



**Sobayeni & another v Consultants Limited & another (Cause E506 of 2020) [2024] KEELRC 1167 (KLR) (3 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1167 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E506 OF 2020**

**SC RUTTO, J**

**MAY 3, 2024**

**BETWEEN**

**LYDIA SUZY SOBAYENI ..... 1<sup>ST</sup> CLAIMANT**

**GEORGINA GLADYS SOBAYENI ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**CONSULTANTS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**GURGEET KAUR TARLOCHAN S CHANA ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimants aver through their joint Memorandum of Claim dated 25<sup>th</sup> September 2020, that they were both employees of the 1<sup>st</sup> Respondent, having been employed on diverse dates. They aver that they discharged their duties effectively and diligently as required under their respective contracts of employment. They further aver that the 1<sup>st</sup> Respondent discriminatorily, unlawfully and unilaterally reduced their salaries for the month of May 2020.
2. That the Respondents further failed to pay their salaries for the months of July 2020, August 2020 and September 2020. Citing constructive dismissal, the Claimants aver that the actions of the Respondents were well orchestrated to push them away from employment. Against this background, the Claimants have sought the following prayers against the Respondents:
  - a. A declaration that the Respondent’s conduct towards the 1<sup>st</sup> and 2<sup>nd</sup> Claimants amounts to constructive dismissal.
  - b. A declaration that the dismissal of the 1<sup>st</sup> and 2<sup>nd</sup> Claimants by the 1<sup>st</sup> Respondent is unprocedural and hence amounts to wrongful dismissal.



- c. An order compelling the Respondents to pay the 1<sup>st</sup> Claimant her full salaries for the months of May, June, July, August and September 2020 amounting to Ksh1,375,000/- together with interest until full payment.
  - d. An order compelling the Respondents to pay the 2<sup>nd</sup> Claimant her full salaries for the months of May, June, July, August and September 2020 amounting and Kshs. 700,000/= together with interest until full payment.
  - e. An order compelling the Respondents to pay the 1<sup>st</sup> Claimant her mandatory one month's salary in lieu of Notice being Kshs. 275,000/=, together with interest until full payment.
  - f. An order compelling the Respondents to pay the 2<sup>nd</sup> Claimant her mandatory one month's salary in lieu of Notice being Kshs. 140,000/=, together with interest until full payment.
  - g. An order compelling the Respondents to pay the 1<sup>st</sup> Claimant, 12 month's salary as compensation for unfair termination being Kshs. 3,300,000/=, together with interest until full payment.
  - h. An order compelling the Respondents to pay the 2<sup>nd</sup> Claimant, 12 month's salary as compensation for unfair termination being Kshs. 1,680,000/= together with interest until full payment.
  - i. An order compelling the Respondents to pay the 1<sup>st</sup> Claimant 12 month's salary for discrimination in the workplace in the course of their employment being Kshs. 3,300,000/= together with interest until full payment.
  - j. An order compelling the Respondents to pay the 2<sup>nd</sup> Claimant, 12 month's salary for discrimination in the workplace in the course of their employment being Kshs. 1,680,000/= together with interest until full payment.
  - k. An order compelling the Respondents to pay the 1<sup>st</sup> and 2<sup>nd</sup> Claimant for leave days not taken.
  - l. An order compelling the Respondents to pay the 1<sup>st</sup> and 2<sup>nd</sup> Claimant gratuity for years of employment with itself.
  - m. The cost of this suit.
  - n. Any other order the Honourable Court deems fit.
3. Opposing the Claim, the Respondents filed a joint Memorandum of Response dated 14<sup>th</sup> June 2023. It is the Respondents' case that the Claimants did not have a clean track record in the course of their employment and that the same was tainted with various disciplinary issues. The Respondents further contend that the salary reduction cut across all employees and that it was a measure to curb the effects of the COVID-19 pandemic.
  4. The Respondents further aver that the 1<sup>st</sup> Respondent's business being one of facilitating the travel of students to Australia for studies was drastically affected since schools were closed and airlines were not operating hence the 1<sup>st</sup> Respondent could not continue with its business as usual. That it was therefore resolved between the employees and the company that the employees would receive a reduced salary until business resumed. In light of the foregoing, the Respondents have asked the Court to dismiss the Claim with costs.
  5. The matter proceeded for hearing on 31<sup>st</sup> October 2023 during which all parties called oral evidence.



## Claimants' Case

6. Both Claimants testified in support of their respective cases. At the outset, the Claimants sought to rely on their respective witness statements as well as the initial list and bundle of documents and supplementary documents to constitute their evidence in chief.
7. The Claimants' case as per their witness statements, which I note are worded in a similar manner, is that over the period of employment with the 1<sup>st</sup> Respondent, they were issued with various raises of their salary and broadening of their employment scope. The latest salary raise having been done through a letter dated 13<sup>th</sup> January, 2018.
8. They had a good working experience with the 1<sup>st</sup> Respondent until May 2020 when the 1<sup>st</sup> Respondent discriminatorily and unlawfully reduced their salary without consulting them as required by law.
9. That they did not accept the reduced salary issued by the 1<sup>st</sup> Respondent since they were never consulted on the said reduction and they had not made any written approval of the same.
10. The Claimants contended that the 1<sup>st</sup> Respondent later issued an Internal Memo dated 2<sup>nd</sup> June 2020 informing the employees that it would be reducing their salaries.
11. They made a complaint at the Nairobi County Labour Office which thereafter scheduled a conciliation meeting between themselves and the Respondent. The Respondent failed to attend and/or produce the requisite documents requested by the Labour Officer.
12. That the 1<sup>st</sup> Respondent thereafter never paid them salary for the months of May, June, July and August, 2020 despite having continued being employees of the 1<sup>st</sup> Respondent. No reason for non-payment was advanced to them.
13. They further averred that the 2<sup>nd</sup> Respondent thereafter developed harsh conduct towards them and frustrated them from duly conducting their obligations under their contracts of employment.
14. According to the Claimants, Mr. Mahul Shah, the 1<sup>st</sup> Respondent's other Director and 50% shareholder who is domiciled outside the country, was opposed to the discriminatory, unlawful and unilateral reduction of their salary for the month of May 2020 and subsequent harsh treatment by the 2<sup>nd</sup> Respondent acting on behalf of the 1<sup>st</sup> Respondent. They contended that the 2<sup>nd</sup> Respondent was thus extending her malevolent actions towards them and hiding behind the 1<sup>st</sup> Respondent as its Director.
15. The Claimants further averred that the actions of the 2<sup>nd</sup> Respondent were in an attempt to unlawfully kick them out of a company they had dedicated themselves physically and emotionally to work for.
16. Their efforts to engage the 1<sup>st</sup> Respondent to cease its harsh conduct aimed at constructively dismissing them, and/or in the alternative pay them their terminal benefits have proved futile.
17. They further averred that through an Internal Memo dated 16<sup>th</sup> July 2020 sent to its employees, the 1<sup>st</sup> Respondent indicated its intentions to voluntarily wind up citing the negative effects of the COVID-19 pandemic on its business.
18. That the 2<sup>nd</sup> Respondent incorporated Australian Careers and Education Limited, a company with close names to the 1<sup>st</sup> Respondent to possibly direct business there upon voluntary winding up of the 1<sup>st</sup> Respondent.
19. They are apprehensive that the 1<sup>st</sup> Respondent's intentions of winding up are aimed at wrongfully and unlawfully terminating their employment without paying them their terminal benefits alluding



to the loss of business and then thereafter, continue operating its business under Australian Careers and Education Limited.

### **Respondents' Case**

20. Ms. Gurgeet Kaur S. Chana, the 2<sup>nd</sup> Respondent herein, testified on her behalf and on behalf of the 1<sup>st</sup> Respondent. She started by identifying herself as a Director of the 1<sup>st</sup> Respondent. Similarly, she adopted her witness statement to constitute her evidence in chief. She further produced the documents filed on behalf of the Respondents as exhibits before Court.
21. According to the 2<sup>nd</sup> Respondent, it is a matter of public notoriety that the initial stages of the COVID-19 Pandemic affected the economy and many businesses suffered the fate of closure during the said period.
22. That the 1<sup>st</sup> Respondent's business, being one of facilitating the travel of students to Australia for studies was drastically affected since schools were closed and the airlines were not operating, hence it could not continue with its business as usual.
23. This forced the 1<sup>st</sup> Respondent to issue an Internal Memo in May 2020 bringing forth the situation to its employees and further giving options of either the employees taking an unpaid leave or having a salary reduction.
24. The employees finally resolved that taking an unpaid leave would be detrimental to them as they wouldn't have any income and would be unable to meet their daily needs.
25. It was therefore mutually resolved between the employees and the 1<sup>st</sup> Respondent that the employees would receive a reduced salary until business resumed.
26. The 2<sup>nd</sup> Respondent averred that the salary reduction cut across all the 1<sup>st</sup> Respondent's employees and none was exempted and/or discriminated.
27. Further, that the 1<sup>st</sup> Respondent having regard to the effect that the sudden salary cut might have on its employees, decided out of humanitarian concerns to pay a salary advance to the employees and have the same gradually recovered with time as the employees would agree.
28. It was the 2<sup>nd</sup> Respondent's case that they were shocked when the complaint was made to the County Labour Office since all the other employees consented to the issue of salary reduction and continued picking their salary cheques.
29. That notwithstanding, the 1<sup>st</sup> Respondent was very accommodating to the Labour Officer and attended meetings through their Advocate on record up until the Labour Officer requested for documents like bank statements, which were only privy to the Company.
30. The 2<sup>nd</sup> Respondent further stated that the Claimants never worked in the months of July and August, as the 1<sup>st</sup> Respondent's offices were shut down following the increase in the number of COVID-19 infections and the Government's directive that people work from home.
31. That neither the 1<sup>st</sup> Respondent nor herself ever developed harsh conduct towards the Claimants.
32. That never at any point did the Respondents inform its Clients that the Claimants were no longer working for it.
33. That further, the 1<sup>st</sup> Respondent's Employee Handbook, reserves the right to discontinue any access to its computerized information including emails and WhatsApp without giving any notice and/or explanation to any persons and that cannot and does not amount to "harsh conduct".



34. It was thus the 2<sup>nd</sup> Respondent's contention that the removal of the Claimants from the WhatsApp group and discontinuation of access to the emails was not a witch hunt. She averred that the same was done for housekeeping purposes without any malice attached to it. That in any case, the WhatsApp group is no longer operational.
35. The 2<sup>nd</sup> Respondent further denied instigating other employees against the Claimants and in her view, the Claimants were being economical with the truth. She contended that the Claimants had started bullying their juniors and harassing them without the knowledge of the Company or its Directors.
36. That the harassment of the junior employees by the Claimants escalated to a very high and dangerous level that some of the staff tendered their resignations on account of harassment by the Claimants.
37. According to the 2<sup>nd</sup> Respondent, the Claimant's claim does not disclose any justifiable cause and thus ought to be dismissed.

### **Submissions**

38. Upon close of the hearing, parties took directions on filing of written submissions. However, only the Claimants complied as the Respondents' submissions were missing from the Court's physical record and the online portal.
39. The Claimants submitted that their termination from employment was unfair, unlawful, discriminatory and amounted to constructive dismissal and as such, ought to be compensated for.
40. It was the Claimants' further submission that the Respondents unfairly targeted them and frustrated the execution of their contractual obligation to the point that they could no longer continue working there. To buttress this argument, the Claimants placed reliance on the cases of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR and *Gatuku v Geminia Insurance Co. Limited (Employment and Labour Relations Cause 79 of 2019)* [2023] KEELRC 2689 (KLR) (27 October 2023) (Judgment).
41. The Claimants further submitted that the Respondents' actions went to the very root of their respective contracts of employment and thus made it impossible for them to effectively conduct their duties. On this core, the Claimants cited the case of [\*Ngure v Huawei Technologies \(Kenya\) Co Ltd \(Cause 335 of 2018\)\*](#) (2023) KEELRC 3204 (KLR) (5 December 2023) (Judgment).
42. It was the Claimants' argument that the Respondents' behavior and actions towards them were so heinous, so intolerable, that it made it considerably difficult for them to continue working for the 1<sup>st</sup> Respondent.
43. Citing the case of *Kenfreight (E.A) Limited v Benson K. Ngugi* (2016) eKLR, the Claimants submitted that no Notice, reasons for termination, or disciplinary process was advanced/instituted against them before the end of their employment with the 1<sup>st</sup> Respondent.

### **Analysis and Determination**

44. Having considered the pleadings filed by both parties, the evidence, as well as the Claimants' submissions, the following issues stand out for determination:
  - i. Whether the Claimants were constructively dismissed by the Respondent;
  - ii. Whether the Claimants are entitled to the reliefs sought.



## Constructive Dismissal?

45. From the record, it is apparent that the parties enjoyed a cordial relationship until sometimes in May 2020, during the early stages of the COVID-19 global pandemic. As the pandemic raged on, so did the employment relationship between the Claimants and the Respondents become increasingly strained.
46. The strain first manifested when the Claimants were not paid full salary during the month of May 2020. Things were not about to get better. On 2<sup>nd</sup> June 2020, the Respondents issued an internal memo to all its employees notifying them of the alteration of their terms of employment. This alteration included a drastic pay cut of gross salaries of all senior employees for the subsequent three months. In this regard, the Claimants received a salary reduction in the month of June 2020. Thereafter, they were not paid any salary.
47. According to the Claimants, this amounted to constructive dismissal by the Respondent. The *Employment Act* 2007, has not defined the concept of constructive dismissal. This notwithstanding, the concept has been the subject of many decisions emanating from this Court and the Court of Appeal. In the leading case of *Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR the Court of Appeal had this to say:
- “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.” Underlined for emphasis
48. The Black’s Law Dictionary (10<sup>th</sup> Edition) defines constructive dismissal to mean:
- “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.”
49. Some of the instances that may arise thus resulting in an employee considering himself or herself constructively dismissed include; reduction or failure to pay salary; withdrawal of a contractual benefit; demotion or reduction in rank; where an employer creates and/or perpetuates a hostile or toxic work environment; unreasonable altering of an employee’s reporting structure, job description, hours of work, or working conditions; or failing to provide an employee with adequate support to do their job.
50. In light of the foregoing, it goes without saying that in the ordinary scheme of things, it can easily be inferred that the Claimants were constructively dismissed from employment when their salaries were reduced. This is more so noting that the Respondents have not adduced any evidence to prove that they acted in consonance with the requirements of Section 10(5) of the *Employment Act* and obtained the Claimants’ consent prior to reducing their salaries. As a matter of fact, the Claimants were so aggrieved with the salary reduction that they referred the matter to the Ministry of Labour for conciliation.
51. Be that as it may, it is notable that the circumstances prevailing at the time were not ordinary. Why do I say so? It is a matter of public notoriety that the outbreak of the COVID-19 global pandemic



caused massive disruptions in business operations. It is also common knowledge that in Kenya, the Government adopted drastic response measures to contain the spread of the pandemic. Such measures included restriction of movement within and out of the country.

52. Indeed, it is not in doubt that the global pandemic and the attendant measures imposed by the Government resulted in decreased business operations. As such, many employers went into survival mode and adopted several measures to stay afloat. This included sending employees on unpaid leave and effecting pay cuts subject to consultation with the concerned employees.
53. Accordingly, it is my considered view that the Respondents' only fault at the time, was failure to consult the Claimants and obtain their consent prior to the salary reduction. However, in the circumstances, that action alone cannot be construed as amounting to constructive dismissal.
54. What stands out is an email dated 6<sup>th</sup> August 2020 in which the 2<sup>nd</sup> Respondent notified a client by the name of Mercy Nyambura, that the Claimants were no longer employees of the 1<sup>st</sup> Respondent. The email reads in part:

“Please make note that until further notice Lydia Sobayeni and Georgina Sobayeni are currently not at Australian Education Consultants (AEC). Lydia Sobayeni and Georgina Sobayeni have taken legal action against the Australian Education Consultants (their employers) as they refused to take a pay cut during the current pandemic time. Please note that your application is with Australian Education Consultants and not an individual staff member at AEC. Australian Education Consultants will not be held liable for any information given to students and parents from any staff using their private email.”

55. It is noteworthy that there is no evidence that at the time, the Claimants had ceased being employees of the Respondent. Therefore, there was no basis at all for the 2<sup>nd</sup> Respondent to communicate to the 1<sup>st</sup> Respondent's clients as she did. If anything, the reasons given for deeming the Claimants as non-employees of the 1<sup>st</sup> Respondent, run afoul of the provisions of Section 46(h) of the *Employment Act* which prohibits an employer from dismissing an employee or imposing a disciplinary penalty on account of a complaint or other legal proceedings against the employer.
56. Revisiting the case of *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga* [supra], the Court cited with approval the case of *Western Excavating (ECC) Ltd. v Sharp* [1978] ICR 222 or [1978] QB 761, in which Lord Denning MR expressed himself 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 (emphasis ours). (See also *Nottingham County Council v Meikle* [2005] ICR 1).” Underlined for emphasis

57. Applying the above determination to the case herein, it is evident that by notifying the 1<sup>st</sup> Respondent's clients that the Claimants were no longer its employees, the 2<sup>nd</sup> Respondent was essentially implying that moving forward, it did not intend to be bound by the terms of the Claimants' contracts of



employment. As such, the Claimants were entitled to treat themselves as having been constructively dismissed from employment.

58. In view of the foregoing, it is this Court's finding that the Claimants have proved on a balance of probability that they were constructively dismissed hence were unfairly and unlawfully terminated from employment.
59. That said what remedies avail to the Claimants?

### **Remedies?**

#### **Compensatory damages and notice pay**

60. As the Court has found that the Claimants were constructively dismissed by the Respondents, they are each awarded one (1) month's salary in lieu of notice and compensatory damages equivalent to four (4) months of their gross salary. This award has taken into account several factors key among them, the length of the employment relationship and the prevailing circumstances during the COVID-19 pandemic, which notably was the main cause of the fallout between the parties.
61. Further to the foregoing, it is worth pointing out that during cross-examination, the Claimants admitted that sometimes in August 2020, while still in the 1<sup>st</sup> Respondent's employment, they established their own organization by the name Envision Australia which renders similar services as the 1<sup>st</sup> Respondent. Therefore, this very well mitigated any prejudice the Claimants may have suffered due to the constructive dismissal.

#### **Unpaid Salary**

62. The Claimants have further sought to be awarded salary for the months of May 2020 upto September 2020. It is notable that during cross-examination, the Claimants admitted to receiving salary for the months of May and June 2020 following a court order. As to the months of August and September 2020, the Claimants admitted during cross-examination that they established their own company around that time. As such, it would be unconscionable to order payment of salary to the Claimants for the month of August and September 2020. In this regard, the Claimants are only entitled to unpaid salary for the month of July 2020.

#### **Gratuity**

63. The Claim for gratuity is declined as the same was not provided for under the Claimants' contract of employment. There is therefore no basis for award of the same.

#### **Damages for Discrimination**

64. The claim for damages for discrimination is equally declined as the Claimants have failed to establish a prima facie case demonstrating the manner in which the Respondents treated them differently and less favourably than the other employees, on any of the grounds enumerated under Section 5(3) of the *Employment Act*. If anything, the Internal Memo dated 2<sup>nd</sup> June 2020, confirms that the salary reduction affected all employees in the 1<sup>st</sup> Respondent company and was not exclusive to the Claimants.

#### **Unpaid leave**

65. The claim for unpaid leave is declined as the Claimants did not indicate the number of unpaid leave days they are seeking and more specifically, the period for which the said leave relates to. This is more



so noting that this was a specific claim hence the Claimants were duty bound to specifically plead the same.

## Orders

66. In the final analysis, the Claim is allowed and Judgment is entered in favour of the Claimants in the following manner:

1<sup>st</sup> Claimant

- a. A declaration that the 1<sup>st</sup> Claimant was constructively dismissed from employment by the Respondents hence was unfairly terminated.
- b. The 1<sup>st</sup> Claimant is awarded one (1) month's salary in lieu of notice being the sum of Kshs 275,000.00.
- c. The 1<sup>st</sup> Claimant is awarded salary for the month of July 2020 being the sum of Kshs 275,000.00
- d. The 1<sup>st</sup> Claimant is awarded compensatory damages in the sum of Kshs 1,100,000.00 being equivalent to four (4) months of her gross salary.
- e. The total award is Kshs 1,650,000.00.

2<sup>nd</sup> Claimant

- a. A declaration that the 2<sup>nd</sup> Claimant was constructively dismissed from employment by the Respondents hence was unfairly terminated.
- b. The 2<sup>nd</sup> Claimant is awarded one (1) month's salary in lieu of notice being the sum of Kshs 140,000.00.
- c. The 2<sup>nd</sup> Claimant is awarded salary for the month of July 2020 being the sum of Kshs 140,000.00
- d. The 2<sup>nd</sup> Claimant is awarded compensatory damages in the sum of Kshs 560,000.00 being equivalent to four (4) months of her gross salary.
- e. The total award is Kshs 840,000.00.

67. Interest shall apply on the total awards at court rates from the date of Judgment until payment in full.

68. The Respondents shall bear the costs of this suit.

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

.....

**STELLA RUTTO**

**JUDGE**

**In the presence of:**

For the Claimants Mr. Njeru

For the Respondents Mr. Amanya

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

