



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.702 OF 2016**

**LEAR SHIGHADI SINOYA.....CLAIMANT**

**VERSUS**

**AVTECH SYSTEMS LIMITED.....RESPONDENT**

**JUDGEMENT**

Issues in dispute – wrongful and unfair constructive dismissal; refusal to pay salary and terminal dues upon constructive dismissal; failure to provide work benefits.

The claimant was employed by the respondent on 30<sup>th</sup> April, 2015 as an Accounts Manager in the Sales department and issued with an employment contract signed on 4<sup>th</sup> April, 2015. Under Clause 3 of the contract, the claimant was to earn Kshs.60, 000.00 as the salary together with a monthly fuel allowance of Kshs.20, 000.00; Kshs.7, 000.00 each quarter for servicing the car; and a 25% salary increase upon completing probation of 3 months.

At the time of constructive dismissal, the claimant was supposed to earn Kshs.69, 000.00 after the 25% increase together with the due benefits of fuel allowance and servicing of the car all at Kshs.27, 000.00.

The claimant completed the probation period successfully on 31<sup>st</sup> July, 2015 but in breach of the contract, the respondent failed to pay the due salary and benefits. The claimant continued in service without pay for August, September, and October, 2015.

On 14<sup>th</sup> October, 2015 the claimant wrote to the respondent managing director, Mr Ben Bella, an email informing him that she was not able to report to work until her salary was paid. There was no response. The August, 2015 salary was paid in December, 2015 but the salaries due for September, and October, 2015 were never paid.

In March, 2016 the respondent through the general manager, Joab Opondo replied to the claimant vide letter dated 2<sup>nd</sup> March, 2016 disputing the salaries due and admitted that the claimant had not been paid her due salaries. This was due to the respondent financial circumstances where all other employees were reporting to work.

The claim is that the respondent acted in breach of contract and thus caused the constructive dismissal of the claimant from her employment by failing to pay the due salaries; refusing to pay for 3 months; and failing to address and resolve the claimant's grievances in time. Such conduct was in clear breach of the law and thus forcing the claimant out of employment. Such caused her untold suffering and forced her to tender her resignation.

The claim is for;

- a) *Notice pay at Kshs.89, 000.00;*
- b) *Unpaid salaries for September, 2015 Kshs.89, 000.00;*
- c) *Unpaid 14 days in October 2015 Kshs.49, 923.00;*
- d) *Unpaid fuel allowance for August, 2015 Kshs.20, 000.00;*
- e) *Underpayment August, 2015 Kshs.9, 000.00;*
- f) *House allowance for 5 months Kshs.32, 633.00;*
- g) *Car service allowance for 2 quarters Kshs.7, 000.00;*
- h) *Unremitted NHIF Kshs.4, 500.00;*
- i) *Unremitted NSSF Kshs.1, 600.00*

The claimant has made demand for her dues and the respondent has failed to pay. The claim is for a declaration that there was unlawful and unfair dismissal; the payment of due payments as set out in the claim; compensation for constructive dismissal; Certificate of service; costs and interests on unpaid dues.

The claimant testified in support of her claim. That upon employment she was issued with a contract of employment spelling out the terms and conditions of employment. She served diligently and was under probation for 3 months which lapsed and the contract indicated that there would be a salary review by 25%. After probation her salary increased to Kshs.75, 000.00. The benefits due in her contract amounted to the gross salary being Kshs.98, 000.00

On 14<sup>th</sup> October, 2015 the claimant was unable to attend work as she had not been paid from August, 2015. She sent an email setting out when she was unable to be at work. There was no reply.

On 24<sup>th</sup> December, 2015 the respondent paid the August salary vide cheque. The respondent also noted that they were going through hard financial circumstances and other employees had been patient and at work. The respondent also indicated that the claimant was being overpaid.

The respondent was under a contract but refused to honour it. There was no remittances to the NSSF and NHIF.

The claimant also challenged the defence and the allegation that the claimant was erratic at attending duty is not correct. The instances she was not at work were with the knowledge of the respondent. The first week of August, 2015 the claimant was unwell and filed a sick sheet;

Last week of August, 2015 the claimant lost both her grandparents and she attended the funeral. The general manager Mr Opondo gave her permission to be away;

When the claimant was late or not at work, Mr Opondo was aware and approved.

The claimant had a sales job which required meeting with clients. Due to non-payment of her salaries she would be unable to be at work in the mornings. When she failed to attend work, there was no warning or disciplinary matter.

