



Chumo v Uthabiti Africa Advisory Services Limited & another (Cause E366 of 2022) [2024] KEELRC 2652 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2652 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E366 OF 2022
L NDOLO, J
OCTOBER 31, 2024**

BETWEEN

LEONARD FALEX CHUMO CLAIMANT

AND

UTHABITI AFRICA ADVISORY SERVICES LIMITED 1ST RESPONDENT

ASAYYA IMAYA 2ND RESPONDENT

JUDGMENT

Introduction

1. This judgment determines the Claimant’s claim against the 1st and 2nd Respondents. The claim is contained in a Statement of Claim dated May 31, 2022. The Respondents filed a joint Response dated July 26, 2022, to which the Claimant responded on 24th August 2022.
2. The matter proceeded to full hearing where the Claimant testified on his own behalf, with the Respondents calling three witnesses; Assaya Imaya, the 2nd Respondent, Tracy Koske, the 1st Respondent’s Policy Officer and Noah Kipkoech, the Finance Manager. The parties also filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the 1st Respondent as a Consultant, in the capacity of Director of Policy and Partnerships, at a monthly salary of Kshs. 450,000, effective 12th April 2021 until 11th April 2022.
4. The Claimant claims that the 2nd Respondent called him to several informal meetings where the 2nd Respondent sought the Claimant’s support against a co-founder of the organisation, who was also the



Respondent's spouse at the time. The Claimant states that the 2nd Respondent sought to enlist him in a scheme leading to the expulsion of the co-founder but the Claimant rejected the invitation.

5. The Claimant avers that on the evening of 4th March 2022, the 2nd Respondent sent him a WhatsApp message, inviting him to an informal chat on 5th March 2022, where allegations of sexual harassment and gross misconduct against the Claimant, were raised. According to the Claimant, all these allegations were false. The Claimant was suspended pending full investigations.
6. The Claimant states that arising from the harrowing allegations, he was left with no option but to tender his resignation. He was subsequently issued with a show cause notice dated 23rd March 2022 and was later invited to a disciplinary hearing.
7. The Claimant lays a claim of unjustifiable and unfair dismissal, accusing the Respondents of breaching the law and the internal policies and procedures. The Claimant lists the following particulars against the Respondents in this regard:
 - a. Failing to provide the Claimant with a sexual harassment policy document;
 - b. Unlawfully suspending the Claimant without first serving him with a notice to show cause;
 - c. Defaming the Claimant through circulation of communication to colleagues and external stakeholders;
 - d. Denying the Claimant a chance to pick his personal items and to return company equipment;
 - e. Pretending to adhere to rules of natural justice by asking the Claimant to attend the hearing with a colleague, while instructing him not to contact any employee while on suspension;
 - f. Doctoring the Human Resource policy documents to conform to an illegality;
 - g. Subjecting the Claimant to mental torture through false allegations of sexual harassment;
 - h. Conducting a hearing in the absence of both the Claimant and the complainant;
 - i. Proceeding to make a judgment based on falsehoods, particularly that the Claimant did not respond to the show cause letter and attend a hearing, when it was clear that the Claimant responded to all letters;
 - j. Using false allegations to deny the Claimant a source of livelihood through summary dismissal;
 - k. Proceeding to conduct disciplinary proceedings against the Claimant even after waiving the notice to terminate his employment;
 - l. Failing to grant the Claimant an opportunity to enjoy his leave days as a Consultant, while at the same time treating him as an employee;
 - m. Maliciously presenting allegations against the Claimant with a view of terminating the consultancy contract.
8. The Claimant seeks the following reliefs:
 - a. Damages for employment related defamation over claims of sexual harassment;
 - b. General damages in lieu of retraction, correction and apology for defamation;
 - c. A declaration that the summary dismissal was unjustifiable, unlawful and unfair;
 - d. 12 months' salary in compensation;



- e. Damages for constructive dismissal;
- f. Costs plus interest.

The Respondents' Case

9. The Respondents launch their defence by stating that the 2nd Respondent is wrongly enjoined in these proceedings. They admit that the Claimant was contracted as a Consultant by the 1st Respondent, for a term limit of 12 months. They add that the consultancy contract could be terminated by either party, at any time with or without reason. The Respondents take the position that the Claimant was not an employee, as he was engaged on a consultancy fee.
10. The Respondents accuse the Claimant of being a pervert and sexual predator. They deny the allegations made by the Claimant in the Statement of Claim, against the 1st Respondent.
11. The Respondents admit that a meeting took place on 5th March 2022, where the Claimant was notified of allegations of sexual harassment made against him. According to the Respondents, this meeting was formal and not informal as stated by the Claimant.
12. The Respondents defend the decision to put the Claimant on suspension with pay, to pave way for investigations into the allegations levelled against him.
13. The 2nd Respondent is said to have received an informal concern from the 1st Respondent's Finance Manager, Noah Kipkoech, regarding a complaint of harassment of a female employee by the Claimant. The employee is said to have formalised her complaint via an email sent to the Human Resource Manager and copied to the 2nd Respondent.
14. The Respondents aver that the Claimant hurriedly resigned to forestall investigations into his conduct. They state that the Claimant picked his belongings and surrendered the office equipment in his possession, upon which he was issued with a certificate of service. The Respondents accuse the Claimant of failing to participate in the disciplinary process availed to him.

