



**Wachanga v Revere Technologies Limited (Cause E1024 of 2021)
[2024] KEELRC 2135 (KLR) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2135 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E1024 OF 2021**

**JK GAKERI, J
JULY 29, 2024**

BETWEEN

JACQUELLYNNE NYAWIRA WACHANGA CLAIMANT

AND

REVERE TECHNOLOGIES LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced the instant suit on 8th December, 2021 vide a Statement of Claim alleging unlawful reduction and retention of salary and constructive dismissal.
2. It is the Claimant's case that she was employed by the Respondent effective 1st January, 2021 as an Account Manager at Kshs.120,000/= per month and was only paid the salary for January 2021, February 2021 and March 2021 and was on probation for 3 months.
3. It is the Claimant's case that she undertook her assignments dutifully and had no recorded misconduct or warning.
4. That on 17th May, 2021, she received a letter from the Respondent referenced as salary reduction informing her that owing to financial challenges, her salary would be reduced from Kshs.120,000/= per month to Kshs.80,000/= per month effective end of May 2021 and she refused her salary for May 2021 insisting on fully salary as the reduction was unlawful and sufficient notice had not been given.
5. The Claimant alleges that on 29th May, 2021, she raised the issue with the Respondent but was coerced to sign another letter changing her terms of employment from permanent and pensionable to commission based performance.
6. That the actions of the Respondent made the continued employment relationship illogical and amounted to constructive dismissal.



7. The Claimant avers that she suffered loss of income, mental and emotional anguish and accumulation of debts.
8. The Claimant prays for;
 - a. Declaration that the Respondent's actions towards the Claimant amounted to constructive dismissal.
 - b. Damages for wrongful/unfair termination of employment Kshs.1,440,000.00.
 - c. Terminal benefits comprising;
 - i. Unpaid salary for May 2021 Kshs.120,000/=
 - ii. One month's salary in lieu of notice Kshs.120,000/=
 - d. Certificate of service.
 - e. Costs of the suit.
 - f. Interest at court rates from date of judgment.
 - g. Any further relief this Honourable Court may deem fit and just to grant.

Respondent's case

9. The Respondent avers that it employed the Claimant vide letter of offer dated 30th November, 2020 in the Information Security Sales Division and while on probation, the Claimant did not meet her targets and was issued with a Performance Improvement Plan (herein after P.I.P) and acknowledged receipt and signed and her probation was extended for failure to meet targets, effective 30th April, 2021.
10. That owing to the ravaging effects of the COVID-19 Pandemic, the Respondent effected a salary reduction until the situation improved and the Claimant accepted the same and on 17th May, 2021 requested the Respondent for a formal letter to enable restructuring of her loan at the NCBA Bank and the Respondent obliged.
11. That on 28th May, 2021, the Claimant proposed to the Respondent's management to alter her terms of engagement to make her a consultant paid on commission, a proposal the parties mutually agreed after a consultative meeting and the Claimant thereafter stopped working for the Respondent on her own volition and her engagement was never terminated and her salary for May 2021 was available for collection.

Claimant's evidence

12. On cross-examination, the Claimant confirmed that she signed the letter of offer and received the P.I.P and signed it on 12th April, 2021 and admitted that she had not met the targets for Quarter I.
13. The Claimant denied that the Respondent communicated the reduction of salary on 12th May, 2021, but admitted that she received the Respondent's email dated 12th May, 2021 on salary reduction as a temporary measure owing to the effects of the COVID-19 Pandemic.
14. The witness denied having received the probation extension letter and according to her, no meeting took place on 28th May, 2021, Mr. Ajay was alone in the office and informed her about the changes in employment.



15. The witness admitted that she had not provided evidence of coercion to sign the letter on record and agreed to be paid on commission basis.
16. On re-examination, the Claimant testified that her probationary contract was for 3 months but did not receive a confirmation letter and received a single P.I.P from the Respondent.
17. The Claimant denied having received or signed the probation extension letter dated 30th April, 2021.
18. That she did not receive any notice to change of rewards other than salary reduction.
19. The Claimant, however, admitted having received the email on salary reduction.
20. It was the Claimant's evidence that the Respondent initiated the change of terms of employment.
21. That she signed the letter to get her salary and did not accept the terms of the letter.

