



**Mukesh v Associated Construction(K) Ltd (Cause 265 of 2020)
[2022] KEELRC 12863 (KLR) (6 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12863 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 265 OF 2020
AN MWAURE, J
OCTOBER 6, 2022**

BETWEEN

KALYANI PANDIAN MOHAN MUKESH CLAIMANT

AND

ASSOCIATED CONSTRUCTION(K) LTD RESPONDENT

JUDGMENT

1. The claimant has filed a claim dated June 19, 2020. The claimant avers he was employed by the respondent as a project manager sometime on October 23, 2018. He says on February 1, 2020 he gave a months' notice to resign from his employment and handed company's assets. He says when he resigned he was earning a monthly salary of Kshs 650,000/- per month.
2. The claimant says at the time he resigned he was owed 3 months salary in arrears together with other statutory and contractual benefits. He says the respondent has frustrated his efforts to pay his dues as listed hereunder.



No	Details	Calculation	Amount (Kshs)
December salary	Balance	200,000	
January salary	Balance	500,00	
February salary	Full payment	650,000	
Reimbursement of house rent paid for Mombasa house	Jan, Feb & March Shs 45,000x3	135,000	
Gratuity	(30 days/12 months)x14 months =35 days	758,333	
Balance leave days	(30 days/12 months)x 14 months =35 days. less leave taken = 10 days (in Dec 19 & Jan, 2020) and 19 days in Feb, 2020) balance due = 35-29=6 days	150,000	
Total due	2,393,333		

3. The claimant therefore prays for orders against the respondent for payment of the following:-
- Claimant's terminal benefits tabulated herein before.
 - Damages for breach of contract
 - Certificate of service
 - Costs of the suit
 - Interest on (a) & (b) at court rates
 - Any other relief that this honourable court may deem just to grant.

Respondent's Case

- The respondent admits the claimant was employed as project manager of the respondent until when he absented himself from work and that he did not resign from work. The respondent says since the claimant absented himself from work in early 2020 he is not entitled to the dues he is claiming.
- The respondent claims Kshs 4,517,880 for losses due to damaged plant machinery, wasted material and lost wage. He also prays for cost and interest.
- The claimant in his evidence in court repeats what was in the pleadings. He says he is claiming his salary for December, January and February and house allowance. He says he did not abscond from duty but



he resigned and handed over to one Alex Juma the assistant engineer. He says the director Mr Bausal promised to pay his dues as per an email but he has never done it.

7. Respondent's witness Mr Naman Singh Bausal says he is a businessman. He said he had worked with the claimant for a long time like 20 years in different projects. He says claimant wrote a letter requesting to go on leave and was told to hand over to one Mr Wachira but after that he did not follow the procedure to proceed on leave.
8. The respondent says the claimant therefore absconded from duty and occasioned losses to the company worthy Kshs 4,500,000/-. The same is claimed by the respondent in his counterclaim.

Claimant's Submissions

9. The claimant in his submissions says he has proved that the respondent breached his contractual obligation and failed to pay his dues. He quotes section 17 and 18(2) (c) which provides that the employer should pay the employee his full dues. The claimant says he is entitled to his terminal dues. he relies on the case of *Ignas Karingo Mghona & 4 others v Star of Hope International Foundation* (2016) eKLR where court held that all terminal dues must be paid to an employee upon exit.
10. The claimant also states that the respondent is not entitled to the claimed counterclaim of Kshs 4,517,880/- due to losses occasioned by the claimant's desertion from duty. The claimant says he never deserted duty but resigned from his employment in accordance to the terms of his contract. Claimant's averment is that the respondent failed to prove the claimant deserted from duty.
11. The claimant says any losses suffered by the claimant cannot be attributed to the claimant and aver then the amounts demanded are plucked from the air. There is no proof of any such losses and he relies on the case of *Willy Kanuna v Capitol Laundry Limited* (2020) eKLR where employer failed to justify his claim for a counterclaim.
12. The claimant therefore says he has proved his case and asks his prayers to be granted. The claimant allege his termination was constructive dismissal as the respondent failed to pay his salary. He prays for his dues therefore to be paid as per his prayers in the statement of claim.

Respondent's submissions

13. The respondent in his submissions avers that the claimant absconded from duty and efforts to trace him were unsuccessful. He says claimant filed this suit to thwart disciplinary steps the respondent would have taken against him.
14. The respondent says when he learnt of the claimant's failure to report on duty he made efforts to reach out to him (emails dated July 21, 2021). The respondent submits that the claimant's case therefore should be dismissed and the respondent should be awarded his counterclaim of Kshs 4,500,000/- and also that claimant should not be awarded the prayer he has prayed.

