



**Mbaya v Murban Movers Limited (Cause E334 of 2023)
[2024] KEELRC 1350 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1350 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E334 OF 2023
NZIOKI WA MAKAU, J
JUNE 6, 2024**

BETWEEN

CHRISTINE GACHERI MBAYA CLAIMANT

AND

MURBAN MOVERS LIMITED RESPONDENT

JUDGMENT

1. In the Memorandum of Claim dated 24th April 2023, the Claimant raises against the Respondent issues of constructive dismissal and unfair labour practice. She averred that she was at all times an employee of the Respondent pursuant to an Employment Contract dated 10th September 2020. That the Respondent employed her as a Human Resource and Administration Manager on a one-year renewable contract from 10th September 2020, which was renewed annually until 8th January 2022 and she was to be paid a gross salary of Kshs. 150,000/- per month subject to applicable legal statutory deductions.
2. The Claimant's case is that she tendered her resignation letter on 8th December 2021 as a result of harsh working conditions and environment, occasioned by the Respondent's failure to resolve employee issues and generating hostility by the other employees towards her. She averred that by December 2021, the Respondent had not remitted salaries for September, October and November 2021, and failed to engage the employees on the same and that it opted to have her contain the situation with empty promises. That consequently, most employees were requested to return the company's trucks to the office and go home without any communication from the Respondent. According to the Claimant, the situation hampered the smooth operation of her job because she was unable to resolve the employees' issues including unlawful deduction of employees' salaries. She further averred that she was necessitated to pay for the Logistics Officer's medical bill with an understanding that the Company would reimburse her following the withdrawal of medical covers for employees. That she held a meeting with the Respondent in December 2021 whereat she Claimant highlighted various



issues obstructing the smooth discharge of her duties in the office, but which issues were never resolved. In further particularising the harsh working environment, the Claimant noted that there was forfeiture of annual leave days, unlawful reinstatement of staff, downward review of salaries, and deduction of airtime allowance to the HR Office amongst other issues.

3. In addition, the Claimant averred that following her resignation, the Respondent decided to act by writing to the company lawyers who also advised that they either send staff on leave or declare positions redundant. That subsequently on 19th December 2021, some positions were declared redundant following a consultation meeting with staff and a one-month notice issued to the affected staff, with a promise that the Respondent was offloading some assets to settle the salary arrears and pay the redundancy benefits. She averred that before the lapse of the redundancy notice, the Respondent sent instructions for her to issue contracts to specific staff with reduced salary without disclosing to her reasons for the same. That she nevertheless discussed with the employees who agreed to take the pay cut and be compensated later. It was the Claimant's case that even after offloading the assets, the Respondent never paid staff salaries and final dues as promised, until April 2022, which led to her being frustrated. She posited that the employment consequently became untenable by the creation of a hostile work environment that made it unbearable for her to perform her duties wilfully and dutifully.
4. The Claimant averred that the Respondent rejected her Resignation Letter of 8th December 2021 and subsequently sent her an Offer Letter dated 8th January 2022 via email, stipulating basic terms and conditions of employment together with time and benefit offers. She averred that she settled on a gross of Kshs. 110,000/- per month, working three (3) days a week with a request for the contract commencement date to be 20th January 2022. The Respondent rebutted with a Counter Offer valid until 11th January 2022 but extended until 14th January 2022 to allow the Claimant make a decision. On 14th January 2022, she sent an email accepting the terms of the offer letter with the option of being paid gross salary of Kshs. 128,000/-, medical, airtime and 24 days leave until September 2022 and then move to the option of receiving a gross of Kshs. 121,000/-, no medical, airtime and 21 days of leave. According to the Claimant, the options were to allow her to go back to school and pursue a diploma in legal studies and that the renegotiated contract was subject to provision of a medical cover for herself and her dependants. The Claimant noted that the Respondent however withdrew the said benefit of a medical cover without any communication. It was the Claimant's averment that she had shared her work frustrations with the Respondent in emails sent on 28th February 2022 and 27th June 2022.
5. Further, the Claimant averred that she was not duly paid all her rightful dues for the month of July gross salary Kshs. 128,000/-, final dues for days worked in August and the leave balance of Kshs. 23,466.67. That the Respondent had also failed to reimburse her 2022 HR membership fee which she paid from her pocket. She seeks reimbursement of costs of repairing her car that got damaged at the company premises during a scuffle with auctioneers. The Claimant further prays for judgment against the Respondent for a declaration that termination of her employment was wrongful and unfair hence amounted to constructive dismissal and compensation for constructive dismissal for five (5) months' salary (remainder of her contract term). Moreover, she asks for damages for her salary being withheld exposing her to financial embarrassment, damages for the unlawful withholding of her medical benefits, general damages for pain and suffering, cost of this suit and interest thereupon, and any other relief that this Court may deem just and fit to grant.

Respondent's Case

6. The Respondent averred in its Response to Memorandum of Claim dated 19th May 2023 that it employed the Claimant vide an offer of employment dated 11th August 2020, for a one-year term contract and on an initial gross salary of Kshs. 150,000/- per month. It asserted that the Claimant



gross salary at the time of expiry of her contract of employment was Kshs. 128,000/- per month. The Respondent's case is that it is in the business of transporting petroleum products to various countries within East Africa. That during the 2020 period, different countries placed various Covid-19 Pandemic restrictions that controlled the movement of the Respondent's products and equally impacted its cash flow source and payment from customers. That consequently, payment of salaries to all the Respondent's was affected and the same was communicated to all the staff including the Claimant, who in fact made the said communication to all the staff. It argued that the Claimant was therefore not the only employee affected by the late salary delays as the impacts of the Pandemic were felt by everyone in the Company including the senior management.

7. The Respondent averred that it had formulated a viable plan to alleviate the issues it was facing and denied that it sold off assets. It asserted that following its financial difficulties, the employees agreed on a payment plan and signed off to effect that no employee would be compensated and the pay cut was mutually agreed on. That even with the financial constraints, it made sure that it paid all the staff including the Claimant, with the only salary not paid to the Claimant being the one for July 2022 because she had resigned before the same was paid to her. It further averred that the Claimant has failed to specify how the Respondent created a hostile work environment for her and contended that it re-offered a contract of employment to the Claimant on mutually agreed terms following her resignation and she therefore cannot claim that the work environment was hostile. It contended that the Claimant's resignation was an attempt to blackmail the Respondent into offering her new terms of her employment contract. The Respondent also denied that it failed to arrive at a resolution after the Claimant made them aware of her frustrations and prays that the instant suit be struck out and/or dismissed with costs.
8. In the Witness Statement made by the Respondent's witness Mr. Vishal Somaia, it was asserted that the Managing Director communicated to the Claimant what the Company was doing to solve the situations and equally made several email communications to her, especially the one dated 28th June 2022, indicating the then financial position of the Company. He explained that the said email clearly indicated that once the payments were received from the Respondent's debtors, the employee's arrears would be paid and that he equally assured the Claimant that the welfare of all the employees was his number one priority. Mr. Somaia further asserted that after the Claimant's initial resignation and subsequent employment offer of 8th January 2022, the Claimant wrote an email dated 27th June 2022 indicating that she wished to amicably resign from the Respondent's employ due to the delay in payment of salary. That despite responding to all her issues and assuring her that the Respondent would make payment, the Claimant proceeded to tender her resignation on 4th July 2022 with 4th August 2022 as her last day. He maintained that the Claimant was paid all her pending salary apart from July 2022 which she refused to receive and concluded that the Claimant came back to work for the Respondent under new terms because the Respondent has always been a good employer.
9. The Claimant's rejoinder in her Reply dated 19th July 2023 was that the initial basic terms and conditions of employment provided for the effective date of her employment to be 10th September 2020. She contended that the Respondent faced the said financial constraints in 2021 and not in 2020 as alleged and contended that the Respondent withheld information from her office that was paramount to better decision-making and amicable resolution of employees' issues. That there are emails and WhatsApp correspondences specifically showing how the Respondent created a hostile working environment for her and that when she followed up on her July 2022 salary, the Respondent rudely informed her that they would release the money when they felt like and that she was welcome to take them to the authorities.



Evidence

10. The Claimant asserted under cross-examination that she did not provide reasons for her resignation and maintained that she could not confirm whether the Respondent Company had financial constraints. She admitted that she discussions with the Respondent on solutions and way forward as regards the issue of salary delays and further agreed that there was no requirement for the employer to pay for her practicing certificate. She also admitted having understood the circumstances under which her salary was reduced under the new offer of employment and confirmed that she again resigned on 4th July 2022 but not willingly. On the other hand, the Respondent's witness, Mr. Vishal Somaia stated under cross-examination that they had multiple discussions with the Claimant on the best course for the organization. He stated that the auctioneers were responsible for the damage occasioned to the Claimant's vehicle as they did not have a right to be in the Respondent's premises.

Claimant's Submissions

11. The Claimant submitted that the issues for determination are whether she was constructively dismissed, whether the termination of her employment was wrongful and whether she is entitled to the reliefs sought. As regards constructive dismissal, the Claimant cited the Court of Appeal case of *Coca Cola East and Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR in which the Court of Appeal outlined the principles relevant in determining constructive dismissal 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. The Claimant submitted that her in her case, the Respondent constructively dismissed her after hers and other employees' salary delayed, which was a breach of a fundamental term of her Contract. That in the case of *Micah Kangogo Chelanga v Kenya Farmers Association Ltd* [2022] eKLR, the



claimant resigned because he was not paid his salary and the Court found that his case amounted to constructive dismissal. The Claimant argued that repudiatory breach is also seen in her case by how the Respondent unilaterally changed the terms of employment by not retracting her medical benefits, failed to pay for her practising certificate and was reluctant to communicate to her how to solve the issues faced by the employees. Regarding the issue of her practising certificate fee, the Claimant relied on the case of [Max Masoud Roshankar & another v Sky Aero Limited](#) [2015] eKLR in which Mbaru J. found the claimant's resignation to have been necessitated by the employer who had failed to procure a work permit for him, which failure amounted to constructive dismissal. The Claimant in the instant case noted that section 7 of The [Human Resource Management Professional \(Registration and Training\) Regulation](#) stipulates that any person holding a Human Resource office must have a practicing certificate. That the Respondent therefore had the duty to pay for her membership fee, which it paid in 2021 but failed to do so in 2022 and that the said conduct was a significant breach of the contract of employment. The Claimant further submitted that she had thus shown the causal link between the Respondent's conduct and the reasons for her resignation being as a result of the harsh working conditions and environment at the Respondent Company. She relied on the case of [Simon Papa Imo v Athi River Shalom Community Hospital](#) [2021] eKLR, in which 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 that 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 and termination of his contract means he is constructively dismissed.

13. It was the Claimant's submission that the termination of her employment was unfair and unlawful because the Respondent created a hostile or unbearable work environment, forcing her to resign. That section 45(1) of the [Employment Act](#), 2007 that a termination of employment by an employer is unfair if the employer fails to prove that the reasons for termination was valid and fair. That in the case of [Nathan Ogada Atiagaga v David Engineering Limited](#) [2015] eKLR, the Court found that since the employee's resignation was not voluntary, it was a termination in effect. As regards the reliefs sought, the Claimant cited the case of [D.K Njagi Marete v Teachers Service Commission](#) [2013] eKLR, in which the Court stated that employment remedies must be proportionate to the economic injuries suffered by the employees and are not aimed at facilitating the unjust enrichment of aggrieved employees. The Claimant therefore urged this Court to grant the prayers sought in the Memorandum of Claim.

Respondent's Submissions

14. The Respondent submitted that the Claimant was not constructively dismissed as alleged. It submitted that the facts and circumstances surrounding the Claimant's case do not fall within the definition of constructive dismissal as set out in the [Black's Law Dictionary \(Tenth Edition\)](#), the case of [Nathan Ogada Atiagaga v David Engineering Limited](#) [2015] eKLR and the Court of Appeal's decision in [Coca Cola East and Central Africa Limited v Maria Kagai Ligaga](#) [2015] eKLR. The Respondent invited this Court to note that the Claimant resigned from her employment twice and in both instances, she did not cite the reasons for her resignation and in fact thanked the Respondent for the opportunity to work with it and wished it all the best. It argued that the Claimant evidently resigned voluntarily and the actions of the Respondent are not in any way connected to her decision to resign. That the Court should also find that the Claimant had not proved any link between the Respondent's financial crisis period, impact or behaviour which became so intolerable or made life so difficult that the she had no choice but to resign. It was the Respondent's submission that in finding that the Claimant was not constructively dismissed as alleged, this Court ought to be guided by the decisions of the Court in the cases of [Herbert Wafula Waswa v Kenya Wildlife Services](#) [2020] eKLR, [Muikamba v Radio Africa Group Limited](#) (Cause E245 of 2021) [2023] KEELRC 1251 and [Thaiya v Twiga Foods Limited](#)



(Cause 15 of 2020) [2023] KEELRC 1960. The Respondent submitted that sections 107 and 108 of the *Evidence Act*, Cap 80 Laws of Kenya provide that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist and that the burden of proof lies with that person who would fail if no evidence at all were given on either side. It relied on the case of *Achieng' v Africa Diatomite Industries Limited & another* (ELRC Cause 13 of 2020) [2023] KEELRC in which Nderitu J. held that the claimant was neither dismissed nor terminated but rather willingly and voluntarily resigned after considering the claimant's admission that he did not cite the reason for his resignation in the letter of resignation. The Respondent submitted that in view of the foregoing, this Court should find that the Claimant was not dismissed but resigned voluntarily to evade the crisis at the Respondent Company. That this Court ought to be guided by the decision in *Sophie Muthoni Njagi v Rift Valley Railways (Kenya) Limited* [2020] eKLR in which the Court having found that the claimant voluntarily resigned from her employment and was not wrongfully terminated, declared that no reliefs sought would accrue to her.

15. Further, as regards the claim for compensation for the HR Practicing Certificate, the Respondent submitted that a reading of section 29 of the *Human Resource Management Professionals Act*, No. 52 of 2012 does not obligate an employer to finance an employee's practising certificate and that the prayer for the same should fail. It further submitted that the Claimant has not demonstrated and/or proved to this Court the pain and suffering suffered in the circumstances and simply seeks to unjustly enrich herself and that her claim for general damages must thus fail. It was the Respondent's submission that the Court should find that the Claimant has not proved her case on a balance of probabilities and is therefore not entitled to the reliefs she is seeking.
16. The Claimant resigned from the employ of the Respondent and asserts constructive dismissal. In the case of *Coca Cola East and Central Africa Limited v Maria Kagai Ligaga* (*supra*) wherein the Court of Appeal outlined the principles relevant in determining constructive dismissal as follows:
 - a. ...
 - 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. ...

17. The *Black's Law Dictionary (Tenth Edition)* defines constructive dismissal under the heading 'constructive discharge' thus:

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 – Also termed constructive dismissal.

18. In her emails to the Respondent around the time of the resignation, there is evidence of distress. In one such email on 27th June 2022, the Claimant seeks payment of salary which was overdue – being the fourth month without pay. She indicated she was affected both financially and emotionally. She did not feel the management was committed to the alleviation of this situation. The Claimant indicated the Respondent was intentionally withholding her benefits in order to frustrate her out of employment. In the case of *Micah Kangogo Chelanga v Kenya Farmers Association Ltd (supra)* the resignation of the employee whose reason was non-payment of salary was found to amount to constructive dismissal accords with this case. In the Court's considered opinion this is a classic case of constructive dismissal. The definition in *Black's Law Dictionary (supra)* makes it amply clear the resignation of the Claimant is right there in the definition. As such I find and hold that despite her thanking the employer, which is courteous on her part, did not detract from the frustration she had faced as employee forcing her to resign. The Claimant did not avail medical records to show emotional distress to the required standard and therefore will not recover for the emotional distress she suffered. In any event, when considering compensation under section 49 of the *Employment Act*, a court is bound to take into account the conduct of parties. In my view, compensation of 10 months salary under the section will suffice as recompense even though it is clear money can never equate peace of mind and the removal of distress from a person's life. As held in prior cases it is hoped the Claimant has mitigated her losses and made steps towards meeting the demands of livelihood. Having found in favour of the Claimant on a number of issues, the Court will delineate them in the final part of the judgment.

19. The Claimant will therefore be entitled to the following reliefs:
- a. Kshs. 128,000/- being withheld salary July 2022.
 - b. Unpaid salary for days worked in August 2022 – Kshs. 23,466.70
 - c. Compensation for unlawful dismissal 10 months salary – Kshs. 1,280,000/-.
 - d. Costs of the suit.
 - e. Interest on the sums in (a) (b) and (c) above at court rates from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JUNE 2024

NZIOKI WA MAKAU

JUDGE

