



**Nyabena v Beshmon Limited (Cause 1495 of 2018)
[2025] KEELRC 1141 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1141 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1495 OF 2018
K OCHARO, J
MARCH 27, 2025**

BETWEEN

REUBEN NYABENA CLAIMANT

AND

BESHMON LIMITED RESPONDENT

JUDGMENT

Introduction

1. Contending that at all material times he was an employee of the Respondent company, who was forced to exit his employment on or about 30th March, 2018, due to the Respondent's actions and inactions that made the work environment uncondusive for him, the Claimant instituted this suit, seeking a declaration that he was constructively dismissed, notice pay, compensation for unpaid house allowance, service gratuity, compensation for unfair dismissal[twelve months' gross salary], medical insurance cover, compensation for earned but unutilised leave days, and issuance of a certificate of service in his favour.
2. The Respondent resisted the Claimant's claim by a reply to the claim and counterclaim dated 11th December 2018. In the reply, it denied the claimant's cause of action, whilst in the counterclaim, it sought the sum of KShs. 100,000, against the Claimant.
3. As required by the rules of procedure, the Claimant filed a response to the Respondent's reply to the claim and counterclaim, reiterating the contents of his statement of claim, and denying the Respondent's counterclaim.
4. After hearing the parties on their respective cases, this Court directed them to file written submissions. They obliged.



The Claimant's case

5. It was the Claimant's case that he first came into the employ of the Respondent company under a letter of appointment dated 5th January, 1994, as an accountant at a monthly basic salary of KShs. 15,000, exclusive of house allowance.
6. The basic salary was increased from time to time, and as of the date of separation, it had risen to KShs. 100,000. He was also enjoying an Insurance cover and an AAR contribution of KShs. 5,331 and KShs. 6,500 per month respectively.
7. He worked for the Respondent diligently and faithfully until on or about 14th July, 2017, when the Respondent terminated his services without a justifiable reason. The Respondent's director, Nelson Jabesh Bichanga, instructed him to tabulate his terminal dues, which he did via his letter dated 14th July, 2017.
8. He asserted that after the termination, the Respondent failed to settle his terminal dues, but recalled him to work. This, they did without settling his outstanding dues, contrary to the law.
9. After resuming duty, the Respondent made his work environment uncondusive. As a result, he decided to leave his employment on 30th March, 2018, as the Respondent was forcing him to work without settling his then outstanding dues and deliberately failed to allocate him any assignments.
10. Prior to his exit from employment in the manner he did, the Respondent Company had kept him working continuously for approximately nine [9] months, an act, coupled with its failure to allocate he assignments, which amounted to unfair labour practice contrary to the provisions of Article 41 of *the Constitution* of Kenya.
11. After the unlawful and unprocedural termination of his employment, the Respondent adamantly refused and or neglected to pay him his terminal dues. He is entitled to the following:
 - i. 3 months' salary in lieu of notice KShs. 111,831 x 3.....KShs. 335, 493.00.
 - ii. House allowance [15% x 111 x 831x310 months]KShs. 5,200,141.50.
 - iii. Service gratuity, 25% x 111,831 x 26 years..... KShs. 726,901.50.
 - iv. 12 months' gross salary, compensation for unfair termination, 111,831 x 12 months.....KShs.1,341,972.00.
 - v. Liberty Insurance Cover.....KShs. 95,000.
 - vi. Compensation for untaken leave days..... KShs. 90,380.
 - vii. Fees due to Embankment Limited.....KShs. 100,000.
 - viii. Certificate of service.
12. Cross-examined by Counsel for the Respondent, the Claimant reiterated that he was employed on the 5th of January 1994.
13. He testified that the letter of offer of employment dated 1st March 1994, by NEBCO [K]Limited, was strange to him. However, he admitted that he knew the company. It was part of the Respondent's group of companies. He started working for the Company [NEBCO] on 1st March 1994. Further, he wouldn't remember the last day he worked for NEBCO [K]Limited.