Respondent's case

22. RWI, Mr. Ajay confirmed that he was a director of the Respondent and issued the offer letter to the Claimant and did not issue a confirmation letter to the Claimant and the Probation Contract would be extended if the targets of the P.I.P were not met.
23. RWI confirmed that staff salaries were reduced in May 2021 as intimated by the email.
24. That the Claimant did not accept the salary reduction.
25. That the meeting on 29th May, 2021 was attended by witness (Ajay), the Claimant and one Solomon and the change of terms of employment was mutual and the letter was authored on the same day.
26. The witness confirmed that he sat with all employees in the boardroom.
27. On re-examination, the witness testified that probation was 3 months and confirmation of employment would follow but no letter was issued.
28. That the Claimant did not accept extension of probation.
29. The witness testified that he had met all employees of the Respondent before the email was sent on 12th May, 2021.
30. That during the meeting on 29th May, 2021, the Claimant offered to continue as a Consultant to be paid on commission basis.
31. That the Claimant did not collect her cheque and filed the instant suit.

Claimant's submissions

32. On reduction of the Claimant's salary, the Claimant's counsel urges that the same was neither discussed nor agreed upon and was thus unilateral and cites Section 10(5) of the [Employment Act](#), on consultation of the employee.
33. According to counsel, the reduction had to be discussed and agreed upon, notice was insufficient and the reduction was unlawful, irregular and illegal for want of mutuality and sufficient notice.
34. On constructive dismissal, counsel relies on the sentiments of Lord Denning MR in *Western Excavating (ECC) Ltd V Sharp* (1978) ICR 222 and [Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga](#) (2015) eKLR for an exposition of the principle of constructive dismissal and the attendant principles to submit that reduction of salary, change of terms of the contract were



sufficiently frustrating to the Claimant having commenced during probation. That the Claimant was constructively dismissed

35. As to whether termination/dismissal of the Claimant's employment was unlawful, counsel for the Claimant submits that it was as the Respondent had no valid reason to terminate the Claimant's employment and there was only one letter complaining about the Claimant's performance.
36. On the reliefs sought, counsel urges that as the Claimant had proved her case, she was entitled to 12 months compensation, Kshs.1,440,000.00 and was not at fault as held in *Duncan Murunyu Mungai V Slopes Media Ltd* (2021) eKLR where the court awarded 8 months' salary.
37. Counsel submits that the Claimant is also entitled to salary in lieu of notice Kshs.120,000/=, salary for May 2021, certificate of service and costs of this suit.

Respondent's submissions

38. Concerning constructive dismissal, counsel submits that the reduction of salary affected all employees and was occasioned by the COVID-19 Pandemic and there had been salary delays owing to financial challenges and the measures were necessary to ensure sustainability and the Claimant accepted the reduction as evidenced by the request for a letter to her bank for purposes of restructuring a loan she had.
39. Reliance was made on the sentiments of the court in *John Ngoweb V East Africa Safari Air Express Ltd* (2015) eKLR on the prerogative of the employer to make business decisions for efficiency and sustainability as long as the decisions are genuine.
40. Counsel urges that in the instant case, the Respondent activated short term measures to ensure sustainability of business.
41. Counsel urges that the Claimant and the Respondent mutually agreed to alter the terms of engagement and there was no constructive dismissal and cites the sentiments of the Court in *Nathan Ogada Atiagaga V David Engineering Ltd (2015)* eKLR on constructive dismissal.
42. Reliance was also made on the Coca Cola East & Central Africa Ltd case (supra) on the tenets of constructive dismissal as were the sentiments in *Godfrey Allan Tolo V Tobias O. Otieno & another* (2022) eKLR to urge that constructive dismissal will only occur where the employer's treatment of the employee is hostile or creates hostile working condition at the work place which occasions the employee's resignation.
43. Sentiments of the court in *Aketch V Rusinga Schools* (2022) KEELRC 13320 (KLR) were also cited on reduction of salary to urge that the Claimant was not constructively dismissed.
44. On the unfairness or otherwise of constructive dismissal, counsel urges that there was no constructive dismissal as the terms of engagement were altered consensually and the working environment was not hostile.
45. Finally, counsel urges the court ought to dismiss claim and award costs to the Respondent.

