

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

ELRC CAUSE E067 OF 2021

BENSON CHOGA KAZUNGU.....CLAIMANT

VS

NAVISAT TELEMATICS LIMITED.....RESPONDENT

JUDGMENT

Background

1. By his statement of claim dated 13th July 2021, the Claimant sued the Respondent herein seeking the following reliefs;

- I. A declaration that the Respondent's acts in regard to the Claimant's employment amount to constructive dismissal of the Claimant from his employment with the Respondent and that the same is unfair and or unlawful.
- II. Terminal dues of KShs. 2,077,155.36 as particularised in paragraph 18 of the Statement of Claim.
- III. That the Respondent be ordered to issue the Claimant with a certificate of service.
- IV. Costs of the suit and interest at court rates.

2. The Respondent challenged the Claimant's claim through a Statement of Defence dated 23rd September 2021, denying his cause of action against them and entitlement to the reliefs sought.

3. At the hearing of this suit, the parties adopted their respective witness statements filed in this matter as their evidence in chief, and produced as their documentary evidence the documents filed herein under their respective lists of documents, as their documentary evidence.

The Claimant's Case

4. It was the Claimant's case that he first came into the employment of the Respondent as an accountant under a letter of appointment dated 1st April 2015. He was subsequently confirmed in employment through a letter dated 1st July, 2015. At the time of separation, his salary had been reviewed upwards to 83,252.72 per month.

5. Sometimes in May 2018, he was verbally informed by Walter Mbidyo, the Respondent's Chief Executive Officer, that he should only report to work when instructed to do so by the Respondent Company.

6. Subsequently, in mid-July 2018, he was called to report back to work. Upon so reporting, he was instructed to do invoicing to the Respondent's Clients, instructions which he duly complied with. 7. He further stated that, quite unjustifiably, the Respondent failed to pay him his salary for April, May, June, and July 2018. His efforts to secure settlement of his remuneration for the months proved completely fruitless.

8. Following the situation, he was forced to report the issue to the Mombasa County Labour Officer.

On 16th August, 2018, at a meeting convened by the Labour Officer, the Respondent's Technical Director indicated that the Respondent was willing to settle the remuneration, provided the Claimant clarified some issues. He was not expressive regarding the issues.

9. Later, he met the Respondent's Chief Executive Officer, who made unsubstantiated allegations that the Respondent had lost approximately KShs. 26,000,000, and that he was responsible for the loss.

10. On 17th August, 2018, he was arrested and taken into custody by the police at Nyali Police

Station. He was later arraigned and charged, together with One Victor Muoki, at the Shanzu Law

Courts with the offence of stealing by servant contrary to Section 281 of the Penal Code. On 24th June, 2021, the charge was withdrawn under Section 87[a] of the Criminal Procedure Code. No witness was available to testify against him on the unfounded allegations.

11. While the criminal case was ongoing, the Respondent did not permit him to report to work, assign any duties, or pay his salary. As of the time of filing this suit, the Respondent had not issued him any notice indicating that his employment had been terminated. He asserted that the conduct of the Respondent amounted to constructive dismissal.

12. Further, the Respondent failed to issue him a certificate of service.

13. During his employment, the Respondent neither allowed him to take his annual leave nor compensated him in lieu. He was the lone accountant, which was why he was not allowed to take leave. Throughout his employment, the Respondent did not pay him a house allowance.

14. In his evidence under cross-examination, the Claimant testified that he wouldn't remember whether the Respondent's CEO, at any point, sent him emails concerning the Respondent's accounts. The email address appearing in the email correspondence tendered in evidence by the Respondent was the one he used during his employment with the Respondent. From the emails, the CEO was seeking clarification on matters related to the Respondent's accounts.

15. At one point, the Respondent's CEO had a meeting with him to discuss the accounts.

16. The environment at his place of work presented a couple of challenges, making it a frustrating workplace. He reported these challenges to the Labour Officer. The letter from the Labour Officer to the Respondent alleged that the Claimant's employment had been terminated.

17. He did not formally bring to the attention of the Respondent his frustrations. Despite the frustrations, including the non-payment of his salary, he did not resign.
18. He admitted that he had not placed before this Court any documents to show that he applied for leave, but nonetheless, the Respondent declined to allow him to proceed for the same.
19. In his evidence under re-examination, the Claimant reiterated that he was the only accountant at the Respondent's. As such, it became difficult for the Respondent to allow him to proceed with his annual leave.
20. Despite the CEO's promises that the issue of his salary was being addressed by the Respondent's Nairobi Office, nothing came of it. He was largely frustrated by the non-payment of his salary.

