



REPUBLIC OF KENYA



**KENYA LAW**  
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**Lidede v Early Learning Montessori Center & 2 others (Cause  
1400 of 2018) [2022] KEELRC 97 (KLR) (14 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 97 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1400 OF 2018  
MA ONYANGO, J  
JUNE 14, 2022**

**BETWEEN**

**VICTORIA MIGALE LIDEDE ..... CLAIMANT**

**AND**

**EARLY LEARNING MONTESSORI CENTER ..... 1<sup>ST</sup> RESPONDENT**

**OLVIER WALA ..... 2<sup>ND</sup> RESPONDENT**

**SARA CHEPCHUMBA ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. Vide her Statement of Claim dated 21<sup>st</sup> September 2018 and filed in Court on 24<sup>th</sup> September, 2018, the claimant contends that she was constructively dismissed by the Respondents.
2. The Claimant contends that she was employed by the Respondents in January 2016 in the position of Head Teacher on permanent basis at a basic salary of Kshs.137,701/-.
3. She avers that she performed her duties diligently and to the Respondent's satisfaction until 4<sup>th</sup> July, 2018 when she tendered her resignation.
4. Prior to her resignation the Claimant had requested for payment of the following: -
  - i. Salaries for the months of May and June 2018
  - ii. NHIF reimbursement of Kshs.8,750/-.
  - iii. NSSF payment
  - iv. KRA P9 form.
5. She contends that despite her request which was acknowledged, the Respondents failed and/or ignored and/or refused to honour the request.



6. The Claimant contends that the withholding of her dues was unlawful and without just cause and/or reason, was oppressive and in total disregard of the law.
7. She further contends that she had legitimately expected the Respondents to pay her salaries as and when due and to deduct and remit all statutory deductions to the relevant government agencies as required under the Employment Act, 2007 and the Constitution of Kenya, 2010.
8. The Claimant contends that she was not accorded a fair hearing on the issues raised and as a result she suffered psychological trauma and medical expenses to the tune of Kshs.208,750/-.
9. She maintains that due to the failure of the Respondents to remit her taxes she cannot obtain a tax compliance certificate and as a result it is difficult for her to secure any alternative employment elsewhere.
10. The Claimant further contends that the Respondents are in gross violation of her rights as protected under Article 43(1)(a) of the Constitution of Kenya as read with Section 41 of the Employment Act, 2007
11. In the instant claim, the Claimant seeks the following reliefs: -
  - a. A sum of Kshs.275,402/-.
  - b. An order compelling the Respondents to refund to the Claimant medical expenses of Kshs.232,750/-.
  - c. General damages.
  - d. Aggravated damages.
  - e. A declaration that the Respondents pay Kenya Revenue Authority unremitted tax on income for the years 2011, 2012, 2015, 2016, 2017 and January 2018 to June 2018 and the attendant penalties totalling to Kshs.40,000/-.
  - f. A declaration that the withholding of the Claimant's salary is unlawful, illegal and void ab initio.
  - g. An order directing the Respondents to remit all statutory deductions in respect of the National Hospital Insurance Fund for the years 2011, 2012, 2015, 2016, 2017 and January 2018 to June 2018.
  - h. An order directing the Respondents to remit all statutory deductions in respect of the National Social Security Fund for the years 2011, 2012, 2015, 2016, 2017 and January 2018 to June 2018.
  - i. Interest on (a), (b), (c), (d), (e) and (j) above at Court rates from the date of filing suit till payment in full
  - j. Costs of this suit.
  - k. Such further or other reliefs that the Court may deem just and fit to grant.
12. The Respondent although properly served with the summons and the statement of claim, failed to enter appearance or to file its defence. The suit therefore proceeded as an undefended claim. The Claimant testified on her own behalf and thereafter filed her written submissions.



## Claimant's Case

13. At the hearing which was virtual as the Claimant was in Rwanda, the Claimant adopted her witness statement dated 21<sup>st</sup> September, 2021 as her evidence in chief. The Claimant further adopted her list and bundle of documents dated 21<sup>st</sup> November, 2021 as well as a supplementary list of documents dated 23<sup>rd</sup> September, 2021 as exhibits in this matter.
14. The Claimant testified that her former employer did not give her a P9 form when she wanted to file her tax returns. That when she finally filed, the tax returns she realised that the employer had not been remitting tax.
15. The Claimant further testified that when she went for surgery her employer refused to pay her salary for May and June 2018 while she was recuperating.
16. She urged the Court to award her prayers as set out in the claim and in her bundle of documents.

## Claimant's Submissions

17. In her submissions the Claimant states that she was constructively dismissed as she was forced to resign from her employment following the Respondents' failure to pay her dues and failure to remit statutory deductions to the requisite statutory bodies. To buttress this argument, the Claimant relied on the Court of Appeal decision in the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR.
18. She submitted that the unlawful withholding of her dues amounted to a repudiatory breach of her contract. For emphasis the Claimant relied on the decision in *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221 (14<sup>th</sup> November, 1977) and *Samson Abuga Nyabate v Magena High School & another* [2017] eKLR.
19. The Claimant further submitted that the Respondent's violated the provisions of Article 41 of *the Constitution* of Kenya, 2010.
20. The Claimant submitted that she incurred huge medical expenses during her illness due to the failure of the Respondent to remit deductions made from her salary for NHIF.
21. She submitted that she is entitled to special damages as pleaded in her claim for the expenses incurred as medical expenses to the tune of Kshs.200,000/- due to non remittance of NHIF and thereafter Kshs.15,000/- for consultation due to poor sanitation at the school facility. For emphasis the Claimant relied on the decisions in *Ndishu & another v Muriungi* (Civil Appeal 3 of 2020) [2022] KEHC 2 (KLR) (21 January 2022) (Judgment) and *Eldama Ravine Distributors Limited and another v. Chebon* Civil Appeal Number 22 of 1991 (ur) on special damages.
22. The Claimant submitted that she is entitled to unpaid salaries for the months of May and June totalling to Kshs.275,402/- which the Respondents did not pay her.
23. With regard to her claim for aggravated damages, the Claimant urged the Court to be guided by the findings in the case of *Rookes v Bernard* (1964) UKHL 1 (21 January 1964) and *Claudette Pamella Thompson v The Commissioner of Police of the Metropolis* (1997) EWCA Civ 3083 (19<sup>th</sup> February, 1997). She submitted that she was entitled to compensation under this head as the Respondents actions put her through frustrations and caused her to resign from work without payment of her dues. That she mental and physical anguish as a result of the harsh treatment by the Respondents.



24. The Claimant submitted that having proved her case against the Respondents she is entitled to the reliefs sought in her statement of claim.

### **Analysis and Determination**

25. Having considered the pleadings, evidence and submissions filed by the Claimant the following are the issues for determination:
- i. Whether there was an employer-employee relationship between the Claimant and the Respondent;
  - ii. Whether the Claimant was constructively dismissed;
  - iii. Whether the Claimant is entitled to the reliefs sought.

Whether there existed an employer-employee relationship between the Claimant and the Respondent

26. This being an undefended Claim this Court must determine, as a preliminary issue, whether or not there existed an employer – employee relationship between the Claimant and the Respondents.
27. In the case of *Monica Kanini Mutua v Al-Arafat Shopping Centre & another* [2018] eKLR, the Court held that in an undefended claim, it is trite that the claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the respondent as a preliminary issue before establishing the alleged unfair termination of the employment.
28. The Claimant attached several documents as proof of her employment relationship with the Respondents including the employee handbook, a copy of her letter of appointment dated 2<sup>nd</sup> January, 2016, several email communications between herself and representatives of the 1<sup>st</sup> Respondent and several pay slips as proof of payment of her salary by the 1<sup>st</sup> Respondent.
29. Based on the above documents I find that the Claimant has proved that she was indeed in the 1<sup>st</sup> Respondent’s employment.

### **Constructive Dismissal**

30. Constructive dismissal is not expressly provided for in the *Employment Act* or in any other legislation in Kenya that makes provision for employment. The subject has however been discussed in many decisions of this and other courts. It is therefore an issue that is settled in our jurisprudence.
31. Constructive dismissal is defined in *Black’s Law Dictionary* 10<sup>th</sup> Edition 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.”
32. Further, the Court of Appeal has had an opportunity to elaborately address the subject in the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR where the Court stated:
- “The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer’s behaviour towards him was so unreasonable that he could not be expected to stay- this is the unreasonable test.



The second interpretation is that the employer’s conduct is so grave that it constitutes a repudiatory breach of the contract of employment- this is the contractual test.”

33. The Claimant submitted that she was forced to tender her resignation from the Respondents employment following failure to pay her withheld salary as well as to remit her statutory dues.
34. The Claimant submits that as a result of the treatment by the Respondents, she suffered psychological and mental anguish that resulted in her illness and hospitalization.
35. Her resignation letter at page 82 of her statement of claim and bundle of documents reads as follows:

“Miss Victoria Lidede

Box 73396 Nairobi 00100

Wednesday July 4<sup>th</sup> 2018

Dear Dr. and Mrs Wala,

It is with great reluctance that I hereby submit my resignation letter. Although my time with Nairobi Montessori Preparatory School has been satisfying and productive for quite a number of years, lately I have become more and more dissatisfied with the work situation.

I kindly request the following issues, which have been communicated to you via email and SMS messages, be clarified to avoid further legal action against the school management

May and June Salaries

NHIF reimbursement

NSSF Payment

KRA P9 form

My letter of resignation from Nairobi Montessori Preparatory

School is effective as at Friday 6<sup>th</sup> July, 2018

Yours Sincerely,

(signed)

Victoria Lidede”

36. From the letter, it is clear that the Claimant tendered her resignation following the Respondents’ failure to pay her salaries and remit statutory deductions. This constituted a fundamental breach of the terms of employment contract as was held by the Court of Appeal in the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* (*supra*).
37. The Claimant further relied on the case of *Milton M Isanya v Aga Khan Hospital Kisumu* [2017] eKLR where the Court stated as follows on constructive dismissal:

“In constructive dismissal the desire to resign is from the employee as a result of hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tender’s resignation.”

