urged this Court to find merit in her Claim as filed against the Respondent and to accordingly allow it in terms of the reliefs sought therein.

Respondent's Case

9. In its Defence the Respondent admits having engaged the Claimant on a fixed term contract as pleaded in her Statement of Claim. It however denies that it constructively terminated her services.

10. The Respondent avers that following the lapse of her fixed term contract, the Claimant did successfully make a fresh application for the position of Programme Assistant and was appointed vide the Respondent's letter dated 20th April, 2016. That upon her appointment the Claimant was posted to the Respondent's Kitui Office.

11. It is the Respondent's position that the Claimant's engagement effective 1st May, 2016 to 1st May, 2017 was a new appointment and not a transfer as she had construed and that as a result she did not qualify for a transfer allowance as requested.

12. The Respondent avers that the Claimant conceded to the position that the Claimant she was not entitled to the transfer allowance and instead sought for a salary advance to facilitate her move to Kitui.

13. It avers that the Claimant failed to follow up on her request for a salary advance and instead failed to report to her new station. The Respondent maintained that the Claimant's failure to report was tantamount to a breach of her contract.

14. The Respondent posits that it did not terminate the Claimant's services as it neither issued her with any notice or letter of termination nor was any disciplinary action taken against her for absconding duties as the Claimant was not available for such disciplinary action.

15. The Respondent avers that the Claimant having absconded lawful duties is not entitled to any of the reliefs she seeks from this Court. It argued that the instant Claim as filed is devoid of merit and should in the circumstances be dismissed with costs to the Respondent.

Evidence

16. At the hearing, the Claimant, adopted her written statement dated 22nd December, 2016 as her evidence in chief. She reiterated the averments made in her Statement of Claim.

17. The Claimant testified that she left the Respondent's employment in April, 2016 when its offices relocated to Kitui. That the Respondent failed to facilitate her transfer to the said office despite requests for facilitation and the same being provided for in the Respondent's Human Resource Manual.

18. She testified that the reason given for the Respondent's failure to facilitate her transfer was that she was not eligible for transfer allowance as this was not a transfer but a relocation.

19. The Claimant testified that she was not able to afford the move to Kitui and as result she was forced to seek for a salary advance in order to facilitate her move to Kitui, a request that was equally not responded to in the affirmative. She testified that this action by the Respondent is what amounts to constructive dismissal. She urged this Court to find merit in her claim and allow it as prayed.

20. On cross examination the Claimant stated that she made an application for renewal of her contract and that she was in fact relocated to the Kitui office. She stated that she was never issued with a letter of redundancy or a termination letter by the Respondent.

21. The Claimant conceded that she did make an application for a salary advance to facilitate her relocation to Kitui. She also conceded that she had no evidence that she made a follow up on her request for the salary advance and that she did not report to the Kitui office as expected.

22. On re-examination, the Claimant stated that she was initially employed on a permanent basis by the Respondent before her terms were changed to contractual. She further stated that she physically followed up on her request for salary advance from the Respondent.

23. The Respondent called one witness to testify on its behalf. ANN GITUMA, its Human Resource Manager who testified as RW1 adopted her witness statement dated 2nd June 2018 as her evidence in chief. In the statement she reiterates the averments made in the Respondent's Statement of Response.

24. RW1 testified that the Claim as filed is misguided and urged this Court to dismiss it with costs to the Respondent.

25. On cross examination RW1 stated that the Claimant was first employed by the Respondent in April, 2004 and that her terms of engagement were later changed to contractual due to the fact that the Respondent is a non- governmental organization that relies on donor funding. She testified that the Claimant's last contract commenced on 1st May 2016 and was to run for one year.

26. On further cross examination RW1 testified that the Claimant failed to report to the Respondent's Kitui office as required. She further testified that the Claimant did make a request for a salary advance to facilitate her move to Kitui but failed to follow up with the Respondent instead choosing not to her new duty station.

27. RW1 testified that an email was sent to the Claimant seeking to know why she had not reported for duty. She testified that no call was made or notice served on the Claimant to show cause why disciplinary action should not be taken against her for absconding duties.

28. On re-examination RW1 stated that the Claimant was offered a fresh appointment and not a transfer. She further stated that the Claimant failed to follow procedure while seeking a salary advance as it was expected that she would report to the Kitui office then follow up the application for the advance salary.

Claimant's Submissions

29. In her submissions the Claimant maintained that the Respondent's refusal and/or failure to facilitate the Claimant's move to its Kitui office despite her request was tantamount to constructive dismissal.

30. She submitted that the Respondent relied on her inability to relocate to its Kitui office to unlawfully and unfairly terminate her services on account of absconding duty as no evidence was adduced by the Respondent indicating efforts it took to contact the Claimant for failure to report to work as her emails requesting for a salary advance remained unanswered. To buttress this argument the Claimant cited and relied on the case of **Simon Mbithi Mbane v Inter Security Services Limited (2018) eKLR** in which the Court held that where there is an allegation of absconding duty, the employer must demonstrate the efforts made to contact such an employee without success.

