



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 416 OF 2015**

**SAMIRA SCHWARZ.....CLAIMANT**

**VERSUS**

**1. FARZANA NAURANGA**

**2. SARABJEET SINGH**

**3. SAMIR MOHAMED sued as AFRI-VENTURES**

**INTERNATIONAL LIMITED T/A AQUA BLU CLUB & LOUNGE BAR.....RESPONDENTS**

**JUDGMENT**

1. The Claimant instituted this suit against the 3 Respondents in March 2015 and later filed an Amended Memorandum of Claim dated 16<sup>th</sup> November 2018 for constructive dismissal and seeking payment of her terminal benefits. She avers that the Respondents operate restaurant and bar services by the name "Aqua Blu Club & Lounge Bar" trading under "Afri-Ventures International Limited" and that she had been in the employ of the Respondents as a Manager from July 2012 or thereabouts. The Claimant averred that the Respondents paid her a net salary of Kshs. 150,000/- per month, half through bank and the other half by cash and that she was also paid other allowances. The Claimant avers that for the two years she worked for the Respondents she was exceptional and had no disciplinary report until her forced resignation in July 2014. She claims against the Respondent terminal dues amounting Kshs. 7,840,288/- being salary arrears, leave, service charge, holidays, overtime and maternity leave as particularised in the Amended Claim. She also prays for judgment against the Respondents for a declaration that the constructive termination from her employment was unjust, unlawful and unfair. In her witness statement dated 17<sup>th</sup> June 2016, the Claimant asserts that she resigned in July 2014 and thereafter wrote to the Respondents on several occasions requesting for payment of her terminal dues. The Claimants averred that the Respondent has however to date failed, neglected and/or refused to settle the said dues and that she has as a result suffered loss and put to great mental and financial distress.

2. The Respondents filed a Defence to the Amended Memorandum of Claim dated 6<sup>th</sup> December 2018 averring that contrary to allegations, the Claimant was paid a monthly wage of Kshs. 100,000/- and the particulars of her terminal dues are ambiguous and bad in law. That the Claimant's pregnancy was never made known to them and in any event the same is a non-issue since the Claimant resigned and could not therefore be entitled to terminal dues for maternity leave, and that she is also not entitled to service pay since she is a member of the NSSF. They further aver in counterclaim that the Claimant did not give them written notice of her resignation contrary to the law and that she owes it a sum of Kshs. 100,000/- for her termination of employment in lieu of notice plus interest at court rates until payment in full. That the said amount is due immediately as the Claimant admitted her resignation in the Claim and that judgment should thus be entered against the Claimant in relation to the Respondents' Counter Claim. The Respondents also filed a witness statement made on 13<sup>th</sup> May 2019 by Sarabjeet Singh who states that the Claimant stopped coming to work after she was named in a theft occurrence in the Respondents' business by a security guard who was arrested, recorded her as a beneficiary in his statement to the police. He stated that the Claimant has a habit of changing jobs like this and that her records can prove the same.

3. The Claimant and the Respondent's witness testified along similar lines as their pleadings and statements. Save to note that the Claimant was unable to prove the salary claimed was Kshs. 150,000/- as all her statements showed a sum of Kshs. 75,000/-

**4. Claimant's Submissions**

The Claimant submits that the Black's Law Dictionary 9<sup>th</sup> Edition defines constructive dismissal as "A termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave". The Claimant submits that constant verbal abuse by the 3<sup>rd</sup> Respondent which the Claimant also complained and communicated about in futility constrained her to resign from her employment as communicated in her email dated 4<sup>th</sup> July 2014. The Claimant asserts that the Respondents

further frustrated her by delaying her salary on numerous occasions and made it hard for her to meet her family obligations and that this fact was admitted by the Respondents' witness who justified the same by asserting that delay of salary only began after the theft allegations. The Claimant relied on the decision of the Court in the case of **Jackson Gona Konde v Ayoob Noor Mohammed & Company Limited [2017] eKLR** affirmed that payment of salary is a matter of right and that there is no justification for delaying an employee's salary. She further relied on the case in **Maureen Wanjiru Mwangi v Blue Sea Energy Limited [2020] eKLR** where the Court held that the respondents' failure to pay the claimant's salary amounted to constructive dismissal. The Claimant cited the case of **Milton M Isanya v Aga Khan Hospital Kisumu [2017] eKLR** where the Court enumerated the basic ingredients in constructive dismissal as follows:

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

5. The Claimant contends that the instant case satisfies the ingredients for constructive dismissal because: (i) the Employer breached the conditions of the employment contract by failing to provide a proper working environment and also failing to pay the Employee's salary on time; (ii) this breach was significant; (iii) the Employee resigned in response to the breach; and (iv) there was no delay in resigning after the abuse. She prays that this Court finds that the termination of her employment was unfair within the meaning of Section 45 of the Employment Act as the Respondents have failed to prove that the termination was grounded on a valid and fair reason and that a fair procedure was followed. On the issue of her net salary, the Claimant submits that she produced her bank statements and emails requesting payment of her salary arrears. The Claimant submits that the figures attest to her salary being Kshs. 150,000/- whereas the Respondents only produced unstamped and unsigned payslips which she is a stranger to and that they have not produced any evidence to show that she actually received these payslips. The Claimant submits that the balance of probabilities thus tilts in her favour on this issue as was stated in **Unilever Tea (K) Ltd v Joseph Ondiek Mogaka [2016] eKLR** that the trial court is forced to look at the most probable scenario on the basis of evidence tabled in support of the respective cases of the parties. It is the Claimant's submission that despite the Respondents alleging that she committed theft, they have not explained why the said reason was not used to dismiss her and that they instead frustrated her until she resigned from employment. The Claimant submits that the constructive dismissal entitles her to compensation for unfair loss of employment as under Section 49(1)(c) of the Employment Act and that in determining whether she is entitled to the 12 months' salary maximum compensation, the Court may be guided by the Court of Appeal decision in the case of **Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR**. On the claim of housing allowance, she submits that the Respondents have not produced any evidence to show that they gave her a consolidated pay and that as held in **Milkah Khakayi Kulati v Sandstorm (Africa) Limited [2014] eKLR**, where an employer fails to document the terms and conditions of employment, the Court is left to interpret those terms. She submits the said Court went on to hold that the evidence presented to the Court did not show any expressed intention that the claimant's salary was inclusive of house allowance. The Claimant in the instant case thus prays that the quantum for the housing allowance be applied be 15% of the salary as was done in the case of **Grain Pro Kenya Inc. Ltd v Andrew Waithaka Kiragu [2019] eKLR**.

6. The Claimant further submits that her evidence demonstrating that she worked until 23<sup>rd</sup> July 2014, that she never took leave while working for the Respondents and that she worked overtime remain uncontroverted. The Claimant submits that she has thus proved her case. She cites the case of **Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & Another [2016] eKLR** where Mulwa J. held that uncontroverted evidence must bring out the fault and negligence of a defendant and a plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not. She further submits that she has produced evidence that she requested for maternity leave and had several discussions on the issue and that having worked during her maternity leave, she should be compensated. The Claimant submitted that the Courts have severally held that it is the duty of the employer to keep employment records, including on hours of work as held in **Meshack Kiio Ikulume v Prime Fuels Kenya Limited [2013] eKLR**.

