



**Kanji v Gulf Badr Group (Kenya) Limited (Cause 82 of 2019)  
[2024] KEELRC 2467 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2467 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 82 OF 2019  
AK NZEI, J  
OCTOBER 11, 2024**

**BETWEEN  
MAHMOOD ABDULALI MOHAMED JAFFER KANJI ..... CLAIMANT  
AND  
GULF BADR GROUP (KENYA) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant herein sued the Respondent vide a Memorandum of Claim dated 11<sup>th</sup> November, 2019 and filed in this Court on 14<sup>th</sup> November, 2019 seeking the following reliefs:-
  - a. A declaration that the Claimant's dismissal was unfair and unjust.
  - b. One month salary in lieu of notice .....Kshs.233,079/=.
  - c. House allowance for the period between May 2010 and September 2019 ..... Kshs.3,950,689.05.
  - d. Unpaid leave for the period between January 2011 to December 2018 ..... Kshs.1,506,047.76
  - e. Unpaid pro rata leave from January 2019 to September 2019 ..... Kshs.141,191.98.
  - f. Unpaid public holidays for the period between May 2010 to September 2019 ..... Kshs.717,165.60.
  - g. Gratuity for the period between May 2010 to September 2019 ..... Kshs.14,000,000.00.
  - h. Unremitted NSSF deductions for 18 months of .....Kshs.7,200/=.
  - i. Compensation for unfair termination .....Kshs.360,000/=.
  - j. Certificate of service.



- k. Costs of the claim and interest at court rates.
  - l. Any other relief that the Court may deem just.
2. The Claimant pleaded that he was employed by the Respondent on 5<sup>th</sup> May, 2010 as an Equipment Control Executive, earning a salary of Kshs.233,079/= at the time of termination.
3. It was the Claimant's further pleading:-
- a. That he was on 4<sup>th</sup> March, 2019 verbally directed by his immediate boss, a Mr. Amr Abdelsalam, to hand over his duties to his colleagues, Mr. Brian Shivali and Mr. John Kimeu, without being given the reason for that direction; which he did and send an email to the said Mr. Amr Abdelsalam updating him of the handover. That the email was not responded to.
  - b. That the Claimant's said boss, Mr. Amr Abdelsalam, instructed the I.T. Manager to confiscate the Claimant's work station computer, company email and skype Id's, thereby leaving the Claimant with no work. That Mr. Brain Shivali was allocated the Claimant's entire company identification.
  - c. That the Respondent's Headquarters Representative (Mr. Amr Abdelsalam) stopped issuing instructions to the Claimant directly, and began doing so through the Claimant's colleagues.
  - d. That the Claimant was instructed to attend Container Surveys at the Verification Area of KPA, to sign all Deposit Refund Applications that were placed on his desk and to counter-sign Container Seal Release Forms issued to the Export Department for further release to exporters; duties which the Claimant dutifully carried out and reported to Brian Shivali while he awaited for official communication on his new job description and duties.
  - e. That on 12<sup>th</sup> March, 2019, the Claimant wrote an email to the Respondent's said Headquarters Representative enquiring on his employment status, job description and duties, but the said Representative (Mr. Amr Abdelsalam) never responded to the email.
  - f. That on 10<sup>th</sup> June, 2019, the Respondent's said HQ Representative instructed the Respondent's IT Manager, Mr. Adrian, to change the password to the computer that the Claimant was using to do his work.
  - g. That the Claimant's colleagues at work began ridiculing him, thus causing him a lot of stress and anguish. That the actions, omissions and demeanour towards the Claimant created a very hostile environment for the Claimant's continuance in the Respondent's employment.
  - h. That for a period of 6 months, the Respondent's said HQ Representative treated the Claimant unfairly and unreasonably, contrary to the Respondent's disciplinary rules as stated in the Claimant's employment contract, thus making it unbearable for the Claimant to remain in employment.
  - i. That on 6<sup>th</sup> September, 2019, the Claimant was forced to unwillingly resign from the Respondent's employment because the Respondent's HQ Representative, who was the Claimant's immediate supervisor, had made the working environment unbearable for the Claimant.
  - j. That the Claimant was constructively terminated and (was) never notified of the impending termination.



