



Owiti v Highlight Travel Limited t/a BCD Travel (Cause E699 of 2016) [2025] KEELRC 1111 (KLR) (4 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1111 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E699 OF 2016**

HS WASILWA, J

APRIL 4, 2025

BETWEEN

JOHN MARKS OWITI CLAIMANT

AND

HIGHLIGHT TRAVEL LIMITED T/A BCD TRAVEL RESPONDENT

JUDGMENT

Introduction

1. The Claimant instituted this claim vide an Amended Memorandum of Claim dated 22nd March 2024 on grounds that he was constructively dismissed from employment by the Respondents. He prays for judgment against the Respondents for: -
 - i. Unpaid annual leave for the year 2019 and 2020 Kshs 298,226
 - ii. Unlawfully withheld salary from the months of March 2020 to March 2021 @ 149,113 x 12 months Kshs 1,789,356
 - iii. Damages for discrimination at the workplace.
 - iv. Certificate of service to issue to the Claimant.

Claimant's Case

2. The Claimant states that he was employed by the Respondent as a Senior Accountant Manager Reconciliations of Highlight Travels Limited on an annual salary of Kshs 780,000/= per annum vide a letter dated 3rd December 2010. Further to the annual salary, he was paid Kshs 20,000/- to cater for transport and telephone expenses.



3. The Claimant avers that upon successful completion of his probation period, he was confirmed as a Senior Accountant, Reconciliations vide a letter dated 27th July 2011, from which period he commenced the process of ISO certification of the Kenyan office/branch/franchise subject to renewal. The Claimant relied on the Respondent to maintain ISO certification through his employment.
4. It is the Claimant's case that some of ISO certification requirements included the promotion and review of salaries of employees on the basis of their performance, however, Respondents only undertook performance appraisals once in the year 2014 during the ISO certification process until his alleged unlawful dismissal from employment in 2021.
5. The Claimant avers that the terms and conditions of employment and the ISO certification requirements and conditions created a legitimate expectation that: he would be appraised periodically; his terms of employment especially emoluments would be revised subject to the appraisals; he would be afforded equal opportunities at the workplace; and he would not be discriminated at the workplace.
6. The Claimant avers that in the year 2015, his was diagnosed with Non-Hodgkin's Lymphoma, a type of cancer disease that attacks the face. He informed the Respondents of the diagnosis which precipitated discriminatory actions by the Respondents at the work place.
7. The Respondent began by transferring the Claimant from the Finance Department to the Credit Control section, a department where he had no qualifications, knowledge or experience in. He was further assigned the clerical duties that did not require the application of expertise and moved the sitting position occupied by a Senior Accountant to the Registry which is occupied by the clerks.
8. When he filed a formal complaint with the Respondents regarding the degrading treatment, he was transferred to the Respondent's office at Othaya Road in Kileleshwa with the intent to further frustrate him as: the Respondents were aware that the Claimant had a sickly child who needed his attention prior to reporting to work; Othaya road was far from the CBD necessitating the Claimant to adjust his timelines to leave home earlier than usual to arrive to work on time; and based on where the Claimant lived, it would require him to take at least 3 "matatus" and walk a distance to get to the office. Albeit difficult, the Claimant reported to his new station.
9. The Claimant avers that he was subsequently advised that his daughter would require specialized treatment in India. He sought for leave to make arrangements for the travels to India, however, it was denied and only approved last minute leading to the Claimant not making adequate earlier preparations hence higher costs.
10. The Claimant avers that the Respondents referred him in derogatory and demeaning terms including one occasion one of the Respondent's Directors told him that he was "persona non grata" in the presence of the Human Resource Manager.
11. It is the Claimant's case that the Respondents continued to transfer him to different locations and departments and failed to give him Key Performance Indicators (KPIs) regarding his new and ever morphing roles. The Respondent further directed the Claimant to take orders and directives from junior staff some of whom he had trained.
12. Furthermore, in the year 2015, the Respondent employed a Senior Accountant Reconciliations, the exact position which the Claimant had been hired for and paying the said employee in excess of Kshs 300,000/=.



