



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 496 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

MARYANNE M. KARIUKI.....1ST CLAIMANT
LEAH E. AMONDI.....2ND CLAIMANT
SIMON MACHARIA.....3RD CLAIMANT
DICKSON N. ONYANGO.....4TH CLAIMANT
JOSEPH N. MUENDO.....5TH CLAIMANT
MOHAMMED J. KADHI.....6TH CLAIMANT
PAMELA AKINYI.....7TH CLAIMANT
CATHERINE W. MACHARIA.....8TH CLAIMANT
YVONNE E. AJWANG.....9TH CLAIMANT
JENNAH ACHIDA KASSIM.....10TH CLAIMANT

VERSUS

MR. JONAH KITHEKA.....1ST RESPONDENT
PROVIDE INTERNATIONAL.....2ND RESPONDENT

JUDGMENT

The 10 claimants herein are former employees of the 2nd respondent. The 1st respondent is the Chief Executive Officer of the 2nd respondent.

The claimants aver that they were employed by the 2nd respondent in various capacities as project nutritionist, project officer, data clerk or community mobilisers on fixed term contracts commencing 8th February 2010 and expiring on 29th February 2012. The claimants aver that they were constructively dismissed by the respondents by failure to pay their salaries from 1st October 2011 to 29th February 2012 and seek the following remedies–

1. The grievants to be paid 12 month' wages as compensation for loss of employment as provided for under Section 15(c) of the Labour Institutions Act 007.
2. One month pay in lieu of notice.
3. Leave prorata for the number of years worked.

4. Severance pay for the years worked.
5. (3) months' salaries from 1st October 2011 to 29th February 2012.
6. That the respondents to pay the grievants' salaries and allowances to date.
7. Any other award or benefits which the court deem fit to grant in the circumstances of this case.
8. The respondents to pay the costs of this suit.

The respondents filed as statement of reply denying the averments of termination of employment by the claimants and aver that the claimants absconded duty and deserted their jobs, that by their actions they caused the project to collapse.

The respondents aver that the 2nd respondent is a none-governmental organisation which operates and runs community feeding programs within the City of Nairobi and its environs within the informal settlements. The respondents aver that the project is solely dependent on funding from donor organisations who on account of failure by the claimants and the respondents to account for the grants and monies received by the 2nd respondent, suspended funding pending investigations into previous grants, that this information was disclosed to the claimants who as a result jointly absconded and deserted their stations of work from 2nd December 2011 as communicated to the 2nd respondent by an email dated 1st December 2011.

That due to the claimants' withdrawal of their labour, the donors discontinued funding of the project hence the respondents' operations came to a halt on account of lack of funding. The respondents aver that there is no basis of holding them liable to pay the claimants the sums claimed as it is the claimants' unruly behaviour and conduct that led to the respondent's operations coming to an end.

The case was heard on 26th July 2017 when MARYANNE KARIUKI (CWA), the 1st claimant testified on behalf of the claimants. On 19th February 2018 JOAN KAVIU KITHEKA, the 1st respondent and BERTY ABORI ALBERT, the 2nd respondent's Human Resource Officer testified on behalf of the respondents. The parties thereafter filed and exchanged written submissions.

Determination

The issues arising for determination are –

1. Whether the claimants deserted duty or they were constructively dismissed by the respondents and
2. Whether the claimants are entitled to the remedies sought.

Constructive Dismissal

Constructive dismissal is defined in Black's Law Dictionary 10th Edition as

“an employer's creation of working conditions that leave particular employer 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 but to quit. – also terms constructive discharge.”

In the instant case, RW1 in his evidence stated that the claimants were not paid salaries in October and November 2011, that they sent an email to the respondents on 1st December 2011 and thereafter stopped reporting for work. In the email, the claimants had stated that it had become impossible for them to run the program and at the end of the day return home to families who relied on them for up keep.

The contracts for the employees state that they would be paid salaries monthly in arrears.

By their own admission, the respondents had breached the fundamental term of the contract on payment of salaries monthly in arrears by failing to pay salaries for October and November 2011. The claimants could not be faulted for being unable to report to work after serving for the whole of October and November 2011 without pay.

In the case of **JOSEPH ALEPER & ANOTHER -V- LODWAR WATER AND SANITATION COMPANY LIMITED**, Marete J considered the issue of constructive dismissal at length as follows –

“What then is constructive termination of an employment contract? Black's Law Dictionary (9th 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 Claimants in their written submission ably make a rendition of the origins of the doctrine of constructive termination of employment and its application in our jurisdiction as hereunder;

“Constructive dismissal has its roots in the law of contract under the doctrine of 'discharge by breach.' Under this doctrine, an employee was entitled to treat himself as discharged from further performance of his obligations where the employer's conduct was a significant breach going to the root of the contract. The termination would be due to the employer's conduct. Such conduct may include unilateral reduction in pay or failure to pay the employee.

In England, constructive dismissal was given statutory clothing through the Redundancy Payments Act 1965 and later the Trade Unions and Labour Relations Act, 1974 and the same was discussed in **WESTERN EXCAVATING (ECC) LTD V SHARP [1978] ICR 221**.

This doctrine has not been given any statutory backing in Kenya and therefore we submit and agree with Justice Radido when he stated in **Anthony Mkala Chitavi V Malindi Water & Sewerage Company Ltd Cause No. 64 of 2012** that:

“The doctrine and principles developed in other comparative jurisdictions would be equally applicable in Kenya because of the entrenchment of a justiciable right to fair labour practices under Article 41 of the Constitution.”

In the above quoted case of **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221** Lord Denning MR noted that an assessment of what was a constructive dismissal applied the ordinary 'contract test' so that a dismissal must first be established as follows:

“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.”

Therefore a distinction should be made of the two facets of the definition of constructive dismissal:

- i. The employer making a unilateral alteration or breach of the employment contract to the detriment of the employee.
- ii. The employer making or otherwise permitting working conditions of the employee to be intolerable for him to continue working.

“The second facet of this definition is in fact what was stated by **Mbaru J** in **Emmanuel Mutisya Solomon V Agility Logistics Cause No. 1418 of 2011**. **Ndolo J.** in **Benuel Mariera V Awand Enterprises Limited Mombasa. Cause No 191 of 2013** defined constructive termination under both limbs and stated as follows:

“It is trite law that when an employer by action or omission materially breaches the contract or otherwise makes it impossible for an employee to perform his contract of employment then the contract is deemed to have been constructively terminated by the employer.”

The Claimants' circumstances fell squarely under both limbs. That is their employment contracts were unilaterally altered by the Respondent through its action of advertising their jobs under different titles and qualifications that they could not meet. The Respondent also made it impossible for the Claimants to continue offering their services to the Respondent.”

I fully agree and adopt the reasoning of Marete J.

Non-payment of salary is a significant breach that goes to the root of the contract. I therefore find that there was constructive breach of the claimants' contracts of service by non-payment of their salary for the months of October and November 2011. The reasons for the non-payment are immaterial as it was not alleged that the claimants had caused the financial crisis of the 2nd respondent. It was the responsibility of the respondents to pay salaries to the claimants as and when the salaries fell due.

Remedies

The claimants prayed for 12 months' wages as compensation. Taking into account the circumstances of this case where it is the claimants who walked out of their jobs following non-payment of salaries that was caused by financial constraints, I do not think this case meets the threshold for compensation. What occurred in this case was more or less a self-help kind of resolution and not the kind of case envisaged under Section 49(1)(c) under which the employer would be liable to pay compensation for unfair dismissal as provided under Section 45 of the Employment Act. I therefore decline to grant any compensation for the reasons stated.

The claimants are however entitled to the salaries for October and November 2011, which were not paid. Having found that there was constructive dismissal, the claimants are entitled to one month's salary in lieu of notice and prorata leave.

The claimants are not entitled to severance pay, which is only payable in the case of redundancy as they were not declared redundant. They are further not entitled to salaries up to February 2012 as they walked out of their jobs on 1st December 2011. They are further not entitled of any salaries after the date of termination as prayed in prayer (6).

Orders

In the final analysis I find that the claimants were constrictively dismissed by the respondents and make the following orders in favour of the claimants –

1. Payment of salaries for October and November 2011.
2. One month's salary in lieu of notice.
3. Prorata leave
4. Costs

The claimants did not tabulate the amounts due to each of them and the court will not do so for them. The claimants are directed to tabulate the amounts due to each of them and forward the tabulations to the respondent within 15 days from date of judgment. The respondents are to confirm the figures within 15 days of service.

The case will be mentioned on a date to be taken at the time of judgment to confirm the amounts payable to each claimants and for final judgment.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF AUGUST 2018

MAUREEN ONYANGO

JUDGE