



**Okewe v Kenol Kobil Limited (Cause 608 of 2019)
[2024] KEELRC 416 (KLR) (27 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 416 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 608 OF 2019
NZIOKI WA MAKAU, J
FEBRUARY 27, 2024**

BETWEEN

GEDION OKEWE CLAIMANT

AND

KENOL KOBIL LIMITED RESPONDENT

JUDGMENT

1. In September 2019, the Claimant filed this suit against the Respondent claiming unlawful, unprocedural, unfair and discriminatory termination of his services; violation of his rights; unpaid terminal dues; and damages for constructive dismissal, unfair termination of service and for loss of employment and future earnings. He prayed to the Court to grant him a myriad of reliefs while asserting that the Respondent should be ordered to pay his dues that include unpaid salaries for April 2017, May 2017 and 5 days in June 2017, one-month salary in lieu of notice, unpaid leave days, travelling and entertainment expenses for March and April 2017, interest at court rates, costs of this suit and a certificate of service.
2. The Claimant averred that vide a Letter of Appointment dated 4th July 2011, the Respondent engaged him as a Sales Representative Trainee within its Marketing and Fuel Business Development Department. The employment was subject to a probationary period of six (6) months and the Claimant was to commence work on 1st August 2011 on a consolidated salary of Kshs. 75,000/-. He was also given a Job Description detailing his position, location and supervisor and outlining his duties. It was the Claimant’s averment that through his sheer determination and resourcefulness, his relationship with the Respondent was regularised and his role reclassified to that of Sales Representative effective 9th February 2012, with an improved consolidated salary of Kshs. 85,000/-. That after his position was confirmed on 17th July 2012, the Respondent appraised his performance as “Very Good” and further increased his monthly salary to Kshs. 94,554/-. That his devotion to the Company was recognised every year from 2013 and rewarded through end-year bonuses as a token of appreciation for his good



performance and which bonuses he was awarded from 2014 to 2016. That in every subsequent year since his first appraisal in July 2012, the Respondent gave him the coveted rating of “Very Good” followed by a salary increment. He further averred that he was eventually elevated to the position of Retail Sales Supervisor, albeit in acting capacity, based at the Head Office and that this promotion was confirmed on 30th April 2016, with a consolidated salary of Kshs. 150,000/-. That again in his final appraisal spanning July 2015 to June 2016, the Respondent rated him highly in almost all parameters listed for consideration and his salary was subsequently adjusted so that his gross salary stood at Kshs. 172,425/- by April 2017. He further notified the Court that the role of Retail Supervisor also rendered him eligible for work-related travelling and entertainment expenses.

3. The Claimant’s case was that on 5th May 2017, he received a letter signed by the Respondent’s HR Manager, Ms. Catherine Chege, alleging that the management had noticed a series of breaches of rules and procedures through an internal audit on service stations run by the Respondent, within the period of August 2016 to April 2017. That the letter also stated that he had to be placed on compulsory leave from the date thereon without pay and the Respondent further purported to excise his accrued leave days. Additionally, that the communique indicated that his salary for April 2017 would be withheld pending a “reconciliations” of the affected accounts and he was similarly denied his due allowances under the Travelling and Entertainment Expenses regime. The Claimant averred that at the end of the 30 days’ compulsory leave, he went back to work determined to resolve the stand-off but was asked to stay away until further notice because the “investigations” into his misconduct were still underway. That he endured another month of anxiety without pay which made him financially constrained by the end of May 2017 and that four days into June 2017 and with no other communication from the Respondent, he decided to terminate his engagement with the Company. He stated that his Resignation Letter dated 5th June 2017 simply informed the Respondent that he had opted to leave to pursue other interests and fulfilments, thanked it for the opportunity given to him and reminded it of his outstanding salaries and allowances.
4. According to the Claimant, the foregoing circumstances demonstrate that he was constructively dismissed and thereby unfairly terminated contrary to employment law. That his Claim was founded on the fact that the Respondent withheld his salary and allowances for at least two months without real justification, failed to explain to him the nature of the accusations against him for him to present his defence, forced him to apply and go on leave and treated him with contempt. The Claimant averred that the Respondent had failed to pay him his dues and to address the issue to date and that it should be held accountable in the interest of justice.
5. In response, the Respondent filed a Memorandum of Defence dated 11th October 2019 averring that the Claimant was expected and agreed to comply with the terms of his contract of employment and the Respondent’s internal policies and regulations. That given the Claimant’s position and the seriousness of the breaches noticed, it was necessary to place him on compulsory leave for the Respondent to conduct proper investigations. That the extent and reason for the compulsory leave was fully explained to the Claimant and he was not entitled to any allowances during the said period since he was not in active employment. According to the Respondent, when the Claimant resigned through a letter dated 5th June 2017, he opted to forfeit his accrued leave days to be deducted as payment in lieu of the notice he was contractually required to give since the resignation was effective the same day. It denied that the Claimant was dismissed from employment upon returning to work from his compulsory leave and asserted that it did not in any way compel him to resign. That since it could not force him to continue working against his wishes and beyond the required one-month notice period, it accepted his resignation. Moreover, that the Claimant was not put on his defence regarding any allegations as he resigned before any charges could be levied against him. The Respondent further averred that



the Claimant having willingly and voluntarily resigned from his position, he was not constructively dismissed as alleged or at all and is abusing the court process.

6. In addition, it was the Respondent's averment that after the Claimant's resignation, it uncovered fraudulent activities he had been involved in while in its employ thus occasioning it serious financial loss. The Respondent stated that the Claimant is not entitled to any of the orders sought in the Claim but amended the same in Court and admitted to not having paid the Claimant his salary for April 2017, May 2017 and 5 days in June 2017. That the Claimant was not eligible to make claims for unfair termination and notice pay having voluntarily resigned from his position and that because the question of termination does not arise, he is therefore also not entitled to compensation. The Respondent also denied that any annual increments/bonuses issued to the Claimant during his employment were premised on his hard work, asserting that the same was a prerogative of the Respondent's Board. It refuted the assertion that the Claimant received Cost of Living Adjustments (COLA) based on his performance and averred that it issued COLA increments to all its employees in April each year to cushion them against inflation as per its HR Policy. The Respondent fronted that the Claimant's constitutional rights were not violated and prayed for his case to be dismissed with costs to the Respondent.
7. In a rejoinder made through a Reply to the Memorandum of Defence dated 17th October 2019, the Claimant restated that he had no intention of leaving the employment and only decided to resign pursuant to the Respondent's conduct.

Evidence

8. The Claimant testified that he never got any bad reviews in his period of service to the Respondent and never breached any terms of his employment. He stated that he had not received any outcome of audits from the Respondent and that when he went back to work on 5th June 2017, he found he had been deactivated on biometrics, security had been instructed not to let him in and Ms. Catherine Chege and the CEO told him there was no job. That he thanked them because he still needed them to issue him with a certificate of service and wanted to leave on a good note. It was the Claimant's testimony that he had 91 days of leave when he went on compulsory leave and having forfeited 30 days as required by notice, the leave days pending are 61 days. The Claimant admitted under cross-examination that his Statement did not have the meeting he had with Ms. Chege and the CEO and confirmed he got his Certificate of Service in 2022. He stated in re-examination that since the Respondent was the custodian of his employment records, it ought to produce documents on his allowances and pending leave days from the company's online system. He reiterated that he was not paid allowances and salary for two months and five days.
9. The Respondent's witness, Ms. Evelyne Ambani stated that the Respondent conducted performance appraisal and confirmed that based on the letters at pages 9-17 of the Claimant's Bundle, the Claimant received increments on account of his performance. She also confirmed that Compulsory Leave was not indicated in the Respondent's HR Manual and that they did not file in court the results of the internal audit. She however clarified in re-examination that the Respondent did not place the audit report before Court because the report involved other employees.