Analysis and determination

46. It is not in contest that the Claimant was an employee of the Respondent effective 1st January, 2021 at Kshs.120,000/= per month and on probationary terms for 3 months and confirmation of employment would follow if the probation was successful and the probationary period lapsed at the end of March



- 2021 but in lieu of confirmation of employment the Respondent issued a letter of P.I.P dated 8th April, 2021 which the Claimant signed on 12th April, 2021.
47. The letter was unambiguous that in the event that the measures outlined in paragraph 3 of the letter and the targets were unsuccessfully met by the end of April, the Respondent would extend the Claimant's probation.
48. Was the P.I.P letter part of the Probationary Contract?
49. The bone of contention between the parties is to a lesser extent the probationary contract, but more fundamentally, the salary reduction in May 2021 and alteration of the terms of engagement in May 2021.
50. The issues for determination are;
- i. Whether the Claimant was still serving on probation by the end of May 2021.
 - ii. Whether reduction of the Claimant's salary in May 2021 was unlawful.
 - iii. Whether variation of the Claimant's terms of employment was lawful.
Depending on the answers to (ii) and (iii) above;
 - iv. Whether the Claimant was constructively dismissed unfairly
 - v. Whether the Claimant is entitled to the reliefs sought.
51. As to whether the Claimant was still on probation, while the Respondent argues that she was, the Claimant submits that she was not.
52. It is common ground that the Claimant's 3 months probationary contract ended on 31st March, 2021 and according to the Respondent's P.I.P letter dated 8th April, 2021, the probation would be extended if by the end of April 2021, the targets in the P.I.P letter had not been met.
53. From the evidence on record, it is unclear whether the Claimant successfully met the targets of the P.I.P. However, the Respondent's letter dated 30th April, 2021 to the Claimant but which the Claimant did not sign makes reference to a meeting on 30th April, 2021 on the P.I.P and purports to extend the probation to 31st May, 2021.
54. The Respondent admitted that the Claimant did not accept or sign the extension of probation.
55. Section 2 of the *Employment Act* defines a Probationary Contract as;
A contract of employment which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period.
56. Clause 5 of the Letter of Offer stated that the Claimant would be under probation for a period of three (3) months from the date of joining and arguably the probationary contract ended at the end of March 2021 and although the Respondent could legally have renewed it for any duration not exceeding 9 months, it did not and the purported renewal by letter dated 17th May, 2021 was ineffectual for the simple reason that the probationary contract had already lapsed and the Claimant's appointment confirmed by operation of law.
57. Even assuming that the probationary contract subsisted after 31st March, 2021, the extension would still have been ineffectual for want of the Claimant's consent as required by the provisions of Section 42(2) of the *employment Act* that –



