



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 874 OF 2016

REBECCA WANJIKU MATHENGE.....CLAIMANT

VS

ALPHINE INSURANCE BROKERS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. On 14th November 2016, the Claimant filed a Statement of Claim seeking accrued dues from the Respondent. With leave of the Court, the Claimant amended her claim on 18th April 2017. The Respondent filed a Statement of Response and Counterclaim on 9th June 2017.
2. However, when the matter came up for hearing on 18th July 2018, there was no appearance for the Respondent. The matter therefore proceeded *ex parte*. The Court rejected the Respondent’s subsequent attempts to reopen the case but allowed both parties to file final submissions.
3. In writing this judgment therefore, the Court has taken the Respondent’s pleadings, supporting documents and submissions into account.

The Claimant’s Case

4. The Claimant states that she was employed by the Respondent as an Office Assistant at a monthly salary of Kshs. 6,000 effective May 2008. On 6th October 2012, she was promoted to the position of Branch Assistant at a monthly salary of Kshs. 15,000.
5. The Claimant pleads that she had negotiated with the Respondent that her salary would be increased by Kshs. 3,000 per month, which the Respondent did not honour. The Claimant further pleads that she was forced to terminate her services effective 8th January 2016, owing to an unfair work environment. She therefore lays a claim for constructive dismissal.
6. The Claimant also claims that the effective date of her promotion to the position of Branch Assistant was February 2012 and not 6th October 2012. She contends that from the month of March 2012 until January 2016, she was entitled to a monthly salary of Kshs. 18,000 and not 15,000.
7. The Claimant further claims that for the entire period of her employment with the Respondent, she never went on leave. She adds that she was not paid salary for the months of November and December 2015 as well as January 2016.
8. Moreover, the Claimant states that the Respondent did not remit her National Social Security Fund (NSSF) dues for the months of December 2013, April, May, June and December 2015 as well as January 2016.
9. The Claimant’s claim is as follows:
 - a) Unpaid salary increment for 34 months.....Kshs. 102,000
 - b) Accrued leave for 7 years.....88,200
 - c) Unpaid salary.....54,000
 - d) Unremitted gratuity.....3,600

e) Compensation for constructive dismissal.....216,000

The Respondent's Case

10. In its Statement of Response and Counterclaim dated 9th June 2017 and filed in court on even date, the Respondent admits that it had an employment relationship with the Claimant, which came to an end on 8th January 2016.

11. The Respondent states that the Claimant was first engaged as a reliever or office caretaker in the month of August 2008 after some employees of the Respondent were summarily dismissed at the end of the month of July 2008.

12. The Respondent adds that since the Claimant was a reliever and had no working knowledge of insurance work, she was paid a gross monthly salary of Kshs. 4,500 for a probationary period of about 2 months. After the probationary period, the Claimant was engaged as a customer care assistant at a gross monthly salary of Kshs. 7,000.

13. In the year 2009, the Respondent noticed that the Claimant's performance was unsatisfactory. She was therefore issued with a memorandum dated 30th September 2009 urging her to improve.

14. The Respondent pleads that despite her poor performance, the Claimant was retained as a Branch Assistant and her monthly salary progressively increased to Kshs. 15,000.

15. In the month of October 2012, the Claimant was issued with a written contract setting out her job description and particulars of employment in compliance with Section 10 of the Employment Act. The Claimant's performance continued to be poor and she was issued with follow up memoranda on 5th June 2013 and 30th September 2013.

16. The Respondent denies having negotiated a salary increment of Kshs. 3,000 with the Claimant. The Respondent adds that any salary increment would be based on the Claimant's performance and other factors such as office expenses and revenue generated by the Branch Office. Overall, the Respondent denies that there was any agreement to increase the Claimant's salary from Kshs. 15,000 to 18,000.

17. The Respondent further denies that the Claimant was forced to resign from employment and avers that according to the resignation letter dated 8th January 2016, the Claimant resigned for personal development.

18. In response to the claim for accrued leave, the Respondent states that the Claimant proceeded on annual leave during the subsistence of her employment contract.

19. The Respondent states that the Claimant was paid her salary for the months of November and December 2015 and that all her NSSF dues were duly remitted. The Respondent further states that any unremitted dues are to be paid to NSSF and not to the Claimant.

20. The Respondent denies the Claimant's assertion that she was constructively dismissed and reiterates that in her letter of resignation dated 8th January 2016, the Claimant cites personal development as the reason for resignation. The Respondent further denies occasioning an unfair work environment.

21. In its counterclaim, the Respondent states that the Claimant left on the same day of her resignation being on 8th January 2016, despite the fact that she had issued a notice of twenty one (21) days. The Respondent also accuses the Claimant of falsifying client records, taking away client data and opening a competing business opposite the Respondent's premises, to which she was directing the Respondent's clients.

22. The Respondent therefore claims from the Claimant one (1) month's salary in lieu of notice plus general damages for breach of employment contract dated 6th October 2012.

Findings and Determination

23. There are three (3) issues for determination in this case:

- a) Whether the Claimant has proved a case of constructive dismissal;
- b) Whether the Claimant is entitled to the remedies sought;
- c) Whether the Respondent has proved a proper counterclaim against the Claimant.

Constructive Dismissal?

24. On 8th January 2016, the Claimant wrote to the Respondent as follows:

"Dear Sir/Madam

Re. Termination of Service

Am writing to inform you that am terminating my services as a Branch Assistant-Alpine ins. Brk. LTD Ukunda Branch, am giving notice of 21 days with effect from 9th Jan. 2016 due to personal development.

It has been a pleasure working for the company for the last 7 years. Thank you for the opportunity, professional (sic) and support that has been provided to me during my tenure with the company.

As I serve my notice period am requesting preparation of my dues made (sic). These are;

- As per the admission there was a salary increment that was not honoured, thus having a different (sic) of 3000 the last 34 months (from April 2012 to Jan 2016)
- 105 leave days accrued (63 days before I was issued the admission letter (sic) and 42 days after being issued the admission letter (sic)
- Salary for the month of November, December 2015 and Jan 2016
- NSSF for the month of DECEMBER 2013, APRIL, MAY, JUNE, December 2015 AND JANUARY 2016

That the payments be done during the time am handing over.

If I can be of any assistant (sic) during these transitions, please let me know, I will be glad to help however I can.

Yours faithfully

(Signed)

Rebecca Mathenge.”

25. On the face of it, this letter communicates that the Claimant resigned from the Respondent’s employment. In her amended claim however, the Claimant accuses the Respondent of constructive dismissal.

26. **Black’s Law Dictionary (Tenth Edition)** defines constrictive dismissal or discharge as:

“An employer’s creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer’s course of action that, being detrimental to an employee, leaves the employee almost no option.”

27. My brother, **Rika J** in **Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited [2014] eKLR** held that constructive dismissal occurs where an employer’s conduct makes the work environment so intolerable that the employee has no choice but to leave.

28. In the final submissions filed on behalf of the Respondent, reference was made to the decision by the Court of Appeal in **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** where the elements of constructive dismissal were assigned as follows:

“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 to 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 constitutes a repudiatory breach of the contract of employment-this is the contractual test.”

29. In the **Maria Kagai Ligaga Case** (supra), the Court of Appeal adopted the contractual test approach holding that:

“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....The criterion of evaluating the employer’s conduct is objective; the employer’s conduct does not have to be intentional or in bad faith before it can be repudiatory...The employee must be able to show that he left in response to the employer’s conduct (i.e. causal link must be shown, i.e. the test is causation.)”

30. The effect of the foregoing jurisprudence is that an employee alleging constructive dismissal must lay before the Court the exact circumstances leading to this inference. At paragraph 17A of her amended Statement of Claim, the Claimant pleads:

“The Claimant shall also ask the Court to declare that although she resigned it was a case for constructive dismissal.”

31. The Claimant did not lead any evidence to back this pleading and nothing in her letter of resignation suggests that she may have been forced out of employment by the Respondent’s conduct. She infact declares that it had been her pleasure working for the Respondent.

32. The result is that the Claimant's claim for compensation for constructive dismissal was unproved and is dismissed.

Other Prayers

33. The Claimant further claims salary increment for 34 months. She told the Court that upon her promotion to the position of Branch Assistant, she was promised a salary increment of Kshs. 3,000 per month, effective February 2012, a promise that the Respondent failed to honour.

34. According to the letter of appointment issued to the Claimant on 6th October 2012, her initial salary was Kshs. 180,000 per annum or Kshs. 15,000 per month rising to Kshs. 216,000 per annum or Kshs. 18,000 per month, after one year and successful completion of a probationary period of six months.

35. Reckoning the effective date of the Claimant's appointment to the position of Branch Assistant, as from 6th October 2012, the Claimant served in this position well in excess of one year prior to her resignation in January 2016. It follows therefore that after the first year of service ending on 5th October 2013, the Claimant was entitled to a monthly salary of Kshs. 18,000. Having continued to earn Kshs. 15,000, she is entitled to salary arrears of Kshs. 3,000 per month from 6th October 2013 until her resignation on 8th January 2016.

36. In response to the claim for accrued leave pay, the Respondent filed the Claimant's leave application form dated 15th December 2015. According to this form, the Claimant had applied for one day leave from 30th December to 31st December 2015. She was to resume duty on 4th January 2016.

37. Critical information on the Claimant's leave credit status is however missing from the leave form. Taking the evidence on record in its totality, I will allow the claim for leave pay for the Claimant's final year of service, less one day evidenced as having been expended.

38. From the evidence on record, the Claimant was paid all her salary. The claim thereon is therefore misplaced and is disallowed.

39. The Claimant's claim for gratuity is premised on her assertion that the Respondent did not remit all her NSSF dues. As held by my sister **Onyango J** in *Lilian Mwende Nzabu v Office Bearers of Diocese of Anglican Church of Kenya [2018] eKLR*, NSSF dues are statutory contributions payable only to the statutory body and not to individual employees. This claim as framed, cannot therefore succeed.

The Respondent's Counterclaim

40. In its Counterclaim, the Respondent claims from the Claimant one (1) month's salary in lieu of notice plus general damages for breach of employment contract dated 6th October 2012.

41. The Respondent did not however adduce any evidence in support of its Counterclaim which therefore fails and is dismissed.

42. In the final analysis, I enter judgment in favour of the Claimant as follows:

- a) Salary arrears for 26 months @ Kshs. 3,000.....Kshs. 78,000
- b) Leave pay for 20 days (18,000/39x20).....12,000
- Total.....90,000**

43. This amount will attract interest at court rates from the date of judgment until payment in full.

44. The Claimant will have the costs of the case.

45. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 3RD DAY OF OCTOBER 2019

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JUDGE

Appearance:

Mr. Maragia for the Claimant

Mr. Tindika for the Respondent