



REPUBLIC OF KENYA



KENYA LAW
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**Wausi v Jubilant Kenya Limited (Cause 869 of 2017)
[2022] KEELRC 1363 (KLR) (7 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1363 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 869 OF 2017**

**B ONGAYA, J
JULY 7, 2022**

BETWEEN

NAOMI METU WAUSI CLAIMANT

AND

JUBILANT KENYA LIMITED RESPONDENT

JUDGMENT

1 The claimant filed the memorandum of claim on November 20, 2017 through Otieno Asewe & Co. Advocates. It is her case that the respondent employed her on January 5, 2016 as a Finance and Strategy Manager earning a monthly salary of Kshs. 47,000.00 as at the time of termination. Further, her last monthly pay was 40% of the agreed monthly salary and which she was paid sometimes in April, 2017. Thereafter, she was not paid the monthly salaries for May, June, July, August and September, 2017. It is her case that she resigned from employment on account of the respondent's fundamental breach of the contract of service by failing to pay the agreed salary. She alleges unfair constructive dismissal. She claims for:

- i. One-month salary in lieu of the termination notice Kshs. 47,000.00.
 - ii. Balance of April salary Kshs. 28,200.00.
 - iii. Unpaid salary for May, June, July, August and September, 2017 Kshs. 188,000.00.
 - iv. 17 days' unpaid leave Kshs. 47,000.00
 - v. 12 months' salary as compensation for unfair constructive dismissal (12-months x Kshs. 47,000.00).
- Total Kshs. 874,200.00.

2 The claimant prayed for Judgment against the respondent for:



- a. That the respondents be ordered to pay the claimant her terminal and contractual dues amounting to Kshs. 874,200.00.
 - b. Costs of this claim and interest thereon at court rates.
 - c. A declaration that constructive dismissal of the claimant from service was unfair, unjust and wrongful.
 - d. Any other relief that this Court may deem just and fit to grant.
- 3 The respondent filed on December 19, 2017 the response and answer to the claimant's memorandum of claim through Jane Kangu & Co. Advocates. The respondent admitted employing the claimant as a Finance and Strategy Manager by the letter dated January 11, 2016. It is the respondent's case that it was a growing medium microfinance whose objective was to aid many poor, struggling and low income earning customers whose livelihoods depended on friendly financial facilities provided by the respondent. Further, during the claimant's employment, the respondent experienced challenges in the market whereby funders withdrew abruptly interrupting the respondent's operations to a complete halt. The circumstances were compounded by a political climate that unsettled the respondent's financial sector. Further, the respondent denied that the claimant was entitled to the claims and remedies as prayed for. Further, the claimant took all her leave days and upon effluxion of her termination notice period, she never went back to clear with the respondent or to collect her certificate of service. The respondent prayed the suit be dismissed with costs.
- 4 The claimant testified to support her case and despite service the respondent did not attend at the hearing of the suit on May 24, 2022.
- 5 Final submissions were filed for the claimant.
- 6 The Court has considered all the material on record and returns as follows:
1. There is no dispute that the parties were in a contract of service as per the letter of offer of appointment dated January 5, 2016 and the employment commenced on January 11, 2016. It was with a probationary service of 6 months running from January 11, 2016 to about July 11, 2016.
 2. The evidence is that the claimant served the respondent a letter of termination of employment by way of resignation to be effective September 30, 2017.
 3. While the claimant alleges unfair constructive dismissal, it appears she tolerated the respondent's fundamental breach of the contract of service by failing to pay salaries for May, June, June, August and September, 2017. In her resignation letter, she did not mention the reason for resignation but instead appreciated the opportunity the respondent had given her in its service. She also served a termination notice by that resignation letter as dated August 9, 2017. The Court finds that the allegation of unfair constructive termination will collapse because even if the salaries were not paid, the claimant condoned the breach. Further, by serving a termination notice, she was not leaving abruptly in protestation of the fundamental breach by the respondent. The Court returns that she is not therefore entitled to compensation for the alleged unfair termination as well as pay in lieu of notice.
 4. The Court finds that by her evidence, the claimant has on a balance of probability, established her claim of unpaid salaries and 17 days of unpaid leave for 2016 and 2017. She is awarded Kshs. 263,200.00.



7 In conclusion, Judgment is hereby entered for the claimant against the respondent for:

1. Payment of Kshs. 263,200.00 by September 1, 2022 failing interest to be payable thereon at Court rates from date of filing the suit until full payment.
2. The respondent to pay the claimant costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 7TH JULY, 2022.

BYRAM ONGAYA

JUDGE