- (2) A Probationary period shall not be more than 6 months but it may be extended for a further period of not more than 6 months with the agreement of the employee.
58. To the question whether the Claimant was still serving under a probationary contract in May 2021, the court returns that the Claimant’s employment had been confirmed by operation of law.
59. As regards reduction of salary, parties have adopted contrasting position with the Claimant’s counsel insisting that it was unlawful for want of the Claimant’s agreement and insufficient notice. The Respondent contends that it was mutually agreed.
60. Section 10(5) of the Employment Act provides that;
- (5) Where any matter stipulated in sub-section (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.
61. It requires no belabouring that Section 10(5) of the Employment Act is couched in mandatory tone that the revision of contract after the change must be in consultation with the employee who must be notified of the change in writing.
62. Evidence on record reveals that by an email dated 12th May, 2012 at 10.43 am, addressed to all staff as confirmed by RWI under the subject salary reduction notification, the Respondent notified its staff of the intended reduction of salary effective May 2021.
63. The email states that the reduction was necessitated by unprecedented financial challenges and there had been delays in processing of salaries and meeting other financial obligations.
64. The notice was also categorical that the reduction would be temporary and noted the effect the decision it would have on staff but additionally stated that it was the best option at that moment.
65. The Claimant’s counsel faults the reduction on the premises that it was not agreed upon and was thus unilateral.
66. A plain reading of Section 10(5) of the Employment Act reveals that the opening part of sentence of the provision is clear that the employer is required to consult the employee(s) and revise the contract to reflect the change.
67. Black’s law Dictionary defines Consultation as;
- “The act of asking the advice or opinion of someone (such as a lawyer). A meeting in which parties consult or confer. The interactive methods by which states seek to prevent or resolve disputes”.
68. Consultation general means seeking the views or opinions of other persons as opposed to their consensus on the matter in issue.
69. Although the Respondent’s witness admitted that he did not meet the Claimant alone, he testified that he met the employees at the Respondent’s boardroom on the issue prior to the email of 12th May, 2021.
70. The concluding sentence of the email states that;
- “should you have any feedback, please don’t hesitate to speak to the management”.
71. The Claimant adduced no evidence to show that she voiced her reservations or opposition to the notification.



72. Although the Claimant's request for a letter on the reduction to NCBA bank on 17th May, 2021 may not be construed as her acceptance, which is not a legal requirement under the Employment Act, it does show that she was alive to the reality of the salary reduction and had to adjust accordingly.
73. It is essential to highlight the foregoing took place on midst of the unprecedented COVID-19 Pandemic which ravaged all business and many of which declared their employees redundant and closed shop.
74. It is indeed unsurprising that the Claimant could not meet her targets for Quarter I due to the Pandemic which persisted for a long time.
75. Arguably, the Respondent, notwithstanding the 19 days' notice engaged its employees on the reduction of salary, revised the contract of employment and notified the Claimant in writing vide letter dated 17th May, 2020. To the Respondent, this was the best way out of a bad situation.
76. The court is in agreement with the sentiments of the court in *Aketch V Rusinga Schools Nairobi (Supra)* cited by the Respondent's counsel as follows;

“ . . . and it was understood that salary reduction was to sustain the institution, encountered with a public health situation not contemplated in the contract of employment. The Respondent opted to retain the staff on adjusted salaries, rather than go the way many employers opted to go-declare redundancies or shut down their business altogether. The court is persuaded that the Respondent acted fairly, rationally and responsibly, and did not constructively dismiss the Claimant . . . Salary reduction was a temporary measure taken by the Respondent, to address the financial constraints caused by COVID-19. It was not an ordinary review of salary, resulting in contractual reduction of salaries . . . It was not the intention of the parties in the view of the court, that salaries due under contract were permanently reduced through the memo issued by the Respondent to staff dated May 26 2020. Reduction was a stop-gap measure meant to help the institution overcome the burden of COVID-19”.

77. The foregoing sentiments apply on all fours to the circumstances of the instant suit and the Respondent's email dated 12th May, 2020 leaves no doubt that the Respondent was labouring under the effects of the pandemic.
78. For the above reasons, the court is not persuaded that the salary reduction effected by the Respondent pursuant to its email of 12th May, 2020 was unlawful or illegal or was in any way intended to frustrate the Claimant as it inter alia affected all employees of the Respondent.
79. As regards the alteration of the terms of the Claimant's employment, the parties have adopted opposing positions with the Claimant contending that the Respondent adduced no evidence to demonstrate that the Claimant originated the proposal while RWI testified that there was a meeting on 29th May, 2020 and alteration of the terms of employment was mutual and the letter was authored on the same day.
80. More significantly, the Claimant admitted on cross-examination that she had no evidence to prove that she was coerced to sign the agreement and added that she agreed to be paid on commission basis as per the letter.
81. Although on re-examination, the Claimant maintained that the Respondent's witness, Mr. Ajay initiated the change of terms of employment and she did not agree with the terms of the letter, having



