Kimani v Mega Wines and Spirits Limited (Employment and Labour Relations Appeal E190 of 2022) [2024] KEELRC 1181 (KLR) (7 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1181 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E190 OF 2022

BOM MANANI, J

MAY 7, 2024

BETWEEN

FREDAH MIRIAM WANGUI KIMANI ..... APPELLANT

AND

MEGA WINES AND SPIRITS LIMITED ..... RESPONDENT

JUDGMENT

Background

1. This is an appeal from the decision of the Magistrate's Court sitting at Nairobi in CMELRC Cause No. 1639 of 2019 which was delivered on 7th October 2022. In the suit, the Appellant had sued the Respondent for unlawful termination of her contract of service.

2. The record shows that the Respondent hired the Appellant's services as its Key Account Manager as from 1st July 2018. Shortly after she was employed, the Appellant made a credit sale to one of the Respondent's customers without the approval of the Respondent.

3. The evidence on record shows that the Respondent questioned the aforesaid decision by the Appellant. Consequently, she (the Appellant) wrote to the Respondent on 11th August 2018 authorizing the latter to apply her August 2018 salary towards clearing the credit sale should the post-dated cheques which the customer had given be dishonoured.

4. As fate would have it, the customer's cheques were disnonoured. However and as the bank statement that was produced by the Appellant demonstrates, the Respondent released to her the sum of Ksh. 61,704.00 to cover her net salary for August 2018.

5. The Appellant stated that the Respondent withheld her salary for September, October and November 2018 allegedly to defray the impugned credit sale. As a consequence, she averred that she was exposed

to extreme financial distress, a matter which forced her to allegedly resign from employment on 4th December 2018. Consequently, she pleaded constructive termination of her contract of service.

6. On its part, the Respondent asserted that when the Appellant made the impugned credit sale, she absconded from duty for the months of September, October and November. However, before it (the Respondent) could consider the disciplinary action it was to take against her, she tendered her resignation on 4th December 2018.

7. The Respondent averred that the Appellant's resignation was voluntary. As such, she cannot assert that she was constructively dismissed from employment.

8. After hearing the parties, the trial magistrate found that the Appellant's resignation was voluntary. As such, she (the trial magistrate) observed that there was no evidence that the Appellant's contract of service was constructively terminated. Thus, the court dismissed her claim save to the extent that the Respondent was ordered to pay her salary for the period running up to 4th December 2018.

9. Aggrieved by the decision, the Appellant filed the instant appeal. The Memorandum of Appeal raises two grounds of appeal to wit the following:-

    a. That the learned trial magistrate erred in law in her judgment dated 5th August 2022 [7th October 2022] by dismissing the Claimant's suit.

    b. That the learned trial magistrate erred in law and fact in her judgment dated 5th August 2022 [7th October 2022] by finding that the Claimant's Statement of Claim dated 4th September 2019 had no merit.

Issues for Determination

10. Having regard to the two grounds of appeal, it is apparent that the single issue that the Appellant raises in the appeal is whether the trial court erred in law and fact in coming to the conclusion that she had not established a case for constructive dismissal. As such, in this decision, I will address this single issue.

Analysis

11. This is a first appeal. As such, the role of this court is to evaluate the evidence on record and reach its own conclusion on the matters in controversy.

12. However, the court ought to do so with the usual caution that unlike the trial court, it did not have the benefit of taking the evidence of the witnesses in the cause. As such, it should only depart from the findings of fact by the trial court if they are not supported by the evidence on record or are inconsistent with the law.

13. The law on constructive dismissal is now fairly settled. The principles that govern this area of law were discussed by the Court of Appeal in the case of Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR. Quoting an English decision, the court expressed itself on the concept 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.
>
> 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 that he

is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once."

14. The court went further to observe on the concept as follows:-

> ''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."

15. The burden of proof in cases of constructive dismissal is on the employee. As such, he (the employee) must provide cogent evidence to demonstrate on a balance of probabilities that the employer's conduct was so grave and unjust that it pushed him into resigning.

16. The question to be considered in the instant case is whether the Appellant placed before the trial court sufficient evidence to meet the above threshold. In my view, she did not. As such, I agree with the trial court's conclusion that this was not a case for constructive dismissal.

17. The record shows that after the Appellant lodged her claim asserting that she had been deprived of her pay for September, October and November 2018 thus forcing her into resigning, the Respondent filed a defense in which it specifically disputed this assertion. The Respondent accused the Appellant of having absconded duty immediately after she concluded the impugned credit sale.

18. The Respondent averred that whilst it was still considering the disciplinary action to take against the Appellant, she tendered her resignation. According to the Respondent, the resignation was voluntary.

19. It is noteworthy that despite the Respondent having asserted that the Appellant absconded from duty in September 2018 only to tender her resignation in December of the same year, the Appellant did not provide evidence to controvert this assertion. A perusal of the Respondent's written witness statement discloses that the same assertions were reiterated by one Catherine Kimani. This statement was adopted on oath as the defense evidence. Yet, the Appellant did nothing to controvert it.

20. The consequence of the foregoing is that the Appellant did not dispute the Respondent's evidence that she absconded duty from September 2018 to 4th December 2018 when she resigned. She is therefore deemed not to have been at work for this period.

21. The question to grapple with is whether the Respondent was under legal obligation to remunerate the Appellant for the period that she was not on duty. The answer to this question is to be found in Part VI of the *Employment Act*. By virtue of section 17 of the Act, an employer is only obligated to remunerate an employee for work done. And by virtue of section 19 (c) of the Act, if the employer has erroneously remunerated an employee for days not worked, he is entitled to recover this money from the employee.

22. The net effect of the foregoing is that the employer has no obligation to remunerate an employee for days that the employee has not worked. Thus, an employer who withholds salary of an employee for days not worked cannot be said to have acted in a manner that constitutes a repudiatory breach of the employment contract.

23. The Appellant finds herself in this scenario. The uncontroverted evidence on record shows that she did not work between September 2018 and 4th December 2018 when she eventually resigned. Thus, the Respondent was under no obligation to remunerate her for this period.

24. As such, the Appellant cannot assert that the decision by the Respondent to withhold her salary for this period constituted a breach of their contract. Consequently, she cannot rely on the fact of nonpayment of salary for this period to plead constructive dismissal.

25. I have also looked at the Appellant's email of 4th December 2018 by which she resigned. In the email, she did not suggest that she resigned due to non-payment of salary or due to some other unfavourable conditions of work. Rather, she indicated that she was resigning in order to pursue greener pastures. This cannot be construed as an involuntary decision to resign. As such, I agree with the finding by the trial court that the email did not suggest that the Appellant's resignation was involuntary.

26. Despite uncontested evidence that the Appellant did not work between September 2018 and 4th December 2018, the trial court directed the Respondent to pay her for this period. If I had been the one who handled the case at that stage, I would probably have arrived at a different conclusion on this issue. However, since the trial court found otherwise and this finding has not been challenged in this appeal, I will l say no more on the matter.

Determination

27. The upshot is that I arrive at the conclusion that the trial court was correct in its finding that the Appellant was not constructively dismissed from her employment.

28. Consequently, I find that the instant appeal lacks merit.

29. It is thus dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 7TH DAY OF MAY, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI