



That sometime in February 2021 the Head of Human Resource invited him for a meeting in Kisii and while in her office she took the car keys and informed him that he was supposed to relocate from Kisumu to Kisii on transfer.

According to the claimant, he was told to go home and await a call which never came and he never went back to the work place.

The claimant sued for constructive dismissal and prayed for declaration that termination of employment was unfair, 3 months salary in *lieu* of notice, 12 months compensation, 60 days leave, severance pay, Certificate of Service, costs, interest and any other relief the court deemed fit to grant.

By an amended response dated 26<sup>th</sup> March 2024, the respondent averred that the claimant was its former employee who absconded duty after 26<sup>th</sup> February 2021 and consequently, his employment was terminated on 24<sup>th</sup> March 2024.

After considering the materials placed before the court, the learned trial magistrate found that the claimant had failed to prove on a balance of probabilities that he was

constructively dismissed from employment, that he simply walked away from employment.

The court dismissed the suit but directed the respondent to issue a Certificate of Service to the claimant within 7 days.

This is the Judgment appealed against.

The Judgment of the trial is faulted on nine (9) grounds that the trial court erred in law and fact by:

- 1. Failing to find that the appellant was subjected to unfair treatment and labour practices.*
- 2. Failing to appreciate and apply the legal principles governing constructive dismissal.*
- 3. Finding that the respondent had properly terminated the appellant's employment.*
- 4. Failing to properly evaluate the evidence adduced by the appellant which showed that there was an implied term of employment that transfer of work station required reasonable notice.*
- 5. Finding that the appellant had absconded despite evidence that he had been forced out.*
- 6. Failing to find that repossession of the motor vehicle by the respondent without justification was a fundamental breach of the employment contract.*

7. *Failing to find that the respondent made no reasonable attempts to notify the appellant of the disciplinary proceedings.*
8. *Dismissing the suit yet the claimant's salary for October 2021 had not been paid and was unaware of the hearing.*
9. *Failing to award the reliefs sought.*

These grounds may in the court's view be condensed into two namely; appreciation and application of the evidence before the court and reliefs and principles governing constructive dismissal.

### **Appellant's submissions**

On constructive dismissal, counsel placed reliance on the sentiments of the Court of Appeal in **Coca Cola East and Central Africa Ltd V Maria Kagai Ligaga** to submit that the appellant had been subjected to unfair treatment and labour practices in 2020 and 2021 which amounted to constructive dismissal by manipulating his sales records, harassment, contempt, ridicule and humiliation and telling him to go home and wait to be contacted.

Counsel urged that the appellant was summarily dismissed and the trial court did not evaluate the conduct

of the respondent or the principles in **Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga** (supra).

According to counsel, the respondent's conduct constituted a fundamental breach of the contract of employment and he was summarily dismissed without due process.

Reliance was also placed on the sentiments of the court in **Stanley Otieno Okello V Daniel Okindo Majiwa & 2 others** [2017] KEHC 4638 (KLR) on natural justice. That a notice to show cause was necessary and the provisions of the Employment Act were not complied with and the termination of employment was unfair.

That the respondent made no attempt to notify the appellant of the disciplinary hearing and it proceeded in his absence.

On breach of implied terms of the contract of employment, counsel submitted that the terms were his place of work, and one month's notice or salary in *lieu* of notice in cases of termination of employment and the change of work station was abrupt and the vehicle was repossessed for no reason and he was in sales.

That the appellant did not abscond duty.

Counsel further submitted that the trial court did not consider the provisions of Section 41 of the Employment Act. On procedural fairness as he was callously asked to go home by word of mouth and conducted disciplinary proceedings in his absence.

Finally, the trial court is faulted for not awarding reliefs including declaration that termination of employment was unfair, salary in *lieu* of notice and compensation.

According to counsel, the trial court was duty bound to award reliefs for the unfair dismissal of the appellant from employment.

On costs, counsel cited the decision in **Supermarine Handling Services Ltd V Kenya Revenue Authority** [2010] eKLR that the successful party was entitled to costs save for a good reason.

