



**Adhala v Great Lakes University of Kisumu (Cause E057 of 2021)
[2022] KEELRC 13054 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13054 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E057 OF 2021
CN BAARI, J
NOVEMBER 3, 2022**

BETWEEN

TOBIAS OMENDA ADHALA CLAIMANT

AND

GREAT LAKES UNIVERSITY OF KISUMU RESPONDENT

JUDGMENT

Introduction

1. The Claimant lodged this suit vide a Memorandum of claim dated 30th July, 2021 and filed in court on 2nd August, 2021. The Claimant prays that this court makes a declaration that his termination is unlawful and without justifiable cause, payment of 1 month's salary in lieu of notice, damages for wrongful dismissal, payment of gratuity, salary arrears, unpaid leave and costs of the suit.
2. The Respondent entered appearance on 1st September, 2021, and filed a response to the memorandum of claim on 22nd September, 2021, wherein, she wholly denied the Claimant's case.
3. The suit was heard on 7th February, 2022, and concluded on 8th June, 2022, with the close of the Respondent's case. The Claimant testified in support of his case and the Respondent presented one Mary, Anne Atieno to testify on her behalf.
4. Both parties filed submissions by 5th October, 2022.

The Claimant's Case

5. The Claimant's case is that he was employed in the year 2017 by the Respondent as a tutorial fellow, on a two 2 years renewable contract of service. The Claimant further states that his contract commenced on 17/7/2017.



6. The Claimant states that he was later promoted to the position of university examination, tabling and curriculum officer and also served in the University quality assurance committee.
7. It is the Claimant's case that his contract was renewed upon its expiry with effect from 21/8/2020 to 31/7/2021, but that his salary was not paid as stipulated in the appointment letter.
8. It is the Claimant's further case that the Bank statement produced in evidence show that he was issued with pay slips but the money was not remitted to the Bank.
9. The Claimant states that his monthly salary was Kshs.80,000.00, but that he was only paid Kshs.61,000.00 and Kshs.30,000.00 intermittently for the months of the claim.
10. It is the Claimant's case that he was not paid at all from 28th August, 2019 to the end of his contract.
11. The Claimant states that during the period of the Covid outbreak, he conducted lectures on-line.
12. It is the Claimant's case that he was not given a show cause letter nor informed of what informed the decision to terminate his services. It is his further case that he wrote an email to the Head of Department and two letters to the Respondent inquiring about his salaries and his employment status, and that he did not receive any communication or response to his letters.
13. The Claimant states that contrary to the Respondent's assertion, his employment was regular having been interviewed by a panel constituted by the Respondent prior to his appointment.
14. It is his further case that the renewal of his contract was signed by the Deputy Vice Chancellor Academic Affairs. It is his case that he was not aware of any accusations against him and no reasons were given for his dismissal.
15. It is the Claimant's case that though he filled leave forms, his leave was not approved, and he thus did not take his leave days, hence the claim for unpaid leave.

The Respondent's Case

16. It is the Respondent's case that the Claimant was irregularly recruited into its service vide a letter dated 31st July, 2017, as a tutorial fellow earning a basic salary of Kshs. 54,000/- and a house allowance of Kshs. 6000/-
17. The Respondent's case is that the Claimant was appointed to the service of the Respondent on 13th July, 2017. The Respondent further states that they realized that the Claimant was irregularly appointed when this case was filed in court on 17/10/2021.
18. The Respondent confirmed on cross examination that the Claimant discharged the duties for which he was hired until his termination.
19. It is the Respondent's case that the Claimant was appointed by their then Vice Chancellor – Anne Atieno Amadi, who was herself subsequently terminated. The Respondent further states that it took no action against the Vice Chancellor for the irregular appointments.
20. The Respondent states that it undertook a fresh recruitment process to fill the vacant posts. The Respondent confirmed on cross-examination that no communication was made to the Claimant to step aside.
21. The Respondent states that the Claimant absconded duty, and that it did not make a follow up on his whereabouts. It is the Respondent's case that no letters were written to the Claimant.



