



**Aketch v Rusinga Schools Nairobi (Cause E522 of 2021)
[2022] KEELRC 13320 (KLR) (30 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13320 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E522 OF 2021
J RIKA, J
NOVEMBER 30, 2022**

BETWEEN

MATHEWS AKETCH CLAIMANT

AND

RUSINGA SCHOOLS NAIROBI RESPONDENT

JUDGMENT

1. The claimant filed his statement of claim on June 29, 2021.
2. He states that he was employed by the respondent as a supply chain manager, on March 1, 2019. Employment was for 3 years, effective March 1, 2019.
3. His monthly gross salary was Kshs 104,500, as at the time of termination.
4. He resigned on January 19, 2021, on the ground that the respondent frustrated him, in discharging his role.
5. Deductions were made from his salary for the period between May 2020 and December 2020, without his consent; he was placed on 4 months' leave without pay; he was discriminated against, because his colleagues were not subjected to similar treatment; his position was advertised between November 10, 2020 and November 24, 2020; he was constantly insulted by the director; and considered himself to have been constructively dismissed.
6. He suffered severe financial crisis, emotional trauma, social distress, mental and physical anguish.
7. He prays for: -
 - a. Service pay at Kshs 104,500.
 - b. Refund of salary unlawfully deducted, May 2020 to December 2020 at Kshs 404,000.



- c. 12 months' salary in compensation for unfair termination at Kshs 1,254,000.
 - d. 3 months' salary *in lieu of* notice at Kshs 313,500.
 - e. Overtime pay of 240 hours at Kshs 104,400.
 - f. Loss of future earnings at Kshs 1,358,500.
- Total...Kshs 3,538,900
- g. Declaration that the respondent's actions amounted to constructive dismissal.
 - h. Declaration that termination was unfair and unlawful.
 - i. Nominal damages.
 - j. Interest.
 - k. Certificate of service to issue.
 - l. Any other suitable remedy.
8. The respondent filed its statement of response dated September 27, 2021. It is accepted that the respondent employed the claimant as a supply chain manager, on terms pleaded in the claim. He was paid basic salary of Kshs 60,000; house allowance of Kshs 25,000; and responsibility allowance of Kshs 15,000 monthly.
 9. The respondent experienced financial constraints, due to Covid-19. It was compelled to offer parents discounted fees. there was severe reduction in cash flow. To ensure sustainability of the respondent, the respondent took certain measures. It was recommended staff take a 60% pay cut for 4 months, from May to August 2020. The resolution by the board was communicated to all the staff through the Head Teacher on May 30, 2020, in a virtual meeting. The claimant attended the meeting. The claimant did not protest the decision, or raise any query when invited by the respondent to do so. The respondent went further by negotiating moratorium with ABSA Bank, for staff who had monthly loan obligations. The claimant was able to defer his loan repayments to ABSA Bank.
 10. The situation did not improve, and beginning September 2020, staff were placed on unpaid leave, and received a stipend of Kshs 7,500 monthly. They were engaged virtual work. This was communicated to the claimant. He was invited for discussions on August 19, 2020. This was accepted by the claimant.
 11. On September 10, 2020 however, the respondent reversed the decision regarding the claimant, and called him to resume duty. He resumed duty and was paid salary for September and October 2020. On November 2, 2020, the claimant agreed to revert to unpaid leave
 12. On January 2, 2021, the respondent issued a staff memo, requiring all staff to resume duties. The claimant absconded, and issued resignation letter dated January 19, 2021. Upon receipt of the letter, the head teacher invited the claimant for a virtual meeting, to be held on January 26, 2021. The claimant declined consultations, and informed the respondent that the matter was in the hands of his advocates.
 13. The respondent states that the claimant does not merit service pay; he was subscribed to the NSSF salary reduction was made consensually. He resigned without issuing notice, and is not entitled to notice. He was in management, and not entitled to overtime. The prayer for future earnings is not supported by the law. He does not merit 12 months' salary in compensation for unfair termination. He was not unfairly treated. The respondent prays the court to dismiss the claim.



