



**Dyhr v Carepay Limited (Employment and Labour Relations Cause E509 of 2020) [2024] KEELRC 2542 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2542 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E509 OF 2020  
MN NDUMA, J  
OCTOBER 17, 2024**

**BETWEEN**

**LINA DYHR ..... CLAIMANT**

**AND**

**CAREPAY LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The suit was filed on 10/9/2020 via statement of claim in which the claimant seeks the following reliefs from the respondent:
  - a. Compensation for unfair loss of employment – 12 months x 536,855 = Kshs. 6,442,260/=.
  - b. Damages for degrading conduct, harassment, mistreatment and discriminatory treatment at the workplace resulting to constructive dismissal; Kshs. 30,000/=.
  - c. Kshs. 1,200,000/= being the compensation for the medical expenses incurred by the claimant.
  - d. Kshs. 536,855 \* 10 = Kshs. 5,368,550/= being the payments for the remainder of the contractual term.  
Total = Kshs. 43,010,810/=
  - e. A certificate of service
  - f. Cost of the suit
  - g. Interest on (a) (b) (c) (d) and (f) above at commercial rates of 20% from 14<sup>th</sup> February 2020.
  - h. Any other and/or further relief that this court may deem fit and just to grant in the circumstances.



2. The claimant testified under oath and adopted a witness statement dated 8/9/2020 as her evidence in chief. The claimant further produced bundle of documents dated 8/9/2020 as exhibits '1' to '6'.

**Facts of the claim.**

3. CW1, testified that she was employed by the respondent as a Marketing and Sales Manager on a one-year contract dated 8/7/2016, which was to end on 7/7/2017. The contract was renewed upon expiry by a three-year term contract starting from 1/1/2018 to end on 31/12/2020 in the position of Marketing Manager.
4. CW1 testified that she served the respondent diligently and brought loads of business to the company however, she was compelled to resign her position on 14/2/2020 due to constant harassment and poor working environment. The claimant earned Kshs. 536,855/= at the time of termination. The claimant states that the resignation was not voluntary, was inevitable due to the mistreatment visited on her by the respondent and so, she was constructively terminated from employment hence the reliefs sought.
5. CW1 states that it was an implied term of the contract that the respondent would provide and maintain a conducive work environment free from any discrimination, harassment, insubordination and mistreatment but this was not the case.
6. CW1 gave particulars of discrimination and harassment to include lack of promotion to position of Marketing Director in line with industry standards. That she raised the issue with the then CEO and later with line manager Mr. Maarten Ras. That all members of her team working on the brand at advertising agency level got promoted due to the good results and earned marketing awards. CW1 said her peers in the Agency found it difficult to receive instructions from her since they had been promoted to Director level and CW1 felt that she was now their subordinate though in practice was the lead of the brand.
7. CW1 added that the respondent failed to respond conclusively to her complaint. That this frustrated her job and the respondent portrayed her as a failure.
8. CW1 said that despite this, she continued to deliver on target numbers, for example, she acquired one million customers by year one and two million customers by year 2. CW1 said when she raised the issue of her promotion with the line manager Mr. Maarten Ras, he was surprised since he thought CW1 was already at director level. That in the staff emails, her superiors including the CEO referred to CW1 as Director Marketing, however, the respondent refused to formalize the position.
9. CW1 said upon her complaint on lack of promotion, a new appraisal which did not conform with company's HR policy was abruptly introduced without involving the claimant as per review standards. That upon review, the claimant's performance was considered not good for a person seeking the position of Director. CW1 said she tried to question the new criteria of review since she had all along performed well but was bounced from one office to another without result.
10. CW1 said she was forced to raise a formal complaint against the line Manager Mr. Maarten Ras on or about 15/4/2019 for raising new expectations without the input of CW1. That the line manager had become very aggressive towards her and would shout at her in front of other staff as happened on or about January 2018. That the staff would leave office as soon as the manager started screaming at CW. That around 3<sup>rd</sup> October 2018 the line manger shouted at her due to a planned work trip. CW1 said the complaint she raised against her line manager was not processed.
11. CW1 said Mr. Maarten Ras was then promoted to commercial Director and CW1 was assigned new line manager. That notwithstanding, Maarten Ras, continued to harass CW1 and on 17/7/2019 he



