



Kirimi v Origen Group EPZ Limited (Employment and Labour Relations Cause E1046 of 2021) [2024] KEELRC 769 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 769 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E1046 OF 2021**

K OCHARO, J

APRIL 12, 2024

BETWEEN

MUTHURI ISALIAH KIRIMI CLAIMANT

AND

ORIGEN GROUP EPZ LIMITED RESPONDENT

JUDGMENT

Introduction

1. Contending that at all material times he was an employee of the Respondent who was constrained to resign from his employment due to the latter's unilateral decision to reduce his salary by 57.5 %, the Claimant has sued the Respondent herein for the reliefs; he was constructively dismissed from employment; compensation for unfair termination; salary arrears; notice pay; and issuance of a certificate of service.
2. The Respondent resists the Claimant claim through the Response to Claim dated 20th December 2021. In it he denies that the Claimant has a cause of action and entitled to the reliefs sought. The Respondent neither filed a list of documents and documents thereunder nor a witness Statement. It didn't present any witness to testify in support of its defence to the Claimant's claim.

Claimant's case

3. When this matter came up for hearing, the Claimant urged the Court to adopt his witness statement as his evidence in chief and the documents he filed herein as his documentary evidence. Without any objection from the Respondent, this Court did.
4. It is the Claimant's case is that he came into the employment of the Respondent under the contract of employment dated 16th January 2020 as a Field Operations Manager at a gross monthly salary of Kshs. 200,000/-.



5. He states that despite working diligently for the Respondent, on or about the 27th July 2020, the Respondent unilaterally revised his salary downwards to Kshs. 85,000/-. The Respondent instructed that the revised salary was to apply until such time as the company was financially stable. The revision was effected without undertaking consultations with the Claimant.
6. The Claimant further states that the Respondent's decision to slash his salary was communicated via a letter. Further, he was given two options, either sign the letter in acceptance of the revised salary, or resign. When the Claimant protested the Respondent's decision, through email, one Grace Kariuki [one of the company's senior staff] reiterated this position, and even made it a condition that he could receive his salary for July 2020 only when he either signed the letter, or resigned.
7. The Claimant states further that he was forced to resign and this he did vide a letter dated 27th July 2020, as he was, not agreeable to the salary revision, and desperate to receive his salary for July 2020. Through the same letter, he requested to be paid his salary arrears that were outstanding for the previous months. Additionally, he demanded that the Respondent ensures settlement of the statutory payments, PAYE and NHIF in respect of his account.
8. On 4th August 2020, the Respondent wrote to the Claimant informing him that his salary arrears would be paid per the schedule contained in that letter. The Respondent made partial payment of the said salary arrears, failing and or neglecting to fully settle the salary arrears and outstanding terminal benefits. All efforts by the Claimant to besiege the Respondent to pay the Claimant's dues through demand letters and reporting the matter to the Labour office have realized no fruit.
9. Cross examined by the Respondent's Counsel, the Claimant testified that he started working on the 1st February 2020. The written contract was signed by both the Chief Executive Officer and him, on the 16th January 2020, and 22nd January 2020, respectively. The contract of employment embodied a probationary clause. The clause stipulated the probation period, the fact that performance review could be conducted within the period, and the Respondent's right to terminate the contract within the period.
10. He further testified that the probationary period was a six month one. The period was to lapse on the 1st of July 2020. He resigned on the 27th July 2020.
11. He further testified that clause 21 of the contract gave the Respondent the right to vary the terms of the contract.
12. The letter communicating the Respondent's decision to review the salary did set out the reasons for the pay cut. Further, the review happened during the Covid-19 pandemic period. Though the review of salaries also affected other employees, his salary was the most slashed.
13. He could not give a termination notice as he was forced to resign due to the Respondent's action.
14. The Claimant complains that the termination of his Contract of Employment through his forced resignation was unfair, illegal and unlawful.

Claimant's Submissions

15. The Claimant submits that the Respondent's failure to present a witness to testify is fatal to its defence. The statement of response it filed remains just such a statement without any value. To buttress this point, the Claimant relies on the cases of North End Trading Company Limited T/A Kenya Refuse Handlers Limited vs City Council of Nairobi [2019] eKLR; Edward Mariga through Stanley Mobisa



Mariga vs Nathaniel Shulter & Another (1979) eKLR; and CMC Aviation Limited vs Crusair Ltd (No.1) (1987) KLR 103.

16. It is further submitted that Section 10 (5) of the *Employment Act* 2007 commands that any changes to an employee's remuneration must be preceded by consultations with the employee affected. In the instant matter, the Respondent did not consult the Claimant about the changes, but rather issued him with a letter with instructions to sign it in acceptance of the changed term.
17. On the issue of the resignation, the Claimant submits that his resignation was not voluntary, but he was forced to resign as a result of the Respondent's conduct. The Respondent by conduct evinced the intention no longer to be bound by the terms of the contract. As a result, he was constructively dismissed. That his was constructive dismissal, he places reliance on the cases of Coca Cola East & Central Africa Limited vs Maria Kagai Ligaga [2015] eKLR and Leena Apparels (EPZ) Limited vs Nyevu Juma Ndokolani [2018] eKLR.
18. On the reliefs sought, the Claimant submits that the probationary period was for six months. Having started working on 1st February 2020, his resignation on the 27th July 2020 was past the date appointed for the lapse of the probationary period. The period ended on 1st July, 2020.
19. The Respondent in its letter dated 4th August, 2020 acknowledged owing the Claimant Kshs. 79,583.62 as unpaid salary for the month of May 2020. The Claim should be awarded on admission. Further, despite expressly pleading and testifying that he was not paid his salary for the month of April 2020, the Respondent didn't place forth any evidence to challenge or rebut the claim. As a result, the Court should find the salary as owed.
20. Clause 18 of the contract of employment provided for a termination notice of two months or payment in lieu of notice. As the Respondent constructively dismissed the Claimant from employment, and without notice, it should be condemned to pay salary in lieu of notice.
21. The Claimant submits that the circumstances of the matter herein could demand that he awarded a compensatory award of 12 months gross salary. He lost his source of livelihood without any notice or justification. The respondent by its conduct forced him to leave his employment.

Respondent's Submissions

22. Counsel for the Respondent submits that the Claimant confirmed during cross-examination that he began working for the Respondent on 1st February 2020. As such, his 6-month probation period was to lapse on 1st August 2020. As at 27th July 2020 when the Claimant submitted his resignation letter, his probation period had not lapsed. Clause 10 of the Claimant's employment contract which imposed the six months' probationary period, was categorical that during the probation period, either party could terminate the employment contract by giving one week's pay in lieu of such notice. The termination notice period was in line with the provisions of Section 42 of the *Employment Act*.
23. It is further submitted that under Section 47(6) of the Act, employees under probationary contracts are excluded from making complaints relating to summary dismissal or unfair termination. However, the Respondent's Counsel goes ahead to acknowledge that the legal landscape has since changed courtesy of the decision in the case of Monica Munira Kibuchi & 6 Others vs Mount Kenya University and the Attorney General [2021] eKLR.
24. On the changed landscape, Counsel submits that however, the Munira Kibuchi case [supra] is distinguishable from the instant case. In the present case the Claimant herein was provided with the reasons for the variation of his salary but willingly opted to terminate his agreement. As a result, his claim for unlawful termination cannot stand.



