



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mukinda & another v Arrow Africa (Cause 236 of 2018)  
[2022] KEELRC 1131 (KLR) (18 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1131 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 236 OF 2018**

**JK GAKERI, J**

**MAY 18, 2022**

**BETWEEN**

**EMILY MWENDWA MUKINDA ..... 1<sup>ST</sup> CLAIMANT**

**SAMMY JONATHAN JUMA ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**ARROW AFRICA ..... RESPONDENT**

**JUDGMENT**

1. By a memorandum of claim dated 1<sup>st</sup> March 2018 and filed on 2<sup>nd</sup> March 2018, the Claimants sued the Respondent alleging that they were wrongfully and unfairly summarily dismissed by the Respondent without payment of salaries and terminal benefits.
2. The Claimant prays for –
  - a. Special damages of Kshs.405,600 as follows:
    - 1<sup>st</sup> Claimant
      - i. Salary or the 4 months (22,600 x 4) worked (August to December) Kshs.90,400
      - ii. Two months' salary in lieu of notice Kshs.45,200
      - iii. Unpaid leave allowance Kshs.35,000Total Kshs.170,600
    - 2<sup>nd</sup> Claimant
      - i. Salary or the 10 months (25,000 x 6) worked (August to December) Kshs.150,000
      - ii. Two months' salary in lieu of notice Kshs.50,000



- iii. Unpaid leave allowance Kshs.35,000
  - iv. Overtime -  
Total Kshs.235,000
  - b. Costs of this suit.
  - c. Interest in (a) above
3. The Claimants' case is pleaded as follows:
  4. The Claimants aver that on or about 18<sup>th</sup> August 2017 the Respondent employed the 1<sup>st</sup> Claimant at Kshs.22,600/= and the 2<sup>nd</sup> Claimant on 6<sup>th</sup> March 2017 at Kshs.25,000/= per month, as clinical officer and lab technician respectively.
  5. It is alleged that the Claimants served the Respondent diligently were loyalty and upheld integrity until 4<sup>th</sup> January 2018 when their employment was unlawfully terminated by the Respondent without notice or pay.

### **Claimants' Evidence**

6. The 1<sup>st</sup> Claimant, CW2, Emily Mwendwa, testified through Mr. Samuel Kathia Mukindi and adopted the written statement and produced the exhibits on record. It is her testimony that the 1<sup>st</sup> Claimant worked from 18<sup>th</sup> August 2017 to 25<sup>th</sup> November 2017, a total of three months without pay. The memorandum of claim states four months. That demand for payment was unsuccessful even after enlisting the assistance of the labour office.
7. The 2<sup>nd</sup> Claimant, CW1, MR. Sammy Juma adopted the written statement and produced the exhibits on record. He tendered no oral testimony. It is his evidence that he worked at the Arrow Africa Web Hospital from 3<sup>rd</sup> June 2017 to 29<sup>th</sup> December 2017, a duration of about seven months. The memorandum states ten months.
8. The witness testified that he was paid for four months in the ten months he worked and no explanation was given why he was not paid for six months.
9. The Respondent entered appearance on 26<sup>th</sup> March 2018 through the firm of Bench and Company Advocates, Commerce House, 4<sup>th</sup> Floor, Moi Avenue, P. O. Box 11964 – 00100, Nairobi but did not file a response nor attend to a mention dated 23<sup>rd</sup> January 2019 served upon them on 29<sup>th</sup> January 2019.
10. The Respondent did not attend any Court at all or respond to the claim.
11. On 4<sup>th</sup> February 2019, the Court certified that the suit could proceed as undefended and directed Counsel for the Claimants to seek a hearing date.
12. The suit was heard on 18<sup>th</sup> January 2022 and continued on 15<sup>th</sup> February 2022 when the second witness testified. The Claimants were accorded fourteen days to file submissions and a mention slated for 12<sup>th</sup> April 2022 to confirm compliance by which date the Claimants had not complied but promised to file and serve by close of business on 12<sup>th</sup> April 2022 which they did.
13. The Court gave a judgment date.

### **Claimants' Submissions**

14. The Claimant isolates two issues for determination excluding costs:



- i. Whether the Claimants' employment was unfairly terminated;
  - ii. Whether the Claimants are entitled to terminal dues after termination.
15. As to whether their employment was unfairly terminated, the Claimants submit that decision to quit was based on the frustration by the employer who was not paying their dues as employees.
  16. Reliance is made on Article 41(1) of *the Constitution* of Kenya, 2010 which guarantees fair labour practices to urge that the Claimant were entitled to fair termination of employment.
  17. It is the Claimants' submission that they were constructively dismissed.
  18. Reliance is made on the celebrated words of Lord Denning in *Western Excavating (ECC) Ltd v Sharp* [1978] 2WLR 344. It is the Claimant's case that the circumstances in which they resigned were within the purview of the principle of constructive dismissal as salary is a fundamental term of a contract of employment and runs to its root.
  19. It is further submitted that the Claimants have discharged the burden of proof imposed by Section 47(5) of the *Employment Act* while the Respondent has not.
  20. On reliefs, it is submitted that since the Claimants were employed for less than one year, the reliefs claim entail remuneration for the duration served without notice, notice pay, pay in lieu of leave and compensation for unfair termination of employment.