### **Analysis and determination**

As adverted to elsewhere in this Judgment, the judgment of the learned trial magistrate is faulted hugely on the

appreciation and application of the evidence on record, reliefs and the principles of constructive dismissal.

While according to the appellant he was subjected to unfair treatment, unfair labour practices and constructive dismissal; the respondent's case was simply that he walked away after delivering the motor vehicle to Kisii for repairs.

This being a first appeal, the court's role is as was stated in **Selle and another V Associated Motor Boat Co. Ltd** [1968] EA 123 that:

*"...An appeal to this court... is by way of a retrial and the principles upon which this court acts in such an appeal are well settled.*

*Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."*

See also **Abdul Hameed Saif V Ali Mohamed Sholan** [1955]22 EACA 270.

The first issue for determination is whether the appellant was subjected to unfair treatment, unfair labour practices or was constructively dismissed.

In his written statement the appellant complaints were

- (i) Incorrect recording of his sales, which were recorded as those of the supervisor and he raised the issue with the supervisor and Human Resource Manager. According to him, his sales were being manipulated.

These concerns lacked a context and in particular the time frame. Was it at the beginning of the contract mid or towards the end in February 2021?

Copies of the invoices on record are dated 14<sup>th</sup> October 2019, 10<sup>th</sup> January 2020, 28<sup>th</sup> November 2019 and 7<sup>th</sup> February 2020 more than one (1) year prior to the separation.

Could the challenge have persisted that long and no action was taken? The appellant did not avail any evidence.

- (ii) That he was labelled a difficult person, a matter the Human Resource Manager mentioned in his statement, that the appellant was a difficult person to work with.

On cross-examination, the appellant admitted that only 6 invoices had queries and in 4 of them he had been captured as the customer.

The straw that broke the camel's back was the alleged meeting with the Human Resource Manager in Kisii on 26<sup>th</sup> February 2021 when the Human Resource Manager allegedly took the car keys and informed the appellant of the transfer to Kisii immediately but because they could not agree, he was told to proceed home to await a call that never came.

The Human Resource Manager admitted that the vehicle was returned for repairs and the appellant was given cash (Kshs.1,500) for transport back to Kisumu. According to the Human Resource Manager and Supervisor, the vehicle had mechanical issues to be rectified.

The appellant also alleged that the reason for the transfer was that his sales were low.

First, the appellant had not alleged that his supervisor (Nicola) had ever complained about his sales being low, nor had he been provided with any data.

Second and more significantly, the appellant alleged that the Human Resource Manager transferred him from Kisumu/Western Region to Kisii by word of mouth and with immediate effect an allegation. The Human Resource denied stating that transfers were always in writing and a letter was necessary.

This confirmation appears to have been in accord with the fact that the respondent employed the appellant by a written contract of service which clearly stated that he would be based in Kisumu/Western Region reporting to the Business Development Manager.

In the absence of verifiable evidence, it is inconceivable that the respondent's Human Resource Manager could have unilaterally decided to transfer the appellant to the Kisii Region with immediate effect and by word of mouth.

Puzzlingly, the appellant adduced no evidence of having contacted his supervisor on the alleged transfer or repossession of the motor vehicle, and in any event he

never returned to the work place or contact anyone after 26<sup>th</sup> February 2021.

From the evidence on record, the court is satisfied the appellant failed to demonstrate that the respondent subjected him to unfair treatment, unfair labour practices or other nefarious acts.

Allegations such as harassment by the supervisor on meeting of targets, denial of facilitation by way of cash or otherwise backed by supportive and verifiable evidence would have embellished the appellant's case.

Regrettably, he had no such evidence.

In the court's view, the learned trial magistrate did not fall into error on this issue.

As to whether the trial court erred by failing to find that the appellant was constructively dismissed, it is common ground that the most authoritative rendition of the principle of constructive dismissal is that of the Court of Appeal in **Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga** [2015] KECA 394 (KLR) where the court adopted the definition of constructive dismissal by

Lord Denning MR in **Western Excavating (ECC) Ltd V sharp** [1918] QB 761.