25. In addition to the foregoing, the Respondent submits that Clause 21 of the Claimant's employment contract granted the Respondent the right to vary the terms of the contract of employment at any time to cater for changing circumstances. The Company was therefore well within its rights to serve the Claimant with the letter dated 27th July 2020 reviewing his salary from Kshs. 200,000/- to Kshs. 85,000/-. This is particularly so owing to the reason that was given for the downward revision, namely, the drastic effects of the Covid 19 pandemic.
26. The Respondent asserts that it is trite law that it is not the place of courts to re-write contracts or agreements between parties, as they usually contain the intention of both parties.
27. The Respondent submits that the Claimant freely and willingly authored and signed his resignation letter. He cannot find an action on the act therefore. However, should the Court find that he resigned as a result of the alleged conduct of the Respondent, the Court should nonetheless dismiss his case as he has not specifically pleaded constructive dismissal. To support this submission reliance has been placed on the case of Rem Odongo Ogana vs Kenya Sugar Board [2016] eklr.
28. Further, the Respondent argues that the revision of the Claimant's salary as a result of the effects of the Covid 19 pandemic cannot equate to a breach of a significant term of the contract between parties since the Covid 19 pandemic was a situation beyond the control of the Respondent. Consequently, it cannot be said that the circumstances of this matter fits in the description, constructive dismissal. To fortify this point, reliance is placed on the above stated case of Bob Morgan Services Ltd vs Ochieng (Appeal E10 of 2022) [2022] KEELRC 12937 (KLR).
29. On whether the Claimant is entitled to compensation, the Respondent submits that having resigned without notice, under Clause 18 (2) of the Act the Claimant is liable to pay the Respondent two months' salary in lieu of notice. It is submitted that the claim for salary for the month of April 2020 was not contained in evidence or proved and so should also be disallowed.

Issues for Determination

30. I have reviewed the pleadings, oral evidence of the Claimant, documentary evidence, submissions filed by both parties and authorities. The issues for determination are as follows: -
 - a. Whether the Claimant was on a probationary contract at the time of resignation;
 - b. Whether the Claimant was constructively dismissed from employment by the Respondent;
 - c. Whether the Court should grant the prayers sought by the Claimant.

Whether the Claimant was on a probationary contract at the time of resignation

31. It becomes imperative to render myself on this point from the onset as a finding thereon in whichever way [affirmative or negative] shall have an effect on the grant or otherwise of some of the reliefs sought.
32. There is no dispute that through a letter of offer dated 16th January 2020, the Respondent offered to employ, and on 22nd January 2020, the Claimant accepted to be employed, under the terms and conditions were encompassed in the letter, by executing the letter of offer. An employer- employee relationship was thereby birthed. The letter stated in the first paragraph, thus;

“I am pleased to offer you an offer for employment in the position of Field Operations Manager with us at Origen Group EPZ Limited (‘the employer’) on the terms and conditions set out in this letter commencing 1st February 2020.” (Emphasis mine).



Clause 10 of the Contract reads as follows: -

“10. Probation

You will be on probation for six (6) months during which time your performance will be reviewed and feedback given accordingly. The employer retains the discretion to extend such period of probation for a further six (6) months, During the period of probation, either party can terminate this contract by giving the other one-week’s pay in lieu of such notice”.

33. Simple arithmetic will reveal that from the date of commencement of the employment relationship, 1st February 2020, the probation period was to lapse on 1st August 2020. To hold otherwise, as the Claimant wants this Court to do, shall amount to this Court venturing into the business of re-writing a contract for parties, a venture that I am unwilling to undertake. My reluctance finds support in holding by the Privy Council of Belize in the case of Attorney General of Belize et al Vs Belize Telecom Ltd & Another (2009), 1WLR 1980 at page 1993, citing Lord Person in Trollope Colls Ltd Vs Northwest Metropolitan Regional Hospital Board (1973) 1 WLR 601 at 609, where it held as follows:

“The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”

34. In sum, at the time of separation, the Claimant was still serving the contractual probationary period.

Whether the Claimant was constructively dismissed from employment by the Respondent

35. The Respondent’s Counsel submitted that the Claimant’s case should fail outrightly as he did not specifically plead constructive dismissal. I have agonized over this submission. However, I am totally unable to understand what informs the position. Further, a reading of the body of the Claimant’s statement, leaves no doubt that it speaks to constructive dismissal. Further, in the relief’s section of the pleading, and to be specific paragraph [i] thereof, the Claimant seeks for a declaration that his constructive termination was unfair, unprocedural and therefore unlawful.
36. As held in Potter v N.B. Legal Aid [2015] 1 .S.R.C.,the test for constructive dismissal has two branches. First, the Court must identify an express or implied contract term that has been breached and determine whether the breach was sufficiently serious to constitute constructive dismissal. However, an employer’s conduct will also constitute constructive dismissal if it more generally shows that the employer intended not to be bound by the contract. This approach is necessarily retrospective, as it requires consideration of the cumulative effect of the past acts of the employer and determination whether those acts evinced an intention no longer to be bound by the contract.
37. The circumstances of the instant matter are that the first branch of the test is applicable. The test requires this court to first establish whether the Respondent’s unilateral change constituted a breach of contract. The second step of analysis will be for this Court to ask whether, at the time the breach occurred, a reasonable person in the situation of the employee would have held that the term of employment contract was substantively changed.



38. The Court of Appeal Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR summarized the factors for consideration in a constructive dismissal claim 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.”

39. On one of the most important terms of a contract of employment is remuneration. No wonder, the [Employment Act, 2007](#) heavily protects the same. Under section 10[5] of the Act, the employer cannot unilaterally change the employee’s remuneration to his or her detriment, without consulting with and seeking the consent of the affected employee. That the Claimant was to earn a monthly salary of KShs. 200,000 was an express term of the contract, and a fundamental one for that matter.

40. Through its letter dated 27th July 2020, the Respondent reviewed the salary downwards in a manner that the Claimant states was unilateral. I have carefully considered the said letter, I am of a clear view that the same was dictatorial and one that clearly suggests that the Respondent cared not about the requirement under section 10[5] of the Act, the need to consult with and seek consensus before the unilateral change.

41. This very Court, in *Stephen Michuki v East African Safari Air Express Limited & another* [2022] eKLR, stated;

“79. In order for a claim for constructive dismissal to succeed where the Court applies this test, it must be concluded that the employer’s conduct or unilateral change, constitute a breach of the contract of employment, and second if it constitutes such a breach, it must be found to substantially alter an essential term of the contract...”

82. The instant claim is anchored on the fact that the 1st Respondent was in breach of a term[s] of the contract of employment that were between it



and the Claimant. That the breach flowed from an act that was unilateral and substantial. A breach which was repudiatory in nature, evidencing its intention to no longer be bound by fundamental terms of the contract.

83. The Claimant contended that the 1st Respondent did not pay him his salary for a whole six months, commencing the first month of his employment with it till the time he resigned...
84. Remuneration is undoubtedly one of the most important terms of an employment contract. In fact, this Court has held before that the right to remuneration is the most important right of an employee, considering the immense protection that the *Employment Act*, 2007 accords, wages and salaries of employees. Where an employer substantially alters [including by a significant reduction, or change of the manner of payment] of an employee's compensation without their consent such alteration may amount to a fundamental breach of the contract. An employee whose compensation has been altered can successfully claim constructive dismissal.
85. I have no doubt in my mind that under the terms and conditions of the contract dated 1st November 2019, and the provisions of the *Employment Act*, the Claimant's salary was one that was payable at end of every month, without any authority on the part of the 1st Respondent to unilaterally depart from this...
88. In the upshot and applying the contractual test, I come to the conclusion that by deciding not to pay the Claimant his entitled monthly salary as and when it fell due under the terms of the employment contract and the law, by effecting the non-payment of his salary without first consulting him and or communicating to him amounted to a unilateral act, and a breach of the terms of the contract in a substantial manner. There was a repudiatory breach of the contract therefore.
89. The Claimant was constructively dismissed. This places him on the path to entitlement of one or more of those reliefs normally attracted by a wrongful or unfair termination of an employee, recognised by law.”
42. By reason of the foregoing premises, I conclude, first, that there was breach of a contractual term, and second, that the breach was in a substantial manner. The Respondent committed a repudiatory breach of the contract. The Claimant accepted the repudiation by submitting his resignation.
43. The Claimant was very particular in his communication to the Respondent that his resignation was prompted by the unilateral change of his salary. The resignation letter reads in part:
- “I hereby issue a resignation from my current roles of the Field and Operations Manager at Origen Group EPZ Ltd, effective Tuesday the 28th July 2020.
- This has been orchestrated by the drastic review of my emoluments that was brought to my attention today, the 27th July 2020, which I believe does not reflect my worth, and therefore I am not able to agree to.”
44. The resignation was therefore directly caused by the Respondent's conduct.



