



**Otieno v Chemelil Sugar Company Ltd (Cause E013 of 2023)  
[2024] KEELRC 1795 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1795 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E013 OF 2023  
CN BAARI, J  
JULY 11, 2024**

**BETWEEN**

**FRANCIS ODUOR OTIENO ..... CLAIMANT**

**AND**

**CHEMELIL SUGAR COMPANY LTD ..... RESPONDENT**

**JUDGMENT**

1. In a Memorandum of Claim dated 20<sup>th</sup> February, 2023 and filed in court on 8<sup>th</sup> March, 2023, the Claimant impleaded the Respondent seeking the following orders: -
  - i. A declaration that his suspension was in contravention of the Respondent’s Human Resource Policy, 2018.
  - ii. A declaration that the disciplinary process that he was subjected to was contrary to the rules of natural justice and the Claimants right to fair administrative procedures.
  - iii. A declaration that the Respondent constructively dismissed him from employment.
  - iv. Issuance of a certificate of service.
  - v. An order compelling the Respondent to remit NSSF contributions that it deducted from the Claimant’s salaries and failed to remit.
  - vi. An order compelling the Respondent to remit the Claimant’s contributions to Chemelil Sugar Company Staff Retirement Scheme deducted from his salary, but not remitted amounting to Kshs 1,880,958.00/=
  - vii. An award of Kshs 6,443,465.40/= comprising of:
    - a. Two months’ salary in lieu of notice Kshs 217,172.2/=



- b. Salary arrears of Kshs 4,923,260/=
  - c. An award of Kshs 12 months' salary being compensation for unlawful termination of employment Kshs 1,303,033.2/=
    - i. Costs of the suit.
    - ii. Interests on (vii) and (viii) above from the date of filing the claim at court rates until payment in full.
2. Through a Response to the Statement of Claim dated 5<sup>th</sup> April, 2023 and filed in court on 11<sup>th</sup> April, 2023, the Respondent refuted the allegations in the Memorandum of Claim and invited the Claimant to strict proof thereof.
3. The matter proceeded for hearing on 30<sup>th</sup> October, 2023 and 20<sup>th</sup> November, 2023 with the Claimant testifying on his own behalf and one Constance Muyite, the Respondent's head of Human Resource testifying for the Respondent.
4. Thereafter, both parties filed written submissions.

### **The Claimant's Case**

5. It is the Claimant's contention that he was engaged by the Respondent as a management trainee in the year 2000 and that he worked until 31<sup>st</sup> October, 2022 when he was constructively dismissed. It is his case that at the time of dismissal, he was the Nucleus Estate Manager earning Kshs 108,586.10/= per month.
6. The Claimant's case is that after inspection of field A8 on 24<sup>th</sup> June, 2022, in the company of the head of agriculture and the Managing Director, he was suspended from duty. He contends that the suspension was on account of failure to ensure timely weeding, failure to maintain weeding standards and approving payment of Kshs 57,750/= in the absence of proper weeding.
7. In his defence, the Claimant avows that the visit having been conducted four weeks after weeding, meant that the weeds had already grown back. He further states that the Respondent had failed to pay weeding contractors resulting in diversion of labour from field A8.
8. It is the Claimant's further case that the disciplinary committee being composed of his accusers was impartial. This he states was because it constituted of the head of agriculture and the security manager who had taken an adversarial position on his case.
9. The Claimant avers that after the disciplinary hearing, he was issued with a letter of reinstatement which did not contain the reasons for reinstatement. He contends that the letter was in breach of his employment contract as it provided for allocation of duties without consultation.
10. It is the Claimant's case that his employment was fraught with breaches of contract by the Respondent as he was denied allowances, not paid full salary, placed in the wrong job group, made to work in more than one position without compensation, and removed from the staff retirement benefit scheme.
11. The Claimant case is that the foregoing maltreatment is what forced him to resign.