- admitted that she had no evidence to demonstrate the alleged coercion or duress, the signature on the letter was binding on her and was thus bound by the terms of the letter.
82. At common law, a signature signifies prima facie acceptance and is binding unless it is evidentiary proved otherwise as was held in *L'Estrange V Graucob* (1934) 2 KB 394.
 83. At common law, for duress to vitiate a contract, it must be proved that actual violence or threat of violence was directed to the party allegedly coerced and was exerted by the other party to the relationship.
 84. In the instant case, the Claimant adduced no evidence to prove the nature of the alleged duress and its source as admitted on cross-examination.
 85. For the foregoing reasons, it is the finding of the court that the change of terms of the Claimant's employment was mutual and not a unilateral act as the Claimant would like the court to believe.
 86. As to whether the Claimant was constructively dismissed unfairly by the Respondent, counsel for the parties have adopted contrasting positions.
 87. According to the Claimant's counsel, the Respondent's act of reducing the Claimant's salary from Kshs.120,000.00 to Kshs.80,000.00 and that change of terms of employment contract were sufficiently frustrating to the Claimant to justify her resignation or leaving employment.
 88. That it was discernible that the Respondent wanted the Claimant out of her employment.
 89. The Respondent's counsel on the other hand maintains that there was no constructive dismissal.
 90. Needless to belabour, the concept of constructive dismissal was aptly captured by Lord Denning MR in *Western Excavating (ECC) Ltd V Sharp* (Supra) and domesticated in Kenya by the Court of Appeal in *Coca Cola East & Central Africa V Maria Kagai Ligaga* (Supra), where the court adopted the contractual approach test and articulated the guiding principles.
 91. In the instant suit, the Claimant has not established that the Respondent committed a repudiatory breach of the contract of employment as the reduction of salary by the Respondent was not only rational but justifiable in light of the prevailing circumstances occasioned by the COVID-19 Pandemic and the Claimant's letter dated 17th May, 2021 may be interpreted as acquiescence or one that creates estoppel.
 92. Relatedly and as found elsewhere in this judgment, the alteration of terms of employment of the Claimant was consensual.
 93. Finally and strangely, neither the Claimant's statement of claim dated 7th December, 2021 nor the witness statement of even date make reference as to when the Claimant resigned or separated from the Respondent and how.
 94. For unexplained reasons, the Claimant has not disclosed when the allegedly constructively dismissal took place as there is neither a letter or resignation nor date of separation and why.
 95. The Respondent's witnesses' evidence that Claimant stopped rendering services on her own volition after the change of terms of employment is more plausible as the Claimant appears unsure as to when she was constructively dismissed.
 96. For the foregoing reasons, it is the finding of the court that the Claimant has failed to prove on a preponderance of probabilities that her employment was constructively dismissed or there was an unfair termination of employment.



Appropriate reliefs

i. Declaration

97. Having found that the Claimant was not constructively dismissed by the Respondent, the declaration sought is unmerited and is declined.

ii. 12 months' salary compensation Kshs.1,440,000.00

98. The Claimant has failed to prove that termination of employment was unfair or constructive. The prayer for compensation under Section 49(1)(c) of the *Employment Act*, 2007 is declined.

iii. Unpaid salary for May 2021 Kshs.120,000.00

99. The Respondent's witness admitted that the Claimant's salary for May 2021 is available for her collection and the same is awarded Kshs.120,000/=.

iv. Certificate of service

100. The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*, 2007.

101. In the upshot, judgment is entered in favour of the Claimant against the Respondent as follows;

- a. Unpaid salary for May 2021 Kshs.120,000.00.
- b. Certificate of service

102. For the avoidance of doubt, all other claims are disallowed.

103. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 29TH DAY OF JULY 2024

DR. JACOB GAKERI

JUDGE

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 *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.

DR. JACOB GAKERI

JUDGE

