



**Nyabuti v East African Safari Express Limited (Employment and Labour Relations Cause E682 of 2022) [2024] KEELRC 2064 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2064 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E682 OF 2022**

**AN MWAURE, J**

**JULY 26, 2024**

**BETWEEN**

**FELIX ONGAGA NYABUTI ..... CLAIMANT**

**AND**

**EAST AFRICAN SAFARI EXPRESS LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant filed a Claim dated September 15, 2022.

**Claimant's Case**

2. The Claimant avers that he entered into a contract of service with the Respondent as an accountant vide an agreement dated 1/9/2013 signed on 19/9/2013.
3. The Claimant avers that at the commencement of the contract his salary was Kshs. 100,000 increasing to Kshs 165,388/- at the time of termination.
4. The Claimant avers that he fulfilled his contractual duties and obligations as an employee until 31/5/2020 when he unwillingly resigned.
5. The Claimant avers that the Respondent neglected and refused to pay his dues from December 2019 to May 2020 forcing him to resign due to frustration.
6. The Claimant avers that he wrote severally to the Respondent requesting settlement of his salary arrears, however, the Respondent neglected to respond to any of his letters.
7. It is the Claimant's case that the Respondent's failure to pay his salary dues for 6 months accumulating to Kshs 744,246 amounts to fundamental breach prompting his termination of contract by way of resignation.



8. The Claimant avers that the Respondent's actions has caused him mental anguish, severe financial strain and he has become indebted to others due to continuous borrowing and struggle to earn a living.

### **Respondent's Case**

9. The Respondent's case is undefended as respondent has not entered appearance in the matter or filed its defence on the same.

### **Evidence in Court**

10. The Claimant (CW1) adopted his witness statement dated 15/9/2022 as his evidence in chief and his list of documents dated 15/9/2022 produced as his exhibits 1-6. He further relies on his memorandum of claim.

### **Claimant's Submissions**

11. The Claimant submitted that as per the letter of employment dated 1/9/2013, there was a legitimate expectation that the Respondent would remit is salary dues as per the terms of the contract. Evidently, the Respondent is in breach in failing to remit his salary when it fell due from December 2019 to May 2020.
12. It is the Claimant's submission that he was compelled to terminate his employment involuntarily resulting from hardships occasioned by working for the Respondent for months without pay.
13. The Claimant relied on the guiding principles in determining constructive dismissal set in Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR; he submitted that he was compelled to tender his resignation subsequent to the Respondent's failure to disburse his salary for a duration of 6 months. His resignation was a direct consequence of the Respondent's conduct which induced intolerable working conditions.

### **Analysis and Determination**

14. The main issue for this court's determination is whether the Claimant was constructively dismissed from employment.
15. The court of appeal in Coca Cola East and Central Africa Limited versus Maria Kagai ligaga, (2015) eKLR, set out the legal principles for determining constructive termination and the principles are as follows:
  - 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 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.”

16. Further, in *Mokaya v Christ the King Parish & another (Cause 386 of 2015)* [2024] KEELRC 28 (KLR) (25 January 2024) (Judgment) the court held:-

“It is the evidence on record that the claimant worked for the respondents, with a good disciplinary record, for the period from January, 2013 to July, 2015. There is no evidence that the respondents were experiencing financial challenges at the time they defaulted in paying the monthly salary to the claimant; there is no evidence of low enrolment in the school; and there is no evidence that the respondents contacted and or discussed the delay or non-payment of the monthly salary with the claimant.

Applying the principles set out by the Court of Appeal in *Coca Cola East & Central Africa Limited V Maria Kagai Ligaga (Supra)* to the evidence and the circumstances of this cause, it is clear and unambiguous that the claimant resigned due to the unilateral decision by the respondents not to pay her monthly salary for three consecutive months. Non-payment of salary to an employee who is working as expected and directed is such a fundamental breach of the contract of employment as it subjects an employee to unfair labour practices under Article 41 of *the Constitution*. Further, non-payment of salary or wages as and when the same falls due and payable subjects an employee to servitude, undue suffering, and indignity.

An employer who is unable to pay working employees shall take remedial measures at the earliest opportunity. Such an employer may negotiate on a mutually agreeable structure of offsetting such arrears or even declare the affected employees redundant under Section 40 of the Act.

It is therefore the finding and holding of this court that the resignation of the claimant was neither voluntary nor of free-will but was occasioned by the unbearable working environment that was created by the respondents through non-payment of the monthly salary for three consecutive months as alluded to above. The respondents subjected the claimant to unfair working conditions and practices and failed to meet their legal obligations as employers. They breached a fundamental term of the contract.

The evidence of non-payment of the said salaries is on record with the respondents even making a failed attempt to pay the same two years after termination in 2017 when this cause was pending in court. The court has no difficulties in declaring that the respondents by their conduct constructively dismissed the claimant as pleaded.”



17. Additionally, in the case of Henry Ochido v NGO Co-ordination Board [2015] eKLR the court observed as follows:

“Constructive dismissal or discharge has been defined by the Court in Nathan Ogada Atiagaga versus Davis Engineering Cause No.419 or 2014 as follows:

Constructive dismissal, occurs when an employee resigns because their employers 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..

Due to the conduct of an employer that make the work environment intolerable, the employee is thus forced to tender his resignation. As submitted by the Petitioner in the case of Emmanuel Mutisya Solomon versus Agility Logistics, Cause No, 1448 of 2011, and the basics of a constructive dismissal can be described as,

... Situation in the workplace, which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee to such an extent that the employee has no other option available but to resign. The concept of constructive dismissal is underpinned on the notion that there is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or highly likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Breach of that implied term will entitle the employee to treat him or herself as wrongfully dismissed.

The intolerable conditions set by the employer are of the nature that the continued employment of employee is not tenable and he has to resign. Thus, by the conduct of the employer there is a fundamental breach of the contract of employment, such breach has no reasonable cause, and such conduct has severely damaged the employment relationship. Such are matters that an applicant, Petitioner or claimant must address when claiming constructive dismissal.”

18. In the instant suit, the Claimant herein has not provided any evidence in court that within the said 6 months his salary was not paid and he never raised any concern with the Respondent on the same.
19. In his resignation letter dated 4/5/2020, the Claimant stated that:- “I have decided to make this painful decision so that I can have ample time to pursue my studies further.” He went further to write that working with the respondent and the rest of the team had been a positive experience and he was grateful for the same. The court is surprised the claimant never raised the issue of non payment of his salary for a whole six months during the time of his employment and he did not allude to it in his resignation letter.
20. The court noted the respondent did not controvert the claimant’s claim but again the claimant resigned from his employment and it seems from the tone of his resignation letter he did so voluntarily. He even gave a notice from 4<sup>th</sup> May 2020 to 30<sup>th</sup> May 2020.
21. In view of the foregoing, the Claimant has failed to prove that his employment was constructively dismissed as provided under Section 47(5) of the [Employment Act](#) which states: -

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred



shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

22. The court cannot grant prayers that are unsupported in any way and so the prayers by the claimant in his statement of claim dated September 15, 2022 are found to be unmerited and so the claim by the claimant fails.

23 The court orders each party to meet their respective costs of the suit.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26<sup>TH</sup> DAY OF JULY, 2024.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

