



**Mutua v Sheer Logistic Management Ltd (Cause 17 of 2020)
[2024] KEELRC 13637 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13637 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 17 OF 2020**

**AK NZEI, J
MAY 9, 2024**

BETWEEN

EVA MWALILI MUTUA CLAIMANT

AND

SHEER LOGISTIC MANAGEMENT LTD RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent herein vide a memorandum of claim dated 22/1/2020 and filed in this Court on 12th March 2020, and pleaded that she was employed by the Respondent as a Quality Assurance Supervisor on 12/2/2019, earning a monthly salary of kshs.110,000, and worked until 18/10/2019 when she resigned vide a resignation letter dated 11/10/2019. The Claimant further pleaded that she was forced to resign by the Respondent’s intolerable conduct which fundamentally and unilaterally changed the Claimant’s contract in that all her duties were given to a new employee, leaving the Claimant with no duties as her supervisor stopped assigning her any.
2. It was the Claimant’s further pleading that in view of the assignment of all her duties to the new employee who had been employed in September 2019 as her assistant, it became illogical for the Claimant to remain in employment, and was thus forced to resign. That the Respondent’s conduct amounted to constructive dismissal of the Claimant.
3. The Claimant sought the following reliefs against the Respondent:-
 - a. A declaration that the Respondent’s conduct amounted to constructive termination of the Claimant’s employment and was unlawful and unfair.
 - b. One month salary in lieu of notice.....ksh. 110,000
 - c. Compensation for constructive dismissal (ksh. 110,000x12).....ksh. 1,320,000



- d. Certificate of service.
 - e. Costs of the suit and interest.
 - f. Any other or further order as may be just, expedient and necessary.
4. Documents filed by the Claimant alongside the memorandum of claim included the Claimant's written witness statement dated 22/1/2020 and an evenly dated list of documents, listing 4 documents. The listed documents included a contract of employment dated 12/2/2019, the resignation letter dated 11/10/2019, a demand letter dated 12/11/2019 and copies of email correspondences.
5. The Respondent filed a memorandum of Response on 31/3/2022 and denied the Claimant's claim. The Respondent further pleaded:-
- a. that the Respondent's business is to provide outsourced labour services to organizations, and that the Claimant was assigned duties at the Respondent's client, Hashi Energy, and that the nature of business was heavily depended on the nature of contracts between the Respondent and its clients.
 - b. that on 11/10/2019, the Claimant emailed a notice of termination of contract to the Respondent's Mombasa Regional Manager, wherein she was to serve one month notice, which the Respondent accepted.
 - c. that the Claimant's work was routine, and that there was no need of daily instruction as her duties were well spelt out for her during induction and that she even attended a tool box meeting on 11/10/2019 as part of her routine responsibility.
 - d. that during the entire period of employment, the Claimant never complained of being frustrated by the Respondent.
6. Documents filed by the Respondent alongside the memorandum of Response was a written witness statement of one Joseph M. Kithyole and a list of documents dated 22/3/2022, listing 2 documents. The listed documents were the Claimant's leave application form dated 18/10/2019 and a response to the demand letter dated 20/11/2019.
7. Trial commenced before me on 31/3/2022. The Claimant testified and adopted her written witness statement, which to a great extent replicated the averments made in the memorandum of claim, as her testimony. She further produced in evidence the documents referred to in paragraph 4 of this judgment. The Claimant testified further:-
- a. that she was employed by the Respondent from January 2019 and was deployed to work at Hashi Energy Limited as a Quality Assurance Supervisor, and had good working relationship with the company.
 - b. that in September 2019, a new staff was brought by the Respondent to assist where the Claimant was working and that the Claimant resigned because of frustrations as all her duties were assigned to the new employee, and that the Claimant sat at her desk from morning to evening every day doing nothing.
 - c. that the Claimant complained to the HR who used to visit her area of employment, and that she served her resignation letter on the Respondent; and that the resignation amounted to constructive dismissal.



- d. that the Claimant's salary was being paid by the Respondent and that the Claimant resigned two months to the expiry of her fixed term contract.
 - e. that the Claimant's contract did not state her duties, and that she was not supplied with a list of the same. That her daily, weekly and even monthly duties were assigned by the immediate supervisor; and that she was never served with any notice of either unsatisfactory performance or unavailability of work at Hashi Energy. That her resignation was not voluntary.
8. The Respondent called one witness, Joseph Kithyoke (RW-1), a Human Resource Officer in the Respondent company. He adopted his filed witness statement dated 31/3/2022 as his testimony. He denied the Claimant's assertion that another employee had been sent to replace the claimant, or having received any complain from the Claimant in that regard. That it was the Respondent's client, Hashi Energy, who was assigning the Claimant duties. That the Claimant procedurally resigned, and was not constructively dismissed.
 9. RW-1 further testified that he was the Respondent's Human Resource Officer when the Claimant was terminated, that the Claimant was employed and seconded to Hashi Energy, which was one of the Respondent's clients assigned to him (RW-1), and which he (RW-1) visited personally. That he was, however, not the Claimant's immediate supervisor. He denied being privy to the troubled relationship between the Claimant and her immediate supervisor. The witness further told the Court that the Claimant gave one month notice, and that during that month, she took her eight (8) days' pending leave. That the Respondent received the resignation letter.
 10. Whereas the Claimant testified that she resigned due to frustrations as all her duties had been assigned to a new employee and that she sat at her desk from morning to evening without being assigned any duties, and that her contract did not specify/set out her responsibilities and that she was never given a list of the same, the Respondent maintained that the Claimant's work was routine and that as such there was no need of re-assignment of duties. I have perused the Claimant's contract of employment dated 12/2/2019, and I have not seen any list or catalogue of the duties that the Claimant was supposed to perform. The Respondent did not even allege that any such list and/or catalogue of duties was ever given to the Claimant.
 11. In the foregoing regard, I have taken note of clause 3 of the Claimant's employment contract which states as follows:-

“ You will be posted at Hashi Energy as your work station and shall report to the Site Manager as your immediate Supervisor.

You shall be posted to your work station as shall be advised by our client. Your services may be transferred to any other department or client of the company, anywhere within Kenya. You may also be assigned such other duties as may become necessary at the discretion of the management or the company's client.”
 12. It is evident from the foregoing clause that the Claimant's work/duties was/were not routine as alleged by the Respondent. She performed such duties as were assigned to her by her immediate supervisor and/or the Respondent's management. The Respondent did not deny having failed to allocate/assign duties to the Claimant, or having brought in a new employee to whom the immediate supervisor assigned duties which the Claimant was supposed to perform. All that the Respondent (RW-1) told the Court was that the Claimant's duties were routine and did not require re-assignment.



13. Further the Respondent is not shown to have responded to the Claimant's resignation letter dated 11/10/2019 or to have denied the reasons the Claimant gave therein for her resignation. The letter of resignation states in part:-

“ Thank you very much for the opportunity you have given me to learn all about quality assurance and customer service at the company.

However, as you are aware, there has been a conflict between myself and my immediate supervisor but to which I do not know the genesis. I have sought to have this problem resolved amicably to no avail.

The relationship has deteriorated so much to the extent that my supervisor no longer assigns me duties. Since the beginning of the month, all my duties have been channeled to a new employee who joined Mombasa office on 18th September 2019.

This turn of events has caused me a lot of frustrations and mental anguish. I feel demotivated and discriminated and therefore I am left with no other option but to resign.”

14. Having considered the pleadings filed and evidence tendered by both parties, issues that emerge for determination, in my view, are as follows:-

- a. whether the Claimant's employment was constructively terminated by the Respondent and if so, whether the termination was unfair.
- b. whether the Claimant is entitled to the reliefs sought.

15. On the first issue, the Claimant proved, on a balance of probability, that her duties were assigned to a new employee and that the Respondent and/or its Site Manager, who was the Claimant's immediate supervisor, failed and/or refused to allocate her duties. The Claimant's evidence that she sat in the office from the morning to evening doing nothing was not rebutted by the Respondent. The Claimant demonstrated that she did not resign voluntarily.

16. The Black's Law Dictionary 10th Edition defines constructive dismissal as:-

“An employer's creation of working conditions that leave a particular employee 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.”

17. The Court of Appeal stated as follows in the case of Coca Cola East & Central Africa Limited -vs- Maria Kagai Ligaga [2015] eKLR:-

“Constructive dismissal occurs where an employee terminates the contract under which he is employed, (with or without malice) in circumstances in which he is entitled to terminate it without notice, by reason of the employer's conduct. The employer's behavior in either case must be shown to be heinous, so intolerable, that made it considerably difficult for the employee to continue working. The employee initiates the termination believing himself to have been fired. The employee needs to show that the employer, without reasonable or proper cause conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is regarded as constructive dismissal if the employer's conduct is a significant breach of the contract of employment and that the conduct shows that the employer is no longer interested in being bound by the terms of the contract. The



employee’s resignation is therefore treated as an actual dismissal by the employer and the employee may claim compensation for unfair termination.”

18. The Respondent’s failure and/or refusal to assign duties to the Claimant as stated in the Claimant’s employment contract, in my view, constituted a repudiatory breach of the contract of employment on the part of the Respondent (the employer). The Claimant had been employed to work according to duties assigned to her based on the contract, but not to sit in the office doing nothing from morning to evening. She resigned in response to the Respondent’s repudiatory conduct, and this constituted constructive dismissal; which dismissal was unfair. I find and hold that the Claimant was constructively dismissed from her employment by the Respondent and that the dismissal was unfair, and I so declare.
19. On the second issue, and having made a finding of unfair dismissal of the Claimant, and taking into consideration the fact that the Claimant resigned some two months to the end of her fixed term contract, I award her the equivalent of six months’ salary as compensation for unfair termination of employment. The Claimant’s monthly salary according to her contract of employment, was kshs. 110,000. The equivalent of six months’ salary is therefore kshs. $11,000 \times 6 =$ kshs. 660,000.
20. The claim for kshs. 110,000 being payment in lieu of notice is declined. The Claimant opted to give one month notice to the Respondent in her letter of involuntary resignation.
21. The claim for issuance of a certificate of service is allowed pursuant to Section 51 of the [Employment Act](#) 2007.
22. In sum, and having considered written submissions filed on behalf of both parties herein, judgment is hereby entered for the Claimant against the Respondent for kshs. 660,000 being compensation for unfair dismissal/termination of employment.
23. The Respondent will issue a certificate of service to the Claimant pursuant to Section 51(1) of the [Employment Act](#) within thirty days of this judgment.
24. The Claimant is awarded costs of the suit and Interest at Court rates. Interest shall be calculated from the date of this judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH MAY 2024

AGNES KITIKU NZEI

JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

Appearance:

.....Claimant

.....Respondent

