

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI
CAUSE NO. E176 OF 2022

(Before Hon. Justice Abuodha Jorim Nelson)

RICKY
CLAIMANT

KOECH.....

-VERSUS-

STABEX
RESPONDENT

INTERNATIONAL

LTD.....

JUDGMENT

1. The Claimant filed a Memorandum of Claim dated 22nd

March, 2022 pleading the following averments:

- a. The Claimant averred that he entered into an employment agreement dated 12th May 2020 and accepted an offer for employment from the Respondent as Retail Operations Manager for a term of three years, commencing from 2nd May 2020 to 1st May, 2023.
- b. The Claimant averred that since the month of October, 2020 the Claimant had an accident on the Mombasa- Kapsabet Road where he sustained head injuries and a fracture on his right arm between the elbow and shoulder and was rushed to the Hospital for Teaching and Referral.
- c. The Claimant averred that he also sustained a fracture on his arm which required implants. That he went to the Hospital for surgery to fix the implants and since his NHI cover did not cover for surgery and the attendant tests he paid for his own medical bills including surgery bills on the promise by the Respondent that the same would be covered since the Respondent had insured its employees. That the Applicant was promised that the bills would be refunded and asked to keep all the receipts detailing the expenditure.
- d. The Claimant averred that on 1st December, he resumed his duties at the Respondent and carried on for two weeks under therapeutic exercise in the office. That his final medical check-up was on 7th January, 2022 when his doctor confirmed that he had fully recovered. That all this while he was waiting for the Respondent to refund expenses but to no avail.

e. The Claimant averred that on 22nd April, 2021 he filed a form notifying the employer in Nairobi office of the accident and the costs incurred therein for the purposes of processing the reimbursement from the employer's employee's insurer but still nothing no action was taken and contrary to the provisions of clause 13 of the Employment Contract.

f. The Claimant averred that sometimes in February 2021 he was unceremoniously told to resign so he could be paid his terminal dues. That the Respondent did not pay him any dues resulting in his constructive termination. That he was not given any reasons for his termination only that he was required to resign, a resignation which was not explained and which resulted in constructive termination.

g. The Claimant averred that on or about 15th February, 2022 through his advocates he issued a demand letter to the Respondent reminding that it was yet to pay his terminal dues for the wrongful dismissal plus the expenses he incurred treating himself. That at the time of termination he was earning a salary of Kshs 34,803.00/=

1. The Claimant prayed for the following against the Respondent:

- i. A declaration that the Claimant's employment services with the Respondent were terminated wrongfully, maliciously and or unfairly.
- ii. Payment of the Claimant's salary for the month of March, 2022.
- iii. Payment of the Claimant's pay for 1 Month in lieu of notice the amount being Kshs 34,803.00/= and all of the Claimant's accrued medical (Kshs 240,000/=), salary for leave days accrued on pro-rata basis (Kshs 84,107.25/=) and liquidated damages for breach of contract (Kshs 974,484.00/=) all totaling to Kshs 1,333,394.00/=.
- iv. An award of Kshs 417,616.00/= being damages for wrongful termination maximum for 12 months (All totaling to Kshs 1,785,833.25/=)
- v. The Respondent dissolve the Claimant certificate of service.

2. The Respondent in response filed its Response to the Memorandum of Claim dated 10th June, 2024 and averred inter alia as follows:-

a. *The Respondent averred that the Claimant was yet to return the DOH/WIBA forms to enable its insurer assess and or process the Claimant's re-reimbursements and or compensation if any.*

b. *The Respondent averred that the Claimant resigned in a huff in February, 2021 when it enquired why there were shortages in cash sales and banking delays.*

c. *The Respondent admitted receipt of demand letter but denied that the Claimant was entitled to terminal dues therein since he voluntarily resigned from employment and that the Claimant's terminal dues were tabulated and paid on 17 March, 2021.*

d. *The Respondent averred that the jurisdiction of court should be denied because the Claimant's monthly salary was below the pecuniary jurisdiction of the court and the cause of action arose in Eldoret.*

3. The Respondent in the prayer prayed as against the Claimant that the Claimant is not entitled to the prayers sought and that the Claimant's case be dismissed with costs to the Respondent.

EVIDENCE

4. Both the Claimant's case and the Respondent's case was heard on 4th June, 2025.

5. The Claimant herein testified on the CW1 and he adopted his witness statement and bundle of documents as his evidence in chief.

6. CW1 testified that he was asked to resign and be reabsorbed and that the resignation was to enable him get recommendation letter for absorption and refund of his expenses.

7. In cross-examination CW1 confirmed that his resignation was not voluntary but conditional. That the last paragraph stated that it was to expedite his clearance and transition to self-employment. That it was not contrary to the assurance of reabsorption.

8. CW1 stated that he was supposed to get his refund and it was not a must for him to be reabsorbed. That he referred to wrongful termination in the contract which he meant to be a forceful resignation.

9. CW1 confirmed that he had not tallied his leave days he was claiming and by the time of resignation he had worked for nine months and he was on a one-year contract.

