



Kamau v African Entrepreneur Collective Kenya Limited (Cause E949 of 2022) [2024] KEELRC 2349 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2349 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E949 OF 2022
JK GAKERI, J
SEPTEMBER 30, 2024**

BETWEEN

ELIZABETH NDUTA KAMAU CLAIMANT

AND

AFRICAN ENTREPRENEUR COLLECTIVE KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim dated 19th December, 2022 filed on 20th December, 2022.
2. The Claimant’s case against the Respondent is that she joined on 21st December, 2021 as Director IT at a monthly salary of Kshs.501,500/= which later rose to Kshs.695,689/= after the contract was renewed on 15th February, 2022.
3. The Claimant avers that although the contract of employment provided for Quarterly Performance reviews based on deliverables agreed upon by the parties, and the performance score card would be discussed and agreed upon and the “360 Degree Feedback Survey showed that the Claimant met expectations, Quarter I (QI) performance review was delayed and was conducted in May 2022 and performance for Quarter II (QII) was not discussed.
4. It is the Claimant’s case that her supervisor, Sara Leedom proceeded on sabbatical leave from 15th February, 2022 and returned sometime in July 2022 and a consultant in the organization carried out Sara’s roles and the QI Performance review was good.
5. The Claimant avers that when Sara Leedom resumed duty in July 2022, her conclusion was that the Claimant’s QII Performance review was unsatisfactory and warranted a Performance Improvement Plan (herein after P.I.P), or transition to a different role or transition out of the Respondent organization.



6. The Claimant questioned how the options were arrived at as the line manager during the execution of QII KPIs had not been consulted nor was the consultant.
7. That Sara Leedom proceeded to draft the terms of the P.I.P but expressed serious concerns about the Claimant's ability to successfully meet the requirements of the P.I.P.
8. It is the Claimant's case that her fate had been sealed even before the P.I.P could take off as the second option was unavailable.
9. That the state of affairs precipitated the Claimant's resignation.
10. It is the Claimant's case that she was constructively dismissed by the Respondent.
11. The Claimant prays for;
 - i. A declaration that the termination from employment was unfair and unlawful.
 - ii. 12 months compensation for the unlawful termination of employment.
 - iii. Certificate of service.
 - iv. Such orders as the Court may deem fit and just and equitable.
 - v. Costs of this suit.
 - vi. Interest on the above at Court rates.

Respondent's case

12. The Respondent admits that the Claimant was its employee effective 15th December, 2020 as the Director IT and performance review was in-built in the contract of employment.
13. That the Claimant struggled in areas of leadership, budget decision, delivery of projects on time to satisfaction communication with colleagues and responding to work requests.
14. The Respondent admits that on 28th January, 2022, it conducted a 360 Degree Feedback Survey for the entire organization but is reticent on the Claimant's performance, which was rated as satisfactory as she met expectations and her contract of employment was renewed effective 15th February, 2022.
15. According to the Respondent, to enable the Claimant perform effectively, the Respondent had an Operations Consultant and the Claimant had direct access to a Board Member and when the Respondent's Chief Operations Officer (herein after COO) proceeded on sabbatical leave, the Finance Director, Emmanuel Mugabo became the Claimant's supervisor but Sara had to be consulted on the Claimant's K.P.I's.
16. It is the Respondent's case that the Claimant's QII Performance review was based on her performance, feedback from directors of other departments, operations consultant and a member of the board.
17. The Respondent avers that the Operations Consultant reported that the Claimant's understanding of planning for an IT Roadmap was elementary.
18. That the board member reported that the Claimant lacked initiative, planning, leadership, communication, ability to innovate and accountability.
19. That the acting supervisor, Mr. Emmanuel reported that the Claimant was unable to provide value to the Respondent's work or deliver meaningful products expected in the second Quarter.



20. Similarly, the Respondent avers that colleagues complained of the Claimant's performance as regards decision making, technical skills to execute her role and was defensive if given feedback.
21. That the Claimant was given feedback for QII through one-on-one meetings, informed of the expectations of a P.I.P and other options available to her.
22. That the Claimant requested for a template of the proposed P.I.P and a draft was shared and at a meeting held on 1st August, 2022 with Sara Leedom and the Head of Human Resource, the Claimant refused to comment or contribute in respect of the P.I.P and no deliverables had been filed yet the Claimant declared the P.I.P unreasonable and resigned by word of mouth and a follow up email.
23. The Respondent denies that the Claimant was constructively dismissed from employment as no repudiatory breach of contract had been demonstrated and prays for dismissal of the Claimant's case with costs.