4. Documents filed alongside the Claimant's Memorandum of Claim included a written witness statement of the Claimant dated 11<sup>th</sup> November, 2019 and an evenly dated list of documents listing 8 documents. The listed documents included copies of the Claimant's National Identity Card, employment contract dated 1<sup>st</sup> September, 2013, payslips for January and February 2019, Claimant's emails to the Respondent's HQ Representative dated 5<sup>th</sup> March, 2019 and 12<sup>th</sup> March, 2019 respectively, copies of the Claimant's Skype Conversation with the Respondent's HQ Representative, the Claimant's resignation letter dated 6<sup>th</sup> September, 2019 and a demand letter addressed to the Respondent dated 15<sup>th</sup> October, 2019.
5. The Respondent entered appearance on 9<sup>th</sup> December, 2019 and filed Response to the Claimant's claim, denying the same. Further, the Respondent pleaded inter alia:-
  - a. That the Claimant had previously been employed by the Respondent on 2<sup>nd</sup> May, 2010 and that on 14<sup>th</sup> November 2011 he voluntarily resigned from the Respondent's employment; and was on 20<sup>th</sup> November, 2011 issued with a certificate of service.
  - b. That on 6<sup>th</sup> September, 2019, the Claimant resigned willingly without coercion, exactly in the same manner as he had previously done on 14<sup>th</sup> November, 2011.
  - c. That neither the Respondent's Headquarters Representative nor the Claimant's immediate supervisor (Mr. Kelvin Kariuki) made the Claimant's working conditions unbearable in any manner.
  - d. That the Claimant received all payments that were due to him from the Respondent as at the time of resignation. That the Respondent never terminated the Claimant's services with it.
  - e. That reliefs sought by the Claimant were not available to him as it had been agreed that he would be paid a consolidated salary to enable him to obtain reasonable housing and accommodation, he resigned and was not entitled to payment in lieu of notice, was paid all his leave days and that he did not work on public holidays, was a member of NSSF and therefore not entitled to gratuity; and that having resigned, the Claimant was not entitled to any compensation.
6. Documents filed alongside the Respondent's Response included a witness statement of Amr Abdelsalam dated 4<sup>th</sup> March, 2020 and a bundle of documents bound into a booklet and paginated page 1 to 49. The booklet did not include a list of the filed documents. The said booklet was filed on 4<sup>th</sup> March, 2020.
7. On 16<sup>th</sup> January, 2020, the Claimant filed Reply to the Respondent's Response.
8. On 9<sup>th</sup> February, 2021, after the Claimant had testified partly on 24<sup>th</sup> September, 2020, the Respondent filed a Notice of Motion dated 8<sup>th</sup> February, 2021 seeking to have the documents itemised on the Claimant's list of documents as the Claimant's Skype Conversation with the Respondent's HQ Representative struck out and expunged from the record of documents for failure to comply with Section 106B of the Evidence Act. The application was allowed by the Court (Ndolo J.) vide a Ruling delivered on 29<sup>th</sup> April, 2021.
9. When the matter came up for further hearing before me on 27<sup>th</sup> February, 2023, the Claimant, having earlier adopted his filed witness statement as his testimony, produced in evidence the documents referred to at paragraph 4 of this Judgement, except the document's struck off vide the Court's aforesaid Ruling delivered on 29<sup>th</sup> April, 2021. The Claimant further testified that he worked for the Respondent from September 2013 upto the date of separation. That he worked in the



Equipment Control Department where he remained until the time of separation. That in 2013, he was reporting to the Marketing Head, but at the time of separation he was reporting to the Headquarters Representative, Mr. Amr Abdelsalam.