issued CW1 with a performance improvement plan (PIP) to implement under her new line manager. CW1 said that the PIP was an exit document as per the HR Policy Manual. CW1 said the PIP was indeed a continued harassment and not an improvement plan. CW1 said the new CEO, who had come pressured her to sign the PIP. CEO said the PIP should be closed in two weeks, however, a normal PIP process takes several months. CW1 stated that she realized that the respondent was simply forcing her out of employment. CW1 suffered emotional and psychological trauma and was treated severely for the ensuing condition. CW1 said she was still on medication to manage the medical issues which arose from the toxic environment and the respondent did not pay her medical bills.

12. CW1 said prior to her resignation, the respondent had begun to discuss a separation agreement with CW1. CW1 said she requested to be given title of Marketing Director, to be paid her medical expenses and to be paid the remainder of the contract. The respondent offered to pay CW1 4.5 months pay off of the remainder of the contract and for insurance cover for a year. The offer was however suddenly withdrawn by the respondent and the entire agreement was called off.
13. CW1 said the conduct of the respondent was intolerable and had no alternative but to resign which she did. That all this time she had been sidelined, isolated and greatly overworked which led to her poor health.
14. CW1 prays to be awarded as prayed.
15. CW1 was subjected to very lengthy up and close cross-examination. The claimant reiterated the narrative she had given during her evidence in chief at length and denied all the allegations made against her by the respondent.

#### **Defence.**

16. Respondent called Moses Kuria (RW1) in defence of the case. RW1 testified that he was the Managing Director of the respondent from 1/9/2019 and had worked with the claimant for a short while before she left employment. RW1, adopted a witness statement dated 7/7/2020 as his evidence.
17. RW1 testified that the claimant was employed as a marketing and sales manager on a one-year contract from 8/7/2016 to 7/7/2017. That the claimant was granted a three-term contract from 1/2/2018 to 31/12/2020 in the same capacity.
18. That key performance indicators of the claimant included:
  - a. Developing cutting edge and effective marketing and communication strategy.
  - b. Increased profile and brand awareness with clear and consistent managing platform
  - c. Increase in the number of users on the Care pay platform.
  - d. Revenue generation and
  - e. Efficient budget management.
19. RW1 said that the claimant initially worked well with the respondent until the second half of 2018 when concerns about her output were noted by the respondent's management.
20. That the concerns were verbally relayed to her through her supervisor Mr. Maarten Ras, the line supervisor in December 2018 as well as during a review of the claimant's performance in the second half of 2018, which was held on 27/3/2019.
21. That CW1's contention that concerns were noted on 27<sup>th</sup> March 2019 is not true as that had happened in 2018.



