



**Kamau v Biovision Africa Trust & another (Cause E947 of 2022)
[2024] KEELRC 2007 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2007 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E947 OF 2022
NZIOKI WA MAKAU, J
JULY 26, 2024**

BETWEEN

PETER NJUGUNA KAMAU CLAIMANT

AND

BIOVISION AFRICA TRUST 1ST RESPONDENT

BIOVISION FOUNDATION 2ND RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim dated 16th December 2022, the Claimant prays for Judgment against the Respondents jointly and severally for:
 - a. A declaration and finding that the Respondents' conduct and/actions were in violation of the Claimant's rights under Articles 27(5) and 41(1) and (2)(b) of *the Constitution* of Kenya, 2010.
 - b. A declaration and finding that the Respondents were in contravention of section 5(3) of the *Employment Act*, 2007.
 - c. A declaration and finding that the Claimant was constructively dismissed from employment as the Respondents failed to provide the Claimant with necessary support, accommodation and a reasonable working environment as required under Article 41(2)(b) of *the Constitution* of Kenya, 2010 .
 - d. A declaration that the Claimant's constructive dismissal amounted to unfair termination of employment;
 - e. General damages in the sum of Kshs. 20,000,000/- against the Respondents for breach of the Claimant's Constitutional rights, which amount is considered to be a fair compensation for the Claimant's prejudice.



- f. Service pay at the rate of eighteen (18) days' wages for each completed year of service.
 - g. Leave earned but not taken for 14 years.
 - h. Payment in lieu of notice.
 - i. 12 months' gross salary as compensation for unfair termination on account of constructive dismissal.
 - j. Costs and interests at court rates from the date of filing this suit until payment in full.
 - k. Any other orders as the Court may deem fit and just to grant.
2. The Claimant averred that the Respondents employed him from 1st January 2005 until in or about December 2019 when he was compelled to leave his employment on medical grounds. That he was engaged by the 1st Respondent as the Manager and Editor for The Organic Farmer (TOF) Magazine from 2005 to 2016 and later by the 2nd Respondent between 2016 and 2019. He further stated that on or about 2010, the 1st Respondent made a Memorandum of Understanding with International Centre of Insect Physiology and Ecology (ICIPE) that all staff salaries be made by the 1st Respondent through ICIPE. That this was the position until in or about July 2016 when Biovision Trust became autonomous from Biovision Africa Trust after obtaining a Trust Deed from the Ministry of Lands and Housing. The Claimant noted that prior to his separation from the Respondents, he was earning a monthly basic salary of Kshs. 265,464/-
 3. The Claimant's case is that his separation was involuntary as it was prompted by the Respondents' failure to provide him with a conducive or healthy working environment, and/or adequate support to mitigate his deteriorating health that was directly caused by unhealthy and stressful working conditions. He contended that he was overworked and constantly denied leave during his course of employment with the Respondents and that the intense work pressure and lack of rest over a long period of time led to him being diagnosed with Major Depressive and General Anxiety Disorders. The Claimant averred that he informed the Respondents of his condition and advice from his doctor that he gets ample rest and have his work load reduced to ensure his health did not deteriorate any further. That however, his request was refused, denied and no support was given and/or any changes implemented to accommodate him despite his condition. He further contended that his condition deteriorated further and that in or about December 2019, he was forced to retire as a result of the Respondents unwillingness and/or blatant refusal to accommodate him, upon the advice from his doctor.
 4. It was the Claimant's averment that on or about 2nd December 2019, he was issued with a notice of termination of contract as an afterthought to his notice of retirement on grounds of ill health. He argued that his separation from employment was not voluntary but was occasioned by the Respondents' unfair and unreasonable actions that amounted to constructive dismissal, unfair termination of employment and breach of the Claimant's rights under Article 41(1) and (2)(b) of *the Constitution* of Kenya. The Claimant also alleged discrimination, asserting that the Respondents subjected him to different and unjustifiable treatment because of his condition, such as issuing a 10% salary increment to other employees whilst only issuing him with 1% salary increment. He stated that the Respondents denied issuing him with a support letter indicating that his separation from employment was on grounds of ill health, despite being fully aware of the same. That this led to him being denied his pension dues by Britam Insurance Company and caused NCBA Bank not to waive part of his outstanding loan. That he was also resultantly listed under the Credit Reference Bureau,



making him incapable of getting credit from other financial institutions thereby worsening his already dire situation.

5. The Respondents filed a Memorandum of Response dated 2nd February 2023, wherein they averred that the Claimant was an employee of the 1st Respondent for TOF Magazine through a series of annual fixed term contracts from 2016 to 2019. That the Claimant was not an employee of the 2nd Respondent but was retained by a Consultant of the 2nd Respondent, Mr. Peter Baumgartner, who hired him to work on TOF Magazine with terms of engagement being those of a freelance Editor remunerated on the basis of deliverables from 2005 to 2009, and an employee of ICIPE from 2010 to 2015.
6. The Respondent's case is that the claims against them are already time-barred under section 90 of the *Employment Act* No. 11 of 2007. They denied that the Claimant retired early on grounds of ill health and poor working conditions, asserting that his contract of employment expired and was not renewed by the 1st Respondent. They also refuted that the Claimant had made complaints about stressful working environment and being overworked during his employment with the 1st Respondent. The Respondents averred that the 1st Respondent is not privy nor is it a party to the loan facility the Claimant had with NCBA Bank Kenya PLC and therefore not liable for any breach he may have committed against the said Bank. As regards the claim for leave days, the Respondent averred that the Claimant had been paid the same in full and denied that he was occasioned any form of discrimination. On the allegation of constructive dismissal and unfair termination, the 1st Respondent stated that the Claimant was engaged on a fixed term contract that expired on 31st December 2019 and that due to lack of funding for his position, the 1st Respondent took a managerial position not to renew his contract of employment and notified him of the non-renewal. That the Claimant then cleared with the HR and Administration Office and was paid his final dues. The 1st and 2nd Respondents pray that the Claim herein be dismissed with costs to the Respondents.

