



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 589 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

NAOMI SAU SHAKO.....CLAIMANT

VERSUS

CHANGAMKA MICRO INSURANCE LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent on 27th March 2017 through a memorandum of claim dated 24th March 2017 alleging that the Respondent withheld part of her salary for the months of April, May, June, July and the entire salary for August 2016.

2. The Claimant prays for –

- (a).. Withheld salary amounting to..... Kshs.238,075
- (b).. Declaration that the Respondent breached the contract dated 24th February 2014
- (c)... General damages for breach of contract.
- (d).. Unpaid salary for performing the role of the Administrator
- (e).. Costs of this suit
- (f)... Interest in (a) and (c) at court rates.

3. The Respondent filed its defence to the memorandum of claim on 2nd June 2017 and denied all averments other than the description of the parties, receipt of demand and jurisdiction of the Court and prayed for dismissal of the suit with costs.

Claimant's Case

4. The Claimant's avers that the Respondent employed her under a written contract from 1st March 2014 at Kshs.90,000 per month. She was the Executive Assistant to the Chief Executive Officer with additional duties for the role of Administrator with no additional pay. Her net monthly pay was Kshs.67,328.

5. The Claimant further avers that she discharged her duties diligently and without any blemish. That in April 2016, the Respondent withheld part of her salary without any notice or warning and the same continued in May, June and July. In August 2016, the entire salary was withheld.

6. That demand for the dues elicited no positive response from the Respondent who alleged that she left on her own violation. With reduced salary from April 2016 and none at all in August 2016 and mounting bills, the Claimant tendered her resignation on 2nd September 2017 and sought legal advice on the issue. That her Counsel demanded Kshs.255,747 inclusive of service charge from the Respondent by a letter dated 13th September 2016.

7. The Claimant contends that the law firm of Anne Babu and Company indicated that its client, the Respondent, had proposed to settle the

arrears for April, May, June, July and August, of Kshs.188,419 in four instalments effective 15th November 2016 and the first cheque of Kshs.85,000 was on 6th December 2016. The law firm further promised that its client had requested to settle the legal fees together with the last instalment.

8. Subsequent telephone and email communication with the Respondent's advocates did not yield any other payment despite promises.

9. Non-payment of the instalments precipitated the claim filed on 27th March 2017.

Respondent's Case

10. Notwithstanding the denials in the response to the claim, the Respondent admitted through its advocates that it owed the Claimant salary arrears for April, May, June, July and August amounting to Kshs.188,419 and proposed to liquidate the amount in four instalments, a promise it did not keep after paying one instalment.

11. Finally, through letter Ref: 4/4/2015 dated 6th December 2016, the Respondent's advocate confirmed that the legal fees would be settled together with the last instalment, another broken promise.

12. Other than mere denials, the Respondent had no sustainable defence against the Claimant's case. In a nutshell it had no case.

Evidence

13. The documentation on record and the Claimant's oral testimony reveal that the Respondent employed the Claimant as an Executive Assistant by a written contract dated 9th February 2014 with effect from 1st March 2014. She was reporting to the Chief Executive Officer. Her salary was Kshs.90,000 per month.

14. The contract was terminable by one month's notice or pay in lieu of notice by either party. The Claimant signed the contract on 21st February 2014. The Claimant testified that in April 2016 the Managing Director and the Chief Executive Officer informed staff that the Respondent was facing challenges but did not provide the way forward. The Respondent subsequently withheld the Claimant's salary for April, May, June and July. In August the Claimant had no pay. As a single mother with bills to pay, the lack of salary and attendant frustrations led to her resignation on 2nd September 2016 and instructed an Advocate to pursue her unpaid salary.

15. The demand for Kshs.255,747 to the Respondent was not honoured and gave rise to the action by the Claimant. It is important to note that the Respondent admitted owing the Claimant's salary arrears amounting to Kshs.188,914 and paid the first instalment of Kshs.85,000.

Submissions

16. The Claimant's Counsel identified three issues namely: -

(a) whether the Respondent illegally withheld the Claimant's salary;

(b) Whether the Respondent was in breach of the employment contract dated 19th February 2014.

(c) Whether the Respondent breached the Claimant's rights to fair labour practices as enshrined in Article 41(1) of the Constitution of Kenya, 2010.

17. On whether the Respondent withheld the Claimant's salary without justification, Counsel relied on Clause 3 of the contract of employment to urge that the Respondent withheld the Claimant's salary without proper cause. Admission by the Respondent's Counsel was also relied upon to reinforce the submission. Counsel further relied on the decision in **Linching Liang v Webwave Electric Manufacturing (K) Co. Ltd & 2 others [2016] eKLR**, where Mbaru J. granted the Claimant salary arrears in a similar case. Further reliance was made on the decision in **Emmanuel Mokoru v Permanent Secretary, Office of the Prime Minister [2017] eKLR** where Wasilwa J. awarded to the entire salary withheld and awarded damages for the unlawful action of withholding the Claimant's salary.

18. Regarding breach of the employment contract, Counsel relied on the decision of Makau J. in **Quorum Limited v Invesco Assurance Limited [2019] eKLR** where the Judge observed that-

"A breach occurs in a contract when one or both parties fail to fulfil the obligations imposed by the terms. Since the contract was in writing the Court's duty was to look at it and determine whether it applies to the facts."