Claimant's evidence

24. On cross-examination, the Claimant confirmed that she was engaged in export business and IT Consultancy and resigned at the end of August 2022.
25. She admitted that performance review was an integral part of her work as the Respondent's IT Director.
26. The witness explained that KPIs are set by the employee and the line manager and had concluded KPIs with the acting supervisor and was contesting the review for QII (April – June 2022) signed in May 2022.
27. That the formulation of KPI's was a collaborative effort between the Claimant, Sara Leedom and Emmanuel and Sara proceeded on sabbatical leave in March 2022.
28. That the Claimant sought approval of the KPIs in April 2022.
29. CWI confirmed that one Mitchell Kambi was the Consultant who oversighted IT Projects while Emmanuel was the supervisor.
30. The Claimant further confirmed that the Respondent's Operating Manual & Employee Handbook (herein after OP&EH) provided for performance monitoring, appraisal and rewards but also mentioned that an employee could be placed on a P.I.P.
31. According to the Claimant, when Sara Leedom resumed duty, she had changed.
32. The Claimant confirmed that she was unaware of her rating by the Manager for QII and was unsatisfied with the line manager's review and no meeting on the review had taken place but on the options recommended by Sara Leedom.
33. The Claimant denied the contents of the email by Sara Leedom to the Claimant dated 12th July, 2022 at 15.41 which stated that the two had met on the QII review.
34. That none of the options proposed by Sara Leedom was based on performance.
35. That the Claimant wrote the email dated 21st July, 2022 enquiring about the options proposed by Sara Leedom.
36. That the Claimant had a meeting with the board member while she was on maternity leave, requested for a P.I.P template and it was availed, to populate.



37. That the Claimant left on 1st August, 2022 and P.I.P had not been populated as there was no agreement on the areas of improvement and supportive mechanisms.
38. That the option on transitioning to another role was conditional on availability of that other role and was unavailable by 1st August, 2024.
39. That the Claimant had no other option but to quit employment.
40. The Claimant maintained that no performance review was concluded.
41. That although the Claimant completed her part of the review, they did not sit to discuss the review and areas of underperformance were not outlined or feedback provided.
42. The Claimant admitted that she resigned from employment and was paid terminal dues and issued with a certificate of service.
43. On re-examination, the Claimant testified that while QI review was delayed, QII review was concluded in July 2022 and could not appreciate why she was placed on a P.I.P.
44. RWI, Barbra Mutoni confirmed that the Claimant was qualified for the position of IT Director and the Claimant met expectations.
45. That when Sara Leedom proceeded on sabbatical leave, all employees of the Respondent were notified vide email.
46. That the consultant was supposed to assist the Claimant.
47. The witness could not tell whether the director met the Claimant.
48. It was her testimony that if there was no agreement between an employee and the line manager, Human Resource would be involved and Mr. Emmanuel did not share his concerns about the Claimant with the witness, did not have to be involved in the Claimant's appraisal and one month P.I.P was sufficient.
49. According to the witness, P.I.P deliverables are determined by the employee and the line manager.
50. That the parties were commencing the P.I.P process as there was none and one month was sufficient.
51. That the Claimant attended the last meeting on the P.I.P and indicated that she had nothing to contribute.
52. The witness confirmed that Sara Leedom proceeded on sabbatical leave from 14th March, 2022 to 14th June, 2022 and Mr. Emmanuel Magabo supervised the Claimant and did have to attend review meetings and KPIs were set when Sara was on sabbatical leave and she was involved in their setting.
53. RWII, Sara Leedom confirmed, on cross-examination that by her email dated 11th July, 2022, she was placing the options on the table. That there were roles the Claimant could execute hence the renewal of the contract.
54. The witness confirmed that the document on the P.I.P was not filed and during her sabbatical leave, the Claimant was reporting to the Finance Director, Mr. Emmanuel.
55. RWI could not confirm whether she received a handover report from Emmanuel, yet he was supervising the Claimant during her absence.
56. On further examination, RWI stated that it was verbal and no meeting between her, the Claimant and Emmanuel took place.



