



**Omacho v National Bank of Kenya Limited (Cause E792 of 2021)
[2025] KEELRC 32 (KLR) (17 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 32 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E792 OF 2021
SC RUTTO, J
JANUARY 17, 2025**

BETWEEN

MILTON OSORO OMACHE CLAIMANT

AND

NATIONAL BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim dated 16th August 2021, the Claimant avers that he was employed by the Respondent as a Business Development Manager, with effect from 14th March 2016. He was confirmed as a permanent employee vide a letter dated 6th January 2021(sic). That as per a letter of appointment dated 14th March 2021, he was to earn a monthly salary of Kshs 87,321/=. The Claimant avers that he performed his duties diligently and was rewarded severally with his monthly salary growing to Kshs 93,538/= at the time of his resignation.
2. Citing the Respondent for constructive dismissal, the Claimant avers that he was forced to resign on 2nd June 2021 as the issues he had raised were not addressed by the Respondent besides being of fundamental breach of his employment contract. Consequently, the Claimant prays for the following reliefs:
 - a. An order that he be reinstated back to his former position.
 - b. An order that the Respondent pays his June 2021 salary as he fully worked for it.
 - c. An order that the Respondent pays his salary from the time that he was forced to resign.
 - d. Damages for frustration of his employment contract by the Respondent.
 - e. Damages for frustration of the terms in a newly advertised job.
 - f. Damages for harassment by the Respondent.



- g. Interest at court's rate on the above prayers.
 - h. Costs of this cause.
 - i. Any other relief the Court may deem fit and just to grant.
3. The Respondent has opposed the Claim through a Statement of Response dated 15th August 2022 in which it denies the Claimant's assertions that he was constructively dismissed. In this regard, the Respondent avers that the Claimant resigned on his own volition. According to the Respondent, the Claimant's suit does not disclose any reasonable cause of action and hence should be dismissed with costs.
 4. The matter was canvassed by way of oral evidence and production of exhibits.

Claimant's Case

5. When the matter proceeded for hearing on 16th October 2024, the Claimant testified in support of his case. He sought to adopt his witness statement, supplementary witness statement as well as his list and bundle of documents to constitute his evidence in chief.
6. It was the Claimant's evidence that on 19th March, 2021 the Respondent invited him for an interview for the position of Regional Sales Manager, a job advertised internally with clear terms of engagement and graded at MG 8. He attended the interview on 22nd March, 2021 and on 15th April 2021 the Respondent communicated to him via an offer letter that he had succeeded for the job.
7. To his surprise, the terms on the offer letter were different from the terms advertised on the job he had been interviewed for, and at no time had the Respondent communicated any form of changes.
8. The Claimant further averred that the salary scale band of MG 8 starts at a minimum basic monthly salary of Kshs 152,672/= but the Respondent's offer had maintained his previous basic monthly salary of Kshs 93,538/= with an addition of Kshs 5,000/= and Kshs 2,000/= for transport and airtime allowance respectively.
9. He raised the issue with his supervisor and questioned the salary variance and his response was "Are you in for the money or the service".
10. The Claimant averred that even before acceptance of the new job/contract, the Respondent moved with unnecessary speed and irregularly adjusted his salary, without any agreement in an effort to force him to take the new job.
11. That on several occasions, he wrote emails to the Director Human Resources to have the matter addressed but nothing was forthcoming. He again raised the matter with his boss but no solution or valid explanation was forthcoming resulting in further frustration.
12. According to the Claimant, this made him more frustrated and it proved very difficult to continue working for the Respondent.
13. It was the Claimant's evidence that on 24th May 2021, the bank having breached his existing contract and tactfully coercing him to ratify the new job contract in dispute, he issued his resignation notice. On the same day, he notified his supervisor of his intention to resign and he (supervisor) shockingly reiterated that his case was of mental and physical health.
14. In the Claimant's view, it was clear that the Respondent was not willing to have his grievances addressed and was determined to create an unendurable environment for him to work.



15. He averred that he was therefore forced to officially resign on 2nd June 2021 as the issues he had raised were not addressed by the Respondent besides being of fundamental breach of his employment contract.
16. The Respondent accepted his resignation letter on 3rd June 2021 with his last day of employment indicated as 23rd June 2021. That the Respondent refused to pay his June 2021 salary despite having worked full time.
17. The Claimant further averred that long after accepting his resignation the Respondent invited him for a meeting where the agenda was to discuss the contents of his letter of intention to sue dated 11th June 2021. Instead of addressing the issues raised, the Respondent's agents turned the agenda into a mockery of his grievances to the extent of the Human Resources Director saying the bank has lawyers and they would defend themselves thus the meeting ended without any solution.
18. The Claimant further averred in his supplementary witness statement that his contract had a variation clause on functions and duties and not the role itself. That the functions and duties were changed from time to time using the job description and performance objectives at the start of the financial year.
19. According to him, the advertised role of Regional Sales Manager had a significantly different reporting structure and job grade and should have had a legal offer and acceptance that was free of undue influence as it was totally a new job.
20. According to the Claimant, there should have been an appointment letter for the role of Regional Sales Manager as opposed to the role realignment letter.
21. He further stated that at no time did he work as a Regional Sales Manager.

Respondent's Case

22. The Respondent called oral evidence through Mr. Stephine Obong'o, who testified as RW1. Equally, Mr. Obong'o adopted his witness statement to constitute his evidence in chief. He proceeded to produce the list and bundle of documents filed on behalf of the Respondent as exhibits before court.
23. RW1 stated that due to business exigencies and the need to realign the Bancassurance business under the new Kenya Commercial Bank Group Structure, the Claimant's role was restructured, and the Bank published an internal job application advertisement calling for suitable candidates to fill in the vacancy for Bancassurance BDM (Retail) on the 19th February 2021.
24. That further, the Respondent had published an internal job application for Bancassurance Regional Sales Manager Grade MG 8.
25. It was RW1's testimony that the Claimant was duly informed that if he was desirous of maintaining his role as Business Development Manager, then he was required to re-apply for the position. Consequently, the Claimant applied for the position and was invited for an interview which he did not qualify.
26. The Claimant was also interviewed for the position and role of Bancassurance Regional Sales Manager, Western Region Grade MG 8. He was successful in this position and his roles were thereafter reassigned accordingly vide a letter dated 15th April 2021.
27. After the role realignment, the Claimant's job grade was maintained at job group MG 9 but with his monthly terms of service revised upwards with benefits/entitlements.



