



REPUBLIC OF KENYA



**Njuguna v Entreplat Insurance Brokers Ltd (Cause E192 of 2022)  
[2024] KEELRC 139 (KLR) (7 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 139 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E192 OF 2022  
JK GAKERI, J  
FEBRUARY 7, 2024**

**BETWEEN**

**ANASTACIAH NDINDA NJUGUNA ..... CLAIMANT**

**AND**

**ENTREPLAT INSURANCE BROKERS LTD ..... RESPONDENT**

**JUDGMENT**

1. The Claimant commenced this suit by a Statement of Claim dated 25<sup>th</sup> March, 2022 alleging constructive dismissal by the Respondent.
2. The Claimant prays for;
  - i. A declaration that she was constructively dismissed by the Respondent.
  - ii. An order for the Respondent to pay the Claimant's terminal dues and compensatory damages of Kshs 192,000/=.
  - iii. 12 months compensation for unlawful termination of employment.
  - iv. In the alternative, the Claimant be compensated and paid terminal benefits.
  - v. Such orders and directions as the court may deem fit to meet the ends of justice.
  - vi. Costs of the suit plus interest.
3. The Claimant's case is that she was employed by the Respondent on 3<sup>rd</sup> August, 2020 as the Business Development Manager at a monthly retainer of Kshs 96,000/= subject to a monthly target of Kshs 1,000,000/= and 3 month probationary period but no confirmation letter had been issued by December 2020.



4. It is the Claimant's case that sometime in October 2021, management advised that terms of employment would change to commission based with a retainer of Kshs 20,000/= per month and the change would be communicated in writing.
5. That the October 2021 salary was paid on 20<sup>th</sup> November, 2021.
6. That on the resumption from leave on 16<sup>th</sup> November, 2021, the Respondent issued the commission based contract.
7. The Claimant avers that the Human Resource Manager was unequivocal that the Claimant's terms of service would be commission based effective 1<sup>st</sup> October, 2021.
8. That in the absence of a consensus, the Claimant tendered her resignation notice on 26<sup>th</sup> November, 2021.
9. It is the Claimant's case that her resignation was actuated by the change of terms of the employment contract by the Respondent without any consultation or discussion.

#### **Respondent's case**

10. The Respondent admits that the Claimant was its employee as alleged, and was issued with a performance notice dated 8<sup>th</sup> December, 2020 as her performance was found wanting and had been issued with verbal warnings.
11. That the Respondent severally notified the Claimant of its intention to align the contractual retainer pegged on commission vide letter dated 1<sup>st</sup> October, 2021 which the Claimant received and continued working and her decision to resign was voluntary.
12. The Respondent denies having constructively dismissed the Claimant.

#### **Claimant's evidence\*\***

13. The Claimant testified that the notice on performance enhancement was sent to all staff and no meeting was convened on the notice.
14. The witness further confirmed that she resigned on account of the changes introduced by the new contract and no discussions had taken place before the change.
15. RWI, Mr. John Maina confirmed that there were several notices on performance enhancement for the entire management and no letter was issued to the Claimant specifically.
16. According to the witness, the Claimant's performance for 5 months was wanting.
17. That the change in the terms of engagement was actuated by the Claimant's non-performance.
18. RWII, Teresiah Burugu confirmed that she had minutes and P.I.P was discussed and there were discussions on the performance enhancement.
19. That clause 4 of the letter of appointment was not implemented and the Claimant provided no feedback on the new contract.
20. It was her testimony that the Claimant had been accorded time to improve her performance and the Respondent was open to discussion on the letter dated 1<sup>st</sup> October, 2021.



### Claimant's submissions

21. The Claimant's counsel cited the sentiments of the court in *Nathan Ogada Atiagaga v David Engineering Ltd* (2015) eKLR and *Coca Cola East & Central Africa Ltd v Maria Kagai Ligaga* (2018) eKLR on the essence of constructive dismissal and the attendant elements to urge that the unilateral change of the Claimant's employment was a repudiatory breach of contract, frustrated the Claimant to resignation and the Respondent had not issued any notice or held meetings to address the Claimant's performance.
22. Reliance was also made on the sentiments of Onyango J. in *Milton M. Isinya v Aga Khan Hospital Kisumu* (2017) eKLR to urge that the Claimant's resignation was tantamount to constructive dismissal.
23. As regards the reliefs sought, counsel submitted that the Respondent violated the Claimant's rights under Articles 27(1) and 41(1) and (2) of the *Constitution* of Kenya, 2010 and the Claimant was thus entitled to damages.
24. Reliance was made on the sentiments of the court in *Godfrey Allan Tolo v Tobias O. Otiemo & another* (2022) eKLR and *D.K. Njagi Marete v Teachers Service Commission* (2013) eKLR.
25. Finally, counsel submitted that the Claimant had met the conditions for constructive dismissal as enunciated in *Coca Cola East & Central Africa Ltd v Maria Kagai Ligaga* (*supra*) and was entitled to 12 months compensation and the Respondent should bear the costs.

