



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. E6548 OF 2020

KENYA UNION OF COMMERCIAL
FOOD AND ALLIED WORKERS.....
CLAIMANT

VERSUS

LONDON DISTILLERS (K) LTD.....
.....**RESPONDENT**

JUDGMENT

1. The Claimant filed this this suit on behalf of its Grievant, Ms. Lucy Wangari Macharia via a Memorandum of Claim dated 26th August 2020 with the central issue in dispute being failure to pay terminal dues. It is the Claimant's case that the Grievant was initially employed in 2002 at a salary of Kshs. 4,288/- and progressively rose through the ranks from

General Labourer to Bottling Hall Clerk, and ultimately to General Clerk, earning a final salary of Kshs. 14,108/-. The Claimant avers that the Grievant's woes began on 15th January 2019 when she was transferred from the Athi River factory to the Nairobi Head Office, where she reported the same day. Shortly thereafter, on 17th January 2019, she was again transferred, this time from Nairobi to Mombasa. Despite requesting reconsideration on account of her school-going children and lack of financial means to facilitate the move, her request was declined. The Claimant further states that the Grievant wrote to the Manager at the Mombasa facility seeking six days' off-duty, but although the letter was received, it was not acted upon. In light of this unfair treatment, the Claimant contends that the Grievant was compelled to resign on 28th January 2019 after which she requested payment of her terminal dues. Although the Respondent acknowledged receipt of this request on 1st February 2019 and indicated that payment would be made, no such payment was forthcoming. This prompted the Grievant to report the matter to the Claimant's branch secretary. The Claimant states that it subsequently

demanded payment on 13th March 2019 and proposed a meeting with the Respondent on 26th March 2019. However, on the appointed date, its branch secretary was denied entry into the Respondent's premises. The Claimant states that consequently it reported a trade dispute to the Cabinet Secretary Ministry of Labour and Social Protection on 10th April 2019. The dispute was accepted on 11th June 2019 and a conciliator by the name Mr. Charles Muniki was appointed. The Claimant states that a conciliation meeting was thereafter held on 9th July 2019, during which the Respondent indicated that it was not prepared to make payment, prompting the Conciliator to issue a certificate of unresolved dispute. The Claimant further avers that it has a valid recognition agreement with the Respondent for the period 1st May 2015 to 1st May 2017. and contends that the Grievant's transfers particularly after nearly 17 years of service were unreasonable and unjustified. Consequently, it seeks: a declaration that the transfers were unlawful and procedurally unfair; a declaration that the Respondent's actions amounted to constructive dismissal; payment of dues under clause 6 of the CBA, including five months' salary in

lieu of notice and service pay totaling Kshs. 1,358,436/-; costs of the suit; and any other appropriate relief.

2. In response, the Respondent filed a Reply to Memorandum of Claim dated 17th August 2021. It denies the existence of a valid Recognition Agreement and CBA asserting that their validity is the subject of an ongoing suit. The Respondent acknowledges the Grievant's former employment status but denies that she was ever employed on permanent terms. It also admits the Grievant's transfer history but maintains that it was a normal administrative undertaking that should not be construed as discriminative. The Respondent's further case is that it received the Grievant's resignation but not the Claimant's letter dated 26th March 2016 requesting a meeting. In general, the Respondent denies all the other averments in the Memorandum of Claim and invites the Claimant to strict proof thereof.

3. At the hearing the Grievant testified in support of the Claimant's case while the Respondent called its Group Human Resource Manager as its witness. The Grievant adopted her witness statement dated 26th August 2020 and

produced the documents in the Claimant's list of documents. She testified that she was transferred from Athi River to Nairobi on 15th July 2019 and, after working there for two days, was transferred to Mombasa with immediate effect. She stated that her requests for additional time to facilitate relocation and for payment of transfer allowance were not heeded. According to her, the time sought was necessary to organize the transfer of her children's schooling and to secure accommodation in Mombasa. She maintained that these frustrations by the Respondent forced her to resign.

4. On cross-examination, the grievant reiterated that she lacked the financial means to secure housing in Mombasa and that her appeals against the transfer went unanswered, leaving her with no option but to resign. She, however, acknowledged having taken a Sacco loan of Kshs. 1,346,000/-. The Claimant thereafter closed its case.