The Court of Appeal held:

*“...The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer’s behavior towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer’s conduct is so grave that it constituted a repudiatory breach of the contract of employment - this is the contractual test. The contractual test is narrower than the reasonable test. The dicta in **Western Excavating (ECC) Ltd. -v- Sharp [1978] ICR 222** adopts the contractual approach test and we are persuaded that the test is narrow, precise and appropriate to prevent manipulation or overstretching the concept of constructive dismissal. For this reason, we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach*

*of the contract of employment. Whether a particular breach of contract is repudiatory is one of mixed fact and law...”*

The court proceed to articulate the legal principles relevant to determining constructive dismissal including: the fundamental or essential terms of the contract of employment, whether there is a repudiatory breach of a fundamental term, conduct of the employer must be fundamental going to the root of the contract, objectivity of the test, causal link between the employer’s conduct and reason for terminating the contract, leaving with or without notice, employee must not have accepted waived, acquiesced or conducted himself or herself to be estopped from asserting repudiatory breach, prove of constructive dismissal, and varied fact situations.

It is common ground that in the instant case, the appellant left on 26<sup>th</sup> February 2021 without notice or contacting anyone or disclose the reason for leaving; but almost two years on 11<sup>th</sup> October 2022 he communicated with RWIII Mr. Abdul Wahab Galgalo, the respondents Head of Security and internal audit on WhatsApp and informed him that “he just walked out of that company

never even resigned was tired sipendi vitina na napenda ukweli mimi”.

The appellant admitted on cross-examination the conversation with RWIII on WhatsApp took place on that day. He also admitted that he did not raise the issue of the alleged transfer or complain to anyone.

The appellant also confirmed on cross-examination that he walked out because of stress. He did not elaborate on the source of stress or the gossip he referred to in his WhatsApp message to RWIII.

On the alleged transfer to Kisii and from the record, only the appellant knew about it and did not tell anyone else until he filed the instant suit in early 2023.

The learned trial magistrate found that the appellant’s case had not met the threshold for constructive dismissal.

Arguably, the work station of an employee is a fundamental term of the contract of employment and is a requirement under Section 10(2)(f) of the Employment Act and most employers have clearly defined transfer policies or procedures which accommodate both parties.

In this case the appellant, in the court's view, failed to prove that the respondent committed a fundamental breach of the employment contract. He did not prove that he had indeed been transferred from Kisumu to Kisii.

The court is satisfied that the trial court did not err on the principles that govern constructive dismissal.

On termination of the appellant's employment, the trial court is faulted for having found that it was procedurally fair.

Evidence adduced in court showed that the appellant himself admitted to having absconded as he did not return to the workplace after 26<sup>th</sup> February 2021 and his witness statement stated as much.

Having admitted that he absconded duty, the only obligation the law placed on the respondent was to demonstrate that it subjected him to a fair disciplinary process after contacting him.

RWI Zipporah Ondani testified on cross-examination that she called the appellant to collect the notice to show cause but did not pick the call or call back.

Mr. Nicolas Mutiso Mwanja, also confirmed that he called the appellant on 27<sup>th</sup> February 2021 but he neither picked the call nor call back.

According to the respondents' witnesses, the respondent resorted to the postal address P. O Box 53, 00200 which the appellant had provided because he was not picking calls or calling back.

The respondent thus issued a notice to show cause dated 9<sup>th</sup> March 2021 for the absconding of duty for more than 7 days, a fact the appellant did not deny. The letter also stated that if he did not report on duty severe disciplinary action including summary dismissal could be taken against him and was accorded 3 days to respond but did not. He was invited for a disciplinary hearing vide letter dated 18<sup>th</sup> March 2021, scheduled for 23<sup>rd</sup> March 2021 at 12:00pm and the disciplinary Committee resolved to dismiss the appellant from employment and a letter dated 24<sup>th</sup> March 2021 was prepared.

