

The Claimant amended the memorandum of claim on 12/5/2023 and also filed five documents namely the employment contract dated 24/1/2015. Contract dated 1/1/2018; various email correspondences with her employer and demand letter written by the advocate for the Claimant dated 19/12/2022.

The Claimant filed a witness statement dated 2/4/2023 in which she set out all the facts in support of her case.

The parties recorded a consent order dated 30/10/2024 as follows:-

“(i) By consent parties have agreed to proceed with determination of the matter under Rule 5 of Employment and Labour Relations Court, (Procedure) Rules 2024.

(ii) The court shall determine the suit on basis of pleadings; affidavits; documents and submissions filed by the parties.

(iii) The Claimant to file and serve submissions within 21 days and Respondent to file within 21 days from service.”

Respondent’s Memorandum of Reply

The Respondent filed reply to the memorandum of claim dated 19/6/2023 together with the contract of employment between the Claimant and Respondent signed by the parties together with Appendix I containing terms and conditions of employment signed on 1/1/2018 by both parties.

A letter dated 3/3/2020 in terms of which the Respondent placed the Claimant on a performance contract; letter dated 6/3/2023, forwarding cheque no. 742184 being terminal dues for the Claimant in the sum of

USD. 14,294.04; a clearance certificate dated 16/11/2022 proposing that the Claimant was to receive the said amount in full and final settlement of any claims the Claimant had against the Respondent and had therefore fully discharged the Respondent from any liability. The discharge certificate before court is however not signed by the parties. The Respondent also filed a witness statement of Mr. Kamau Kishor dated 23/8/2023 in support of the Respondent's case.

The Claimant and Respondent having submitted documents as evidence before court by consent of the parties, the duty of the court is to assess the relative strength of the respective case-based merely on the witness statement of the Claimant vis a vis the witness statement of Kamal Kishor together with the bundle of documents admitted by consent of the parties.

The Claimant in the witness statement dated 23/4/2023 and adopted as his evidence in chief stated that he was employed by the Respondent vide a letter of offer dated 24/11/2015 as the Country Head of the Respondent in Kenya. That he served under the 1st contract which was then renewed on 1/1/2018.

That in terms of the contract dated 4/1/2018 his salary was USD 6,268.00 per month. That he was to be paid performance-based bonus pay of USD. 16,500.00 annually per clause 1(a) of the contract.

That he was based in Nairobi office but could travel from time to time to discharge his mandate.

That he was entitled to leave days under clause 10 of the contract. The Claimant was entitled to Life Insurance and medical benefits under clause 8 of the contract.

That the contract had no performance assessment clause so the standards of performance applicable were not defined and so not clear.

That his performance was outstanding which resulted to periodical extension of the contract until the year 2022.

That clause 18 of the contract provided for a 12-month evaluation of work performance if unsatisfactory and warnings would be issued before termination was considered. That renewal of the contract was performance based and so the Claimant was sure that his performance had been good all along.

That on 2/3/2022 the Claimant received a letter in which was stated that the Claimant's work was not satisfactory. The email stated:

“In case your performance is not improved by 30th April 2022, your contract will be terminated without further notice...”

The Claimant states that no reasons were given or the specification of the dissatisfaction with the Claimant's performance. Same was vague and unclear. That this email contravened clause 18 of the contract aforesaid.

That on or about June 2022, the Respondent frustrated the Claimant's work by denying him resources to discharge his duties; given broken down

machinery; failed to release funds approved for projects in respect of day care chem centre approved in 2018. Funds were approved 2 years later in 2020 leading to a skewed performance appraisal. That the Respondent was non-responsive to queries and reminders by the Claimant about release of funds for the approved projects.

That Respondent also unlawfully, did not release the bonus payable to the Claimant for a period of four (4) years in the sum of USD. 66,000.00 per the contract of employment.

That the Respondent unlawfully released the Claimant's final dues, housing and internet allowances held for more than a year from January 2021 and March 2022 in the sum of USD. 11,250.00.

That up to the time of filing suit only USD. 6,384.21 of the allowances had been paid.

The Respondent also failed to pay end of contract gratuity for six-year period.

The Respondent also did not pay the Claimant salary for 46 days worked which was deducted during COVID-19 pandemic period.

That the Respondent conducted a skewed, arbitrary and unprocedural appraisal by including the entire East Africa as his scope of work yet the contract was limited to being the Country, Head, Kenya.

That the Respondent by fact of the aforesaid subjected the Claimant to mental and emotional anguish in order to push him out of employment. That the Respondent failed to consider the 7 years good track record. That the Claimant persevered the persecution and continued to work until he could no longer bear it and therefore resigned from employment forced by the intolerable mistreatment and bad work conditions.

That the court to find that the Claimant was constructively dismissed from employment and award compensation to the Claimant together with an award of the terminal benefits claimed.