57. That the Claimant's review for QI was completed in late May and she was rated 3.0 i.e met expectations.
58. That Michelle's scope of work was wider than the Claimant's docket and had no written terms of reference and the Claimant met the director once.
59. The witness admitted that she had no evidence of feedback from the director.
60. That the consultant did not provide any feedback on the projects he was working on.
61. RWII confirmed that she expressed concerns about the Claimant's success and the P.I.P process was collaborative.
62. That the Claimant's challenge was her unwillingness to engage.
63. That Dat did not participate in the review of the Claimant and no discussion on resignation had taken place.
64. On re-examination, RWII confirmed that she was by the P.I.P according the Claimant an opportunity to improve. The witness further explained that they needed certain standards for directors and had concerns about the Claimant's performance.
65. That the Respondent provided support by way of the consultant and the director.
66. That the witness conducted an appraisal of the Claimant and the Claimant avoided the P.I.P.

Claimant's submissions

67. According to the counsel, the Claimant was forced to resign by the hostile environment created prior to and during the meeting and no performance appraisal was conducted to show that the Claimant's performance was wanting and the P.I.P was an afterthought.
68. As to whether the Claimant was constructively dismissed, counsel submits that she was as the Claimant stood no chance in the performance review.
69. Reliance was made on the sentiments of the Court in *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga* (2015) eKLR, *Kitavi Resort V Munirah J. Rashid* (2013) LCCD 161 and *Thomas Olum Miyago & another V S.C Johnson & Sons Kenya Ltd* (2020) eKLR.
70. On the reliefs sought, counsel relies on the decision in *Kariki Ltd V Karimi ELRC App E005 of 2023* to urge that the Claimant is entitled to 12 months compensations and costs of the suit.

Respondent's submissions

71. On constructive dismissal, counsel for the Respondent submits that as under the decision in *Coca Cola East & Central Africa Ltd V Ligaga* (Supra), the Claimant bore the burden of establishing a repudiatory breach of the contract of employment and had not done so and cites the sentiments of the Court in *Geoffrey Muriithi Muthee V XPLICO Insurance Co. Ltd* (2022) eKLR to reinforce the submission.
72. According to counsel, RWI appraised the Claimant for QII as KPI had already been developed, the Claimant was assisted by the director, RWII reached out the Claimant even though she was on sabbatical leave and the acting supervisor handed over after the RWII resumed duty.
73. Counsel urges that Respondent's concerns notwithstanding, there was no repudiatory breach of the contract of employment.



74. That the Claimant resigned in the course of discussions on the P.I.P and thus declined to contribute to the creation of the P.I.P and the resignation was voluntary.
75. Counsel urges that the Claimant failed to establish that there was a repudiatory breach of the contract of employment.
76. On the reliefs sought, counsel submits that the Claimant is not entitled to any of the reliefs prayed for.

Analysis and determination

77. It is common ground that the Claimant was an employee of the Respondent effective 21st December, 2020 and the contract of employment was renewed effective 15th February, 2022.
78. It is equally not in contest that the Claimant's evaluation for QI was concluded in May 2022 and the rating was satisfactory as the Claimant met expectations.
79. Further, it is not in dispute that under the "360 Degree Feedback Survey" on 28th January, 2022, the Claimant's performance was satisfactory.
80. Although the Respondent's witnesses downplayed the importance of the 360 Degree Feedback Survey being an all-round survey, it demonstrated that the Claimant was discharging her duties as the Respondent's IT Director.
81. The Claimant is contesting the performance evaluation for QII which culminated in the separation with the Respondent.
82. According to the Claimant, no performance evaluation of QII took place.
83. The issues for determination are;
 - i. Whether the Respondent evaluated the Claimant for QII.
 - ii. Whether the Claimant was constructively dismissed.
 - iii. Whether the Claimant is entitled to the reliefs sought.
84. Concerning the 1st issue, while the Claimant maintains that she was not appraised by the Respondent. RWII on the other hand, testified that she reviewed the Claimant's performance for QII.
85. It is common ground that the Respondent had institutionalised a Performance Management System. Part XIV of the Respondent's Operating Manual & Employee Handbook 2022 provided for Performance and Professional Development including Performance Monitoring, Appraisal and Performance and Rewards.
86. In particular, the Manual provided for Quarterly reviews and annual appraisal. A formal performance discussion had to be held and recorded in Odoo and the appraisal outcome would be kept in the employee's file.
87. As adverted elsewhere in this judgment, the Respondent's COO, RWII, Sara Leedom proceeded on sabbatical leave in March 2020 and resumed duty in June 2022.
88. RWI admitted that during her absence, Emmanuel stepped into her shoes and agreed with the Claimant on the KPIs which Emmanuel sought RWII's approval vide email. RWII admitted that the Claimant was at the time reporting to Emmanuel.
89. Similarly, the Consultant and director were also supposed to assist the Claimant, as necessary.