28. The Claimant being dissatisfied that his job grade was not varied to that of an MG8, vide an email of 3rd May 2021, wrote to the Respondent's Director Human Resources acknowledging receipt of the letter for Regional Sales Manager Western region. The Claimant further indicated that the salary allocated as per the letter was contrary to the advertised job salary scale of MG8. He sought to be advised on the applicable pay grade for the role and if there was any error on the same to be rectified accordingly.
29. In response thereto, the Respondent's Director, Human Resources by an email of 4th May 2021 confirmed to the Claimant that indeed the role of Regional Sales Manager was advertised as that of an MG8 but upon further review, all Sales Managers Roles were varied to MG9 due to the business extremities.
30. The Claimant was further informed that all the Sales Managers who had joined the Respondent had been placed in MG9 at a starting salary of Kshs. 87,132/= and therefore the Claimant's then salary of Kshs. 93,538.42/= was well within the pay grade.
31. On 6th May 2021, the Claimant wrote to the Respondent's Director, Human Resources with a copy to his Line Manager and Principal Officer wherein he further expressed his disappointment in the role re-alignment and asked the management to re-look into his case. This prompted the Respondent's business heads to deliberate further on the matter.
32. Thereafter, the Claimant resigned vide an email of 24th May 2021.
33. Concerned about the manner in which the Claimant had resigned, the Respondent's Human Resources & Business Partner Mr. Nzau wrote to him on 24th May 2021 requesting that the Claimant reconsider his resignation and noted that he might be resigning due to frustrations he might have suffered on account of his role having been reassigned.
34. RW1 further averred that in his letter of 31st May 2021 to the Business Development Manager the Claimant expressed his frustrations and declined to have his role re-assigned.
35. According to RW1, the Respondent's email of 24th May 2021 was never meant to deride the Claimant. He averred that the Claimant's frustration is evident in his response to the Respondent's Business Development Manager by an email of 31st May 2021 and his refusal to support the Respondent's Business Development Manager take over the role.
36. Despite several pleas imploring him not to resign from employment, the Claimant issued an official letter of resignation on 2nd June 2021 and which resignation was accepted vide the Respondent's letter of 3rd June 2021.
37. According to the resignation acceptance letter dated 3rd June 2021, the Respondent indicated that the Claimant would be paid all his dues up to and including 23rd June 2021 which was his last date of employment. The Claimant's dues would be paid less any monies owed to the Bank upon presentation of the Respondent's Staff clearance certificate.
38. RW1 further averred that the resignation acceptance letter dated 3rd June 2021 asked the Claimant to advise the Respondent on how he planned to settle all his outstanding staff loan balances which amount stood at Kshs. 7,820,305.73/= as of 31st May 2021.
39. The Claimant was also informed that the loans would be handled in accordance with the Bank's Staff Facilities Policy, and that he would continue repaying his loans at the prevailing staff rate for 6 months and thereafter at the commercial rate until loan maturity.
40. According to RW1, the Claimant cannot allege to have been frustrated by the Respondent.



41. RW1 was categorical that the Claimant resigned on his own volition and was not constructively dismissed as alleged or at all. That the Claimant vide his email of 31st May 2021 asserted that the Respondent should 'prepare for his replacement and hand-over as he was pre-occupied with the next move'. In RW1's view, this clearly demonstrates that the Claimant had secured an alternative employment and therefore could not have any discussion with the Respondent.
42. That upon resignation by the Claimant and acceptance thereof by the Respondent, he was duly paid all his terminal dues but has never bothered to write to the Respondent giving a proposal of how to repay his outstanding loans with the Bank contrary to the request that was made to him vide the Respondent's letter of 3rd June 2021.
43. RW1 further testified that contrary to the allegations by the Claimant, he was given more than reasonable accommodation by the Respondent despite having resigned from his employment.
44. It was RW1's evidence that the Respondent tried its best to accommodate the Claimant who vide his email of 31st May 2021 had indicated that he had been 'pre-occupied with the next move'.

Submissions

45. Upon close of the hearing, both parties filed written submissions which the court has considered. On his part, the Claimant submitted that the role realignment letter issued to him required only an acknowledgment signature, denying him the freedom to either accept or decline the role's term.
46. The Claimant further submitted that the Respondent's action contravened Article 41(1) of *the Constitution* of Kenya, 2010 which guarantees every person the right to fair labour practices.
47. It was the Claimant's further submission that the policies make clear that job grade changes within KCB Group PLC are procedural, involving multiple stakeholders to ensure fairness, transparency and accountability. In the same vein, the Claimant submitted that the absence of documentary evidence suggests that the job grade change was not conducted in a fair, transparent or procedural manner which amounts to an infringement of Article 41(1) of *the Constitution* that guarantees fair labour practices.
48. The Respondent on the other hand submitted that there is no causal link between the Claimant's resignation and its conduct. To this end, the Respondent urged that the claim for constructive dismissal ought to be dismissed. To buttress its submissions, the Respondent placed reliance on the cases of *Kiprop vs Melchizedek Hospital Limited (Cause E134 of 2022)* (2023) KEELRC 3090 (KLR) and *Yattani vs Eco Oil Kenya Limited (ELRC cause 1575 of 2017)* (2022) KEELRC 13293 (KLR).
49. It was the Respondent's position that the Claimant did not present any evidence during the hearing that he was treated differently than the person selected for the role of Bancassurance Business Development Manager (Retail). On this score, the Respondent posited that the Claimant cannot use submissions to tender new evidence. In support of this argument, reliance was placed on the case of *Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & another* (2014) eKLR.
50. The Respondent stated in further submissions that the Claimant resigned of his volition and was not constructively dismissed as alleged.