5. The Respondent's witness, Mr. Peter Muli, its Human Resource Manager, adopted his witness statement dated 17th August 2021 as his evidence in chief and produced the documents in the Respondent's list of documents of even

date as REXH 1-7. He testified that the transfers affected several employees and that the Grievant's transfer to Mombasa was based on her suitability for that station. He further stated that transfer allowances were ordinarily processed mid-month and reflected in the end-of-month payslip. He added that the Grievant's request for reconsideration of transfer was still under review. Regarding terminal dues, he testified that the Grievant's account reflected a negative balance due to the substantial Sacco loan.

6. On cross-examination, the witness conceded that no documentary evidence had been produced to demonstrate that the transfer allowance was being processed. He also acknowledged that the Grievant was transferred to Mombasa shortly after her transfer from Athi River to Nairobi. With respect to terminal dues, he maintained that payment was contingent upon clearance, which the Grievant had not done.

7. The Respondent thereafter closed its case, and the parties proceeded to file written submission.

Claimant's Submissions

8. The Claimant submits that the parties are bound by a valid Collective Bargaining Agreement registered under sections 59 and 60 of the Labour Relations Act, specifically the agreement covering the period 1st May 2015 to 30th April 2017. It submits that the Grievant was a member of the Claimant union throughout her employment, a fact that is not in dispute. The Claimant submits that the Grievant's resignation was occasioned by the Respondent's conduct, which created intolerable working conditions, amounting to constructive dismissal. It asserts that the successive transfers issued with immediate effect were malicious and unfair, and that the Respondent failed to pay the grievant her terminal dues despite there being no allegation of misconduct. Specifically, the Claimant highlights the second transfer to Mombasa terming it abrupt and unreasonable due to the limited time for relocation, despite the Respondent's awareness of the Grievant having a Class Six child and a child suffering from cerebral palsy requiring special care. In support of its position the Claimant cites **Kenya Union of Commercial Food & Allied Workers v Generation Electronic Allied Limited [2021] eKLR**, where the Court

defined constructive dismissal as arising where an employer creates a hostile or untenable work environment that forces an employee to resign.

9. The Claimant submits that to further compound the unfairness, the Grievant made efforts to comply with the transfer but was unable to do so due to lack of financial facilitation and the Respondent's refusal to provide either transfer allowance or salary advance. Moreover, the Claimant contends that even after accepting his resignation and undertaking to pay terminal dues, the Respondent failed to do so. In support of the dues sought, the Claimant submits that the Grievant is entitled to service pay of Kshs. 1,358,436.90/- calculated at 60 days for each year of service, having served for 16 years. It draws attention to the Respondent's witness admission in cross-examination that the Collective Bargaining Agreement was not applied in computing the gratuity. Additionally, the Claimant adds that the Grievant's transfer allowance of Kshs. 5,000/- from Athi River to Nairobi was not paid. In support of the dues the Claimant relies on the case of **KUCFAW v London**

Distillers (K) Ltd (Cause E490 of 2020) [2024] KEELRC 897 (KLR), where the Court affirmed that gratuity under the relevant clause of the CBA is computed per completed year of service. In conclusion the Claimant urges the Court to allow the claim as prayed.

Respondent's Submissions

10. On its part the Respondent identifies the issues for determination as: whether the Grievant was constructively dismissed or she voluntarily resigned; whether the transfers were unlawful or unfair; whether the grievant is entitled to five months' pay in lieu of notice; whether the grievant is entitled to service pay at 60 days per year for sixteen years; and whether the Claimant has proved its case to the required standard.
11. On constructive dismissal the Respondent submits that the grievant's case does not meet that threshold. It asserts that her resignation was voluntary maintaining that there was no evidence of conduct amounting to a repudiatory breach of contract. It relies on **Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR**,

where the Court of Appeal held that constructive dismissal arises where an employer's conduct is so unreasonable or amounts to a repudiatory breach of contract, thereby entitling an employee to leave without notice. It maintains that routine transfers do not amount to repudiatory breach going to the root of the contract. Moreover, it highlights the full due settlement form dated 4th February 2019 evincing payment of all terminal dues to argue that the resignation was indeed voluntary and was duly accepted.

