



REPUBLIC OF KENYA



KENYA LAW
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**Muga v G. North & Son Limited (Cause E716 of 2023)
[2025] KEELRC 753 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 753 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E716 OF 2023
L NDOLO, J
MARCH 13, 2025**

BETWEEN

ELIJAH JACKTONE ODHIAMBO MUGA CLAIMANT

AND

G. NORTH & SON LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant commenced his claim against the Respondent by a Statement of Claim dated 29th August 2023. In spite of due service, the Respondent did not defend the claim.
2. The matter therefore proceeded as an undefended cause, with the Claimant testifying on his own behalf and thereafter filing written submissions.

The Claimant's Case

3. By an employment contract dated 23rd February 2001, the Claimant was employed by the Respondent as a Management Trainee, effective 1st March 2001.
4. By a subsequent letter dated 27th November 2001, the Claimant was confirmed in the position of Sales Engineer, effective 1st November 2001. He was entitled to a 5% commission on all irrigation sales over and above the monthly target.
5. As at 1st October 2017, the Claimant earned a gross monthly salary of Kshs. 305,000. On 4th June 2020, he was notified of the decision to reduce his salary by 35%, on account of the negative impact of the COVID-19 global pandemic.
6. By letter dated 26th August 2020, the Claimant was sent on a 3-month unpaid leave, which was extended by a further 3 months vide letter dated 25th November 2020.



7. The Claimant accuses the Respondent of failing to pay his salary for the months of March, April and May 2020 in addition to the reduced salaries for the months of June, July and August 2020.
8. The Claimant pleads that upon reporting to work on expiry of the unpaid leave, he was denied access to the office premises, on the pretext that the offices were closed for fumigation.
9. The Claimant lays a claim of constructive dismissal against the Respondent, citing the following particulars:
 - a. Closure of the Respondent's office premises under the guise that they were being fumigated;
 - b. Failure to pay the Claimant's monthly salary as and when it became due;
 - c. Making it impossible for the Claimant to report to work and discharge his duties and/or refusing to pay his monthly salary as and when it became due.
10. The Claimant terms the Respondent's actions as unfair labour practices, causing him pecuniary embarrassment, loss and damage.
11. The Claimant further avers that the Respondent breached the terms of the employment contract by failing to do the following:
 - a. To remit the accrued amount of Kshs. 1,443,180 deducted from the Claimant's salary in the months of January 2019 to August 2020, on account of the Claimant's loan repayment to KCB Kenya Limited;
 - b. To remit the accumulated amount of Kshs. 955,500 deducted from the Claimant's salary in the months of June 2018 to August 2020, for the Claimant's pension at ICEA Lion Trust Company Limited;
 - c. To reimburse the amount of Kshs. 93,750 unlawfully deducted from the Claimant's salary on the allegation that a customer by the name, Apollo Owuor, had received items worth the said amount from the Company, without making any payments, yet Owuor had settled the amount and was issued with a receipt number RCT18473 by the Company.
12. The Claimant tabulates his claim as follows:
 - a. One month's salary in lieu of notice.....Kshs. 305,000
 - b. Salary arrears for 6 months (March 2020-August 2020).....1,830,000
 - c. Unremitted loan deductions.....1,182,300
 - d. Unremitted pension deductions.....955,500
 - e. Reimbursement of unlawful salary deduction.....93,750
 - f. Salary for imposed unpaid leave for 6 months.....1,830,000
 - g. General damages for unlawful termination
 - h. Certificate of service
 - i. Costs plus interest

Findings and Determination

13. There are two (2) issues for determination in this case:



- a. Whether the Claimant has proved a case of constructive dismissal against the Respondent;
- b. Whether the Claimant is entitled to the remedies sought.

Constructive Dismissal?

14. The Claimant claims to have been constructively dismissed by the Respondent. Black's Law Dictionary (Tenth Edition) defines constructive dismissal or discharge as:

“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.”

15. In *Nathan Ogada Atiagaga v David Engineering Limited* [2015] eKLR constructive dismissal was defined in the following terms:

“Constructive dismissal occurs when an employee resigns because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge.”

16. In *Milton M. Isanya v Aga Khan Hospital* [2017] eKLR the Court stated thus:

“In constructive dismissal the desire to resign is from the employee as a result of hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tenders resignation.”