10. On the other hand, the Respondent called Philip Koskei (RW1 herein) the Respondent's HRM who testified that he knew the Claimant who was employed as a station manager in one of their stations in Eldoret. That he was on a three-year contract.

11. RW1 adopted his witness statement and the documents filed with the response as his evidence in chief. That he did not ask the Claimant to resign and he was not forced to resign. That the Claimant's supervisor took the Claimant's role when he was injured and undergoing treatment.

12. RW1 testified that the certificate of service was processed and was in the Claimant's file and he did not pick the same.

CLAIMANTS' SUBMISSIONS

13. The Claimants' Advocates Mwenesi & Company Advocates filed written submissions dated 4th June, 2024.

14. Counsel submitted that while the Claimant resigned when the Respondent initiated inquiries on shortage in cash sales and banking delays and relied on unexecuted letter dated 15th February 2021 the Respondent did not provide any documents to demonstrate the cause of any inquiries against the Claimant as asserted. Therefore the alleged reason provided to support the alleged resignation was unfounded.

15. Counsel submitted that it was clear from the hearing that the Claimant having suffered head injuries was in vulnerable condition and even so it was clear that he was partly unable to properly recall objectively documented dates of certain events. That the Respondent might have taken an advantage to deceive the Claimant to witness a purported resignation which in any event was unsigned and of no probative value.

16. Counsel further submitted that the Respondent unilaterally made a deduction of Kshs 2,000,000 as shortages and advances which shortages were not supported by any background documentation, report on shortages or such other valid justiciable method of arriving at the decision to make such deductions. That at the hearing parties agreed that the court conceded that the Court properly seized of the matter excluding the claim for medical bills relating to the accident.

RESPONDENT'S SUBMISSIONS

17. The Respondent's Advocates A.E Kiprono & Associates filed written submissions dated 28th July, 2025.

18. On the issue of whether the Claimant's employment was wrongfully, maliciously and/or unfairly terminated counsel submitted that the Claimant contradicted himself on how he left employment. That on one hand he averred in the claim he was unceremoniously terminated and on the other hand in his witness statement that he was forced to resign.

19. Counsel submitted that it was for the Claimant to prove his case on a balance of probability and that his employment was terminated wrongfully. Counsel relied on section 107 of the Evidence Act and section 47(5) of the Employment Act and the case of **Omar N. v. Modern Coast Express (2019) eKLR** on the Claimant proving that unfair termination occurred.

20. Counsel submitted that the burden shifts to the employer to justify the grounds of termination once the employee discharges the burden of showing that a wrongful termination occurred as per section 47(5) of the Employment Act. That the Respondent showed that the Claimant resigned voluntarily while the Claimant insinuated that he was forced to resign. That a look at the resignation letter shows it was voluntary.

21. Counsel further submitted that if there was any doubt as to the nature of the Claimant's resignation the same was cured by the fact that the letter of resignation was transmitted to the Respondent through email. That if there was any coercion

or force nothing prevented the Claimant from stating as such in the resignation letter.

22. Counsel submitted that the Claimant's allegations that the resignation letter cannot be relied upon because it was not signed was an afterthought on his part because he neither denied issuing the said letter nor its contents. That he also confirmed during hearing that the email used to forward the resignation letter to the Respondent was his.

23. Counsel further submitted that the Respondent's evidence on Claimant's decision to resign voluntarily was cogent and uncontested by the Claimant. Counsel relied on the case of **Edwin Belti Kariuki Vs National Bank of Kenya Limited (2018) eLR** to submit that resignation by employee was termination of employment at instance of employee. That the resignation was therefore not malicious or wrongful as he resigned voluntarily.

24. On the issue of whether the Claimant was entitled to the reliefs sought counsel submitted having established that the Claimant resigned voluntarily was not entitled to the prayers sought. That the prayer for compensation for wrongful termination as per section 49 of the Act and one-month notice pay could not be sustained since the Claimant's employment was terminated at his own instance. Counsel relied on among other cases the case of **Okello Munyolo v Unilever Kenya Limited (2019) eLR** and **Robert Indiazi v Tembo Sacco Limited (2019) eLR** to submit that the Claimant was not entitled to compensation there being no

unfair termination and that the Claimant was not entitled to notice pay as per section 35 of the Act having resigned respectively.

25. Counsel submitted that even if the court were to find the termination of the Claimant's employment unfair the claim for 12 months' salary as compensation would be unreasonable and excessive under the circumstances because the Claimant had worked for the Respondent for only 9 months. That the court is guided by consideration of section 49(4) of the act on being length of service counsel proposed one month salary in case the court finds the termination unfair while relying on the case of **Ondari Angusi v Meru Slopes Hotel (2021) eLRP** where the Claimant had worked for one year five months and was awarded one month salary as compensation.

