



**Gitonga v Fep Sacco Society Limited also known as Unicom Sacco Society Limited
(Cause E004 of 2022) [2024] KEELRC 44 (KLR) (26 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 44 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
CAUSE E004 OF 2022
ON MAKAU, J
JANUARY 26, 2024**

BETWEEN

STEVE COLLINS GITONGA CLAIMANT

AND

**FEP SACCO SOCIETY LIMITED ALSO KNOWN AS UNICOM SACCO
SOCIETY LIMITED RESPONDENT**

JUDGMENT

1. The claimant was employed by the respondent as a Senior Regional Manager from 7th August, 2019. His basic salary was kshs.140,000.00 per month. On 1st February 2020 he was promoted to Acting Area Manager and Team Leader and was awarded a responsibility allowance of kshs.10,000.00 per month but he was never paid any housing allowance.
2. On 8th April 2022, he was issued with a letter sending him on unpaid leave for three months. The reason cited was failure to meet his targets. The letter also required him to re-apply for the position after the expiry of the three months leave. He brought this suit accusing the employer of constructive dismissal and prayed for the following:-
 - a. General damages for unfair termination kshs.900,000.00
 - b. Loss of remuneration kshs.900,000.00
 - c. Outstanding salary in arrears kshs.900,000.00
 - d. Unpaid leave days not taken kshs.155,167.00
 - e. Unpaid House Allowance kshs.777,000.00
 - f. Refund for his staff deposits with Sacco kshs.169,200.00
 - g. Interests in (a), (b), (c), (d), (e) and (f)above



- h. Certificate of service; and
 - i. Costs of the suit.
3. The respondent admitted the employment relationship and attributed the claimant's woes to dismal performance in his employment. It further attributed it to the scaling down of operation due to Covid-19 Pandemic. It admitted salary arrears for the claimant amounting to kshs.477,817.00 but accused the claimant of not following the procedure laid down for seeking refund of Sacco savings/ deposit.

Evidence

4. The claimant testified as CW1 and adopted his written statement as his evidence and produced a bundle of documents. In brief, his testimony basically reiterated the facts as set out in his pleadings.
5. On cross-examination he admitted that his contract provided for a gross salary of kshs.140,000.00 and clarified that there was no performance appraisals done in the Sacco. He denied that the role of debt collection was his and contended that his role was to supervise Branch Managers who were managing branches.
6. The respondent was represented by its CEO Mr.Kenneth Charles Nyaga who testified as RW1. He also adopted his written statement dated 28th February, 2023 and produced a bundle of documents as exhibits. He contended that the claimant was not meeting his targets and as such in 2021 he was issued with a show cause letter. Thereafter he was transferred to Meru Branch in February 2022 but still persisted in his poor performance.
7. On 8th April, 2020 he was sent on unpaid leave and through the assistance of a clergy, an agreement was reached that he be paid kshs.13,500.00 per month for the period. The respondent paid the agreed sum but the claimant made another demand on 16th May, 2022.
8. He admitted the claimant's salary arrears of kshs.472,817.08 but clarified that the claimant's salary of kshs.140,000.00 was gross pay. As regards the claim for Sacco savings, he contended that the savings can only be refunded to the claimant upon giving 60 days' notice of termination of his membership.
9. On cross-examination, RW1 admitted that no disciplinary hearing was conducted for the claimant before the termination. He, however clarified that except the show cause letter and the leave letter, no termination letter was served on the claimant. He denied that the claimant was dismissed but contended that he was sent on unpaid leave because the respondent could not afford his salary due to his poor performance.
10. He admitted that the claimant was supposed to re-apply for appointment and clarified that the claimant was on three years contract renewable on performance basis.
11. As regards the claim for unpaid salary, RW1 admitted that the claimant was not paid salary for August to October 2020, March 2021, and then February and March 2022. He maintained that the contract of employment provided for kshs.140,000.00 basic pay but no other allowances. He also admitted that the claimant had accrued leave of 33 days which was not yet paid for. He maintained that the respondent has already computed the dues payable to the claimant and it is willing to settle the same as provided in his contract.