Claimant's Submissions

10. The Claimant submitted that the following are the issues for determination by this Court:
 - a. Whether the Respondent carried out actions that amount to repudiation of the Contract of Employment that led to the Claimant's constructive and unfair termination; and



- b. Whether the Claimant is entitled to the prayers sought.
11. It was the Claimant's submission that as affirmed in the case of *Joseph Aleper & another v Lodwar Water and Sanitation Company Limited* [2016] eKLR, constructive dismissal has its root in the law of contract under the doctrine of 'discharge by breach', which doctrine entitled an employee to treat himself as discharged from further performance of his obligations where the employer's conduct was a significant breach going to the root of the contract, and the termination would be due to the employer's conduct. The Claimant noted that the defence witness admitted in court that the Claimant was not paid his dues and stated that non-payment of salary is a fundamental breach of contract and that no employee can work for free. He submitted that placing him on compulsory leave and not sharing the results of the investigations is a violation of his rights to a fair hearing and fair administrative action envisaged under Articles 50 and 47 of *the Constitution* of Kenya, 2010. That the Respondent in fact violated its HR Manual by placing him on compulsory leave, which leave is not provided for in the said Manual. Furthermore, that failing to pay his salary for work done amounted to a repudiation of clause 2 of the Contract of Employment and led to his constructive termination by resignation. In this regard, the Claimant submitted that the Court of Appeal set out in the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR, the legal principles relevant to determining constructive dismissal to include as follows:
- 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.
12. It was the Claimant's submission that in analysing the foregoing case, it is a fundamental term of any employment contract that there be payment of salary for work done and which goes to the root of the contract. That in the case of *Simon Papa Imo v Athi River Shalom Community Hospital* [2021] eKLR, the Court cited the case of *Western Excavating ECC Ltd v Sharp* [1978] 2 WLR 344 in which Lord Denning observed that:
- “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 essential terms 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..."

13. That further in the case of *Micah Kangogo Chelanga v Kenya Farmers Association Ltd* [2022] eKLR, the claimant had resigned because he was not paid his salary and the Court found that his case amounted to constructive dismissal. On the first issue, the Claimant submitted that he had established all the necessary principles set out in the *Coca Cola* case (*supra*) showing that his termination was indeed unfair. The Claimant submitted that having proved his case, he is thus entitled to be awarded his prayers on compensation for the unfair termination and on one month's pay in lieu of notice. That for his unpaid salary, since the Respondent's witness had admitted in testimony and even in its amended Defence document that the Claimant's salary as claimed was never paid, he is entitled to receive the said payment plus interest. He further submitted that since he worked for the Respondent in April 2017 and his position as Retail Supervisor made him eligible for work-related travel and entertainment allowances, he is thus entitled to the said allowances as prayed for. The Claimant further submitted that he is entitled to costs and interest in the suit because he was constructively dismissed.

Respondent's Submissions

14. According to the Respondent, the issues for determination before this Court are:
- a. Whether the Claimant voluntarily resigned from employment or was constructively dismissed from his employment;
 - b. Whether the Claimant is entitled to the remedies sought in the Claim; and
 - c. Who should pay the costs of the Claim?
15. The Respondent cited the case of *Nathan Ogada Atiagaga v David Engineering Limited* [2015] eKLR – Cause No. 419 of 2014 in which the Court defined constructive dismissal as occurring 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. It further cited the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR wherein the Court of Appeal discussed the criteria for determining whether constructive dismissal has taken place as follows:
- “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...” (Emphasis by Respondent)
16. The Respondent submitted that the burden to prove constructive dismissal has occurred, lies squarely on the Claimant but who had failed to set out a valid claim for constructive dismissal as set out in the *Coca Cola* case (*supra*). It argued that the wording and tone of the Claimant's letter of resignation dated 5th June 2017 do not suggest that he was compelled by the Respondent's behaviour but that he simply chose to move on from his employment willingly “in pursuit of further interests and fulfilment”. The Respondent referred to the case of *Milton M Isanya v Aga Khan Hospital Kisumu* [2017] eKLR wherein the Court found that the claimant's resignation did not constitute constructive dismissal as he had thanked the respondent and the entire senior management team in his letter of resignation, which tone the Court opined was not of an employee forced out of work due to frustration by his employer's conduct. It also relied on the case of *Sophie Muthoni Njagi v Rift Valley Railways (Kenya) Limited* [2020] eKLR where the Court found no evidence of constructive dismissal in the