Claimant's Submissions

7. The Claimant submitted that there is no specific statutory provision for constructive dismissal but where established, constructive dismissal would amount to unfair termination of employment (see the Court of Appeal decision in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR). He posited that his separation from employment was not voluntary but was occasioned by the Respondents' unfair and unreasonable conduct and/or actions which were so intolerable thereby forcing him to leave his employment. As to whether his claims are time-barred, it was the Claimant's submission that his claims against the Respondents are premised on violation of his constitutional rights particularly Articles 27 and 41(1) and (2)(b). He noted that at no time was he a consultant of the 2nd Respondent and Mr. Peter Baumgartner as alleged, and was also not an employee of ICIPE, was the channel through which the 2nd Respondent paid salaries to its staff members in Africa including the Claimant. He further submitted that notably, the Respondents have not produced any evidence in the form of a Consultancy Agreement to support their allegations that he was a consultant and not an employee and there is similarly no evidence to controvert his assertions that he was the Respondents' employee from 2005 to 2019. The Claimant argued that with his uncontroverted evidence, the Respondents have failed to discharge their evidentiary burden by not adducing any evidence to controvert his documents.
8. The Claimant further submitted that the actions of the Respondents were in clear violation of his right as enshrined under Article 27(5) of *the Constitution* of Kenya, 2010 and section 5 of the *Employment Act*, 2007. That they went contrary to the performance evaluation procedure contained in the 1st Respondent's HR Manual requiring the 1st Respondent's line manager or supervisor to have a discussion with its employees before issuing them with performance scores. According to the



Claimant, the Respondents had an obligation to provide him with a healthy working condition and accommodate him being fully aware of his condition. On the issue of ill health, the Claimant relied on the case of *Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019)* [2021] KESC 12 (KLR). It was submitted by the Claimant that having established that his constructive dismissal amounted to unfair termination of employment, the Court should find he is entitled to the remedies as set out under his Statement of Claim.

Respondents' Submissions

9. The Respondents submitted that the Court lacks jurisdiction to entertain claims against the 2nd Respondent. That the proper party that ought to have been sued in place of the 2nd Respondent is ICIPE. It explained that by a fixed term Contract dated 18th December 2009, the Claimant was offered a positing by ICIPE as an Editor of TOF Magazine. That as such, all and any claim(s) brought by the Claimant for unfair labour practices for between 2010 and 2015 ought to have been brought as against ICIPE and not the 2nd Respondent herein. They further submitted that secondly, this Court has no jurisdiction to entertain any claim against the 2nd Respondent herein on account of effluxion of time. They asserted that the Claims against the 2nd Respondent herein thus offends the provisions of section 90 of the *Employment Act* for they have been brought against the 2nd Respondent outside the time limitation of 3 years.
10. It was submitted by the Respondents that the Claimant was not terminated but his fixed term contract ended. That a fixed term contract carries no rights, obligations, or expectations beyond the date of expiry and given he was in employment under a fixed-term contract and that the contract came to an end at the appointed time which was 31st December 2019. It submitted that therefore, the relief sought by the Claimant on basis of his assertion that his employment was unfairly terminated is automatically not available to him as held in *Transparency International - Kenya v Omondi (Civil Appeal 81 of 2018)* [2023] KECA 174 (KLR) a decision of the Court of Appeal.
11. Respondents further submitted that the Claimant did not suffer any discrimination during his employment with the 1st Respondent and as such, the burden of proof shifts to the Claimant to prove the same per the edicts of section 109 of the *Evidence Act*. They argued that the letter from Dr. Kemunto Sylvia dated 10th March 2021 is an afterthought and that if indeed the Claimant sought medical attention and was diagnosed with the said Major Depressive and General Anxiety Disorder during the tenure of his fixed term contract, he would have cared to produce them for the benefit of the Court. They further submitted that the Claimant was properly remunerated and that based on his performance appraisal, his salary was duly increased as was done with other employees until point that his salary reached the ceiling per his job grade. The Respondents concluded that the Claimant's Claim be dismissed with costs to the Respondents.
12. The Claimant was not constructively dismissed as he resigned of his own accord. There was no nexus with the Respondents in so far as the decision to resign was concerned. He did so on account of ill health. That does not fit in the mould of constructive dismissal espoused in the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga (supra)*. The Claimant having hinged his case on dismissal has nothing to recover because even if he had filed the case hinged on discrimination, his claim for leave not taken in 19 years would have been deemed stale in terms of section 90 of the *Employment Act*. The Claimant indicated that he was offered a contract that ended in December 2019. He testified that the contract was not renewed as he said he was not taking any work due to illness. The contract ended and he left as he was not ready to take the job of project manager. He therefore declined the offer of a new job with the 1st Respondent thereby shutting himself out of any remedies against both



defendants. The suit is found to be unmerited is dismissed albeit with an order that each party bears their own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY 2024

NZIOKI WA MAKAU

JUDGE

