



**Kihura v Amazon Motors Limited (Cause E830 of 2021)  
[2024] KEELRC 1168 (KLR) (3 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1168 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E830 OF 2021**

**SC RUTTO, J**

**MAY 3, 2024**

**BETWEEN**

**ESTHER WANJIKU KIHURA ..... CLAIMANT**

**AND**

**AMAZON MOTORS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. It is common ground that the Claimant was employed by the Respondent with effect from 26<sup>th</sup> February 1991 as a Stores Clerk. According to the Claimant, she served the Respondent faithfully and diligently from the date of her employment until 4<sup>th</sup> May 2020 when she was informed that she was to proceed on unpaid leave.
2. To this end, the Claimant has cited the Respondent for constructive dismissal and consequently seeks an order for compensation for unfair termination, payment of withheld salary from the month of March 2020 up to February 2021, salary in lieu of notice, compensation for violation of her right to fair labour practices, leave pay, severance pay, SACCO dues, costs plus interests. She further seeks an order for the issuance of a Certificate of Service.
3. Opposing the Claim, the Respondent avers that the decision to send the Claimant on unpaid leave was due to unpredictable times ushered by the COVID-19 pandemic and that it was compelled to take extraordinary steps to keep afloat. The Respondent further avers that the COVID-19 pandemic affected its business recording low sales leading to massively downscaling operations including sending employees on unpaid indeterminate leave, the Claimant being among them. The Respondent further contends that it had no other revenue stream to sustain its business given that the salaries were drawn from sales hence it had a challenge paying salaries.
4. According to the Respondent, it was impossible to predict when the public health problem would be resolved at the time the Claimant was sent on leave. That without default on its part, the contractual



obligations became incapable of being performed because of circumstances beyond its control and or force majeure effectively frustrating the contract. It is against this background that the Respondent has asked the Court to dismiss the Claimant's claim with costs.

5. It is worth pointing out that on 25<sup>th</sup> July 2022, the Court allowed the Respondent's Notice of Motion Application dated 30<sup>th</sup> June 2022, through which it had prayed for an order that the instant suit be selected and tried as a test case on liability with respect of all the suits arising out of the letters of 4<sup>th</sup> May 2020 sending the Claimants on unpaid leave. It is further worth noting that the Respondent had sought an order to stay further proceedings in the said matters.
6. Subsequently, the matter proceeded for hearing on 17<sup>th</sup> November 2023.

### **Claimant's Case**

7. The Claimant testified in support of her case and at the outset, sought to adopt her witness statement to constitute her evidence in chief. She proceeded to produce the documents filed on her behalf as exhibits before Court.
8. It was the Claimant's evidence that since May 2020, she was treated in bad faith with the ill intention to constructively push her out of employment. She contended that the ill-treatment towards her was in total breach of *the Constitution*, Labour Laws and Fair Labour Practices and amounted to constructive dismissal.
9. She averred that she was never paid salary for March 2020, May 2020, June 2020, July 2020, August 2020, September 2020, October 2020, November 2020, December 2020, January 2021 and February 2021 before being dismissed constructively. That further, she was never accorded a termination notice or salary in lieu of notice.
10. The Claimant believes that her termination was unfair as the Respondent failed to adhere to the appropriate procedure stipulated in the law.

### **Respondent's Case**

11. The Respondent called oral evidence through Ms. Jackline Mulandi who testified as RW1. Ms. Mulandi identified himself as the Respondent's Human Resource Manager. Equally, she adopted her witness statement to constitute her evidence in chief and produced the documents filed on behalf of the Respondent as exhibits before Court.
12. It was RW1's evidence that the Respondent is the appointed dealer and distributor of Volvo cars in Kenya and that it is responsible for importing, servicing and maintaining Volvo vehicles in the region.
13. She stated that in 2020, the COVID-19 pandemic posed significant challenges to the Respondent's business leading to a steep decline in its sales volumes and the number of vehicles it serviced.
14. It was her evidence that the Claimant was informed that the situation might prevail for an indefinite period of time and that the business continuity measures would be reviewed on a continuous basis.
15. She further stated that the COVID-19 pandemic was an unprecedented and extraordinary event and unpaid leave, salary reductions and compulsory leave were some of the global responses adopted by all employers to avert loss of jobs. That the Respondent made the decision to send some of its employees home in good faith with the hope that the situation would improve once the pandemic was over.