10. It was the Claimant's further evidence that he resigned from the Respondent company vide a letter dated 6<sup>th</sup> September, 2019. That it took him 6 months to make a decision to write the letter. The Claimant further testified:-
  - a. That on 4<sup>th</sup> March, 2019, he was verbally instructed to handle the matter of an empty container that had been damaged by KPA's Crane, but the shipping line's authorisation to incur expense on the damage was not received fast.
  - b. That as the Claimant was leaving office on the said date, Mr. Amr Abdelsalam asked the Claimant to hand over his duties to him directly; which he did the following morning. He referred the Court to Amr Abdelsalam's email to Kelvin (dated 5<sup>th</sup> March, 2019) referring to handed over duties and to the Claimant's email to Abdelsalam as he (the Claimant) had not been given new duties. That no response came, and that the following day his computer and company identification were withdrawn and given to a colleague by the name Brian.
  - c. That thereafter, the Claimant could not do his duties, but could get instructions from Amr Abdelsalam through Brian whenever there were damaged containers.
  - d. That the unbearable conditions referred to in the resignation letter were that the Claimant was sitting in a google plan office and clients were going to him to be assisted but he could not assist them because his duties had been withdrawn, and that his colleagues were not talking to him. That it was like he did not exist.
  - e. That it reached a point where even his colleagues started telling him that it was pointless going to work as he was doing nothing.
  - f. That for 6 months, the Claimant tried to have a one-on-one with Amr Abdelsalam but it did not happen.
11. Cross-examined, the Claimant stated that for purposes of the suit herein, he started working with the Respondent in 2013. That he had earlier been employed but resigned on 14<sup>th</sup> November, 2011. The Claimant further testified that he on 4<sup>th</sup> March, 2019 handed over to Amr Abdelsalam, though he had pleaded that he handed over to Brian Shivali and John Kimeu. That he first handed over his file to Mr. Amr, and then the same was handed over to the said two persons.
12. It was the Claimant's further evidence under cross-examination that his computer was confiscated, and that his password was changed in June 2019. That the Claimant wrote a letter on mistreatment and sought to know what his fate in the company was, but did not write to the Labour Officer. That he resigned with immediate effect, and had pleaded constructive dismissal because of the unbearable work conditions.
13. Re-examined, the Claimant stated that although the contract of employment stated that disputes would be internally resolved with one's immediate supervisor, his immediate supervisor was Mr. Amr, and he was the one he had differences with. That he would not have resigned were it not for the unbearable conditions.
14. The Respondent called one witness, Amr Abdelsalam (RW-1), who adopted his witness statement dated 4<sup>th</sup> March, 2020 as his testimony. He also produced in evidence the documents referred to in paragraphs 6 and 8 of this Judgment; and contained in the Respondent's bundle of documents



filed in Court on 4<sup>th</sup> March, 2020. The documents included the Claimant's resignation letter dated 6<sup>th</sup> September, 2019, the Claimant's leave documents upto 2018, the Claimant's NSSF records, and documents on payments made to the Claimant upon resignation. Also produced in evidence by RW-1 were copies of the Claimant's earlier resignation letter dated 14<sup>th</sup> November, 2011 and commendation letter by the Respondent commending the Claimant for good service.

15. It was RW-1's further evidence that the Claimant worked for the Respondent until he resigned. He denied having directed the Claimant to hand over to him or having directed confiscation of the Claimant's workstation computer by the I.T Manager as alleged by the Claimant. He also denied having ordered for the change of the Claimant's password or having made the Claimant's life in the Respondent Company difficult or unbearable. RW-1 denied having been the Claimant's immediate supervisor, and stated that the Claimant's immediate supervisor was Mr. Kelvin.
16. RW-1 further testified that the Claimant was assigned other duties within the same department pursuant to clause (point) No. 2 in the Claimant's contract which permitted variation of duties as per the schedule thereto.
17. Regarding the Claimant's claim for leave from January 2011 to December 2018, RW-1 testified that the Claimant first resigned in November 2011 and was not working with the Respondent in 2012. That he went back to the Respondent company in September 2013. That according to Clause 9.2 of the Claimant's contract, leave not taken was forfeited. That the Respondent had produced documents to show that the Claimant took leave. That the Claimant was paid for the whole month of September 2019, despite having resigned on 6<sup>th</sup> September, 2019.
18. Cross-examined, RW-1 testified that the Claimant was a good employee and that he (RW-1) did not receive any complaints against him. That Kelvin was the Claimant's immediate supervisor in the Equipment Control Department. That there was a chain in the Respondent Company before any issue could reach RW-1, who was the Headquarters Representative. That that was the Head of Department, the Branch Manager and then RW-1. That variation of duties was done within the Department without any discussion with the Claimant. That the Claimant's resignation letter was addressed to the Respondent's Chairman. That the Claimant's resignation was with immediate effect, leaving no room for discussion.
19. Re-examined, RW-1 testified that any aggrieved employee had to follow the grievance redress procedure set out in Schedule 2 of the Claimant's contract and as stated in paragraph 13 of the witness' witness statement. That it was upon the Claimant to follow the grievance procedure if he had any grievance. That Schedule 2 of the Claimant's contract sets out the Claimant's duties, which could be varied from time to time. That the contract did not provide for discussion before variation.
20. I have looked at the grievance procedure as spelt out in Schedule 2 of the Claimant's procedure, and the same states as follows;
  - “ 1. Any grievance should first be raised formally with the immediate supervisor or Human Resource Manager.
  2. The immediate supervisor or Human Resource Manager (as the case may be) will notify the employee of their decision in writing.
  3. If the employee has any grievance relating to their employment or if they are dissatisfied with any disciplinary decision affecting the employee, the employee should first attempt to resolve this by discussion with the Human Resource