13. It is the Claimant's case that the discrimination was open to all to see making him a constant subject of ridicule from his fellow employees. However, due to his daughter's illness he sunk into debt for medical fees and could not resign.
14. The Claimant states that in response to the Covid 19 pandemic, he was placed on unpaid leave for a period of 3 months which was extended indefinitely putting him in a position he could not seek alternative employment. he wrote to the Respondent several times to be called back to duty but the Respondent failed to do so.
15. It is the Claimant's case that the Respondent's action left him with no choice but to resign vide a letter of resignation dated 21st March 2021.

Respondent's Case

16. In opposition, the Respondent filed a reply to the Amended Memorandum of Claim dated 15th July 2024
17. The Respondent avers that the Claimant was its employee and within the period of his employment, the Claimant was treated fairly, in a reasonable and non-discriminatory manner to the extent of being granted necessary support to attend to his child which entailed financial support, time away from his work to attend to his child where necessary and he benefitted from the Respondent's highly subsidized travel costs.
18. It is the Respondent's case that due to the severity of the daughter's illness, the Claimant's working relationships was affected prompting the Respondent's decision to transfer him to other roles within the organization to facilitate continuity of work and without any issue being raised during the term of employment.
19. It is the Respondent's case that Covid 19 pandemic threatened its business in tours and travel as travel was halted to curb the transmission of the disease; this led to shutdown of the Respondent's operations since there wasn't any business of facilitating travel for conferencing, leisure or other business. Following directives and engagement with the Ministry of Labour, the Federation of Kenya Employers and COTU, it alongside other employers looked for ways to retain its staff, with adjustment, appreciating that there were no revenues being generated due to the pandemic.
20. The Respondent avers that while looking for ways to sustain the business, the Claimant was retained as a staff member with health insurance and statutory dues being paid, however, due to lack of work, he was not expected to report to work but utilize his leave days till exhaustion. the Claimant was not discriminated upon as this applied to all of the Respondent's employees.
21. The Claimant however opted to resign from his employment and initiate this suit. The parties hereon subsequently engaged in discussions through their lawyers culminating to an agreement that Claimant would be paid Kshs 1,850,000 by 22nd December 2021 and that he would have access to his pension. Further, the Respondent agreed to bear the legal fees incurred by the Claimant all in consideration of the withdrawal of the claim.
22. It is the Respondent's case the agreement was recorded in its lawyer's letter of 15th December 2021 followed by withdrawal of the suit on 16th December 2021 with funds being transmitted by the lawyers into the Claimant's account on 20th December 2021.
23. Having negotiated and concluded the settlement, the Claimant cannot allege the sum arising from his claim was not settled.



Evidence in Court

Claimant

24. The Claimant (CW1) adopted his witness statement dated 25th May 2024 as his evidence in chief and produced his amended list of documents dated 22nd May 2024 and supplementary list of documents dated 29th September 2024 and 27th September 2024 as his exhibits number 1-33.
25. During cross examination, CW1 testified that in respect to the notice of withdrawal, he received approximately Kenya Shillings One Million Eight Hundred Thousand from the Respondent meant to resolve the matter herein.
26. Upon re-examination, CW1 testified that he did not resign as it can be seen the Respondent vide a letter dated 28th June 2021 titled 'Resumption from Unpaid Leave', the Respondent was recalling him to work after his alleged resignation.
27. CW1 further testified that in regards to the amount of Kenya Shillings One Million Eight Hundred Thousand from the Respondent, he did not accept it as final settlement of the claim.