26. On the claim for salary for the month of March 2022 counsel submitted that the Claimant had resigned in February 2021 he was not entitled to salary for March 2022. Counsel further submitted that the Claimant was not entitled to any leave days despite claiming that he was entitled to Kshs 84,107/= he did not adduce any evidence to the same. That there was evidence that upon the resignation by the Claimant the Respondent calculated the Claimant's outstanding leave at Kshs 22,803.56 and the same was paid to the Claimant on 8th March, 2021.

27. On the claim for damages for breach of contract of Kshs 974,484/= counsel submitted that the Claimant neither

pleaded the same in the claim nor adduced evidence on how his employment contract was breached by the Respondent. That the Claimant voluntarily resigned hence he was not entitled to any damages for breach of contract.

DETERMINATION

28. The Court has reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the case. The Court has also considered authorities relied on by the parties. The parties also agreed that the Court is properly seized of the matter with the exclusion of the medical expert. It is left to this court to determine the fairness of termination and reliefs sought.

29. The issues for determination are:

- (a) *Whether the Claimant was wrongfully terminated by the Respondent and or he resigned voluntarily.*
- (b) *Whether the Claimant is entitled to the reliefs sought.*

Whether the Claimant was wrongfully terminated by the Respondent and or he resigned voluntarily

30. It is not in dispute that there existed employment relationship between the Claimant and the Respondent where the Claimant was employed in May, 2020 and he worked for 9

months before the cessation of employment. What is in dispute before this court is how parties parted ways. The Claimant alleged that he was forced to resign by the Respondent so that his dues could be paid and he be reabsorbed back to work.

31. The Respondent on the other hand maintained that the Claimant resigned voluntarily. The court has had a look at the resignation letter dated 14th February, 2021 which was sent to the Respondent on 14th February, 2021. The letter stated that the Respondent was to expedite the Claimant's clearance and transfer to self-employment.

32. This corroborates that from his letter although unsigned it was sent to the Respondent. The Claimant is therefore estopped from denying the relevance of the said letter. When he never denied the contents of the said letter or writing the same.

33. The respective burden of proof for the parties is governed by section 47(5) of the Employment Act where the Claimant ought to illustrate that an unfair termination has occurred and the Respondent was to justify the grounds of the termination.

The court of Appeal in **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** explained this burden as follows:

14. Section 47 (5) of the Act provides for the procedure to be followed in matters of complaints of unfair termination as follows:

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer. *[Emphasis added]*

So that, the appellant in this case has the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only on this foundation has been laid will the employer be called upon under section 43 (1): "to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 47 (5)."

15. We have carefully considered the testimony of the appellant in relation to the discharge of his evidential burden but we are afraid it does not lay the necessary foundation to require the employer's response under section 43 (1).

34. The Claimant ought to illustrate that unfair termination occurred before the Respondent could be called upon to justify the grounds for the termination. It was upon the Claimant to illustrate whether he was forced to resign as asserted for the same to amount to constructive dismissal.

35. The concept of constructive dismissal was aptly articulated by Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp (1978) ICR 221** as follows:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that

the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct."

36. The court is also guided by the case of **Nathan Ogada Ajiagaga v David Engineering Ltd (2015) eKLR**, where the court stated as follows;

"Constructive dismissal occurs when an employee resigns because the employer's behavior has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than firing the employee, the employer is trying to effect a constructive discharge."

37. Finally, this court is guided by the case of **Coca Cola East & Central Africa v. Muriel Kariuki Ligaga 2015) eKLR**, where the Court of Appeal adopted the contractual approach test of constructive dismissal and enunciated the guiding principles including fundamental breach of the contract, causal link between the resignation and the employer's conduct, resignation within reasonable time and absence of acquiescence, waiver or estoppel among others.

38. From the foregoing the basic ingredients in constructive dismissal are:-

- a. *The employer must be in breach of the contract of employment;*

b. The breach must be fundamental as to be considered a repudiatory breach;

c. The employee must resign in response to that breach; and

d. The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.”

39. In this case the Claimant never illustrated any breach of contract which could cause him resign or any force or coercion towards resigning coupled with the fact that the Claimant failed to illustrate that a fair termination occurred and that constructive dismissal occurred it is therefore clear that the Claimant was wrongfully terminated but he resigned voluntarily.

Whether the Claimant is entitled to reliefs sought.

40. Having established that the Claimant voluntarily resigned and his dues were tabulated and paid on 8th March, 2021 which included leave pay it is therefore clear that the Claimant is not entitled to compensation for unfair termination and notice pay. The Claimant claimed that the deductions of advance and shortage were not justified yet he never objected to the said deduction.

41. On the claim for salary for March 2022 the Claimant having resigned in February, 2021 he was not entitled to any payment.

The Claimant was also not entitled to damages for breach of contract since the same had to be specifically pleaded and proved. The Claimant voluntarily resigned and he never illustrated any breach of contract.

42. In conclusion the Claimant's claim is found unmerited and is here dismissed with each party bearing for the costs of the suit.

43. It is so ordered.

Dated at Nairobi this 19th day of December 2025

Delivered virtually this 19th day of December

2025

Abuodha Nelson Jorum

Presiding Judge, Appeals Division