### **The Respondent's Case**

12. On its part, the Respondent contends that the Claimant was taken through the rightful disciplinary procedure as stipulated by its human resource policy. It contends further that the disciplinary action was informed by valid reasons bordering on professional negligence.



13. In restating the disciplinary procedure, it is the Respondent's case that the Claimant was invited for a disciplinary hearing on 29<sup>th</sup> July, 2022, which he attended and made representation.
14. That at the end of the disciplinary process, it is the Respondent's contention that the Claimant was reinstated and issued with a warning, and it therefore came as a surprise when he resigned from their employment.
15. It is the Respondent's case that it did not in any way intend to frustrate the Claimant, but was only carrying out due diligence to ensure the farms were well tended.
16. It is the Respondent's further case that it indeed owes the Claimant unpaid salary of Kshs 3,001,654.00/=, gratuity of Kshs 301,638.41/= and unremitted NSSF contributions of Kshs 67,000/= which it had not paid due to financial constraints. The Respondent asserts that it had undertaken to clear the amounts within 5 years.
17. In conclusion the Respondent contends that the suit is unmerited as the Claimant voluntarily resigned, which resignation was duly accepted.

### **The Claimant's Submissions**

18. It is the Claimant's submission that he is entitled to salary arrears from January 2017 to October, 2022, amounting to Kshs 4,923,260/=. He places reliance on the schedule of arrears produced as Claimant's exhibit 1 and urges the court to also consider the Respondents' witness testimony acknowledging he was owed Kshs 3,001,654.00/= in unpaid salary among other dues.
19. The Claimant strongly urges the Court to place more weight on his computation as the Respondent had not produced any evidence to back its computation.
20. On the unremitted NSSF and Retirement Benefits, the Claimant strongly reiterates the amounts sought under the Memorandum of Claim. He draws the Court's attention to the Respondents' witness statement acknowledging non-remittance due to financial constraints.
21. In respect of constructive dismissal, the Claimant submits that the Respondent's conduct is instructive. He avers that his unfair treatment during the disciplinary process and the fundamental breaches of his contract forced him to resign. The Claimant submits that the Respondent's condition that he was only to be reinstated upon signing a warning letter, is prove of such breach.
22. In highlighting additional breaches of contract, the Claimant submits that he was paid a quarter of his salary during suspension instead of half, that his suspension period was extended beyond the 30-day period, and that he was issued with conditional reinstatement contrary to the policy document and the disciplinary committee comprised of his accusers.
23. The foregoing actions the Claimant submits, were of a repudiatory nature and infringed on his right to fair labour practices. He cites the book, *'Honey Ball and Bowers' Text book on Employment Law 13<sup>th</sup> Ed Oxford (2014) page 335*, which mentions a deliberate reduction in pay as a classic case of repudiation of contract.



24. It is the Claimant's further submission that he was subjected to unfair labour practices. He cites a litany of authorities among them *Joseph Maina Theuri v Gitonga Kabugi & 3 others* [2017] eKLR, where the court stated that: -

“the fulcrum of employment relationship in this country is fair labour practices as envisaged under Article 41 of the *Constitution*. What is fair, straddles and goes beyond what is lawful or legal.”

25. The Claimant further submits that the Human Resource Policy was sanctified and amounted to a written agreement. He urged this court to consider it as an agreement based on the case of *Kenya Plantation and Agricultural Workers Union v. Kenya Cuttings Limited* [2013] eKLR.

26. Regarding suspension, the Claimant submits that there should be a distinction between administrative and punitive suspension as enunciated in the case of *Donald Avula v Kenya Forest Services* [2015] eKLR where it was stated that: -

“Suspension being a process not provided for by law, must be considered in line with the criteria set in the decision of the Supreme Court of Canada in the case of *Cabiakman v Industrial Alliance Life Insurance Co.* [2014] 3 SCR 195, 2004 SCC 55. The Court in this case distinguished "disciplinary" suspension. For purposes of the case, disciplinary suspension was defined as "punitive measure for a reproachable act made during work, while administrative suspension is a preventive measure which can be taken when the interest of the employee's business requires it, even in absence of an act made by the employee while working.

