



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1622 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**ROSE WANGARI MWANGI.....CLAIMANT**

**VERSUS**

**MOUNT KENYA UNIVERSITY.....RESPONDENT**

**JUDGMENT**

Vide a Memorandum of Claim filed on 12<sup>th</sup> August, 2016, the Claimant alleges that the Respondent constructively dismissed her from employment.

She avers that she was employed by the Respondent at its Nairobi Campus on a renewable 2 year contract which was renewed for a further 2 year after its lapse on 1<sup>st</sup> May, 2015. She avers that on 30<sup>th</sup> August, 2015 she was put on bed rest due to her health condition. She avers that she communicated this to the Respondent and proceeded on 14 days sick off. She avers that after completion of her sick off, she continued with her maternity leave.

She avers that she resumed duty at the Respondent’s Nairobi Campus on 14<sup>th</sup> December, 2015. She did not receive her salary from even date to March 2016. She avers that she was not given any reason for non-payment of her monthly salary. She seeks the following reliefs:

- 1.... Full payment for the three (3) months worked between  
14<sup>th</sup> December, 2015 to 15<sup>th</sup> March, 2016..... Kshs.54,000.00
- 2.... Gratuity for two (2) years at 10% per annum on basic salary for completion of contract ending  
1<sup>st</sup> May, 2015..... Kshs.18,720.00
- 3... Twelve (12) month’s salary as compensation for unfair constructive  
dismissal..... Kshs.216,000.00
- 4... One months’ salary in lieu of notice..... Kshs.18,000.00
- 5... Interest thereon till payment in full.
- 6... Costs of this claim.

The Respondent filed a Response to the Claim on 25<sup>th</sup> November, 2016. It avers that the contract it had with the Claimant was one of services payable in arrears for work done and that the Claimant did not work during the alleged period thus she is not entitled to any pay.

The Respondent avers that the Claimant dismissed herself from employment by absconding duty thus she is the author of her own misfortune. It therefore avers that the claimant is unfit for protection under the Employment Act and is not entitled to any relief.

The Claimant filed a Reply to the Response on 19<sup>th</sup> December, 2016. She avers that the Respondent's conduct in failing to pay her led to her suffering financial burden and it forced her to abandon employment.

The suit was by consent of the parties disposed of by way of written submissions.

### **Claimant's submissions**

The Claimant submitted that although the concept of constructive dismissal has not been given statutory grounding in Kenya, the concept was recognised under common law and defined in the case of **Western Excavating (ECC) Ltd v Sharp [1978] ICR 222**. She submitted that this concept can find its anchor in Article 41(1) of the Constitution on every person's right to fair labour practices.

She argued that the Respondent's refusal to remunerate the Claimant for 3 months after resumption of duty is conduct which is so significant and shows that the Respondent no longer intended to be bound by terms of the contract. She submitted that the primary concern in constructive dismissal is the conduct of the employer and not the conduct of the employee unless waiver, estoppel or acquiescence is in issue and that an employee's claim of constructive dismissal remains valid whether she left work immediately without giving notice or tenders a valid resignation.

She argued that she communicated the events of her sickness and maternity progress to the Respondent's supervisor via phone call. She submitted that she was entitled to sick leave under section 30 of the Employment Act and after her delivery, her maternity leave commenced automatically from 15<sup>th</sup> September, 2015 lapsing on 14<sup>th</sup> December, 2015 when the Claimant resumed work.

She submitted that the Respondent without consent and/or knowledge of the Claimant changed the terms and period of her maternity leave from 29<sup>th</sup> August, 2015, when she fell ill, to 19<sup>th</sup> October, 2015. She submitted that she was not privy to the letter dated 28<sup>th</sup> September, 2015 which sought to include her sick off days in her maternity leave. She submitted that the change of terms of the employment between her and the Respondent was in contradiction to her filled maternity leave form.

She argued that the letters and memos regarding her absconding work are from the Estate Manager to the Human Resource Manager and none of these documents is addressed to her. She submitted that the Respondent has not on a balance of probability substantiated its claim that she absconded work. That no warning letter was written to her.

