



**Tongola v Flamingo Horticulture Kenya Limited (Employment and Labour Relations Cause 779 of 2019) [2024] KEELRC 1323 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1323 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 779 OF 2019**

**MN NDUMA, J**

**MAY 30, 2024**

**BETWEEN**

**HASSAN ISAAC TONGOLA ..... CLAIMANT**

**AND**

**FLAMINGO HORTICULTURE KENYA LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed suit on 13/11/2019 seeking for an order in the following terms:-
  - i. General damages for breach of contract of service.
  - ii. Payment in compensation and loss of earnings for the remaining 15 years (as per paragraph 26).
  - iii. Maximum compensation of 12 months as provided for in the law of cessation of contract (as per paragraph 26)
  - iv. Costs of this suit (claim)
  - v. Confirmation of remittance of any statutory deductions (as applicable)
  - vi. Issuance of certificate of service by the respondent
  - vii. Exemplary damages
  - viii. Interest on (i), (ii), (c) and (iii) above at court rates
  - ix. Any other relief that this honourable court may deem fit to grant.
2. The claimant (CW1) adopted a witness statement dated 1/10/2019 as his evidence in chief. CW1 testified that he was employed in the position of Commercial Manager Dudutech by the respondent vide a letter of appointment dated 4/6/2018. That his gross pay was Kshs.400,000/=. That he



- had abandoned his lucrative consultancy firm to join the respondent on a promise that the said employment would be on long term permanent basis.
3. That he was confirmed to the position on 4/9/2018 after 3 months period.
  4. That in the course of his employment he was intimidated, harassed, mistreated, insulted, frustrated and discriminated upon by the Managing Director (MD) of the respondent. That other individuals also frustrated the claimant under instruction from the MD.
  5. That on 7/1/2019, the claimant was verbally informed by the respondent's operations manager one Ignatius Kirimi that the claimant's line manger Barnaba Rotich, at Dudutech (K) Limited, a subsidiary of the respondent had written an email intimating that the role of the claimant was not needed in the respondent's company. That the operations manager had intimated that the email was malicious.
  6. That the line manager had also indicated one Hannah Kibiru had left the employment of the respondent due to being frustrated by the claimant.
  7. On 7/1/2019, the claimant requested for a meeting with the respondent's operations manager who at the time was assisting the Human Resource Manager, to establish the source of the accusations levelled against the claimant.
  8. That on 29/11/2018 the claimant was assigned a role of managing the respondent's business in Uganda, Tanzania and Zimbabwe and other support in terms of business growth in Europe and United States, however the respondent did not allow the claimant to start the new assignment.
  9. On 14/1/2019 the respondent's MD informed the claimant that the customers of the respondent had raised complaints about the claimant's conduct. At the said meeting, the MD became abusive and violent towards the claimant and accused the claimant of recording their conversation. The MD demanded the claimant to write that he was not recording their conversation and snatched the phone from the claimant. The MD then forcefully chased the claimant from his office. The MD took the company phone and laptop from the claimant in full glare of other employees. That in the process the MD hit the claimant with the mouse of the laptop. That the MD refused the claimant opportunity to remove his personal content from the laptop. The MD ordered the claimant to leave the company premises. (emphasis added)
  10. That the claimant was thoroughly demoralized as a result of the said mistreatment, humiliation and frustration and sent an involuntary letter of resignation to the respondent's Human Resource Manager on 14/1/2019. The claimant also sent another email to the respondent to explain the wrongful action that was taken by the respondent against the claimant hence causing the involuntary resignation.
  11. That on 14/1/2019, the MD hatched a plan to access personal emails of the claimant. That on 22/1/2019, the claimant was called to a meeting at the Human Resource Manager's office at Nairobi. That he was blackmailed and intimidated at the meeting and was informed that the respondent could not allow the claimant to serve three months' notice and that the claimant would be disciplined for insubordination. That the MD began a malicious campaign against the claimant to tarnish his name. That the claimant suffered loss and damage as a result of the unlawful conduct by the respondent and seeks to be awarded as prayed.
  12. The claimant was closely cross-examined by Advocate Obokoke for the respondent. The claimant was shown a consultancy agreement dated 13/11/2018 between himself and ISDA. He admitted that he was in employment of the respondent when he signed the consultancy agreement. The claimant said that the consultancy work was personal to him and there was no conflict with his work since he only gave technical advice to ISDA.



13. The claimant agreed that on 4/2/2019, one Mr. Jonathan terminated the consultancy agreement with ISDA. The claimant admitted that he did not utilize the grievance procedure on the issues of harassment and intimidation he testified about in court. The claimant admitted that he was given higher roles by the MD who he says was harassing him. The claimant however said he was never allowed to take up the newly assigned roles.
14. The claimant stated that he took leave days as per the application forms dated 29/1/2019, 27/9/2018 and 4/12/2018. The claimant denied that he took leave because he was working for other organizations contrary to the company policy. The claimant said he had to exhaust his leave days as he was exhausted due to the intensive work in the respondent's employment. The claimant however stated that the respondent still owed him leave days.
15. The claimant insisted that he was constructively dismissed. He insisted on the physical confrontation by the MD who snatched the phone and laptop from him and in the process got hit with the mouse. That this happened in the presence of senior staff. That the claimant's colleagues called to console him and said the MD behaved badly.
16. The claimant said none of the said staff was willing to come to court to testify on the matter. The claimant admitted that he did not explain the reason for resignation in his letter but he wrote a letter subsequently explaining the reason why. The claimant said he had been treated violently and did not wish to attend a subsequent meeting he was invited to by HR manager on 16/1/2019.
17. The claimant however subsequently attended a meeting upon insistence of the respondent. At the meeting the claimant said HR told him the respondent would not allow him to serve notice. The claimant then wrote a letter asking for the 3 months' notice to be waived. Claimant insisted that this was not his wish but had been prevailed upon to request for waiver of notice. The claimant stated that he served for six months only though he had expected a permanent and pensionable engagement. That he did not get certificate of service.

## **Response**

18. RW1, Margaret Mwingirwa, stated that she was the Human Resource lead, of the respondent. RW1 said the respondent and Dudutech were related. That Dudutech was a subsidiary of the respondent. That the respondent is based at Karen whereas Dudutech was at Naivasha but had been sold off in 2020/2021. RW1 relied on a witness statement dated 22/6/2022.
19. RW1 said claimant was appointed as commercial manager at Dudutech on 4/6/2018. Claimant was on six months' probation but was confirmed after 3 months.
20. That on 1/12/2018 the operations structure changed at Dudutech affecting all staff. That no one prevented the claimant from taking up his new role under the changed structure.
21. That on 14/1/2019, the claimant voluntarily resigned from employment whereupon he undertook to serve the contractual three months' notice.
22. On 22/1/2019, the claimant requested for waiver of the three months' notice period and requested the resignation to take immediate effect from 22/1/2019.
23. That subsequently, the respondent held cordial meetings with the claimant but was unable to persuade the claimant to reconsider his decision to resign as evidenced by email correspondence dated 15/1/2019, 16/1/2019 and 29/1/2019. That on 22/1/2019, the respondent accepted the claimant's voluntary resignation from employment. That separation process commenced after 22/1/2019



- involving formal clearance and handing back the company properties. That the claimant left company phone and laptop.
24. That the MD and other staff did not access the claimant's personal details such as emails; WhatsApp; text message; LinkedIn or skype. That the respondent did not invade the claimant's privacy as alleged or at all.
  25. That it was after the claimant had resigned that the respondent became aware that the claimant was also working for Innovative Solution for Decision Agriculture Africa Limited (ISDA) while he was employed by the respondent in breach of the employment contract and respondent corporate code of conduct with respect to conflict of interest. RW1 produced a consultancy contract between the claimant and ISDA.
  26. That bonus payment to employees is at the complete discretion of the respondent. The claimant was not entitled to payment of any bonus as at the time of his resignation on 22/1/2019 as the claimant was not in employment as of 1/4/2019, as provided by the bonus rules and key principle of the management bonus scheme.
  27. Furthermore, the claimant's performance had not been assessed under the two key targets being business performance and personal performance as a prerequisite for bonus qualification. That as at the time of claimant's resignation the respondent owed the claimant 2.3 leave days which he had already taken. That respondent responded to the claimant's letter of demand dated 27/3/2019 on 29/3/2019.
  28. That claimant has to date not collected his final dues and certificate of service despite being requested to do so.
  29. That the claimant is not entitled to the reliefs sought.
  30. Under cross-examination by Advocate Kadima for the claimant, RW1 stated that re-designation of roles was done upon restructuring of Dudutech. That the claimant had personal issues with the operations manager and RW1 facilitated meetings to help the two resolve their differences. That the claimant was junior to the operations manager.
  31. That the claimant resigned before their differences were resolved. RW1 stated that the claimant resigned after a meeting held on 14/1/2019. The claimant alleged that he was harassed and intimidated. RW1 said that he was only aware of the resignation upon receipt of the letter from the claimant.
  32. RW1 stated that he was not aware of any harassment of the claimant by the MD. RW1 said that the claimant and MD had different version of events. These were just allegations since the claimant did not invoke the grievance procedure in this respect so as to resolve any grievance he had against the MD.
  33. RW1 said that she had informed the claimant that he could continue to serve the three months' notice but the issue of conflict of interest which had just been discovered would be investigated. The notice was mutually waived after a cordial meeting with the claimant. The phone and laptop were taken on 14/1/2019. RW1 stated that the claimant worked for ISDA in violation of respondent's policy on conflict of interest.
  34. RW1 said that the MD denied using vulgar language and/or assaulting the claimant. The meeting of 14/1/2019 was convened to investigate the issues. The respondent was willing to resolve the differences between the claimant and the MD if any. The claimant however walked out of employment when matter of conflict of interest was raised.



## Determination

35. The parties filed written submissions which the court has carefully considered together with evidence adduced by CW1 and RW1. The issues for determination are: -
- i. Whether the claimant has proved a case of constructive dismissal on a balance of probabilities.
  - ii. Whether the claimant is entitled to the reliefs sought.
36. On 14/1/2019, the claimant wrote to the respondent as follows: -
- “I would like to inform you that I will resign from my role of commercial manager Dudutech, three months from today (Monday 14<sup>th</sup> January 2019); therefore, effectively ceasing to be an employee with the Flamingo Horticulture Group and as such with Dudutech Limited Kenya. Therefore, from 15<sup>th</sup> April 2019, I will stop being an employee at Dudutech Limited, Kenya
- Sincerely yours
- Isaac Tongola”
37. The other letter produced by the claimant is an email dated 22/1/2019 written to RW1 as follows:-
- “Thank you for your time today, to discuss with me, following my recent resignation. As discussed and agreed between yourself, Dennis (in cc here) and myself today at Head office Nairobi, I would like for Flamingo Horticulture Kenya Ltd/Dudutech Kenya Ltd, to waive for me the three-month resignation period including all the obligations attached to the notice period.
- In this connection and as agreed with yourself and Dennis, I would like that the resignation be effective starting today 22<sup>nd</sup> January 2019.
- Much obliged
- Isaac Tongola”
38. On the same date RW1 responded to the email as follows:
- “Dear Isaac,
- This is to confirm that I am in receipt of your email and do accept your resignation with effect from 22<sup>nd</sup> January 2019. I will work on your final dues and provide the same to you for your review.
- Thanks
- Margaret”
39. On 14/1/2019, the date of resignation, the claimant had written to Dennis Mwangi a lengthy letter copied to many other members of staff titled ‘follow up to resignation’.
40. In the said letter also addressed to RW1 and three other staff named Dennis, Angale and Tabitha, CW1 explained the events that took place between the claimant and the MD, Tom at a meeting that took place at the MD’s office on the day the alleged confrontation between the claimant and the MD took place when the MD allegedly snatched the work phone and the laptop from the claimant. That this



took place on the day the claimant resigned with the intention of serving three months' notice which position was subsequently revised after a meeting between the claimant and RW1.

41. RW1 had by a letter dated 17/1/2019 written to the claimant telling the claimant that upon his resignation on three months' notice he should be committed to serve until 15/4/2019. That the complaint by the claimant against the MD on the events that took place on 14/1/2019 remained a grievance which remained to be substantiated and was not a dispute as such.
42. RW1 educated the claimant on the grievance procedure to be followed to resolve the issue including the right to be accompanied by a staff of choice at a meeting to be convened to resolve the issue. These are events that took place between the date of tendering the letter of resignation on 14/1/2019 and the agreement to waive the notice period on 22/1/2019 that led to separation of the claimant and the respondent.
43. It must be noted at the outset that the burden of proving that a constructive dismissal took place lies on he who alleges in terms of section 107 and 108 of the *Evidence Act* Cap 80 Laws of Kenya.
44. Constructive dismissal is well explained in the case of *Nahan Ogada Atagaya versus David Engineering Limited* [2015] eKLR as follows: -

“Constructive dismissal occurs when an employee resigns because their employer’s behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge.”
45. The position was elaborated by the Court of Appeal in the case of *Coca Cola East and Central Africa Limited versus Maria Kega Liganya* [2015] eKLR wherein the legal principles defining constructive dismissal were set out in details as follows:
  - i. What are the fundamental or essential terms of the contract of employment?
  - ii. Is there a repudiatory breach of the fundamental terms of the contract through the conduct of the employer?
  - iii. 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.
  - iv. An objective test is to be applied in evaluating the employer’s conduct.
  - v. 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.
  - vi. An employee may leave with or without notice so long as the employer’s conduct is the effective reason for termination.
  - vii. The employee must not have accepted, waived, acquiesced, or conducted himself so as to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
  - viii. The burden to prove repudiatory breach or constructive dismissal is on the employee.
  - ix. Facts giving rise to repudiatory breach or constructive dismissal are varied.



46. In short there must be a fundamental breach of the contract of employment proven upon application of an objective test to reach the conclusion that the employee had no choice but to leave the employment of the employer with or without notice. This is what is called repudiatory breach or constructive dismissal.
47. According to the testimony by RW1, matters leading to the separation of the claimant from the respondent happened very fast and around a personal dispute between the MD of the respondent and the claimant. That the HR Department intended to resolve the dispute but the claimant had already tendered a letter of resignation before invoking the grievance procedure of the company.
48. The MD was the top authority at the Dudutech where the claimant worked. The events that took place in front of many staff between the claimant and the MD which facts have not been placed in dispute by the MD who chose not to attend the hearing and contradict his conduct on 14/1/2019 and his impugned behavior against the claimant over time leave the court with only one uncontroverted side of the story.
49. RW1 told the court clearly that she only became aware of the grievance by the claimant against the MD upon receipt of the letter of resignation and her attempt to intervene and resolve the issue was too late in the hour. RW1 was evidently only able to mitigate the circumstances of the separation by accepting to waive the three (3) months termination notice already given by the claimant.
50. The court is of the considered view that the conduct by the MD towards the claimant on 14/4/2019 is a matter that went to the root of the contract of employment between the claimant and the respondent. It was no longer tenable for the claimant to remain in the employment of the respondent serving under the MD who was his supervisor and overall in-charge of the operation of the respondent at Dudutech Naivasha.
51. The MD fundamentally breached the contract of employment between the claimant and the respondent. The resignation by the claimant that followed the happenings of the day, was not voluntary. The claimant needed not put the resignation in writing nor give any formal notice of separation with the respondent. The respondent had already constructively dismissed the claimant from employment. The contract of employment between the claimant and the respondent had been repudiated and could no longer hold.
52. The conduct by the respondent was unlawful and unfair and in violation of sections 36, 41, 43 and 45 of the [Employment Act](#) 2007.
53. The constructive dismissal of the claimant was unlawful and unfair.
54. The issue of the claimant having acted in breach of company policy by consulting for another entity was a matter raised by the respondent only after the separation. It was never an issue between the claimant and the respondent before his resignation. Whether or not the consultancy which was admitted by the claimant was in violation of company policy is only a moot question.

**Reliefs: -**

**Leave days.**

55. The claimant did not tender credible evidence that he had not taken leave for the six months he had served the respondent from 4<sup>th</sup> June 2018 up to 4<sup>th</sup> January 2019. RW1 testified that the claimant had only accumulated 3.2 leave days not taken by the time he separated from the respondent. RW1 tendered leave forms showing that the claimant had indeed exhausted his leave days by the time he tendered his



letter of resignation other than the 3.2 outstanding days. The court awards the claimant Kshs.42,560/= in lieu of leave not taken.

#### **Notice period.**

56. The court having determined that the claimant was constructively dismissed from employment finds that the claimant is in terms of the contract of employment that was repudiated by the respondent, entitled to payment for three months' salary in lieu of notice in the sum of Kshs.1,200,000/=.

#### **Gratuity.**

57. The claimant did not demonstrate that he was entitled to payment of gratuity in terms of his contract of employment with the respondent. The claimant was pensionable upon completion of probation. He had already been confirmed in his employment. This claim fails.

#### **NSSF and NHIF clearance.**

58. These claims have not been substantiated by the claimant and fail for want of prove.

#### **Medical allowance compensation.**

59. This is a special damage that requires specific prove. The same was not proved by the claimant and is dismissed.

#### **Compensation.**

60. Following the decision by the Court of Appeal in the case of Kenfriight (E.A) Limited versus Civil Aviation Ltd. Benson K. Ngutu, 2006 eKLR, the ELRC is bound to consider award of damages only in terms of section 49 of the *Employment Act*, 2007 upon making a finding of dismissal of an employee.
61. It is not appropriate to award exemplary or aggravated damages in addition to the award of compensation or general damages on the same finding of unlawful and unfair dismissal.
62. Of course, if the case presents violation of human rights and fundamental freedoms, which are proved during trial in addition to the dismissal from employment which is not the case in the present matter, the court may consider awarding additional damages.
63. In the present matter, the claimant had only served the respondent for a period of six months. The claimant has already been awarded three months' salary in lieu of notice by the court and other terminal benefits. The claimant failed to collect certificate of service and other terminal benefits paid to him. The claimant lost good prospects of career advancement to retirement in a well-paying job and thus suffered loss and damage.
64. The claimant has not been compensated for the loss. The court finds that the claimant did not contribute to the dismissal but was unlawfully forced out of it.
65. The court awards the claimant the equivalent of two months' salary in compensation for the unlawful and unfair dismissal in the sum of Kshs.800,000/=.
66. In the final analysis judgment is entered in favour of the claimant against the respondent as follows: -
- a. Kshs.1,200,000 in lieu of three months' notice.
  - b. Kshs.42,560/= in lieu of 3.2 leave days not taken.
  - c. Kshs.800,000/= being two months' compensation for unlawful constructive dismissal



Total award Kshs.2,042,560/=

- d. Interest at court rates from date of judgment till payment in full.
- e. Costs of the suit

**DATED AT NAIROBI THIS 30<sup>TH</sup> DAY OF MAY, 2024.**

**MATHEWS NDERI NDUMA**

**JUDGE**

**Appearance:**

Mr. Kadima for claimant

Mr. Obokoke for respondent

Mr. Kemboi, Court Assistant

