



**Kariuki v Elsek & Elsek (K) Limited (Cause 916 of 2017)
[2022] KEELRC 12829 (KLR) (14 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12829 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 916 OF 2017
B ONGAYA, J
OCTOBER 14, 2022**

BETWEEN

JACQUELINE MUTHONI KARIUKI CLAIMANT

AND

ELSEK & ELSEK (K) LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 14.12.2017 in person. She is an Advocate of the High Court. The respondent entered appearance in person on 12.01.2018 and later filed a response to the memorandum of claim on 26.02.2021 through Kihoro & Company Advocates. On 13.04.2021 the respondent filed a notice to act in person and its Finance Manager one Shahame Aziz Mwidani (also the respondent's witness – RW) appeared in that regard.
2. The claimant's case is based on her amended memorandum of claim filed on 05.07.2021. The claimant has pleaded as follows. The respondent employed her as an in-house lead counsel or advocate effective 01.07. 2014. She acted as an advocate for the respondent in various court disputes. She worked diligently until 31.01.2015 when the respondent unlawfully and without any right denied her salary and dues thereby rendering her employment untenable and she considered herself constructively discharged. Sometimes in August 2014 to January 2015 and without any reason or notice the respondent unilaterally constructively terminated the claimant's services without further correspondence and denied her the monthly salary for more than five months consecutively despite working and rendering professional legal services. The respondent was a profitable going concern but the claimant's demands to be paid salary were rudely denied.
3. The claimant's further case is as follows. As at termination she earned Kshs. 100, 000.00 per month. Further, her unfair termination and constructive dismissal from employment was unfair, unlawful, and without justification. The employment was terminated contrary to equity and the Employment Act, 2007. The claimant claimed against the respondent as follows:



4.
 - a. Five months of unpaid salary Kshs. 500, 000.00.
 - b. Three months' pay in lieu of notice Kshs. 300, 000.00.
 - c. Five months' service pay at 15 days Kshs. 49, 500.00.
 - d. Prorate leave earned Kshs. 49, 500.00.
 - e. Unpaid NHIF Kshs. 3, 000.00.
 - f. Unpaid NSSF Kshs. 1, 800.00.
 - g. Contract of service (which the claimant urged to mean certificate of service).
 - h. 12 months' compensation for unfair termination Kshs. 1, 200, 000.00.
 - i. Total Kshs. 2, 111, 800.00.
5. The claimant prayed for judgment for payment of Kshs. 2, 111, 800.00; costs and interest of the claim; and any other relief that the Honourable Court may deem fit to grant.
6. The respondent's case is based on the response to the amended memorandum of claim filed for the respondent on 18.08.2021. The respondent denied employing the claimant as an in-house lead counsel or advocate and that parties were never in employment relationship. Further the claimant never offered the respondent services that would constitute employer-employee relationship. If at all the claimant was engaged, it was on part-time as a legal consultant and not a full time employee as was alleged. Her proper demand would be for fees under the Schedule VI(j) of the Advocates Remuneration Order. The claimant never reported at the respondent's offices to work and no instructions for an Advocate-Client relationship has been established. The respondent denied dismissing the claimant and denied Kshs.100, 000.00 as the agreed monthly salary. The claimant denied that the claimant was entitled to the remedies as prayed for. It was prayed that the suit be dismissed with costs.
7. The claimant testified to support her case and RW was the respondent's Finance Manager. The parties filed their respective final submissions. The Court has considered all the material on record and makes findings as follows.
8. The 1st issue for determination is whether the claimant has established employer-employee relationship between herself and the respondent. The claimant testified that she worked for the respondent effective 01.07.2014 to Christmas vacation when the respondent broke for the vacation. Further, the contract of service was oral between herself and the Managing Director Osman Erdinc Elsek. The official search at the Business Registration Services shows that Osman Erdinc Elsek is the respondent's director and shareholder. The NSSF statement of account exhibited by the claimant shows that the respondent made contributions for the claimant for the months of August, September and October 2014. By an email on 28.08.2014 the claimant is listed as one of the employees required to attend a meeting on time at the respondent's office. The meeting had been scheduled for 29.08.2014 with the CEO at the Nyali office. The claimant has exhibited email communication on work related issues issued in September and November 2014. In view of that evidence the Court returns that the claimant was employed by the respondent orally at Kshs. 100, 000.00 per month. The parties were in employment relationship on a balance of probabilities especially and in view that the respondent failed to call the Managing Director Osman Erdinc Elsek to rebut the claimant's case about the oral contract.



