Mwalimu Plus Limited v Cheruto (Employment and Labour Relations Appeal 13 of 2020) [2022] KEELRC 13417 (KLR) (2 December 2022) (Judgment)

Neutral citation: [2022] KEELRC 13417 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL 13 OF 2020

MA ONYANGO, J

DECEMBER 2, 2022

BETWEEN

MWALIMU PLUS LIMITED ..... APPELLANT

AND

EMMA NAMUMA CHERUTO ..... RESPONDENT

JUDGMENT

1. The appeal challenges the decision of the Senior Resident Magistrate in Milimani Chief Magistrate's Court case No 359 of 2018 delivered on January 31, 2020. In the decision, the trial magistrate found that the Appellant had dismissed the Respondent through constructive termination. Consequently, the court awarded the Respondent damages in reparation of the irregular termination.

2. From the record, the Appellant engaged the Respondent on May 1, 2017 as a Content Management Team Leader. It would appear that before this date, the parties had been in some form of employment perhaps from September 2016 as averred by the Respondent. However, according to the Appellant, their engagement before May 1, 2017 was on fixed term contracts of service the last of which presumably lapsed before the contract that was signed on May 1, 2017.

The Case and Determination before the Trial Court

3. The Respondent asserted that throughout her engagement with the Appellant that commenced on May 1, 2017, she experienced a series of difficulties at work which eventually led to her decision to resign on May 26, 2018. The Respondent asserted that even though she was hired in a management position, her role was unilaterally revised downwards in what appeared to be a demotion. Instead of executing her mandate in terms of the job description she had been given on May 1, 2017, the Respondent asserted that she was asked to take up the role of data entry which according to her was a task that was usually performed by staff at entry level.

4. The Respondent also asserted that sometime in May 2018, the acting CEO of the Appellant reprimanded her in front of junior members of staff that were working under her. This, according to the Respondent, caused her embarrassment and humiliation a matter which undermined her authority over those members of staff.

5. The Respondent also raised the issue of sudden shift in work hours and days. According to the Respondent, her contract of employment stipulated that she would work between 9 am and 5 pm. Further, the contract stipulated that she would be on duty between Monday and Friday of every week. However, the Appellant's management unilaterally changed these terms of the contract and required her to report to work from 8 am to 5 pm and to also work on Saturdays.

6. Basing on the agreed work hours and days, the Respondent asserted that she enrolled for a University course. That she understood that she would utilize the time outside her agreed work hours and days to attend to her studies. Therefore, the sudden and unilateral change in the work hours and days by the Appellant threw her study program into disarray.

7. It was the Respondent's case that despite her pleas, the Appellant's management was unwilling to stick to the work hours and days initially agreed in order to allow her the opportunity to pursue her studies. That the Appellant was not even willing to allow the Respondent to work from home on Saturdays. According to the Respondent, she was left with little option but to terminate the weekend studies even though she had already paid for the course.

8. The Respondent also asserted that the contract of employment provided for leave entitlement that was less than what is permissible under the law. Whilst the law provides for a minimum of 21 days' leave, the contract provided for 14 days' leave. The Respondent asserted that she raised her objection to this aspect of the contract but was advised that the leave period would eventually be revised to 24 days.

9. Despite this assurance from the Appellant's management, the leave days were not revised upwards. Besides, the Respondent alleged that she was not even allowed to take the 14 days leave stipulated in the contract despite a number of requests.

10. According to the Respondent, she asked for sick leave to allow her time to recover from her ulcers problem but this was declined. Although the Appellant's CEO had approved the request, the Respondent's immediate boss reversed the decision and asked her to resume work.

11. The Respondent also raised concern about communications that were sent to her by the Appellant's management outside normal work hours. She lamented about Skype calls that would sometimes be made by the Appellant's officials quite late in the night.

12. The Respondent asserted that she lodged complaints about the way she was being treated at work but her grievances were not taken seriously. Instead of addressing her grievances, the Respondent asserted that the Appellant's management placed her on second probation long after her contract of May 1, 2017 had been confirmed. That the decision to place her on probation a second time greatly undermined her ability to execute her duties.