Analysis and Determination

51. Flowing from the pleadings filed by both parties, the evidentiary material on record, as well as the rival submissions, it is evident that the issues falling for the Court's determination are:
 - i. Whether the Claimant resigned on his own volition or was constructively dismissed;



- ii. Whether the Claimant is entitled to the reliefs sought;

Voluntary resignation or Constructive dismissal?

52. It is common cause that the Claimant tendered his resignation from the Respondent's employment on 2nd June 2021. The point of divergence is whether the said resignation was voluntary or amounted to constructive dismissal.

53. The Employment Act 2007, has not defined the concept of constructive dismissal. This notwithstanding, the concept has received considerable attention in decisions emanating from this Court and the Court of Appeal. In the leading case of *Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR the Court of Appeal had this to say:

“What is the key element and test to determine if constructive dismissal has taken place? The factual circumstances giving rise to constructive dismissal are varied. 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.”

54. The Court proceeded to formulate guiding principles in respect of claims of constructive dismissal key among them being that, 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.

55. The Black's Law Dictionary (10th Edition) defines the term constructive dismissal to mean: -

“An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”

56. Fundamentally, constructive dismissal occurs when an employee is left with no choice but to leave his or her job owing to the employer's conduct. Therefore, in as much as the employee is not actually dismissed from employment, the working conditions created by the employer are so intolerable or there is a breach of fundamental terms of the employment contract by the employer such that the employee is entitled to regard himself or herself as having been unfairly dismissed.

57. In the case herein, the reasons for the Claimant's resignation can be discerned from his letter dated 2nd June 2021 addressed to the Respondent's Human Resources Manager, which I will reproduce in part, for context purposes:

“My recent experiences with your office added to an abusive treatment by my immediate supervisor Mr. Nathan K. Nzau have directly left me with no choice at all but to resign. Both of your conduct as listed below have made my position at work untenable.

1. You have rudimentarily breached a contract on a job you recently advertised and which I fully participated to the end.



2. You have tactfully decided to ruse and change my job significantly without following the due process, without reviewing other relevant and critical terms of our existing contract and without discussing or notice; against the *Employment Act*.
3. You have in writing informed me of your intention to carry out the above said illegalities.
4. My supervisor treated my grievances as a case of mental and physical disorder which appeared very abusive and malicious to me as he lacks the qualifications and mandate to determine such. He actually went to an extent of putting it into writing where your office was copied, without the involvement of any medical doctor. This was totally harsh, amounted to bullying against the law and the Bank Policy and Procedures.
5. Your office has failed, neglected and/or refused to address my grievances. Due to this, the Bank has formally communicated to me of her inability to make a business decision on my position hence making my working with you intolerable.

While I appreciate the time and energy you have invested in training me, I consider all these to be unreasonable and a fundamental breach of various contracts on your part."

58. It is not in dispute that the Respondent advertised for the position of Bancassurance Regional Sales Manager grade MG8 and that the Claimant successfully interviewed for the said position.
59. In a letter dated 15th April 2021, the Claimant was notified of the outcome of the said interview in a letter referenced "Role Realignment". Notably, the said letter did not bear the Claimant's job grade although his salary fell within grade MG9. This prompted the Claimant to enquire from the Director Human Resources Manager, Mr. Mungumi through his email of 3rd May 2021, as to the applicable pay grades for the role that had been advertised.
60. In response, Mr. Mungumi advised the Claimant as follows vide his email of 4th May 2021:

"Indeed the role was advertised at MG8. However, on further review, the role was placed at MG9. All the Sales Managers that joined have been placed at MG9. Once the Bancassurance business portfolio grows there will be an opportunity to re-evaluate the role."
61. What manifests from the foregoing is that the Respondent placed the Claimant in grade MG9 contrary to the position he had interviewed for which was MG8. As it is, this was done unilaterally and not in consultation with the Claimant.
62. According to the Respondent, the role of the Sales Managers was varied to MG9 due to business extremities. This being the case, it was prudent for the Respondent to notify the Claimant of the said changes at the outset so as to allow him make a decision as to whether he was desirous of taking up the new role with the terms being offered.
63. Indeed, it may very well be said that the Claimant was blindsided as he was invited to interview for a position falling with a specified grade which was higher than the one he was holding at the time, only to be realigned to a grade which was lower to the position he had interviewed for.
64. What's more, the Claimant was not given room to make a decision as to whether or not to accept the new terms which were significantly different from the position advertised.



65. Coupled with the foregoing, the Respondent stated that the Claimant was duly informed that if he was desirous of maintaining his role as Business Development Manager, he would be required to reapply for the said position, which he did, unsuccessfully. Essentially, the Claimant was in a fix and was left with almost no option but to accept the new terms contained in the letter of 15th April 2021 or resign. In the end, he opted to resign.
66. Further, it is this court's finding that the unilateral variation of the grade the Claimant had interviewed for amounted to breach of his reasonable expectations. I say so because the advertisement for a higher-grade position (MG8) created a reasonable expectation of improved terms of service, which was subsequently frustrated without proper justification.
67. Applying the guiding principles set out in the case of *Coca-Cola East & Central Africa Limited vs Maria Kagai Ligaga* (supra), to the case herein, it is apparent that the conduct of the Respondent amounted to a fundamental breach going to the root of the contract of employment.
68. Indeed, the Respondent's actions demonstrated that it no longer intended to be bound by one or more of the essential terms of the contract.
69. In view of the foregoing, the Claimant was entitled to treat himself as constructively dismissed hence reserved the right to leave the employment of the Respondent.
70. The total sum of my consideration is that the Respondent's actions amounted to constructive dismissal hence the Claimant was unfairly and unlawfully terminated from employment.

Reliefs?

71. The Claimant has prayed for an order of reinstatement to his former position. Under the *Employment Act*, the remedy of reinstatement is provided for under Section 49(3) (a). The factors to be considered by a court of law when deciding whether to grant an order reinstatement, are spelt out in Section 49(4) and include the practicability of recommending reinstatement or re-engagement; the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; as well as the opportunities available to the employee for securing comparable or suitable employment with another employer.
72. In view of the circumstances preceding the Claimant's resignation from the Respondent's employment it is this court's view that the remedy of reinstatement would not be practical.
73. Besides, Claimant testified during cross-examination that he had secured another employment with an insurance company.
74. To this end, the order that commends itself in the circumstances is an award of damages for unfair termination. As the Court has found that the Claimant's termination from employment was unfair and unlawful on account of constructive dismissal, he is entitled to compensatory damages under Section 49(1) of the *Employment Act*, 2007. Accordingly, he is awarded compensatory damages equivalent to seven (7) months of his gross salary. This award has taken into account the length of the employment relationship as well as the circumstances attendant to the separation.

Orders

75. In the final analysis, Judgment is entered in favour of the Claimant against the Respondent as follows;
 - a. The Claimant is awarded compensatory damages in the sum of Kshs 654,768.94 being equivalent to seven (7) months of his gross salary.



- b. Interest on the amount in (a) at court rates from the date of Judgment until payment in full.
- c. The Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY 2025.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant In person

For the Respondent Ms. Songok

Court Assistant Millicent

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 15th March 2020 and subsequent directions of 21st 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 had 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.

STELLA RUTTO

JUDGE