The challenge to the claimant's work performance is not supported by any evidence. The claimant was entitled to a work commission together with the monthly salary. She was unable to meet her targets when her salaries were not paid on time.

## Defence

In defence the respondent admit they employed the claimant at a gross salary of Kshs.60, 000.00 per month and a fuel allowance of Kshs.20, 000.00 paid in arrears and a quarterly car service fee. All payments were subject to statutory deduction making the net salary at Kshs.60, 427.00 per month.

The claimant deserted duty while still on probation and had not qualified for the 25% salary increase due to inability to meet set targets. She was issued with caution letter leading to the delay in confirmation of her employment. All terminal dues have been paid in excess of Kshs.80, 000.00. This was not disclosed.

From June, 2015 the claimant started absconding duty and the respondent was entitled to deduct from her salary for days absent. In October, 2015 the claimant deserted work and has not reported back. There was never a dismissal and the claimant never tended her resignation.

The claimant still holds assets of the respondent put in her custody and a Certificate of Service shall be issued once there is a full handover.

## Counter-claim

In counter-claim, the respondent case is that the claimant owes a sum of Kshs.80, 000.00 paid in excess while she received salary for May, June, July and August, 2015. There is also claim for Kshs.60, 000.00 pay in lieu of notice and formal handover. Costs of the suit..

In evidence, the respondent witness was Ben Bella Anyang Ogolla, a director of the respondent. He testified that the respondent employed the claimant in the sales department from 30<sup>th</sup> April, 2015. She was on probation for 3 months at a salary of Kshs.60, 000.00. Upon confirmation the claimant was to get an increase. Termination of employment was on one (1) month notice of payment in lieu thereof.

The claimant was unable to meet her work targets. She was issued with a caution letter, a meeting was held with her as a follow up and letter dated 1<sup>st</sup> October, 2015 to caution her on her work performance. The claimant had been on probation for 3 months but was not confirmed upon expectation to improve on her performance. The claimant had set objectives which she had not met.

The claimant had a salary of Kshs.60, 466.00 and she had been overpaid by Kshs.20, 000.00 every month. The overpayment was due to accounts office mistake and the claimant was notified of this fact.

The claimant later absconded duty to date since 14<sup>th</sup> October, 2015. There is no letter of dismissal or a letter of resonation. The claimant has not submitted her identity card issued by the respondent and the clients list she had in her custody.

Both parties filed written submissions.

Taking into account the pleadings, the evidence and submission I find the employment of the claimant by the respondent is not contested. The employment contract is dated 30<sup>th</sup> April, 2015 which the claimant signed on 4<sup>th</sup> May, 2015. The respondent has attached the employment contract.

Clause 1 provides for probation period at 3 months;

Clause 3 provides that the claimant salary was Kshs.60,000.00 per month which is subject to statutory deductions and that upon completing the probation period, the salary would increase by 25% and she would receive commission on sales; and

The claimant was also entitled to Kshs.20, 000.00 monthly fuel allowance and quarterly service for use of own car for the sales duties.

The claim is that the claimant did not receive her monthly salaries for August to October, 2015 and was unable to attend work due to non-payment of the same. She wrote to the respondent and there was no reply. She could not report to work without pay and thus was constructively dismissed.

The respondent case is that the claimant was never confirmed into her employment due to poor performance and a caution was issued; she absconded duty from 14<sup>th</sup> October, 2015 to date and while she was in employment she was overpaid and has refused to clear with the respondent by returning the property of the respondent in her custody so as to be issued with a certificate of service.

The last work day of the claimant is thus 14<sup>th</sup> October, 2015.

Section 42 of the Employment Act allows an employer to place an employee on probation for up to 12 months. When the period of probation is agreed upon in the employment contract, confirmation of the employee should follow upon the lapse of such period. Where the employee has not performed well during the probation period, the employer is allowed to review the performance of such an employee and with the consent of the subject employee extend the probation period.

Section 42(2), (3) and (4) of the Employment Act provides that;

*(2) A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.*

*(3) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).*

*(4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.*

It is therefore not sufficient for the employer to state that they found the employee not performing well in her duties. Such information must be put to the notice of the employee and where there is need to extend the probationary period, such must be agreed upon with the employee. In **Peris Nyambura Kimani versus Dalbit Petroleum Limited, Petition No.63 of 2014** the court held that once the probation period lapses and the employer does nothing to confirm the employee, this cannot be shifted to any other date as the period has passed and by operation of the law the employee is confirmed and should be paid the salary due upon confirmation from the date when probation period ended.

The duty is upon the employer to call and advise the employee when the probation period has lapsed. Where an employer allows the same to pass without any action, the employee stands confirmed into full employment with the due benefits.

In this case, the claimant continued at work without any knowledge that her probation period had been extended. There is no evidence submitted that she was called to a review or assessment and that her non-performance or meeting of set targets was addressed with her.

As such, by operation of the law, at the end of probation period on 30<sup>th</sup> July, 2015 the claimant became a permanent employee of the respondent. Such confirmation had benefits. The claimant's salary increased by 25%.

On the salary due during probation, the claimant was entitled to Kshs.60, 000.00 plus Kshs.20, 000.00 for fuel allowance and quarterly service for her car. The contract is clear to the extent that, the benefit is the salary together with a car allowance and service at Kshs.20, 000.00 pay each month. The evidence by the claimant that there was a Kshs.7, 000.00 for car service in every quarter is lost in my reading of clause 3 of the contract. The provision for fuel and service are covered in the kshs.20, 000.00 paid per month.

The gross pay during probation is Kshs.80, 000.00 per months being salary of Kshs.60, 000 and Kshs.20,

000 for fuel and service. All paid dues are also subject to statutory deductions.

Therefore, from 30<sup>th</sup> August, 2015 the basic pay of Kshs.60,000.00 increased by 25% together with the benefit of Kshs.20,000.00 for car fuel and service all being 60,000 +25 (15,000) +20,000 = Kshs.95,000.00 all less statutory deductions.

The claimant testified that she was paid her August, 2015 salary on 24<sup>th</sup> December, 2015. The unpaid salaries thus are for September at Kshs.95,000.00 and the 14 days salary prorated at Kshs.35,000.00 plus Kshs.9,300.00 for salary and fuel and service all at Kshs.44,300.00.

All monies paid to the claimant are subject to statutory deductions.

On the question of constructive dismissal, this is a case where an employee is placed by the employer under intolerable conditions forcing her to resign from employment. The duty is upon the employee to demonstrate such intolerable circumstances and conditions for the court to make a finding that indeed, placed under such conditions, the employee was justified in tendering resignation. Such a claim must be pleaded and evidence advanced to this effect.

In the case of **Osman Eggae Egaal versus John Philip Tilley & Others, Petition No.90 of 2012** the court in addressing the issue of constructive dismissal relied on the case of **David Potter versus New Brunswick Legal Aid Services Commission, Supreme Court of Canada, 2015 SCC 10**, and where **Wagner J** held that;

*The test for constructive dismissal has two branches. The court must first identify an express or implied contract term that has been breached and then determine whether that breach was sufficiently serious to constitute constructive dismissal. ... first, the employer's unilateral change must be found to constitute a breach of the employment contract and, second, if it constitutes such a breach, it must be found to substantively alter an essential term of the contract. ...*

*Constructive dismissal can take two forms: that of a single unilateral act that breaches an essential term of the contract, or that of a series of act that, taken together, show that the employer intended to no longer be bound by the contract. In all cases the primary burden is on the employee to establish constructive dismissal, but where an administrative suspension is at issue, the burden will necessarily shift to the employer ....*

In this case, the claimant asserts that she was not paid her salaries from August, 2015 forcing her to resign. She has not tendered her letter of resignation. The respondent asserts that the claimant absconded duty. It is well that the claimant in submissions has relied on the case of **Coca Cola East and Central Africa Limited versus Maria Kagai Liganga [2015] eKLR** in which case the employee had been forced to tender her letter of resignation following what the court found to have been intolerable circumstances.

On 14<sup>th</sup> October, 2015 the claimant sent an email to the respondent noting that she had not been paid for two months. That she was unable to report to work for lack of funds. That she would resume work upon these matters being resolved. Was this then a resignation letter? Can it be termed as constructive dismissal?

First the respondent was in breach of contract when they failed to pay the claimant her due salaries as agreed at end month end. Such was to put the claimant into circumstances that can only be termed as unfair and not warranted. The defence that the respondent had financial problems and other employees were attending work save for the claimant is not sufficient reason to warrant the breach of contract. There was no communication to the claimant on such problems in finances and in any event, the law allows an employer faced with financial constraints and is unable to keep employee to follow due process.