14. The claimant gave evidence and rested his claim, on June 14, 2022. Human Resource Manager Alexander Mbae, gave evidence for the respondent on the same date, closing the hearing. The claim was last mentioned in court on September 21, 2022, when parties confirmed filing and service of their final submissions.
15. The 2 witnesses adopted in their evidence, the respective witness statements and bundles of documents on record.
16. The claimant emphasized that he did not consent to deduction of his salary. He was placed on unpaid leave and recalled after 2 weeks. He was paid 80% of his salary for September and October 2020. He was insulted by the director. He developed high blood pressure. He could not sustain himself and his family. He resigned. The respondent accepted his resignation. He was invited for a meeting by the respondent. He told the respondent that he had engaged advocates, and all communication should be channelled through his advocates.
17. Cross-examined, the claimant told the court that he was aware of the covid-19 situation. He was not aware that most schools experienced difficulties and were laying off staff. He signed a letter asking his bank to grant him a loan holiday. He did not understand the contents. Salary cuts did not affect all staff. He was asked to take leave in November 2020. He did not report back in January 2021. Working conditions were hostile. The director abused the claimant. The claimant did not have evidence that he lodged a complaint against the abuse. He did not know that absenteeism was ground for dismissal under his contract. He was actively subscribed to the NSSF. The position of Procurement Manager was advertised. He was Supplies Chain Manager. The roles were the same. The contract provided for 3 months' notice of termination. The claimant did not issue this. He was paid allowances, equivalent of overtime pay. Redirected, the claimant told the court that he did not report back in January 2021, because he had been asked to go on 4 months' unpaid leave.
18. Mbae emphasized that covid-19 adversely affected the finances and operations of the respondent. The respondent sought to ensure that learning was not interrupted. There was a revision of fees. Salaries were reduced. The reduction was done in consultation with the staff. The claimant attended the relevant meeting. 64% of non-teaching staff were sent on leave. They were paid a stipend over the period. The claimant was recalled on September 10, 2020. It was only him, who was recalled. He was asked to revert to unpaid leave, in December 2020. In January 2021, all staff were recalled. The claimant did not resume, but instead issued resignation letter. He was called for consultations. He instead filed the claim herein. The respondent did not advertise his position. It advertised for a Strategic Leader in Procurement. The respondent did not terminate any of its employees' contracts during the covid-19 downturn. It paid Christmas savings to employees. It was never a hostile employer.
19. Cross-examined, Mbae denied that he invited the claimant to the meeting to consult about resignation, through SMS. The head teacher wrote to the claimant, advising him that he was free to attend the meeting in the company of his advocate. His letter was enough to prove resignation. Redirected, Mbae told the court that the claimant did not give details of his advocates to the respondent. The respondent did not at any time, intend to terminate the claimant's contract. 217 employees consented to salary adjustment. The claimant resigned without issuing notice. He does not merit service pay.
20. The issues are: whether the claimant was constructively dismissed by the respondent; whether his contract was unfairly terminated by the respondent; and whether he merits the remedies sought.



The Court Finds:

21. The claimant was employed by the respondent school as a supply chain manager on March 1, 2019. The contract was for 3 years, ending on March 1, 2022. He had previously been appointed through a contract dated July 18, 2018, as an Inventory Officer. The earlier contract was renewed for 3 years, ending on July 31, 2021. The last contract appears to have been made before the first one ended. It superseded the first one.
22. On January 19, 2021, the claimant resigned. In his resignation letter, he stated that he was compelled to resign, due to frustration from the top management. He detailed instances of frustration: he was placed on unpaid leave of 4 months, on November 2, 2020; his salary was subjected to deductions for 6 months without his consent; he was discriminated against as other employees continued to be paid 100% of their monthly salaries; he was insulted by the director; his job was advertised in November 2020; and he suffered health issues due to these frustrations.

Constructive Dismissal.

23. The court is not satisfied that resignation by the claimant, amounted to constructive dismissal. It is common evidence that the respondent, like many other employers worldwide, was confronted with the covid-19 pandemic. It suffered financial constraints, not of its own making. It was compelled to take certain measures, to keep afloat, and to ensure that its core activity- teaching – did not shut down.
24. It put in place sensible measures such as e-learning, school fees adjustment, and consulted staff on pay reduction. There is evidence that the pay reduction affected 217 employees, not just the claimant.
25. The respondent went a step further by negotiating with banks on behalf of its staff who had loans with the banks, for loan holidays.
26. In January 2021, all staff who had been on unpaid leave were recalled. The claimant did not resume, but resigned and instructed his advocates to pursue this claim for constrictive dismissal.
27. There was no evidence that he was insulted by the Director, making it impossible to continue working. He states that he was told by the Director, “don’t be silly...” The court does not think that if these words were uttered by the Director, would amount to an insult, such as would make the work environment so hostile, to the continuous discharge of the supply chain management function, justifying the claimant’s resignation. An employer who tells his employee, “don’t be silly,” cannot invariably be deemed to be in fundamental breach of the contract of employment. The court does not think, that even in the ordinary use of the English language, the term is to be invariably seen as an insult.
28. The claimant did not bring his claim within the elements identified by the Court of Appeal in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] e-KLR, on constructive dismissal. Primarily, there was no reason for the claimant to believe that the respondent was no longer interested in being bound by the terms of the contract. The respondent recalled staff who had been placed on unpaid leave. It was open to the claimant to resume. He opted to terminate the contract. The salary reduction was not made unilaterally, or without reason. All staff were consulted, and it was understood that salary reduction was to sustain the Institution, encountered with a public health situation not contemplated in the contract of employment. The respondent opted to retain the staff on adjusted salaries, rather go the way many employers opted to go- declare redundancies or shut down their businesses altogether. The court is persuaded that the respondent acted fairly, rationally, and responsibly, and did not constructively dismiss the claimant.



