



Mwinyihaji v David Livingstone Limited t/a Mara River Lodge & another (Cause E006 of 2022) [2024] KEELRC 2238 (KLR) (18 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2238 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E006 OF 2022
DN NDERITU, J
SEPTEMBER 18, 2024**

BETWEEN

MWINYI AHMAD MWINYIHAJI CLAIMANT

AND

**DAVID LIVINGSTONE LIMITED T/A MARA RIVER
LODGE 1ST RESPONDENT**

GOPAL PATEL 2ND RESPONDENT

JUDGMENT

I. Introduction

1. The claimant commenced this cause by way of a memorandum of claim dated 24th February, 2022 through Oumo & Company Advocates. As it is the procedure, the statement of claim is accompanied with a verifying affidavit sworn by the claimant, a list of witness, a written statement by the claimant, a list of documents, and a bundle of copies of the listed documents.
2. The claimant is seeking for the following reliefs –
 1. A declaration that the claimant was constructively terminated by the Respondents effective 1st March 2020.
 2. An Order for compensation as follows;
 - a. Salary for the month of February 2020 = Kshs 100,000/=
 - b. One month’s salary in lieu of notice = Kshs 100,000/=
 - c. Leave days not taken for 3 years
(100,000 x 3) = Kshs 300,000/=



- d. Compensation under Section 49(c)
Gross salary x 12 month -100,000x12 =Kshs 1,200,000/=
 - (e) One month's Gross salary in lieu
of notice = Kshs 100,000/=
Total - Kshs 1,800,000/=
 - (f) A certificate of Service as per Section 51 of the *Employment Act*.
 - (g) Costs and interest.
 - h. Any other relief this Honourable court may deem fit to grant.
3. The respondents through S.E. Kinyanjui & Co. Advocates filed a memorandum of appearance on 1st April, 2022 and filed statement of defence and counter-claim. In the statement of defence the respondent denies liability and prays that the claimant's suit be dismissed with costs for want of merits.
4. In the counter-claim the respondents pray for judgment against the claimant in the following terms –
- a. A Declaration that the respondent breached the terms of its employment with claimant by failing to account for the monies.
 - b. An order directing the respondent to pay the claimant:
 - i. USD 900
 - ii. Kenya Shillings 24,000/-
 - c. Interest on (b) above at court rates from the date of filing the suit till payment in full.
 - d. Costs of the claim.
 - e. Interest on (d) above from the date of judgment till payment in full.
5. The claimant filed an amended memorandum of claim and defence to counter-claim on 18th May, 2022 praying that the counter-claim be dismissed with costs and that judgment be entered against the respondents jointly and severally in the following terms –
- 1. A declaration that the claimant was constructively terminated by the Respondents effective 1st March 2020.
 - 2. An Order for compensation as follows;
 - a. Salary for the month of February 2020 = Kshs 100,000/=
 - b. One month's salary in lieu of notice = Kshs 100,000/=
 - c. Leave days not taken for 3 years
(100,000 x 3) = Kshs 300,000/=
 - d. Compensation under Section 49(c)
Gross salary x 12 months –100,00x12 =Kshs 1,200,000/=
= Ksh1,700,000/=
 - (f) A certificate of Service as per Section 51 of the *Employment Act*.



- (g) Costs and interest.
 - (h) Any other relief this Honourable court may deem fit to grant.
6. On 24th January, 2023 the respondents filed an amended defence and counter-claim, a witness statement by Harilal D. Patel (RW1), and an authority to plead and swear documents for the said witness. A list and a bundle of copies of the listed documents was filed on 26th April, 2023.
 7. The claimant filed and served a notice to produce documents/records seeking that the respondents produce the following documents during the trial –
 1. The written Contract of Employment
 2. Itemized pay statements (pay slip)
 3. Statements of Statutory Deductions
 4. Employees annual leave entitlements, days taken, days due.
 5. Employee’s sick and maternity leave records.
 6. Records of warning letters or other evidence of misconduct of an Employee.
 8. The claimant’s case came up for hearing on 30th October, 2023 when the claimant (CW1) testified and closed his case.
 9. The defence was heard on 20th November, 2023 when RW1 testified and the respondent’s case was closed.
 10. Counsel for both parties addressed the court by way of written submissions. Mr Oumo for the claimant filed written submissions on 2nd February, 2024 while Mr Kinyanjui for the respondent filed on 27th February, 2024.

II. The Claimant’s Case

11. The claimant’s case is expressed in the amended memorandum of claim, the oral and documentary evidence adduced by the claimant (CW1), and the written submissions by his counsel.
12. In the amended memorandum of claim, the claimant avers that he was engaged by the 1st respondent, a limited liability company operating tours and offering hospitality services, as a general manager on 1st June, 2017 in a camp in Maasai Mara Game Park.
13. It is pleaded that his last monthly net salary was Kshs 100,000/=.
14. It is pleaded that sometimes in early 2020 the claimant took his annual leave but when he was supposed to report back on 1st March, 2020 he was informed by the 2nd respondent, the director/CEO of the 1st respondent, not to report back to work on 1st March, 2020. It is further pleaded that the claimant was not paid salary as from February, 2020.
15. The claimant avers that after he was instructed by the 2nd respondent not to resume duties as from 1st March, 2020 the respondents neither contacted him again nor invited him to report back to work. It is the claimant’s case that he was thus constructively dismissed, unfairly and unlawfully, as from 1st March, 2020, after serving the respondents for three years.
16. It is pleaded that the dismissal violated Sections 35, 41, 44, 45, 49, & 51 of the Employment Act (the Act).



17. The claimant challenged the respondent to produce the following documents during the trial –
 - a. Employee’s appointment letter.
 - b. Employee leave forms and employee leave register/records.
 - c. Master roll and payroll register.
 - d. Employee attendance register for the period in issue.
18. In defence to the counter-claim the claimant denies receiving, holding, or incurring any expenses for or on behalf of the 1st respondent and states that no demand for such monies has ever been made to him. It is pleaded that the counter-claim is an afterthought that was intended to intimidate, discourage, and or scare him from pursuing his claim for unfair and unlawful dismissal.
19. In his testimony in court, the claimant relied on his filed statement dated 24th February, 2022 as his evidence-in-chief and produced copies of his listed documents as exhibits 1 to 5. He reiterated that he was employed as a general manager on 1st June, 2017 at a net salary of Kshs 100,000/= . He stated that he took annual leave in February, 2020 to resume by 1st March, 2020 but the 2nd respondent informed him on phone not to resume. He stated that thereafter the respondents did not get in touch with him even after his lawyer addressed a demand letter to the respondents on 13th January, 2021 and as such he was constructively dismissed.
20. He stated that the relevant employment records are in the custody of the respondents who failed, refused, and or neglected to avail the same in court even after challenging them to do so in his amended memorandum of claim and a notice to produce served upon them.
21. On his defence to the counter-claim the claimant stated that the receptionist at the facility was also the cashier and at no time did he, the claimant, handle money or payments. He stated that he neither collected nor held the alleged monies as alleged in the counter-claim.
22. He stated that while on compulsory leave he received a sum of Kshs 65,000/= from the respondents but it was not specified what the money was meant to cover as it was not adequate for his one month’s salary.
23. In cross-examination the claimant admitted that the Covid-19 pandemic affected the respondent’s business which was also affected by floods in 2020.
24. It is on the basis on the foregoing that the claimant is seeking that judgment be entered in his favour as prayed in the statement of claim and that the counter-claim be dismissed with costs.

III. The Respondent’s Case

25. The respondents’ case is founded on the filed defence and counter-claim, the oral and documentary evidence by Harilal D. Patel (RW1), a director of the 1st respondent, and the written submissions by their counsel.
26. In the defence the 2nd respondent denies that he is the CEO of the 1st respondent and that he at anytime supervised the claimant and or worked with him.
27. While it is admitted that the claimant took annual leave in February, 2020, it is pleaded that the claimant could not resume his duties on 1st March, 2020 due to the Covid-19 pandemic that faced the country with serious operational and financial implications on the hospitality industry where the 1st respondent



