



**Bhogatia v Madison Group (Cause 6564 of 2020)
[2024] KEELRC 1587 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1587 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 6564 OF 2020**

SC RUTTO, J

JUNE 21, 2024

BETWEEN

RAVIKUNMAR V. BHOGATIA CLAIMANT

AND

MADISON GROUP RESPONDENT

JUDGMENT

1. The Claimant avers in his Statement of Claim dated 17th December 2020, that vide a contract of service dated 1st September 2009, he was employed by the Respondent as an Agency Manager vide an appointment letter dated 9th October 2019. According to the Claimant, he dutifully and diligently discharged his duties and obligations. That he was forced to terminate his employment due to a hostile and discriminatory work environment. It is on this account that he prays for the following reliefs against the Respondent:
 - i. Unpaid salary for the months of December 2019 and January 2020 of Kshs 300,000/=.
 - ii. Interest on (i) above at commercial rates from the due date until payment in full.
 - iii. Agency and unit overrides for the months of December 2019 and January 2020.
 - iv. NHIF arrears for the months of December 2019 and January 2020.
 - v. Damages for discriminatory treatment at the workplace.
 - vi. A Certificate of Service.
 - vii. Damages for constructive dismissal.
 - viii. Costs of the suit.
 - ix. Interest on (vi) above.



- x. Any other relief that this Honourable Court may deem fit.
2. The Respondent countered the Memorandum of Claim through a Statement of Response dated 1st February 2023, in which it avers that the Claimant was employed by Madison Life Assurance Kenya Limited, its subsidiary. The Respondent further avers without prejudice that the Claimant absconded duty on diverse dates, neglected his duties as Agency Manager, and repeatedly displayed insubordination and wilful failure to obey orders of his superiors. According to the Respondent, the Claimant resigned from his position as Agency Manager *vide* a resignation letter dated 11th January 2020. Consequently, the Respondent has asked the Court to dismiss the suit with costs.
3. During the hearing which proceeded on 15th February 2024, both parties called oral evidence.

Claimant's Case

4. The Claimant testified in support of his case and at the outset, sought to adopt his witness statement to constitute his evidence in chief. He further produced the list and bundle of documents filed on his behalf as exhibits before Court.
5. The Claimant stated in his evidence, that the working environment at the Respondent Company was toxic and hostile and not conducive for him to work ardently. He contended that he was severally asked by his superior to tender his resignation and seek employment elsewhere as he felt that he did not fit into their work environment.
6. He further averred that as the only employee of Asian origin in his department, there was a constant open bias against him in the workplace from his direct superiors and this naturally resulted in him being very uncomfortable and fearful at work. Consequently, *vide* a letter dated 11th January 2020, he was forced to issue a resignation notice. He requested that his terminal dues be paid expeditiously.
7. The Claimant further stated that the Respondent *vide* a letter dated 15th January 2020 acknowledged receipt of his resignation notice and the terminal dues owing and payable to him.
8. However, since his resignation, the Respondent has failed and or neglected to pay his terminal dues as owed. He instructed his advocates on record, to demand his terminal dues from the Respondent.

Respondent's Case

9. The Respondent called oral evidence through Ms. Lucy Mwangi who testified as RW1. She identified herself as an Agency Service Manager at the Respondent company and equally, she proceeded to adopt her witness statement to constitute her evidence in chief. She proceeded to produce the list and bundle of documents filed on behalf of the Respondent as exhibits before court.
10. It was RW1's evidence that the Claimant was put on probation for a term of six months during which period, his monthly subsidy of Kshs 150,000/= and Agency and unit overrides would only be earned and become payable upon the attainment of agreed targets.
11. That the Respondent customarily pays the monthly subsidy and agency and unit overrides 30 days after they fall due as this allows for the assessment of the targets achieved and subsequently the computation of wages earned and payable to each employee.
12. RW1 further stated that at the end of October 2019, the Claimant was paid a gross pay of Kshs 204,800/= calculated on the basis of his performance in October 2019. That these wages although payable at the end of November 2019, were paid at the end of October 2019 in line with the Respondent's policy.



13. That in the month of November 2019, the Claimant was paid a gross salary of Kshs 217,601/= computed on the basis of his October performance once again in line with the Respondent's Wages and Remuneration Policy.
14. RW1 further stated that the Claimant did not earn any monthly subsidy or agency and unit overrides in the months of November 2019, December 2019 and January 2020 as he did not attain the targets set out in his appointment letter.
15. It was her further evidence that the Claimant was reported as having absconded duty on diverse dates, failed to perform his duties, or performed them negligently.
16. RW1 further stated that the Claimant voluntarily resigned on 11th January 2020 and the said resignation was acknowledged and accepted vide a letter dated 15th January 2020.
17. The Claimant was invited to clear with the Respondent but declined to avail himself and to date, has not cleared.
18. It was RW1's further evidence that computation of the Claimant's final dues revealed that there were no dues owing to him as he had not earned any wages in the months of November 2019, December 2019 and January 2020. That further, the Claimant was issued with a Certificate of Service on 5th February 2021.

Submissions

19. The Claimant submitted that the Respondent never at any one time in all his (Claimant) email correspondences, stated that he was not entitled to the commissions claimed. It was his position that the Respondent had not disowned any of the correspondences or provided any evidence against the contents.
20. In further submission, the Claimant stated that his employment contract with the Respondent is valid and unambiguous in its wording. Referencing the case of *Five Forty Aviation Limited v Erwan Lanoe* (2019) eKLR, he urged the Court to enforce the employment contract as it is binding.
21. He further urged the Court to find that he was entitled to commissions during his employment.
22. The Respondent did not file written submissions as the same were missing from the court's physical record and online portal at the time of writing this Judgment. This is despite the Respondent being given a further extension of 14 days on 28th February 2024, to comply.

Analysis and Determination

23. Flowing from the pleadings, the evidence on record as well as the Claimant's submissions, I find the issues falling for the Court's determination as being;
 - i. Whether the Claimant was constructively dismissed by the Respondent;
 - ii. Whether the Claimant was subjected to discrimination by the Respondent;
 - iii. Is the Claimant entitled to the reliefs sought?

Constructive dismissal?

24. The Claimant has averred that the working environment at the Respondent company was toxic and not conducive hence he was forced to resign.



25. On the other hand, the Respondent has refuted this position and contends that the Claimant's resignation was voluntary.
26. In light of the rival positions taken by both parties, the key question that begs for an answer is whether the Claimant was constructively dismissed.
27. The *Black's Law Dictionary* (10th Edition) defines the term constructive dismissal to mean:

“An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”

28. In as much as the *Employment Act* has not defined the term constructive dismissal, the concept has received attention in this Court and the Court of Appeal. Case in point is the leading case of *Coca-Cola East & Central Africa Limited v Maria Kagai Lugaga* [2015] eKLR in which the Court of Appeal cited with approval the case of *Western Excavating (ECC) Ltd. -v- Sharp* [1978] ICR 222 or [1978] QB 761, in which Lord Denning MR expressed himself 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.

He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once (emphasis ours). (See also Nottingham County Council -v- Meikle (2005) ICR 1).”

29. The learned Judges of Appeal proceeded to formulate guiding principles in respect of claims of constructive dismissal key among them being that, there must be a causal link between the employer's conduct and the reason for the employee terminating the contract i.e causation must be proved.
30. Turning to the instant case, the record bears that the Claimant tendered his resignation from the Respondent's employment vide a letter dated 11th January 2020, whose contents I will reproduce hereunder for context purposes: -

“RE: RESIGNATION NOTICE W.E.F 11TH JANUARY 2020

kindly accept this as my resignation letter from Madison Group Ordinary Life from 13th January 2020.

I am grateful for all the support during my time here and appreciate all the valuable experience I have gained in the organization.

I have to attend an emergency family related issues and would appreciate that my dues are paid in full as soon as possible. Thank you.

Best regards

Ravinkumar V. Bhogatia”



31. The Claimant's resignation was accepted by the Respondent's Head of Ordinary Life, Francis Miano through a letter dated 15th January 2020.
32. Revisiting the principles formulated in the case of *Coca-Cola East & Central Africa Limited v Maria Kagai Lugaga* [supra] and bearing in mind the definition of the term constructive dismissal, it is clear that the Claimant was duty bound to demonstrate that there was a fundamental breach of the employment contract in order to sustain a claim for constructive dismissal.
33. Put another way, it was incumbent upon the Claimant to prove that the actions of the Respondent resulted in his resignation and that he resigned in response to the breach.
34. More importantly, it is instructive to note that the Claimant was required to establish a causal link between the Respondent's conduct and the reason for his resignation.
35. In this case, it is notable that the Claimant did not indicate that he was resigning on account of the alleged toxic environment at the Respondent company. He only indicated that he had an emergency family related issue to attend to.
36. Needless to say, the Claimant did not prove that there was a causal link between the alleged toxic environment at the Respondent company and his resignation. Indeed, the Claimant failed to draw a nexus between his resignation and the work environment at the Respondent company. Quite the contrary, the Claimant informed the Respondent that he was grateful for all the support during his time at the company and was appreciative of the valuable experience he had gained therefrom.
37. All in all, it is this Court's finding that the Claimant has not demonstrated to the requisite standard that his resignation from the Respondent's employment was involuntary and amounted to constructive dismissal.

Discrimination?

38. The Claimant has further averred that since he was the only employee of Asian origin in his department, there was open bias against him from his direct superiors and this resulted in him being very uncomfortable and fearful at work.
39. In terms of the *Black's Law Dictionary*, (10th Edition), "discrimination" is defined to mean: "Differential treatment; a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."
40. In the case of *Barclays Bank of Kenya LTD & another vs Gladys Muthoni & 20 Others* [2018] eKLR, the Court of Appeal held that arbitrary discrimination in the workplace is outlawed at the highest level of the *Constitution* and has always been. Therefore, a claim of discrimination is a serious claim that must be supported by evidence.
41. In this case, the Claimant's assertion that he was discriminated against, was not backed by evidence. I say so because he did not demonstrate even to a remote extent, how he was treated differently and more favourably compared to his counterparts in the department, on grounds of race.
42. Granted, by dint of Section 5(7) of the *Act*, the employer bears the burden of proving the fact that the discrimination did not take place as alleged and that the discriminatory act is not based on any of the grounds specified within that Section. Be that as it may, the Claimant was first required to establish a prima facie case for discrimination in order for the burden to shift.
43. In the circumstances, it is my finding that the claim for discrimination has not been substantiated hence it collapses.



Reliefs?

44. The Claimant has sought to be paid salary for the months of December 2019 and January 2020 amounting to the sum of Kshs 300,000.00. In its defense, the Respondent avers that the Claimant did not earn any monthly subsidy or agency and unit overrides in the months of November 2019, December 2019 and January 2020 as he did not attain targets set out in his appointment letter.
45. This being the case, I have to revisit the Claimant's letter of appointment which states as follows with regards to remuneration;
- “The remuneration will be a monthly subsidy of Kshs 150,000/= plus agency and unit overrides subject to attainment of targets set out as per the attached (Appendix 1).”
46. My reading of the foregoing paragraph does not reveal whether payment of the subsidy, the agency, and unit overrides were all subject to the attainment of the Claimant's target or whether the subsidy was constant and that it was only the agency and unit overrides that were subject to attainment of the targets. Indeed, it is no wonder the parties have taken different positions over the issue.
47. In light of the ambiguity, I have to resort to the rules of interpretation of contracts.
48. Under the contra proferentem rule, an ambiguity in a contract is to be construed unfavourably to the drafter [*Black's Law Dictionary*, 10th ed., p. 401].
49. Section 9(2) of the *Employment Act* imposes an obligation on the employer to draw up a contract of service stating the particulars of employment. It thus follows that the contract of employment herein was drafted by the Respondent in its capacity as the employer.
50. Applying the rule of contra proferentem herein, it goes without saying that any ambiguity in the contracts of employment should be construed against the Respondent.
51. In this regard, I will follow the determination of the Court (Radido J) in the case of *Mwangi Ngumo v Kenya Institute of Management* [2012] eKLR where the learned Judge reckoned as follows: -
- “...I do agree with the Claimant that any ambiguities in the contract should be construed against the party who drew the contract and that party is the respondent. This is what has been construed as the contra proferentem rule and which was applied in the case of *Horne Coupar v Velletta & Co.* 2010 BCSC 483 relied on by the Claimant.”
52. Accordingly, I am inclined to find that the Claimant is entitled to the sum of Kshs 150,000/= being subsidy and that it was only the agency and unit overrides that were payable upon attainment of the set targets. As such, the Claimant is entitled to the full amount of the subsidy with respect to the month of December 2019 and for 11 days in the month of January 2020.
53. The claim for agency and unit overrides for the months of December 2019 and January 2020 is declined for two major reasons. First, the Claimant did not indicate the specific sum he is seeking to be paid and second, he did not prove that he met his targets as expected of him to qualify for payment.
54. As the Court has found that the Claimant has failed to prove his allegation of constructive dismissal and discrimination, the claim for damages to that extent fails.



Orders

55. In the end, the claim succeeds only to the extent of unpaid subsidy in respect of December 2019 and January 2020. In this regard, the Claimant is awarded the sum of Kshs 205,000.00. Interest shall apply at court rates from the date of filing the suit until payment in full.

56. The Respondent shall bear the costs of the claim.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JUNE 2024.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Ms. Mugure

For the Respondent Mr. Waweru

Court Assistant Millicent Kibet

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 had 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.

STELLA RUTTO

JUDGE