### **Analysis and Determination**

21. From the evidence on record and submissions by the Claimants, the issues for determination are whether: -
  - a) The Claimants were employees of the Respondent;
  - b) The Claimants were constructively dismissed;
  - c) The Claimants are entitled to the reliefs sought.
22. As to whether the Claimants were employees of the Respondent, the documentary and oral evidence on record which is uncontroverted, is sufficient for the Court to find that the Claimants were employees of the Respondent as alleged. The documents on record to reinforce allegation include the 2<sup>nd</sup> Claimant's letter of appointment dated 1<sup>st</sup> March 2017 letter to the Court dated 12<sup>th</sup> February 2017 seeking assistance to recover outstanding dues, copies of letters from the Ministry of East African Community, Labour and Social Protection dated 29<sup>th</sup> January 2018, 8<sup>th</sup> January 2017, 23<sup>rd</sup> January 2018 and 8<sup>th</sup> February 2018 addressed to the Director of the Respondent.
23. The final document is the resignation letter by Sammy Juma dated 4<sup>th</sup> April 2018.
24. The letters and documents on record demonstrate when the Claimants were employed, their work station, duration served and the amounts not paid by the Respondent even after seeking assistance from the Ministry of East African Community, Labour and Social Protection in January 2018.
25. For these reasons, it is the finding of the Court that the Claimants were employees of the Respondent hospital as alleged.
26. As to whether the Claimants were constructively dismissed, the first point of call is the principle of constructive dismissal.



27. *Black's Law Dictionary* (10<sup>th</sup> Edition) defines constructive dismissal or discharge 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.”

28. The *locus classicus* articulation of the principle of constructive dismissal are the words of Lord Denning in *Western Excavating ECC Ltd v Sharp* [1978] 2WLR 344 where the Judge expressed himself as follows;

“If the employer is guilty of conduct which is a 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, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

29. The principle of constructive dismissal was authoritatively domesticated by the Court of Appeal in its decision in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR which elaborated the principle eloquently as follows:

The legal principles relevant to determining constructive dismissal include the following:

- 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 conducted himself to be estopped from asserting the 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.”



30. The principle has been applied in countless decisions such as *Joseph M. Kivilu v Kenya National Examination Council* [2016] eKLR.
31. The Court is bound by the Court of Appeal decision in this case.
32. I will now proceed apply the law above to the facts in this case. The resignation letter by the 2<sup>nd</sup> Claimant dated 4<sup>th</sup> January 2018 addressed to Bramuel Simiyu, Arrow Web Hospital Management P.O. Box 956 – 0018 Nairobi states as follows –
- “Re: Resignation From Employment
- Am writing to formally inform you of my decision to cease from being your employee. This is due to your unexplained breach (breach) of contract with failure to pay my six months’ salary. I therefore request you to kindly pay my salary arrears.
- This resignation is effective as on 4<sup>th</sup> January 2018.
- Yours Sammy Juma
- Date 4/01/2018”
33. The letter is not signed. It is unclear whether the letter was delivered to the Respondent.
34. The letter notwithstanding, the letter from the Ministry of East African Community, Labour and Social Protection dated 8<sup>th</sup> January 2018 to the Director Arrow Web Hospital demonstrates that the Claimants had left employment by January 2018. While the 1<sup>st</sup> Claimant left on 25<sup>th</sup> November 2017, the 2<sup>nd</sup> Claimant left on 4<sup>th</sup> January 2018 for non-payment of salaries which amounts to a fundamental breach goes to the root of the contract of employment which entitled the Claimants to treat the contract of employment as discharged and were not obligated to give a notice.
35. For the foregoing reasons, it is the finding of this Court that the Claimants have on a balance of probabilities established that they were constructively dismissed.

### **Reliefs**

36. Having found that the Claimants were constructively terminated, I will now proceed to examine the reliefs available to the Claimants.
37. The letter from the Ministry to the Director of the Respondent shows that the 1<sup>st</sup> Claimant was employed on 17<sup>th</sup> August 2017 and left on 25<sup>th</sup> November 2017, a duration of about three months and eight days while the 2<sup>nd</sup> Claimant was employed on 8<sup>th</sup> March 2017 and left on 4<sup>th</sup> January 2018, a duration of nine months.
38. The 1<sup>st</sup> Claimant testified that out of the total months he served, he was paid for four months and was claiming for the unpaid salary of six months but since he served for nine months, the outstanding salary is for five months.
39. The prayer for two months’ salary in lieu of notice was neither testified about nor proved. The Claimants are awarded one (1) month pay in lieu of notice.
40. On unpaid leave allowance or entitlement to the allowance, the Claimants led no evidence of their leave entitlement and have not demonstrated how the amount claimed was computed or ascertained. The claim is declined.



41. Regrettably, the Claimants did not pray for compensation for the constructive dismissal and none is awarded.
42. In conclusion, judgment is entered for the Claimants against the Respondent in the following terms:
- 1<sup>st</sup> Claimant
- a. Outstanding three months' salary Kshs.67,800
- b. One month's salary in lieu of notice Kshs.22,600
- Total Kshs.90,400
- 2<sup>nd</sup> Claimant
- a. Outstanding five months' salary Kshs.125,000
- b. One month's salary in lieu of notice Kshs.25,000
- Total Kshs.150,000
43. Costs of this suit.
44. Interest at Court rates from the date of judgment till payment in full.
45. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18\*<sup>TH</sup> DAY OF MAY 2022**

**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**