As a precautionary measure, the respondent sent copies of the three (3) letters to the Office of the County Labour Officer for information, which in the court's view, is sufficient evidence that the letters were in fact written at

that time and the appellant was absent from the work place.

All the documents submitted by the respondent, copies of which the appellant did not avail show, as the trial court found that P. O. Box 53-00200 Etago Kenya was used throughout and Zipporah Andani confirmed that it was provided by the appellant and he signed all these documents after receiving them thereby acknowledging that that was his contact address.

The jurisprudence emerging from the Employment and Labour Relations Court is that where desertion and absconding is cited by an employer, the employer is required to show the efforts expended to contact the employee to resume duty.

In **Felistas Acheha Ikatwa V Charles Peter Otieno** [2018] KEELRC 2491 (KLR) Maureen Onyango J held:

*“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that*

*termination of employment on the ground of desertion is being considered”.*

See also **Joseph Nzioka V Smart Coatings Ltd** [2017] eKLR and **Simon Mbithi Mbane V Inter Security Services Ltd** [2018] eKLR.

In the latter case, the court held:

*“An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success”*

In the instant case, the appellant did not deny that calls were made to his number, the fact that he did not receive the letters notwithstanding.

A panoramic view of the steps taken by the respondent after the appellant deserted duty, a fact he admitted even before he adduced evidence in court were, in the court’s view, sufficient to proof that reasonable efforts were made to ascertain why the appellant was not reporting for duty and was afforded an opportunity to be heard on the issue before termination of employment.

For the evidence on record, it is patently clear that the appellant willingly deserted the work place and the respondent complied with the law in such circumstances and the trial court did not fall into error by having found that termination of the appellant's employment was procedurally fair.

The respondent had a substantive justification to summarily dismiss the appellant under the provisions of Section 44(4) of the Employment Act, for being away without leave or other lawful cause and the procedure employed was in accord with the provisions of Section 41 of the Employment Act as held in **Walter Ogal Anuro V Teachers Service Commission** [2013] eKLR and underscored by the Court of Appeal in **Naima Khamis V Oxford University Press (EA) Ltd** [2017] eKLR.

The forgoing disposes of grounds 3 and 7.

On ground number 5, and as adverted to elsewhere in this judgment, the appellant was unable to demonstrate on a preponderance of probabilities that he was constructively dismissed. He failed to show a consistent course of conduct on the part of the respondent which on the whole constituted a repudiatory breach of the

contract of employment in accord with the holding in **Coca East & Central Africa Ltd V Maria Kagai Ligaga** (supra) and **Western Excavating (ECC) Ltd V Sharp** (supra).

The appellant failed to prove *inter alia* that he had been transferred to Kisii from Kisumu or that the motor vehicle was repossessed for purposes other than repair. Zipporah confirmed on cross-examination that the appellant handed over the car keys to her and she gave him transport back to Kisumu and other financial requirements were to be facilitated by Accounts.

As regards ground 8, the respondent tendered no evidence of having paid the appellant's salary for the 26 days the appellant had worked before he deserted duty.

The respondent adduced no evidence to justify retention of appellant's salary for the 26 days worked which was due and payable under Section 17(1) of the Employment Act.

The award was merited dismissal of the appellant's case notwithstanding.

Finally, as regards ground 9 of the Memorandum of Appeal, having found that the appellant had failed to demonstrate that he was constructively dismissed and/or that termination of his employment was unfair within the meaning of the provisions of Section 45 of the Employment Act, the learned trial magistrate found none of the reliefs warranted and dismissed the case with no Orders as to costs.

As adverted to elsewhere in this judgment, the court is satisfied that the learned trial magistrate did not fall into error on her finding.

Flowing from the foregoing, it is clear to the court that the appellant's appeal is unmerited and it is accordingly dismissed save for payment of the appellant's salary for 26 days of February 2021, unless previously paid and 7 outstanding leave days.

Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT  
KISUMU ON THIS 10<sup>TH</sup> DAY OF DECEMBER 2025.**

**DR. JACOB GAKERI**

## **JUDGE**

### **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

ORIGINAL