



**Rotich v Kenya Women Microfinance Bank PLC (Cause E583 of 2022)
[2024] KEELRC 2141 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2141 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E583 OF 2022**

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

BETWEEN

SYLVIA CHEMUTAI ROTICH CLAIMANT

AND

KENYA WOMEN MICROFINANCE BANK PLC RESPONDENT

JUDGMENT

Introduction

1. By her Memorandum of Claim dated 21st July 2022, the Claimant makes a claim of constructive dismissal, against the Respondent. The Respondent filed a Memorandum of Response dated 23rd September 2022, to which the Claimant responded on 23rd November 2022.
2. At the trial, the Claimant testified on her own behalf and the Respondent called its General Manager-Human Resources, Caroline W. Mungai. The parties then filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent on 10th April 2000, at an entry level of Business Development Officer, and rose through the ranks to the position of General Manager-Operations from 1st August 2012.
4. At the time of separation on 7th November 2019, the Claimant was stationed at the Respondent's Head Office. She earned a monthly salary of Kshs 448,000. The Claimant claims to have had a sterling employment record with the Respondent, spanning nineteen (19) years.
5. The Claimant accuses the Respondent of subjecting her to unfair labour practices as follows:
 - a. On 3rd April, the Respondent unilaterally altered the terms of the Claimant's employment by reducing her airtime allowance from Kshs 10,000 to Kshs 5,000;



- b. By a letter dated 24th July 2019, the Respondent unilaterally withdrew the Claimant's telephone allowance;
 - c. By a letter dated 8th October 2019, the Respondent unilaterally withdrew the Claimant's car allowance;
 - d. By a letter dated 24th July 2019, while the Claimant was on maternity leave, the Respondent arbitrarily transferred her from the Rift Valley Zone to the Head Office in Nairobi.
6. The Claimant avers that her transfer was unreasonable, unfair, uncalled for, irregular and premeditated to achieve an ulterior motive of inconveniencing the Claimant and her new-born baby and thus drive her to resign, contrary to Clause 7 of the Respondent's Human Resources Policies and Procedures Manual, 2018 on lactating mothers.
 7. The Claimant reported to the Head Office on 2nd October 2019. She was however not issued with a job description as stipulated under Clause 338 of the Human Resources Policies and Procedures Manual, 2018.
 8. On 15th October 2019, the Claimant wrote to the Respondent, seeking reasons for the withdrawal of her car allowance and entertainment allowance as well as reduction of her telephone allowance. The Claimant also asked to be issued with a job description. She claims to have been issued with a job description with nonspecific duties.
 9. The Claimant was informed that by virtue of her transfer to the Head Office, her duties did not include any fieldwork, leading to withdrawal of her car and entertainment allowances as well as reduction of her telephone allowance. The Claimant avers that she needed the allowances to meet her target for fixed deposit mobilisation.
 10. The Claimant's case is that the Respondent's actions left her frustrated to the extent that she had no choice but to tender a resignation letter on 7th November 2019. She therefore makes a case of constructive dismissal. Further, the Claimant accuses the Respondent of altering her terms of employment, without following proper procedure, which was tantamount to breach of contract.
 11. The Claimant terms the Respondent's decision to withhold her three months' salary on account of pay in lieu of notice as a further act of frustration. In addition, the Claimant faults the set off of her terminal dues in part payment of her outstanding loan with the Respondent, which she deems to be contrary to the Respondent's Credit Policy, 2018. The Claimant also accuses the Respondent of failure to conduct an exit interview with her, as required under Clause 15.6 of the Human Resources Policies and Procedures Manual, 2018.
 12. The Claimant tabulates her claim as follows:
 - a. 33 months' salary for remainder of contract.....Kshs 14,784,000.00
 - b. 12 months' salary in compensation (alternative to (a))Ksh.....5,376,000.00
 - c. Gratuity for remainder of contract.....Ksh.3,696,000.00
 - d. Holiday allowance for remainder of contract.....300,000.00
 - e. Car allowance for October 2019.....40,000.00
 - f. Entertainment allowance for April-October 2019.....210,000.00
 - g. Telephone allowance for August-October 2019.....30,000.00