13. The Respondent asserted that the totality of the foregoing presented an unfriendly and difficult work environment for her. That the Appellant's management had made it impossible for the Respondent to continue executing her mandate through their unilateral decisions that resulted in fundamental breaches of the contract between the parties and by withholding basic employee rights from the Respondent. This forced her into taking the decision to resign.

14. On its part the Appellant refuted the Respondent's assertions. According to the Appellant, the contract of service signed between the parties on May 1, 2017 gave the Appellant power to alter the

duties assigned to the Respondent so long as this did not affect the validity and or efficacy of the contract. In the Appellant's view, all that it did was to give the Respondent assignments that fell within the range of her core mandate. The Appellant denied ever demoting the Respondent.

15. The Appellant denied that the Respondent was diligent as she had asserted. It was the Appellant's case that the Respondent had sometimes failed to take lawful directions from the Appellant's management, conduct which had attracted some form of reprimands.

16. According to the Appellant, the Respondent voluntarily resigned from employment. Her resignation had nothing to do with hostile work environment as the Respondent has alleged.

17. The Appellant's case was that contrary to the Respondent's assertions, it has always granted its staff flexible work schedules depending on exigencies of duty. That the Respondent never raised concern over her work hours and days.

18. The Appellant's witness stated that whilst the rest of the Appellant's staff used to work on Saturdays, the Respondent was accorded the privilege of staying away on this day. That this privilege was however withdrawn in March 2018. That the employees who were studying were allowed to stay away from work on Saturday morning but report in the afternoons.

19. After hearing the parties, the trial magistrate found that the circumstances leading to the Respondent's resignation pointed to a scenario of constructive termination. It was the trial magistrate's view that the evidence on record pointed to the Appellant's management having created a difficult work environment for the Respondent which pushed her into resignation. Consequently, the trial court found that the Respondent was unfairly terminated.

The Case on Appeal

20. The Appellant was dissatisfied with the trial magistrate's decision. This prompted the filing of this appeal.

21. The Memorandum of Appeal raises eight (8) grounds of appeal. From these grounds, the following are the issues for determination:-

    a. Whether the trial magistrate was right to conclude that the Respondent was terminated through constructive dismissal.

    b. Whether the trial magistrate failed to properly evaluate the evidence by the parties in arriving at his decision.

    c. Whether the trial magistrate ought to have reached the conclusion that the Respondent voluntarily resigned from duty.

    d. Whether the trial court misdirected himself in awarding the Respondent compensation equivalent to his salary for 12 months.

    e. Whether the trial court erred in making its order on interest.

22. The answer to issue number one will in effect settle issues numbers two and three. These issues will therefore be considered together. The last two issues will be addressed distinctly.

23. This is a first appeal. Consequently, it is to proceed by way of a retrial. The court is to re-evaluate the evidence on record and arrive at its own conclusion on the matter. However, as the court did not hear the witnesses, it must make allowance for this.

24. The law on constructive dismissal is as espoused in the decision by Mbaru J in the case of *Lear Shighadi Sinoya v Avtech Systems Limited [2017] eKLR*. As observed by the learned Judge, constructive dismissal is deemed to occur where the employer places an employee under intolerable conditions that force the employee to resign from employment. This may be occasioned by the employer's unilateral actions that fundamentally breach the terms of the employment contract.

25. The unilateral actions need not be in a series. A single act that breaches a term of the contract of service is sufficient to push an employee into resigning if it materially affects the relation between the parties and the employer is unwilling to make amends to allow the contract to remain.

26. Where an employee pleads constructive termination, the burden is on him to prove this fact. However, the standard of proof remains the one applicable in civil cases.

27. The first issue before me is whether the trial magistrate was right to conclude that the Respondent was terminated through constructive dismissal. In answering this question, I shall be guided by the law on the subject as set out above.

28. The contract of service between the parties to this action is captured in the instrument executed by the Respondent on May 1, 2017 together with the schedules thereto. The contract was clear that the employee would be required to work between 9.00 am and 5.00 pm during weekdays. It further stated that the employee will be required to offer 40 work hours per week running from Monday to Friday.