22. The Respondent's further case is that their Human Resource Manual provides for payment of gratuity at the rate of 25% of basic salary. The Respondent further states that payment of gratuity is depended on availability of funds. The Respondent's witness could not confirm that the Respondent did not have funds for payment of gratuity at the time the Claimant exited their service.
23. It is the Respondent's case that leave is a statutory entitlement, and further that the Claimant utilized his leave days.
24. The Respondent states that it has not disputed any of the pay slips availed by Claimant in evidence, as well as the documents indicating that Claimant taught and administered exams.

The Claimant's Submissions

25. It is submitted for the Claimant that the Respondent's conduct was so unreasonable as to amount to constructive dismissal, for reason that the working environment created by the Respondent was too hostile making it difficult for the Claimant to continue working. The claimant sought to rely in the holding in *Coca Cola East & Central Africa Limited v. Maria Kagai Ligaga* to support this position.
26. It is submitted for the Claimant that the Respondent did not make a follow up on the Claimant's whereabouts so as to allege desertion of duty. The Claimant had reliance in the holding in *Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited (2016) eKLR*
27. The Claimant submits that he is entitled to the remedies sought in accordance with Section 49 of the *Employment Act, 2007*.

The Respondent's Submissions

28. It is submitted for the respondent that the Claimant's appointment was irregular and therefor void ab initio having been recruited by a Vice Chancellor who was serving on suspension.
29. It is the Respondent's submission that the Claimant having been irregularly recruited, is in itself sufficient reason for his termination. They had reliance in the holding in *Jackson Cheruiyot Rono v County Secretary Bomet & Another* (2017) eKLR to support this position.
30. It is submitted for the Respondent that the Claimant has failed to prove constructive dismissal which he alleged, and that he actually deserted duty.
31. It is the Respondent's submission that the Claimant is not entitled to the reliefs sought owing to the fact that he was not dismissed from service and had in fact been irregularly employed.
32. The Respondent submits that the Claimant is not entitled to payment of gratuity as it accrues upon serving for two years, and that the Claimant had not completed his second year of service.

Analysis and Determination

33. I have considered the pleadings in the matter, the witnesses' testimonies and the rival submissions. The issues for determination are:
 - i. Whether the Claimant was an employee of the Respondent
 - ii. Whether the Claimant was constructively dismissed.
 - iii. Whether the Claimant deserves the reliefs sought.



Whether the Claimant was an employee of the Respondent.

34. Contracts of service/Employment are by law, either oral or in writing. The law places the obligation to reduce oral employment agreements into writing, on the employer's door step. This thus means that where an employee is able to show that he has a contract of employment with an employer, the same does not always have to be in writing.
35. The Claimant herein has placed before this court an appointment letter dated 13th July, 2017, indicating that he was appointed to the position of tutorial fellow at the Respondent's University. The contract per the appointment letter, was to last for a period of two years terminating on 30th August, 2019.
36. The Claimant has likewise exhibited pay slips emanating from the Respondent and which pay slips, the Respondent did not contest. Bank statements have also been provided in evidence which show that the Claimant received salary payment from the Respondent.
37. The Respondent's only contention in this regard, is that the Claimant was hired irregularly by virtue of having been recruited during the term of office of a Vice Chancellor who was said to have been suspended for reason of the irregular employment amongst other grounds. Nothing was placed before this court to prove that the recruitment and subsequent appointment was irregular.
38. The evidence before court are full proof that the Claimant was an employee of the Respondent and I so hold.

Whether the Claimant was constructively dismissed.

39. The Claimant contends that he was constructively dismissed from the service of the Respondent on the basis that the Respondent's conduct was so unreasonable as to amount to constructive dismissal.
40. The Claimant contends that the working environment created by the Respondent was too hostile making it difficult for the Claimant to continue working. Specifically, the Claimant told this court that students informed him that they were instructed by the head of department not to log into his classes for reason that he had been dismissed.
41. The Respondent's position is that the Claimant deserted duty and was thus not dismissed and/or terminated.
42. The Black's Law Dictionary (Tenth Edition) defines constructive dismissal or discharge 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.”
43. In the case of *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344, Lord Denning had this to say on constructive dismissal:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee



is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

44. The issue for this court is whether the removal of the Claimant from the Respondent’s teaching time table constitutes unilateral acts that amounts to breach of employment contract, and If so, whether the decision not to allocate duties could reasonably be perceived as having substantially changed essential terms of contract as to amount to constructive dismissal.
45. To arrive at a determination of constructive dismissal, the court must identify an express or implied contract term that has been breached, and then determine whether that breach was sufficiently serious as to constitute constructive dismissal.
46. The messages exchanged between students and the Claimant in relation to his employment with the Respondent, are in my view a clear breach of contract for reason that the Respondent did not inform the Claimant that it was considering terminating his service, and he only got to learn about it through his students who refused to log into his classes, and who further forwarded to him messages from his head of department informing students that the Claimant had been sacked.
47. Withdrawing the Claimant’s duties, was a clear indication that the Respondent no longer intended to be bound by the terms of the Claimant’s contract, and thus, in my view, the Claimant was entitled to treat himself as discharged from any further performance of his contract or deem himself as having been constructively dismissed. (See David M. Potter v. New Brunswick Legal Aid Services Commission 2015 SCC 10)
48. Further, the Respondent did not make effort to follow up on the Claimant’s whereabouts, if indeed it considered his absence from duty as an abscondment of duty. In *Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited* (2016) eKLR, the court held that an employer relying on the grounds of desertion of duty to justify a termination of employment, must show that efforts have been made to get in touch with the deserting employee and at the very least, the employer must issue notice to the employee that termination is being considered.
49. The Claimant herein was not issued with notice of the intended termination and/or dismissal on account of desertion of duty, and therefore the Respondent’s assertion on desertion does not hold.
50. I find and hold that for reason of the Claimant’s removal from the Respondent’s teaching time table, the Claimant was constructively dismissed.

Whether the Claimant is entitled to the reliefs sought

51. The Claimant’s prayers to this court are for a declaration that his termination is unlawful and without justifiable cause, payment of 1 month’s salary in lieu of notice, damages for wrongful dismissal, payment of gratuity, salary arrears, unpaid leave and costs of the suit.

Damages for wrongful termination

52. The court has found that the Claimant was constructively dismissed. Constructively dismissal amounts to unfair dismissal and which entitles the Claimant to compensation as envisaged under Section 49 and 50 of the *Employment Act*, 2007.



53. In determining an award of compensation, the court is to consider the 13 factors set out under section 49 (4) of the *Employment Act* (See *Alphonse Maghanga Mwachanya v Operation 680 Limited* [2013] eKLR)
54. The Claimant's last contract with the Respondent is dated 20th July, 2020 and was to lapse on 31st July, 2021. It would in my view amount to an unjust enrichment of the Claimant to award him damages for twelve (12) months, when he had only three (3) months to the end of his contract.
55. Considering the holding in *D.K. Marete v Teachers Service Commission Cause No. 379 of 2009* where the court held that remedies are not aimed at facilitating the unjust enrichment of aggrieved employees but to redress economic injuries in a proportionate way, I deem three months' salary sufficient to compensate the Claimant for the unfair/constructive dismissal, and which is hereby awarded.

Salary in lieu of Notice

56. It is not disputed that the Claimant was not issued with either notice of dismissal or salary in lieu thereof. The Claimant is hereby awarded one month's salary in lieu of dismissal notice.

Gratuity, Salary Arrears and Unpaid Leave

57. The claim for gratuity was not expressly provided for under the Claimant's employment contract, and the evidence before court show that he was a member of the National Social Security Fund (NSSF) for which the Respondent/employer made contributions. The claim fails and is dismissed.
58. The claims for salary arrears and unpaid leave have both not been sufficiently proved and are hereby dismissed.
59. In conclusion, Judgment is entered for the Claimant as against the Respondent as follows:
- a). A declaration that the Claimant was constructively dismissed.
 - b). An order for payment of one month's salary in lieu of notice at Kshs. 98, 940/-
 - c). Payment of Three months' salary as damages for unfair dismissal at Kshs. 296,820/-
 - d). Costs of the suit and interest until payment in full.
60. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 3RD DAY OF NOVEMBER, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. M.M. Omondi Present for the Claimant

Ms. Anuro present for the Respondent

Christine Omollo- C/A