Manager of the Company. Failing satisfaction, they may refer it in writing for determination by the General Manager or the Managing Director.”

21. From the evidence presented in Court, the Claimant, who testified that he was aggrieved by RW-1’s actions (instructions regarding him) did not comply with the foregoing provisions which formed part of his employment contract. I will, however, not hold this against the Claimant, in view of the Respondent’s breach of the statute, which I will set out herein.
22. Clause 2.1 of the Claimant’s employment contract provides as follows:-

“The employee’s main duties, rights and responsibilities, which may be varied from time to time, are set out in Schedule 1 (appended).”
23. Having considered the pleadings filed and evidence presented thereon by both parties, issues that fall for determination, in my view, are as followed:-
  - a. Whether the Claimant was constructively dismissed by the Respondent.
  - b. Whether the Claimant is entitled to the reliefs sought.
24. On the first issue, the Claimant testified that after his duties, workstation computer and company identify were withdrawn from him and given to a colleague of his and his computer password was subsequently withdrawn (changed), he was unable to do his duties. That he could only get instructions from Amr Abdelsalam through a colleague whenever there were damaged containers. That since the Claimant was sitting in a google plan office, clients were going to him to be assisted but he could not assist them as his duties had been withdrawn, and his colleagues were not talking to him. That it reached a point where even his colleagues started telling him that it was pointless going to work as he was doing nothing. That these are the unbearable conditions that the Claimant referred to in his resignation letter dated 6<sup>th</sup> September, 2019. That for 6 months, the Claimant tried to have a one-on-one with RW-1 but it never happened.
25. It is to be noted that although RW-1 testified that he was not the Claimant’s immediate supervisor and that the Head of Equipment Control Department was Mr. Kelvin, RW-1 did not produce in evidence the Respondent’s organogram (organizational chart) to demonstrate the basis of that allegation. Further, the Claimant’s contract of employment did not state the department in which he would work and to whom he would report.
26. Further, although the Claimant’s contract of employment provided for variation of his duties, which RW-1 testified was to be done without consulting the Claimant (employee), a contract cannot supercede the statute, unless the statute in issue expressly so states. Section 10(5) of the [Employment Act](#) provides as follows;

“(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.”
27. RW-1 did not deny there having been verbal variation of the Claimant’s duties. All he said was that the variation did not require consultation with the Claimant. RW-1 did not deny having received the



Claimant's email send to him on 12<sup>th</sup> March, 2019 confirming handover of the Claimant's duties to Mr. John and Mr. Brian following RW-1's verbal instructions in that regard. The email stated:-

“Kindly note, further to your verbal instructions of Monday 4<sup>th</sup> March, 2019 to handover my duties the following day Tuesday 5<sup>th</sup> March, 2019 to Mr. John and Mr. Brian, was done and the handover file I send to your attention vide Skype to review.

Since 5<sup>th</sup> of March, 2019, I have not heard from your good side, therefore kindly do advice on the way forward as almost all my duties are now being handled by my respective colleagues.

Thanking you and looking forward to your early response and decision . . .”