38. In view of the foregoing, I find that the Respondents acts pushed the Claimant to tender her resignation hence her constructive dismissal.



## Whether the Claimant is entitled to the reliefs sought\*\*

39. In her statement of Claim the Claimant sought the following reliefs: -
- a. A sum of Kshs.275,402/- being unpaid salaries for the months of May and June
40. In the absence of any proof of payment of the said salaries by the Respondents who did not defend the claim, I find that the Claimant is entitled to the same and award her Kshs.275,402/- on account of salary for May and June 2018.
- b. An order compelling the Respondents to refund the Claimant medical expenses of Kshs.223,750/-
41. The Claimant prayed for the refund of medical expenses as special damages. He avers that she spent the sum of Kshs.223,750/- which she paid due to the fact that the Respondents had not remitted her NHIF deductions from her salary.
42. The Claimant submitted her payslip which reflects that the Respondent deducted Kshs.1,700/- every month on account of NHIF. She further produced evidence of treatment from various hospitals together with receipts from Nairobi, Women's Hospital. She further produced correspondence between her and the Respondents over reimbursement of the hospital bills.
43. This being special damages, it must be specifically pleaded and proved. The Claimant pleaded for a sum of Kshs.223,750/- but only provided receipts for Kshs.14,450/- which I award her.
- c. General Damages
44. Having found that the Claimant's resignation was as a result of constructive dismissal, she is entitled to compensation. In my view, an award of award her six (6) months' salary as compensation is reasonable. In arriving at this award, I have considered the provisions of Section 49 of the *Employment Act*, 2007.
45. The Claimant is therefore awarded the sum of Kshs.826,206/- under this head. The amount is tabulated as hereunder;
- Kshs.137,701/- being the monthly salary x 6 months = Kshs.826,206/-
- d. Aggravated Damages
46. This Claim fails as the Claimant has not proved that the circumstance under which she left employment qualify for aggravated damages. As was held in the case of *Godfrey Julius Ndumba Mbogori & another v Nairobi City County* [2018] eKLR:

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are:

- i. In cases of oppressive, arbitrary or unconstitutional action by the servants of the government,
- ii. Cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and
- iii. Where exemplary damages are expressly authorized by statute”.



47. The Claimant did not prove that the Respondent's actions were so arbitrary or oppressive as to justify the award of aggravated damages. The prayer is declined.
- e. A declaration that the Respondents pay Kenya Revenue Authority unremitted tax on income for the years 2011, 2012, 2015, 2016, 2017 and January 2018 to June 2018 and the attendant penalties totalling to Kshs.40,000/-
48. The Claimant submitted that the Respondents failed to remit tax on income for the above period and as a result the statutory body has levied penalties on her account for unpaid taxes.
49. In the absence of any evidence to prove remittance of taxes as required by law, I direct that the Respondents remit all unpaid taxes with respect to the Claimant's earnings for the period she worked for the Respondent and to further pay the penalties accrued as a result of the failure to remit the taxes totalling to Kshs.40,000/-.
- f. An order directing the Respondents to remit all statutory deductions in respect of National Hospital Insurance Fund for years 2011, 2012, 2015, 2016, 2017 and January 2018 to June 2018
50. The Claimant submitted that the Respondents failed to remit to the statutory body being National Hospital Insurance Fund for the aforesated period despite making the deductions on her payslip.
51. In the absence of any evidence to rebut this assertion, I direct the Respondents remit all the National Hospital Insurance Fund deductions made from the Claimant's salary to the statutory body as required by law.
- g. An order directing the Respondents to remit all statutory deductions in respect of National Social Security Fund for years 2011, 2012, 2015, 2016, 2017 and January 2018 to June 2018
52. In absence of any evidence to confirm that the Respondents did remit to the statutory body deductions made with respect to National Social Security Fund, this Court directs that the Respondents remit to the statutory body the said deductions as required by law.

### **Conclusion**

53. In conclusion, judgment is entered for the Claimant against the Respondent jointly and severally in the total sum of Kshs.1,116,058/=.
54. The Respondents shall further remit income tax, NSSF and NHIF that it failed to remit together with any penalties and/or interest as provided for under the various legislation governing the payments.
55. The Respondents shall pay the Claimant's costs for this suit. Interest shall accrue at Court rates on the decretal sum from date of judgment till payment in full.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF JUNE 2022**

**MAUREEN ONYANGO**

**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.

**MAUREEN ONYANGO**

**JUDGE**

*JUDGMENT Nairobi ELRC Cause No. 1400 of 2018 Page 10*