12. On the issue of the transfers, the Respondent maintains that they were not intended to frustrate the Grievant. It submits that the transfer letters dated 15th January 2019 and 17th January 2019 were lawful and constituted a legitimate exercise of managerial prerogative. It asserts that transfers within an organisation are permissible provided they do not alter the essential terms of employment, highlighting that, the grievant's salary, benefits, and designation remained unchanged. Moreover, the Respondent contends that the transfers affected several employees and were not targeted at the Grievant, and that the decision to transfer her to

Mombasa was informed by operational requirements. It also submits that there is no contractual provision prohibiting inter-branch transfers, and that her personal circumstances, though unfortunate, do not render an otherwise lawful transfer unfair.

13. On the claim for five months' salary in lieu of notice, the Respondent submits that under sections 35 and 36 of the Employment Act, notice pay is only applicable where termination is initiated by the employer. It asserts that in cases of resignation, the obligation to issue notice lies with the employee, and the employer is not liable to pay in lieu of notice unless expressly provided for in the contract. The Respondent contends that Clause 6 of the Collective Bargaining Agreement does not provide for five months' notice in cases of resignation and is therefore inapplicable. With respect to service pay, the Respondent submits that Clause 6 of the Collective Bargaining Agreement applies only where termination is initiated by the employer and does not extend to voluntary resignation. It further submits that in any event, section 35(6)(d) of the Employment Act bars payment of service pay where an employee is a member of a statutory

pension scheme such as the National Social Security Fund (NSSF). The Respondent asserts that the grievant was a member of NSSF throughout her employment and is therefore not entitled to service pay as claimed.

14. On the claim for transfer allowance, the Respondent submits that such allowance is payable only upon reporting to the new station and is ordinarily processed at the end of the month. It contends that since the grievant did not report to Mombasa, no transfer allowance was payable. In conclusion the Respondent submits that the suit should be dismissed with costs as the Claimant has not discharged its burden under section 47(5) of the Employment Act. It highlights its failure to demonstrate that the transfers were unlawful, that constructive dismissal occurred, or that the Respondent failed to compute or pay terminal dues.

Disposition

15. The Grievant was an employee of the Respondent and she resigned her position after a series of transfers. The transfers took place in rapid succession. They are eerily similar to those in the case of **Maria Ligaga v Cocacola**

East and Central Africa Limited (Cause 611 (N) of 2009) [2011] KEIC 36 (KLR) (Employment and Labour) (31 May 2011) (Award) where Rika J. held that the term “constructive dismissal” was not defined in our statutes but went on to state the following:

...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.” These Acts of foreign parliaments do not of course bind this Court, but an overall understanding of the concept is gained from a comparative look, particularly in view of the omission in our own statutory law. Common law, which has been embraced in our law through section 12 of the Labour Institutions Act Number 12 of 2007, treats constructive dismissal as a repudiatory breach by the employer of the contract of employment. The employer’s behaviour in either case must be shown to be so heinous, so intolerable, that it made it considerably difficult for the employee to continue working. The employee initiates the termination, believing herself, 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 in significant breach of the contract of employment and that the conduct shows the employer is no longer interested in being bound by the terms of the contract. There is no practical difference in terms of effect, between the statutory and the common law concept on constructive dismissal; it is unlikely that an employer is in fundamental breach of the contract of employment, but all the same is found to have acted fairly. It is very unlikely that a common law breach occurs without amounting to a statutory wrong. The employee's resignation is therefore treated as an actual dismissal by the employer, and the employee may claim compensation for unfair termination.

This concept, like many concepts in labour law, is based on the recognition of the inequality of bargaining power in the employment relationship. If it did not exist, the danger would be that employers would simply force their

employees to quit, and avoid paying any form of compensation. The onus of proof in this form of employment termination, unlike in other termination, lies with the employee. While under section 43 and 45 of the Employment Act 2007 the duty in showing that termination was fair is on the employer, constructive dismissal demands the employee demonstrates that his resignation was justified. Other collateral issues that must be shown by the employee are: that the employer made a fundamental change in the contract of employment, and that such change was unilateral; that the situation was so intolerable the employee was unable to continue working; that the employee would have continued working had the employer not created the intolerable work environment; and, that the employee resigned because he did not believe the employer would abandon the pattern of creating unacceptable work environment. These are some of the rules governing a claim for constructive dismissal.

