



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1247 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

CAROLYNE KALUNDE MUUMBO.....CLAIMANT

VERSUS

NANCY MUKONYO KILONZO T/A

KILONZO N. M AND COMPANY ADVOCATES.....RESPONDENT

JUDGMENT

Vide memorandum of claim dated and filed on 25th July 2011, the claimant who is an advocate avers that she was employed by the respondent, as an advocate on 5th January 2008 until 29th July 2011 at a monthly salary of Kshs.20,000. That while in the employment of the respondent she managed the firm in the respondent's absence and performed all legal and administrative work. That she resigned on 29th July 2011 owing to the failure of the respondent to pay her salary as and when it fell due.

The claimant seeks orders against the respondent as follows–

1. That the Respondent's conduct towards the Claimant amounted to constructive dismissal and ought to be declared unfair/unlawful and hence null and void.
2. The Respondent do re-engage the Claimant in work comparable to that in which the Claimant was employed prior to the constructive dismissal or other reasonably suitable work at the same wages with no loss of benefits together with salaries and allowances in arrears for both the period the Grievant has been working and out of office/work.
3. Reinstate the Claimant and treat her in all aspects as if the Claimant employment had not been constructively dismissed.

In the alternative to the demand for reinstatement, the Claimant prayed for payment as under:-

- i) Terminal dues as enumerated in the sum of Kshs.796,666.66
- ii) Interest on clause from the dates of dismissal until payment in full at the court rates.
- iii) Any other statutory entitlements.
- iv) The Respondent to pay legal costs in this suit.

The sum of Kshs.796,666.666 is made up of the following –

- (i.) Salary arrears sum of..... Kshs.465,000.00
- (ii.) Notice of one month sum of..... Kshs.20,000.00
- (iii.) Maximum compensation of 12 months for loss of employment 12 x 20,000.00..... Kshs.240,000.00

(iv.).....	28 Leave days (annual for 1 year)
one month's salary.....	Kshs.20,000.00
(v.).....	Pro-rata leave (seven months)
x 20,000.00.....	Kshs.11,666.66
(vi.) Service pay 3 x x 20,000.....	<u>Kshs.40,000.00</u>
Total	Kshs.796.666.66

The respondent filed a memorandum of response on 31st August 2015 in which she denies the averments in the memorandum of claim. The respondent avers that the claim is an attempt by the claimant to make unlawful earnings by claiming that she is an employee and at the same time a partner in business. That the claimant illegally inserted her name as a partner in the respondent's business name without the respondent's consent. She prays that the claim be dismissed with costs.

At the hearing of the claim both the claimant and the respondent testified in support of their respective claims. The parties thereafter filed and exchanged written submissions.

In both her witness statement dated 9th and filed on 12th November 2018 and in her testimony, the claimant avers that she was admitted to the bar on 20th December 2007. Thereafter on 5th January 2008, the respondent who had secured a contract to work for the Government of South Sudan (Juba) to assist the Government of South Sudan in drafting its legislation, employed her to run the respondent's law firm in Nairobi. That in the oral contract they agreed on a monthly salary of Kshs.20,000 as a start. That the respondent was also to pay for the claimant's practicing certificate.

It is the claimant's averment that the respondent failed to pay for her practicing certificate as agreed, compelling her to pay for the same personally. It is also the claimant's averment that the respondent did not pay her salary as agreed causing her to accrue arrears of salary of Kshs.120,000 in 2008, Kshs.120,000 in 2009 and a further Kshs.120,000 in 2010. That in 2011, the respondent only paid her Kshs.15,000 in February and a further Kshs.20,000 in April 2011, thus the total salary arrears of Kshs.465,000.

The claimant further avers that the respondent owed her Kshs.20,000 being pay in lieu of termination notice and Kshs.240,000 being 12 months' salary as compensation for unfair termination.

Under cross examination the claimant testified that she was admitted in 2007 but she took out her first practicing certificate in 2009 which she paid for personally. She denied that she imposed herself as the respondent's partner in the law firm and testified that she only became aware of that fact after reading the memorandum of defence.

The claimant also adopted and relied on her list of documents filed with the memorandum of claim and her supplementary list of documents dated 28th November 2018 and filed on 9th January 2019. The documents in the supplementary list of documents include proceedings in Nairobi Children's Case No. 455 of 2006 and email correspondence between the parties while the documents filed with the memorandum of claim are demand letters and responses thereto including the claimant's letter of resignation titled "*Relinquishment*" signed on 29th July 2011.

For the respondent the only documents filed are a letter to the Registrar of Companies' complaining about an illegal change of name and a copy of certificate of Registration of Change of Name.

The respondent's bold to file further documents after the claimant's evidence in chief had been taken was rejected by the court.

In her testimony the respondent stated that she is an advocate of the High Court of Kenya trading in the business name and style N. M. Kilonzo and Company Advocates, established in August 2007. She testified that she knew the claimant who was a pupil at Munyasya and Company Advocates where the respondent was employed between 2003 and 2005 before she set up her own law firm. She denied ever employing the claimant and testified that the claimant only held her briefs and used her office for her own personal business. She testified that while she was away working in Juba, South Sudan, she would come back home every week to work from home as she had a young family. That the claimant used to go to her office but would arrive and leave at her own time. That besides holding briefs for her, the claimant also held brief for other lawyers. That the relationship between her and the claimant was very good until 2011 when she noted that the claimant had become cold towards her. That this was after she discovered that the claimant had registered herself as a partner in the respondent's law firm. That she used to pay the claimant according to work done.

She testified that the claimant handed in the letter of resignation to the respondent's secretary and carried away her things on 29th July 2011 when she was in Juba. She testified that the only mistake she made was to allow the claimant space in her office.

The respondent testified that the claim herein is filed by the claimant out of malice after the claimant realised she could not become a partner in the respondent's law firm.

Under cross examination the respondent testified that her contract with the Government of South Sudan was initially for months from 2009 but was renewed on and off until February 2012.

She testified that she paid the claimant in cash for work done.

Analysis and Determination

I have considered the pleadings, evidence and submissions filed herein. The issues for determination are –

- (i) Whether the claimant was employed by the respondent.
- (ii) Whether the claimant was constructively dismissed by the respondent.
- (iii) Whether the claimant is entitled to the remedies sought.

Contract of Service

The Employment Act recognises both oral and written contracts of employment. The Act defines contract of service as –

“contract of service” means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of this Act applies;

It is the claimant’s submissions that the email correspondence between her and the respondent proves an oral employment contract. She relies on the case of **Addison v London Philharmonic Limited (1981) I.C.R. 261, 271** and **Warner Holidays Limited v Secretary of State for Social Services (1983) I.C.R. 440** where the factors relevant to the process of identifying a contract of employment were listed as follows: -

1. *The degree of control exercised by the employer;*
2. *Whether the worker's interest in the relationship involved any prospect of profit or risk of loss;*
3. *Whether the worker was properly regarded as part of the employer's organization*
4. *Whether the worker was carrying on business on his own account or carrying on the business of the employer;*
5. *The provision of equipment;*
6. *The incidence of tax and national insurance;*
7. *The parties' own view of their relationship;*
8. *The structure of the trade or profession concerned and the arrangements within it.*

The claimant also relied on the case of **Whittaker v Minister of Pensions and National Insurance (1967) 1 Q.B. 156** in which the court stated that:

"the greater the amount of control exercised over the details of the work to be done the more likely is the inference that the relationship is one of employment"

The respondent does admit the correspondence filed by the claimant which in her submissions, she states is proof of existence of a relationship. She however denies that this was an employment relationship.

I have perused the correspondence filed by the claimant. The correspondence which are for 2010 and 2011 are updates of work done by the claimant for the respondent. Some of the correspondence is appropriately titled “*office updates*”. All the correspondence is very friendly until the email dated 1st August 2011 in which the respondent writes –

“From: Nancy Advocate.

Sent: Monday, August 01, 2011 3:00 PM

To:

Cc:

I hav received ur letter. Let me know how much u are demanding from us. Taking into account the days u have bn absent I know that we owe u June n July. Further give an account of money n us possession. Wish u the best n ur endeavours.”

“From:

Sent: Monday, August 01, 2011 3:39 PM

To: Nancy Advocate.

Cc:

If that is what you say, how much do you owe me for the two months?”

From: Nancy Advocate.

Sent: Monday, August 01, 2011 4:10 PM To:

Cc:

I hav bn giving u 20k a month”

“From:

Sent: Monday, August 01, 2011 4:35 PM

To: Nancy Advocate.

Cc:

First of all to correct you, you know very well that you have been paying me Kshs.20,000 per two months That is the amount that you always left for me on your way back to Juba.”

From: Nancy Advocate.

Sent Monday, August 01, 2011 4:17 PM

To:

Cc:

What r u demanding”

“From:

Sent: Monday, August 01, 2011 6:30 PM

To: Nancy Advocate.

Cc:

You very well know that you have been paying me Kshs.20,000 per two months. Do you think you have really been fair considering the fact that you "had taken me to be just like your sister" if I may borrow your words? Is that the way people treat their sisters? Make the calculations yourself based on that”

From: Nancy Advocate.

Sent Monday, August 01, 2011 4:48 PM

To:

Cc:

It appears u want to fight. If I recall we have never fully discussed ur salary, and u never complained to me until now, be bold n say how much ur demanding, no need of burning bridges coy I dont harbour any ill motives. I would hve appreciated if u had faced me n told me all ur grievances like mature people.”

From:

Sent: Monday, August: 01, 2011 5:14 PM To: Nancy Advocate.

Cc:

I tried to talk to you but you refused and you very well know that and so you are the one who has never been sincere in the first place and that is why you totally refused and/or ignored to communicate to me before you left for Juba. I am not interested in fighting with you. You admit that you paid me Kshs.20,000 per month and i corrected you that it was per two months and not per month. You always left me that amount on your way back to Juba with excuses that you are expecting money from somewhere or that you were expecting big clients. I carried out Legal, Administrative as well as Clerical duties and you very well know that i broke my back for you.

“From: Nancy Advocate.

Sent Monday, August 01, 2011 6:06 PM

To:

Cc:

Still waiting for the figure u r demanding”

From:

Sent Monday, August 08, 2011 4:10 PM

To: Nancy Advocate.

Cc:

Hello. You have not yet responded with regard to the amount you owe me. Should i compute the figure for you based on my last sms message to you?”

From:

Sent- Monday, August 01, 2011 4:13 PM To: Nancy Advocate.

Cc:

Good. We will settle it in court then.”

From the correspondence, it is clear that there was an employment relationship between the claimant and the respondent at a salary of Kshs.20,000 per month. I thus find that there was a contract of employment between the claimant and the respondent.

Whether the claimant was constructively dismissed by the respondent

Constructive dismissal was defined by Lord Denning in the case of **Western Excavating (ECC) Limited v Sharp (1978) QB 761** where he stated that –

“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.”

Indeed, this is a matter that although not expressly provided for in the Kenyan labour legislation, has been addressed in numerous cases. In the case of **Benjamin Muriuki Selestino v Cobra Security Company Limited (2019) eKLR**, Nzioki Wa Makau J. stated the following: -

*“In the case of **Coca Cola East and Central Africa Limited v Maria Kagai Ligaga [2015] eKLR**, the Court of Appeal, cited with approval the definition of constructive dismissal by Lord Denning MR in **Western Excavating (ECC)Ltd v Sharp [1978] ICR 222 or [1978] QB 761** where he held as follows:*

“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 ... whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment.”

In the case of **Joseph Aleper and Another v Lodwar Water and Sanitation Company Limited (2015) eKLR**, Marete J. defines

constructive termination by reference to the definition in **Black's Law Dictionary (9th Edition)** as follows: -

"constructive dismissal" A termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave"

In the case of **Catherine Kinyany v MCL Saatchi and Saatchi (2013) eKLR** the court held that: -

"For a claim of constructive dismissal to succeed, the Claimant must show that the Respondent acted in a way that made it extremely hard for the Claimant to continue working."

In the case of **Milton M Isanya v Aga Khan Hospital Kisumu (2017) eKLR**, the court held as follows: -

"In Cause Number 611 [N] of 2009 between Maria Kagai Ligaga v Coca Cola East and Central Africa Limited [unreported], the Court held that constructive dismissal occurs where an employee is forced to leave his job against his will, because of his employer's conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed.

The basic ingredients in constructive dismissal are:-

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

In the case of **Kenneth Kimani Mburu and another v Kibe Muigai Holdings Limited [2014] eKLR**, Rika J. held as follows:

"The conduct by the employer must be shown to be so intolerable that it made it considerably difficult for the employee to continue working. At the heart of constructive dismissal is breach of the duty of trust and confidence. The employer's behaviour must be shown to have destroyed or seriously undermined trust and confidence. In the English Employment Rights Act 1996 and the South African Labour Relations Act Number 66 of 1995, constructive dismissal occurs when an employee terminates the contract under which he is employed, with or without notice, in circumstances which he is entitled to terminate it without notice, by reason of the employer's conduct. Although the Court is not bound by this definition, the two Statutes conform to the definition of the term given by most labour and employment law publicists"

In the case of **Alice Mbithi Mwanzia v Express It Courier Limited (2016) eKLR**, Wasilwa J. stated that: -

"In Ndebele v Foor Warehouse (pty) Ltd t/a Shoe Warehouse (1992) 13 ILL 1247, the then Industrial Court of South Africa Deputy President stated as follows regarding the subject of constructive dismissal:-

"Constructive dismissal arises when the employee terminates the employment contract in circumstances such that he is entitled to terminate it without notice by reason of the employer's intolerable or unreasonable conduct. It may also arise where an employee resigns and the resignation cannot be held to be voluntary in the real sense as it was promoted by the employer's unlawful or improper conduct, such as assault, sexual harassment or unsubstantiated allegations of theft or dishonesty."

In the claimant's letter of resignation, she states as follows –

"TO: KILONZO N. M. & CO. ADVOCATES

ROYAL ICT BUSINESS PARK II

MOMBASA ROAD

OPP. CITY CABANAS, 3RD FLOOR

P.O. BOX 8376 – 00300

NAIROBI

ATTN: NANCY KILONZO

RE: RELINQUISHMENT

The above refers.

This is to notify you that I will no longer be offering Legal Services to your Law Firm come next month.

This is to effect my earlier intimation to you made solely for the purpose of giving you an opportunity to make the necessary arrangements and/or take the necessary action with regard to the running and management of your Law Firm.

Kindly make the necessary arrangements and/or efforts to delete my name from the Law Firm's Letter Head and/or any other official document.

I will also be requiring you to make the necessary arrangements for the settlement of the office Account and salary arrears for I do require that I be remunerated in accordance with the proper standards befitting an Advocate for all my services rendered.

I have, carried with me the following files which require urgent attention for the purpose of avoiding any inconveniences to the clients

1. Tr. CASE NO. 899/2011

R -VS- YI PING GU.

2. HENRY WAMBUA KINYOWE'S FILE.

Yours Sincerely,

SIGNED 29th of July 2011

CAROLYN K. MUUMBO”

Does this letter express the anguish of an employee who has been compelled to leave service by the employer's conduct? I do not think so. This is a letter of notice of resignation where the employee also demands arrears of salary. The letter does not state that the claimant was resigning because of the arrears of salary. The claimant even gave the respondent an opportunity to make arrangements for someone else to run the law firm.

In my understanding, the letter or circumstances of this case do not amount to a constructive dismissal and I hold accordingly.

Remedies

Having found no proof of constructive dismissal, the claimant is not entitled to pay in lieu of notice as it is she who resigned from employment of her own free will. For the same reason the claimant is not entitled to compensation as there is no proof of unfair termination of employment.

The respondent having not specifically controverted the evidence of the claimant that she never took the annual leave for the entire period she was in the respondent's employment, she is entitled to annual leave as claimed for one year and 7 months.

The claimant is also entitled to service pay by dint of Section 35(5) as read with Section 35(6) of the Employment Act at 15 days' salary per year worked being 3 complete years.

She is further entitled to arrears of salary as claimed as this was not controverted by the respondent other than making bare denials that are in contrast to the correspondence between the parties.

Conclusion

I thus enter judgment for the claimant against the respondent as follows –

1.. Salary arrears..... Kshs.465,000.00

2.. Pay in lieu of annual leave..... Kshs.31,666.66

3.. Service pay..... Kshs.30,000.00

Total **Kshs.526,666.66**

The respondent shall also pay claimant's costs for this suit.

The decretal sum shall accrue interest at court rates from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF APRIL 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of 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.

MAUREEN ONYANGO

JUDGE