- h. Illegally debited notice pay.....1,355,999.75
- i. 3 months' notice pay.....1,355,999.75
- j. Certificate of service
- k. Costs plus interest

The Respondent's Case

13. In its Memorandum of Response dated 23rd September 2022, the Respondent admits that the Claimant was its employee until the date of her resignation.
14. The Respondent denies the Claimant's claim of constructive dismissal and states that the Claimant voluntarily opted to resign on her own accord. The Respondent adds that some of the allowances received by the Claimant were variable and did not form part of the statutory allowances set out in law.
15. In addition, the Respondent states that other benefits accorded to the Claimant were dependent on the position she was occupying and would be subject to withdrawal if she was assigned a role that did not require the facilitation of such benefits, or if she was moved to a station where the functions supported by those benefits were provided for by alternative arrangements, such as pool transport and a well manned telephone exchange system.
16. The Respondent states that while it has adequate facilities for lactating mothers at the workplace, arrangements are made to allow such mothers to leave work early so as to have sufficient time with their babies. The Respondent asserts that the Claimant was afforded all the required support pre and post her maternity leave.
17. The Respondent avers that it reviewed telephone allowance for all its managers, an administrative decision that was duly communicated to the Claimant. By letter dated 3rd April 2019, the Claimant was notified that telephone allowance had been broken into Kshs 5,000 as a monthly allowance and a maximum of Kshs 5,000 to be claimed upon production of evidence of expenditure.
18. The Respondent further avers that at the time of issuing its letter dated 24th July 2019, withdrawing the Claimant's telephone allowance, the Claimant had already been issued with a notice of transfer from the Rift Valley Zone to the Microfinance Division at the Head Office in Nairobi.
19. According to the Respondent, the Claimant no longer needed the telephone allowance since her functions of overseeing the vast Rift Valley Zone were no longer within her ambit. The Respondent adds that the Claimant had been moved to the Head Office, where there was an elaborate and well manned telephone exchange system at the disposal of all authorised managers, including the Claimant.
20. Regarding the withdrawal of the car allowance on 8th October 2018, the Respondent states that this coincided with the Claimant's expected reporting date to the Head Office where a fleet of cars, at the disposal of officers for official duties, was maintained. The Respondent further states that it had arrangements where officers could hail taxi cabs which were paid for by the Respondent.
21. While conceding that the Claimant was issued with a transfer letter on 24th July 2019, while she was on maternity leave, the Respondent asserts that there is nowhere in the said letter where the Claimant was asked to cut short her maternity leave.
22. The Respondent maintains that the Claimant's transfer to Head Office was a normal administrative action and adds that the Claimant was paid Kshs 140,000 being fourteen (14) days per diem as adjustment allowance plus Kshs 50,000 being reimbursement for transportation costs.



23. The Respondent denies the allegations of frustration made by the Claimant and states that the Claimant was given all the support she required and was also issued with a job description for her new position.
24. The Respondent asserts its right to recover three (3) months' salary in lieu of notice from the Claimant. The Respondent denies the allegations of breach of the terms and conditions of the Claimant's loan facility, pointing out that the Claimant had herself prepaid Kshs 2,000,000 of the facility.

Findings and Determination

25. 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?

26. On 7th November 2019, the Claimant wrote to the Respondent as follows:

“Dear Madam,

TERMINATION OF EMPLOYMENT

I am writing to officially confirm that am resigning from my position as the General Manager-Operations in your institution with immediate effect from today's date.

The reason for my departure is primarily because the company has for all intents and purposes deliberately frustrated me in a manner that can only suggest a plan to edge me out. The impugned actions include the following:

The institution was well aware that I was on maternity leave and without considering such a relevant fact, opted to transfer me from Eldoret to Nairobi with immediate effect and without consultation. While on maternity leave, the company unilaterally withdrew agreed items of my emoluments in a discriminative manner and without a valid justification. Upon reporting to my new post, I have been kept idle for almost a month and without a job description and only issued with a nonspecific one upon my insistence. The said description was outside the terms of my previous position prior to maternity leave. I was prior to this letter being kept without any credible duties. Notwithstanding that several of my allowances including Car Allowance, Telephone allowance and entertain allowance have been unilaterally removed and illegally withdrawn, I have been given a target for fixed deposit mobilization leaving me to wonder how I would be expected to meet the targets when facilitation to do that has been withdrawn and not supported to discharge the responsibilities. The job description and other tasks subsequently given or not given without support are clearly part of setting me up for failure. Finally, kindly let me know of any handover required and also tabulate and make payment of my Terminal dues at least within the next 7 days. I have however handed back the Laptop, the only asset allocated to me to Mr. Gicheru Wamba, Procurement Manager and attached is his acknowledgement. Yours faithfully (signed) Sylvia Rotich”

