



**Maingi v Bridge International Academy Limited (Civil Appeal
193 of 2019) [2023] KECA 1211 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1211 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL 193 OF 2019
F SICHALE, FA OCHIENG & LA ACHODE, JJA
OCTOBER 6, 2023**

BETWEEN

SAMUEL KANYI MAINGI APPELLANT

AND

BRIDGE INTERNATIONAL ACADEMY LIMITED RESPONDENT

((Being an appeal from the Decision of (Marete J) dated 14th March 2019 in Employment and Labour Relation Court In Eldoret Cause No 49 of 2017 (Formerly Nakuru ELRC No 91 of 2015))

JUDGMENT

1. Samuel Kanyi Maingi the appellant herein, instituted a Memorandum of Claim dated 25th of March 2015, against Bridge International Academy Ltd, the respondent in Cause No 49 of 2017, in the Employment and Labour Relations Court at Eldoret. He alleged that he was employed by the respondent on the 7th of May 2012 at a basic salary of Kshs 23,000, and thereafter Kshs 27,000, but that in the month of October 2014, the respondent began to deduct unexplained sums from his salary. Further that, during his employment the respondent was required to reimburse him expenses incurred in transport and accommodation while performing his duties, and as of December 31, 2014 the respondent owed him Kshs 23,466 being reimbursement of transport and accommodation expenses.
2. The appellant also alleged that he and the respondent had agreed that upon completion of a real estate acquisition, the appellant would be entitled to a bonus of ksh 15,000 for each acquisition. He averred that he had completed seven acquisitions in Maji Mazuri, Rumuruti, Dunderi, Kijabe, Makuyu, Salгаа and Karaba regions, and he was paid only Kshs 18,000. Lastly, that during the 2 years of his employment he did not go on leave.
3. Consequently, the appellant made demands for his dues, which were completely ignored by the respondent, causing him to consider his employment as having been terminated by the conduct of the respondent, albeit without notice. As a result, he prayed that the respondent's termination of



his employment be declared unlawful, unjustifiable and contrary to the Employment Act. He sought compensation pegged on twelve months salary being Kshs 324,000/= and also claimed the following:

- I. Refund of irregular deductions.....Kshs 79,460
 - II. Refund of out-of-pocket expenses...Kshs 23,466
 - III. Accrued bonus/dues.....Kshs 87,000
 - IV. Leave allowance for 2 years.....Kshs 54,000
 - V. One month pay in lieu of notice.....Kshs 27,000
4. In rebuttal, the respondent denied the claim in the Memorandum of Claim. It was averred that at paragraph 34 (b), the appellant's contract dated February 13, 2013 incorporated the Employment Handbook terms and conditions. That at page 25 of the handbook, it is stated that an employee will be provided with funds to cover work related travel, transport, housing, work related non-travel expenses or purchases. That staff advances/reimbursement were subject to a policy on reconciliation and accountability.
 5. For the foregoing reason, employees were required to attach an original authentic receipt for all requisitions for all approved expenses within forty-five days of receiving the staff advance. That the appellant, on joining the respondent's employment, was advanced funds for purposes of executing official duties, a total sum of Kshs 79,643 which he failed to account for. As a result, the respondent applied company policy and recovered the said money from his salaries. Further, that the appellant owes them Kshs 47,208 that he has failed to reconcile to date.
 6. On the bonuses, the respondent averred that indeed the appellant had the benefit of this policy. However, he was paid Kshs 9000 for the four projects: Remuruti L15XXX, Dundori L15XXX, Salгаа L15XXX and Maji Mazuri L15XXX; and Kshs 15,000 for Makuyu L15XXX.
 7. It was asserted that the appellant resigned from work through an email dated December 1, 2014 addressed to his direct executive supervisor and did not therefore, conclude processing the title of the Karaba land deal. As such he was not entitled to the bonus claimed. They also averred that the claimant applied and took his leave days since the commencement of his employment.
 8. Upon considering the evidence before him, Marete J dismissed the appellant's case and ordered each party to bear its own costs.
 9. The above judgment did not go down well with the appellant whereupon, he brought this appeal against it, on the grounds that the court erred in law and in fact:
 - a. In failing to consider the evidence of the appellant and the respondent on record.
 - b. In failing to consider the agreed issues and Written Submissions filed.
 - c. In failing to give reasons for the determination.
 - d. In finding that the claimant had not established a case on a balance of probability.
 - e. In finding that the claimant had failed to establish a case of unlawful termination of employment.
 - f. That the court erred in law and fact in finding that the claimant had been unable to establish the monies owing to a balance of probabilities and preponderance of evidence.
 - g. In finding that the claimant's case was bereft of any evidence in support of such a case.