31. The Claimant further relied on the findings in the case of **Joseph Nzioka v Smart Coatings Limited (2017) eKLR** where the Court similarly ruled that for a dismissal on account of absconding duty to be lawful the employer must avail evidence showing that reasonable attempts were made to contact the employee concerned and a show cause letter issued prior to the termination.

32. The Claimant maintained that her termination was therefore unlawful and unfair as it did not comply with the mandatory provisions of Sections 40 and 41(2) of the employment Act, 2007. She argued that her termination was thus unfair within the meaning of Section 45 of the Employment Act, 2007.

33. She contended that she is entitled to the reliefs sought in her statement of claim and urged this Court to allow them as prayed.

Respondent's Submissions

34. The Respondent on its part submitted that constructive dismissal does not arise in the instant claim as pleaded by the Claimant. For emphasis the Respondent relied on the Court decisions in **Nathan Ogada Atiagaga v David Engineering Limited Cause No. 419 of 2014; Magare Gikenyi J Benjamin v County Government of Nakuru & 4 Others (2020) eKLR** and **Solid Doors (Pty) Ltd v Commissioner Theron & Others (2004) 25 ILJ 2337 (LAC)**.

35. The Respondent further submitted that the Claimant having failed to establish a case for constructive dismissal as pleaded the claim ought to be dismissed in its entirety.

36. The Respondent reiterated that the Claimant's engagement effective 1st May, 2016 was a fresh engagement and not a transfer. As a result, the Claimant did not qualify for a relocation allowance a fact that was brought to her attention. The Respondent further argued it was incumbent upon the Claimant to follow up on her request for a salary advance and she cannot now claim that the Respondent's actions were intolerable as to make it difficult for the Claimant to report to work.

37. The Respondent argued that the Claimant failed to initiate the termination by rendering a resignation letter which would have been

construed as constructive dismissal. For emphasis the Respondent cited and relied on the case of **Milton Isanya v Aga Khan Hospital (2017) eKLR**.

38. The Respondent contended that the Claimant has failed to prove that she was unfairly terminated as required under the provisions of Section 47(5) of Employment Act, 2007. To buttress this argument the Respondent cited and relied on the findings in the case of **Kipkepe Limited v Peterson Ondieki Tai [2016] eKLR** where the Court held that the law of evidence requires that a party who asserts a fact must prove his case by way of evidence.

39. The Respondent further relied on the provisions of Sections 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya.

40. The Respondent submitted that the Claimant had not established a case for wrongful termination as it did not at any point terminate the Claimant's employment, relying on the decision in **Protus Wanjala Mutike v Anglo African Properties T/A Jambo Mutara Lodge Laikipia (2021) eKLR** where the Court held that the Claimant had not made a case for unlawful termination as he had not adduced evidence in support of his case for unlawful termination as provided under Section 47(5) of the Employment Act, 2007.

41. It is the Respondent's submission that it did not in any way play a role in the Claimant's failure to report. It maintained that the Claimant on her own volition failed to report to duty at its Kitui office as directed.

42. On specific prayers, the Respondent submitted that the Claimant is not entitled to one month's salary in lieu of notice as her employment was never terminated by the Respondent and that the employer/employee relationship between the Claimant and the Respondent still subsists. For emphasis the Respondent cited and relied on the case of **Leah Shighadi Sinoya v Avtech System Limited (2017) eKLR** where the Court held that a claim for notice pay is not due to a Claimant who failed to submit a resignation letter and simply kept out of work.

43. The Respondent argued that the Claimant is not entitled to salary earned for February, March, April, May, June and July 2016 as she failed to report to its Kitui office on 1st May, 2016 when her contract was expected to commence following the lapse of the previous contract in December, 2015. The Respondent maintained that the Claimant cannot be paid for services not rendered, relying on the decision in **Thomas Njumwa v Kenya Wildlife Services (2016) eKLR** Where the Court denied a similar relief on the ground that awarding the Claimant salary for work not done is not only unlawful but also against the public policy.

44. The Respondent further argued that the Claim for payment of Annual Leave for 2016 cannot be allowed for want of proof. On the Claim for salary for the remainder of the contract period the Respondent argued that the same cannot be allowed as it lacked any legal basis. To buttress this argument the Respondent cited and relied on the Court findings in the case of **Robert Kennedy Moi v Attorney General & Another (2014) eKLR**.

45. The Respondent submitted that the Claimant is further not entitled to One month's redundancy notice and Severance pay given that this is not a case where the Claimant was declared redundant. However, the Respondent acknowledged that the Claimant is entitled to be issued with a Certificate of Service by dint of Section 51 of the Employment Act, 2007.

46. The Respondent further contended that the Claim for service pay cannot be allowed as the Claimant was a member of NSSF and NHIF and that the Respondent made all the statutory deductions as required by Law. The Respondent relies on the provisions of Section 35 (6) of the Employment Act, 2007.