RW1 KAMAL KISHOR

Kamal Kishor stated in the adopted witness statement that he was Finance Head Africa of the Respondent. That he was well versed with the facts of this case. That the Claimant was Country, Head, Kenya of the Respondent. That the Claimant willingly and voluntarily resigned from his position as per employment letter dated 19/6/2023 before court.

That the employment contract clearly stipulated that annual performance bonus of USD. 16,500.00 was “performance-based bonus pay” and was only payable upon achievement of set key result areas (KRAS).

That throughout his employment, the Claimant constructively failed to meet business targets. His performance fell below the standard expected of a Country Head. That the Respondent provided support and resources despite the challenges.

That COVID-19 pandemic necessitated difficult operational decisions in 2020. That the Claimant as Country Head participated in and implemented cost-sharing measures that affected all staff and ensured continuity during unprecedented time.

That by early 2022, the Claimant's performance deteriorated further. That he had consistently under performed on set target.

That on 2/3/2022 the Respondent initiated a Performance Improvement Plan (PIP). The letter placed the Claimant on a two-month improvement programme. The letter said that failure to improve would result in contract termination. That this was a standard management tool to help the Claimant improve his work.

That on 30/3/2020 28 days after receiving the PIP, the Claimant tendered his letter of resignation, citing various grievances in the letter.

That the grievances had never been formally raised through proper channels. That the Claimant gave 3 months' notice. That the Claimant continued working until 30th June 2022. That during this period the Claimant discharged his duties normally and received his full salary.

That upon his departure, the Respondent calculated and attempted to settle all dues to the Claimant. A cheque for USD. 14,249.64 was prepared in November 2022. This amount included allowances from January 2021 to March 2022.

That the claims made by the Claimant are not valid and were made for the first time upon voluntary resignation by the Claimant.

That the Claimant was not constructively dismissed from employment.

That the Claimant was registered with NSSF during his entire tenure and Respondent made regular contributions to the funds. That there is no obligation to pay the Claimant gratuity as claimed or at all. That Claimant opted to leave rather than engage with Performance Improvement Programme (PIP).

That the suit lacks merit and it be dismissed.

DETERMINATION

The parties filed written submissions which the court has carefully considered together with all evidence adduced by consent of the parties.

The issues for determination are:-

- (a) Whether the Claimant voluntarily resigned or did the resignation amount to constructive dismissal?
- (b) Is the Claimant entitled to the reliefs sought?

In ***Emmanuel Mutisya Solomon versus Agility Logistics Cause No. 1448 of 2011***, the court held that constructive dismissal is:-

“a 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.”

This court has held time and again that conduct by the employer that amounts to a fundamental breach of the contract of employment entitles that employee to repudiate the contract and resign.

Where there is evidence of such fundamental breach followed by resignation such a separation is not voluntary and amounts to constructive dismissal. Each case depends on the facts of the case but the factors to put into consideration include:-

proved unlawful or unfair conduct against the employee including:

- (i) Non-payment of agreed remuneration.
- (ii) Failure to provide work and/or access to work to the employee
- (iii) Consistent harassment, abuse, violence or any other conduct that breaches the human dignity of the employee.
- (iv) Failure to resolve reported grievance by the employee which touches on matters above.
- (v) Failure to provide equipment essential to perform the work assigned in the contract of employment.
- (vi) Failure to provide the necessary budget and/or monetary support to get the work done.
- (vii) Persistent, unsubstantiated disciplinary action such as undeserved warnings be they verbal or written designed to cause the employee to leave employment.
- (viii) Discrimination of any nature that goes to the root of the contract of employment

This list is not exhaustive. An employee has to demonstrate, by way of evidence, the pattern of abuse and the response by the employee to the

said abuse in writing or otherwise to the satisfaction of the court to find that the employee had no choice but to leave the employment.

In the present matter, the Claimant cites the following as the causes for his resignation:-

- (i) Denial by the Respondent of necessary recourses to facilitate effective discharge of his mandate as a Country Head without justification including:-
 - (a) Provision of completely broken-down machinery without availing any resources to repair or replace the same.
 - (b) failure to release or diverting funds that had been earmarked for the projects the Claimant was overseeing including Day care Chemo Centre approved in 2018 which funds were never dispersed until 2020.
 - (c) Unlawfully retained Claimant's fuel, driver, mobile and internet allowances for the period January 2021 to March 2022, a period of more than one year, which gravely affected Claimant's work.
 - (d) Having subjected the Claimant to (e), (f) and (c) above, embarked on a skewed PIP wholly aimed to terminate the employment of the Claimant since there was no enabling environment to fulfill it as the time line given was very short and the same was not based on the contract of employment.
 - (e) Failing to release to the Claimant annual bonus payment for a period of four (4) years in the sum of Kshs. 66,000 in accordance with the contract of employment.