The Respondent's Case

21. The Respondent presented one witness, Walter Kiilu Mbindyo, to testify on its behalf. The witness stated that at all material times, the Claimant was an employee of the Respondent. In May 2018, a dispute arose between the Claimant and the Respondent when the latter realised that it had suffered massive financial losses in 2017, notwithstanding that it apparently did well business-wise. 22. As a result, it was prompted to outsource the services of an independent auditor to conduct an audit of its books of account. During the audit, which ran from December to April 2018, the witness asked the Claimant to cooperate with the Auditor by providing the necessary information and documents as and when requested.
23. In the course of the audit, issues emerged that required the Claimant's explanation, including a financial loss of approximately KShs. 758,930.13 that had been unearthed by the auditor. The Claimant was unable to explain the loss.
24. The audit was subsequently conducted and finalised in April 2018 by the contracted auditor, Mr Mackean Sidho Otieno. The audit concluded that the Claimant, as the finance manager, had engaged in a scheme and had indeed succeeded in siphoning a total of KShs. 13, 758,930.13 from the Respondent through undisposed cash and cheques.
25. The witness stated that he subsequently invited the Claimant to a meeting in his office on 4th May 2018 to explain how such a substantial amount could not be traced. The auditor was also in attendance.
26. Being dissatisfied with the false and unsatisfactory explanation given by the Claimant, he on 7th May 2018 issued him with a termination letter dated 7th May 2018, terminating his employment forthwith, on the grounds of stealing by a servant.
27. Around the end of July 2018, the witness was surprised to be served with a letter dated 26th July 2018 from the Mombasa County Labour Officer purporting that the Respondent had unlawfully terminated the services of a number of pf employees, including the Claimant.
28. On 16th August 2018, the Respondent's Technical Director attended a meeting that was convened by the Officer. At the meeting, he informed the Officer

that an audit had been done on the Respondent's books of account and that the Claimant was among those implicated and dismissed accordingly.

29. The witness asserted that the Claimant did not at any point or at all exonerate himself from the findings of the internal audit, which found him and the General Manager culpable of misappropriating the sum of KShs. 13, 758.13, the property of the Respondent.

30. He further stated that he, on behalf of the Respondent, lodged a complaint of stealing by servant against the Claimant and on 17th August 2018, he was arrested and subsequently charged with the offence of stealing by servant contrary to section 281 of the Penal Code in Shanzu Chief Magistrate's Court Criminal Case Number 1190 of 2018.

31. The charge was, however, withdrawn under section 87[a] of the Criminal Procedure Code on 24th June 2021 under the advice of the Director of Public Prosecutions, as crucial evidence had not been submitted to him. The evidence was subsequently submitted.

32. Cross-examined by Counsel for the Claimant, the witness stated that the Claimant was not answerable to him on a day-to-day basis. He was answerable to the General Manager. The Claimant did not at any point complain to him that he was being frustrated at the workplace. The general Manager at the relevant time was not to tender any evidence.

33. The charges in the criminal case were withdrawn to allow further instructions. The investigations are now complete, and the Claimant is to be recharged.

34. The Audit report concluded that the Respondent had suffered a loss of approximately KShs.13,000,000. However, it has not been presented to this Court as evidence.

35. Further, the Respondent did not tender any evidence to demonstrate that a show cause letter was served upon the Claimant requiring him to explain the alleged loss of KShs. 13,000,000. There are no minutes for the meeting that was held on 4th May 2018.

36. The witness further stated that he doesn't know how the termination letter was served upon the Claimant. He has no proof that the service was effected. Furthermore, the letter is captioned "Suspension from duty". It was not a dismissal letter.

37. Respondent has not filed any suit against the Claimant seeking compensation for the alleged lost money.

38. The Respondent has not filed any document from which it can be discerned that the Claimant utilised all his earned leave days.

Analysis and Determination

39. I have carefully considered the pleadings by the parties herein, their respective evidence, and the respective submissions by their Counsel, and the following issues emerge for determination: a) How did the separation of the Claimant from his employment occur?

b) Is the Claimant entitled to the reliefs sought?

40. Undoubtedly, the parties herein have taken diametrically opposite positions on how the separation occurred, each hoping to attain a favourable outcome. The

Respondent contended that the Claimant was not constructively dismissed but was summarily dismissed from employment under a letter dated 7th May 2018, and hopes that the Court is convinced by this position, holds that the Claimant's claim for constructive dismissal was not proved, and, as such, dismisses the same.

41. The Claimant, on the other hand, contended that he was constructively dismissed, not summarily dismissed, by the Respondent. He posits that the Respondent's position is unfounded and should be disregarded.

42. The Claimant, from the outset, through his Reply to the Respondent's Statement of Response, denied receipt of the alleged termination letter or any such letter at all, and maintained this position during the hearing. Accordingly, the Respondent was made aware from the beginning that the matter of service and the actual existence of the letter dated 7th May 2018 were disputed, and that they bore the burden of proving them during the hearing.

43. I must say that the Respondent failed to discharge the burden. Under cross-examination, the Respondent's witness explicitly stated that he could not say when or how the alleged termination letter dated 7th May 2018 was served on the Claimant. In essence, therefore, he did not help the Respondent to discount the Claimant's position that he was not served with the letter.

44. Furthermore, I have carefully considered the said letter and note, as rightly submitted by Counsel for the Claimant, that it is captioned 'suspension of services from duty' and that the last paragraph gives a clear impression that the Claimant was being excluded from the workplace to enable further investigations into the incidents mentioned in the letter.

45. Despite the Claimant's detailed submissions on this vital issue, the Respondent did not address this Court on it, nor did it do so in any sufficient manner.

46. On the basis of these premises, I am inclined to conclude that the Respondent's position on how the Claimant's employment came to an end is unconvincing. Resultantly, and on the basis of the material placed before me, I am convinced that the Claimant's employment ceased when the Respondent no longer called him to report to work, caused him to be arrested on the alleged criminal offence of stealing by servant, and failed to call him back to the workplace after the criminal charges were dropped.

47. Having held as I have hereinabove, the subsequent crucial question is whether, then, the Claimant was constructively dismissed.

48. The test for constructive dismissal comprises two branches. The Court must first identify an express or implied contractual term that has been breached, followed by an assessment of whether that breach was sufficiently serious to constitute constructive dismissal. The conduct by the employer that a Claimant must navigate to prove constructive dismissal will also be deemed to constitute constructive dismissal if it demonstrates more broadly that the employer's intention was not to be bound by the contractual agreement. This methodology is inherently retrospective, as it requires an examination of the cumulative effects of the employer's past actions and a determination of whether those actions indicate an intention to no longer be bound by the contract.

49. In the case of *Stephen Michuki v East African Safari Air Express Limited & another* [2022] eKLR, this Court elaborated the tests, thus: -“76. From the onset, it should be pointed out that the Claimant’s claim is one for constructive dismissal. It is trite law that where an employer’s conduct evinces an intention no longer to be bound by the contract of employment, a path gets available to the employee to either accept the conduct or changes made by the employer or treat the conduct or changes as a repudiation of the contract by the employer and sue for wrongful dismissal. In the instant matter, it is clear that the Claimant settled for the latter choice.

77. Having said this, it is further imperative to state that at the centre of a claim for constructive dismissal is ever the conduct of an employer, not the employee’s conduct. The term “constructive” indicates that the dismissal is a legal construct. The employer’s act is treated as a dismissal because of the way it is characterised by law- *Potter v. N.B Legal Aid* [2015] 1 S.C.R...In determining whether the conduct of an employer evinced an intention no longer to be bound by the contract, there are two branches of test that are evident across jurisdictions. The court must first identify an express or implied term that has been breached, and then determine whether the breach was sufficiently serious to constitute constructive dismissal. Typically, the breach in question involves changes to the employee’s compensation, work assignments or place of work that are both unilateral and substantial. See the *Porter* case [*Supra*.]

79. In order for a claim for constructive dismissal to succeed where the Court applies this test, it must be concluded that the employer’s conduct or unilateral change constitutes a breach of the contract of employment, and second, if it constitutes such a breach, it must be found to substantially alter an essential term of the contract. This is the test that the Court of Appeal called the contractual test, *Coca-Cola East & Central Africa Limited v. Maria Ligaga* [2015] eKLR.

80. On the other hand, the Court can declare constructive dismissal where the conduct of the employer more generally shows that the employer intended not to be bound by the contract; it need not identify a specific term that was breached, it shall be enough to find that the employer’s treatment of the employee made continued employment intolerable. This approach is in character retrospective. It takes stock of the cumulative effect of the past acts by the employer and considers whether those acts evinced an intention to no longer be bound by the contract. In terms of the Court of Appeal decision [*supra*], this is “the unreasonable test.”