47. In conclusion the Respondent urged this Court to find the Claim devoid of merit and to accordingly dismiss it with costs to the Respondent.

Analysis and Determination

48. Having considered the facts, evidence, submissions and authorities cited, I am of the view that the following are the issues for determination:

- (i) Whether the Claimant was constructively dismissed;
- (ii) Whether the Claimant is entitled to the reliefs sought

Constructive Dismissal

49. Constructive dismissal is defined in **Black's Law Dictionary 10th Edition** as –

“An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”

50. Constructive dismissal is not expressly provided for in the Employment Act or in any other legislation in Kenya that makes provision for employment. The subject has however been discussed in many decisions of this and other courts. It is therefore an issue that is settled in our jurisprudence.

51. The Court of Appeal elaborately addressed the subject in the case of **Coca Cola East & Central Africa Limited v Maria Kagai**

Lugaga (2015) eKLR where the Court stated:

“The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer’s behaviour towards him was so unreasonable that he could not be expected to stay- this is the unreasonable test. The second interpretation is that the employer’s conduct is so grave that it constitutes a repudiatory breach of the contract of employment- this is the contractual test.”

52. In the said decision, the Court of Appeal proposed the principles for determination of constructive dismissal as:

- a. *What are the fundamental or essential terms of the contract of employment?*
- b. *Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?*
- c. *The conduct of the employer must be a fundamental or 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.*
- d. *An objective test is to be applied in evaluating the employer’s conduct.*
- e. *There must be a causal link between the employer’s conduct and the reason for employee terminating the contract that is causation must be proved.*
- f. *An employee may leave with or without notice so long as the employer’s conduct is the effective reason for termination.*
- g. *The employee must not have accepted, waived, acquiesced or conduct himself to be estopped from asserting repudiatory breach; the employee must-within a reasonable time terminate the employment relationship pursuant to the breach.*
- h. *The burden to prove repudiatory breach or constructive dismissal is on the employee.*
- i. *Facts giving rise to repudiatory breach or constructive dismissal are varied.”*

53. The Claimant pleaded that she was constructively dismissed because the Respondent failed to facilitate her relocation from Molongo to Kitui.

54. The Claimant maintained that she was entitled to a relocation allowance which was not provided by the Respondent forcing her to make an application for salary advance to facilitate the move. The request was also not responded to making it difficult for her to report for duty.

55. The Respondent on the other hand maintained that the Claimant was not entitled to a transfer/relocation allowance as hers was a new appointment, a fact that was clearly brought to her attention through the Respondent’s email of 12th May, 2016.

56. It further maintained that it was unable to respond to the Claimant’s request for salary advance as she failed to report for duty. That they later received a demand letter from her advocates.

57. It is the Respondent’s position that it did not terminate the employer–employee relationship that existed between it and the Claimant as it neither served her with a letter of termination nor was any notice for disciplinary hearing served upon her for absconding lawful duties.

58. I have perused the letter dated 25th January, 2016 by the Claimant in which she expressly acknowledges the expiry of her contract and expresses her desire to re-apply for the position of Program Assistant. I have also perused the Respondent’s letter dated 20th April, 2016 notifying the Claimant of her appointment. I agree with the Respondent’s submission that the Claimant’s engagement was a fresh appointment and not a transfer. She was thus not entitled to a transfer or relocation allowance as she was not transferred or relocated but was offered a new appointment after her fixed term contract expired.

59. This position was clearly brought to the Claimant’s attention in the email dated 12th May, 2016.

60. For the Court to find in favour of the Claimant in a claim of constructive dismissal she must prove that the Respondent made it impossible for her to continue working. She must then resign from employment citing the reasons for so doing to be the frustrations by the Respondent which made it impossible for the Claimant to continue working.

61. In this case there is no resignation letter by the Claimant. Indeed, she could not resign as she had just been re-engaged on a new contract which she did not report for. The new contract was to be commenced by her reporting to the new duty station.

62. In the case of **Milton M Isanya v Aga Khan Hospital (Supra)** the Court in dismissing a claim for constructive dismissal stated that:

*“In constructive dismissal the desire to **resign** is from the employee as a result of 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 **tender's resignation**. I find no evidence of constructive dismissal in the Claimant's case."

63. An employee **MUST** tender his/her resignation citing clearly the reason for their resignation to be frustration or hostile environment of work for the Court to find that there was constructive dismissal. There must thus be a termination of employment by the employee which the Court would then determine to be a constructive dismissal by the employer. In this case there is no resignation by the employee which the Court can construe as a dismissal by the employer.

64. The claim for constructive dismissal therefore fails as there is no proof of the same.

Whether the Claimant is entitled to the reliefs sought

65. Having found that the Claimant has failed to prove constructive dismissal she is not entitled to the reliefs sought save for issuance of Certificate of Service for the period worked.

66. In conclusion the claim lacks feet to stand on and is accordingly dismissed save for issuance of Certificate of Service to the Claimant as stipulated under Section 51 of the Employment Act, 2007.

67. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST DAY OF JANUARY 2022

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE