



Kilima v Centre for Rights Education and Awareness (Employment and Labour Relations Cause E842 of 2022) [2024] KEELRC 614 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 614 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E842 OF 2022**

BOM MANANI, J

MARCH 14, 2024

BETWEEN

NAOMI KAJAIRA KILIMA CLAIMANT

AND

CENTRE FOR RIGHTS EDUCATION AND AWARENESS RESPONDENT

JUDGMENT

Introduction

1. This action alleges unfair termination of the Claimant’s contract of service. The Claimant alleges that the Respondent rendered her work environment intolerable thereby forcing her to resign from employment. She also alleges that during the currency of her contract, she was exposed to discriminatory treatment at the workplace.
2. As a result, she prays for orders to the effect that her contract of service was wrongfully terminated and that she was subjected to discrimination. She also prays for: salary for the balance of her contractual term; salary in lieu of notice to terminate her contract; compensation for unfair termination of her contract; and damages for alleged violation of her constitutional rights, under payments and embarrassment caused to her during termination from employment.
3. The Respondent does not admit the claim. According to it, the Claimant voluntarily resigned from her employment before she exhausted the available grievance resolution procedures. Therefore, she cannot plead constructive termination of her contract. The Respondent also denies the assertions of discrimination by the Claimant.



Claimant's Case

4. According to the Claimant, she was engaged by the Respondent in the position of project lawyer on 1st September 2020. The contract was for one year but renewable subject to availability of funds and her performance. The last renewal was entered into on 1st January 2022.
5. The Claimant avers that on 13th October 2022, she conducted an audit involving two legal assistants in her department who were not delivering on their mandates. Being allegedly afraid of the audit outcome, the two assistants allegedly lodged false claims against her.
6. Following the aforesaid report, the Respondent's Human Resource Officer allegedly summoned the Claimant for a meeting on 14th October 2022 at which she was reminded of the need to use her emotional intelligence whilst addressing the two legal assistants. She was allegedly further advised against reprimanding the two.
7. The Claimant accuses the two assistants of refusing to perform their duties on 16th and 17th October 2022. Instead, they allegedly spent the two days rummaging through her personal and office files in a bid to gather evidence to support their fabricated accusations against her.
8. The Claimant avers that on 18th October 2022, the Respondent issued her with a letter of show cause requiring her to respond to the accusations against her by the two assistants. Through the same communication, she was sent on compulsory leave pending investigations into the case.
9. The Claimant avers that she was thereafter subjected to a flawed investigative process. She accuses the Respondent of bias in the manner it handled the process.
10. She contends that the Respondent suspended her from duty on the basis of unverified and incredible allegations. She further accuses the Respondent of sidelining and treating her with contempt during the investigations and depriving her of the opportunity to cross examine her accusers and their witnesses.
11. The Claimant asserts that most of the issues that were raised by the assistants had been raised earlier in 2021 and found to have had no basis. They were merely intended to tarnish her good reputation. As a result, the complaints had long been closed.
12. It is the Claimant's case that despite her responses to the alleged fabrications against her, the Respondent's Investigation Panel did not take her version of events into account. Instead, the team relied on evidence from witnesses it had allegedly intimidated to find fault with her. She contends that the investigation team was on a mission to fix her.
13. The Claimant avers that on 29th October 2022, she asked for a copy of the investigation report but was not supplied with one. In addition, she asserts that the Respondent allegedly declined to share with her the minutes of the online investigation meeting.
14. The Claimant contends that she was instead directed to resume duty on 15th November 2022 before the underlying issues had been resolved. Feeling dissatisfied with the turn of events, she appealed the decision to resume duty.
15. She contends that before the Respondent had supplied her with all the information and documents relating to the investigation, it purported to set down her appeal for hearing on 18th November 2022. It was at this stage that she allegedly realized that the Respondent was hell bent on not addressing the toxic work environment. As a result, she opted to resign from employment. Consequently, she now pleads constructive dismissal.



