



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

ELRC CAUSE NO. 2457 OF 2017

JULIE AKINYI OLOO.....CLAIMANT

VERSUS

RED HOT BRANDING LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant instituted this claim against the Respondent for the alleged wrongful and/or unlawful constructive dismissal and non-payment of terminal dues and other work emoluments. The Claimant averred that she was employed by the Respondent as Personal Assistant to the Director vide a letter of appointment dated 23rd March 2015 earning a basic salary of Kshs. 92,413/- and house allowance of Kshs. 13,862/- a month and that she was also entitled to 21 days leave allowance among other entitlements spelt out in the employment contract. The Claimant avers that while in the employ of the Respondent she has never faced any disciplinary proceedings impugning her conduct at work and has maintained an untainted employment record. The Claimant avers that in January and February 2017 the Respondent failed to remit her wages despite her reporting to work and discharging her duties on a daily basis and that she was inconvenienced and confronted by the bank for failing to service the loan facility extended to her. The Claimant averred that she was forced by the said extraneous circumstances to resign from her position vide a letter dated 17th March 2017 and was thus constructively dismissed from her employment by the Respondent. She further contends that she never went on leave during her engagement with the Respondent. The Claimant seeks notice pay, unpaid salary for 17 days worked in March 2017, unremitted NSSF and NHIF dues, service pay, unpaid leave entitlement and compensation at 12 months' gross salary for unlawful constructive dismissal of employment. Among other prayers she prays for judgment to issue against the Respondent in terms of a declaratory order that the non-payment of dues and the circumstances surrounding her resignation from duty amounted to wrongful and constructive dismissal. Further, that her constitutional right to fair labour practices including the right to fair remuneration and favourable working conditions under Article 41 of the Constitution were violated by the Respondent. The Respondent neither entered appearance nor filed a defence and the matter therefore proceeded to be heard as an undefended Cause.

2. In her submissions, the Claimant cites the case of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** where the Court of appeal extensively considered the concept of constructive termination of employment and defined the same as follows:-

*“In this appeal.....The authoritative meaning of constructive dismissal was articulated by Lord Denning MR in **Western Excavating (ECC) Ltd. -v- Sharp [1978] ICR 222 or [1978] QB 761, as follows:***

“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 that 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 (emphasis ours). (See also Nottingham County Council -v- Meikle (2005) ICR 1).”

What is the key element and test to determine if constructive dismissal has taken place? The factual circumstances giving rise to constructive dismissal are varied. 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. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer’s behaviour towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer’s conduct is so grave that it constituted a repudiatory breach of the contract of employment - this is the contractual test....” (emphasis theirs)

3. She further cites the case of **Leena Apparels (EPZ) Limited v Nyevu Juma Ndokolani [2018] eKLR** where the Court of Appeal while

addressing itself on the issue of constructive termination of employment held that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer constituted a repudiatory breach of the contract of employment and the employer's conduct does not have to be intentional or in bad faith before it can be repudiatory as held in **Office v Roberts (1980) IRLR 347**. The Claimant submits that in this case, the main conduct of the Respondent relates to non-payment of salary from January, February and the period leading up to her resignation on 17th March 2017 and which goes to the root of the contract of employment. That such conduct repudiated the contract of engagement between her and the Respondent and amounted to constructive termination and that she is therefore entitled to the remedies sought. The Claimant also relies on the case of **Nathan Ogada Atiagaga v David Engineering Limited [2016] eKLR**.

4. The Claimant submitted that she is entitled to notice pay and service pay as under Section 35 of the Employment Act. For service pay, she cites the case of **Abuga Nyabate v Magen High School & Another [2017] eKLR** wherein the claimant was a member of NSSF but Nduma Nderi J. nevertheless awarded service pay on account of non-remittance by the employer. It is the Claimant's prayer that the court adopts the said findings and awards her service pay. She further submits that although the Claimant pleaded and computed arrears in salary for February and March 2017 in the sum of Kshs. 166,497.50, the same failed to factor unpaid salary for January in the sum of 12,303.00 as seen in the Respondent's letter produced in evidence. She thus urges the Court to factor in the omitted Kshs. 12,303/- and award the same in addition to the pleaded arrears of Kshs. 166,497.50. She submitted that no prejudice will be suffered by the Respondent as the same is already stated as owing in their own letter. She also urges the Court to award the claim for unpaid leave days which is as computed by the Respondent. The Claimant submits that as her constructive dismissal from duty was unfair in terms of Section 45 of the Employment Act, 2007, she is entitled to payment of compensation as provided for in Section 49(1)(c) of the Employment Act, 2007. She urges the court to award maximum compensation for the unfair constructive termination of employment and prays the suit be allowed with costs as prayed in the pleadings.

5. The Claimant has alleged constructive dismissal. Constructive dismissal is said to occur when an employee resigns as a result of the employer creating a hostile work environment leading to the resignation of the employee. Since the resignation so procured is not voluntary, it is in effect a termination ergo – constructive dismissal. In this case, the Claimant asserts that the Respondent failed to remit her wages for the months of January and February 2017 despite her reporting to work and discharging her duties on a daily basis. She asserts that she was inconvenienced and confronted by her bank for failing to service the loan facility extended to her and that she was forced by the said extraneous circumstances to resign from her position vide a letter dated 17th March 2017 and was thus constructively dismissed by the Respondent. Failure to pay wages does not quite fit in the realm of hostile work environment. A hostile work environment may be defined as the unwelcome or offensive behaviour at the workplace which causes one or more employees to feel uncomfortable, scared, or intimidated. This may include gender based discrimination or racial discrimination. Payment of wages is a contractual obligation and the failure to pay wages for 2 months is a repudiation of the contract of employment. As such, the Claimant herein was entitled to seek recompense on the basis of a repudiation of her contract and not under the rubric of constructive dismissal.

6. The Claimant had the right to a dignified exit with notice being paid, wages withheld being settled and the issuance of the certificate of service. As the Respondent did not accord the Claimant the termination of contract within the confines of the law and in terms of the contract, the Claimant is entitled to recover the unpaid salary, the 17 days worked, notice for one month and costs of the suit. She did not prove constructive dismissal and will not therefore recover on that score. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- i. Salary for January and February 2017 – Kshs. 212,550/-
- ii. Salary for 17 days worked in March 2017 – Kshs. 60,222.50
- iii. Notice pay of one month – Kshs. 106,275/-
- iv. Costs of the suit
- v. Interest on the sums in i), ii) and iii) above at Court rates from the date of judgment till payment in full.
- vi. Certificate of service.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER 2021

NZIOKI WA MAKAU

JUDGE