In the *Cabiakman case*, the Court set the criteria for administrative suspension as follows: sufficient link between the reproached act and the type of employment; the nature of the accusations; the existence of reasonable grounds to believe that maintaining, even temporarily, the employment relationship would be prejudicial to the employer or his reputation; the existence of immediate important inconvenience that cannot be practically countered by alternative measures for example: assigning the employee to another post; and, the necessity of protecting the public,"

27. In urging that his rights while on administrative leave were breached, the Claimant relies on the case of *Naomi Achieng Oketch & 3 others v Seed of Peace International and another* [2021] eKLR. where the court held:-

“The onus is on the employer to demonstrate to court on a civil standard of proof that a reasonably serious and immediate risk to the employer's legitimate interests exist. In other words, in order for a suspension to be held justified, there must be shown, to be present legitimate business reasons.”

28. The Claimant prays that his claim be allowed as prayed.

### **The Respondent's Submissions.**

29. The Respondent on its part submits that despite finding the Claimant culpable for wrongdoing, it reinstated him. It therefore avows that the allegations that it dismissed the Claimant were unfounded.



30. In respect of the remedies sought, the Respondent submits that the Claimant had not cleared as required by the Human Resource Policy and therefore they could not process his terminal dues. In this regard, the Respondent submits that the suit is premature

### **Analysis and Determination**

31. Upon an extensive analysis of the pleadings, exhibits produced, oral testimonies and the rival submissions, the following issues crystalize for determination: -
- i. Whether the Claimant was constructively dismissed
  - ii. Whether the Claimant is entitled to the remedies sought.

### **Whether the Claimant was constructively dismissed**

32. The Claimant's contention is that the manner in which he was treated, starting with how the disciplinary proceedings were conducted, being denied allowances, non-remission of statutory dues, being subjected to unjustified suspension periods, and not being paid full salary while on suspension, amounted to constructive dismissal.
33. The Respondent denies having constructively or at all dismissed the Claimant. It asserts that the Claimant was only warned and instructed to resume work after the disciplinary hearing, and that his resignation was on his own volition. It states further that all it did was accept the Claimant's resignation.
34. Lord Denning in *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344, described constructive dismissal in the following words: -

“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 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. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”

35. The test for constructive dismissal was further set out in the South African case of *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 ILJ 981 (LAC) as follows:

“Where an employee resigns or terminates the contract as a result of constructive dismissal, such employee is, in fact, indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee's most important function, namely to work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears



were unfounded, then she has not been constructively dismissed and her conduct proves that she has in fact resigned.”

36. To construe constructive dismissal, the Respondent’s conduct must be judged objectively vis-a-vis the employee’s action. In the case of *Murray v Minister of Defence* (2008) 29 ILJ1369 (SCA), the court held:

“It is not sufficient for an employee to establish that he or she was subjected to intolerable conditions. More is required. The employer must be culpably responsible in some way for the intolerable conditions. The employer’s conduct must have lacked reasonable and proper cause.”

37. It is therefore imperative that the employee must prove that the employer was actually responsible for introducing, enhancing or permitting an intolerable condition, and for the court to further ascertain that there was no other way of resolving the dispute except for resignation.

38. The Claimant resigned from the employ of the Respondent based the Respondent’s demand that he should acknowledge receipt of a warning letter as a condition for reinstatement. The Court further notes that after taking the Claimant through a disciplinary process, the result was a warning and a purported reinstatement.

39. The show cause and suspension letter dated 27<sup>th</sup> June, 2022, indicates that the Claimant was to be on half pay while on suspension. The Respondent has not adduced any evidence to rebut the Claimant’s assertion that he was paid salary at a quarterly rate during the suspension period.