27. The Claimant complains that the Respondent's cumulative actions of transferring her while on maternity leave, and withdrawing her allowances forced her to resign. The Claimant therefore lays a claim of constructive dismissal against the Respondent.



28. The law as to what constitutes constructive dismissal is well settled. In a nutshell, constructive dismissal occurs where an employer's conduct makes the employment environment so hostile that the employee has no choice but to resign.
29. In *Nathan Ogada Atiagaga v David Engineering Limited* [2015] eKLR Mbaru J held that:
- “Constructive dismissal occurs when an employee resigns because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge.”
30. In the subsequent decision in *Milton M. Isanya v Aga Khan Hospital* [2017] eKLR Onyango J stated the following:
- “In constructive dismissal the desire to resign is from the employee as a result of hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tenders resignation.”
31. On its part, the Court of Appeal established the following guiding principles in determining constructive dismissal claims, in its well-known decision in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR:
- 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.
32. The facts in this case are not in contest, but the parties have offered diametrically opposed interpretation to these facts. It is therefore my role to apply those facts to the foregoing definition of constructive dismissal and reach definitive conclusions.



33. The Claimant's first complaint is that the Respondent's decision to transfer her from the Rift Valley Zone to the Head Office in Nairobi did not take into consideration that she was a lactating mother. She asked the Court to take notice that the transfer notice was issued to her while she was on maternity leave.
34. In its defence, the Respondent states that transfers fall within the purview of an employer's prerogative and there is no obligation to consult an employee before effecting a transfer. The Respondent avers that although the transfer notice was issued while the Claimant was on maternity leave, she was not asked to cut short her leave. The Respondent adds that it had in fact allowed the Claimant extended time by way of annual leave to begin seamlessly upon expiry of the maternity leave period.
35. I am fully aware that a transfer is an administrative action taken by the employer in the ordinary course of business and courts are generally discouraged from interfering. However, when an employee states that the employer's action is punitive or overly oppressive, the Court must pay attention.
36. The Claimant's transfer letter dated 24th July 2019 states as follows:

“Dear Sylvia,

PARALLEL TRANSFER

We wish to inform you that you have been transferred from Rift Valley Zone to Microfinance Division, Head Office in the same position effective 1st August, 2019.

Consequently, please note that your telephone allowance has been stopped with effect from the same date, but all your other terms and conditions of service remain unchanged.

In the meantime, you are advised to update all your records and complete all tasks allocated to you to enable smooth handing over.

We take this opportunity to wish you God's blessing as you continue serving the Women of this country.

Yours sincerely,

(signed)

MWANGI GITHAIGA

MANAGING DIRECTOR”

37. A plain reading of this letter reveals that the Claimant's transfer was to take effect on 1st August 2019, meaning that she had just one week to complete any pending tasks and prepare to hand over her duties in Rift Valley Zone. It is not in dispute that at this time, the Claimant was still on maternity leave.
38. Section 29 of the *Employment Act* provides as follows:

29. Maternity leave

- (1) A female employee shall be entitled to three months maternity leave with full pay.
- (2) On expiry of a female employee's maternity leave as provided in subsections (1) and (3), the female employee shall have the right to return to the job which she held immediately prior to her maternity leave or to a reasonably suitable job on terms and conditions not less favourable than those which would have applied had she not been on maternity leave.



(3) Where-

- (a) the maternity leave has been extended with the consent of the employer; or
- (b) immediately on expiry of maternity leave before resuming her duties a female employee proceeds on sick leave or with the consent of the employer on annual leave; compassionate leave; or any other leave, the three months maternity leave under subsection (1) shall be deemed to expire on the last day of such extended leave.