Findings and Determination

15. At the interlocutory stage, I dealt with the issues of joinder of the 2nd Respondent and admissibility of email communication filed by the Claimant. This leaves the following as pending issues for determination in this judgment:
 - a. Whether there an employment relationship between the Claimant and the 1st Respondent;
 - b. Whether the Claimant has made out a case of unlawful dismissal;
 - c. Whether the Claimant is entitled to the remedies sought.

Employment Relationship?

16. In their Response to the Claimant's claim, the Respondents suggest that the Claimant was not an employee as defined in law. They base their argument on the fact that the Claimant was engaged on the basis of a consultancy agreement.
17. However, in determining the existence of an employment relationship, the Court will not confine itself to the terms used by the parties in the engagement instrument. Rather, the Court will go beyond to examine the conduct of the parties, the nature of assignment and core functions of the position.



18. In *Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited* [2014] EKLRL, Rika J held that the existence of an employment contract is to be discerned from the conduct of the parties, not merely the terms used in the contract. The learned Judge stated as follows:

“It was not necessary that the words ‘employer’ and ‘employee’ be expressed on the face of the agreements, for them to be valid employment contracts...Consultancies/independent contracts are based on the periphery of the employer’s business. They are not integral to the business.”

19. Looking at the consultancy contract dated 12th April 2021, the Claimant was engaged in the core position of Director of Policy and Partnerships, a role that cannot be said to have been peripheral. Further, the Claimant was engaged on full time basis with complete working hours running from 8.00 am to 5.00pm, Monday to Friday.
20. This evidences the existence of an employer-employee relationship and the fact that the contract was termed as a consultancy contract did not alter this position. The answer to the question whether there was an employment relationship between the Claimant and the 1st Respondent is therefore in the affirmative.

Unlawful dismissal?

21. The Claimant lays a claim of unlawful dismissal against the Respondents. There is however evidence that he himself sent the following letter dated 5th March 2022, to the Respondents:

“Dear Imaya

Notice Of Termination Of Consultancy Contract As The Director Of Policy And Partnership

Above subject refers.

I hereby write to notify you of my intention to terminate my consultancy as the Director of Policy and Partnerships at the end of this month (March 31, 2022). I have made this rather unprecedented decision for what I will sum up as adverse working conditions.

As I move on, I look back with pride the tremendous change we’ve made together within the early childhood development landscape in Kenya in just about a year and thereby raising Uthabiti’s banner high. I can only wish the organization best of luck in days ahead for the sake of the children and families.

For the remaining days, I will be available for consultation and, if and when necessary, to offer background support to the upcoming National Policy Conference on Early Childhood Care, Education and Development. I will also take accumulated leave/off days due to me during this period.

Should our paths cross again, may it be for the reason that it is worth all for the children.

Should you have any questions or need clarification, do not hesitate to reach out.

Yours truly,

(signed)

Leonard Chumo Falex



leofaxiconex@yahoo.com”

22. In his letter, the Claimant cites adverse working conditions as the reason for his decision to tender a resignation. Although the Claimant did not give details of the adverse working conditions in his letter of resignation, there is evidence that he resigned in the wake of investigations into allegations of sexual harassment, levelled against him. It is therefore reasonable to conclude that the Claimant’s claim is one of constructive dismissal. Constructive dismissal was defined in *Nathan Ogada Atiagaga v David Engineering Limited* [2015] eKLR as follows:
- “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.”
23. In its decision in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR the Court of Appeal established the following principles to be applied in determining claims of constructive dismissal:
- 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.
24. The Claimant complains that he was subjected to an unfair disciplinary process. It is however on record that the disciplinary process did not run full circle. In fact, the Claimant issued his resignation notice soon after his initial meeting with the 2nd Respondent on 5th March 2022, where the allegations of sexual harassment were first placed before him.
25. As held in *Kennedy Obala Oaga v Kenya Ports Authority* [2018] eKLR, our employment law enables employees to place themselves beyond the disciplinary authority of employers, by tendering a resignation. By his letter therefore, the Claimant effectively placed himself outside the disciplinary



control of his employer and any subsequent disciplinary proceedings were a nullity and do not merit the attention of this Court.

26. Moreover, the Claimant did not adduce any evidence linking the Respondents' actions to his decision to resign; he therefore failed to make a case of constructive dismissal. Likewise, he did not lay before the Court any particulars of defamation.
27. In the result, the Claimant's entire claim fails and is dismissed with an order that each party will bear their own costs.
28. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF OCTOBER 2024

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JUDGE

Appearance:

Mr. Mulama for the Claimant

Mr. Obunga for the Respondents