16. RW1 further stated that the Respondent never treated the Claimant in a manner likely to suggest that it no longer needed her services or acted in any manner that constituted a violation of the International Labour Organization Convention, the Employment Act of 2007, or the Constitution of Kenya as alleged.
17. It was her further testimony that the manufacturers of Volvo vehicles also announced their decision that year to shift from the production of petroleum cars to purely electric vehicles and to move most of its sales online, negatively impacting the Respondent's line of business.
18. RW1 further averred that on 30<sup>th</sup> April 2020, the Respondent issued a memo to all members of staff informing them that due to a decline in the volume of sales as a result of the economic downturn, some members of staff would be asked to proceed on unpaid leave, while others would stay on but have their salaries reviewed downwards by up to 50% until the situation improved.
19. According to the said memo, the members of staff who would not go on unpaid leave would receive only 50% of their salaries. The Claimant was among the group that was asked to go on unpaid leave. That they would be asked to go back to work when the economic situation subsides.
20. It was RW1's further evidence that the Claimant was notified via a letter dated 4<sup>th</sup> May 2020, that she would be sent home on unpaid leave due to the prevailing circumstances.
21. RW1 contended that the Respondent never terminated, constructively or otherwise, the employment of the Claimant and that the compensation/awards sought, particularly compensation for unfair termination, withheld salary, compensation for violations of right to fair labor practice, severance, costs of the suit and interest, are not available to her.
22. RW1 maintained that the Respondent's business continuity measure which the Claimant prematurely misconceived as constructive termination was a common trend for employers who were seeking to avert job losses while at the same time weathering the financial difficulties brought on by COVID-19 which were worsened by subsequent government directives.

### **Submissions**

23. Upon close of the hearing, both parties filed written submissions. The Claimant submitted that the Respondent constructively terminated her employment by repudiatory breaching the fundamental and essential terms of the contract of employment. In support of this argument, reliance was placed on the case of Coca Cola East and Central Africa Limited vs Maria Kagai Ligaga, (2015) eKLR.
24. It was the Claimant's further submission that from the evidence of the Respondent's witness and averments, it can be construed that the Respondent terminated her employment on account of redundancy. In this regard, the Claimant argued that the reason for termination offered by the Respondent was Redundancy which led to her position as a warehouse supervisor being rendered redundant after the Volvo manufacturer shifted from petrol-propelled vehicles to electric motor vehicles and from physical showrooms to online sales.
25. The Claimant further argued that her termination was unfair in terms of section 45 of the Employment Act and the covert reason for termination on grounds of redundancy was invalid under section 47 of the Employment Act.
26. Citing the case of Kenya Union of Commercial Foods and Allied Workers Union vs Tusker Mattresses Ltd (2020) eKLR, the Claimant posited that for the defence of frustration by force majeure to succeed, the contract in question must have a force majeure clause. To this end, she argued that neither her contract of employment nor the relevant Collective Bargaining Agreement has a force majeure clause, hence the defence fails.



27. On the other hand, the Respondent submitted that the Claimant's services were not terminated. Rather, they let themselves go before the Respondent could have them back after the negative effects of the COVID-19 pandemic subsided. In the Respondent's view, the suit is therefore premature and ought to be dismissed with costs.
28. Citing the case of *Kipkepe Limited vs Peterson Ondieki Tai* (2016) eKLR, the Respondent submitted that the Claimant has not adduced evidence to prove her assertion of sacking.
29. Referencing the provisions of Section 47(5) of the *Employment Act*, the Respondent maintained that the Claimant has not proved that her services have been unfairly terminated hence the claim must fail. On this score, further reliance was placed on the case of *Protus Wanjala Mutike vs Anglo African Properties t/a Jambo Mutara Lodge Laikipia* (2021) eKLR.
30. The Respondent stated in further submission that the Claimant has not produced a resignation letter to show why she resigned nor has she established the nexus between her voluntarily leaving her employment and the alleged conduct of the Respondent to support her claim of constructive dismissal. On this issue, the Respondent buttressed her submissions with the case of *Coca Cola East and Central Africa Limited vs Maria Kagai Ligaga* (2015) eKLR.
31. Further submitting on the issue, the Respondent maintained that the Claimant has not proved that she has been constructively dismissed and the claim ought to be dismissed.
32. It was further submitted by the Respondent that the Claimant was not taken through a redundancy process as she was not fired.

### **Analysis and Determination**

33. Having considered the pleadings filed by both parties, the evidence on record, as well as the rival submissions, the following issues stand out for determination:
  - i. Whether the Claimant has made out a case of constructive dismissal;
  - ii. Whether the Claimant is entitled to the reliefs sought?

### **Constructive dismissal?**

34. It is common ground that the Claimant was sent on unpaid leave through a letter dated 4<sup>th</sup> May 2020. It is apparent that the Claimant was informed through the said letter, that her unpaid leave was to take effect on 1<sup>st</sup> May 2020 and was for an indefinite period of time. The Respondent further informed the Claimant that the step to send her on unpaid leave may be reviewed on a continuous basis.
35. Evidently, it is the decision by the Respondent to send the Claimant on unpaid leave that has precipitated the instant suit. Whereas the Claimant holds the view that the said decision amounts to constructive dismissal, the Respondent opines otherwise and contends that its action was due to the unpredictable times ushered by the COVID-19 pandemic.
36. Constructive dismissal occurs when an employee is forced to leave his or her employment not on their own accord, but because of the employer's conduct.
37. In addressing the question of constructive dismissal, the Court of Appeal had this to say in the case of *Coca-Cola East & Central Africa Limited vs Maria Kagai Ligaga* [2015] eKLR:

“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."

38. The Court proceeded to formulate the following as the guiding principles in determining a case of constructive dismissal: -
- a. What are the fundamental or essential terms of the contract of employment?
  - b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?
  - c. The conduct of the employer must be a fundamental or 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.
  - d. An objective test is to be applied in evaluating the employer's conduct.
  - e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e causation must be proved.
  - f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.
  - g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting repudiatory breach; the employee must-within a reasonable time terminate the employment relationship pursuant to the breach.
39. Back to the case herein, it is apparent that upon sending the Claimant on unpaid leave, the Respondent did not revert to her regarding the status of her employment. I say so because no evidence has been produced to this effect. It would thus mean that from 4<sup>th</sup> May 2020 up to date, the Claimant is still in the dark regarding her employment status with the Respondent.
40. In the premises and applying the principles set out in the case of Coca-Cola East & Central Africa Limited vs Maria Kagai Ligaga (supra), the Respondent's action of placing the Claimant on an indefinite and unpaid leave without any communication clearly shows that the Respondent was no longer interested in continuing with the employment contract. Needless to say, this amounted to a significant breach that went to the root of the employment contract. As such, the Claimant was entitled to treat herself as constructively dismissed.
41. It is this Court's view that regardless of the circumstances, sending an employee on an indefinite and unpaid leave without any communication is unreasonable and unfair.
42. If I may add, the Respondent's contention that there was no constructive dismissal as the Claimant did not resign, does not hold water. In constructive dismissal, it is the conduct of an employer that is in question and not the employee's.
43. In this case, the conduct of the Respondent clearly demonstrated that it did not want to continue being bound by the terms of the employment contract. In such a case, what was the Claimant required



to do? How was she expected to resign when she was already out of employment indefinitely? What purpose would her resignation have served?

44. Granted, the Respondent may have experienced challenges in the face of the COVID-19 pandemic. Be that as it may, there were many options it could exercise when the situation lasted longer than anticipated. Case in point is a declaration of redundancy.
45. Indeed, the Respondent has stated that it was recording low sales on account of the COVID-19 pandemic which adversely affected its business. It has further averred that it had no revenue stream to sustain its business and that it had a challenge paying salaries as the same were dependent on sales. RW1 further stated in her testimony that in 2020, the manufacturers of Volvo vehicles announced their decision to shift from the production of petroleum cars to purely electric vehicles and to move most of its sales online, negatively impacting the Respondent's line of business.
46. It thus follows that if the Respondent's version is to be believed, a redundancy would have been more suitable as opposed to sending the Claimant on an indefinite and unpaid leave.
47. As a matter of fact, the *Employment Act* provides for mechanisms and avenues through which an employer can exit an employment contract where its operational requirements demand so. What's more, Clause 20 of the Collective Bargaining Agreement (CBA) executed between the Respondent and the Amalgamated Union of Kenya Metal Workers envisages a redundancy situation.
48. To this end, I cannot help but question why the Respondent failed to exercise this option if it is indeed true that it was experiencing low sales and the manufacturers of Volvo vehicles were shifting from the production of petroleum cars to purely electric vehicles. As it is, the scenario depicted by the Respondent is a classic case of what would call for a redundancy situation but not an indefinite and unpaid leave.
49. The total sum of my consideration is that the Respondent's actions of sending the Claimant on an indefinite and unpaid leave amounted to constructive dismissal hence she was unfairly and unlawfully terminated from employment.

### Reliefs?

50. As the Court has found that the Claimant's termination from employment was unfair and unlawful on account of constructive dismissal, she is entitled to compensatory damages under Section 49 of the *Employment Act*, 2007. Accordingly, she is awarded compensatory damages equivalent to ten (10) months of her gross salary. This award has taken into account the length of the employment relationship which I note was considerably long as well as the Respondent's conduct leading to the separation.
51. The Claimant is further awarded three (3) months' salary in lieu of notice in line with Clause 19(a) (iii) of the CBA seeing that she had served the Respondent for more than 15 years.
52. The Claimant has further sought to be compensated for untaken leave totaling 78 days. Notably, the Respondent did not exhibit leave records in fulfilment of its obligation under Section 74 (1) (f) of the *Employment Act*, to prove that the Claimant proceeded on leave as required under the law. To this end and in terms of Section 28(4) of the *Employment Act*, the claim for leave succeeds but only to the extent of 18 months preceding the separation.
53. The claim for severance pay is declined as there is no finding that the Claimant was declared redundant. Indeed, the Claimant did not seek an order for a declaration that her termination was on account of redundancy.



54. The claim with respect to the SACCO dues is declined as the Claimant did not lay down the basis for the same. In this regard, it is not clear whether the same relates to reimbursement of her contributions to the SACCO or deductions effected from her salary and not remitted to the SACCO as appropriate. This being a specific claim, it behoved the Claimant to craft it in a precise manner.
55. The claim for unpaid salary is declined as it is clear that the Claimant did not render any services to the Respondent during the period in question. It would be unconscionable to award salary in the circumstances.
56. With respect to compensation for unfair labour practices, the Court will be inclined not to grant the same having taken note of the circumstances prevailing at the time the Claimant was sent on unpaid leave. In arriving at this determination, I am further guided by the principle of a “fair go all round” which requires the Court to balance the interests of the employer and that of the employee.
57. As the employment relationship has not been disputed, the Claimant is entitled to a Certificate of Service in line with Section 51(1) of the Act.

### **Orders**

58. It is against this background that I enter Judgment in favour of the Claimant against the Respondent as follows:
  - a. The Claimant is awarded three months’ salary in lieu of notice being the sum of Kshs 274,458.00.
  - b. The Claimant is awarded compensatory damages in the sum of Kshs 914,860.00 being equivalent to ten (10) months of her gross salary.
  - c. The Claimant is awarded the sum of Kshs 118,931.80 being equivalent to untaken leave for 18 months preceding the separation.
  - d. The total award is Kshs 1,308,249.80.
  - e. Interest on the amount in (d) at court rates from the date of Judgment until payment in full.
  - f. The Claimant shall also have the costs of the suit.
59. The Respondent shall issue the Claimant with a Certificate of Service within 30 days from the date of this Judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF MAY 2024.**

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**STELLA RUTTO**

**JUDGE**

In the presence of:

For the Claimant Mr. Odhiambo instructed by Mr. Onditi

For the Respondent Mr. Muturi

Court Assistant Millicent Kibet

**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 had 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.

**STELLA RUTTO**

**JUDGE**

