



**Motieri v Monarch Insurance Company Limited (Cause E905 of 2022)
[2024] KEELRC 1241 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1241 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E905 OF 2022**

L NDOLO, J

MAY 23, 2024

BETWEEN

LUKE GEKONGE MOTIERI CLAIMANT

AND

MONARCH INSURANCE COMPANY LIMITED RESPONDENT

JUDGMENT

Introduction

1. This dispute arises from an alleged termination of the Claimant’s employment by the Respondent. The Claimant’s claim is contained in a Memorandum of Claim dated 2nd December 2022 and the Respondent’s defence is contained in a Response dated 9th March 2023.
2. At the trial, the Claimant testified on his own behalf and the Respondent called its Human Resource and Administration Manager, Angela Mjomba.

The Claimant’s Case

3. By a contract of employment dated 16th September 2014, the Claimant was employed by the Respondent. The Claimant states that on 24th February 2019 he had an accident while in the course of duty.
4. He claims that as a result of the accident, the Respondent withheld his salary for 8 months. Further, the Claimant states that he was transferred from Eldoret to Nairobi, making it impossible for him to continue working, thus forcing him to resign on 5th November 2020. At the time of resignation, the Claimant earned a monthly salary of ksh 150,000 plus a telephone allowance of ksh 10,000.
5. The Claimant lays a claim of constructive dismissal and therefore claims the following:
 - a. Salary arrears for February to September.....ksh 1,200,000



- b. Service pay.....100,000
- c. Salary for unfair dismissal (3 months).....450,000
- d. 1 month's salary in lieu of notice.....100,000
- e. 12 months' salary in damages.....1,800,000
- f. Costs plus interest

The Respondent's Case

6. In its Response dated 9th March 2023, the Respondent states that by a contract dated 16th September 2014, the Claimant was employed in the position of Manager, Eldoret Branch. By an addendum dated 6th April 2016, a production based monthly incentive was introduced.
7. The Respondent states that the Claimant was paid all dues arising from his employment contract.
8. Regarding the Claimant's transfer from Eldoret to Nairobi, the Respondent states that the employment contract provided for transfer depending on exigencies of duty.
9. The Respondent avers that the Claimant was entitled to sick leave of 30 days with full pay and 15 days on half pay. The Respondent claims to have lodged a claim, on behalf of the Claimant, with the third party insurer who is said to have requested for copies of medical records in support of the claim. The Respondent states that the Claimant had made a claim for 221 days but only provided records in support of 132 days and failed to provide records in support of the balance of 89 days. Consequently, the third party insurer settled the Claimant's claim for 132 days.
10. The Respondent admits that the Claimant resigned by letter dated 5th November 2020 but denies the Claimant's claim of constructive dismissal.
11. The Respondent states that it discovered that the Claimant had obtained employment by falsifying his academic certificates. By letter dated 4th November 2020, the Claimant was required to show cause why disciplinary action should not be taken against him. In response, the Claimant resigned from employment by his letter dated 5th November 2020.
12. The Respondent accepted the resignation by its letter dated 10th November 2020; the Claimant was required to clear with the Heads of Department and return the Respondent's property before his final dues could be calculated and paid.
13. According to the Respondent, the Claimant did not clear until March 2021. As he had failed to give notice of his resignation, he is said to have owed the Respondent a net amount of ksh 90,544.08.
14. The Respondent avers that it made payment on account of the Claimant's sick leave of 30 days' full pay and 15 days' half pay as set out in the policy. The total amount of ksh 188,179.50 was recovered from the amount received from the third party insurer being ksh 545,927. A further sum of ksh 90,544.08 was recovered on account of notice pay. The balance of ksh 267,203.42 was paid to the Claimant.

Findings and Determination

15. There are two (2) issues for determination in this case:
 - a. Whether the Claimant has made out a case of constructive dismissal;
 - b. Whether the Claimant is entitled to the remedies sought.



Constructive Dismissal?

16. On 5th November 2020, the Claimant wrote to the Respondent as follows:

“Dear Sirs

RE: Resignation

I hereby tender my resignation with immediate effect.

On that note I kindly request you to arrange for my pension withdrawal from the scheme and other related benefits plus my Group Personal Accident claim.

With kind regards.

Yours faithfully

(signed)

Luke G. Motierl”

17. The Claimant claims that the Respondent frustrated him out of employment, thus forcing him to resign. He cites the instances of his transfer from Eldoret to Nairobi and alleged withholding of his salary as acts of frustration. It is on this basis that the Claimant makes a claim of constructive dismissal.

18. Constructive dismissal occurs where an employer’s conduct makes the workplace so unbearable that the employee has no choice but to resign.

In its decision in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR the Court of Appeal established the following principles to be applied in the determination of constructive dismissal claims:

- 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 the 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 the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
- h. The burden to prove repudiatory breach or constructive dismissal is on the employee.
- i. Facts giving rise to repudiatory breach or constructive dismissal are varied.



19. It is on record, that the Claimant was issued with a letter dated 4th November 2020 requiring him to show cause why disciplinary action should not be taken against him, for presenting falsified academic documentation to procure employment with the Respondent. Instead of responding to the show cause letter, the Claimant tendered his resignation the following day, being 5th November 2020. The Claimant was unable to explain the coincidence of the two letters and the Court had no difficulty in reaching the conclusion that he resigned to avoid imminent disciplinary proceedings.
20. The Claimant did not adduce any evidence to support his allegation that his transfer from Eldoret to Nairobi made it impossible for him to continue working. The Court noted that by the time the Claimant was being transferred, he was on sick leave; he was however allowed to exhaust his sick leave before resuming duty and he was therefore not prejudiced in any way.
21. Regarding the allegation that the Claimant's salary was withheld, there is evidence that he was paid full salary for one month and half pay for the following month. This was in line with the Respondent's Human Resource Policy and the Claimant's employment contract.
22. Overall, I find and hold that the Claimant has failed to prove a case of constructive dismissal against the Respondent.
23. The claims for salary for unfair dismissal, notice pay and damages are therefore without basis and are dismissed.

Other Claims

24. In light of the finding that the Respondent complied with its Human Resource Policy and the Claimant's employment contract regarding sick leave, the claim for salary arrears fails and is disallowed.
25. By his own admission, the Claimant was a contributing member of the National Social Security Fund. The claim for service pay is therefore without basis and is dismissed.

Final Orders

26. Finally, the Claimant's entire claim fails and is dismissed with an order that each party will bear their own costs.
27. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF MAY 2024

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JUDGE

Appearance:

Mr. Kibet for the Claimant

Ms. Wataka for the Respondent