17. In *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR the Court of Appeal stated the following:

“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 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 constituted a repudiatory breach of the contract of employment-this is the contractual test.”

18. The Court of Appeal went further to establish the following principles to be applied in adjudicating claims of constructive dismissal:

- 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 the 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.
19. The Claimant bases his claim of constructive dismissal on the Respondent's decision to reduce his salary and subsequently send him on unpaid leave. According to correspondence produced by the Claimant, the Respondent's decision was informed by the negative impact of the COVID-19 global pandemic.
20. The foregoing decision by the Respondent resulted in variation of the Claimant's terms and conditions of employment. Section 10(5) of the [Employment Act](#) provides that any such variation be preceded by consultation of and notification to the affected employee.
21. Emerging jurisprudence is to the effect that consultation as contemplated under Section 10(5) of the [Employment Act](#), does not necessarily connote agreement. In Emmanuel Wambua Muthusi & 6 others v Khoja Shia Ithna Shari Education Board t/a Jaffery Academy [2020] eKLR my brother Rika J stated the following:
- “Section 10[5] does not require that there is agreement on revision of contract, between an Employer and an Employee...The provision does not require that consultation ends up in agreement. All that the Employer is required to do, in changing terms of the contract, is to consult the Employee; revise the contract to reflect the change; and notify the Employee about the change. The word 'agreement' does not feature in Section 10(1) of the [Employment Act](#). There would be no requirement for notification, if agreement has already been reached. The Employee is free to take the revised contract, or reject it.”
22. In the present case, there is evidence that the Respondent issued communication to all staff, informing them of impending salary cuts, after which the Claimant was issued with a letter dated 5th June 2020, giving details of a salary cut specific to him.
23. In the circumstances of the case, and bearing in mind the reason advanced for the salary cut, the Court is satisfied that the provisions of the law on revision of employment terms and conditions were satisfied. This also covers the decision to send the Claimant on unpaid leave.
24. For the foregoing reasons, I have reached the conclusion that the Claimant has not proved a case of constructive dismissal against the Respondent. Consequently, the claims for damages for unlawful termination and notice pay are disallowed.



Other Claims

25. The claim for salary arrears was uncontroverted and therefore succeeds, with the rider that effective June 2020, the Claimant's monthly salary was Kshs. 198,250.
26. The Claimant produced documentary evidence in support of his claims for unremitted loan deductions and pension dues, in the form of payslips as well as communication from KCB Bank and Eagle Africa. In the absence of evidence to the contrary, these claims succeed and are allowed.
27. The claim for unlawful salary deduction arises from a surcharge imposed on the Claimant, on account of an alleged uncollected debt. As held by this Court in its decision in Kenya National Library Services Board v Beatrice N. Ayoti [2014] eKLR a surcharge is a disciplinary action that can only be taken pursuant to the procedural fairness provisions of Section 41 of the *Employment Act*.
28. The corollary is that a unilateral decision to surcharge an employee is out-rightly unlawful and unfair. If indeed the Claimant had caused loss to the Respondent as alleged, he ought to have been afforded an opportunity to respond, by way of a show cause notice and attendant response as well as a personal hearing with full preparation. There being no evidence of any such opportunity, the only conclusion to make is that the decision to surcharge the Claimant was unlawful. The sum of Kshs. 93,750 is therefore due to the Claimant.
29. In light of the finding that the decision to send the Claimant on unpaid leave fell within allowable variation of terms and conditions of employment, the claim for salary during the period of unpaid leave fails.
30. Finally, I enter judgment in favour of the Claimant as follows:
 - a. Salary arrears for March 2020-May 2020 Kshs. 915,000
 - b. Salary arrears for June 2020 to August 2020 594,750
 - c. Unremitted loan deductions 1,182,300
 - d. Unremitted pension dues 955,500
 - e. Unlawful surcharge 93,750Total 3,741,300
31. This amount will attract interest at court rates from the date of judgment until payment in full.
32. The Claimant is also entitled to a certificate of service plus costs of the case.
33. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF MARCH 2025

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JUDGE

Appearance:

Mr. Mungla for the Claimant

No appearance for the Respondent