90. Although RWII testified that she completed the QI review and rated the Claimant 3.0, she adduced no evidence as to when she completed review for QII or what the rating was.
91. Similarly, although RWII testified that she was still active during her sabbatical leave, no evidence was adduced as to the actual roles she played in the formulation and/or conclusion or execution of the KPI's for QII.
92. As regards the review for QII, although the Claimant's email of 12th July, 2022 to Dat and Barbara alludes to a meeting with the Claimant on even date and had rated the Claimant below expectations, the email had no score and no indication as to the parameters considered or the areas the Claimant performed poorly.
93. Equally, although the email makes reference to feedback from the consultant, Board and other directors, colleagues, the feedback remains undisclosed.
94. Indeed, RWII confirmed on cross-examination that she had no written handover report from Emmanuel, who was the Claimant's supervisor during her sabbatical.
95. In a similar vein, RWII admitted that she had no feedback from Shipra or the consultant.
96. It would appear that the Respondent had no documentary evidence of the actual review of the Claimant's appraisal for QII which would appear to vindicate the Claimant's assertion that she could not find any anchorage of the P.I.P proposed by the COO, RWII.
97. The Respondent's Manual required that the documented performance review be kept in Odoo.
98. The Claimant, however admits that a meeting took place with Sara Leedom to discuss the performance review of QII on 12th July, 2022.
99. Based on the evidence before the Court, it is the finding of the Court that the Respondent has proved on a preponderance of the evidence that a meeting was held to discuss the Claimant's performance for QII. However, neither the document under review, scores or minutes of the discussion were availed.
100. Other than reference to undocumented and undisclosed feedback from unnamed persons, RWII availed no evidence as to what she considered in appraising the Claimant's QII performance.
101. Concerning constructive dismissal, the Claimant contends that her resignation was precipitated by the hostile manner in which the Respondent treated her.
102. The Respondent on the other hand submitted that the Claimant resigned to avoid the P.I.P having declined to contribute to its terms during a meeting with RWII and Human Resource.
103. It is not in contest that during the meeting held on 12th July, 2022 between the Claimant and RWII to discuss the review of QII, RWII's email of even date reveals that she went ahead to propose to the Claimant the options at her disposal and the same were formally communicated.
104. The second option was only viable "if available" and in the case of the 3rd, notice was required.
105. By email dated 21st July, 2022, the Claimant raised issues on the duration of the P.I.P, assistance, areas of important, evaluation, availability of a different role and method of separation.
106. By an email dated 25th July, 2022, RWII provided more details as follows;

The short-term P.I.P would be for 30 days on strategic leadership, delivery of results, understanding of future needs and communication with directors and seniors.