28. The Claimant testified that the foregoing email was not responded to, and that for 6 months he tried to have a one-on-one (a meeting) with RW-1 without success. That he eventually resigned on 6<sup>th</sup> September, 2019.
29. Failure by the Respondent to comply with Section 10(5) of the *Employment Act*, which is couched in mandatory terms, was an illegality and an act of unfair labour practice. It was a clear indication that the Respondent had no regard for the law and was no longer willing to be bound by the terms of the Claimant's employment contract dated September, 2013.
30. The Court of Appeal stated as follows in the case of *Coca Cola East & Central Africa Limited – vs – Maria Kagai Ligaga* (2015) eKLR:-

“Constructive dismissal occurs where an employee terminates the contract under which he is employed, (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. The employer's behaviour in either case must be shown to be heinous, so intolerable that it made it considerably difficult for the employee to continue working. The employee initiates the termination believing himself to have been fired. The employee needs to show that the employer, without reasonable or proper cause, conducted himself in a manner likely to destroy or seriously damage the employment relationship.

Resignation is regarded as constructive dismissal if the employer's conduct is a significant breach of the contract of employment and that the conduct shows that the employer is no longer interested in being bound by the terms of the contract. The employee's resignation is therefore treated as an actual dismissal by the employer and the employee may claim damages for unfair termination.”

31. I find and hold that the Claimant was constructively and unfairly dismissed by the Respondent, and I so declare. The Claimant was not obligated to issue a termination notice. The period of 6 months taken by him under unbearable working conditions before finally deciding to resign was long, but was not unreasonably long, in my view; given the fact that he had written to RW-1 and was awaiting his response, which never came.
32. Having made a finding that termination of the Claimant's employment was unfair, I award him the equivalent of 6 months' salary as compensation, which is Kshs.233,079 x 6 = Kshs.1,398,474/=.
33. The claim for Kshs.233,079/= being one month salary in lieu of notice is declined, in view of the fact that the Claimant was paid a full salary for the month of September 2019, despite having worked upto 6<sup>th</sup> September, 2019. The Claimant testified that he had dropped the claim for house allowance.



34. The claim for leave pay for the period between January 2010 and 2018 is declined. It was demonstrated in evidence by both parties that the Claimant worked for the Respondent in two phases and under two distinct contracts. The first contract terminated on 14<sup>th</sup> November, 2011 when the Claimant resigned. This first contract is not the subject of the suit herein. The second contract was entered into in 2013, and terminated on 6<sup>th</sup> September, 2018. This second contract is the subject of the suit herein. RW-1 demonstrated by evidence that the Claimant took leave upto 2018.
35. The claim based on alleged public holidays worked is declined. Such a claim is in the nature of special damages and must be specifically pleaded and proved, which the Claimant did not do. The claim for gratuity is declined, as the Claimant was a member of, and a contributor to the NSSF. Section 35(6) (d) of the Employment Act disqualifies the Claimant from making such a claim. Further, his contract of employment did not include term on such payment.
36. The Claim for Kshs.141,191.98 being pro rata leave pay for the period January to September 2019 is allowed. The Respondent did not demonstrate by evidence that the Claimant either took leave in 2019 or was paid in lieu thereof. Section 74(g) of the Employment Act obligates an employer to keep leave records.
37. The Respondent is entitled to be issued with a certificate of service pursuant to Section 51(1) of the Employment Act.
38. In sum, and having considered written submissions filed by both parties, Judgment is hereby entered for the Claimant against the Respondent as follows:-
- a. Compensation for unfair termination of employment..... Kshs.1,398,474/=.
  - b. Pro rata leave pay for the period January 2019 to 6<sup>th</sup> September 2019 ..... Kshs.141,191.98.
- Total = Kshs.1,539,665.98.
39. The awarded sum shall be subject to statutory deductions subject to Section 49(2) of the Employment Act.
40. The Respondent shall issue the Claimant with a Certificate of Service pursuant to Section 51(1) of the Employment Act. This shall be done within thirty days of this Judgement.
41. The Claimant is awarded costs of the suit and interest at court rates. Interest shall be calculated from the date of this Judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> OCTOBER 2024**

**AGNES KITIKU NZEI**

**JUDGE**

**ORDER**

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

.....Claimant



.....Respondent