- belongs. However, it is pleaded that the claimant was paid the salary for February and March, 2020 and that he was to be called back to work once the situation normalized.
28. It is further pleaded that in 2020, besides the Covid-19 pandemic, the 1st respondent was affected by flooding that destroyed its properties including the records of employment for the claimant.
 29. Further, it is pleaded that the claimant was summarily dismissed for his failure to account for monies that he collected in September, 2019 and January, 2020 which monies the claimant allegedly failed and refused to surrender to the 1st respondent and or account for.
 30. In the counter-claim it is pleaded that the claimant received USD 900 from clients who were accommodated in the facility on 27th and 28th September, 2019 and Kshs 24,000/= from clients who were accommodated in the same facility from 15th to 17th of January, 2020. The 1st respondent counter-claims these monies and prays that judgment be entered against the claimant in the two sums with interest.
 31. It is pleaded that by receiving and failing to surrender and or account for the above stated monies the claimant breached the contract of employment hence the summary dismissal.
 32. In his testimony in court RW1 relied on his filed witness statement dated 24th January, 2023 as his evidence-in-chief. He admitted that the claimant was an employee of the 1st respondent as pleaded and that the 2nd respondent is a director thereof. He stated that he is the manager of the 1st respondent's facility where the claimant worked and also a director in the company. He stated that the 2nd respondent is one of the directors of the 1st respondent.
 33. He stated that the facility remained closed from February, 2020 to April, 2023 when they restarted the operations and recalled the employees. He however stated that by that time the claimant had already filed this cause in court and as such he was not recalled. He produced copies of the respondents' filed documents as exhibits 1 to 8.
 34. In cross-examination RW1 admitted that the claimant was an employee as pleaded and that his monthly net pay was Kshs 100,000/=. He stated he supervised the claimant and that the claimant was an employee from 2017 to March, 2020 as he pleaded.
 35. He stated that Covid-19 hit when the claimant was on leave and as such he was advised not to report back to work until further notice. He alleged that the claimant was paid his monthly salary for February and March, 2020 but the records were lost following disastrous flooding in the facility. He stated that the claimant was neither suspended nor dismissed but he could not be recalled back to work as by April, 2023 when the facility resumed operations as the claimant had already filed this cause in court.
 36. He denied that a demand notice was served upon the respondents. He clarified that the counter-claimed sum is what the claimant was supposed to follow up for payment from clients as debts and not money paid or received by the claimant from clients.
 37. It is on the basis of the foregoing that the respondents pray that the claimant's cause be dismissed with costs and that judgment be entered against him in the terms of the counter-claim.

IV. Submissions

38. The claimant's counsel identified the following issues for determination –
 - a. Whether the claimant was constructively dismissed by the Respondent.
 - b. Whether the respondent has proved its counter-claim.



- c. What are the remedies available to the claimant.
 - d. Who pays for the costs of the case.
39. On the first issue, it is submitted that by prevailing upon the claimant not to report back to work on 1st March, 2020 and subsequently failing to call him back to work, the respondents constructively dismissed the claimant. It is submitted that this conduct on the part of the respondents amounted to unilateral variation of the terms and conditions of service and fundamental breach of the contract.
40. On the second issue, it is submitted that the respondents failed to prove the counter-claim. It is submitted that the counterclaim is an afterthought as no demand of the claimed sum was ever made to the claimant before he filed this cause.
41. It is further submitted that the claimant proved his case and that judgment be entered in his favour as prayed with costs.
42. On the other hand, counsel for the respondent identified the following issues for determination –
- a. Whether there was misjoinder of the 2nd respondent in the claim?
 - b. Whether the employment contract between the party was frustrated by the onset of Covid 19?
 - c. Whether the Counterclaim has been proved?
43. On the first issue, it is submitted that the evidence does not point to any wrong-doing or liability on the part of the 2nd respondent. It is submitted that there was no employment relationship between the claimant and the 2nd respondent. It is thus submitted that the 2nd respondent is a misjoinder in the cause and the cause against him should be dismissed with costs.
44. On the second issue, it is submitted that the employment contract between the claimant and the 1st respondent was frustrated by the devastating effects of Covid-19 pandemic. Counsel cited *Davis Contractors Ltd v Fareham U.D.C* (1956) AC 696 on frustration of a contract arising from circumstances beyond the control and management of the parties and it is submitted that the Covid-19 pandemic that led to the termination of the claimant is one such force. It is submitted that it is not only the claimant who lost his job but many others were terminated under the same or similar circumstances.
45. On the counter-claim, it is submitted that the claimant either failed to collect the monies claimed from the guests and or collected the same but failed to account for the same. It is submitted that judgment should be entered against the claimant as pleaded.
46. For all the afore-stated, the court is urged to dismiss the claim with costs and that judgment be entered against him as prayed in the counter-claim.