29. The contract did not require the Respondent to report to work earlier than 9.00 am during week days or on Saturdays. Whilst the law entitles an employer to require an employee to work for six (6) days in a week, parties are free to negotiate for lesser days. In my view, the contract between the disputants is a typical example of a case where parties agreed to a work schedule that covered less than six (6) days in a week.

30. In her evidence, the Respondent asserted that the Appellant unilaterally altered this arrangement when it required the Respondent to report to work not only from 8.00 am to 5.00 pm every week day but also on Saturdays. According to the Respondent, this change to their contract affected her ability to continue with her weekend studies.

31. In her witness statement dated September 17, 2019, the Appellant's witness stated that the Respondent was initially granted the privilege of not working on Saturdays. However, this privilege was withdrawn in March 2018. The witness did not deny that this change to the Respondent's contract by the Appellant was unilateral as stated by the Respondent.

32. Section 10(5) of the *Employment Act* forbids employers from altering terms of a written contract of employment without consultations with the affected employee. Where the employee agrees to changes to a written contract of service, the employer must incorporate those changes in the contract through amendments to the instrument. The employee must then be notified of these alterations in writing.

33. Much as the contract of employment may reserve the employer's right to alter a term in it, such alteration must be done in line with the guidelines provided in the law. In this case, the alterations of March 2018 required a session with the Respondent and the changes required to be reduced into writing.

34. The Appellant's decision to unilaterally change the clauses on work hours and days in the Respondent's contract in March 2018 without her involvement resulted in the breach of the contract between the parties. This alone entitled the Respondent to consider resigning in the event the Appellant remained unwilling to address the issue.

35. The second issue related to the decision by the Appellant to issue the Respondent with a third contract on May 18, 2018 days before she finally resigned. This was confirmed by the Appellant's witness during cross examination. Again, there was no evidence that this was after consulting the Respondent.

36. The third issue of concern related to the Appellant's decision to grant the Respondent leave days that were less than the minimum that the law provides. Section 28 of the *Employment Act* provides for leave of 21 days for every year an employee provides continuous service. The Appellant did not deny that it granted the Respondent 14 days.

37. There is evidence from the email correspondence between the parties that the Respondent protested this decision. There is also evidence that the Appellant's management stuck to its guns on the issue. There is no evidence that this matter was ever addressed by the Appellant with a view to meeting the statutory minimum leave days as set by law.

38. The Respondent also spoke to changes in her roles from one of managerial to one of data entry. She considered this a demotion. Communication addressing the changes in the Respondent's position can be seen at page 55 of the Record of Appeal. Even though the Appellant's witness was of the view that there was nothing demeaning about one being asked to do data entries, there was no evidence that these changes were preceded with some form of consultations with the Respondent.

39. The Respondent also pointed to the harsh treatment she received in the course of her employment. This was demonstrated by the fact that the Appellant's management would sometimes engage the Respondent on work related issues outside work hours. Examples of this include the Skype calls that were made after 5.00 pm and the occasional demands that the Respondent remains on duty sometimes up to 3 am the following day.

40. It is noteworthy that the Appellant never denied this fact through evidence on oath. On the contrary there is evidence in the form of emails demonstrating that indeed the Appellant's management sometimes pushed the Respondent to work well outside office hours. These include the email appearing at page 54 of the Record of Appeal. This was also confirmed by the Appellant's witness who stated that staff would sometimes work late into the night.

41. The legal position is that an employee can only be required to work overtime with her consent and with payment to compensate for the extra time she commits to her work. The Appellant did not demonstrate that it sought the Respondent's consent to work outside the work hours initially agreed upon or that it compensated her for doing so.

42. Further, the Respondent indicated in both her pleadings and evidence that she was sometimes reprimanded by her supervisor in front of members of staff that were working under her. She said that this action by the Appellant's management humiliated and embarrassed her undermining her authority over the said members of staff. In response to this complaint, all that the Appellant's witness had to say was that the Respondent was under duty to obey lawful directions from her superiors. It was the Appellant's case that communication of such directions could be deemed embarrassing.