Decision

15. The claimant avers that he resigned from his employment on February 1, 2020 and the reasons he gives is that he did not use to get his salary on time. At the time of his resignation he says his arrears were totaling three months. He was employed in October 2018 and he resigned in February 2020.
16. After his resignation there are records to show he handed over company assets to one Alex Juma on February 28, 2020 and Alex Juma signed for the same.



17. The respondent is alleging the claimant absconded from duty without any hand over. Yet the respondent did not refute the fact that Alex Juma received the items handed over by the claimant on February 28, 2020. That was about one month after the claimant tendered his resignation on February 1, 2020. The evidence on record and the evidence offered in court by the claimant is convincing that he tendered his one month notice as per the contract of employment.
18. Further there is an email produced in court dated February 1, 2020 by Mr N.S Bausal where he wrote “I am not surprised to your resignation. I wish to know what measures you have left in place for the works in your absence as you proceed on leave?” Bausal the respondent witness did not deny he wrote this email. It is obvious therefore he was aware of the claimant’s resignation.
19. Again there is an email of March 22, 2020 where the claimant was asking the respondent to be paid his dues and the respondent responded. “Don’t give the threats. Once funds come we shall settle whatever is due”.
20. Once again this is evidence that the respondent acknowledged there were dues to the claimant and would settle them. He did not however specify when they would settle them.
21. Going by the pleadings and evidence adduced in court as well as the submissions hereto, I find no evidence that the claimant absconded from duty. In the case of *Evan Ochieng Oluoch v Njimia Pharmaceutical Limited* (2016) eKLR the court observed that desertion of duty is a grave administrative offense which if proved would render an employee liable to summary dismissal. However it is not enough for employer to simply state that an employee has deserted duty. The law is that an employer must show efforts he made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration.
22. The court finds no evidence by the respondent or any records that they attempted to reach out to the claimant if at all he absconded from duty as earlier observed. The claimant has evidence that he resigned from his employment as per the contract by giving one month notice. He then tried to follow his unpaid dues and seems the same was not settled and he was then obliged to file a case in court as per his claim dated June 17, 2020.
23. The respondent filed his response dated August 6, 2020 and at that point claimed losses of Kshs 4,517,880/- due to claimant absenting himself from work and so in the process there was damage to plant machinery, wasted material and lost wages.
24. It is correct the respondent had not alluded to such loses before until he filed his response to the claim. This claim seems to be to quote the famous phrase from the Supreme Court petition judgment of 2022 election petition as “hot air balloon”. The reason I call it this is because there is no evidence of damaged machinery, wasted material and value and the wages paid to the employees and for what purpose. This claim cannot be sustained in any way as is not proved.
25. The court would like to say that there is clear proof however that the claimant was owed salary in arrears and no wonder he opted to resign. Indeed his resignation would have fitted to be constructive dismissal but since he did not pursue that line I will not deal with it. But failure to pay an employee salary for service rendered is a fundamental breach of contractual obligation. In the cause 140 of 2016 *Isaiab Gathogo v The Board of Management of St Antony Schools & another* the court held that failure to pay salary falls in the armpit of being contractually dismissed as per the cited authorities.
In the case of *Nathan Ogada Atiagaga v David Engineering Limited* (2015) eKLR the court held that constructive dismissal occurs when an employee resigns because their employers behavior has become intolerable or made life so difficult that the employee has no choice but to resign.



26. In this case failure by the respondent to pay the claimant his dues including three months' salary is truly a breach of a fundamental obligation of an employer and can make any employee to break down. The court finds the claimant behaved in a manner that was expected of him under the circumstances and so voluntarily resigned from his employment and then demanded to be paid his dues.
27. The court finds the claimant has proved his case and should be paid some of the dues claimed in his statement of claim.

Remedies awarded

28. The claimant is awarded his unpaid salary as per the table which is presented hereinbefore and is as follows:-
- i. Part December 2016 salary Kshs 200,000
 - ii. Part January salary Kshs 500,000
 - iii. February salary is Kshs 650,000 awarded as well
 - iv. Reimbursement of house rent is not proved and so is declined.
 - v. Gratuity is provided in the contract of employment Kshs 758,333/-
 - vi. Balance of leave days as is not controverted by the respondent is awarded Kshs 150,000/-
Total awarded Kshs 2,258,333
 - vii. Costs are also awarded to the claimant.
 - viii. Interest is awarded at court rates from date of judgment till full payment.
 - ix. Damages for breach of contract are not pleaded specifically and so not granted.
 - x. Certificate of service to be given to the claimant 14 days from today's date.
29. The respondent did not prove his claim for the counterclaim of Kshs 4,517,880/- and so is not granted.
- Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 6TH OCTOBER, 2022.

ANNA NGIBUINI MWAURE

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 15th March 2020 and subsequent directions of 21st 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 had 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.

ANNA NGIBUINI MWAURE



JUDGE