#### 7. Respondents' Submissions

The Respondents submit that they are the shareholders/directors of the said Afri-Ventures International Limited which they also explained in their evidence in Court and that the said company is a Limited Liability Company incorporated under the Companies Act Chapter 486 (Laws of Kenya) now repealed. They submit that they did not therefore at any one-point hire or employ the Claimant because of the principle of Separate Legal Entity and which position was affirmed in the Court of Appeal case of **Victor Mabachi & Another v Nurtun Bates Limited [2013] eKLR** that a body corporate is a *persona juridica* with a separate independent identity in law, distinct from its shareholders, director and agents. They further submit that they are not her employers and that the Termination Letter and the Bank Deposits made in the Claimant's account were addressed to Afri-Ventures International Limited. Therefore, they submit that the Claimant's suit must fail as the Court cannot create and enforce a non-existing contract of employment. Without prejudice, to the foregoing submission, the Respondents' submit that the law on constructive dismissal was stated in the landmark decision issued by the Court of Appeal in the case of **Coca Cola East & Central Africa Limited v Maria Kasai Ligaga [2015] eKLR**. They further rely on the case of **Herbert Wafula Waswa v Kenya Wildlife Services [2020] eKLR** where the Court observed that the appellant did not cite frustrations by his employer as a reason for his desire to leave and dismissed the appeal case for constructive dismissal. The Respondents similarly submit that the Claimant in the instant case left employment in a very rosy state while painting a picture of all fun and gloom and did not make any reference to specific acts of the employer that forced the resignation. They submit that the Claimant has thus failed to prove the alleged unfair termination of employment by constructive dismissal

8. The Respondents submit that they have in their only bundle of documents filed before this Court listed the Claimant's payslips for the months of January 2013 to June 2014 and that the email and bank statements submitted on by the Claimant is not proof of payment of salary and specifically the amount payable. They submit that their bundle of documents also indicates that the Claimant's basic pay was all-inclusive and that having convinced the Court that the Claimant wilfully resigned as she had found a new job, there was no unlawful termination. They further submit that the Claimant has not proved how she is entitled to half-month salary for the month of July 2014 which she also presumably abandoned in her submissions and only submitted on the 23 days' salary worked in the month of July 2014. They submit that for the alleged 23 days, the same is contrary to her letter of resignation dated 24<sup>th</sup> June 2014 wherein she states that "*I am giving my 15*

*day notice and my last day of employment will be 3<sup>rd</sup> July 2014.*” The Respondents submit that this shows she only worked up to 3<sup>rd</sup> July 2014 and that the alleged email of 23<sup>rd</sup> July 2014 cannot be used as proof that she was actually working up to the said 23<sup>rd</sup> July 2014. It is the Respondents’ submission that the Claimant has also failed to prove the particulars of leave days and days worked during maternity leave as per the provisions of Sections 107 and 108 of the Evidence Act and that since she was a member of NSSF she is not entitled to service pay as stipulated under Section 35 of the Employment Act, which claim she also abandoned in her submissions. On the claim for overtime, the Respondents submit that the Courts have in recent times held that the employee must prove the same and where the same is not proved the Courts have declined or rejected the claim for overtime. That since the Claimant has not provided any proof that she worked overtime, the same must fail. They cite the cases of **Peter Mwanai v Kiu Construction Company Ltd [2019] eKLR**; **Dennis Maisiba v Economic Industries Limited [2020] eKLR**; and **Carolyn Ondiri Sheunda & 7 Others v Top Rank Industries Limited [2019] eKLR**. They urge the dismissal of the Claimant’s case with costs to the Respondents.

9. The Claimant resigned from employment and in her case asserts constructive dismissal. For constructive dismissal to have traction, the employer must have made the work environment so toxic that the only way out is by resignation. In that case, the employer indirectly dismisses the employee as they make the employee lack room to perform their contract and though the employee resigns it is as if they were dismissed by the employer hence the term constructive dismissal. In this case the Claimant was not strictly speaking in a situation where the employer could be accused of constructive dismissal. The Court discerns that there was poor work environment as there was the frequent delay of salaries. There is the allegation on constant verbal abuse but there was no evidence of this tendered. The Claimant failed to record the verbal abuse whether through memos complaining of it or letters to HR raising the issue. The failure to do so means there is paucity of evidence to find the Respondents breached the terms and conditions of service by failing to provide a conducive environment for its employees and in this case, the Claimant. She asserted there was discrimination on account of her maternity leave but a close perusal of the claim and the evidence in support of her case she was actually granted maternity leave. She resigned and could not make a nexus between the resignation and the allegations of maltreatment by the directors of her employer. The Claimant’s suit is therefore unproved to the required standard and is dismissed with each party bearing their own costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2021**

**NZIOKI WA MAKAU**

**JUDGE**