



**Otieno v Rhs Freight Services (K) Ltd (Cause 490 of 2019)  
[2024] KEELRC 2138 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2138 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 490 OF 2019**

**L NDOLO, J  
JULY 31, 2024**

**BETWEEN**

**BEATRICE AKINYI OTIENO ..... CLAIMANT**

**AND**

**RHS FREIGHT SERVICES (K)LTD ..... RESPONDENT**

**JUDGMENT**

1. On 21<sup>st</sup> March 2019, the Claimant wrote the following letter to the Respondent:

“Dear Sir,

Ref: Resignation

I hereby submit my resignation as Assistant Manager, Customer Service.

Am submitting my resignation from the date of this letter and I am prepared to serve my one month notice as provided by the company policy.

I have been forced to issue this resignation letter due to the frustrations at work and this is against my will. I would have preferred to continue working for this great company had the current intolerable conditions not been created, given my potential and hard work since I had worked for the company and left then I was recalled back after a year.

I was terminated unlawfully when I was on medical leave. I pursued with my advocate and was reinstated to report back to work. However there were back and forth communications as the company was not willing to take me back under the contract my termination was done (sic).

When I reported to work, the environment was not conducive to perform my duties and I felt that work was being kept away from me, hence preventing me from performing my duties as per my job description. I was also put to sit on the walk way with no work station



when I reported back to work and I had to raise the issue as I was just from a major operation and could not stretch my legs yet my work station was vacant.

I have had issues with my computer since I resumed and I have had to keep on moving to my colleagues' computers to ensure that my work is done even after having raised this issue several times.

On the other hand when I reported back to work, my email address was disabled upon reporting and I have been forced to share a general email address with a new employee who is my junior.

It is clear that the company is no longer interested in honouring the terms of my employment contract and that the current pattern of frustrating and demoralizing my service to the company will not change.

The circumstances created are unjust and averse to my constitutional right to fair labour practices. Therefore I would like the company to process my dues as follows:

-Severance pay

-Compensation for breach of contract and unfair termination of employment (equivalent to 12 months' salary)

-Compensation for traumatic experience and emotional distress for me and my family

-Certificate of Service

Any other dues accruing to me by virtue of the employment contract

Yours faithfully,

(signed)

Beatrice Otieno”

2. This letter forms the basis of the dispute before the Court. The Claimant states her case in a Memorandum of Claim dated 8<sup>th</sup> July 2019 and the Respondent states its case in a Memorandum of Response dated 16<sup>th</sup> September 2019.
3. At the trial, the Claimant testified on her own behalf and the Respondent called its Country Director, Rajesh Narayana Shetty. Both parties also filed written submissions.

### **The Claimant's Case**

4. The Claimant states that she was employed by the Respondent on 15<sup>th</sup> October 2015. She claims to have been called by a customer on 21<sup>st</sup> January 2019 while on sick leave, inquiring about information circulating on social media that she was no longer an employee of the Respondent.
5. Upon the Claimant taking issue with the termination, the Respondent recalled it on 8<sup>th</sup> February 2019 and it was agreed that the Claimant would go back to work.
6. The Claimant resumed work on 25<sup>th</sup> February 2019. She however claims that she was frustrated by being made to sit on a walkway, an uncomfortable place for her as she had just gone through a major surgery. The Claimant adds that her email address and some features on her computer were disabled, making it difficult for her to work.
7. The Claimant accuses the Respondent of malice and witch-hunt which forced her to resign. She therefore claims Kshs 1,980,000 being compensation for constructive dismissal.



8. The Claimant also asks for a certificate of service, costs, and interest.

### **The Respondent's Case**

9. In its Memorandum of Response dated 16<sup>th</sup> September 2019, the Respondent states that the Claimant was recalled and reinstated back to work on 25<sup>th</sup> February 2019. The Respondent adds that the Claimant's terms and conditions of employment prevailed until 21<sup>st</sup> March 2019 when she voluntarily resigned.
10. The Respondent denies the Claimant's allegations that she was frustrated out of employment. The Respondent specifically denies that the Claimant was made to sit on a walkway or that she was locked out of the work system.
11. The Respondent maintains that the Claimant resigned on her own volition and therefore asks the Court to dismiss the claim.