Respondent

28. The Respondent's witness (RW1) Mike Cheluget, testified that he is the Respondent's Human Resource and Administration Manager. He adopted his witness statement dated 17th July 2024 as his evidence in chief.
29. RW1 testified that the Respondent is in the hospitality industry and deals with travel tickets and conferencing for clients. In March 2020, when the Covid 19 hit the country, its business was affected as there was no international travel. The Respondent held a tripartite meeting and agreed to ask its employees to take unpaid leave which was communicated to all employees.
30. RW1 testified that the Claimant was granted financial support including subsidized tickets when his child was ill. Further due to the pressure he was facing, the Respondent scaled down his duties.
31. During cross examination, RW1 testified that it is the Respondent's stand that the Claimant resigned however, they have not produced the resignation letter before this court.
32. RW1 testified that in April 2019 when the Claimant requested for leave to take his child to India, the Respondent's Managing Director declined to approve the leave request.
33. He continued to testify that the Claimant was not paid his salary for March 2020 to June 2021 albeit he did not sign the document signifying acceptance to take unpaid leave. RW1 stated that the Claimant protested unpaid leave and the Respondent called him for a meeting.
34. RW1 testified that the Claimant had annual leave for the year 2019 being 24 days annually, these days were not paid as the employee was expected to take his annual leave.
35. It is RW1's testimony that the Respondent's letter of June 2021 recalling the Claimant back to work on half pay signifies that the Claimant had not resigned, however, the Claimant declined the offer through his advocate.
36. RW1 testified that the Claimant was issued a certificate of service through his advocate.



37. During re-examination, RW1 testified that the Claimant's leave days were exhausted between March 2020 to June 2021 when on unpaid leave and the salary was not paid during this period as employees were on unpaid leave due to Covid 19.

Claimant's Submissions

38. The Claimant submitted on three issues: whether the Respondent owes the Claimant his lawful dues; whether the Respondent discriminated the Claimant at the workplace; and whether the Claimant is entitled to the reliefs prayed.
39. The Claimant submitted that the Respondent still owes him dues for unpaid annual leave for 2019 and 2020 and the unlawfully withheld salary from April 2020 to June 2021 and damages for discrimination.
40. It's the Claimant's submission that although his leave for 2019 and 2020 were approved, they were not paid due to covid 19 as testified by the Respondent's witness, therefore, he is entitled to be paid the unpaid amount pursuant to Section 28(1) (a) of the Employment Act which states that an Employee shall be entitled after every twelve consecutive months of service with the employer to not less than twenty-one working days of leave with full pay.
41. It was further submitted that the Claimant furnished this Court with evidence that he never consented to be subjected to unpaid leave from April 2020 to June 2021 when he was recalled back to work on half pay terms.
42. On the issue of discrimination, it is the Claimant's submission that the Respondent treated him differently from his colleagues on the basis that they were recalled to work on their previous terms whereas he was offered half pay and demoted without any basis. Further he was subjected to frequent transfers which no other employee was subjected to.
43. The Claimant submitted that he worked for the Respondent for over 10 years and the Respondent has never issued him with a certificate of service contrary to Section 51 of the Employment Act.

Respondent's Submissions

44. The Respondent submitted it has shown this Court that it placed all its employees on unpaid leave from April 2020 to June 2021 when travel resumed with restriction. This was to avoid redundancies and termination of account of Covid 19, therefore, the Claimant was not victimised.
45. It is the Respondent's submission that the Claimant misled this Court by suggesting that his salary was withheld when the reality is that he was on unpaid leave due to the COVID-19 impact on the Respondent's operations. This information was shared with the Claimant and explained to all the Respondent's employees. This was done in accordance with Section 10(5) of the Employment Act which allows temporary adjustments in employment terms during economic crises, provided employees are informed
46. The Respondent submitted that the Claimant was treated fairly, equitably, and in accordance with company and industry practice. Additionally, he was accorded preferential treatment in recognition of his unique personal circumstances, arising from his child's health condition which cannot be deduced as discrimination.
47. It is Respondent's submission that the Claimant together with all other employees of the company were recalled on half salary due to the gradual recovery of the travel industry.