22. That after a review meeting held on 27/3/2019 the concerns were communicated to the claimant via email dated 11<sup>th</sup> April 2019 to the effect that her performance was not satisfactory. That the concerns included lack of visibility of her work, website had taken long to develop, press releases were made without claimant's review and the claimant was not showing full ownership of her marketing role. That some staff had difficulties in the style of her communication which created an environment with mistrust. The claimant was also seen to be insensitive to certain costs and value for money to the respondent including breach of travel policy of the respondent.
23. RW1 stated that the claimant responded to the email vide an email dated 15<sup>th</sup> April 2019 in a strongly worded response saying she was shocked by the concerns raised and requested for a meeting with Line supervisor to explain further. That on 15<sup>th</sup> April 2019, a meeting was held with the HR Manager Emily Kinuthia, and the Line Manager, The Line supervisor then summarized the action points agreed upon including development of a Marketing Communication plan, personal development plan, share thoughts on development of the communication and marketing organization and claimant to respond in writing to the concerns raised by the line manager substantively.
24. RW1 stated that the claimant lodged a complaint of harassment to the Human Resource Manager on the same day, 15<sup>th</sup> April 2019 stating that she felt bullied and harassed by the line manager and was in anguish. Claimant said her past performance was good and did not understand where recent concerns had come from. That she had received bonuses consistently in recognition of good performance. Including in the year 2018 when the respondent paid out 30% bonus to members of staff. RW1 said bonus payment was at the discretion of the respondent and was based not on an individual performance but that of the organization as a whole and this was the case in 2018 and so payment did not reflect the performance of the claimant.
25. That following the complaint, the HR Manager held a meeting with the claimant on 16<sup>th</sup> April 2019 to hear her grievances. The HR manager held a separate meeting with the line manager of the claimant and a subsequent meeting with both officers and the CEO on 3<sup>rd</sup> May 2019. The meetings dealt with the working relationship between the claimant and the line supervisor.
26. The line supervisor put his explanation in writing in letters dated 14<sup>th</sup> May 2019 and 16<sup>th</sup> July 2019. The claimant wrote on 17<sup>th</sup> July 2019 objecting to being placed on PIP as same was not warranted. The HR Manager responded to the claimant by a letter dated 21<sup>st</sup> July 2018 explaining the need for the PIP. RW1 added that the claimant stood her ground and refused the PIP. RW1 said that the claimant had effectively declined to obey lawful instructions.
27. That the matter was escalated to the CEO who on 31<sup>st</sup> July 2019 clarified to the claimant the need for her to be placed on PIP. That the claimant wrote to the CEO on 23<sup>rd</sup> September 2019 maintaining her refusal to be subjected to PIP. That the claimant stated that the ongoing events had created a very hostile environment for her. RW1 Said that the claimant then requested the respondent to consider a possible separation arrangement with her. RW1 added that he arranged a meeting with the claimant in which separation package was discussed on a without prejudice basis. That no agreement was reached. That on 9<sup>th</sup> January 2020 the claimant wrote an email to RW1 seeking confirmation of proposed package which entailed:

12 months' pay for the remainder of the contract; medical reimbursement of Ksh. 4.5 million; to be given reference letter with title of Director Marketing; payment of leave days not taken and pension. RW1 said that the proposed terms were not acceptable to the respondent and this was communicated by an email dated 10<sup>th</sup> January 2020.



28. RW1 stated that the claimant then tendered her resignation by a letter dated 14<sup>th</sup> February 2024. Rw1 denied that the claimant was compelled to resign stating that the action was voluntary and that it is not true that the respondent created untenable environment for the claimant to continue working. That the claim has no merit and it be dismissed with costs.
29. RW1 was rigorously cross examined by counsel for the claimant and largely stuck to his narrative as presented in chief.

#### **Determination.**

30. The Parties filed written submissions which the court has carefully considered together with the evidence adduced by the claimant and Rw1 and the issues for determination are: -
  - a. Whether the claimant was constructively dismissed from employment?
  - b. Whether the claimant has established violation of her right not to be discriminated at the work place?
  - c. Whether the claimant is entitled to the reliefs sought?

#### **Issues (a) and (b).**

31. The court shall explore issue (a) and (b) together since the claim for constructive dismissal is based on allegations of harassment by the immediate supervisor and discrimination by the respondent by failing to promote the claimant to the position of director marketing as compared to her peers in a marketing agency which comprised a marketing arm of the respondent though was a separate employer. The claimant alleges that she was the lead of the respondent's brand and overall supervisor of the sales and marketing team which comprised employees of the respondent and those of the assisting agency. Under cross examination the claimant conceded that all employees that held the position of director marketing and who worked with her were not direct employees of the respondent but were employed by a different legal entity which was an agent of the respondent. The claimant failed to demonstrate that any of the employees of the respondent who were her equals were promoted to positions of director and she was left out in a discriminatory manner. The entire case of the claimant is based on the argument that since she was the head of the marketing team which comprised of directors employed by an agency failure by the respondent to change her designation to director marketing from the position she held of sales and marketing manager amounted to discrimination. The claimant failed to prove that she received remuneration that was not commensurate with her work. We do not even know how the directors employed by the agency were remunerated. The court finds that the allegation of discrimination by the claimant was wholly based on a fixated perception which clouded her better judgment in the way she handled the grievances she had with the respondent.
32. Furthermore with regard to the issue of harassment and condescending conduct by the immediate supervisor of the claimant, the court finds that the respondent handled the grievance fairly from the beginning up to the end. The court finds that there was nothing untoward with the decision by the respondent to place the claimant on a PIP. The court finds that the claimant acted unreasonably in refusing to submit herself to the PIP plan to her loss and detriment. Indeed, the respondent bent backwards to accommodate the concerns by the claimant to no avail.
33. In the case of Edwin Kipchumba Vs National Bank of Kenya LTD (2018) EKLR the court held:

“What amounts to constructive dismissal? In Industrial Court at Nairobi, Cause Number 611(N) of 2009 between Maria Kagai Ligaga versus Coca Cola East & Central Africa



Limited, the court held that constructive dismissal occurs where the employer's behavior is so intolerable, that it makes it considerably difficult for the employee to continue working. The employee initiates termination, believing himself, to have been fired. The employer is deemed to no longer be interested in honouring the terms of the contract of employment. The employee must demonstrate that the employer has engaged in repudiatory breach. The court must be persuaded that the employer has reason to resign. Employer's actions need not be coercive, threatening or in the nature of duress. The court in the above decision found the employee, who had serially been transferred from one country and region to another; who was never given an opportunity to settle down by her employer and make career progression; and who resigned involuntarily, to have been constructively dismissed. The employee was granted damages for wrongful dismissal. The decision was upheld in Court of Appeal Civil Appeal Number 20 of 2010, Coca Cola East and Central Africa Limited versus Maria Kagai Ligaga [2015] eKLR."

34. It is trite that he who alleges must prove the allegations to the satisfaction of the court in terms of section 107 and 108 of the *evidence Act* cap 80 laws of Kenya. In the case of Kenya Union of Commercial Food and Allied Workers Vs Fralet Agencies [2023] KEELRC 2208 (KLR), the court held as follows: -

'It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act* provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person'

35. The court finds that upon a careful consideration of the evidence adduced by the claimant as pitted against that by RW1, the claimant has failed to prove that the employment environment was made intolerable by the respondent to warrant her resignation. The resignation was voluntary and does not amount to constructive dismissal. The claimant has equally failed to prove that failure by the respondent to designate her position to Marketing Director amounted to discrimination. Indeed, the claimant has not proved that she was unduly harassed or discriminated upon by the respondent.
36. At the time of resignation, the claimant had 12 months left on her 3 years contract.

#### **Issue (c) reliefs.**

37. The claimant chose not to complete her term for reasons best known to herself. The claimant is therefore not entitled to compensation for the uncompleted term of the contract nor is she entitled to damages for harassment, mistreatment and discrimination the claimant having failed to sufficiently prove those allegations.
38. The court however find that the respondent had in recognition of the claimant's contribution to the company offered the claimant an exit package which the court finds was unfairly not paid upon her resignation. Furthermore, the respondent failed to provide the claimant with a certificate of service upon her resignation.
39. Accordingly, the court finds that the claimant has proved on a balance of probability that she had been offered an exit package which was not paid comprising of: -
- a. Equivalent of four (4) months' salary in the sum of ksh. 2,147,420
  - b. One year insurance cover
  - c. Certificate of service



40. The court grants the claimant the said relief under the prayer of any other just relief the court deems just to grant.
41. The claim for reimbursement of medical expenses being a special damage was not proved by the claimant. The same is dismissed for want of prove.
42. In the final analysis Judgment is entered in favour of the claimant against the respondent as follows: -
  - a. Ksh 2,147,420 exit package
  - b. Equivalent of one year insurance cover
  - c. Certificate of service
  - d. Interest at court rates on (a) above from date of judgment till payment in full
  - e. Costs of the suit

**DATED AT NAIROBI THIS 17<sup>TH</sup> DAY OF OCTOBER, 2024**

**MATHEWS NDERI NDUMA**

**JUDGE**

Appearance:

Ms. Atieno for Mr. Koceyo for claimant

Ms. Makena for Peter Waiyaki for respondent

Mr. Kemboi – Court Assistant