43. The Appellant's reaction to this issue is indeed a confirmation that the communication the Respondent complained about was made to her in the presence of her juniors. However, according to the Appellant, it did not really matter the manner in which the communication was made so long as it was lawful. What is more, the acting CEO who is said to have humiliated the Respondent in the presence of other members of staff did not testify to controvert this assertion by the Respondent.

44. I have considered the emails and text messages exchanged between the parties around the time the Respondent resigned. Of significance are the exchanges appearing at pages 57 to 61 of the Record of Appeal.

45. In the text exchange at page 57, the Respondent is seen asking for a meeting to resolve outstanding issues between her and the Appellant after she had resigned. In response, the Appellant's officer one Ahmed is seen responding positively to the request. The Respondent then asks that any meeting with a Mr Ali should be attended by a third party. Ahmed then mentioned that M/S Faith will attend the meetings but remain silent. He encouraged the Respondent not to take the matter personally against the Mr Ali as he was working under pressure. In my view, it is the Respondent's response to Ahmed's last text that gives one a glimpse of what happened before the Respondent resigned. It stated as follows:-

> 'Ahmed no matter what pressure, there are some things that are out of question.'
>
> How does someone say that he or she is sick and needs a rest then instead of even trying to understand, you tell her 'if you take the leave I will make some changes when you come back.'
>
> In front of my juniors you tell me 'this power can be taken away from you'.

46. The above statements speak to the poisoned relationship that existed between the Respondent and those that she was reporting to, more specifically Mr Ali. It appears that Mr Ali was unwilling to accommodate what appear as reasonable requests by the Respondent but quite ready to humiliate her in front of her juniors. Undoubtedly, it is this toxic work environment that led the Respondent into resigning. And this is clear from her email appearing at page 60 of the Record of Appeal where she says that she had reflected on 'things' and chosen to resign.

47. The trial magistrate considered the fact that the Respondent raised her grievances with the management but as confirmed by the Appellant's witness, the issues were not addressed. The court also considered that the unilateral changes in the designation of the Respondent constituted a change of terms of her contract in breach of the contract and implied constructive termination.

48. In the face of an obstinate superior who was unwilling to engage, what was the Respondent to do? She had the option of putting up with the toxic work environment or calling it quits. That she elected to resign in view of the obtaining circumstances can only point to a case of constructive termination. I therefore agree with the trial magistrate's findings that the Respondent did not voluntarily resign but was forced by the hostile work environment into taking this decision. Consequently, it is correct to hold that the Respondent was constructively terminated.

49. I have considered the Appellant's plea that the Respondent cannot be said to have been constructively dismissed as she did not allude to the reasons that informed her decision to resign in her resignation notice. I do not agree with this view. In determining whether a resignation is voluntary, the court looks at the circumstances surrounding the decision to resign and not just the content of the resignation notice. Indeed, this is the reason why the court in *Reuben Lucheleli Shikuri v Eldoret Packers Ltd [2015] eKLR* cautions that the issue whether a resignation amounts to constructive dismissal being a matter of fact and the factual positions in each case not being similar should be determined on a case by case basis.

50. As I have observed in the earlier parts of this judgment, the email and text correspondences shortly before and after the Respondent resigned provide a glimpse of the circumstances under which the resignation was tendered. Thus, they are critical in determining whether the resignation was voluntary or forced by the prevailing work environment. And as pointed out earlier on, the circumstances obtaining around the time the Respondent resigned point to the fact of the resignation not having been voluntary. The resignation was occasioned by and in reaction to the prevailing difficult work

environment that the Respondent had been exposed to. This, in effect satisfies the conditions for constructive dismissal as alluded to in the case of *Richard Nyaundi Marasi v Board of Management, Geturi Mixed Secondary School [2017] eKLR*.

51. Further, the Appellant has argued that the Respondent did not provide particulars of the alleged constructive dismissal. For this reason, the claim ought to have failed. It is the Appellant's case that it was wrong for the trial magistrate to rummage through the Statement of Claim to come up with what he thought were particulars of the claim for constructive dismissal. Put differently, it is the Appellant's case that these particulars ought to have been self-evident in the Statement of Claim. For this proposition, the Appellant has relied on an observation in the decision by Justice Nduma Nderi in *Rem Ogodo Ogana v Kenya Sugar Board [2016] eKLR*.

