



**Amira v Milbabrands Associates Limited (Cause 212 of 2015)
[2022] KEELRC 1374 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1374 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 212 OF 2015
MN NDUMA, J
MAY 19, 2022**

BETWEEN

BEVERLY AMIRA CLAIMANT

AND

MILBABRANDS ASSOCIATES LIMITED RESPONDENT

JUDGMENT

1. The claim is based on a Statement of Claim filed on 18th February, 2015 in which the following reliefs are sought:-
 - a. Payment of salary arrears for the months of November and December 2014, (294,000) Kshs 588,200.
 - b. Salary arrears for 5 days worked in January, 2015 (5x9, 483.87) – Kshs 47,419.35 Total Claim: Kshs 635,419.35.
 - (c) Interest and costs.
2. The respondent filed statement of response to the claim in which is denied the entire claim and the claimant put to strict proof thereof and a counter claim made of: -
 - a. Kshs 94,838.70 in lieu of termination notice not given by the claimant.
 - b. Kshs 114,840 being the cost of unreturned H.P Pavillion laptop serial No. 5CD41313JT).
 - c. Kshs 10,000 being daily rental charge of unremitted company car from 5th January, 2015 until the same is returned.
 - d. Costs and interest.



3. The claimant filed a reply to the statement of response, counter claim and setoff and reiterates her claim for salary arrears and denies the Counterclaim in total stating that she gave notice to terminate the contract but was unable to fully service the notice on account of lack of finances and duly notified the respondent accordingly and has reduced her claim by the number of days not served in January, 2015. That the respondent cannot seek benefit from its wrong doing having failed to pay the claimant salary due and owing.
4. The claimant admits provisions of the laptop and motor vehicle but reiterates that she made a proposition to the respondent on how to return them but the respondent did not respond to her proposition. That there is no legal agreement, the basis of any rental charges for the car.
5. The claimant was granted leave by Wasilwa, J to amend the statement of claim on 18th September, 2019. The Draft amended statement of claim was admitted on the said date.
6. In the amended statement of claim, the monthly salary was amended from Kshs 294,000 to Kshs 298,887.70 per month. A Claim for Constructive dismissal for the respondent's failure to pay the claimant her salaries hence fundamentally breached the contract of service was introduced. Damages are sought for the constructive dismissal. The amended statement of claim was duly filed on 20th September, 2019 from the record.
7. The respondent filed an amended Statement of Response and Counter-claim as set out in which the respondent denies owing the claimant Kshs.635,419 arrear salary and puts the claimant to strict proof and counter-claims Kshs. 94,838.70 in respect of the retained motor vehicle KAS 234P by the claimant, valued at Kshs.500,000 and Kshs. 10,000 daily rental. The respondent also claims the value of a laptop retained by the claimant in the sum of Kshs 114,840. The claim for damages is denied.
8. The claimant testified as C.W.1 and adopted a witness statement dated 20th September, 2019 as her evidence in Chief. C.W.1 also produced list of documents dated 18th February, 2015 as her exhibits in support of the suit and supplementary list of documents dated 4th June, 2018.
9. C.W.1 testified that she was employed by the respondent as Associate Director and given a contract of employment produced before Court.
10. The claimant was to receive a gross salary of Kshs. 420,000 per month which was net salary of Kshs. 298,887.70
11. That she started working on 1st September, 2014 and offered diligent services without any adverse record. The claimant was issued a laptop and a motor vehicle to perform her work on 1st September, 2014. The motor vehicle is KAS 234P.
12. The respondent withheld the salary for the month of November, 2014 and the claimant demanded the salary orally and was promised payment by one Brian Oduori. Claimant was requested to be patient which the claimant did. The claimant suffered financial stress during the time and depended on her own savings.
13. Mr. Brian Oduori, the Director of the respondent continued to be evasive concerning the issue of payment of salary.
14. As a result of the breach of contractual obligation by the respondent the claimant wrote a letter dated 16th December, 2014 to the respondent giving one month termination notice to the respondent due to the frustration of the Employment contract. The claimant cleared her desk and was unable to continue providing truthful service to the respondent after 5th January, 2015 due to lack of operational funds.



15. That the claimant is a single mother with Children aged 15, 13 and 6 years who depended on her for upkeep. The claimant decided to keep the motor vehicle and the laptop as lien in reference to the sum of monies owed to the claimant by the respondent.
16. Claimant stated that this was her right in respect of monies due and owing by fact of her employment.
17. That the Counter-claim stated to be daily monthly rental of Kshs 10,000 is misconceived and has no basis.
18. That the claim for Kshs 94,838.70 in respect of the said motor vehicle is misconceived since the respondent was the author of the dispute and cannot benefit from its wrong doing. That the laptop in her possession is only held as lien pending payment of salaries due and owing to her for work done. That the claim for Kshs 111,840 for the laptop is misconceived and it be dismissed also.
19. The respondent on 5th January, 2015, wrote an email to the claimant in which he admits owing salaries to the claimant due to financial constraints. The respondent requested the claimant to be patient and await payment of arrear salaries.
20. C.W.1 testified that the respondent has failed and or neglected to pay her salary to date hence the claim. The email admitting the non-payment was produced as evidence before Court.
21. The claimant served a demand letter for payment of arrear salaries. The respondent has however failed and neglected to make good the claim. The claimant prays to be awarded accordingly.
22. R.W.1 Brian Baraza Oduori testified for the respondent and stated that he is a Sales and Marketing Executive. That the claimant was employed as Associate Director on 1st September, 2014. That she was issued with Laptop valued at Kshs 114,840 on 2nd September, 2014. That she was issued with a Motor Vehicle KAS 234P Honda CR-V registered in the name of Brian Oduori.
23. That claimant issued a notice of resignation on 16th December, 2014 barely 3 months after she had been employed. The notice was to subsist until 15th January, 2015. The claimant absconded on 5th January, 2015 before end of the notice. That she left with the Laptop and the car whose value was Kshs. 500,000.
24. That the claimant has illegally kept the Laptop and the motor vehicle which she has now enjoyed the use for more than 5 years.
25. That the claim be dismissed with costs.
26. Under cross-examination R.W.1 admitted that the respondent did not pay the claimant November and December salary and the amounts are not paid to date.
27. R.W.1 admitted there were email exchanges on 3rd, 5th, and 7th January, 2015 on the issue of non-payment. That this was after the resignation. R.W.1 denied that he was hostile to the claimant. R.W.1 stated that the claimant told him that she would retain the laptop and the motor vehicle until the respondent paid her salary.
28. The parties filed submissions and list of authorities
29. The issues for determination are:-
 - (a) Whether the claim for payment of arrear salary has been proved.
 - (b) Whether the Counter-claim and setoff has been proved.
 - (c) What remedies if at all are available to either party.