Respondent's Case

16. On its part, the Respondent contends that the Claimant suffers from poor interpersonal skills that fueled an unhealthy work environment at the work place. The Respondent contends that on 17th October 2022, two of the Claimant's assistants raised grievances about the manner in which the Claimant was handling them. This prompted it to issue the Claimant with a notice to show cause dated 18th October 2022 asking her to respond to the accusations.
17. It is the Respondent's case that when the Claimant denied the accusations in her response to the notice to show cause, it became necessary to conduct an independent inquiry into the matter. Consequently, around 24th October 2022, it (the Respondent) constituted an independent Investigation Panel to execute this task.
18. The Respondent avers that once the team was set up, the Claimant was suspended from duty to enable the process. At the same time, she was asked not to conduct the two complainants or indeed other officers of the Respondent except as authorized.
19. The Respondent avers that the Claimant was allowed a chance to present her version of events to the Investigation Panel on 28th October 2022. She was also allowed to call her witnesses.
20. The Respondent avers that the aforesaid investigation was not a disciplinary hearing. Rather, it was an information gathering process. As such, the complaint by the Claimant regarding the need to cross examine witnesses is misplaced.
21. The Respondent contends that after the investigation, the Claimant was issued with a letter requiring her to resume duty on 15th November 2022 with recommendations on areas for improvement. However, she appealed the decision.
22. The Respondent avers that it agreed to the proposed appeal and set it down for hearing on 18th November 2022. However, the Claimant declined to attend the appeal claiming that she had not been supplied with the requisite documents to wit the investigation report and minutes of the Investigation Panel's meetings.
23. The Respondent avers that it then forwarded to the Claimant the documents requested for and asked her to indicate when it will be appropriate for her to have the appeal heard. As it awaited this confirmation, the Claimant tendered her resignation which was accepted.
24. The Respondent denies that the resignation was involuntary as asserted by the Claimant. It (the Respondent) denies that it subjected the Claimant to a hostile work environment.
25. According to the Respondent, the Claimant had never filed any complaint about the work environment. In its (the Respondent's) view, the Claimant gave up her job of her own freewill.
26. The Respondent avers that after the Claimant resigned, she was paid all her terminal dues. She thereafter signed a discharge voucher confirming the payment and closing the matter.

Issues for Determination

27. After evaluating the pleadings and evidence on record, I arrive at the conclusion that the following are the matters that require determination in the cause: -
 - a. Whether the Claimant's employment was terminated through constructive dismissal.



- b. Whether the Claimant is entitled to the reliefs that she seeks through the Memorandum of Claim.

Analysis

28. Constructive dismissal is deemed to occur when an employee is forced to resign from employment because of a hostile work environment that has been created by the employer and which must have persisted for some time. The ensuing resignation is considered as involuntary. Therefore, the employment is considered as having been terminated because of the employer's intolerable conduct.
29. In, *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga* [2015] eKLR the court defined the concept of constructive dismissal as follows: -
- “The key element in the definition of constructive dismissal is that the employee must have been entitled to 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 constitutes a repudiatory breach of the contract of employment- this is the contractual test.”
30. The burden of proof in claims for constructive dismissal is on the employee. Commenting on this, the court in *Susan Waittherero Rukungu v Boniface Kamau & another* [2018] eKLR expressed itself as follows: -
- “Whereas in cases of termination under Section 43 of the *Employment Act*, the employer has a duty to show the termination was fair, in cases of constructive dismissal, the burden of proof shifts to the employee to show that the situation was intolerable and that he had no choice but to leave.”
31. From the definition of constructive dismissal in the *Coca Cola case* (supra), the employee must provide evidence that establishes either or both of the following on a balance of probabilities: -
- a. That the employer has subjected him to conditions that are so unreasonable as to force him into giving up on the engagement.
- b. That the employer has engaged in conduct which in effect constitutes a repudiation of the contract of service between them.
32. From the evidence on record, it appears to me that the Claimant's grievances arose from the events that resulted in her suspension from duty in October 2022. She alleges that her two legal assistants made false accusations against her after she decided to interrogate their non-performance.
33. Following this development, the Claimant alleges that the Respondent instigated an arbitrary disciplinary process against her without affording her the opportunity to cross examine her accusers. She alleges that when the Respondent withheld the results of the investigations from her and demanded that she resumes duty, she sensed a spirited attempt to frustrate her from employment by subjecting her to a hostile work environment since the issues that caused the friction between her and her two assistants had not been addressed.