Submissions

12. The claimant submitted that he was constructively dismissed by the respondent by being sent on unpaid leave for 3 months and being required to re-apply for the position. His demands for payment of outstanding salary were disregarded until June when his unpaid leave lapsed. Consequently, he left the employment without notice due to frustrations from the employer.
13. To fortify his case, he relied on the case of *Coca Cola East & Central Africa Ltd v Maria Kagai Ligaga* (2015) eKLR and *Godfrey Allan Tolo v Tobias O.Otieno & Another* (2022)eKLR where the Court of Appeal discussed constructive dismissal.
14. The claimant further submitted that he is entitled to the reliefs sought including compensation for unfair termination. He submitted that his contract term of three years was to lapse on 2nd September, 2022 but it was terminated constructively on 10th June, 2022 when he failed to re-apply for re-appointment. He prayed for six month salary compensation for unfair termination being kshs.150,000 x 6 =kshs.900,000.00.
15. He further claimed entitlement to salary for August-October 2020, March 2021 and February and March, 2022 being kshs.150,000 x 6 =kshs.900,000.00.
16. He also prayed for housing allowance citing section 31 of the *Employment Act*. He assessed the same at 15% of the basic salary of kshs.140,000.00 for 37 months equaling kshs.777,000.00. He relied on the case of *Grain Pro Kenya Ltd v Andrew Waitbaka Kiragu* (2019) eKLR where the Court of Appeal assessed house allowance using 15% of the basic salary.
17. He further claimed 33.25 leave days based on section 28 of the *Act* equaling kshs.155,167.00. As regards the refund of Sacco savings, he submitted that he is entitled to kshs.169,200 which has not been contested by the respondent. He contended that Document 8 in the respondent's documents confirms his claim. He further contended that the attempt to pursue the refund was complicated by the respondent's closure of branches, change of its name and its head office location.
18. Finally, the claimant submitted that he is entitled to certificate of service and costs of the suit.
19. Respondent submitted that the claimant has failed to prove a case of constructive dismissal as enunciated by the Court of Appeal in the case of *Coca Cola East & Central Africa Ltd, supra*, and by this court in the case of *Milton M.Isanya v Aga Khan Hospital Kisumu* (2017) eKLR.
20. In view of the above, it was submitted that the claim for unfair termination must fail. It was submitted that the claimant never lost income during his leave nor was he dismissed from employment. However, the respondent reiterated the admission of kshs.472,817.08 and contended that it is willing to settle the same by instalments. It was further submitted that the claim for kshs.900,000.00 is unsupported by evidence and it is aimed at unjust enrichment. The claim for costs was also opposed since the claim for the salary arrears was not opposed from the beginning.

Issues for Determination

21. Having carefully considered the pleadings, evidence and submissions, the following issues fall for determination:
 - a. Whether the claimant was constructively dismissed.
 - b. Whether reliefs sought are merited.



Constructive Dismissal

22. Constructive dismissal is not defined in our law books. It is a legal concept developed by courts elsewhere and adopted by our courts as good law. In the case of *Milton M. Isanya v Aga Khan Hospital Kisumu*, *supra*, Onyago J held that:-

“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 frustrate the employee to the extent that the employee tenders resignation.

23. In the case of *Nathan Ogada Atiagaga v David Engineering Ltd* (2015) eKLR, the court held that:-

“Constructive dismissal occurs when an employee resigns because their (sic) employer’s behavior that 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 dismissal.”

24. The Court of Appeal, in *Coca Cola East & Central Africa Ltd*, *supra*, held that:-

“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 to leave without notice because of the employer’s conduct.”

