



**Sherry v Children Transformation Project (K) (Cause 439 of 2017)
[2022] KEELRC 1429 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1429 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 439 OF 2017
CN BAARI, J
JUNE 23, 2022**

BETWEEN

MIRIAM ETALE ANJAO SHERRY CLAIMANT

AND

CHILDREN TRANSFORMATION PROJECT (K) RESPONDENT

JUDGMENT

Introduction

1. The Claimant's claim is dated 5th December, 2017, and filed in court on 13th December, 2017. The Claimant prays that this court makes a declaration that her indefinite suspension amounts to constructive dismissal, hence unfair termination of employment. She further seeks payment of 1 month's salary in lieu of notice, 12 months' salary for unfair termination of employment, statutory deductions, salary and benefits arrears and costs of the suit.
2. The Respondent filed a statement of defense dated 5th April, 2018, and filed on similar date, wherein she wholly denied the Claimant's case save only that she was their employee.
3. The suit was first heard on 7th February, 2022, and concluded on 16th February, 2022, at the close of the Respondent's case. The Claimant testified in support of her case and the Respondent presented one Pheline Amolloh, to testify on her behalf.
4. Both parties filed submissions by the 4th April, 2022, and which have been duly considered.

The Claimant's Case

5. The Claimant states that she had a contractual relationship with the Respondent as a caretaker, deployed at the Koinonia Children's Retreat Center situated along the Kakamega/Webuye highway in Lurambi area since June 2010.



6. It is her case that by a letter dated the 24th day of June, 2015, the Respondent indefinitely suspended her from her duties on allegations of having sexually abused female minors in the Retreat Centre without any pay whatsoever.
7. The Claimant states that her suspension was unlawful as she was not accorded an opportunity to show cause before the drastic action of suspending her from duty was arrived at.
8. The Claimant avers that the Respondent has never initiated any steps to have the accusations levelled against her tested by way of disciplinary hearing, but has instead, registered a complaint that led to criminal proceedings against her being filed anchored on the said allegations vide Kakamega Sexual Offences Case No.16 of 2016, wherein, her accusers have never come forward to give evidence.
9. The Claimant avers that her suspension from duty was malicious and without any legal foundation.

The Respondent's Case

10. The Respondent's case is that she employed the Claimant on contractual basis, and which contract lapsed on 31st April, 2015 and that the contract was not renewed, but that the Claimant was retained in the service of the Respondent as a casual labour.
11. It is the Respondent's case that the employment relationship between her and the Claimant terminated by effluxion of time, and as such, she had no obligation to issue termination notice to the Claimant.
12. The Respondent states that the Claimant served on casual basis in the months of May and June, 2015, and that before end of June, she faced charges of gross misconduct that resulted in her suspension from duty.
13. The Respondent maintains that the Claimant's suspension was lawful and in line with the labour laws. The Respondent further avers that the Claimant sexually abused minors in her custody while at the Respondent's Children's home and upon thorough investigations by the Criminal Investigation Department, the Claimant was charged vide Kakamega Sexual Offences Case No.16 of 2016.
14. The Respondent avers that despite having suspended the Claimant on account of gross misconduct, she still went ahead and paid her full salary for the remainder of her contractual period.
15. The Respondent states that she suspended the Claimant from duty on 24th June, 2015 and invited her to attend a disciplinary hearing that was set to sit on the 7th July, 2015. The Respondent avers that the Claimant failed to attend the disciplinary hearing.
16. The Respondent states that she paid the Claimant's salaries in full up to July, 2015.
17. The Respondent avers that the Claimant is not entitled to the prayers sought and prays that the suit be dismissed with costs.

Analysis and Determination

18. I have considered the pleadings in the matter, the witnesses' testimonies and the rival submissions. The issues for determination are: -
 - i. Whether the Claimant was constructively dismissed.
 - ii. Whether the Claimant had a valid contract with the Respondent and if so, whether the contract was fairly terminated.
 - iii. Whether the Claimant deserves the reliefs sought.



Whether the Claimant had a valid contract with the Respondent.

19. The Claimant's case is that she was variously put on three months' fixed term contracts, and that the last contract had an end date of 31st April, 2015. The Respondent case is that the Claimant's term in her employ terminated by effluxion of time. The Respondent further told the court that the Claimant's last contract with them lapsed on 31st April, 2015.
20. The Claimant's position is that she continued to work for the Respondent, and on salary until 24th June, 2015, when she was indefinitely suspended on the ground of gross misconduct. It is her submission that although the last contract entered between her and the Respondent ended on 31st April, 2015, she continued to work in the months following the lapse of her contract, and was paid for the services rendered until the date of her indefinite suspension.
21. It is the Claimant's submission that the Respondent having continued paying her salary two months after the lapse of her contract creates an implied contract between her and the Respondent.
22. The Respondent admitted having retained the Claimant in her employ in what it termed as casual service, upon the lapse of her contract. The only basis upon which the Respondent could suspend and/or discipline the Claimant is by virtue of an existing contract of service.
23. It is therefore clear to the court that the Respondent intended that the Claimant continues in her service even after the lapse of her contract. The Claimant's contract had thus by implication been renewed. In the case of *Lamb vs. Evans* (1893) 1 Ch 218 the Court stated that: -

".....What is an implied contract or an implied promise in law? It is that promise which the law implies and authorizes us to infer in order to give the transaction that effect which the parties must have intended it to have, and without which it would be futile....."

24. It is also not lost on this court that the responsibility to issue a written contract of service rests on the employer. Section 9(1) of the [Employment Act](#) states:

“ contract of service-

- (b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months shall be in writing
- (2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3)”

25. I find and hold that the Claimant had an implied contract with the Respondent as at the time she was suspended for gross misconduct.

Whether the Claimant was constructively dismissed.

26. The Claimant's contends that she was constructively dismissed from the service of the Respondent for having been indefinitely suspended from duty and not called for a disciplinary hearing.
27. The Respondent on their part, told the court that the Claimant was suspended from duty on account of gross misconduct, and thereafter invited for a disciplinary hearing, an invitation she did not honour.



28. The issue for this court is whether administrative suspension constitutes unilateral acts that amounts to breach of employment contract, and If so, whether the decision to suspend could reasonably be perceived as having substantially changed essential terms of contract as to amount to constructive dismissal.
29. *Black's Law Dictionary (Tenth 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.”
30. In the case of *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344, Lord Denning had this to say on constructive dismissal:
- “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.”
31. To arrive at a determination of constructive dismissal, the court must identify an express or implied contract term that has been breached, and then determine whether that breach was sufficiently serious to constitute constructive dismissal.
32. The assertion that the Claimant was invited for a disciplinary hearing and she failed to appear, was not proved. No letter of invitation was produced before this court to show that indeed the Claimant was invited, and that she failed and/or declined to participate in the disciplinary hearing. In my view, the failure by the Respondent to adhere to disciplinary procedures, is a serious breach of contract. In the case of *David M. Potter v. New Brunswick Legal Aid Services Commission* 2015 SCC 10, the Court of Appeal for New Brunswick, held that the Appellant was constructively dismissed in light of the indefinite duration of his suspension.
33. The Respondent’s omission to invite the Claimant for a hearing, coupled with the non-issuance of a dismissal/termination letter to signify separation, in my view, entitles the Claimant to treat the indefinite suspension as a dismissal, and deem herself discharged from the service of the Respondent.
34. I find and hold that for reasons of the indefinite suspension, the Claimant was constructively dismissed.

Whether the Claimant is entitled to the reliefs sought

35. The Claimant seeks a declaration that her indefinite suspension amounts to constructive dismissal, hence unfair termination of employment. She further seeks payment of 1 month’s salary in lieu of notice, 12 months’ salary for unfair termination of employment, statutory deductions, salary and benefits arrears and costs of the suit.



Compensation for Unfair Termination

36. The court has found that the Claimant was constructively dismissed. Constructively dismissal amounts to unfair dismissal and which entitles the Claimant to compensation as envisaged under Section 49 and 50 of the *Employment Act*, 2007.
37. In determining an award of compensation, the court is to consider the 13 factors set out under section 49 (4) of the *Employment Act* (See *Alphonse Maghanga Mwachanya v Operation 680 Limited* [2013] eKLR)
38. The court was told that the Claimant failed to provide a certificate of good conduct to facilitate the signing of a contract between her and the Respondent. The Claimant vide an apology letter to the Respondent produced before court, confirmed this to be true.
39. The Claimant's implied contract with the Respondent could only have been for a term of three months, based on the expired contract last entered between the parties herein.
40. I find and hold that the Claimant has not proved a case for maximum compensation, and instead, is hereby awarded three (3) months' salary as compensation for unfair dismissal.

Salary in lieu of Notice

41. It is not disputed that the Claimant was not issued with either notice of dismissal or salary in lieu thereof. The Claimant is hereby awarded one month's salary in lieu of dismissal notice.
42. In conclusion, Judgment is entered for the Claimant and against the Respondent as follows:
 - a). A declaration that the Claimant was constructively dismissed.
 - b). payment of one month's salary in lieu of notice at Kshs.12,912/-
 - c). Three months salary for unfair dismissal at Kshs.38,736/-
 - d). Costs of the suit and interest until payment in full.
43. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 23RD DAY OF JUNE, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Claimant

N/A for the Respondent

Christine Omollo- C/A

TABLE



