



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 809 OF 2018

*(Before Hon. Lady Justice Maureen Onyango)*

ALINUR MOHAMED ABDI..... CLAIMANT

VERSUS

COUNTY GOVERNMENT OF GARISSA..... RESPONDENT

JUDGMENT

1. The Claimant filed a statement of claim dated 11<sup>th</sup> May 2018 in which he prays for the following remedies against the Respondent.
  - a) *A declaration that the enjoyment of rights and fundamental freedoms of the Claimant secured and guaranteed under Articles 41 and 47 of the Constitution have been and continue to be threatened, infringed and violated by the Respondent.*
  - b) *A declaration that the Respondent has violated and continues to be in violation of section 5(3), 17, 18(2)(d) and 20(1) of the Employment Act of Kenya, 2007.*
  - c) *An Order be issued directing the Respondent to reinstate the Claimant in its payroll and pay all salaries as shall be accrued by the Claimant in the course of his employment.*
  - d) *An order be issued directing the Respondent to pay the Claimant salary arrears for all unpaid months commencing from the month of September 2017 till full and final payment. (As at May, 2018 the salary arrears stand at Kshs.804,339/=).*
  - e) *An Order be issued directing the Respondent to pay interest at the rate of 14% on all salary arrears for unpaid months commencing from the month of September 2017 till full compliance with (c) and (d) above.*
  - f) *Cost of the suit*
  - g) *Interest on (f) above at the rate of 14% per annum for the date of issuance of that order till full and final payment.*
2. The Respondent did not file a response to the claim herein nor participate in the proceedings despite being served with the pleadings on 23<sup>rd</sup> July 2018. The facts as pleaded in the statement of claim are thus uncontested.
3. The claim having been undefended, the court on 25<sup>th</sup> January 2021 gave directions that the same be disposed of by way of written submissions. The Claimant filed submissions dated 3<sup>rd</sup> April 2021.
4. The Claimant avers that he was recruited by the Government of Garissa County on 1<sup>st</sup> July 2015 to the position of Deputy Director in the Department of Information Management on permanent and pensionable terms under job group Q. Throughout his appointment the Claimant states that he worked diligently, faithfully, and to the best of his ability. That he was never cited for misconduct, non performance, poor performance, or breach of any employment terms. The Claimant further states that the Respondent had been constant in payment of his monthly salary as per the appointment letter until September 2017 when the Respondent unlawfully and without any form of justification withheld his salary despite the Claimant having been reporting to work without fail. The Claimant further states that throughout his employment he never committed any misconduct or undergo any disciplinary action that could justify the Respondent to expunge his name from the payroll.
5. The Claimant raised a complaint vide a letter dated 10<sup>th</sup> October 2017 to the Garissa County Public Service Board over non-payment of his salary for the month of September 2017 which had been withheld but the salary was not reinstated.

6. The Claimant avers that the Respondent's actions are in contravention of Article 41 of the Constitution of Kenya on the right to fair labour practices and Article 47 which requires exercise of administrative action in an expeditious, efficient, lawful, reasonable and procedurally fair manner.

7. He also avers that the Respondent violated Section 5(3), Section 17, Section 18(2)(d) and Section 20(1) of the Employment Act

8. The Claimant submits that the Respondent declined to pay him salary from the month of September 2017 despite his continued work for 6 months. He states that he was constructively dismissed by the Respondent and relies in the holding of Radido J. in the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd (2013) eKLR** where the Judge defined constructive dismissal as follows:

*“Constructive dismissal has been defined in **Pretoria Society for the Care of the Retarded v Loots** fl9971 6 BLLR 721 as a situation in the workplace, which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee - to such an extent that the employee has no other option available but to resign.*

*Constructive dismissal has its roots in the law of contract under the doctrine of 'discharge by breach'. Under this doctrine, an employee was entitled to treat himself as discharged from further performance of his obligations where the employers conduct was a significant breach going to the root of the contract. The termination would be due to the employers conduct. Such conduct may include unilateral reduction in pay or failure to pay the employee.*

*In England, constructive dismissal was given statutory clothing through the Redundancy Payments Act, 1965 and later in the Trade Unions and Labour Relations Act, 1974 and the same is discussed in **Western Excavations v Sharp (1978) IRLR 27.***

*The doctrine of constructive dismissal has not been given statutory underpinning in Kenya. But the doctrine and principles developed in other comparative jurisdictions would be equally applicable here because of the entrenchment of a justiciable right to fair labour practices under Article 41 of the Constitution and the need to interpret the Constitution in a manner that advances human rights and fundamental freedoms in the Bill of Rights and the doctrine that the Constitution is always speaking.*

*The Claimant did not resign. A resignation, under the doctrine of constructive dismissal should be prompt otherwise the employee may be taken to have acquiesced in the employer's intolerable conduct.”*

9. The Claimant also relies on the case of **Kenneth Kimani Mburu & Another v Kibe Muiqai Holdings Limited [2014] eKLR** where Rika J. held as follows:

*“Constructive dismissal is not defined in our Employment Act 2007. The concept was the subject of this Court's Award in **Cause Number 611 [N] of 2009 between Maria Kagai Ligaga v. Coca Cola East and Central Africa Limited [unreported]**. The Court found that constructive dismissal occurs where an employee is forced to leave his job against his will, because of his employer's conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed. The basic ingredients in constructive dismissal are:-*

*a. The employer must be in breach of the contract of employment;*

*b. The breach must be fundamental as to be considered a repudiatory breach;*

*c. The employee must resign in response to that breach; and*

*d. The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.*

*... The conduct by the employer must be shown to be so intolerable that it made it considerably difficult for the employee to continue working. At the heart of constructive dismissal is breach of the duty of trust and confidence. The employer's behaviour must be shown to have destroyed or seriously undermined trust and confidence. In the English Employment Rights Act 1996 and the South African Labour Relations Act Number 66 of 1995, constructive dismissal occurs when an employee terminates the contract under which he is employed, with or without notice, in circumstances which he is entitled to terminate it without notice, by reason of the employer's conduct. Although the Court is not bound by this definition, the two Statutes conform to the definition of the term given by most labour and employment law publicists.”*

10. He submits that the Respondent repudiated the employment contract when he refused to pay the Claimants salary which is the core of the employment contract.