40. Secondly, suspension is an interruption in the performance of the obligation inherent in the employment contract, but does not in any way amount to termination of the employment relationship. To therefore purport to reinstate a suspended employee as an outcome of a disciplinary process is untenable. To be reinstated, one must have been dismissed/terminated from service.

41. The issuance of the letter of reinstatement and reallocation of duties, was merely an attempt by the Respondent at reviewing the Claimant’s contract terms through the back door.

42. The totality of the Respondent’s conduct against the Claimant, does without doubt constitute repudiatory breach of contract, and which by all means entitled the Claimant to treat himself as having been discharged. (See *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga* (2015) eKLR).

43. The essentials of the Claimant’s contract were grossly breached, and which breaches, the Respondent has not rebutted.

44. In the premise, this Court returns that the Claimant was constructively dismissed.

### **Whether the Claimant is entitled to the remedies sought**

#### **Unremitted NSSF Contributions**

45. The Claimant asserted that the Respondent deducted NSSF contributions from his salary but did not remit them. He alludes to an NSSF statement which is missing in his documents. The Respondent acknowledges owing Kshs 67,000/= in unremitted NSSF dues.

46. From the foregoing it is evident that indeed, there are unremitted NSSF dues in respect of the Claimant’s deductions.



47. This court is alive to the fact that NSSF is a statutory body with the power to ensure remission of employee deductions. This court will however not close its eyes on the Respondent's admission that it indeed deducted but failed to remit NSSF deductions on behalf of the Claimant and for this reason, I proceed to order that the amount deducted and admittedly not remitted, be remitted to the NSSF not later than 30 days of this order.

#### **Unremitted contributions to the Chemelil Sugar Staff Retirement Benefits Scheme.**

48. The Claimant sought Kshs 1,880,958/= in deducted but unremitted contributions. It is evident that indeed the Claimant was admitted to the Respondent's staff pension scheme and the Respondent by its own admission told court that due to financial constrain, it has not been in a position to remit the deductions but which it promises to do so within a period of 5 years.
49. The Claimant has not led evidence to prove the actually amount owed in this respect and the Court will in the premise order that the Claimant pursues payment with the Chemelil Sugar Staff Retirement Benefits Scheme pursuant to the Retirement Benefits Act, which in any event, divests this court of jurisdiction on such matters.

#### **Salary in lieu of notice.**

50. Having found that the Claimant was constructively dismissed, it follows that he is entitled to pay in lieu of notice. His employment contract carries a two months' notice period, hence this prayer is allowed as prayed.

#### **Salary Arrears**

51. The Claimant sought Kshs 4,923,260/=. On its part, the Respondent acknowledged owing Kshs 3,001,654.00/= on account of salary arrears. Although the Claimant has produced statements from his SACCO, the same are not prove of what he is owed as salary arrears.
52. In the premise, I proceed to award salary arrears in accordance with the Respondent's computation being Kshs 3,001,654.00/=

#### **Compensation**

53. Having found that the Claimant was constructively dismissed, and taking into consideration that he was in the service of the Respondent for close to 22 years, while also considering the Respondent's admission of financial constraints, I deem an award of 6 months' salary as sufficient compensation for the dismissal.
54. In the final analysis, the claim succeeds in the following terms: -
- a. A declaration that the Claimant was constructively dismissed
  - b. An order compelling the Respondent to remit NSSF contributions deducted from the Claimant's salary to NSSF in the sum of Kshs. 67,000/- within 30 days of this order.
  - c. Two months' salary in lieu of notice at Kshs. 217,172.20/-
  - d. Salary arrears at Kshs 3,001,654/-
  - e. Six (6) months salary as compensation for unfair termination at Kshs. 651,516/-
  - f. Costs of the suit and interest until payment in full.



55. It is so ordered.

**DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 11<sup>TH</sup>  
DAY OF JULY, 2024.**

**C. N. BAARI**

**JUDGE**

Appearance:

Mr. Jeji h/b for Ms. Dima for the Claimant

N/A for the Respondent

Ms. Debra O. – CA