52. In addressing this issue, it is perhaps important to start by stating that there is no requirement of law that a party pleading constructive dismissal must provide particulars of the claim in any particular form. What I understand the Judge in the Rem Ogodo decision to be saying is that the employee must provide a proper basis for his claim by providing factual details of the claim in the Statement of Claim. How this is done is in my view immaterial.

53. In addressing this issue, the learned trial magistrate observed that whilst the Respondent had not particularized the claim for constructive dismissal in the form in which pleadings describing a state of mind such as negligence would be drawn, she had nevertheless set out sufficient details in her Statement of Claim to support the claim. I do not find any fault in the trial magistrate's approach to addressing this issue. It was not improper for him to evaluate the entire Statement of Claim to determine whether or not the Respondent had provided a factual foundation for the plea of constructive dismissal.

54. That said, my own analysis of the Statement of Claim yields the conclusion that it in fact did provide particulars of the circumstances that provided the foundation for the plea of constructive termination. At paragraph 38 of the Statement of Claim, the Respondent states as follows:-

> 'On May 26, 2018, the Claimant resigned from employment with immediate effect. The Claimant claims that she was entitled to do so in the light of the way in which she had been treated by the Respondent. She claims constructive dismissal.'

55. At paragraph 40 of the Statement, although headed particulars of malice and bad faith, the particulars speak to issues such as: the drastic and unilateral decision by the Appellant to change the Respondent's terms and conditions of work; failure by the Appellant to provide the Respondent with a conducive work environment; refusal by the Appellant to investigate the Respondent's complaints about her working conditions; denying the Respondent study leave; and denying the Respondent her statutory 21 days leave.

56. An analysis of the plea in paragraphs 42 and 43 of the Statement of Claim shows that these are the very same grounds that the Respondent relied on to advance the case that her resignation was forced and therefore resulted in her unfair termination. In my view, therefore, the assertion by the Appellant that the Respondent's claim lacked particulars of constructive dismissal is unmerited.

57. There is also no inconsistency between the trial court's finding that the Respondent had not proved discrimination against her and the finding that she was constructively dismissed. As appears from parts of this judgment, the reasons for finding that the Respondent was constructively dismissed were distinct from the issue raised regarding the alleged discrimination against her. The allegation of discrimination was founded on the Respondent's assertion that the Appellant refused to allow her time off to sit an exam whilst it allowed other employees of Somali extract to attend exams.

58. The next issue I have to consider is whether the trial magistrate misdirected himself in awarding the Respondent compensation equivalent to his salary for 12 months. The court judgment shows that the Respondent was awarded maximum compensation for 12 months. Whilst the magistrate mentions that he took into account the principles that guide the grant of compensation under section 49 of the *Employment Act*, it is not clear from the record which of these principles the court considered and how they influenced the final decision on compensation.

59. It is not in dispute that the trial magistrate enjoys discretion in determining the quantum of compensation under the *Employment Act*. However and as has often been observed, such discretion must be exercised judiciously. The court has a duty to justify the award it makes by reference to specific principles enshrined under section 49 of the *Employment Act* (see *Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR*).

60. I note that the Respondent had not been in service of the Appellant for long. She also mitigated her loss by securing a new job with KCB Bank Ltd almost a year down the line. Having regard to the totality of these factors, I do not think that this was an appropriate case for the award of full compensation equivalent to the Respondent's twelve (12) months' salary. I will therefore review the compensation awarded to one which is equivalent to the Respondent's five (5) months' salary.

61. I also wish to make some comments on the award of salary in lieu of notice for one month. Under section 35 of the *Employment Act*, a party seeking to terminate a contract of service ought to issue a notice whose duration is to be determined by reference to the period the employee has to serve before he becomes entitled to be paid a salary.

62. The notice to terminate applies to both the employer and employee. The Respondent was therefore obligated to issue the Appellant with a resignation notice.