V. Issues for Determination

47. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence tendered by the claimant, and the written submissions by counsel for both parties. The following issues commend themselves to the court for determination -
- a. Whether the 2nd respondent is properly joined in the cause.
 - b. Whether the claimant was unfairly and unlawfully terminated or constructively dismissed.
 - c. Whether the claimant is entitled to the reliefs sought.
 - d. Whether the counter-claim has been proved.



- e. Who should bear the costs of the cause and the counter-claim?

VII. Termination/Dismissal

48. The uncontested evidence on record is that the claimant was an employee of the 1st respondent as a general manager in a facility known as Mara River Lodge for the period from June, 2017 to February, 2020. It is also not disputed that his monthly net pay was Kshs 100,000/=. It is also not in dispute that the claimant took annual leave in February, 2020 and he was expected to report back on 1st March, 2020. However, before reporting back he received a call from the 2nd respondent prevailing upon him to stay away from work until further notice. It is in common knowledge, and the court takes judicial notice of the same, that during this period the country was faced with the Covid-19 pandemic. It is also not in dispute that the claimant did not receive any communication from the respondents calling him to resume his duties and subsequently he filed this cause in court.
49. It is the court's understanding that the 2nd respondent has been sued or joined in this cause as the manager and supervisor of the claimant and as the person who communicated to the claimant that he should remain on unpaid leave when he was supposed to report back to work on 1st March, 2020.
50. Misjoinder or non-joinder of a party may not render a cause incompetent as the court should actually proceed to hear and determine a cause as between the parties before the court based on the facts and evidence adduced and the law applicable. It is in determining the remedies that the court shall issue appropriate orders as regards each of the parties – See Order XX of the Civil Procedure Act & Rules.
51. On the circumstances under which the claimant left employment of the 1st respondent and the legal implications thereof, the evidence on record points to constructive dismissal. The claimant was sent on indeterminate unpaid leave and the respondents failed to call him back and or allocate him any duties. The claimant was neither declared redundant in accordance with Section 40 of the Act, nor was he lawfully terminated in accordance with Sections 35, 41, 43, 45, & 47 of the Act.
52. The fact that the claimant was terminated and or dismissed without due process renders the actions by the respondents untenable in law and the dismissal or termination was completely without legal foundation or support – See *Mary Chemweno v Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno v Kenya Commercial Bank Limited* (2013)eKLR, and *Walter Ogal Anuro v Teachers Service Commission* (2012) eKLR.
53. It is the finding and holding of the court that the claimant was constructively dismissed for the failure by the respondents to call him back to work within reasonable time from 1st March, 2020 when he was sent on compulsory unpaid leave.
54. On the counter-claim, there is no evidence that the claimed money was ever paid to the claimant. The evidence on record is that the same is in regard to bills incurred by guests who apparently left the facility without settling the same. As a legal entity the 1st respondent has the capacity, subject to law of limitation, to pursue the said debtors. In any event, having sent the claimant on compulsory leave as from March, 2020 the respondents denied the claimant the opportunity to follow the collection of the said debts.
55. The court agrees with the claimant that the counter-claim is an afterthought aimed at intimidating the claimant in his claim as no demand was made to the claimant prior to him filing this cause. The respondent is at liberty to pursue the debtors for full recovery of the alleged debts. The court concludes that in the circumstances of this cause and the evidence availed the claimant is not liable to pay or settle the same.