25. In the instant case the claimant was not paid salary for six months before he left employment in June 2022 without notice. In April 2022, he had been sent on an unpaid leave for three months. His woes were attributed to failure by the claimant to meet his performance targets. An attempt to settle the issue of salary during the three months compulsory leave was allegedly made before a clergy. However, no such agreement was produced as exhibit.

26. In the circumstances of this case I find that the claimant was entitled to leave the employment without notice. The conduct of the employer made the claimant’s working condition intolerable. He had been denied salary for six months, and thereafter forced into an unpaid leave for three months. His job was also not assured since he was required to re-apply for the same after the lapse of the three months leave.

27. The said conduct by the employer was unreasonable and also amounted to a repudiatory breach of the claimant’s contract of employment. Consequently, I must hold that the claimant has proved his case on a balance of probability that his resignation was involuntary and therefore amounted to constructive dismissal by the respondent.

28. This case is distinguishable from the cited case of *Godfrey Allan Tolo*, *supra* because in the said case, the employee never resigned despite the employer’s conduct, but went ahead to sign an agreement for amicable separation and payment of terminal dues.

Reliefs

29. The claimant prayed for kshs.900,000.00 being damages for unfair termination of his employment contract. The termination occurred from 8th June, 2022 when he failed to report back to work after the forced leave. His contract was to lapse on 2nd September, 2022 as per paragraphs 2 of the contract.



His expected period of service under the contract was three months. Consequently, I award him kshs.300,000.00 being two months gross salary compensation for unfair termination.

30. The claim for salary arrears for August-October 2020, March 2021, and February-March 2022 has not been disputed. However, the sum owing was assessed by the employer as kshs.472,817.08. The employer's case is that the claimant was paid portions of his salary leaving the said balance. The claimant did not dispute the said assessment. He did not produce bank statements to confirm that he never received any salary advances as alleged. Consequently, I award him the said sum of kshs.472,817.08.
31. The claim for leave of 33.25 days was not disputed and therefore I award the sum of kshs.155,167.00 as prayed. Likewise, the claim for Staff Deposit and Savings of kshs.169,200.00 has not been disputed. All what the respondent contended was that the procedure provided for the refund of savings was not followed.
32. The claimant responded that the procedure was not applicable because the respondent closed all Regional offices, relocated its head office to unknown place and changed its name. In the circumstances, I agree with the claimant that court's intervention is necessary. Consequently, I allow the prayer for the refund of the claimant's savings totaling to kshs.158,200.00 as per the statement filed by the employer. However, the balance of kshs.10,000.00 is made up of share capital which must be pursued under the rules of the Sacco and the relevant statute.
33. There is also a claim for house allowance of kshs.777,000.00 being 15% of the kshs.140,000.00 for 37 months. The respondent denied the claim and maintained that the salary of kshs.140,000.00 was gross pay. Paragraph 8 of the contract of employment provided for a remuneration package of kshs.140,000.00 less statutory deductions. It provided for medical cover, car loan, Group personal Accident Insurance, end of year bonus and any other benefit or allowance that may be approved by the Board. The claimant did not produce any evidence to confirm that the Board approved for him housing allowance. He never claimed for the same before the termination. The claim is therefore an afterthought and it is declined.
34. The claim for certificate of service is however allowed as prayed.

Conclusion

35. I have found that the claimant was constructively dismissed from employment by the respondent. I further found that he is entitled to some of the prayers sought. Consequently, I enter judgement for him as follows: -
 - a. Damages for unfair termination.....kshs.300,000.00
 - b. Salary arrears.....kshs. 472,817.08
 - c. Leave.....kshs.155,167.00
 - d. Refund of Sacco savings.....kshs.158,200.00kshs.1,086,183.08

The award is subject to statutory deductions. The claimant will have costs plus interest at court rates from date of the judgment. He will also have a certificate of service.

DATED, SIGNED AND DELIVERED AT NYERI THIS 26TH DAY OF JANUARY, 2024.

ONESMUS N MAKAU

JUDGE



ORDER

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