45. In the upshot, I hereby conclude that the was constructively dismissed from employment by the Respondent.

Whether the Court should grant the prayers sought by the Claimant.

46. Having concluded as I have hereinabove, I now turn to consider whether the Claimant is entitled to those reliefs he has sought in his Statement of Claim.

47. The Claimant seeks inter alia salary arrears for May 2020 and unpaid salary for the month of July 2020. I have carefully considered the Respondent's letter dated 4th August 2020, and note that it admits non-payment of the arrears and the salary. As a result, grant the same on admission.

48. The Claimant contended that the Respondent didn't pay him salary for April 2020, and sought for payment thereof. The Respondent by failing to present any adduce evidence as it did, left the Claimant's claim under this head unchallenged. I hesitate not to find that the Claimant is entitled to the same.

49. On the claim for two months' salary in lieu of notice, I have already found that the Claimant was under a probationary contract which was terminable by seven (7) days' notice under Clause 10 of the Employment Contract and Section 42 (4) of the Act. I therefore decline the prayer only to the extent that it seeks more than what the Claimant is genuinely entitled to. Nevertheless, having found that the Claimant's constructive dismissal was unfair, I am persuaded that notice pay in lieu of notice is deserved. To fail to make the award would be tantamount to unjustly rewarding the Respondents who are wrongdoers. I grant the Claimant 7 days' pay in lieu of notice.

50. Section 49 (1) (c) of the Act bestows on this Court power to grant a compensatory relief in favour of an employee who has successfully assailed his or her employer's decision to terminate his or her employment or summarily dismiss him or her from employment. Exercise of the power is discretionary, influenced by the circumstances of each case, taking into account the factors contained in Section 49 (4).

51. The Claimant prays for 12 months' gross salary as compensation. The Respondent is adamant that the Claimant is not deserving of this compensation as he voluntarily resigned from employment.

52. I have carefully considered the fact that the fact that the Claimant was forced to resign from his employment due to the Respondent's conduct which was not only unlawful but in breach of a fundamental term of the employment contract, the dictatorial conduct of the Respondent as exhibited in the letter dated 27th July 2020, the fact that the Claimant didn't in any proven manner contribute to the termination, the length of service [which diminishes the quantum] and hold that the Claimant is entitled to the compensatory relief and to the extent of two months gross salary.

53. Per Section 51 of the Act, the Claimant is entitled to a Certificate of Service.

54. In the upshot judgement is hereby entered in favour of the Claimant in the following terms: -

- a. A declaration that the Claimant was constructively dismissed from employment by the Respondent, and that the constructive dismissal was unfair and unlawful.
- b. The Respondent shall pay the Claimant the following sums;
 - i. Salary for April 2020 Kshs. 200,000.00
 - ii. Salary arrears for May 2020 Kshs. 79,563.62



- iii. Payment in lieu of notice Kshs. 46,666.66
- iv. Compensation for unfair Termination Kshs. 400,000.00
- c. Interest on (b) above at court rates from the date of this judgment until payment in full.
- d. Costs of this suit shall be in favour of the Claimant against the Respondent.
- e. The Respondent shall Issue the Claimant with Certificate of Service within 30 days of this Judgment.

55. It is so ordered.

READ, DELIVERED AND SIGNED THIS 12TH DAY OF APRIL, 2024.

OCHARO KEBIRA.

JUDGE

In the presence of:

Mrs. Wavinya for Claimant

No appearance for Respondent

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 15th March 2020 and subsequent directions of 21st 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 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.

A signed copy will be availed to each party upon payment of Court fees.

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OCHARO KEBIRA

JUDGE