48. The Respondent submitted that for discrimination to be established, there must be proof of unfair differential treatment without justification. The Claimant has not provided evidence that he was treated unfairly compared to others in the same category.
49. I have examined all evidence and submissions of the parties herein. It is admitted by the claimant that he resigned from duty citing harassment and discrimination at work. The claimant informed court that he resigned vide a letter of 21/3/2021. He avers that the resignation was not voluntary but was occasioned by the actions of the respondent.
50. He avers that he had been on an indefinite leave beyond 6 (six) months and without pay. I have looked at the documents filed by the claimant and note that the letter dated 22/3/2021 written by the claimant's counsel HMS advocates LLP indicated a chronology of events that the claimant had gone through and for which the claimant avers he considered himself constructively dismissed. It is clear that the resignation was not voluntary but was actuated by the events the claimant had gone through in the hands of the respondent.
51. In *Western Excavating (ECC) Ltd v Sharp (1978) ICR 222*, Lord Denning MR stated as follows:
- “If the employer is guilty of conduct which is a 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 essentials of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave instantly without giving any notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once.”
52. The claimant herein was indeed transferred from station to station. He was moved from a different department for which he avers that he was not fully qualified. His duties were given to another person. He had a sick child and had many issues going. He was then sent on an indefinite unpaid leave. This in my view qualifies as a constructive dismissal as the respondents were treating him in a manner which did not conform to the envisaged employer-employee relationship. His conclusion that he considered himself dismissed was proper in the circumstances.
53. Considering the constructive dismissal therefore, the claimant sought to be paid damages for this which I find he was indeed entitled to and including the way he was handled whereas he was going through a tumultuous time with a sick child with cancer. I find compensation of 8 (eight) months is reasonable and I accordingly award this which translates to 8x149,113= Kshs 1,192,904/-.
54. The respondents had previously raised a preliminary objection that the parties had already entered a consent for the claimant to be paid certain amounts of money being kshs 1,850,000/- as full and final settlement of the claim.
55. From the facts produced, the claimant never consented to the payment to serve a full and final satisfaction of the claim. The claimant exhibited his supplementary list of documents dated 26th September 2024 which show his email correspondence with his former advocates and whatsapp conversation with the said counsel and he clearly indicated as follows:

“with your conviction that our case is good I AM NOT TAKING THE KSHS 1.85M PALTRY CLAIM OFFER and please fight on while putting in check the cunningness,



sharpened manipulation skills, vast financial muscles and oratory process for influence by the respondent”

56. This Clery shows that there was no consent or agreement by the claimant not to pursue his claim despite being paid kshs 1.85 million. That in my view clears out the issue raised in the preliminary objection and it is my finding that though the claimant was paid kshs 1.85 million he left room to pursue his claim, which this court shall put into consideration in the final award.
57. The claimant also sought to be paid unpaid leave for the 2019 and 2020. There is evidence exhibited by the claimant that his leave was approved but he did not proceed due to Covid 19 pandemic. The claimant is therefore entitled to the said leave being kshs 149,113x2= Kshs 298,226/-.
58. The respondents admitted that they did not pay the claimant salary during the Covid period of April 2020 and June 2021 – 15(fifteen) months. The respondents averred that they explained to their employees the bad situation and the employees agreed to unpaid leave. The respondents did not however exhibit any evidence that this was the position as is expected under section 10(5) of the Employment Act 2007 which states as follows:
 - (5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.
59. It is therefore my finding that the claimant is entitled to payment of withheld salary during the said period = 15x Kshs 149,113= Kshs 2,236,695/-
60. Total payable therefore = Kshs 3,727,825/-
Less Kshs 1,850,000/- already paid. Balance due = Kshs 1,877,825/- Less statutory deductions.
61. The claimant should also be issued with a certificate of service.
62. The claimant claimed he was discriminated against by the respondent but he did not point out in which way he was discriminated against and vis a vis which employee. The claim for discrimination therefore fails.
63. The respondent will pay costs of this suit plus interest at court rates with effect from the date of this judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 4TH OF APRIL, 2025.

HELLEN WASILWA

JUDGE

