



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1883 OF 2017

NOREEN WAITHIRA KAGO.....CLAIMANT

v

GEORGE NAMASAKA SICHANGI t/a SICHANGI PARTNERS ADVOCATES....RESPONDENT

JUDGMENT

1. Noreen Waithira Kago (Claimant) is an Advocate of the High Court of Kenya, admitted on 9 March 2015.
2. On or around 3 March 2015, Sichangi Partners Advocates (Respondent) employed the Claimant as an Associate Advocate in the conveyancing department at a gross monthly salary of Kshs 92,000/-.
3. On 20 September 2017, the Claimant commenced these legal proceedings against the Respondent and she stated the Issues in Dispute as
 1. Wrongful dismissal.
 2. Redundancy.
 3. Failure by the Respondent to follow due process in terminating the Claimant's employment.
 4. Non-payment of terminal dues.
 5. Compensation.
4. Although served and acknowledging service of Summons on 26 September 2017, the Respondent failed to enter Appearance and/or file a Response.
5. The Cause, therefore, proceeded undefended on 16 December 2019. The Claimant testified (also adopted witness statement) and produced documents and filed her submissions on 31 January 2020 (should have been filed by 24 January 2020).
6. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

7. The Claimant testified that she was not issued with a formal contract despite following up with the Human Resources Administrator.
8. On the circumstances leading to separation, the Claimant testified that in June, July and August 2016, the Respondent delayed and/or withheld her remuneration despite other staff being paid on time, and this caused her to write to the Managing Partner on 31 August 2016 to notify him of her inability to continue carrying her duties under such working conditions.
9. The Claimant also testified that the Managing Partner responded on 2 September 2016 indicating that the complaint was being looked into and communication would be made and that the next communication she got was an email on 9 September 2016 instructing her to hand-over her work.
10. The testimony of the Claimant was not rebutted or controverted.

11. The payment of remuneration when it falls due is one of the *essentialia* of an employment contract. It is a fundamental term and obligation. It has been given statutory underpinning in sections 17 and 18 of the Employment Act, 2007.

12. In breaching the fundamental obligation to pay the Claimant the remuneration when it fell due, the Respondent was showing an intention of repudiating the contract with the Claimant.

13. The Respondent was not only failing to fulfil a fundamental obligation but had created a hostile work environment for the Claimant by failing to pay wages.

14. In the view of the Court, this was a repudiation of the contract and *constructive dismissal*.

15. The doctrine of *constructive dismissal* was discussed in detail in the case of *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344.

16. The test, essentially as to what amounts to constructive dismissal as endorsed in the authority is that 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.

Compensation

17. The Claimant served the Respondent for slightly over 1 year. The circumstances leading her to leave were not of her making.

18. Considering the length of service and the circumstances, the Court is of the view that the equivalent of 2 months gross salary as compensation would be fair (gross salary was Kshs 92,000/-).

Salary in lieu of notice

19. The Respondent repudiated the contract with the Claimant without notice.

20. The Court finds that the Claimant is entitled to a 1-month salary in lieu of notice.

Breach of contract/statute

Annual leave

21. The Claimant sought Kshs 70,000/- in lieu of leave.

22. Annual leave of at least 21 days with full pay is a statutory minimum and without the participation of the Respondent in the proceedings and considering the provisions of section 10(3) of the Employment Act, 2007, the Court has no option but to find for the Claimant.

Unpaid remuneration

23. The main reason causing the Claimant to leave employment was the failure to pay her salaries for June, July and August 2016 amounting to Kshs 210,000/-.

24. The Claimant produced a copy of her bank statement to show that the Respondent did not remit the salaries as it had done during previous months.

25. Without any contrary pay records, the Court finds that the Respondent was in breach of contract/statute by not paying the salaries and that the Claimant is entitled to the same as of right.

Certificate of Service

26. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant within 21 days.

Severance pay

27. The Claimant made a plea of Kshs 15,000/- on account of *severance pay*. *Severance pay*, under the Employment Act, 2007 is an entitlement in cases of redundancies and since this was not a case of redundancy, the Court holds that the Claimant is not eligible for *severance pay*.

Conclusion and Orders

28. The Court finds and declares that the Respondent repudiated the contract and constructively dismissed the Claimant and also breached the contract/statute and awards her

(a) Compensation Kshs 184,000/-

(b) Pay in lieu of notice Kshs 70,000/-

(c) Unpaid salaries Kshs 210,000/-

(d) Accrued leave Kshs 70,000/-

TOTAL Kshs 534,000/-

29. The decretal sum to accrue interest at court rates from 20 September 2017.

30. Respondent to issue a certificate of service within 21 days.

31. The Claimant to have costs on a half-scale.

Delivered, dated and signed in Nairobi on this 7th day of February 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Gachugi instructed by Hiram Gachugi & Co. Advocates

Respondent did not participate

Court Assistant Judy Maina