14. Shown a letter dated 4th June 1999, he admitted that he signed the same on behalf of the company, and confirmed that he was then in the employment of the Company [NEBCO].
15. As at 17th December 2003, he was an employee of NEBCO[K] Limited.
16. He received his salary for February 2018. The payslip for that month is a testament. The amount of KShs. 100,000, reflected thereon was his basic salary, thus exclusive of house allowance.
17. The appointment letter dated 5th January 1994, provided for three [3] months' salary in lieu of notice. The letter of appointment exhibited by the Respondent doesn't have a provision for gratuity, but the one dated 5th January 1994 did have a provision for the same.
18. He contended that all through he was aware that his salary was not inclusive of house allowance. He further alleged that he was not paid his medical cover allowance for 18 months. Initially, the Respondent was paying premiums for his medical cover directly to the insurance company; however, at some point, it started paying him the same directly to him as part of his salary.
19. The Respondent terminated his employment on or about 14th July 2017. However, he resumed his duties at the instance of the Respondent's directors. Thereafter, he worked for about nine months before he exited his employment again.
20. In his reply to the Reply to Claim and counterclaim, he mentioned that he was also employed by other companies like NEBCO, which was a sister company to the Respondent.
21. In his evidence under re-examination, he stated that he was never issued with an appointment letter by NEBCO Ltd. The one tendered by the Respondent is a forgery.
22. In the course of his employment with the Respondent, he could handle accounting matters for the sister companies.

The Respondent's case

23. The Respondent presented one witness, Amos Ayua, to testify on its behalf. The witness adopted his witness statement dated 17th July 2019, as his evidence in chief.
24. The witness testified that the Claimant was employed by the Respondent on a fixed-term contract under a letter dated 1st June 2009. He had previously been engaged for consultancy services vide a letter dated 5th February 2001, with the mandate to prepare monthly statements of account for the Respondent. As such, there was no contract of employment between the Claimant and the Respondent prior to 1st June 2009.
25. Between 2001 and June 2009, the Claimant rendered his services to the Respondent under a contract for service and not a contract of service.
26. During the period, the Claimant was duly paid for the consultancy services. He never complained at any time in the course of his contract for service that he hadn't been paid for the service.
27. Under a letter of appointment dated 1st June 2009, the Respondent employed the Claimant on a fixed-term contract, at a monthly salary of Kshs. 33,000, an amount inclusive of house allowance, which was subject to statutory deductions such as P.A.Y.E, NHIF and NSSF.
28. On 29th March 2018, the Claimant took leave for Easter holidays and was to report back on 3rd April 2018. However, he failed to show up for work on 3rd April 2019. His absence persisted for several



- days, prompting the Respondent to take an initiative to find out his whereabouts. Upon reaching the Claimant on call, he indicated that he was to return in due course.
29. As at 12th April 2018, the Claimant hadn't reported to work. That prompted the Respondent to write to the labour office on the desertion of duty by the Claimant. Through the letter, the Respondent claimed one month's salary in lieu of notice.
 30. The Claimant is not entitled to notice pay as the Respondent didn't terminate his employment. He deserted duty without any valid reason or explanation. He never tendered any resignation.
 31. The Claimant was a member of NSSF whose contributions were deducted from his salary and remitted to the relevant Authority. He isn't, therefore, entitled to service gratuity.
 32. The Claimant utilized all his entitled leave days. His Claim for leave dues is thus unfounded.
 33. The witness urged the Court to note that the Claimant has introduced forged documents in this matter, to wit, the letter dated 5th January 1994. Interesting to note that the Respondent Company was neither his employer nor active.
 34. He stated that the Claimant was earning a consolidated salary of KShs. 33,000 from 2009 to October 2011, KShs. 55,000 from November 2011 to October 2013 and a consolidated salary of Kshs. 100,000 from March 2018 when he deserted.
 35. At all material times, the Respondent ensured a conducive working environment for the Claimant, entrusting him with its sensitive financial documents, allocating him a wide range of duties and obligations in line with the employment contract of 1st June 2009 and improving his terms of employment by consistently reviewing his salary upwards, inter alia. Therefore, the claim for constructive dismissal is unfounded.
 36. Cross examined by Counsel for the Claimant, the witness testified that he first joined the Respondent's workforce in 2000, as a clerk. He later moved up the ladder to the position of an accountant, in 2019.
 37. In his position as an accountant, he among others, deals with Human Resource matters, like being involved in the recruitment processes, and aligning the processes with the Respondent's accounts system.
 38. The Respondent company has Directors and shareholders. The Directors are Nelson Bichanga and Rechael Bichanga.
 39. He further testified that when he joined the Respondent Company as an employee, he found the Claimant working for them but not as a full-time employee. He worked on contract tasks. At the time, the company was not fully established and as such, it didn't have a Human Resource Department.
 40. Equally, he [the witness] came in as a consultant, being engaged by the Respondent, and when they had tasks to be performed.
 41. They [him and the Claimant] were fully employed in 2009. The Claimant was employed in June 2009. The Claimant was the supervisor of the Respondent's employees and in charge of documenting matters for the Respondent.
 42. The Respondent has filed the payroll for all months, and it is reflective of the fact that the Claimant signed against all the payments that were made under his name.



43. The Claimant was employed by the Respondent under a letter of appointment dated 1st June 2009. The letter is not signed by the Claimant. The letter indicated that the Claimant was to serve under a one-year fixed-term contract.
44. At the time of separation, the Claimant was earning KShs. 100,000.
45. Insurance payments could be made discretionarily as they were not provided for in the Claimant's employment contract.
46. Whenever the Claimant asked for a payslip, the witness could generate and issue him with one. The payslip for February 2018 indicates a basic pay and a gross pay of KShs. 100,000.
47. The Claimant was answerable to the directors of the Respondent Company. He isn't aware that the directors of the Company didn't allocate him work for a whole period of nine months. To the best of his knowledge, at all material times, the Claimant was discharging his duties, and would sometimes go beyond accountancy duties, into managerial duties.
48. When he deserted duty, the Human Resource Manager called him to know about his whereabouts.
49. The witness clarified that the document filed by the Respondent wasn't a payroll but a payment voucher for those who had offered consultancy services. Otherwise, if it were a payroll, it could have a field for statutory deductions.
50. In his evidence under re-examination, the witness reiterated that the Claimant transitioned into the Respondent Company as an employee in 2009. Initially, he was a consultant. This is reinforced by the fact that the Claimant has not placed before this Court any document from which it can be deduced that he earned a salary before this date.
51. The daily duties weren't being allocated to him by the directors. He was a professional. However, he was charged with the responsibility of assigning his juniors duties. It isn't true, therefore, that the directors didn't allocate him work for nine months.

Analysis and Determination

52. I have carefully considered the pleadings by the parties, their respective evidence and submissions, and the following issues emerge for determination;
 - i. When was the Claimant employed by the Respondent?
 - ii. Was the Claimant constructively dismissed or did he abscond from duty;
 - iii. Is the Claimant entitled to the remedies sought in the statement of claim?

When was the Claimant employed by the Respondent?

53. There is no dispute that there existed an employer-employee relationship between the Respondent and the Claimant. However, there was one regarding the exact date of his employment. Whereas the Claimant asserted that he first came into the employment of the Respondent on 5th January, 1994, the Respondent contended that he joined its workforce as an employee in June 2009. Initially, he had been serving them as a consultant, performing specific contracted tasks.
54. True, as submitted by the Claimant's Counsel, the positions taken by the parties on this vital issue were diametrically opposite. However, it is important to point out that in such a situation, the Court doesn't become helpless; the pleadings, witness testaments, and documents presented by the parties,



read between the lines, and the parties' demeanour, come in handy to enable it to determine the position to hold as true.

55. The Claimant tendered a letter dated 5th January 1994, alleging that it was under the letter that he first came into the employment of the Respondent. I have keenly gone through the letter and note that it is a document not signed by the employer. Further, considering the Respondent's evidence that as of June 2009, the Respondent didn't have an established Human Resource Department, [yet the Claimant purports that the letter was done by the Department], the Respondent Company was at its nascent stages, evidence which Claimant didn't challenge in any manner, I am of the view that the letter isn't authentic. It was prepared at the prompting of ill faith.
56. This Court hasn't lost sight of, the Claimant's evidence under cross examination, that as of 1st March 1994, he was working as an employee of NEBCO[K] Ltd, his admission that he as late as 2003, he was authoring and executing letters on behalf of the company, and with great respect his pretentious answer that he would not remember the last day he worked for NEBCO[K] Limited.
57. By reason of the foregoing premises, I hold that the Claimant wasn't candid to the Court as regards his exact date of employment.
58. I find the Claimant's submissions that the Respondent didn't put forth any evidence to demonstrate that the Claimant was an employee of NEBCO[K]Ltd, deliberately ignorant of two critical pieces of evidence, his admission under cross-examination mentioned hereinabove [para. 56], and the letter of employment by NEBCO[K] Ltd dated 1st March 1994, appointing him into its employment as an accountant, to which the admission aligns duly.
59. In the upshot, I hold that the Claimant came into the employment of the Respondent not in 1994 as he alleges, but on 1st June 2009 as explained by the Respondent.

Was the Claimant constructively dismissed?

60. The doctrine of constructive dismissal isn't codified in Kenya. However, the principles in relation thereto, and to be specific, applicable in suits anchored on the doctrine, are now trite through judicial precedents. Although it has no common-law antecedent, it corresponds to the concept of repudiation of the contract of employment by the employer and acceptance thereof by the employee, thus bringing the contract to an end.
61. Constructive dismissal has been accepted by Courts to mean action[s] on the part of the employer which drive the employee to leave, whether or not there is a form of resignation. Such actions can take a wide variety of forms. The circumstances of constructive dismissal are so infinitely various that there cannot be, and is, no rule of law setting out a comprehensive list of the circumstances that can justify constructive dismissal. It is a question of fact for the Court to determine. See also, *Jooste v Transnet Ltd* [1995] 5 BLLR 1[LAC]4.
62. The onus to prove constructive dismissal is on the employee.
63. In the case of *Stephen Michuki v East African Safari Air Express Limited & another* [2022] eKLR, this Court stated;
 - “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 by the employer 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.

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. 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 the law. - Porter v N. B Legal Aid [2015] 1 S.C.R.

In determining whether the conduct of an employer evinced the intention no longer to be bound by the contract, there are two branches of the test that are evident across jurisdictions. The court must 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.....

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 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, in the Coca Cola East & Central Africa Limited v Maria Ligaga [2015] eKLR.

80. On the other hand, the Court can declare being of constructive dismissal where the conduct of the employee 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 cumulative effect of the past acts by the employer and consider whether those acts evinced an intention to no longer be bound by the terms of the contract. In terms of the Court of Appeal decision[supra], this is the unreasonable test."

64. In the instant matter, the Claimant contended that two acts by the Respondent compelled him exit his employment. First, that the Respondent's directors, for some time, deliberately refused to assign him duties, leaving him to idle whenever he reported to work.
65. As this Court stated in the case of Njuguna v Sybrin Kenya [Employment and Labour Relations Cause E 706 of 2020] [2024] KEELRC 287[KLR] [16 February 2024] [Judgment], one of the fundamental contractual obligations of the employer in an employment relationship is to supply work to the employee. A failure to provide work for an employee would amount to a repudiatory breach, the basis for which the Court would find that there was constructive dismissal.
66. As I indicated hereinabove, the onus to prove constructive dismissal lies on the employee asserting the same. A party bearing a legal burden of proof cannot discharge the burden by generalised assertions. Besides, baldly asserting that the directors refused to assign him work, the Claimant did nothing to explain whether the directors were daily "workers" of the Respondent Company for them to assign him daily duties, which tasks were those directors could assign daily to a professional accountant, and under which stipulation, either in policy or contract, placed an obligation on the directors to assign him daily tasks.



67. I have carefully considered the terms of employment of the Claimant as set out in the letter of appointment dated 1st June 2009, and hold that none made the Claimant dependent on daily task assignments by the directors.
68. The Respondent's witness's evidence, to the effect that daily tasks could not be allocated to the Claimant by the Respondent's directors, and that he managed the Respondent's staff generally, was not shaken under cross-examination or discounted in any manner.
69. The Claimant further contended that the Respondent committed a repudiatory breach of a fundamental term of the contract, when it failed to pay him for nine months before he decided to quit. This assertion is unpersuasive. This Court hasn't lost sight of the fact that in his evidence under cross-examination, he admitted that he was paid his salary for February 2018. Then, he needed to be specific about the months for which he wasn't paid. This, he didn't do.
70. By reason of the foregoing premises, I am not convinced that the Respondent did commit any repudiatory breach, or conduct itself in a manner that could force the Claimant to leave his employment with or without notice. In sum, the Claimant failed to prove his case for constructive dismissal.

Whether the Claimant is entitled to the reliefs sought.

71. From the onset, it is imperative to point out that the Claimant sought for relief, some of which were dependent on his claim for constructive dismissal, while others weren't. Among those that were dependent was the compensatory relief under section 49[1][c] of the *Employment Act*. Having found that the Claimant wasn't constructively dismissed, the remedy cannot be availed to him. Equally, the relief for notice pay.
72. The Claimant sought for Service gratuity for an alleged 26 years of service. The claim under this head fails for the following reasons: having found that he didn't come to the employment of the Respondent in 1994 as he alleged, but in June 2009, the claim is misanchored, and driven by a desire for unfair self-enrichment; the letter of appointment dated 1st June 2009, which letter I have held was the basis of the employment relationship between the Respondent and the Claimant didn't provide for gratuity; and it is now trite law, that gratuity is a contractual benefit, and where the contract of employment doesn't provide for it, it cannot not be successfully claimed by an employee in a litigation. See also the Court of Appeal decision in *H. Young & Company E.A Limited vs Javan Were Mbango* [2016] eKLR.
73. I am of the view that the Claimant's claim for unpaid allowance house stands on quicksand, and a result of ignorance of the terms of the letter of appointment dated 1st June 2009, which read in part;
- “.....You will start with a gross salary which is inclusive house allowance of KShs. 33,000, which will be subject to all statutory deductions [NHIF, NSSF and P.A.YE] and paid in arrears at the end of every month.”
- With this, I have no doubt that the KShs. 100,000 gross salary that the Claimant was earning at the time of separation, was inclusive of house allowance. The Claimant's claim under this head is thus rejected.
74. The Claimant sought for” Leave due 21/26 x111, 831=Kshs. 90,000. From the pleadings by the Claimant, his witness statement, and oral evidence, it wasn't pointed out the untaken leave days for which period. This Court cannot grant relief that isn't supported by evidence.



75. The Claimant submitted that the Respondent did not provide any evidence regarding leave days taken. This submission is misleading. I have carefully scanned through the documents tendered in evidence by the Respondent, and note that among them are leave application forms, duly executed by the Claimant, for leave in the years 2015, 2016, 2017, and 2018. With this evidence, and without specificity regarding when the leave was earned but not utilised, I will still find that the claim under this head remained unproven.
76. The Claimant claimed against the Respondent, “fees from embankment.” This relief was first mentioned in his pleadings, in the reliefs section. Not a single fact the basis for entitlement to the relief was brought out in the body of the pleadings. As such this is a remedy which was for declining, but as the Claimant correctly submitted, the Respondent’s witness asserted without proof that the amount sought under this head was paid to the Claimant, and this prompts this court to conclude that the Respondent admitted his entitlement to the relief, and in absence of proof of payment, it is liable to pay the Claimant the sum of KShs. 100,000, sought under the head.
77. I have carefully analysed the material placed before me by the Claimant. I am totally unable to decipher what informed the Claimant’s claim-Liberty Life Insurance Cover. Further, the claim was a specific claim that needed to be specifically proved, but I fear it wasn’t proved as such or at all. I decline the same. See also, John Richard Okuku v South Nyanza Sugar Co Ltd [2013] eKLR.
78. Under Section 51 of the Employment Act, a certificate of service is a statutory entitlement to any employee who has exited employment. It shall matter not under what circumstances he or she exited. The Respondent did not demonstrate that it issued the Claimant a certificate of service. As a result, I hereby direct that it issues him with one, within the time specified hereunder.

Whether the Respondent’s counterclaim is merited.

79. The Claimant contended that the Claimant continuously worked up to 29th March 2018, when he took leave for Easter holidays and was expected back on 3rd April 2018, but never returned to work. The Respondent subsequently wrote a letter to the Labour officer reporting the desertion. Having found as I have hereinabove, that the Claimant was not constructively dismissed, coupled with the admission that indeed he left employment, without notice following the alleged uncondusive work environment [which I have found wasn’t], and that the clause 3 of the contract of employment provided for one[1] months’ notice or a month’s salary in lieu of notice, I come to the inevitable conclusion that the Claimant is liable to pay one month’s salary in lieu of notice. Thus, the Respondent’s counterclaim hereby succeeds.
80. In the upshot,
- i. Judgement is hereby entered for the Claimant only in the following terms;
 - a. The admitted sum of KShs. 100,000, Embankment fees.
 - b. The Respondent shall issue the Claimant with a certificate of service within 30 days of this Judgment.
 - ii. The Respondent fully succeeds in its Counterclaim, and as such;
 - a. The Claimant shall pay the Respondent notice pay, KShs. 100,000, which amount shall be offset against the sum awarded in favour of the Claimant in[I][a], above.
 - b. The Claimant’s suit having substantially failed, he shall pay the Respondent 90% of the costs of the suit.



c. Costs of the Counterclaim shall be in favour of the Respondent.

READ DELIVERED AND SIGNED THIS 27TH DAY OF MARCH 2025.

OCHARO KEBIRA

JUDGE.