The claimant is also at fault. Despite noting that she had not been paid, for her to allege constructive dismissal, this was not to be resolved by failing to attend work without her letter of resignation. Failure to attend work is addressed under section 44 of the Employment Act as a matter subject to summary

dismissal as it is classified as an act of gross misconduct. Where the claimant found her unable to attend work due to non-payment of her due salaries, she had every right to serve her letter of resignation citing the reasons for the same. To keep out of work and do nothing left the claimants claim for constructive dismissal exposed and compromised.

In the circumstance, the claimant is entitled to her due salaries unpaid for the period of her employment with the respondent and for days worked in October, 2015.

Salaries dues;

May, 2015 Kshs.80, 000.00 being salary at Kshs.60, 000 and Kshs.20, 000 for fuel and service;

June, 2015 Kshs.80, 000.00;

July, 2015 Kshs.80, 000.00;

August, 2015 Kshs.95, 000.00;

September, 2015 Kshs.95, 000.00;

October, 2015 Kshs.44, 300.00.

All the above payments are subject to statutory deductions as required under section 49(2) of the Employment Act;

**(2) Any payments made by the employer under this section shall be subject to statutory deductions.**

The claim for notice pay is not due as the claimant failed to submit a resignation letter and simply kept out of work. Even where the claimant had a good reason for not attending work, the duty was upon her to tender a resignation so as to benefit from the concept of constructive dismissal.

The claim for salary due for September, 2015 is due at Kshs.95, 000.00.

The claim for October, salary is due at kshs.44, 300.00.

The claim for unpaid fuel allowance and underpayment and house allowances are not due as the fuel and due payable wage is put into account in the assessment of owing salaries above. The contract of employment was clear on the agreed terms which did not include a house allowance noting the claimant was earning a salary above the minimum wage.

On the claims for unremitted NSSF and NHIF dues, such are dues owing to the statutory bodies and payable therein and not to the employee. What the claimant ought to have claimed in this regard is service pay but she served for only 5 months and 14 days.

### **Counter-claim**

The respondent counter-claim is on the basis that the claimant was overpaid by Kshs.80, 000.00 in May to August, 2015 and should thus refund the same. That there was no notice pay of Kshs.60, 000.00 when the claimant absconded duty.

The basis of the claim for overpayment of kshs.80,000.00 is dealt above on the assessment of the claim that the claimant was entitled to kshs.80,000.00 each month during probation and upon confirmation a 25% increase was due making her salary to shift to Kshs.95,000.00.

From the payments and benefits an employee receives, the employer is by virtue of section 49(2) of the Employment Act required to deduct all statutory dues. Section 19 also allows an employer to effect any

other lawful deductions or monies irregularly paid to an employee.

*(f) any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award;*

Therefore where the claimant received monies which ordinarily ought to have been part of statutory deductions and or monies received which ordinarily ought not to have been paid to her, such can be lawfully recovered from her salaries. With the claimant leaving employment without notice or resigning, from her terminal dues owing, such amounts paid to her irregularly can be recovered. Such is lawful and in order.

The claim for notice pay is dealt when the respondent failed to pay the claimant the due salaries. Such frustration of an employee is an unfair labour practice. Save what is assessed above and noting the claimant was also in error for not submitting her resignation letter to let the respondent know she had been forced out of work, to award the respondent for non-issuance of notice pay on the admission that the due salaries had not been paid is to reward an unfair practice.

The wrong computations of due salaries should not be visited upon the claimant. Where the accounts officer/office of the respond made an error, such is a disciplinary issue that ought to be dealt internally and not visited upon the claimant. Failure to pay the due salary on the ground that the claimant was being overpaid is not a good defence. Such matters were never put to the knowledge of the claimant for the same to be procedurally addressed. The claimant shall be paid her costs at 50%.

In conclusion therefore, Judgement is hereby entered for the claimant as follows;

**(a) for salaries due for September, 2015 at kshs.95,000.00; salary due for October, 2015 at kshs.44,300.00, which salaries shall be paid less statutory deductions;**

**(b) On the counter-claim, the respondent shall compute all due salaries paid and payable to the claimant for the entire duration of employment as noted above, effect statutory deductions and pay the balances to the claimant.**

**(c) For good order, the claimant shall be paid upon clearing with the respondent.**

**(d) The certificate of service shall be issued to the claimant unconditionally in terms of section 51 of the Employment Act.**

**(e) The claimant shall be paid 50% of her costs.**

Delivered in open court and dated this 29<sup>th</sup> day of June, 2017.

**M. MBARU**

**JUDGE**

In the presence of:

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