[Emphasis provided]

16. The Grievant in my considered view was shown a lot of disregard for her rights. She had a child with special needs and yet was being shifted all over the place like an unwanted beverage. She was sent to Nairobi from Athi River, a distance that may not seem long to the Respondent but one which is not short for a commuter in public transport on a daily ride to and from her base in Athi River. Shortly after reporting to Nairobi on 15th January 2019 after the Grievant was transferred from the Athi River factory to the Nairobi Head Office, upon reporting the same day she was shortly thereafter, on 17th January 2019, again transferred, this time from Nairobi to Mombasa. Despite requesting reconsideration on account of her school-going children and lack of financial means to facilitate the move, the Grievant's request was declined.

17. This is a classic case of constructive dismissal fitting right in the mould of the **Maria Ligaga** case. Yet again a company in the beverage business was treating an employee badly and yet again, a woman. In her appeal letter addressed to the Chairman (Mr. Mohan Galot) dated 18th

January 2019 for her to be considered for retention in the Nairobi depot (at least) she stated the following:

Mr. Chairman Sir,

REF: AN APPEAL TO BE CONSIDERED

I kindly request for the above mentioned. Sir I am a mother with young kids whom (sic) seriously need my care. They are in school and I cannot move with them in that new station. Any transfer outside Nairobi will make them suffer mentally and physically and as you being a caring parent you would not wish the same to happen to your kids.

Sir, I have worked in the company for 17 good years. I have never been involved in any issue which is against the factory, neither being a representative of union.

I would request you to maintain me in head office and let me be monitored and feedback given to you on my behaviour and performance.

Sir, I am dying a natural death. I don't see why I should suffering (sic) this much. I swear to God I am very innocent. I know you are a caring parent and you will consider my request positively.

Thank you in advance.

Yours faithfully

(signed)

Lucy Macharia

18. The Grievant then wrote another letter on 21st January 2019 to the Manager London Distillers (K) Limited Mombasa Depot. The letter read thus:

Dear Sir

REF: SIX DAYS OFF DUTY

I kindly request for the abovementioned to be deducted from my annual leave. Sorry I have not yet reported to my new work station since it was abrupt transfer and as a mother I seriously need time to make some arrangement on how my kids will survive without my care.

I have to look for a boarding school where one can be admitted to take another one to my mother upcountry and to look for someone to take care of my house while I am away. Please sir, bear with me this struggle I am undergoing and grant my request. I hope and pray you will consider my request positively.

Thank you in advance.

Yours faithfully,

(signed)

Lucy Wangari Macharia

19. The above entreaty, just like her earlier passionate letter to the Chairman fell on deaf ears. The Grievant resigned on 28th January 2019 and the Respondent was quick to accept her resignation vide the letter dated 1st February 2019 under the hand of Mr. Peter Muli the Group Human Resource Manager accepting her resignation effective immediately. It was addressed to Lucy Wangari Macharia P.No 1062, Mombasa Depot meaning the Grievant had effectively been transferred to Mombasa Depot. The Claimant is correct in its surmise that the Grievant had no option but to resign. She made efforts to comply with the directive to relocate to Mombasa but this was rebuffed. The Grievant is therefore entitled to recover compensation - the maximum compensation given her personal circumstances - 17 years of service, a mother of young children and the fact that she was forced to make adjustments at the work place within a very short time - Athi River to Nairobi then 2 days later

transferred from Nairobi to Mombasa. It is sometimes just easier for an employer to dismiss you instead of taking you on a roller coaster ride as it ushers you out the door. The Grievant is entitled to the following reliefs:-

- (a) Terminal benefits Kshs. 1,358,436/-
- (b) Damages for her constructive dismissal - Kshs. 1,000,000/-
- (c) 12 month's compensation - Kshs. 168,000/-
- (d) Costs of the suit.
- (e) Interest at court rates on the sums in (a), (b) and (c) above from the date of judgment till payment in full.

It is so ordered.

Dated and delivered at Kisumu this 21st day of April

2026

**Nzioki wa Makau, MCI Arb.
JUDGE**