### **Findings and Determination**

12. There are two (2) issues for determination in this case:
  - a. Whether the Claimant has proved a case of constructive dismissal;
  - b. Whether the Claimant is entitled to the remedies sought.

### **Constructive Dismissal?**

13. The Claimant lays a claim of constructive dismissal against the Respondent. *Black's Law Dictionary* (Tenth Edition) defines constructive dismissal as:

“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.”

14. In *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344, Lord Denning stated the following:

“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 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. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”



15. In its decision in *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga* [2015] eKLR the Court of Appeal offered a dual interpretation of the concept of constructive dismissal thus:
- “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.”
16. In summary, constructive dismissal occurs where an employer forces an employee to leave employment by reason of conduct that makes the employment environment so hostile that the employee has no choice but to leave. Constructive dismissal could also be inferred from a fundamental breach of an employment contract by the employer.
17. In the *Maria Kagai Lugaga Case* (*supra*) the Court of Appeal set out the following guiding principles to be applied in determining constructive dismissal claims:
- 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 the 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.
18. In her resignation letter dated 21<sup>st</sup> March 2019, the Claimant gives a blow by blow account of events leading to her resignation, which she terms as involuntary.
19. The Claimant told the Court that on 21<sup>st</sup> January 2019, while on sick leave, she learnt of the termination of her employment on account of redundancy, through social media. Upon her protest, the termination was recalled on 8<sup>th</sup> February 2019 and it was agreed that the Claimant would go back to work. The Claimant testified that there was disagreement on her job title at reinstatement but this appears to have been resolved.



20. The Claimant resumed work on 25<sup>th</sup> February 2019. She however complained about her new sitting position, next to the Finance Manager, on what the Claimant referred to as a walkway, an uncomfortable place for her as she had just gone through a major surgery. The Claimant adds that her email address and some features on her computer were disabled, making it difficult for her to work.
21. The issue of the Claimant's sitting position was addressed but her personal email address was not enabled. According to the Respondent, personal email addresses had been replaced with a general email address. The Claimant's complaint about the working efficacy of her computer was dismissed as unfounded.
22. From the evidence on record, it is evident that the Respondent's decision to recall the termination of the Claimant's employment was forced by intervention by her Advocate. Further, there was initial disagreement regarding the Claimant's job title upon her reinstatement. In addition, the decisions to move the Claimant from her usual sitting position and to deny her a personal email address was not supported by any credible explanation.
23. All these actions demonstrate only one thing; that the Respondent, having failed in its bid to terminate the Claimant's employment, set out to frustrate her and force her to resign.
24. In his testimony before the Court, the Respondent's Country Director stated that there were concerns raised about the Claimant's performance. There was however no evidence of the Claimant being given an opportunity to respond to any of these issues. It would appear that instead of confronting the Claimant with its concerns on her performance, the Respondent chose the clandestine route of frustrating her out of employment. The Respondent succeeded in its scheme and the Claimant tendered a resignation on 21<sup>st</sup> March 2019.
25. Pursuant to the foregoing, I find and hold that the Claimant has proved a case of constructive dismissal against the Respondent.

### **Remedies**

26. I therefore award the Claimant six (6) months' salary in compensation for constructive dismissal. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's mishandling of her case, ranging from an unlawful termination, a reluctant reinstatement and lack of support to the Claimant upon her reporting back to work.
27. Finally, I enter judgment in favour of the Claimant in the sum of Kshs 990,000 being 6 months' salary in compensation for constructive dismissal.
28. This amount will attract interest at court rates from the date of judgment until payment in full.
29. The Claimant is also entitled to a certificate of service plus costs of the case.
30. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY JULY 2024**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Rakoro for the Claimant

Mr. Kimathi for the Respondent