- policies, then that would amount to subjecting the employee to servitude which is contrary to article 30 of the Constitution.
16. They relied in the decision of Herbert Wafula Waswa v Kenya Wildlife Services (2020) eKLR Civil Appeal No 14 (A) of 2020 where it was held that failure of the appellant to cite frustration by the respondent as the reason for his desire to leave, failed to prove his claim for constructive dismissal.
 17. On the second issue as to whether the trial court failed to give reasons for its decisions, the respondent holds that the court below explored the logic and found that the appellant did not provide good evidence to sustain his claim against the respondent, in terms of the issues framed for determination by the parties. They rely on this Court's decision in Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021) (2022) KEHC 7 (KLR) (24 January 2022) (Judgment) and assert that the reasons given should not be read pedantically but sensibly. That provided the reasons expose the logic of the decision and contain findings on those matters of fact essential to that logic, they will be adequate.
 18. On the final issue as to whether the trial court arrived at the wrong decision, the respondent has advanced several reasons to illustrate that the trial court arrived at a proper conclusion. First, that deductions were made on the appellant's salary because he refused to reconcile his expenses, and failed to adhere to the laid down policy and procedure on staff advance reconciliations. Second, that, he did not provide evidence to prove that he closed the deals on the plots for which he is claiming unpaid bonuses. Third, that he did not provide any evidence to justify the out-of-pocket expenses, and why he did not requisition for staff advances to fund his work-related expenditure. Fourth, that he did not dispute the fact that he had filed a leave form with the respondent on December 8th, 2014, which was approved on December 10th, 2014, and he proceeded on leave. Lastly, that the appellant indicates that he had not cleared with the respondent. This he says, is because he still believed he was an employee of the respondent.
 19. We have considered the record of appeal, the submissions of the parties and the law applicable. This being a first appeal, our duty is as provided in rule 31 (1)(a) of the Court of Appeal Rules, 2022 as follows:

“On appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power to re-appraise the evidence and to draw inferences of fact.”
 20. Also, in Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, this court stated its duties as follows:

“[A]n appeal to this Court from a trial by the High Court is by way of 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 allowances in this respect”
 21. Guided by the above position we find that the issues that fall under our consideration are whether the court applied its mind to the case before reaching a conclusion, whether the appellant proved that there was unlawful termination, and whether the appellant proved that the respondent owed him money.
 22. Order 21 rule 4 of the Civil Procedure Rules 2010 provides that:

“Judgements in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decisions.”



We note that in the impugned judgment, the learned judge analyzed each party's case and the evidence relied on upon which he reached a conclusion that the appellant did not prove his case to the required standard. In our view therefore, the superior court complied with the afore stated rule. He applied his mind to the case before reaching a decision.

23. The appellant contends that he did not resign but was constructively dismissed by the respondent. That the email he sent to the respondent did not constitute a resignation letter, since it is not in accordance with the procedure laid down in the Handbook for resigning. On the other hand, the respondent urges that it was a resignation letter, as an employee can unilaterally resign from work. Further that, since neither they nor the appellant were prejudiced by the mode of resignation, they accepted it. They contend that the appellant having not indicated in his letter of resignation the reasons for the resignation, he cannot claim constructive dismissal.
24. The record indicates that on December 1, 2014, the appellant sent an email to the respondent, the subject of which was "Resignation Letter". The said letter reads as follow:

"Dear Shanon,

I'm compiling a report for you regarding the outcome of our meeting with the CDE in UG.