39. The *ILO Maternity Protection Convention* No 183 [2000] guarantees female employees maternity leave, accompanied with an assurance that they will return to their job at the expiry of the maternity leave.
40. Unlike annual leave, which may be utilised for varied purposes, maternity leave is intended to allow the mother time to recover from the vagaries of child birth, while taking care of the new-born baby. This explains why this special leave is protected by the law in a manner that shields the mother from any uncertainties at the work place.
41. In the present case, the Respondent breached both domestic and international law by transferring the Claimant while on maternity leave. It cannot be said to have been reasonable to expect an employee on maternity leave to worry about handing over and relocating from Eldoret to Nairobi.
42. An attempt was made to explain the Respondent's rush in transferring the Claimant, by pointing to an alleged leadership gap in the Rift Valley Zone. I think however that the Respondent could have found other means of filling any such gap, without subjecting a lactating mother to the anxiety that comes with a sudden transfer.
43. I will now address the Claimant's complaint regarding the withdrawal and reduction of her allowances. By the transfer letter, which was to take effect on 1st August 2019, the Claimant's telephone allowance was withdrawn. This was despite the fact that the Claimant did not report to Nairobi until October 2019.
44. The Court was perturbed at the Respondent's explanation that the Claimant was resting at home and did not therefore need the telephone allowance. The only thing to say on this issue, is that as long as the Claimant remained an employee of the Respondent, her telephone allowance could not be withdrawn on the unjustifiable ground that she was away on maternity leave.
45. The Respondent defends its decision to withdraw the Claimant's car allowance upon her transfer from the Rift Valley Zone to Nairobi. However, according to the transfer letter, which is significantly referenced 'Parallel Transfer' the only allowance that was to be affected was the telephone allowance, with all other terms and conditions of employment remaining unchanged. The decision to withdraw the Claimant's car allowance therefore amounted to an unlawful variation of her terms of employment.
46. Regarding the withdrawal of entertainment allowance and reduction of telephone allowance, the Court notes that the Respondent's decision was communicated to the Claimant by letter dated 3rd April 2019. The Respondent's General Manager-Human Resources, Caroline W. Mungai told the Court that this action affected all managers, and the Court had no reason to disbelieve her on this account.
47. Further, although the Claimant received communication on this way before the commencement of her maternity leave and her transfer to Nairobi, she did not protest at the opportune time. Consequently,



the Court rejects her attempt to piggyback on the present claim to introduce what is evidently an outlier issue.

48. Although the Claimant complained about the handling of her loan facility after her exit from the Respondent's employment, there is no prayer in her claim on this issue. As a result, there is no issue for determination by the Court in this regard.
49. On the whole, I find that the Respondent's action of transferring the Claimant while on maternity leave, coupled with withdrawal of her telephone allowance and car allowance amounted to a repudiatory breach of her employment contract, forcing her to resign.

Remedies

50. Flowing from the foregoing, the Claimant's claim for constructive dismissal has been proved to the required standard. I therefore award her twelve (12) months' salary in compensation. In arriving at this award, I have considered the Claimant's very long service, spanning 19 years. I have also taken into account the Respondent's callous behaviour of transferring a lactating mother in addition to irregularly withdrawing her allowances.
51. Pursuant to the finding that the Claimant was constructively dismissed, the claims for notice pay and refund of amount debited as notice pay by the Respondent succeed and are allowed.
52. In light of my finding that the telephone allowance and car allowance were irregularly withdrawn, I will allow Kshs 15,000 for telephone allowance @ Kshs 5,000 per month and Kshs 40,000 as car allowance for October 2019.
53. The claim for entertainment allowance is dismissed. The claims for salary, gratuity and holiday for remainder of the contract are without basis and are disallowed.
54. Finally, I enter judgment in favour of the Claimant in the following terms:
 - a. 12 months' salary in compensation.....Kshs 5,376,000
 - b. 3 months' salary in lieu of notice1,344,000
 - c. Refund of debited notice pay.....1,344,000
 - d. Telephone allowance for August-October 2019.....15,000
 - e. Car allowance for October 2019.....40,000
 - Total.....8,119,000
55. This amount will attract interest at court rates from the date of judgment until payment in full.
56. The Claimant is also entitled to a certificate of service plus costs of the case.
57. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY JULY 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Thuita for the Claimant

Mr. Njiru for the Respondent