34. There is no concrete evidence to suggest that the Claimant had been subjected to a difficult work environment before the events of October 2022. As a matter of fact, her pleadings do not suggest that the Respondent had treated her unfairly prior to this date.
35. I do not consider that the Respondent's decision to suspend the Claimant in order to carry out investigations on the allegations that had been made against her by her two assistants was hostile action by the Respondent. Indeed, this is what a reasonable employer would do in order to address alleged infractions against an employee.
36. It is an accepted practice that sometimes, an employer may ask an employee to step aside to facilitate investigations into alleged misconduct against him (the employee). Unless the employee is able to demonstrate that the decision was driven by spite and ill will for him, the court has no business upstaging it. To do otherwise would be to interfere with the employer's prerogative to manage the workplace.
37. The Claimant has not presented any evidence to demonstrate ill will on the part of the Respondent in making the decision to suspend her from duty in order to investigate the accusations against her by the two legal assistants. Apart from asserting that the suspension was ordered before the accusations were verified, the Claimant presents no credible evidence to justify her challenge against the suspension.
38. As I understand it, a suspension is a precursor to the process of verifying the matters that have informed the taking of action against an employee. Therefore, it (suspension) normally issues before the accusations against the employee have been verified. Thus, the Respondent was perfectly within its mandate to suspend the Claimant in order to carry out investigations into the allegations against her.
39. Although it is important to allow an employee the opportunity to cross examine his accusers, this is not a must at the investigation stage unless the internal work rules provide otherwise. In my view, the investigation stage is purely a fact finding stage which will eventually inform the decision whether to invite an employee for a disciplinary hearing. It is at the stage of disciplinary hearing that the employee must be heard.
40. In the instant case, the Claimant did not provide evidence to suggest that the Respondent's Human Resource Manual requires it to allow an employee to cross examine his accusers at the investigation stage. Therefore, I do not agree that the failure by the Respondent to accord her an opportunity to cross examine her accusers vitiated the investigation results.
41. In any event, there is evidence that when the investigation results were issued, the Claimant asked for a copy of the report and it was issued to her. She appealed the decision to report back to work because she wanted to challenge the investigation results and the request was granted. Instead of pursuing the appeal, she opted to resign.
42. The Claimant now asserts that she resigned because she had lost faith in the process. She asserts that the Respondent was hell bent on subjecting her to a hostile work environment.
43. The Claimant must appreciate that she was still in the Respondent's employment at the time that investigations against her were completed. Therefore, when the Respondent lifted her suspension from duty, she was duty bound to resume her work and address the issues that she had whilst on duty.
44. The Respondent's decision to require the Claimant to resume duty before her appeal was heard cannot, of itself, be said to have been intended to subject her to a hostile work environment. Therefore, her decision to resign because she had been asked to resume duty whilst her appeal was pending cannot be termed as involuntary. It was voluntary action by her.



45. In *Samuel Mbugua Kang'ethe v University Council Inoorero University* [2016] eKLR, the court, whilst analyzing two other decisions, had this to say of constructive dismissal: -

“What the two decisions imply is that first, the burden of proof of constructive dismissal rests with the employee and second the conditions must be so intolerable or aggravated that no reasonable person placed in the employee’s position would not consider resigning or repudiating the contract. Circumstances creating the intolerable working conditions must be more than once and consistently remain intolerable or worse. Every work environment presents its own challenges and every employee will invariably be confronted with situations or colleagues that would cause stress. The Court must therefore proceed cautiously against allegations by overly sensitive employees since there is no guarantee that workplace would be free of stress.”

46. Thus, the test whether the conditions that have pushed an employee into resigning were indeed intolerable must be that of a reasonable man on the street. It is not an entirely subjective one. Not every action by the employer that the employee finds undesirable will provide an employee with a justification to resign and plead constructive dismissal. The conduct must be one that would have pushed any other reasonable employee into considering to resign.

47. In the instant case, the reason for the Claimant’s decision did not, with respect to her, provide a sound basis for her to resign and plead constructive dismissal. It does not appear reasonable that an employee who is unhappy about a disciplinary process against her would throw in the towel even before exhausting the internal disciplinary processes and plead constructive dismissal. Consequently, I reject the assertion that the Claimant was constructively dismissed from employment.

48. But even if I was wrong on the foregoing, I would still have declined to award the Claimant compensation for the alleged constructive dismissal from employment. This is because after she resigned from employment, she executed a voucher dated 8th December 2022 in which she indicated that the payments that she had received constituted the “full and final settlement of all my dues including salary and other claims in relation to my employment with the Centre for Rights Education and Awareness.” To my mind, this voucher absolved the Respondent from the obligation of entertaining further claims by the Claimant in respect of her employment including the present one.

49. Vouchers such as the one that the Claimant signed constitute a complete contract between the parties. They bind the parties. They cannot be sidestepped by the court unless there is evidence that they were obtained through fraud, mistake, undue influence or misrepresentation (*Nguna v Hoggers Limited (Employment and Labour Relations* Cause 2457 of 2016) [2023] KEELRC 2688 (KLR) (27 October 2023) (Judgment)). The Claimant has not proffered evidence to suggest any of the foregoing vitiating elements.

Determination

50. The upshot is that I find that the instant claim has no merit.

51. Accordingly, it is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 14TH DAY OF MARCH, 2024

B. O. M. MANANI

JUDGE

In the presence of:



.....for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties 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.

B. O. M. MANANI

JUDGE