19. Counsel submits that since the Respondent neglected or refused to pay the Claimant's salary as and when it became due, and the Claimant was performing her part of the bargain but eventually resigned, that the Respondent violated the terms of the contract of employment and the Claimant is entitled to general damages.

20. On constructive dismissal, Counsel relies on the Court of Appeal decision in **Coca Cola East and Central Africa Ltd v Maria Kagai Ligaga [2015] eKLR** to urge the Court that the Claimant was constructively dismissed since her leaving employment was a consequence of the Respondent withholding her salary for 4 months which culminated in her resignation on 2nd September 2016.

21. Counsel submitted that the conduct of the Respondent made the working environment intolerable since the Claimant could not cater for her daily needs which explains her resignation. The Respondent was explicit that it was no longer bound by the terms of the contract of employment between the parties.

Analysis and Determination

22. It is common ground that the Claimant was an employee of the Respondent from 1st March 2014 to 2nd September 2014 when she resigned. It is also not in dispute that the Respondent withheld part of the Claimant's salary in April, May, June and July 2016 and did not pay the August salary. The issues for determination are: -

- (a) Whether the Claimant was constructively dismissed.
- (b) Whether the Claimant is entitled to the reliefs sought.

Constructive Dismissal

23. **Black's Law Dictionary, 10th Edition** defines constructive dismissal as –

“An employer's creation of working conditions that leave a particular employee or group 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 determinate to an employee, leaves the employee almost no option but to quit.”

24. According to Lord Denning in **Western Excavating ECC Ltd v Sharp [1978] 2WLR 344** constructive dismissal occurs;

“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.”

25. In **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** the Court of Appeal explained the principle of constructive dismissal. The Court was categorical that –

“The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer's conduct.”

The Court distinguished the unreasonable and the contractual tests and proceeded to formulate the guiding principles.

26. A similar holding was made in **Joseph Sebastian Ooga Atambo v DAC Aviation (EA) Ltd [2021] eKLR**. In the instant case, the withholding of part of the Claimant's salary for the month of April, May, June and July and cessation of payment in August 2016 amounted to a repudiatory breach and left the Claimant with no option but to quit. She had bills to pay among other commitments. The *proxima causa* of the resignation was the non-payment of salary, a fact the Respondent admitted through its Advocates.

27. The Claimant resigned on 2nd September 2016. The letter stated *inter alia*: -

“I wish to earnestly thank you for the opportunity you have accorded me since 21st February 2014 when you engaged me as an executive assistant in your company with a gross salary of Kshs.90,000 vide a contract dated on the same day.

We have enjoyed a cordinal employer-employee relationship with you ever since until April 2016 when several issues arose with regards to our contract. In a blatant disregard of the above mentioned contract and the law, you have since failed to remit my full salary over the past five (5) months, thus leading to frustrations as I am unable to adequately cater for myself.

This therefore serves as my official resignation from any further arrangements(s) with you as my employer forthwith. In light of the foregoing, kindly settle my dues as articulated herein below –

| | |
|-------|-------------|
| April | Kshs.16,832 |
| May | Kshs.67,328 |
| June | Kshs.57,328 |
| July | Kshs.26,931 |

August 2016 salary Kshs.67,328

Certificate of service

Total Kshs.255,328..."

28. The Claimant's resignation letter demonstrates the frustration the Claimant had to endure due to the withholding of her salary by the Respondent. The Respondent did not deny that it owed the Claimant's salary area and had even commenced repayment in December 2016.

29. On reliefs, the Claimant prays for

(i) Withheld Salary

April Kshs.16,832

May Kshs.67,328

June Kshs.57,328

July Kshs.26,931

August 2016 salary Kshs.67,328

30. Since the Respondent admitted owing the Claimant's salary arrears, and had commenced payment in December 2016, the sum of **Kshs.155,747** is awarded to the Claimant as net salary arrears.

Unpaid leave Kshs.67,328

31. The Claimant adduced no evidence to prove this claim. It is declined.

Service charge Kshs.20,000

32. The Claimant led no evidence to establish his claim. It is declined.

(ii) A declaration is hereby made that the Respondent breached in contract of employment with the Claimant

33. Since the Employment Act, 2007 makes no provision for general damages in employment contracts and having regard to the termination coupled with the fact that the Claimant served the Respondent for about 2 years and 5 months, the equivalent of 2 months' salary is fair compensation. The Claimant is awarded sum of **Kshs.180,000**.

(iii) Unpaid salary for performing the role of Administrator

34. The Claimant led no evidence to demonstrate the additional duties. She was performing as the Administrator and how much they were worth. The claim is declined.

35. **In the final analysis, judgment is entered for the Claimant as follows –**

(a). Net salary arrears..... Kshs.155,747

(b). Equivalent of 2 months' salary..... Kshs.180,000

(c) Costs of this suit.

(d) Interest on (a) and (b) at court rates from the date of judgement till payment in full.

36. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH DAY OF NOVEMBER 2021

DR. JACOB GAKERI

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 15th March 2020 and subsequent directions of 21st 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.

DR. JACOB GAKERI

JUDGE