50. One of the fundamental contractual obligations of the employer in an employment relationship is to provide work to the employee. The Claimant contended that the Respondent failed to call him back to work. By failing to allow the Claimant to report to work, even after the criminal charges were withdrawn, the Respondent implicitly signalled that it could no longer provide work for the Claimant. In my view, this was a repudiatory breach, and this Court hereby finds that there was constructive dismissal.

51. By denying the Claimant the opportunity to resume work, the Respondent implied that the Claimant would remain suspended indefinitely without pay. Such an indefinite suspension has been recognised across various jurisdictions

- as a fundamental breach of contractual obligations, constituting a repudiatory breach and serving as grounds for a claim for constructive dismissal. By initiating this legal action, the Claimant accepted the repudiation.
52. The Respondent's Counsel submitted that the Claimant's claim for constructive dismissal is not well founded, as he did not resign. Time and again, this Court has held that where an employee is forced to leave employment because the employer's conduct renders the continuance of the employment relationship impossible, the exit need not be preceded by notice. The Labour Appeal Court of South Africa held in *Amalgamated Beverage Industries (Pty) Ltd vs Jonker (1993) 14 ILJ1232 (LAC) 1248H* that a formal resignation is not necessary for a case of constructive dismissal to succeed, and I agree.
 53. In conclusion, the Claimant was constructively dismissed from his employment.
 54. I now turn to consider whether the Claimant is entitled to the reliefs sought. It bears repeating that constructive dismissal is, in the eyes of the law, an unfair dismissal. As such, an employee who successfully proves constructive dismissal becomes entitled to any of the reliefs that can be granted to an employee who has been unfairly dismissed in some other way than constructive dismissal. However, the extent and nature of the relief shall depend heavily on the circumstances of his or her case.
 55. Undoubtedly, the employment of the Claimant was subject to the requirements stipulated under Section 35 of the Employment Act, 2007, which mandates termination with a notice period of twenty-eight days, unless it is established that the termination was validly carried out summarily in accordance with the provisions of Section 44 of the Employment Act. Upon determining that the Claimant was not summarily dismissed but rather constructively dismissed, and consequently without notice, I find no grounds to refrain from directing the Respondent to compensate the Claimant with one month's salary in lieu of notice.
 56. Section 49 [1][c] of the Employment Act, 2007, grants the Court the authority to award compensation to an employee who has successfully challenged their employer's unlawful termination. Nevertheless, it is important to recognise that this authority is discretionary and must be exercised on a case-by-case basis.
 57. I have carefully considered the circumstances under which the separation occurred, including that it occurred due to the Respondent's repudiatory breach of a fundamental obligation (s) under the contract of employment, that, in the circumstances of the matter, it was not proven that the Claimant contributed to the termination, and the length of his service to the Respondent, and hold that he is entitled to the compensatory relief, to an extent of five months' gross salary, KShs 461,263. 60.
 58. The Claimant sought compensation for unpaid salary covering a period of thirty-nine months. He sought to fortify his position with the decision in *Mulei vs Total Kenya PLC [2024] KEELRC 1743 [KLR]*. I have carefully considered the letter dated 1st November 2015, under which the Claimant was promoted, and his salary increased, and note that it expressly states that the monthly salary was a

gross salary. In my view, the Claimant's position could make sense and succeed if the salary were termed a basic salary. The pay slip cannot be read in isolation from other documents that speak to an employee's remuneration. By reason of these premises, I decline to award relief under this head.

59. The Claimant contended that throughout his employment, he was not afforded an opportunity to take his annual leave or compensated for the earned but untaken leave days. Consequently, he claims compensation for earned but unused leave days for the years 2015, 2016, 2017, and 2018. In my view, this claim would rightfully be characterised as a continuing injury claim, which under Section 89 of the Employment Act ought to have been filed within one year of cessation of the injury.

No doubt, it is time-barred. A grant of the same is declined.

60. By the same reasoning as in the preceding paragraph, the claim for unpaid salary is rejected.

61. In the upshot, Judgment is hereby entered for the Claimant against the Respondent for;

- I. A declaration that the Claimant was constructively dismissed from employment.
- II. One month's salary in lieu of notice, KShs. 83, 252.72.
- III. Compensation pursuant to the provisions of Section 49[1][c] of the Employment Act, KShs.461,263.60.
- IV. Interest at court rates on the awarded sum, from the date of this Judgment till full payment.
- V. Costs of this suit.

Read, Signed, and Delivered this 9th Day of April 2026.

OCHARO KEBIRA

JUDGE