63. In my view and having regard to the wording of the resignation notice at page 61 of the Record of Appeal, the Respondent provided for the duration she was to remain in the Appellant's service during the notice period. According to the notice, the Respondent requested to utilize her leave days which estimated one month. In law, an employee on leave is deemed to be in service. It was therefore inaccurate for the Appellant to assert that the Respondent resigned without notice.

64. The Respondent issued a resignation notice which was to take effect immediately in terms of commencement and run up to July 11, 2018. The Respondent having offered to have closure of her contract take effect after her leave days, it was for the Appellant to either accept the resignation as offered or waive the requirement as to notice. If the Appellant opted in favour of the latter, it was required to pay the Respondent salary in lieu of notice under section 38 of the *Employment Act*.

65. There is no evidence on record that the Appellant allowed the Respondent to resign in terms of her proposal which would have addressed her obligation with respect to notice under section 35 of the *Employment Act*. From the record, it appears that the Appellant elected to treat the closure of the contract as having taken effect immediately. The Appellant opted not to let the resignation notice run its full course from May 26, 2018 to July 11, 2018 as proposed by the Respondent.

66. In terms of section 38 of the *Employment Act*, the Appellant waived the requirement of notice by conduct. Consequently, the trial court's pronouncement that the Appellant was to pay the Respondent salary in lieu of notice was well founded. However, as the Respondent was entitled to one month's notice, the award under this head is adjusted accordingly.

67. On leave pay, the record is clear that the Appellant afforded the Respondent less days than the law authorizes. Further, out of the leave entitlement for the period the parties worked together, the

evidence placed on record shows that the Respondent took five (5) days which were converted to her sick leave. These were then deducted from her annual leave days.

68. To fight off the leave claim, the Appellant's witness stated that the Respondent took some days off between December 22, 2017 and January 3, 2018. There was however evidence that during this period, the Appellant's offices remained closed at the Appellant's instance in order to allow all staff to break for the festive season. There is no evidence that staff were informed that whatever days they were allowed to be away around this time would be recovered from their annual leave days. In any event, it is not disputed that the Appellant's offices remained closed during this period. Even if the Respondent wished to report on duty, where was she to work from?

69. Having regard to the foregoing, I find that the Respondent was entitled to leave for one year between May 2017 when she was engaged and May 2018 when she resigned. Consequently, the award to cover leave pay is adjusted accordingly.

70. Finally, the law grants the court discretion to award interest on money decrees so long as the power is exercised judiciously. Unless a party challenging the exercise of this discretion is able to demonstrate that it has been applied inappropriately, an appellate court has no right to interfere with the exercise of the power by the trial court merely because it would have reached a different decision on the matter (see *Jane Wanjiku Wambui v Anthony Kigamba Hato & 3 others [2018] eKLR*).

71. The Appellant has challenged the trial court's decision to grant the Respondent interest allegedly because the order requires that interest runs from the date of institution of the suit before the trial court. There was no such order made by the trial court. The court only ordered that there be interest on the sums it awarded. It did not specify from when the interest will run. For this reason, I see no reason to disturb the trial court's order on interest save to the extent that it shall not apply to the costs awarded and that it will run from the date of the court's decision.

Final Award

72. The appeal is dismissed.

73. The Respondent is awarded compensation equivalent to her salary for five months that is to say Ksh 375,000/=.

74. The Respondent is awarded salary in lieu of notice equivalent to Ksh 75,000/=.

75. The Respondent is granted pay in lieu of accrued leave days equivalent to Ksh 75,000/=.

76. The Respondent is granted interest on the above sum of money at court rates to run from the date of the decision of the trial court till payment in full.

77. The award aforesaid is subject to the statutory deductions under section 49 of the *Employment Act* if applicable.

78. The Respondent shall be paid costs of both the trial court and appeal proceedings.

DATED AND SIGNED ON THE 30TH DAY OF NOVEMBER 2022

MAUREEN ONYANGO

JUDGE

DELIVERED ON THE 2ND DAY OF DECEMBER 2022

B. O. M. MANANI

JUDGE