11. The Claimant further submits that he was unfairly terminated without any cause, reasonable or otherwise, and without notice and the same was extremely unjust and unfair having worked for two years without being involved in any kind of misconduct or being subjected to any disciplinary process.

12. He submits that having been forced out of employment abruptly without any reason or notice or a certificate of service he has suffered financially. As such prays that the Respondent be condemned to pay damages of twelve months' salary.

13. Claimant submits he is entitled to payment of salary in lieu of notice as provided in Section 36 of the Employment Act which provides as follows:

Either of the parties to a contract of service to which section 35(5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section.

14. The Claimant further submits that he worked for 6 months from September 2017 to March 2018 awaiting the response of his complaint letter dated 10<sup>th</sup> October 2017 but was not paid. The Claimant submits that he came to court hoping for reinstatement of his salary but was forced to stop working from the month of March 2018 as he could not work anymore without pay. As such he submits that he is entitled to salary arrears of six months totalling to Kshs.891,810 for the months worked without pay.

15. The Claimant also prays to be issued with a certificate of service

### **Determination**

16. The Claimant submitted that he was removed from the payroll without his knowledge and his salary withheld from September 2017 to date without any notice.

17. It is the Claimant's case that he was constructively dismissed by the respondent by virtue of removal of his name from the payroll of the Respondent, but without a letter of termination being issued to him or being taken through any disciplinary proceedings process.

18. Constructive dismissal was defined by Radido J. in the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd (2013) eKLR** (supra).

19. Also, in the case of **Kenneth Kimani Mburu & another v Kibe Muiqai Holdings Limited [2014] eKLR** Rika J. held as follows:

*“Constructive dismissal is not defined in our Employment Act 2007. The concept was the subject of this Court's Award in **Cause Number 611 [N] of 2009 between Maria Kagai Ligaga v Coca Cola East and Central Africa Limited [unreported]**. The Court found that constructive dismissal occurs where an employee is forced to leave his job against his will, because of his employer's conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed. The basic ingredients in constructive dismissal are:-*

- a. The employer must be in breach of the contract of employment;*
- b. The breach must be fundamental as to be considered a repudiatory breach;*
- c. The employee must resign in response to that breach; and*
- d. The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.*

*... The conduct by the employer must be shown to be so intolerable that it made it considerably difficult for the employee to continue working. At the heart of constructive dismissal is breach of the duty of trust and confidence. The employer's behaviour must be shown to have destroyed or seriously undermined trust and confidence. In the English Employment Rights Act 1996 and the South African Labour Relations Act Number 66 of 1995, constructive dismissal occurs when an employee terminates the contract under which he is employed, with or without notice, in circumstances which he is entitled to terminate it without notice, by reason of the employer's conduct. Although the Court is not bound by this definition, the two Statutes conform to the definition of the term given by most labour and employment law publicists.”*

20. Payment of salary is fundamental to an employment relationship and withdrawal or failure to pay the same constitutes fundamental breach of an employment contract justifying the termination thereof by an employee. The Claimant herein having been forced to leave his job by the Respondent by failure to pay his salary, I find that he was constructively dismissed.

### **Whether the Claimant is entitled to the reliefs sought;**

#### **(i) Withheld salary since September 2017**

21. The Claimant having been unfairly removed from the payroll which is evidenced by the letter dated 10<sup>th</sup> October 2017, the Claimant is entitled to full salary for the months of September and October 2017 only. No evidence has been adduced to prove that he continued to work from October 2017 until the month of March 2018 as he has alleged. Based on his last gross monthly salary of Kshs.148,635.00, I award him **Kshs.297,270.00**

#### **(ii) Reinstatement to the payroll without loss of benefits**

22. The Employment Act provides at Section 49(4) that reinstatement is to be ordered only in very exceptional circumstances, being an order for specific performance of personal services.

23. The Employment and Labour Relations Court Act further provides at Section 12(3)(vii) that an order of reinstatement may only be made within 3 years of dismissal. The Claimant having been constructively dismissed in October 2017, the order of reinstatement is no longer available to him. The prayer is accordingly declined.

**(iii) Damages for Unfair Termination**

24. Having found the termination of his employment unfair, and taking into account the circumstances under which the said employment was terminated and the fact that the Claimant did not contribute to the same, I award the Claimant maximum compensation equivalent to 12 months' salary in the sum of **Kshs.1,783,620.00** as compensation.

25. The Claimant is not entitled to payment of salary to date of retirement, as this is not provided for by the law and was also not a term of his contract.

**26. In conclusion judgement is entered in favour of the Claimant against the Respondent in the total sum Kshs.2,080,890.00.**

**(iv) Certificate of Service**

27. The Respondent is directed to issue a certificate of service to the Claimant in terms of Section 51 of the Employment Act.

**(v) Costs and Interest**

28. The Claimant is awarded the costs of the suit and interest shall accrue at court rates from date of judgment till payment in full.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16<sup>TH</sup> DAY OF JULY 2021**

**MAUREEN ONYANGO**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 has 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.

**MAUREEN ONYANGO**

**JUDGE**