56. The counter-claim is thus dismissed.

VII. Reliefs

57. Flowing from the finding and the holding in the foregoing part of this judgment, the court shall consider the reliefs sought as hereunder.
58. Prayer 1 is for a declaration that the claimant was constructively dismissed as from 1st March, 2020 when he was supposed to resume work after leave but instead sent on compulsory unpaid leave. The court has found as much in the foregoing part of this judgment. The 1st respondent through the 2nd respondent directed the claimant not to resume duty on 1st March, 2020 and then kept him in abeyance without any communication rendering the prolonged disengagement to amount to constructive dismissal as per the reasoning and conclusion elsewhere in this judgment.
59. Prayer 2 has several items for compensation as follows. Item (a) is for the sum of Kshs 100,000/= being salary for February, 2020. This claim is allowed as no evidence has been availed by the respondent to the contrary. The allegation that employment records were destroyed by floods was not backed by any reporting made to the police or any other institution and as such those allegations are merely that. Item (b) is for one month's salary in lieu of notice in the sum of Kshs 100,000/= which is hereby allowed as no notice was issued to the claimant prior to the dismissal.
60. Item (c) is for a sum of Kshs 300,000/= for leave not taken in the three years that the claimant worked for the 1st respondent. The evidence on record is that the claimant was on annual leave when he was informed by the 2nd respondent not to report back to work on 1st March, 2020. It cannot therefore be true that the claimant did not take leave for the three years that he served the 1st respondent. The leave form availed by the claimant as an exhibit dated 29th October, 2019 indicates that as of October, 2019 the claimant only had a balance of 29 leave days. Again, the claimant was on leave until 29th February, 2020 to report back to work on 1st March, 2020. In those circumstances, notwithstanding that the respondents failed to avail the leave records, it is not correct that the claimant did not take leave for the three years that he served. Beyond pleading and claiming for the same the claimant ought to have proved that he is truly entitled to this claim. This prayer is hereby denied and dismissed.
61. In item (d) the claimant is asking for the maximum compensation equivalent to 12 months salary in the sum of Kshs 1,200,000/=. The court has considered the factors provided for under Section 49(4) of the Act. There is no doubt that the dismissal was annoying, crude, shrewd, unfair, and unlawful as the respondents kept the claimant in darkness after informing him not to report back to work on 1st March, 2020. Yet, by the time the claimant filed the cause in court in February, 2022 the respondents had made no efforts of recalling the claimant to resume his duties. During the entire period that the claimant was out of work the respondent only paid to him a sum of Kshs 65,000/=. That is not the way that a responsible employer should handle its employee.
62. While the 1st respondent pleaded that it suffered greatly due to the Covid-19 pandemic and alleged flooding, no records in form of audited accounts were availed to prove that indeed the business actually suffered financial, structural, or operational loses as alleged.
63. The respondents threw the claimant under the bus, so to say, and the evidence on record is that he was not able to secure another job. Even if the respondents wished to terminate or dismiss the claimant they ought to have applied due process in accordance with the law. For example, Section 40 of the Act allows an employer to declare an employee redundant in accordance with the provisions therein. This was an option available to the 1st respondent yet it opted to dismiss the claimant without applying due process of the law.



64. In my considered view this an appropriate cause for award of the maximum compensation as claimed in the sum of Kshs 1,200,000/= and the same is hereby awarded.
65. Prayer 3 is for a certificate of service under Section 51 of the Act. RW1 admitted that the 1st respondent has always been ready and willing to issue the certificate of service to the claimant. It is hereby ordered that the 1st respondent shall issue and deliver a certificate of service to the claimant forthwith.
66. It is very clear by now that other than informing the claimant not to resume duties on 1st March, 2020 the 2nd respondent was not the employer of the claimant and only acted for and on behalf of the 1st respondent in conveying the above message. In the circumstances, the judgment herein is against the 1st respondent alone.

VIII. Costs

67. Costs follow the event and the claimant is awarded the costs of the cause and those of the dismissed counter-claim. This is against the 1st respondent.

IX. Orders

68. For all the foregoing reasons, the claimant’s cause succeeds and the counter-claim fails. The court issues the following orders –
 - a. A declaration be and is hereby issued that the claimant was unfairly and unlawfully constructively dismissed by the 1st respondent on or around 1st March, 2020.
 - b. Consequently, the claimant is awarded the following –
 - i. One month’s salary in lieu of notice ... Kshs 100,000/=
 - ii. Salary arrears for February, 2020Kshs 100,000/=
 - iii. Compensation for unfair & unlawful constructive dismissal..... Kshs 1,200,000/=

Total Kshs 1,400,000/=

Less paidKshs 65,000/=

Balance due and payableKshs 1,335,000

This amount is NOT subject to statutory deductions as the same is based on net pay.
 - c) The 1st respondent shall issue and deliver a certificate of service to the claimant within 30 days of this judgment.
 - d) The claimant is awarded the costs of the cause and of the dismissed counter-claim.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 18TH DAY OF SEPTEMBER, 2024.

.....

DAVID NDERITU

JUDGE