30. The claimant was an employee of the respondent from 1st September, 2014. The claimant served and was paid September and October salary. The respondent admits that it did not pay the claimant salary for the months of November and December, 2014 and 5 days worked in January, 2015. The claimant claims payment of the same.
31. It is not in dispute that the claimant earned net salary of Kshs 298,887.70. The claimant is therefore owed a sum of Ksh 672,4897.33 being unpaid salary up to 5th January, 2015. The Court finds that the claimant has proved this claim on a balance probabilities and the Court awards her arrear salary in the sum of Kshs 672,497.30
32. The next question is whether the respondent has proved the Counter-claim being Kshs 94,838,70 in lieu of 10 days unserved notice since the claimant worked up to the 5th January, 2015 instead of 15th January, 2015. The claimant willingly served termination notice on the respondent but failed to serve the last 10 days of the notice. The Court finds that the respondent is entitled to payment in lieu of notice in the sum of Kshs 94,838.70 and is awarded accordingly.
33. R.W.1 told the Court that the claimant informed him that she would retain the Laptop and the motor vehicle in question until when the respondent pays her, the arrear salary. It is common cause that the respondent has not paid the arrear salary which the Court has already awarded the claimant. The claimant had a right to hold the laptop and the motor vehicle as lien pending the payment of her lawfully earned salary.
34. In the case of *John Kihara Timani Njibia -vs- Xplico Insurance Company Limited* [2017] eKLR the:-
“ In my view, the continued retention of the vehicle by the claimant amounts to what in law is a lien. However as it is in respect of a contract of employment, can it amount to a legal lien as defined above? In my view, in employment relations, the conduct of parties can broaden the scope of the attachment of the equitable lien. In this case, was the vehicle assigned to the claimant? It has not been demonstrated to this Court that the vehicle has been so assigned. Did the claimant acquire the vehicle or retain it in suspicious circumstances that would deny him the right to retain it? The Court is of the firm view that the circumstances in which the vehicle was moved by the claimant were not illegal as it was indicated to be for the use of the Mombasa staff. It is therefore preposterous to suggest that the claimant was not entitled to have the vehicle.”
35. In the present case, there is no doubt that the claimant was assigned the motor vehicle and the Laptop lawfully to use in the course of her employment. The claimant notified the respondent that she would retain the two items pending payment of her lawful salary. It is the Court’s finding that it was within the undisputed power of the respondent to collect the motor vehicle and the laptop at will upon payment of arrear salary to the claimant. The respondent failed to do so and cannot ride on a breach of employment contract to claim equitable reliefs emanating from the lawful retention of the laptop and the motor vehicle. The respondent has also not adduced any evidence to prove that the laptop and the motor vehicle were not merely held in lien but were also used by the claimant to her benefit. The claimant simply testified she held the items in lieu of payment of her arrear salary.
36. The claim for payment in respect of retained Laptop and motor vehicle are dismissed. The respondent is entitled to collect the two items upon discharging its obligations in terms of the judgment of the Court.



Constructive dismissal

37. The claim for constructive dismissal was first raised in the amended statement of claim filed on 20th September, 2019. The claimant resigned and left employment of the respondent on 5th January, 2015. The matter of constructive dismissal was therefore raised before Court more than three (3) years from the date the cause of action arose. The Court is entitled to raise this matter meromotu the issue of limitation having not been raised by either party.
38. On the strength of the Court of Appeal decision in *Divecon Limited –vs- Shirinkanu Sadrudin Samani*, Civil Appeal No. 142 of 1997, the claimant is barred from raising the issue of Constructive dismissal against the respondent more than (3) years from the date the cause of action arose, by dint of Section 90 of the *Employment Act*, 2007.
39. Accordingly, on that ground alone, the claim for damages for alleged constructive dismissal is struck out.
40. In the final analysis, judgment is entered in favour of the claimant against the respondent for:-
- (a) A sum of Kshs 672,497.33
 - (b) A sum of Kshs 94,838.70 is awarded to the respondent against the claimant and the amount is setoff against the award made in favour of the claim aforesaid.
 - (c) The total amount due and owing to the claimant as against the respondent is Kshs (67,497.30- 94,838.70) = Kshs 577,658.60.
 - (d) By fact of having retained the assets of the respondent, being a laptop and motor vehicle aforesaid, the amount is payable without interest.
 - e. The Claimant is to release the laptop and the motor vehicle to the respondent as is where is basis with no warranties given of their present condition.
 - f. The respondent to pay the costs of the suit to the claimant.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2022.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this Judgment has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE



Appearances:-

Mr. Ong'wanya Ombo Advocates for claimant

Mr. Nyachwa for Baabu for Respondent

Ekale: Court Assistant.

