



**Wanjiku v Aldonai Enterprises Ltd (Cause 26 of 2020)
[2022] KEELRC 13122 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13122 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 26 OF 2020
AK NZEI, J
NOVEMBER 3, 2022**

BETWEEN

JOHN NJOROGE WANJIKU CLAIMANT

AND

ALDONAI ENTERPRISES LTD RESPONDENT

JUDGMENT

1. The claimant instituted the suit herein *vide* a memorandum of claim dated June 10, 2020 and filed in court on June 12, 2020. The claimant pleaded:-
 - a. that the claimant was on December 7, 2016 employed by the respondent as a Crane Operator/ Top Loader and was earning Kshs 86,531 as at the time of termination.
 - b. that the claimant had previously been employed by the respondent on a one year contract and was on December 10, 2017 confirmed a permanent employee.
 - c. that around May 2019, the respondent stopped remitting the claimant's salary even though the claimant was still reporting to work daily; and that as at the time of filing suit, the respondent had not paid the claimant's salary for May, June, July, August, September and December 2019.
 - d. that on May 27, 2019, the respondent wrote to the claimant informing him that his contract had been renewed for two (2) years; and that this the respondent did despite the fact that the claimant was a confirmed permanent employee.
 - e. that the respondent thus constructively terminated the claimant's employment; and reasons for such termination were not given to the claimant.
 - f. that termination of the claimant's employment was unfair, unprocedural, and unlawful as it contravened the requirements set out in sections 35, 36, 41,44 and 45 of the [Employment Act](#), and that the claimant was not accorded a hearing before termination.



- g. that the claimant did not utilize his leave for 2017 and 2018.
2. The claimant claimed the following from the respondent:-
- a. one month salary *in lieu of* noticeKshs 86,531
 - b. unpaid salary for May, June, July, August, September and December 2019 (Kshs 86,531X6 months).....Kshs 519,186
 - c. unpaid leave for the period December 2016 to December 2018 (21 days xKshs3,328x2 years)Kshs 139,776
 - d. house allowance as from December 6, 2016 to December 7, 2019 (15%Xkshs 86,531X35 months)...Kshs 454,287.75
 - e. compensation for unfair termination of employment (Kshs 86,531 X12).....Kshs 1,038,372
 - f. a declaration that termination of the claimant’s employment was unfair.
 - g. costs of the suit and interest.
3. The respondent did not file any response to the claimant’s claim. There is on record an affidavit of service filed in court on August 11, 2020 stating that summons and suit documents herein were served on the respondent on July 24, 2020. On March 29, 2022, however, the respondent entered appearance through the firm of Mwiniki Gitahi & Partners Advocates and when the suit came up for pre-trial directions on March 31, 2022, the respondent’s counsel orally sought, and this court granted the respondent leave to file and to serve response to the claim, witness statements and documents within fourteen days of the said date. The suit was fixed for hearing on June 6, 2022 in the presence of the respondent’s counsel.
4. The respondent did not file any pleadings, either as ordered on March 31, 2022 or at all. Hearing proceeded ex-parte on March 31, 2022, and the suit was heard as an undefended claim. The claimant adopted as his testimony his witness statement dated June 10, 2020 and produced in evidence some ten(10) documents listed on his filed list of documents dated the same date. The documents included the claimant’s letter of appointment dated December 7, 2016, a letter of confirmation of employment dated December 10, 2017, letter of contract renewal dated May 27, 2019, and copies of payslips for the years 2017 and 2018; among others.
5. The claimant further testified that the respondent stopped remitting his salary and did not pay the claimant’s salary for May, June, July, August, September and December 2019, and that it became hard for the claimant to continue working as he had to hike lifts to and from work. The claimant further testified that he did not take his leave from 2017 to 2018.
6. The claimant further testified that his salary was not inclusive of house allowance. He prayed that his claim against the respondent be allowed.
7. In a bid to prove his plea of constructive dismissal by the respondent, the claimant testified that whereas he had, *vide* a letter dated December 10, 2017, been confirmed as a permanent employee, the respondent wrote to the claimant on May 27, 2019 and informed him that “his contract had been renewed for a period of two (2) years from December 7, 2017 to December 6, 2019.” This purported retrospective “renewal of contract” purported to cover the period during which the claimant had worked as a permanent employee. It amounted to an attempt by the respondent to change in retrospect



the claimant's terms of employment without his consent or without consulting him. Such a conduct by the respondent contravened the provisions of section 10(5) of the Employment Act.

8. Upon considering the claimant's pleadings and evidence on record, issues that present for determination are as follows:-
 - a. whether the claimant was constructively dismissed.
 - b. whether the dismissal was unfair.
 - c. whether the claimant is entitled to the reliefs sought.
9. In determining the first and the second issues, this court is guided by the Court of Appeal decision in the case of Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR where the court stated as follows:-

“constructive dismissal occurs where an employee terminates the contract under which he is employed,(with or without malice) in circumstances in which he is entitled to terminate it without notice, by reason of the employer's conduct. The employer's behavior in either case must be shown to be heinous, so intolerable, that it made it considerably difficult for the employee to continue working. The employee initiates the termination believing himself to have been fired. The employee needs to show that the employer, without reasonable or proper cause conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is regarded as constructive dismissal if the employer's conduct is a significant breach of the contract of employment and that the conduct shows that the employer is no longer interested in being bound by the terms of the contract. The employee's resignation is therefore treated as an actual dismissal by the employer and the employee may claim compensation for unfair termination.”

10. In the present case, failure by the respondent to pay the claimant's salary for six months and an arbitrary attempt by the respondent to change the claimant's permanent employee status in retrospect amounted to a repudiatory breach of the claimant's contract of employment, and therefore to constructive dismissal of the claimant. I make a finding that the claimant was constructively dismissed by the respondent, and that the dismissal was unfair. I so declare.
11. On the third issue, and having made a finding that the claimant was unfairly dismissed, I award him the equivalent of seven months' salary in compensation for unfair termination of employment; that is (Kshs 86,531X7 = 605,717).
12. On the claim for unpaid salary for the months of May, June, July, August, September and December 2019, the claimant pleaded and gave particulars of the claim. The claim was not disputed by the respondent, who did not defend the suit. The claim is allowed (Kshs 86,531X6 = 519,186). The claim for unpaid leave for two years is also allowed at Kshs139,776 as prayed. The claim was pleaded and oral evidence was adduced thereon. The respondent did not dispute the same as it never defended the same.
13. The claim for house allowance was not pleaded, and is declined. The claim for one month salary *in lieu of* notice is allowed at Kshs 86,531 pursuant to section 35 (1) (c) of the Employment Act.
14. In sum, judgment is hereby entered for the claimant against the respondent for:-
 - a. seven months' salary in compensation for unfair termination of employment (86,531x7)
.....Kshs 605, 717



- b. unpaid salary for May, June, July, August, September and December 2019 (Kshs 86,531X6)
.....Kshs 519,186
 - c. unpaid leave.....Kshs 139,776
 - d. one month salary *in lieu of notice*Kshs 86,531
- Total Kshs 1,351,210

- 15. The awarded sum shall be subject to statutory deductions under section 49(2) of the *Employment Act*.
- 16. the claimant is awarded costs of the suit and interest. interest shall be calculated from the date of this judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 3RD DAY OF NOVEMBER 2022

AGNES KITIKU NZEI

JUDGE

Order

In view of restrictions on physical Court operations occasioned by the Covid-19 Pandemic, this Judgment has been delivered via Microsoft

Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Claimant

.....for Respondent