She submitted that the Human Resource notes that "*DD-HRP/HRO-Benefits Zerorise her payment for now*" were made without her knowledge and the same was never communicated to her even after she resumed work. She submitted that she had proved her claim on a balance of probability and hence she is entitled to the prayers in the claim.

She submitted that she is entitled to 3 months' payment for the period worked between 15<sup>th</sup> December 2015 to March 2016. She submitted that save for the conduct of the Respondent which led to constructive dismissal she would have continued to work despite non-payment of her salary for 3 months.

She submitted that she remained with 1 year and one month to complete her contract thus payment of one year salary for unfair and constructive dismissal is reasonable in the circumstances. She submitted that the Respondent failed to give notice to her that it did not intend to be bound by the terms of the contract of employment and went ahead to constructively dismiss the her.

She prayed for a certificate of service, interest and costs of the claim.

### **Respondent's Submissions**

The Respondent submitted that the Claimant requested to proceed on maternity leave from 19<sup>th</sup> October, 2015 to 18<sup>th</sup> January, 2016 but proceeded on leave on 27<sup>th</sup> August, 2015. It submitted that this prompted the Respondent's estate manager to write to the Human Resource Director of the Claimant's expected return date on 30<sup>th</sup> November, 2015 and also her failure to return to work on that date.

The Respondent submitted that the Claimant did not report any injury, sick leave or request authorisation of early leave and no evidence has been adduced by the Claimant on notifying the Respondent of the same.

It submitted that the Claimant did not produce any sick leave document or any medical report upon reporting back to work on 15<sup>th</sup> December, 2015 and that sick leave could not be given in August 2015 when maternity leave was taken, on an unreported incident.

It submitted that it became aware of the Claimant's alleged sickness upon receipt of the document for sick leave submitted in June 2016 when she served it with a demand letter. It further argued that the letter dated 3<sup>rd</sup> February, 2016 from St. Maria did not indicate that it had received the letter.

It submitted that section 30 of the Employment Act provides that an employee should notify or cause to be notified to his/her employer as soon as is reasonably practicable of his/her absence and reasons for it in order to be entitled to sick leave with full pay. It relied on the decision in **Ahmed Aden Hire v Natif Jama & another [2016] eKLR** that no effort was made by the Petitioner to set out why he was absent and that a person such as the petitioner's wife is allowed to notify the employer of the Petitioner's circumstances. It further relied on the case of **Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd [2014] eKLR**.

It submitted that the Claim is frivolous as the Claimant was required to abide by its staff policies, code of regulations and terms of service and

such other instructions from the Respondent.

With respect to constructive dismissal, it submitted that constructive dismissal is not expressly provided for in the Employment Act. It submitted that the same was defined in **Nathan Ogada Atiagaga v David Engineering Limited [2015] eKLR** to mean that constructive dismissal occurs when an employee resigns because their employer's behaviour has become intolerable or made life difficult for the employee who has no choice but to resign.

It submitted that there was no constructive dismissal because the Claimant had absconded duty on numerous occasions and that the Claimant voluntarily dismissed herself without notice. The Respondent urged the Court to be guided by the decision in the case of **Lear Shighadi Sinoya v Avtech Systems Limited [2017] eKLR** that despite not being paid the Claimant compromised her claim for constructive dismissal as she kept out of work.

On the claim for 3 months' pay, the Respondent submitted that the Claimant is not entitled to salaries as she has been absent on numerous occasions. It submitted that the employment contract provided that immature termination of the contract would render the clause affording the Claimant gratuity null and void.

It submitted that the Claimant's absenteeism without cause contradicts the Claimant's submission that she was willing to fulfil her obligations under the contract as the absenteeism amounted to absconding duties which is gross misconduct.

With regard to 12 months' salary compensation for constructive dismissal, the Respondent submitted that Court of Appeal in **OI Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR** held that for the Court to award this amount it must be based on the evidence on record. She submitted that the Claimant having voluntarily dismissed herself she is not entitled to 12 months' salary.

It submitted that the Claimant is not entitled to one month's salary in lieu of notice as no termination notice was served upon her by the Respondent to warrant entitlement to the same. In conclusion, the Respondent submitted that the claim for constructive dismissal has not been established. It urged the Court to dismiss the claim with costs.

#### **Determination**

The issues for determination are:

1. Whether the Claimant absconded duty.
2. Whether the Claimant was constructively dismissed.
3. Whether the Claimant was entitled to the reliefs sought.

#### **Whether the Claimant absconded duty**

Though the main claim is that the Claimant was constructively dismissed for failure to be paid her salary, the Respondent's case is that the Claimant dismissed herself by absconding duty. From the records it is evident that the Claimant's maternity leave was to begin on 19<sup>th</sup> October, 2015 and lapse on 18<sup>th</sup> January, 2016. She avers that prior to this date, she fell sick and was admitted in hospital on 1<sup>st</sup> September, 2015. That she was discharged on 5<sup>th</sup> September, 2015 during which period she was issued with a bed rest advise that was to lapse on 14<sup>th</sup> September, 2015. According to the Claimant, her maternity leave automatically commenced on 15<sup>th</sup> September, 2015 and was to lapse on 14<sup>th</sup> December, 2015.

The Respondent's Estate Manager in a Memo dated 28<sup>th</sup> September, 2015 requested for the review of the Claimant's maternity leave which was to commence on 29<sup>th</sup> August, 2015 instead of 19<sup>th</sup> October, 2015 and was to lapse on 30<sup>th</sup> November, 2015 and not 19<sup>th</sup> January, 2016.

Section 29 of the Employment Act provides:

**(1) A female employee shall be entitled to three months' maternity leave with full pay.**

**(2) On expiry of a female employee's maternity leave as**

**provided in subsections (1) and (3), the female employee shall have the right to return to the job which she held immediately prior to her maternity leave or to a reasonably suitable job on terms and conditions not less favourable than those which would have applied had she not been on maternity leave.**

**(3) Where— (a) the maternity leave has been extended with the consent of the employer; or (b) immediately on expiry of maternity leave before resuming her duties a female employee proceeds on sick leave or with the consent of the employer on annual leave; compassionate leave; or any other leave, the three months maternity leave under subsection (1) shall be deemed to expire on the last day of such extended leave.**

**(4) A female employee shall only be entitled to the rights mentioned in subsections (1), (2) and (3) if she gives not less than seven days notice in advance or a shorter period as may be reasonable in the circumstances of her intention to proceed on maternity leave on a specific date and to return to work thereafter.**

(5) The notice referred to in subsection (4) shall be in writing.

(6) A female employee who seeks to exercise any of the rights mentioned in this section shall, if required by the employer, produce a certificate as to her medical condition from a qualified medical practitioner or midwife.

(7) No female employee shall forfeit her annual leave entitlement under Section 28 on account of having taken her maternity leave.

(8) A male employee shall be entitled to two weeks paternity leave with full pay. [Emphasis Added]

From the records, it is clear that the Claimant did apply for maternity leave which was to commence on 19<sup>th</sup> October 2015 and lapse on 18<sup>th</sup> January 2016. She however claims to have been given bed rest early on 30<sup>th</sup> August 2015 according to her letter dated 3<sup>rd</sup> February 2016. The Respondent appears to have been aware of this as reflected in the communication in the Memo dated 28<sup>th</sup> September 2015 in which the Estate Manager advised the Human Resource Director to adjust the date of commencement and reporting back for the Claimant. The Memo is reproduced below –

“FROM: ESTATE MANAGER  
TO: HUMAN RESOURCE DIRECTOR  
THROUGH: DEPUTY DIRECTOR, FINANCE, ADMINISTRATION AND PLANNING  
REF: MKU02/EST/002/2015  
DATE: 28<sup>TH</sup> SEPTEMBER 2015.  
SUBJECT: MATERNITY LEAVE; REVIEW FOR ROSEMARY MWANGI – PF 1357

Dear Sir,

As above refers, am kindly requesting you to reverse reporting date for Rosemary Mwangi. Her maternity leave commenced on 29<sup>th</sup> August 2015 instead of 19<sup>th</sup> October 2015 as indicated on her leave form. As a result, she is supposed to report back on 30<sup>th</sup> November 2015 and not 19<sup>th</sup> January 2016. Kindly find attached a copy of the maternity leave form duly signed.

Kind regards,

SIGNED

JOHN KAMAU MUNGA

ESTATE MANAGER

MOUNT KENYA UNIVERSITY NAIROBI CAMPUS”

There is however no record of the claimant applying for sick leave before her maternity leave commenced. The claimant also appears to have deliberately concealed the date on which her maternity leave commenced. It is only in her submissions that she states: -

“The claimant was at all material times of this claim an employee of the Respondent at its Nairobi Campus under a renewable contract of service for two (2) years commencing on the 1<sup>st</sup> May, 2015. the plaintiff became pregnant and requested Maternity leave commencing 19<sup>th</sup> October, 2015 to 18<sup>th</sup> January 2016. Unfortunately, the plaintiff developed pregnancy complications before her leave could commence and on the 30<sup>th</sup> day of August 2015 the claimant was issued with bed rest note as a result of health condition and communicated the same to the respondent taking a fourteen (14) days off days; This was after an emergency childbirth. At the expiry of the Sick off days on the 14<sup>th</sup> day of September the claimant continued with her Maternity Leave and resumed her duties at the respondent Nairobi Campus on the 14<sup>th</sup> day of December, 2015 upon filling the resumption forms as required by the respondent.

The Respondent however failed to remunerate the claimant for the month of December, 2015 and January, 2016 prompting the claimant vide a letter dated 3<sup>rd</sup> February 2016 to write to the respondent inquiring about her salary which letter the respondent failed to respond to and/or was ignored by the respondent. Despite non-payment of her salary, the claimant continued to work until mid-March 2016 without pay and as a result she suffered heavy financial, could not afford fare to work and ended up being evicted from her rented house forcing her to resign from work.”

As provided in Section 29 of the Employment Act, extension of maternity leave can only be on mutual agreement or upon production of a medical certificate. The claimant neither sought her employer’s consent nor did she produce a medical certificate until 3<sup>rd</sup> February 2016 after her salary had been stopped following her failure to resume duty upon the lapse of 90 days’ maternity leave. Again what she produced is not a Medical Certificate but a letter she sought to clarify what had transpired. From the letter from St. Matia Mulumba Mission Hospital,

it is evident that the claimant was admitted on 1<sup>st</sup> and discharged on 5<sup>th</sup> September 2015, presumably after child birth. The said chit is curiously not dated.

From the foregoing, I find that the claimant absconded duty from about 1<sup>st</sup> December 2015 when her 90 days' maternity leave lapsed.

The Respondent annexed Memos dated 7<sup>th</sup> January, 2016 18<sup>th</sup> January 2016, 16<sup>th</sup> January 2016 from the caretaker to the Estate Manager indicating that the Claimant did not attend work and was not picking his call.

It is immaterial that the Memos were not addressed to the Claimant. She did not prove that she had been authorised to be away from work or that she explained her absence to the Respondent after reporting to work since she claims that she worked until March 2016.

#### **Whether the Claimant was Constructively dismissed**

The Claimant's case is that she returned to work on 14<sup>th</sup> December, 2015 but never received her salary up-to the month of March 2016. She contends that this amounted to constructive dismissal. The Respondent avers that there is no constructive dismissal as the claimant absconded duty. The period in question in the claim is between 14<sup>th</sup> December, 2015 and March 2016 when the Claimant did not receive her salary which is the period that the Claimant alleges she was constructively dismissed.

The Court of Appeal in **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** held:

*“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 behavior 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. The contractual test is narrower than the reasonable test. The dicta in **Western Excavating (ECC) Ltd. -v- Sharp [1978] ICR 222** adopts the contractual approach test and we are persuaded that the test is narrow, precise and appropriate to prevent manipulation or overstretching the concept of constructive dismissal. For this reason, we affirm and adopt the contractual test approach. This means that 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. Whether a particular breach of contract is repudiatory is one of mixed fact and law.”*

In the letter dated 3<sup>rd</sup> February 2016, the claimant states that she resumed normal duties on 14<sup>th</sup> December 2015 and filled the resumption forms as required. She however did not attach a copy of the resumption form to her bundle of documents. The Respondent denies that she signed the Resumption to Duty Form. At paragraph 7 of the witness statement of Lucy W. Maina, the Deputy Director Human Resource Department, she states as follows –

*“7. The Claimant also failed and/or declined to fill the Staff Movement Advice Form for Resumption of Leave as required upon which she had earlier done when she sought maternity leave for 7<sup>th</sup> January 2014 to 8<sup>th</sup> April 2014 and was subsequently approved.”*

Having failed to report to work from 1<sup>st</sup> December 2014 when her maternity leave lapsed to 14<sup>th</sup> December 2014 when she resumed duty, the Respondent cannot be faulted for stopping her salary. This was within the right of the Respondent as reflected in the Memo dated 9<sup>th</sup> December 2015 in which the Estate Manager reported her absence as follows –

*“FROM: ESTATE MANAGER*

*TO: HUMAN RESOURCE DIRECTOR*

*THROUGH: DEPUTY DIRECTOR, FINANCE, ADMINISTRATION AND PLANNING*

*REF: MKU 02/002/EST/2015/*

*DATE: 09/12/2015*

*SUBJECT: FAILURE TO REPORT AFTER MATERNITY LEAVE*

*This is to inform you of failure to report back to work by one, Rosemary Mwangi PF number; 1357 after her maternity leave days expired.*

*She was supposed to report back on 30<sup>th</sup> of November 2015 but she has not reported nor communicated. My effort to reach her through her mobile phone has not been successful.*

*Thank you.*

SIGNED

JOHN KAMAU MUNGA

ESTATE MANAGER

As can be noted from the endorsement on the memo, there was authority to “zerorize” her payroll, that is, to pay her “zero” salary.

The claimant seems not to have sought to have this sorted out even though she had no salary from 14<sup>th</sup> December 2015 and January 2016 until 3<sup>rd</sup> February 2016 when she wrote the letter of that date titled “RE: SALARY REQUEST” which, as I have pointed out, failed to sufficiently explain or justify her absence between 1<sup>st</sup> and 14<sup>th</sup> December 2015 when she was absent without authority.

Her decision to walk away on grounds of the Respondent’s failure to pay her salary would therefore not fit within the definition of constructive dismissal. The stopping of her salary having been justified, it was her responsibility to seek the reinstatement of her salary by justifying or explaining the reasons for her absence

The Respondent is however not free of blame as it did not notify the claimant of the change of her maternity commencement date and the new reporting date. This therefore must be the reason why the claimant made the assumption that her maternity date was lapsing on the date indicated on her leave application form.

Further, although the claimant reported back for work on 14<sup>th</sup> December 2015 (according to her) or 15<sup>th</sup> December 2015 (according to the Respondent), the claimant’s salary was not reinstated. She was allowed back to work without resolving the issue of her absence and without reinstatement of salary.

I thus find that the state of affairs that led to the claimant’s leaving service was contributed to by both the claimant and the respondent and none can blame the other for the same.

#### **Whether the Claimant is entitled to the reliefs sought**

Having worked from 14<sup>th</sup> December 2015, the Claimant is entitled to salary for the period worked between 14<sup>th</sup> December 2015 to 15<sup>th</sup> March 2016. I award her the same at **Kshs.54,000/-**.

The Claimants employment contract provided that she was eligible for MKU gratuity scheme at 10% per annum on basic pay upon completion of her contract. The gratuity sought is for the contract ending on 1<sup>st</sup> May 2015. The period for which gratuity is sought had already lapsed. The Respondent did not prove that the claimant was paid gratuity after the contract ended on 1<sup>st</sup> May, 2015. I therefore award her the same at **Kshs.18,720/-** as prayed.

The Claimant sought 12 months’ salary compensation. Section 49(4) of the Employment Act sets out what a court should consider in awarding remedies. Having found that the Claimant did not prove constructive dismissal, she is not entitled to compensation. The prayer is accordingly dismissed.

The prayer for one month’s salary in lieu of notice also fails for the same reason that she was not constructively dismissed.

**In conclusion, judgment is entered for the claimant against the Respondent in the total sum of Kshs.72,720/=.**

The Claimant is awarded costs of the suit and interest shall accrue at court rates from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13<sup>TH</sup> DAY OF NOVEMBER 2020**

**MAUREEN ONYANGO**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**