



REPUBLIC OF KENYA



KENYA LAW
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**Okinda v Vijana Amani Pamoja (Cause 802 of 2017)
[2022] KEELRC 4114 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4114 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 802 OF 2017
M MBARÚ, J
JUNE 30, 2022**

BETWEEN

ELIZABETH ADHIAMBO OKINDA CLAIMANT

AND

VIJANA AMANI PAMOJA RESPONDENT

JUDGMENT

1. In August, 2010 the respondent employed the claimant as the Mrembo – coordinator/programme officer on a wage of ksh 15, 000 per month.
2. The claimant worked in her position and including other positions such as master coach, restaurant assistant a directed by the respondent.
3. The claimant was forced to resign from her employment due to conditions at work and the precarious state of her health. The claimant was demoted in her job title on the allegations that funds were not available which statement had become a practice of the respondent.
4. The claimant spent her time working in the office or the restaurant or in the field at schools. The claimant would work overtime as a master coach without compensation. The manager and director directed the claimant to start work at the restaurant and then the kitchen despite her health conditions and as a result she developed headaches and in one occasion collapsed as a result of the heat from the kitchen and smoke. The hand nerves were not working for some time.
5. The claimant repeated sought for her certificate of service form the respondent to no avail. Following the illness, the claimant sought for treatment but was informed that the employer was not making any remittances to the NHIF forcing the claimant to pay from her salary to undergo a brain surgery and treatment.



6. While in the respondent's employment, no annual leave was allocated. This resulted in unfair and wrongful termination of employment through constructive dismissal due to intolerable working conditions.
7. The claimant is seeking the following dues;
 - a. Salary for last month of employment ksh 15,000;
 - b. Balance of salary for 6 months ksh 48,000;
 - c. Overtime pa ksh 15,000;
 - d. Leave pay for 8 years ksh 84,000;
 - e. General damages for default in payment of NHIF and NSSF ksh 100,000;
 - f. Compensation for constructive dismissal ksh 180,000; and
 - g. Costs.
8. The claimant testified in support of her case that upon employment by the respondent she worked diligently but she faced a lot of problems at the hand of the director who was mean to her and caused her anguish and untold suffering. While her wages were too low, she was made to work overtime without compensation and her duties changed from time to time without any written instructions.
9. The claimant also testified that she had a health conditions which made her susceptible to headaches and was advised by the Doctor not to be a poorly ventilated place, a place with excessive heat or smoke but despite advising the respondent on the same, the director out of malice caused her to work in the restaurant and then the kitchen which was poorly ventilated, full of smoke due to lack of an exit and had excessive heat. This led to her condition deteriorating and one day she collapsed in the view of the Director who did nothing to assist her and instead mocked her.
10. The claimant testified that she was ill-treated by the response and opted to resign so as to seek medical assistance. She could however not get time off work since no annual leave was allocated and when she sought for medical attention, she discovered that the respondent was not paying her NHIF dues and therefore could not enjoy under such scheme. She therefore suffered loss and damage and the orders sought should issue since there was constructive dismissal.

Response

11. In response, the respondent's case is that the claimant applied to be one of the volunteers coaches which request was accepted and the claimant went on to work as a skills coach since the year 2010 to 2012. Due to her dedication, the claimant rose to the position of a master coach in the year 2013 and Mrembo-coordinator in the year 2014.
12. The claimant's conduct changed from the year 2014 after she was promoted and she had serious issues with punctuality, attendances and professionalism. The respondent's operations were minimised by 30% in the year 2015 by donors which resulted in less employees working and a staff performance would determine a renewal of the contract and which communication was passed to the claimant in a meeting held inn December, 2014.
13. The claimant had to juggle between being a parent and working in schools as a volunteer coach and at some point the respondent allowed her to carry her young son to school as she performed her duties as a coach as well as the office. The claimant's contract was not fully renewed due to her poor work



performance and she was at work on part time basis 3 times a week from 8am to 12Pm and 2 hour sent he field.

14. In the year 2016 one of the respondent's supervisors at the restaurant went for maternity leave and the claimant was tasked with the role of requisitions, reconciliations and staff supervisor as she was relieved off her duties since she was a coach.
15. The claimant accepted her new role in the restaurant reluctantly and raised concern in her health which the respondent knew and she was informed that her role was to cook but in a few instances she would assist the chef in food preparations but did not take it willingly and was occasionally given verbal warnings and she failed to improve.
16. The claimant resigned from her employment on August 3, 2016 ad efforts to reach her for discussions were fruitless. After the resignation, the respondent stopped the NHIF payments and the NHIF officers advised that payment should be made from March, 2015 to July, 2016 which the respondent did.
17. The respondent is a charitable organisation and he claimant took extra hours as a volunteer and with her permissions this was converted to leave days,
18. The claims made are a sham and should be dismissed with costs.
19. At the hearing, the respondent opted to be present.
20. No evidence was called.

