



Aluoch v Executive Committee of the Central Conference of the Seventh Day Adventist Church & another (Employment and Labour Relations Appeal E026 of 2020) [2021] KEELRC 2421 (KLR) (20 September 2021) (Judgment)

Neutral citation: [2021] KEELRC 2421 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E026 OF 2020
NZIOKI WA MAKAU, J
SEPTEMBER 20, 2021**

BETWEEN

IMELDAH ITA ALUOCH APPELLANT

AND

EXECUTIVE COMMITTEE OF THE CENTRAL CONFERENCE OF THE SEVENTH DAY ADVENTIST CHURCH 1ST RESPONDENT

. BOARD OF MANAGEMENT KARURA SDA CHURCH SCHOOL 2ND RESPONDENT

(Being an Appeal against the entire Judgment and Decree by the Hon. E. Wanjala (SRM) delivered on the 5th March 2020 in CMEL Cause No. 344 of 2019)

JUDGMENT

1. The Appeal herein relates to the Judgment delivered by the Hon. E. Wanjala Senior Resident Magistrate on 5th March 2020. In the Judgment, the learned Senior Resident Magistrate dismissed the Claimant’s claim and stated that had she proved her constructive dismissal the Court would have granted Kshs. 34,458/- being one month’s salary in lieu of notice, 6 month’s salary amounting to Kshs. 206,748/- as compensation but would have dismissed the claims for outstanding per diem, monetary benefit and medical allowances, leave allowance, travel and lunch allowance, termination allowance. She was only successful in getting her certificate of service hence her appeal. In the appeal she raises 7 grounds of appeal. These grounds were as follows:-

1. The Learned Magistrate erred in law in holding that the Appellant required to provide a resignation letter for a claim of constructive dismissal to be fully proved to the required standard.



2. The Learned Magistrate erred in law in dismissing the claim for constructive dismissal when there was an express demand letter written for and on authority of the Appellant.
 3. The Learned Magistrate erred in law and in fact when despite the established principle that there can be no wrong without a remedy, she proceeded to find that there was a unilateral alteration of the terms of employment by the Respondent yet she failed to give a remedy to that wrong.
 4. The Learned Magistrate contradicted herself when she on one hand held that the Appellant did not desert work and on the other hand failed to make a finding that there was constructive dismissal merely because there was allegedly no resignation issued by the Appellant.
 5. The Learned Magistrate erred both in law and in fact in finding that the Appellant was not entitled to the reliefs sought in the Memorandum of Claim filed by the Appellant.
 6. The Learned Magistrate disregarded the claim of termination allowance provided in the Respondent's Church Working Policy on the grounds that none of the parties had produced it while it had been produced by the Respondents as Exhibit 11 and 12.
 7. The Learned Magistrate disregarded the evidence produced by the Appellant in totality thereby dismissing her case.
2. The Appellant sought that the Judgment of the Honourable E. Wanjala delivered on 5th March 2020 be reversed and set aside and Judgment be entered in favour of the Appellant as prayed in the Memorandum Claim with costs of this Appeal as well as the initial claim be awarded to the Appellant.
 3. The Respondent did not file any documents in opposition to the Appeal save for a notice of address for the purpose of this Appeal.
 4. The court on first appeal, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and thereafter make its own conclusions about the matter, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. It is trite law that it is not open to the first appellate court to review the findings of the trial court simply because it would have reached different results if it were hearing the matter for the first time. The Court has therefore had to relook at the matter from this perspective taking into account the parameters set out in precedent and the Rules.
 5. The sole issue that would have a bearing on the Appeal is the question of constructive dismissal. The Appellant who was the Claimant in the Court below was required to demonstrate that her resignation was a consequence of a fundamental or repudiatory breach of her employment contract. Such a breach could have related to either an express or implied term in her contract of employment and could be similar to the incident where she was removed from her position as a member of the procurement board of the 2nd Respondent. The Appellant had the onus to prove constructive dismissal for her to be awarded the reliefs she sought from the learned Senior Resident Magistrate. She did not avail a copy of a resignation and the demand letter from the advocate she engaged cannot take the place of her resignation letter which was the basic premise for a claim for constructive dismissal. Constructive dismissal is so called since it is the forced removal from employment by the hand of the employer on account of the actions of the employer. There must be a set of circumstances which would be cumulative or even singular but a clear line can be drawn to the action of the employer and the resignation of the employee. There was no proof of the forced resignation presented before the Learned Magistrate and there was therefore no basis for any other finding than the one the Learned Magistrate reached. For that reason the Appeal fails and is dismissed. Each party is to bear their own costs.



It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE

