



**Mbito v Kenya Meat Commission (Cause 924 of 2016)
[2024] KEELRC 1837 (KLR) (12 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1837 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 924 OF 2016
SC RUTTO, J
JULY 12, 2024**

BETWEEN

IRENE KAPCHEBAI MBITO CLAIMANT

AND

KENYA MEAT COMMISSION RESPONDENT

JUDGMENT

1. Through a Statement of Claim which was amended on 11th August 2016, the Claimant avers that she was an employee of the Respondent from August 2009 to July 2013. She avers that her contract was renewed vide a letter dated 4th July 2012 and she was promoted to the position of Acting General Manager Legal and Human Resource.
2. According to the Claimant, she continued to diligently perform her duties in her new capacity until 28th May 2013, when she decided to tender her resignation. It is the Claimant's case that she resigned under duress as she was forced out by the Respondent's Board which in its meetings recommended her immediate termination.
3. The Claimant further avers that throughout her tenure at the Respondent, she constantly requested to be paid non-practice allowance as per the circular for legal officers in the Public Service, but the Respondent declined to pay her until her exit.
4. It is against this background that the Claimant prays for the following reliefs against the Respondent:
 - a. A declaration that the Respondent's actions/decision to withhold and/or refuse and/or fail to pay her terminal dues is a breach of the Claimant's terms of service.
 - b. An order that the Claimant be paid the three month pay in lieu of notice Kshs. 750,000.00.
 - c. An order that the Claimant be paid prorated Gratuity for every year worked till August 2013 the end of her contract period.



- d. $31\% \times 250,000.00 \times 3 \frac{1}{2} \text{ years} = \text{Kshs.}271,250.00.$
 - e. An order that the Claimant be paid 73.5 outstanding leave days amounting to Kshs 612,499.00 with interest from the date of filing suit.
 - f. An order that the Claimant be paid Non Practicing allowance of Kshs.40,000.00 per month for $3 \frac{1}{2}$ years worked amounting to Kshs.1,680,000.00.
 - g. An order that the Claimant be paid 12 months' salary pursuant to Section 49 of the Employment Act for unfair loss of employment and wrongful termination of employment amounting to Kshs. 3,000,000.00.
 - h. A declaration that the Respondent's action to force her to resign was unlawful, actionable and the Claimant is entitled to 12 months' salary in damages.
 - i. The cost of the cause.
5. Opposing the Claim, Respondent denies that the Claimant performed her work diligently throughout her engagement. It is the Respondent's contention that the Claimant failed terribly in her performance when she negligently and/or fraudulently withdrew Kshs. 3,000,000/= from the Respondent's account and misappropriated the same. According to the Respondent, the Claimant submitted her letter of resignation voluntarily and on her own volition. On this account, the Respondent has asked the Court to dismiss the suit with costs.
 6. The Respondent further lodged a Counterclaim against the Claimant for the sum of Kshs 3,000,000/= which it contends the Claimant fraudulently withdrew and misappropriated. Consequently, the Respondent prays for judgment against the Claimant for the said sum of Kshs 3,000,000/= as well as interest and exemplary damages plus costs.
 7. The Claimant did not take the Counterclaim lying down. In her Reply dated 14th December 2016, the Claimant contended that the Counterclaim is sub judice as the Ethics and Anti-Corruption Commission had filed a similar suit against her in the Senior Resident Magistrate's Court at Kajiado, being Civil Suit No. 160 of 2016 which was still pending.
 8. The suit herein was canvassed by way of oral evidence and production of exhibits.

Claimant's Case

9. The Claimant testified in support of her case and at the outset, she sought to adopt her witness statement and the documents filed on her behalf to constitute her evidence in chief.
10. The Claimant stated that her resignation letter was conditionally/partially received and accepted by the Board Chairperson who informed her that the Commission had initiated investigations of financial misappropriation touching on her docket.
11. She was also informed that she was required to put in a response to the various allegations raised by the Board. These related to the withdrawal of Kshs.3,000,000.00 from the Commission's accounts on instructions by the Managing Commissioner. According to the Claimant, the funds were applied for the purchase of animals for the Angolan meat supply.
12. The Claimant further averred that the Respondent informed her that her resignation was accepted subject to her giving a satisfactory explanation on the question of misappropriation of Kshs. 3,000,000.00 which was under probe.



13. The letter further indicated she would instead go on leave and would be entitled to her full salary until the completion of investigations and once the same was completed, her final dues would be settled. She contends that the same has not been settled to date and the Commission is yet to conclude the investigations.
14. The Claimant further averred that her leave period ran concurrently with the purported investigations by the Respondent, during which period she never received any salary.
15. In her view, the Respondent purported to summarily dismiss her from employment.

Respondent's Case

16. The Respondent called oral evidence through its Chief Legal Officer, Mr. Anthony Adamba who testified as RW1. At the outset, Mr. Adamba sought to adopt his witness statement to constitute his evidence in chief. He further produced the list and bundle of documents filed on behalf of the Respondent, as exhibits before Court.
17. It was RW1's testimony that on 18th December 2012, in the course of her employment, the Claimant presented herself to the Commissioner's bank (KCB Kitengela) and withdrew an amount of Kshs. 3,000,000.00 from the Respondent's account which she signed for.
18. When the issue was revealed, investigations by the Board, Inspector of State Corporations and the Ethics and Anti-Corruption Commission, who had the mandate and were thus competent to conduct such investigations, began their investigations immediately.
19. That in the course of the investigations, the Claimant submitted her letter of resignation voluntarily. She further requested to be allowed to immediately proceed on annual leave which was going to run concurrently with her three-month notice of resignation.
20. In her letter of resignation, the Claimant did not mention that she was resigning on account of any duress or undue influence.
21. It was RW1's testimony that the Claimant tendered her resignation when she was already facing investigations by the Respondent and other government agencies into the loss of Kshs.3,000,000.00.
22. In RW1's view, the Claimant's resignation was to run away from the investigations and the eventualities of those investigations.
23. That by virtue of having voluntarily resigned and given adequate notice in line with the Employment Contract, the Claimant ceased to be an employee of the Respondent and as such, the Respondent did not have the mandate of carrying out further investigations into the matter.
24. RW1 further averred that the Claimant was subjected to thorough investigations and that the Inspectorate of State Corporations appointed a team of inspectors to undertake a special audit of the Respondent.
25. Consequently, the Claimant was invited for a meeting by the Inspectorate of State Affairs on the 4th of July, 2013 at the Respondent's Headquarters. The purpose of the meeting was for the Claimant to clarify issues that came to light during the audit.
26. That on or about the 3rd of June 2013, the Chairperson of the Board, wrote to the Claimant acknowledging the receipt of her resignation notice. The acceptance of the resignation notice was subject to the Claimant giving a satisfactory explanation on the question of misappropriation of Kshs. 3,000,000.



27. That while on leave, the Claimant would be required to shed more light on how and under what circumstances during her tenure as Company Secretary she withdrew Kshs. 3,000,000.00 without surrendering the prerequisite documents.
28. That further, payment of terminal dues, was subject to the Claimant being cleared of the allegations of misappropriation of the Commission's funds amounting to Kshs. 3,000,000.00 which were the subject of the investigations.
29. RW1 further averred that the investigations that were done both at the office level and by the audit team found that the Claimant was legally responsible for the misappropriation of the said amount.
30. This led to the Claimant being charged in Court alongside two (2) others with the offence of abuse of office, unlawful acquisition of public property, stealing by servant and conspiracy to commit an economic crime in a criminal case.
31. With respect to the Claimant's claim for non-practice allowance, RW1 averred that the letter dated 11th June 2010 exhibited by the Claimant was written as an advisory to the Solicitor General. That it was neither written nor copied to the Respondent and they were not privy to it prior to its production in these proceedings. According to him, the mere fact that the letter is not even signed only proves that it is a questionable document and is of dubious authenticity.
32. RW1 further stated that the advisory to the Solicitor General did not form part of the terms of engagement between the Claimant and the Respondent. That further, the Claimant never raised the issue of payment of non-practicing allowance with the Respondent. He termed the same as an afterthought and urged the Court to disregard it.

Submissions

33. The Claimant submitted that the Ethics and Anti-Corruption Commission was successful in the criminal case against her in Kajjado and that she had appealed against the said decision. According to the Claimant, it will be untidy for the Respondent to try to claim the same amount of money, which is the cause of action in another pending suit. In her view, the facts surrounding whether she owes the sum of money claimed in the Counterclaim lie for determination before another Court and thus cannot be a cause of action in this suit.
34. Placing reliance on the case of Milton M Isinya v Aga Khan Hospital Kisumu (2017) eKLR, the Claimant submitted that the Respondent created a hostile working environment forcing her to tender her resignation. That she was left with no choice save for involuntarily resigning. It is the Claimant's contention that she was unfairly terminated through the said constructive dismissal. In further support of her submissions, the Claimant sought to rely on the case of Nathan Ogada Atiagaga v David Engineering Limited (2015) eKLR.
35. On its part, the Respondent submitted that the Counterclaim dated 11th November 2016 is not res judicata and should be allowed with costs. Citing the provisions of Section 193A of the Criminal Procedure Code, the Claimant submitted that criminal proceedings can run concurrently with civil, commercial or employment matters and it will not constitute res judicata. In further support of the Respondent's submissions, the Court was invited to consider the determination in the case of James Mutiyasa & 5 others v Alphayo Chimwanga Munala & 2 others (2021) eKLR.
36. The Respondent further posited that by virtue of the Claimant's conviction in the criminal trial, she cannot be presumed innocent in these proceedings. According to the Respondent, the Judgment has neither been stayed nor set aside.



37. It was the Respondent's further submission that the Claimant has not proved constructive dismissal. To this end, reference was made to the case of Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR and Sophie Muthoni Njagi v Railways (Kenya) Limited (2020) eKLR.
38. In further submission, the Respondent stated that the tone in the Claimant's letter of resignation does not reveal any instance of duress as alleged or at all. To this end, the Court was urged to find and hold that the Claimant voluntarily resigned from her employment and thus a case for unlawful termination and/or constructive dismissal did not crystallize.

Analysis and Determination

39. Flowing from the pleadings before Court, the evidence on record and the opposing submissions, the issues falling for determination can be distilled as follows: -
- i. Whether the Claimant was constructively dismissed;
 - ii. Whether the Respondent has proved its Counterclaim;
 - iii. Is the Claimant entitled to the relief sought?

Constructive dismissal?

40. It is common ground that the Claimant resigned from the Respondent's employment through a letter dated 28th May 2013. According to the Claimant, her resignation was not voluntary as she was forced out by the Respondent's Board. Refuting this position, the Respondent has maintained that the Claimant's resignation was voluntary and was out of her own volition.
41. As it is, the *Employment Act*, has not defined the concept of constructive dismissal. Nonetheless, the concept has received considerable attention and has been the subject of many decisions emanating from this Court and the Court of Appeal. Case in point is Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR in which 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.”

42. The learned Judges of Appeal proceeded to formulate guiding principles in respect of claims of constructive dismissal key among them being that, there must be a causal link between the employer's conduct and the reason for the employee terminating the contract, that is, causation must be proved.
43. In the instant case, the Claimant's letter of resignation is partly couched:

“Due to unavoidable circumstances and after reflecting on my future career development, I hereby tender a three (3) months' notice resignation as per my letter of appointment...”

44. Revisiting the principles formulated in the case of Coca-Cola East & Central Africa Limited v Maria Kagai Lugaga [supra] and bearing in mind the definition of the term constructive dismissal, it is clear



that in order to sustain a claim for constructive dismissal, the Claimant was duty bound to demonstrate that there was a fundamental breach of the employment contract and that the resignation was as a result of the Respondent's conduct.

45. Differently expressed, it was incumbent upon the Claimant to prove that the actions of the Respondent triggered her resignation and that she resigned in response to the breach.
46. More importantly, the Claimant was required to establish a causal link between the Respondent's conduct and the reason for her resignation.
47. In this case, it is apparent that the Claimant did not indicate let alone suggest that she was resigning due to duress from the Respondent's Board. She only cited unavoidable circumstances whose details she did not disclose.
48. Needless to say, the Claimant did not prove that there was a causal link between the alleged duress by the Respondent's Board and her resignation. As a matter of fact, there was no nexus between the Claimant's resignation and the Respondent Board's conduct.
49. Quite the contrary, the Claimant highlighted what she considered her achievements at the Respondent Commission and thanked the Board Chairman, the Board members and her colleagues for the support given to her during her four-year tenure. As a parting shot, she wished everybody success in their endeavours.
50. There was no indication of her dissatisfaction with the Respondent's Board. If anything, she seemingly, left on a positive note. As such, I am led to question why the Claimant later changed tune and cited duress.
51. During cross-examination, the Claimant stated that the document containing an analysis of the livestock purchase proves that she was under duress. Be that as it may, that fact alone does not constitute constructive dismissal. On this issue, I wish to echo the sentiments expressed by the Court in the case *Stella W. Muraguri v Edward Kamau Muriu & 4 others* [2022] eKLR, thus:

“ 44. To my mind, not every involuntary resignation amounts to constructive dismissal. The threshold for constructive dismissal is achieved where the involuntary resignation has a direct causal link with the employer's conduct, which may reasonably be described as intolerable. It cannot be said to be constructive dismissal, when an employee resigns to get out of a tight spot.”
Underlined for emphasis

52. The upshot of the foregoing is that the Claimant has failed to prove on a balance of probabilities that her resignation from employment was involuntary and amounted to constructive dismissal.

Counterclaim

53. As stated herein, the Respondent lodged a Counterclaim against the Claimant for the sum of Kshs. 3,000,000.00. The Respondent avers that the Claimant withdrew the said amount of money from its account and misappropriated the same.
54. In her Reply to the Counterclaim, the Claimant contends that a similar suit was filed against her by the Ethics and Anti-Corruption Commission in the Senior Resident Magistrates Court at Kajiado and that the same was still pending.



55. It is notable that during the hearing, the Claimant testified that she was acquitted of the criminal charges against her. This position is in sharp contrast with the Claimant's submissions in which she stated that the Commission was successful in the criminal trial and that she had appealed the Judgment.
56. In this regard, the Respondent has submitted that based on the Claimant's submissions that she was convicted following the criminal trial, she cannot be presumed innocent in these proceedings.
57. Notably, there is no Judgment before this Court confirming the Claimant's conviction in the criminal trial. Therefore, this remains an unconfirmed fact.
58. Besides, it is trite that the pendency of a criminal suit is not a bar to civil proceedings and that neither can stand in the way of the other provided that such concurrent matters are filed and pursued lawfully and in good faith. Therefore, nothing bars the Respondent from bringing a Counterclaim against the Claimant.
59. As to the substance of the Counterclaim, RW1 stated that the Respondent stopped further internal investigations following her resignation. There is therefore no conclusive report from the Respondent's end confirming that indeed the Claimant was found to have withdrawn and misappropriated the sum of Kshs 3,000,000.00.
60. To this end, the Respondent has not proved its Counterclaim to the requisite standard.

Reliefs?

61. The claim for notice pay and compensatory damages, is declined as the Court has found that the Claimant was not constructively dismissed.
62. The Claimant has further sought to be paid the sum of Kshs 1,680,000.00 being unpaid non-practice allowance for the period she was employed by the Respondent. With respect to this, the Claimant pleaded in her Amended Statement of Claim that she constantly requested and reminded the Respondent to pay her non-practice allowance but it declined to make payment until her exit.
63. In support of her case, the Claimant exhibited a copy of a letter dated 11th June 2010 from Mr. Titus Ndambuki, of the then Office of the Prime Minister addressed to the then Solicitor General Mr. Wanjuki Muchemi. The letter which constitutes an advisory, is referenced; "Rationalization and Harmonization of the Public Service Legal Sub-Sector Remuneration."
64. Despite her assertions, the Claimant did not lead evidence to prove that she requested the Respondent to pay her non-practice allowance based on the aforementioned advisory.
65. Further to the foregoing, it is worth noting that the advisory reads in part: "In the meantime, the Board has agreed only to the enhancement of non-practice allowance as follows..."
66. My interpretation of the aforementioned expression is that the non-practice allowance was being enhanced as opposed to being introduced afresh. Therefore, it is presumed that the terms of the advisory were only applicable in instances where the non-practice allowance was already being paid.
67. A perusal of the Claimant's contract of employment reveals that she was not earning non-practice allowance. Therefore, it would be preposterous to conclude that she was entitled to earn non-practice allowance solely on account of the said advisory.
68. In any event and as I have stated herein, there is no evidence that the Claimant requested the Respondent to pay her non-practice allowance. As such, the Court declines to grant this relief.



69. With respect to unpaid leave days, the Claimant has sought to be paid the sum of Kshs 612,499.00. It is notable that in her resignation letter, the Claimant requested to proceed on her leave which was to run concurrently with her notice of resignation.
70. From the record, the Respondent through its letter dated 3rd June 2013, advised the Claimant that it had reviewed and accepted her request to proceed on her accumulated leave. This being the case, the issue of unpaid leave does not arise in the circumstances and for that reason, the claim to that extent flops.
71. The claim for unpaid gratuity succeeds as there is no evidence that the Respondent has settled the same. Further, the Respondent did not present a justified reason for the continued withholding of the Claimant's gratuity. This is further noting that RW1 stated in his testimony that it dropped internal investigations following the Claimant's resignation.

Orders

72. In the final analysis, the claim substantially fails and only succeeds to the extent of unpaid gratuity being the sum of Kshs 271,250.00 which the Claimant is entitled to. Interest shall apply on the said amount from the date of filing the suit until payment in full.
73. The Counterclaim is dismissed.
74. As the Claim has substantially failed, each party shall bear its own costs of the Claim and the Counterclaim.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2024.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Ms. Kariuki instructed by Mr. Gitonga

For the Respondent Mr. Ogoro

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 15th March 2020 and subsequent directions of 21st 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