Determination

21. The response by the respondent paints a very dire employer.
22. The scenario is that the claimant was a skills coach and due to her good work performance was promoted to Mrembo – coordinator in the year 2014. But upon prmotition, the claimant resulted to poor work performance from December, 2014. Due to reduced funding by donors there was work reduction by 30% and the claimant would only work for 3 days in the office and 2 days in the field. She had a young child and was allowed to attend work with the minor.
23. The response is also that the sometime in the year 2016 one of the claimant's colleagues went on maternity leave and the respondent directed the claimant to take over her duties in the restaurant. The respondent was aware that the claimant was unwell and she raised concern about her deployment to the restaurant and requirements to cook. Her health deteriorated and she resigned on August 3, 2016.
24. The claimant has pleaded constructive dismissal. That she was placed under intolerable working conditions by the respondent, made to cook in the kitchen which was poorly ventilated and without windows and the heat affected her already poor health leading to headaches and she fell due to the same. This is confirmed by the respondent.
25. The claimant though a skills coach was made to be the restaurant reliever while another employer was on maternity leave.
26. Even though the respondent pleaded to be a charitable organisation, such does not remove the respondent form the mandatory provisions of the law.
27. Constructive dismissal occurs where the employer places the employee under intolerable working conditions forcing the employee to resign from her employment. The conduct of the employer is the cause and reasons for termination of the employment relationship.



28. In the case of *Milton M Isanya versus Aga Khan Hospital Kisumu* [2017] eKLR constructive dismissal is defined that;

... Constructive dismissal has its roots in the law of contract under the doctrine of 'discharge by breach.' Under this doctrine, an employee was entitled to treat himself as discharged from further performance of his obligations where the employer's conduct was a significant breach going to the root of the contract. The termination would be due to the employer's conduct. Such conduct may include unilateral reduction in pay or failure to pay the employee....

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.”

29. Therefore a distinction should be made of the two facets of the definition of constructive dismissal:

- i. The employer making a unilateral alteration or breach of the employment contract to the detriment of the employee.
- ii. The employer making or otherwise permitting working conditions of the employee to be intolerable for him to continue working.

30. In Cause Number 611 [N] of 2009 between *Maria Kagai Ligaga v Coca Cola East and Central Africa Limited* the court held that constructive dismissal occurs where an employee is forced to leave his job against his will, because of his employer's conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed.

31. The termination of employment must be therefore at the instance of the employee due to being placed under intolerable work conditions. It is not sufficient that the employee has engaged in misconduct and to claim constructive dismissal hastily tenders a resignation notice to avoid the obvious.

32. The claimant resigned from her employment due to intolerable working conditions where her health was at risk, she made her concerns known to the respondent but this was taken as reluctance to work in the restaurant.

33. The court finds there were justifiable reasons leading to termination of employment through constructive dismissal.

34. The respondent has also raised the issue of the claimant's poor work performance. Upon being promoted to a programme officer she changed her attitude and would report late and failed to complete her duties.

35. Section 41 of the *Employment Act*, 2007 regulates poor work performance and allows the employer to initiate disciplinary proceedings against the subject employee.

1. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.



36. Where the respondent found the claimant to be of poor work performance, she was late for work or committed any misconduct, such matters, if at all, were not addressed within the confines of the law. What the respondent and its officers opted to do was to engage in frustrating the claimant in her employment well aware of her health conditions.
37. Such resulted in unfair termination of employment which is not justified.
38. The claimant is entitled to payment for the period worked and for the unpaid salaries. There is no evidence of payment of final dues.
39. Salary for August, 2016 is due at ksh 15, 000.
40. The claimant is entitled to notice pay at ksh 15, 000.
41. The unpaid salary balances are not challenged in any material way and this is salary for time served all at Ksh 48, 000.
42. On the claim of overtime pay, the respondent's response was that the claimant agreed to be a volunteer and hence accepted to work overtime. No written consent is filed. The sum of ksh 15, 000 is due as claimed.
43. Leave is lawfully due to every employee pursuant to the provisions of section 28 of the Employment Act, 2007. Where the employee opts to convert her annual leave in monetary terms, the employer is required to place the same in the payment statement pursuant to the provisions of section 20 of the Act. The claimant is entitled to her leave pay all at ksh 84, 000.
44. On the claimant for damages for non-payment of NHIF and NSSF, such are monies owed to a statutory body and not due to the employee. The counter claim where there is no remittance to the NHIF is service pay which is not pleaded.
45. On the findings that there was constructive dismissal which was not justified the claimant is entitled to compensation pursuant to section 45 and 49 of the Employment Act, 2007. On the wage of ksh 15, 000 per month, a compensation equivalent to 6 months wages is hereby found appropriate all at ksh 90, 000.
46. Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;
 - a. A declaration that there was constructive dismissal of the claimant by the respondent;
 - b. Compensation ksh 90,000;
 - c. Notice pay ksh 15,000;
 - d. Unpaid salaries for January to August, 2016 kshs 48,000;
 - e. Leave pay ksh 15,000;
 - f. The respondent shall issue the claimant with a Certificate of Service pursuant to section 51 of the Employment Act, 2007; and
 - g. Costs of the suit.

DELIVERED IN COURT AT NAIROBI THIS 30TH DAY OF JUNE, 2022.

M MBARŪ



JUDGE

In the presence of:

Court assistant: Peter Kigotho

