



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1804 OF 2015

RISPER NYANDWAKI NYAMBANE.....CLAIMANT

VERSUS

VIVA AFYA LIMITED.....RESPONDENT

JUDGEMENT

1. The claimant vide a memorandum of claim dated 9th October, 2015, cited the respondent for various contractual breaches including failure to pay salaries for 4 months, unfair termination, refusal to pay house allowance and failure to remit statutory deductions.
2. The respondent through its response dated 18th June, 2015 admitted not paying the claimant's salary for 4 months on account that it was experiencing cash flow issues at the time. It however denied terminating the claimant from employment and withholding the statutory deductions due on her account. It further averred that the claimant resigned voluntarily from employment.
3. The matter proceeded partially on 13th October, 2021 for the hearing of the claimant's case and was adjourned to 9th November, 2021 for the defence hearing.

Claimant's case

4. The claimant testified as CW1. It was her testimony before court that she was employed by the respondent sometimes in December, 2012 as a pharmaceutical technologist. That she started out as a casual employee but was later retained on a permanent basis. She further stated that all was well within the employment until March, 2015 when the respondent withheld her salary for the month of March, 2015 till May, 2015. That as a result, she was unable to meet her financial obligations hence, on 5th June, 2015 she tendered her resignation to the respondent and gave one months' notice. That the respondent accepted her resignation the same date. She testified that while serving her notice period, she engaged her Advocates to demand for the outstanding salary from the respondent. That upon receipt of the said demand letter, the respondent vide a letter dated 24th June, 2015 issued through its Human Resource Manager, asked the claimant not report to work the following day. In her view, this amounted to termination on the part of the respondent.

Respondent's case

5. On its part, the respondent called its Human Resource Manager, Ms. Grace Kamero to testify on its behalf. Ms. Kamero informed court that at the material time, the respondent was experiencing cash flow problems, a fact the claimant was well aware of. That on 5th June, 2015, the claimant tendered her resignation voluntarily and without coercion. That the claimant offered to serve one months' notice to allow for smooth transition hence the resignation was to take effect on 5th July, 2015. She further stated that the respondent paid the claimant's salary, pension contribution and welfare contribution pursuant to a court order issued on 9th October, 2015. She further told court that the claimant's salary was in gross hence was inclusive of house allowance.

Submissions

6. Upon close of the hearing, the parties filed written submissions with the claimant urging that the respondent's act of withholding her salary amounted to constructive dismissal hence her resignation was not voluntary. She cited the case of **Coca Cola East & Central Africa Limited vs Maria Kagai Lugaga [2015] eKLR**. She further submitted that the respondent unlawfully and unfairly terminated her employment on 24th June, 2015 when it asked her not to report to work the following day.

7. On its part, the respondent, denied constructively dismissing the claimant and submitted that her resignation was indeed voluntary. It further submitted that the circumstances leading to the claimant's resignation did not fit constructive dismissal. It further submitted that the claimant did not state the reasons for her resignation and the tone of her resignation was not one of a frustrated employee hence she could not have been constructively dismissed. On this issue, it also placed reliance on the case of **Coca Cola East & Central Africa Limited vs Maria Kagai Lugaga [2015] eKLR**, **Herbert Wafula Waswa vs Kenya Wildlife Services (2020) eKLR** and **Sophie Muthoni Njagi vs**

Rift Valley Railways (Kenya) Ltd (2020) eKLR. The respondent further submitted that the delay in paying the claimant's salaries was occasioned by financial difficulties it was experiencing at the time, a factor it submitted, was beyond its control. It invited the court to consider the finding in the case of **Erick Oyier Omondi & 3 others vs Catholic University of Easter Africa (2019) ECLR.**

Analysis and Determination

8. In view of the claim before Court, the documentary evidence, testimonies before court and the rival submissions, I find that the issues falling for the court's determination are;

- i. Whether the claimant was constructively dismissed or unfairly and unlawfully terminated by the respondent?**
- ii. What reliefs if any, are available to the claimant?**

Unfair termination or Constructive dismissal?

9. The claimant has alleged that the respondent unlawfully withheld her salary with effect from March, 2015, thus necessitating her resignation on 5th June, 2015. She has termed the actions of the respondent as amounting to constructive dismissal.

10. The term constructive dismissal is defined by the Black's Law Dictionary (10th Edition) as follows:

“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.”

11. The claimant tendered a resignation vide an email of 5th June, 2015, whose contents I will reproduce hereunder;

“Dear Grace

I regret to inform you that I would like to tender my resignation as a Pharmatech from 5th July, 2015. I hereby give a one month notice to leave your company as per the contract and please let me know what I'm entitled to get from the company and what I'm supposed to give the company if there is. It has been a great pleasure working with you and the entire Viva afya staff. I wish you as Viva afya continued success. If there is anything I can do in adding a smooth transition of responsibilities, please let me know.

Yours faithfully,

Risper Nyambane.

12. The resignation by the claimant was accepted by the respondent's Human Resource Manager, Ms. Grace Kamero in the following manner;

“You have mentioned that you are able to assist us with the transition. As you move on, kindly the ppb license in Umoja even as you cancel the coverage. It will help us before we get a replacement which you know is a bit hard now due to our current situation. Also let me know if you need a letter to cancel the coverage. Its been nice working with you and hope that if an opportunity arises and things are better, you can always come back”

13. The pertinent question now is whether the claimant was constructively dismissed from employment. This issue was addressed by the Court of Appeal in an elaborate fashion in the case of **Coca Cola East & Central Africa Limited vs Maria Kagai Lugaga [2015] eKLR** with the following guiding principles being pronounced;

- 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 i.e 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.*

14. The principles encapsulated herein above envisages a situation where there is contractual breach on the part of the employer, with such breach going to the root of the employment contract. The respondent has admitted that it did not pay the claimant's salaries as and when the same fell due. It has attributed this state of affairs on the fact that it was facing cash flow problems at the time.

15. Undeniably, failure to pay salary amounts to a contractual breach. Be that as it may, it is imperative to tie the breach to the other guiding principles so as to justify constructive dismissal. In my considered view, the element of breach cannot stand on its own.

16. According to the holding in the **Coca Cola case (supra)**, *"There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e causation must be proved."*

17. In the instant case, the claimant did not indicate the reason for her resignation. As a matter of fact, she did not cite the issue of delayed salary as being the reason that pushed her to resign. She did not even imply the same in her resignation. Accordingly, it is not possible to link the claimant's resignation to the delayed salaries. It is probable that she may have resigned on account of other factors and not necessarily, the delayed salary. An employee can resign on various grounds ranging from newer and better opportunities also known as greener pastures, in pursuit of other interests etc. Therefore, since the claimant failed to provide the reason for her resignation, it will be very presumptuous to infer that her resignation was on account of the delayed salary.

18. Indeed, and as can be discerned from her letter, the claimant appears not to have had an issue with the respondent, the delayed salary notwithstanding. She thanked the respondent and gave her best regards.

19. Further, under the aforesaid guiding principles stipulated in the **Coca Cola case (supra)**, *"the employee must not have accepted, waived, acquiesced or conduct himself to be estopped from asserting repudiatory breach;"* In this case, it is apparent that despite the delayed salary, the claimant continued to work for the respondent and even offered to serve one month's notice period so as to allow for smooth transition. Therefore, if at all, she was aggrieved by the respondent's conduct, she appeared to have acquiesced to the same hence is estopped from asserting the repudiatory breach.

20. The Court further found that where constructive dismissal is claimed, **the burden of proof lies with the employee.**

21. Ultimately, it was incumbent upon the claimant to prove that she was constructively dismissed. In this instance, I find that the claimant has not proved on a balance of probability that she was constructively dismissed.

22. The claimant has also alleged that she was unfairly and unlawfully terminated on 24th June, 2015, when she was asked by the respondent's Human Resource Manager not to report to work the following day.

23. By her own admission, the claimant stated that she resigned on 5th June, 2015 and the said resignation was accepted by the respondent. Therefore, as at, 24th June, 2015, she was serving her notice period.

24. The question therefore is, when did the resignation take effect? On this issue, I will draw some guidance from the case of **William Kariuki vs Kenya Civil Aviation Authority [2008] eKLR**, where the court held that **"In this court's opinion, the plaintiff having resigned from the defendant's employment and the defendant having accepted that resignation which fact was being acknowledged in the letter complained of, the relationship of employer/employee had been thereby severed."**

25. In the instant case, the resignation and the acceptance thereof were both unequivocal. It was therefore implied that the employment relationship had been severed save that the claimant was serving her notice period. As such, there was no employment relationship to terminate as the same had ceased to be. It cannot therefore be said that the claimant was terminated by the respondent's decision of 24th June, 2015, which effectively stopped her from working.

26. What can be discerned from the respondent's decision of 24th June, 2015 was that it waived part of the claimant's notice period.

27. Pursuant to section 38 of the Employment Act, **an employer may waive the whole or any part of the notice, in instances of resignation provided it pays the remuneration payable for the notice period.**

28. From the circumstances herein, it is apparent that the respondent waived the notice period by 6 days or so, when it asked the claimant not to report to work. It is also notable that it paid the claimant her full salary upto the end of the notice period which was 5th July, 2015.

29. The upshot of the foregoing is that the claimant's exit from employment was through resignation and not termination as alleged.

30. The net effect of the foregoing is that the claimant was not constructively dismissed nor unfairly and unlawfully terminated.

Remedies

31. As was admitted during the hearing, the claimant was paid her full salary for the month of March, 2015 till 5th July, 2015 hence the claim to that effect is spent. The same applies to the relief for pension contribution and reimbursement of money deducted from the claimant's salary towards welfare fund which as evidenced by the respondent, were duly paid upon orders of this court.

32. Having found that the claimant resigned voluntarily and was not constructively dismissed or terminated, the claim for compensatory damages flops.

33. The claim for accrued leave is also denied for the reason that the respondent placed before court, the claimant's leave records for 2016, which indicated that she had taken leave in excess of 2 days at the time. On her part, the claimant did not refute the same nor tender any evidence to the contrary.

34. The claimant has also prayed for house allowance for the duration she was in the employment of the respondent. Clause 3 of the claimant's contract of employment provides as follows in respect of salary; "Effective the date you start, you will earn a gross monthly salary of Kshs 30,000/= ". The Black's law dictionary, 10th Edition defines gross income as the "Total income from all sources before deductions, exemptions, or other tax reductions...Also termed as gross earnings."

35. From the above definition it is presumable that the term gross infers that all income payable has been taken into account. Further, in the case of **Samson Omechi Ongera vs Tusker Mattresses Limited [2018] eKLR**, the court found that "Gross monthly pay comprises of basic pay together with house allowance but does not include other work dependent on allowances such as bonus or car allowance and overtime."

36. The court arrives at a similar finding and makes a determination that the claimant's salary was inclusive of house allowance, hence the prayer in that respect is denied.

Orders

37. The upshot of the foregoing is that the claim is dismissed in its entirety with no orders as to costs.

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

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Mwae

For the Respondent Ms. Asasha

Court assistant Barille Sora

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 had 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.

STELLA RUTTO

JUDGE