107. As regards the short-term P.I.P, RWII was emphatic that;
- “As mentioned in the conversation we had, I have serious concerns about your ability to successfully meet the PIP requirements based on what we have seen thus far.”
108. Similarly, as regards transitioning to a different role, the option had evaporated after RWII had a discussion with Dat on the team structure and needs based. Details on separation were also availed, namely; 2 months’ salary, extension of medical benefit to the end of the year and recommendation letter.
109. Put in the alternative, the Claimant was faced with the hobson’s choice to take the P.I.P or separate with the Respondent.
110. RWII forwarded a draft structure of the P.I.P to the Claimant but left the specific outputs open for completion.
111. RWII identified strategy and management as the Claimant’s largest challenges.
112. By email dated 1st August, 2022, the Claimant revisited RWII’s concerns about her suitability for the position of IT Director expressed on 12th July, 2022 and her ability to meet the requirements of the P.I.P.
113. The Claimant contested the timing of the P.I.P (30 days) and considered the intentions of the P.I.P unattainable and resigned vide notice forwarded on even date vide email dated 1st August, 2022 at 17.56.
114. In determining whether the Claimant was constructively dismissed, the Court is guided by the judicial authorities on this subject.
115. The classical rendition of the principal of constructive dismissal are the sentiments of Lord Denning in *Western Excavating (ECC) Ltd V Sharp (1978) ICR 22* thus;
- “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 essentials 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 . . . But the conduct must in either case be sufficiently serious to entitle him to leave at once.”
116. In *Nathan Ogada Atiagaga V David Engineering Ltd (2015) eKLR*, the Court stated thus;
- “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.”



117. In *Milton M. Isanya V Agha Khan Hospital Kisumu* (2017) eKLR, Maureen Onyango J. stated thus;
- “ . . . 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.”
118. The principle of constructive was domesticated by the Court of Appeal in its decision in *Coca Cola East and Central Africa Ltd V Maria Kagai Ligaga* (Supra) where it adopted the contractual approach test and articulated the guiding principles for determining constructive dismissal.
119. In the instant case, by an email dated 12th July, 2022 or thereabout, RWII informed the Claimant that owing to her below expectations performance, she was free to adopt any of the three options outlined and as mentioned elsewhere, the Claimant sought clarification on each of the options and by 25th July, 2022, RWII had settled for a 30 days P.I.P on the Claimant’s areas of improvement.
120. Regrettably, RWII expressed her concerns on the Claimant’s ability to meet the requirements of the P.I.P, as she had done on 12th July, 2022, in the Claimant’s presence.
121. It is intriguing that RWII wanted the Claimant to undertake a P.I.P on very fundamental aspects such as strategic leadership, communication, appreciating user needs and delivery of usable results to staff and for only 30 days which, in the Court’s view was patently inadequate. These are exceedingly heavy matters that would typically require more time for a meaningful review.
122. In the Court’s view, none of the issues set out by RWII vide her email of 25th July, 2022 could not be sufficiently appraised within 30 days.
123. Strategic planning for instance involves conceptualization of a vision, facts and objectives and their realization.
124. More poignantly, RWII had both orally and in writing expressed her opinion on the chances of the Claimant pulling through the P.I.P, yet it was the only option on the table.
125. The Claimant’s emails dated 1st August, 2022 at 12.15 pm and 17.56 pm, clearly demonstrate the Claimant’s frustration by the Respondent’s conduct which left her with no other option but to quit.
126. It is puzzlingly that RWII expected the Claimant to conclude a P.I.P with her yet she had openly questioned the Claimant’s wherewithal to see it through and cannot be faulted for asserting that the outcome of the P.I.P was predetermined and was being set up for failure.
127. The totality of the foregoing is that it is the finding of the Court that the causa causan of the Claimant’s resignation was the unpalatable working environment the Respondent created and was thus involuntary and constituted a constructive dismissal from employment.

Appropriate Relief

128. Having found as above, the Court proceeds as follows;

a. Declaration

129. Having found that the Claimant’s resignation amounted to a constructive dismissal, the declaration sought is merited.



b. 12 months' salary

130. Having found that termination of the Claimant's employment by the Respondent was unfair, the Claimant is entitled to compensation under Section 49(1)(c) of the *Employment Act*.

131. The Court has considered the following;

- i. The Claimant was an employee of the Respondent for a duration of 1 year and 7 months which is very short.
- ii. The Claimant had no recorded instance of misconduct or discipline or poor performance.
- iii. The Claimant did not express her wish to remain in the Respondent's employment
- iv. The Respondent paid the Claimant's terminal dues.

132. In the circumstances, the Court is satisfied that the equivalent of 2 months' salary is fair.

c. Certificate of service

133. The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act* unless already issued.

d. The Claimant is awarded 50% of the Costs of the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER 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