Meanwhile I hereby tender my resignation from Bridge. Notice of which resignation takes effect from the date of this email.

Samuel Kanyi"

25. We have also looked at the Handbook guidelines which indicate that resignation should not be by way of email. However, we are of the considered view that if the appellant's intention was to resign, and the respondent would have no business holding him against his will. We are guided with this Court decision in *Public Service Commission & 4 others v Cheruiyot & 20 others* (Civil Appeal 119 & 139 of 2017 (Consolidated)) [2022] KECA 15 (KLR) (8 February 2022) (Judgment) where it was observed in paragraph 47 that:

"A notice of resignation is basically a notice of termination of employment, given by an employee to the employer. It is a unilateral act. The *Black's Law Dictionary* (Tenth Edition) defines resignation as follows:

"The act or an instance of surrender or relinquishing an office, right or claim. A formal notification of relinquishing an office or position, an official announcement that one has decided to leave one's job or organization, often in the form of a written statement."

26. The pertinent question is: Did the respondent force the appellant's hand to resign? Constructive dismissal has been defined in many decisions in this Court. In the decision of *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga* (2015) eKLR it was stated thus:

"The key element in the definition of constructive dismissal is that the employee must have been entitled to 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 behaviour 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 constitutes a repudiatory breach of the contract of employment- this is the contractual test."



27. In the same decision the Court further outlined the guiding principles in determining the issue of constructive dismissal as follows:
- a. What are the fundamental or essential terms of the contract of employment?
 - b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?
 - c. The conduct of the employer must be a fundamental or 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.
 - d. An objective test is to be applied in evaluating the employer's conduct.
 - e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e causation must be proved.
 - f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.
 - g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
 - h. The burden to prove repudiatory breach or constructive dismissal is on the employee.
 - i. Facts giving rise to repudiatory breach or constructive dismissal are varied.
28. The appellant did not give any reasons for his resignation in the resignation letter. He just decided to leave employment as was his right to do. Considering the guidelines set out in *Coca Cola East & Central Africa Limited supra* we are of the considered view that the appellant has not discharged the burden of proof that he was constructively dismissed by the respondent. It therefore follows that the appellant is not entitled to one month's salary in lieu of notice nor is he entitled to 12 months' salary for unfair dismissal or at all.
29. The appellant also claims from the respondent, refund of irregular deduction of ksh 79,460; refund of out-of-pocket expenses of Kshs 23, 466; accrued bonuses of Kshs 87,000; and leave allowance for two years being Kshs 54,000. In rebuttal, the respondent contends that the reduction of Kshs79,460 from the appellant's dues was because of the advance funds that the appellant was given for the execution of official duties, Kshs 23,466 claimed for out-of-pocket expenses. According to the respondent, the bonuses that the appellant was entitled to were all paid, and he also utilized his leave days as entitled.
30. The appellant provided his pay slips. From the month of October 2014 to January 2015 the pay slips indicate deductions that were termed as "payroll recovery" or "staff debt recovery." The respondent justified these deductions by providing an m-pesa statement to demonstrate that kshs 79,460 was made to the appellant as advance payment for official duties, that the appellant needed to account for in accordance with the handbook. The appellant claims to have accounted for it but there is no such proof on record and neither has provided any evidence to prove that he used out-of-pocket money, Kshs 23,466, for official duties for which he should be refunded.
31. The appellant also claims bonuses for the completion of the seven real estate acquisitions. On the other hand, the respondent asserts that the appellant had completed the acquisition of five real estate assets and was duly paid. We have looked at the record and there is no evidence that the appellant completed the acquisition of the two additional real estate assets.



32. Finally, on leave there is nothing in the record showing that the appellant applied for his leave and was denied.

33. After a careful analysis of the record and the submissions before us, we find that the appellant did not prove his case to the standard required. Ultimately, we find no basis to disturb the findings of the superior court. As such, this appeal is dismissed in its entirety with costs to the respondent.

DATED AND DELIVERED IN ELDORET THIS 6TH DAY OF OCTOBER, 2023.

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