- claimant's case. It was the Respondent's submission that based on the foregoing, it is evident the Claimant willingly wrote the resignation letter and his resignation was as such voluntary and deliberate.
17. The Respondent submitted that without prejudice to the foregoing, if it did breach the Claimant's contract of employment, the Claimant waived such breach since he resigned on 5th June 2017, which was nearly 2 months later after the Respondent's failure to pay his April and May 2017 salaries. On this submission, the Respondent relied on the case of *Herbert Wafula Waswa v Kenya Wildlife Services [2020] eKLR* in which the Court affirmed that where there is delay on the part of an employee in resigning, it cannot be considered a constructive dismissal. The Respondent fronted that the Claimant's case on the claim for constructive dismissal should be disallowed and having voluntarily resigned, he is not entitled to any compensation and notice pay. Further, that the Claimant is not entitled to the interests sought on the unpaid salaries as the claim has no basis and its determination is within the discretion of the Court. That the Claimant having not produced any leave forms or records on leave days and any travelling receipt records, he is not entitled to the said awards. That the Claimant admitted in his testimony that he was duly issued with the Certificate of Service and costs should be awarded to the Respondent since costs follow the event.
 18. The Claimant asserts he was entitled to compensation for his unfair dismissal which was upon his resignation from the Respondent. He had at the time not been paid his salaries for 2 months as admitted by the Respondent. The Claimant had been sent on leave for "investigations" to be undertaken and when the Claimant attempted to resume work a month later he was advised to go and wait as the investigations were still ongoing. The Respondent asserts that the parameters for finding there was constructive dismissal have not been met. The Court is of a contrary view. When the Respondent asserted that it was investigating allegations of impropriety against the Claimant (and other employees), the Respondent did not have the luxury of a long period before giving the Claimant any response. The Respondent admits it took more than a month, the employee was unsure of his status and opted to resign. In the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga (supra)*, the Court of Appeal held inter alia that
 - a. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?
 - b. 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.
 - c. An objective test is to be applied in evaluating the employer's conduct.
 - d. 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.
 - e. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.
 - f. 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.
 - g. The burden to prove repudiatory breach or constructive dismissal is on the employee. (Emphasis mine)
 19. The Claimant resigned after not receiving his salary for almost 2 months. There was no valid reason for withholding the Claimant's salary as the Respondent had chosen to send the Claimant on what it



termed compulsory leave. During leave, an employee is entitled to pay. Having fundamentally breached the contract of service since an employee is entitled to be paid a salary, the Respondent is guilty of constructive dismissal as there is a nexus between the refusal to pay the salary and the resignation that ensued. As held in the Coca Cola v Maria Kagai Ligaga case, there was repudiatory breach wholly attributable to the Respondent. I thus find in favour of the Claimant on that score. The Claimant had a raft of reliefs he sought some of which are not capable of being granted. The Claimant was not entitled to leave as he had forfeited the leave dues as notice. No evidence was led in relation to the amounts claimed for handovers in March and April 2017 as well as the bankings in April and March 2017. The claims in respect of the entertainment expenses would therefore not be due. The following are the reliefs he is entitled to – unpaid salary for April and May 2017 as well as 5 days worked in June 2017 – Kshs. 354,597.50, one month’s salary in lieu of notice – Kshs. 172,425/-, 3 months salary as compensation for unfair termination – Kshs. 517,275/-.

20. In the final analysis I enter judgment for the Claimant as follows:

- a. Unpaid salary for April and May 2017 as well as 5 days worked in June 2017 – Kshs. 354,597.50,
- b. One month’s salary in lieu of notice – Kshs. 172,425/-,
- c. 3 months’ salary compensation for unfair termination – Kshs. 517,275/-.
- d. Costs of the suit.
- e. Interest at court rates on the sums in (a), (b) and (c) above from date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2024

NZIOKI WA MAKAU

JUDGE