Unfair Termination.

29. Having made the findings above, the court does not think that the respondent could otherwise have terminated the claimant's contract unfairly. The contract was terminated by the claimant through his letter of resignation. He initiated termination. The respondent in fact, did not accept termination downright, but made attempts to reach out to the claimant, asking for consultations to salvage the contract of employment, which the claimant rebuffed, instructing his advocates to initiate claim for constructive dismissal. The claimant did not establish that unfair termination of employment or wrongful dismissal occurred, as required of him under section 47[5] of the [Employment Act](#). The employer is not called upon by this provision to justify the reasons for termination, where the employer is not the initiator of termination.

Remedies:

30. The prayer for 12 months' salary in compensation for unfair termination, is declined for the reasons stated above. The claimant tendered his resignation on January 19, 2021. He terminated his contract without notice to the respondent. He does not merit notice pay.
31. He has not established the prayer for service pay. It is not provided for in his contract. He did not establish that he was eligible for service pay, under section 35 of the [Employment Act](#). His contract indicates that he was eligible for staff pension scheme.
32. There is similarly no evidence to support the prayer for overtime pay. The prayer is not based on any wage order applicable to the claimant or his contract of employment. The formula adopted by the claimant, in pursuing overtime, is not based on any law. There is no evidential material showing that the claimant performed 240 hours of overtime work.
33. Loss of future earnings is a remedy awarded by courts, when it is established that a claimant has suffered a reduction in his or her ability to earn money, as a result of an injury. The claimant has not shown that his ability to earn money, suffered reduction, as a result of any injury.
34. The last substantive remedy sought is refund of salary deductions made, for the period May 2020 to December 2020, computed at Kshs 404,000.
35. Salary reduction was a temporary measure taken by the respondent, to address the financial constraints caused by covid-19. It was not an ordinary review of salary, resulting in contractual reduction of salaries. On January 2, 2021, the respondent wrote to the staff recalling them, and restoring their full salaries. On September 27, 2021, the claimant was recalled temporarily and paid his full monthly salary, although he stated he was paid about 80% of his full salary.
36. It was not the intention of the parties, in the view of the court, that salaries due under contract, were permanently reduced through the memo issued by the respondent to staff, dated May 26, 2020. Reduction was a stop-gap measure, meant to help the Institution overcome the burden of covid-19. A time for restoration would come, and did come, in January of 2021. Unpaid salaries would be paid as part of the restoration.
37. The claimant opted to discontinue working. This would not disentitle him, salaries owed by the respondent, for the period between May –December 2020. There was no written contract between the claimant and the respondent, to show that his salary had been revised down. The memo issued by the respondent was targeted at a certain exigency, which ended in January 2021. It was not a variation of the contract between the parties, replacing the existing contract. The respondent made the decision to recall and restore staff to their contracted terms and conditions of service. Financial stability and



normal operations would have bounced back, for the respondent to recall and restore all staff. Just like the bank deferred loan repayment for the respondent's staff, upon the intercession of the respondent, rather than write off the loans, the staff would be deemed to have deferred their contractual expectation for full monthly salaries from the respondent, rather than forfeit those salaries. The claimant merits his withheld salary for the period claimed, at Kshs 404,000. The prayer for salary arrears is allowed, at Kshs 404,000.

In Sum, It Is Ordered:-

- a. The respondent shall pay to the claimant salary arrears at Kshs 404,000.
- b. No order on the costs.
- c. Interest awarded at court rates, from the date of judgment, till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 30TH DAY OF NOVEMBER 2022.

JAMES RIKA

JUDGE