### Respondent's submissions

26. As regards constructive dismissal, counsel submitted that the Claimant had not demonstrated the criteria for constructive dismissal as her contract had a performance targets and an appraisal was done on 8<sup>th</sup> December, 2020, the Claimant was put on a 3 months performance watch and was accorded an opportunity to improve performance and participated in the meeting at which the agenda to review the initial contract was discussed and had no objection and resigned after working under the new contract for one month.
27. Counsel urged that the duty of court is to construe contracts not to rewrite them as held in *Pius Kimaiyo Langat v Co-operative Bank of Kenya* (2017) eKLR.
28. Counsel urged that the parties entered into a contract and the Claimant was bound by its terms, that the Claimant was in breach and the Respondent could cancel or terminate the contract.
29. Counsel submitted that the employer could terminate the contract based on poor performance as held in *Kenya Petroleum Oil Workers Union v Kenya Petroleum Refineries Ltd* (2015) eKLR and the Respondent had a valid and fair reason to terminate the Claimant's employment.
30. That even if the Claimant was constructively dismissed, he delayed in the delivery of the resignation notice as held in *Herbert Wafula Waswa v Kenya Wildlife Services* (2020) eKLR, that the Claimant had accepted the new terms.
31. As regards the reliefs sought, counsel submitted that the Claimant had not discharged the burden under Section 47(5) of the *Employment Act*, 2007 by establishing a *prima facie* case as held in *Josephine M. Ndungu & others v Plan International Inc.* (2019) eKLR.
32. According to counsel, the Respondent's case overwhelms that of the Claimant which does not warrant the exercise of the court's discretion in her favour under Section 49(1)(c) of the *Employment Act*, 2007.



## Findings and determination

33. The issues for determination are;
- i. Whether the Claimant was constructively dismissed by the Respondent.
  - ii. Whether the Claimant is entitled to the reliefs sought.
34. As to whether the Claimant's employment was constructively dismissed or it was a unilateral variation, counsels adopted opposing positions with the Respondent's counsel submitting that the circumstances in this case do not lend themselves to a construction of constructive dismissal.
35. It requires no gainsaying that the concept of constructive dismissal was aptly articulated by Lord Denning MR in *Western Excavating (ECC) Ltd v Sharp* (1978) ICR 221 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 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.”
36. Equally, in *Nathan Ogada Atiagaga v David Engineering Ltd* (*supra*), the court stated as follows;
- “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.”
37. In a constructive dismissal, the employer frustrates the employee to the extent that the employee has no option but resign. (See *Milton M. Isanya v Aga Khan Hospital Kisumu* (2017) eKLR).
38. Similarly, in *Coca Cola East & Central Africa Ltd v Maria Kagai Ligaga* (*supra*), the Court of Appeal adopted the contractual approach test of constructive dismissal and enunciated the guiding principles including fundamental terms of the contract, causal link between the resignation and the employer's conduct, resignation within reasonable time and absence of acquiescence, waiver or estoppel among others.
39. I will now proceed to apply the foregoing propositions of law to the facts of the instant case.
40. It is common ground that the Respondent employed the Claimant under a written contract of service with clear terms on monthly target, probation, evaluation after 3 months and termination by one month's notice by either party.
41. Copies of minutes on record reveal that the Claimant attended management meetings where sales was discussed and it was clear that the Respondent was not doing well in sales.
42. At its meeting held on 8<sup>th</sup> September, 2021 attended by four persons including the Claimant. However, the Respondent did not avail evidence of any meeting between any officer and the Claimant on the proposed change of terms of employment.



43. On sales update, it was reported that the team was committed to better sales performance for the month of September.
44. At its meeting on 26<sup>th</sup> October 2021, attended by the entire management, including the Claimant, the Agenda included, salary and commission structure, organizational structure and Reports among others.
45. Under “Update”, it was recorded that “Management advised the structure will be changed to commission basis contract to be drawn to reflect the changes . . .”
46. Evidently, the issue of engagement on commission basis had been addressed earlier in a meeting or other forum, whose records the Respondent did not avail as this was a mere update.
47. Strangely, the letter to the Claimant on the change of employment contract is dated 1<sup>st</sup> October, 2021 which would appear to suggest that the decision was made earlier on, possibly in September or earlier.
48. The Respondent tendered no evidence as to when the decision was made.
49. Contrary to the Respondent’s counsel’s submission that the Claimant received the letter and accepted the new contract for about 2 months, the Respondent tendered no evidence as to when the letter was received by the Claimant.
50. Unauthenticated and ambiguous handwritten words state “Email sent on 11/11/2021, Letter sent”.
51. It is unclear as to who indicated the words and what they meant.
52. It is unclear as to when the Claimant received the letter.
53. From the Claimant’s written statement, it is discernible that the Claimant received the letter in November and having been advised of the change on 26<sup>th</sup> October, 2021, and she was on leave in November, it is clear that the Claimant was not consulted on the issue before the letter was written on 1<sup>st</sup> October, 2021.
54. Contrary to the RWI’s evidence and the Respondent’s counsel’s submission that the letter was not conclusive and they were open to discussion, the tone of the letter communicates otherwise.
55. First, from a plain reading of the letter, it is clear that the change of terms of employment was actuated by the Claimant’s performance.
56. Second, paragraph 3 of the letter is explicit that a decision to change the Claimant’s terms of engagement had already been made. The letter states in part “the terms of your engagement have been changed from regular salary to commission-based pay.”
57. Third, although the letter additionally states that the terms may be changed from time to time in consultations of both parties, it is unclear as to why there were no consultations before the letter was written.
58. Fourth, paragraph 4 of the letter states that the Claimant’s letter of appointment dated 2<sup>nd</sup> January, 2018 had been nullified with immediate effect.
59. Finally, the letter notified the Claimant that she was at liberty to seek further clarifications if she required any. Was this an invitation to renegotiate the new terms? The court is not so persuaded.
60. In the court’s view, the Claimant was faced with a fiat accompli and reacted in the manner she did which falls within the band of reasonableness by giving a notice of resignation.



61. The court is persuaded that the Respondent breached the Claimant's employment contract by changing the terms of appointment.
62. Section 10(5) of the *Employment Act*, 2007 provides that;  
Where any matter stipulated in sub-section (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.
63. Thus, in law, the Respondent could not unilaterally vary the Claimant's employment contract without consultation.
64. In *Kenya County Government Workers Union v Wajir County Government & another* (2020) eKLR, the court held that;  
"Further, in my view, the common law principle that a unilateral variation of an employment contract is unlawful and amounts to repudiation and breach of contract and the statutory requirement to consult with an employee where there is any variation to the employment contract and more specifically, to an essential term such as the duration of remuneration where the employee would be adversely affected are ingredients and are sub-sumed in the fair labour practices principles."
65. Having found that the unilateral variation of the Claimant's employment contract by the Respondent was unprocedural for want of consultations as ordained by Section 10(5) of the *Employment Act*, 2007, it is the further finding of the court that the Claimant has proved her case on a balance of probabilities against the Respondent and the letter dated 1<sup>st</sup> October, 2021 was unlawful and unfair and as it actuated the Claimant's resignation from employment, the court is persuaded that the Claimant's employment was constructively dismissed by the Respondent.
66. The Respondent's argument that the Claimant worked under the new terms for 2 months is not borne by facts and cannot avail the Respondent.
67. As regards the reliefs sought, the court proceeds as follows;  
i. Declaration
68. Having found that the Claimant's employment was constructively dismissed by the Respondent, a declaration to that effect is merited.  
ii. Terminal dues and compensatory damages Kshs 192,000/=
69. The Claimant tendered no evidence of the terminal dues prayed for or the compensatory damages under this prayer.  
The prayer lacks particulars and is dismissed.  
iii. 12 months gross salary
70. Having found that the Respondent constructively terminated the Claimant's employment, the Claimant is entitled to the relief under Section 49(1)(c) of the *Employment Act*, 2007.
71. The court has taken into consideration the fact that the Claimant was an employee of the Respondent for a fairly short time of 1 year and 3 months. The Claimant had no recorded cases of misconduct. The Claimant did not express his wish to remain in the Respondent's employment or appeal the decision. The Claimant substantially contributed to the constructive dismissal by her performance at the workplace.



72. In the circumstances, the court is satisfied that the equivalent of 2 months' salary is fair, Kshs 96,000/ = x 2 = Kshs 192,000/=.

iv. The alternative claim of compensation and terminal dues lack clarity and does not commend itself for consideration.

73. In the upshot, judgement is entered in the Claimant's favour against the Respondent as follows;

a. Declaration that the Respondent constructively dismissed the Claimant from employment.

b. Equivalent of 2 months' salary, Kshs 192,000/=.

c. Costs of this suit plus interest at court rates from the date hereof till payment in full.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF FEBRUARY 2024**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