9. The 2nd issue for determination is whether the claimant was unfairly terminated and constructively so. Her testimony is that she was paid for the month of July 2014 and thereafter she was never paid. Further she testified that she worked August, September, October, November, and December 2014 but she was not paid. Further, she testified that in December 2014 the respondent broke for Christmas vacation and thereafter changed offices without advising her to report at new offices. The Court has considered that testimony and returns that it contradicts the claimant's pleading at paragraphs 6 and 7 of the amended memorandum of claim where the claimant has pleaded that she worked up to 31.01.2015 – so did the relationship end at Christmas break or at the end of January? The claimant in the demand letter dated 13.09.2016 stated that she was constructively terminated in August 2014. The Court returns that the claimant's contradictory account on the circumstances of the separation cannot be trusted. Further, if indeed she was paid only for July 2014 and continued to work to Christmas vacation or 31.01.2015, it would appear to the Court that she condoned the alleged fundamental breach of the contract of service, namely, failure to pay salaries effective August 2014. In such circumstances, her alleged constructive and unfair termination is found flaccid. The Court therefore returns that the material on record does not aid the claimant to establish the alleged unfair constructive termination as was alleged and submitted. The collateral prayers for pay in lieu of the termination notice and compensation for unfair or unlawful termination will collapse as not justified at all.
10. The 3rd issue is whether the claimant is entitled to the five months' salaries for August to December 2014. The Court finds that the claim must fail as time barred. The Court finds that the failure to pay the alleged salaries was a continuing injury which allegedly ceased on 31.12.2014. Under section 90 of the *Employment Act*, 2007 the 12 months of limitation from the cessation of the continuing injury lapsed on or about 31.12.2015 but the suit was filed belatedly on 14.12.2017. Further, while the claimant has provided material suggesting the parties were in a contract of service for the five months the salaries are being claimed (such as NSSF contributions for the initial three months and office email communications on staff meetings), the claimant has not shown the work she actually performed throughout the five months and on full time basis – and the respondent's submissions are upheld in that regard. The prayer will therefore fail as time barred or not justified at all.
11. To answer the 4th issue, the Court returns that the claimant has not established that she owned a H.P Mini Printer valued at Kshs. 8, 000.00 and that the same was withheld or converted by the respondent. It is trite that special damages are not only specifically pleaded but are also strictly proved. The claimant failed to provide the necessary evidence and the prayer will fail.
12. To answer the 5th issue, the claimant did not serve for at least 12 months so that she did not earn annual leave as per provisions of section 28 of the *Employment Act*, 2007. The prayer for payment of prorated annual leave is therefore declined as unjustified. The claim on NHIF was abandoned by the claimant at the hearing and for being overtaken. The court has found that the claim for NSSF contributions not made was equally a continuing injury and therefore time barred just like the claim for salary for five months. In any event the NSSF claims may be satisfied per relevant statutory provisions.
13. The Court has considered the correspondence suggestive of client-advocate relationship and further considered the respondent's suggestion that fees may be available to the claimant under the Advocates Remuneration Order for such work established as duly performed. Accordingly, each party shall bear own costs of the suit.
14. In conclusion, judgment is hereby entered for the respondent against the claimant for dismissal of the suit with orders each party to bear own costs of the proceedings.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 14TH OCTOBER, 2022.



BYRAM ONGAYA
JUDGE

