Chege v Africa Star Railway Operations Company Ltd (Employment and Labour Relations Appeal E087 of 2023) [2025] KEELRC 623 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 623 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E087 OF 2023

JW KELI, J

FEBRUARY 28, 2025

BETWEEN

DAVID CHEGE ..... APPELLANT

AND

AFRICA STAR RAILWAY OPERATIONS COMPANY LTD ..... RESPONDENT

JUDGMENT

1. The Appellant dissatisfied with the Judgment and Decree of the Honourable S.A Opande (PM) delivered at Nairobi on the 12th May, 2023 in Nairobi CMEL No. 858 of 2020 between the parties, filed a Memorandum of Appeal dated 30th May, 2023 received in court 6th June 2023 seeking the following Orders: -

    i. A finding that the unilateral variation of the Claimant's employment contract by the Respondent is wrong, irregular and an affair labour practice;

    ii. The Appellant be deemed to have been constructively dismissed;

    iii. The dismissal be deemed to be unfair, devoid of procedure and unlawful;

    iv. The Appellant be paid his terminal benefits as enumerated in the Statement of Claim amounting to Kshs. 1,080,256/=.

    v. General damages for harassment and intimidation at the workplace;

    vi. Costs of this Appeal; and

    vii. Interest on (iv), (v) and (vi) above

Grounds of the Appeal

2. That the Learned Magistrate erred in fact and in Law by delivering a judgment that was at gross variance with the proceedings;

3. That the trial magistrate erred in fact and in law in finding that the appellant had not proved his case against the Respondent for constructive dismissal whereas there was overwhelming evidence to the contrary.

4. That the learned magistrate erred in fact and in law in failing to make a finding and or award unpaid salary balances.

5. That the trial magistrate erred in Law and in fact by issuing a Judgement that is contrary to established case law and precedent which had been cited before him.

6. That the trial magistrate erred in fact and in law by disregarding the claimant's evidence, submissions and authorities relied upon thus arriving at an erroneous decision.

7. That the learned magistrate erred in Law and in fact in wholly dismissing the appellant's claim despite the same being supported by evidence.

8. That the learned magistrate erred in Law and Fact by delivering a Judgement inconsistent with the proceedings.

9. That the learned magistrate erred in law and in fact in delivering a judgement that is contrary to the provisions of the law and settled authorities.

Background to the Appeal

10. The Claimant/Appellant filed a claim against the Respondent via an Amended Statement of claim dated 24th March 2021 seeking the following orders: -

    i. A finding that the unilateral variation of the Claimant's employment contract by the Respondent is wrong, irregular and unfair labour practice;

    ii. The Claimant be deemed to have been constructively dismissed;

    iii. The dismissal be deemed to be unfair, devoid of procedure and unlawful;

    iv. That the Claimants be paid all his terminal benefits as enumerated above totaling to Kshs. 1,080,256/=.

    v. General damages for harassment and intimidation at the workplace

    vi. The Honourable Court do issue such orders and directions as it may deem fit to meet the ends of justice

    vii. The Respondent to pay costs of this suit

    viii. Interest at Court rates for the above.

11. The Claimant filed his verifying affidavit, his statement, and list of documents all of even date together with the bundle of documents (see pages 41-88 of ROA).

12. The claim was opposed by the Respondent who entered appearance and filed a response to the Amended Statement of Claim dated 26th April, 2021 (pages 90-96 of ROA), Respondent's list of

witnesses(Pages 62 of ROA), Respondent's Witness statements of Mary Mwihaki dated 9th February, 2022, Sammy Karuga Gachuhi dated 19th October, 2021 (Pages 98-104of ROA) and list and bundle of documents dated 26th April, 2021(Pages 105-150 of ROA).

13. The Claimant, in response, filed a Reply to Response to amended Statement of Claim dated 27th May 2021(Pages 151 of ROA).

14. The claimant's case was heard on the 24th of November, 2022, where the claimant testified in the case, produced his documents, and was cross-examined by counsel for the Respondent Mr. Kibaara (pages 174-175 of ROA).

15. The Respondent's case was heard on the same date where RW1 Sammy Gachuhi and RW2 Mary Mwihaki testified on behalf of the Respondent. They relied on their filed witness statement. They were cross-examined by counsel for the claimant Mr. Onenga (pages 175-176 of ROA)

16. The parties took directions on the filing of written submissions after the hearing. The parties complied.

17. The Trial Magistrate Court delivered its Judgment on the 12th May, 2023 dismissing the Claimant's case with costs to the Respondent (Judgment at pages 179A-183 of Supplementary ROA).

Determination

18. The appeal was canvassed by way of written submissions. Both parties complied.

19. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. [1968] EA 123 that:- "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

20. The court is further guided by the principles on appeal decisions in Mbogo v Shah [1968] EA De Lestang V.P (as he then was) observation at page 94: "I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Issues for determination

21. The Appellant addressed the grounds of appeal as its issues for the court's determination.

22. The Respondent likewise submitted on the grounds raised in the Memorandum of Appeal as its issues for determination.

23. The court was of the considered opinion the issues placed before it for determination in the appeal were as follows:-

    a. Whether the trial court erred in fact and law in finding there was no case of constructive dismissal.

b. Whether the trial court erred in fact and law in failing to grant reliefs prayed for in the claim.

Whether the trial court erred in fact and law in finding there was no case of constructive dismissal

24. The appellant raised several grounds and sought prayers as follows:-

    a. A finding that the unilateral variation of the Claimant's employment contract by the Respondent is wrong, irregular and an affair labour practice;

    b. the appellant be deemed to have been constructively dismissed; and

    c. the dismissal be deemed to be unfair, devoid of procedure and unlawful.

25. The appellant submitted that he was employed on a 3-year contract of 15th September 2018 and worked diligently until 22nd May 2020 when the respondent unilaterally issued him with a new contract varying the terms of employment. He was not consulted on the new terms of employment, which saw his salary reduced over the months and he had no choice but to accept the new terms. That the complaint emanates from deductions of wages done after the 4th month, September 2020 onwards. That the decision to review his salary downwards several time without consulting and obtaining his express consent was unjustified and wrongful. He relied on the contract of 22nd may 2020, clause 14 on the variation of the contract to wit:- '' the provisions of this contract can only be varied by agreement , in writing between you and the company and signed by both of you and the manager.."(page 60 of ROA) That clause 14 of the new contract was mandatory and the respondent did not prove how COVID 19 made it difficult to consult the Appellant before varying the contract terms. The appellant relied decision in Kenya Union of Commercial, Food and Allied Workers v Tusker Mattresses Limited (2020)e KLR where the court held compliance with a variation clause was mandatory. Further in the decision in Bakery Confectionary Food and Manufacturing And Allied Workers Union (K) v Kenafric Industries Limited (2021) e KLR, paragraph 57.

26. The Appellant submitted that his resignation amounted to constructive dismissal and the respondent continued with making deductions on the appellant's salary after the 4th month lapsed without any consultations. To buttress the claim for constructive dismissal the appellant relied on the decision in Coca-Cola East & Central Africa v Maria Kagai Lugaga(2015)e KLR among other decisions. Coca-Cola East & Central Africa v Maria Kagai Lugaga(2015)e KLR is leading authority of constructive dismissal and the court upheld it to apply in the appeal. In the decision the Court of appeal guided on what amounts to constructive dismissal as follows: - ''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. The contractual test is narrower than the reasonable test. The dicta in Western Excavating (ECC) Ltd. -v- Sharp [1978] ICR 222 adopts the contractual approach test and we are persuaded that the test is narrow, precise and appropriate to prevent manipulation or overstretching the concept of constructive dismissal. For this reason, we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment. Whether a particular breach of contract is repudiatory is one of mixed fact and law. (See Pedersen -v- Camden London Borough Council [1981] ICR 674). The criterion for evaluating the employers conduct is objective; the employer's conduct does not have to be intentional or in bad faith before it can be repudiatory (See Office -v- Roberts (1980) IRLR 347).

The employee must be able to show that he left in response to the employer's conduct (i.e. causal link must be shown, i.e. the test is causation). In the case of Jones -v- F. Sirl & son (Furnishers) Ltd. [1997] IRLR 493, it was held that there can still be constructive dismissal if the employee waits to leave until he has found another job to go to. The employee must leave because of the breach but the breach need not be the sole cause so long as it is the effective cause. (See Walker -v- Josiah Wedgwood & Sons. Ltd. [1978] IRLR 105). The criterion to determine if constructive dismissal has taken place is repudiatory breach of contract through conduct of the employer. The burden of proof lies with the employee. The employer's conduct must be such as when viewed objectively, it amounts to a repudiatory and fundamental breach of the contractual obligations. (See Wooder -v- Wimpey [1980] 1 WLR 277; see also Malik and Mahmud -v- Bank of Credit and Commerce International [1998] AC 20). If the employee makes it clear that he or she is working under protest, he/she is not to be taken to have waived the right to terminate the contract under constructive dismissal. We adopt the dicta in the above cited persuasive judicial decisions as establishing relevant principles in constructive dismissal.

27. The legal principles relevant to determining constructive dismissal include the following:

    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 the 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 Respond net submitted that it met the foregoing contractual test as their conduct was informed by the COVID-19 pandemic which paralyzed their operations and they took measures to retain employees instead of declaring redundancy. That prior to issuance of the new contracts the respondent issued notice and inform the employees that the execution of new contracts was voluntary and optional(page 126-133 of ROA was the notice on new contracts). That the appellant was aware of the notice and took into consideration the new terms before signing. That under the new contract the respondent did mot repudiate the contract. The burden of proof of the constructive dismissal was not met by the appellant and the claim had no merit.

Decision

29. The trial court on whether the claimant signed the new contract voluntary held that on cross-examination, the Appellant admitted he knew of the transition and was issued with a new contract by

a new entity as informed and he was aware that the new contract was optional. The trial court held the signing was optional. The court, having evaluated the evidence before the trial court did not find any basis to disturb that finding.

30. On the deductions the trial court addressed clause 14 of the contract of 20th May 2020 on the variation of the terms of contract. Any variation was to be by agreement of both parties. That since the new contract already had a force majeure clause, the employer simply needs to invoke the clause when the conditions stipulated in clause 20 occur. The trial court then held that the changes made by the respondent during the COVID-19 period were as per the contract executed by the parties.

31. The appellant submitted that its case was founded on clause 14 of the contract in relation to the 4th month under clause 20.2 of the new contract as the deductions continued without constellations. The relevant part read; For the third month that follows, pay 30%. It shall be counted unpaid leave starting from the beginning of the fourth month and no remuneration shall apply''

32. The evidence before the trial court by the Respondent was that instead of invoking the unpaid leave and thereafter zero remuneration the respondent continued to pay the salary as at 3rd month. Clause 20.4 of the contract stated:- ''if force majeure conditions continue and the employment agreement has to end , the company needs to follow redundancy procedure , giving one month notice or payment in lieu and 15 days of pay for each complete year of service as severance pay. ''(page 62 of ROA). The appellant's contract had not ended by the time of resignation as it was running from 22nd may 2020-17th September 2021. (page 57 of ROA) The Appellant resigned on the 12th March 2021(page 85 of ROA).

33. The court having evaluated the evidence as above found no evidence of breach of the contract by the Respondent who opted not to terminate the employment but continue to pay the appellant at the 3rd month's reduced salary. The Court found that the option for the employer was not to revert to full salary under clause 20 but to end the relations. In the opinion of the court, the employer took the more advantageous position under the contract to the appellant and other employees. The Court upheld the trial court decision that the appellant did prove the allegation of constructive dismissal related to contractual breach as the main reason for the resignation.

34. The other reason advanced to support case of constructive dismissal was discrimination in being recall of employees. The respondent pleaded that not all employees had been recalled. In reply the appellant simply stated the defence was mere denials. In the opinion of the court such a reply did not controvert the specific pleading by the respondent in paragraph *11*(i) that as at 12th march 2021 it had recalled 624 out of 705 employees in the Track and signalling department. The appellant could have issued notice to produce if it doubted evidence on recalling of the employees. The court found that it was subjective of the appellant to submit that since the company was at 100% occupancy that all employees had been recalled except him. The court cannot micromanage the employer's operations. The defence that as at 12th march 2021 the respondent had recalled 624 out of 705 employees in the Track and Signalling Department was unchallenged. There were other employees yet to be recalled.

35. In Mbogo v Shah [1968] EA De Lestang V.P (as he then was) observed at page 94: "I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion' Upon re-evalution of the evidence before the trial court I found the trial court applied the contractual test properly (Coca-Cola case) and I had no basis to interfere with the finding of lack of prove of constructive dismissal by the Appellant.

Whether the trial court erred in fact and law in failing to grant reliefs prayed for in the claim

36. The appellant sought the following reliefs at appeal:-

    i. A finding that the unilateral variation of the Claimant's employment contract by the Respondent is wrong, irregular and an affair labour practice;

    ii. The Appellant be deemed to have been constructively dismissed;

    iii. The dismissal be deemed to be unfair, devoid of procedure and unlawful;

    iv. The Appellant be paid his terminal benefits as enumerated in the Statement of Claim amounting to Kshs. 1,080,256/=.

    v. General damages for harassment and intimidation at the workplace;

    vi. Costs of this Appeal; and

    vii. Interest on (iv), (v) and (vi) above

37. The court having upheld the decision of the trial court that the applicant was not constructively dismissed from employment of the respondent the only outstanding issue under reliefs sought for determination would be the claim for salary difference. The contract of 20th May 2020 clause 20(5) stated: '' the remuneration difference compared to normal issuance before force majeure will not be recompensed when business operation resumes.'; The court held the appellant signed the optional contract voluntarily and bound himself to the clause; hence the prayer for the salary difference is disallowed as held by the trial court. The court upheld the decision of the trial court in disallowing all the reliefs sought.

38. In the upshot, the appeal is dismissed, and the Judgment and Decree of the Honourable S.A Opande (PM) delivered at Nairobi on the 12th May, 2023 in Nairobi CMEL No. E858 of 2020 is upheld.

39. Taking into account the cause of action, to temper justice with mercy, the Court made no order as to costs in the appeal.

40. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2025.

J.W. KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Claimant :- Jude Onyango

Respondent: Mbugua