The Respondent denies these particulars of breach and others, but admitted that it had not provided fuel, driver, mobile and internet allowances to the Claimant for the period January 2021 of March 2022. It is not in dispute that the Claimant over saw projects all over Kenya and the said provisions were essential to enable him do his work as Country Head. It is not in dispute that this is the same period the Respondent subjected the Claimant to a PIP by a letter dated 3/3/3030 which had in the court's view and finding impossible time frame to fulfill, of two months, which period coincided with non-payment of work-related allowances.

As a matter of fact, the Respondent prepared a cheque to pay the Claimant upon his resignation monies that included the said work-related allowances, without which the Claimant could not be expected to effectively conduct his work as a Country Head.

The court concludes following the Court of Appeal decision in the case of ***Cocacola East and Central Africa Ltd versus Marie Kege Ligege [2015] eKLR*** in which the court adopted the contractual approach from ***Western Excavating (ECC) Ltd versus Sharp [1978] OB 761***. This test requires proof of employer conduct so grave as to constitute a repudiatory breach of the contract.

In the present case, the Claimant has proved denial of resources to the Claimant by the Respondent to perform his work followed by a skewed and impossible PIP in a very short time and compounded by failure by the Respondent to pay enabling allowances to the Claimant amounted to a

repudiatory breach of the contract that entitled the Claimant to resign as he did in the circumstances of this case.

The court therefore finds that the Claimant was constructively dismissed from employment. The Claimant is entitled to compensation in terms of section 49(1)(c) and (4) of the Employment Act.

Terminal benefits

From the contract of employment, the Claimant has demonstrated that he was entitled to annual bonus in the sum of Kshs. 66,000.00. The Respondent did not tender any credible evidence to show why the Claimant was not entitled to payment of the bonus for a period of 4 years. The Respondent continuously renewed the contract of employment of the Claimant which renewal was performance based. No appraisal by the Respondent which would disentitle the Claimant to the payment of the bonus has been placed before court by the Respondent. Indeed, this was part of the frustration heaped on the Claimant, which cumulatively led to his resignation.

The court finds that the Claimant is entitled to payment of USD 66,000.00 being non-paid annual bonus at the rate of 16,500.00 as set out in the employment contract.

Fuel, driver, mobile and internet allowance.

The Claimant initially claimed USD 11,250.00 being paid work related fuel, driver, mobile and internet allowance.

The Respondent presented a payment voucher and cheque dated 16/11/2022 which included payment of Kshs. 6,384.21 in respect of the unpaid item. This indeed is part of the prove that the conduct by the Respondent inhibited the Claimant to perform his work in a material way yet the Respondent purported to subject the Claimant to performance appraisal for East Africa, while he was a Country Head, Kenya.

The court finds that the Claimant has proved that he is still owed by the Respondent USD. 4,865.75 being the balance of unpaid allowances for the stated period. The Claimant was paid in respect of other terminal benefits in lieu of 53.5 earned leave days amounting to USD. 12,972.42.

The contract of employment provided for payment of statutory deduction by the employer including PAYE, NSSF and NHIF which were paid by the Respondent.

The contract did not provide for termination gratuity and so the claim for payment of gratuity lack merit and is dismissed.

The Claimant served 3-month notice, upon tendering his resignation and was paid salary for the work done during the notice period.

The deductions done due to COVID-19 have not been proved by the Claimant. The claim lack merit and is dismissed.

Compensation

The Claimant had served the Respondent from 1st January 2018 and resigned after serving the Respondent for a period of six (6) years. The Claimant was forced out of employment by unpalatable conditions explained in this judgment. The Claimant did not contribute to the dismissal. The Claimant was not compensated for the forced loss of employment. The Claimant was not paid deserved remuneration while he worked. The Claimant lost a top job and means of support. The court notes that the Respondent allowed the Respondent to serve the three (3) month termination notice which situation lessened the burden on the Claimant.

Accordingly, the court awards the Claimant the equivalent of three (3) months' salary in compensation for the unlawful constructive dismissal in the sum of USD (6,268 x 3) **18,804.00.**

Accordingly, judgment is entered in favour of the Claimant against the Respondent as follows:-

- (a) USD 18,804 in compensation
- (b) USD 4,865.75 being unpaid allowances
- (c) USD. 66,000.00 being bonus payment.

Total amount USD. 89,669.75

- (d) Interest at court rates from date of judgment till payment in full.
- (e) Costs of the suit

Dated at Nairobi this **23rd Day of October 2025.**

Mathews Nduma

JUDGE

Appearance:

Mr. Ochieng for Claimant

Ms. Onsare for Respondent

Mr. Kemboi – Court Assistant

ORIGINAL