



Fondo v Kenya Chemical Workers Union (Employment and Labour Relations Cause 27 of 2019) [2024] KEELRC 2451 (KLR) (4 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2451 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 27 OF 2019**

AN MWAURE, J

OCTOBER 4, 2024

BETWEEN

HUSSEIN SAIDI FONDO CLAIMANT

AND

KENYA CHEMICAL WORKERS UNION RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 21st January 2019.

Claimant's Case

2. The Claimant avers that he was employed by the Respondent in January 2017 and was confirmed as the Accountant on 25/7/2011; as at 15/10/2018 he was earning Kshs 102,520.
3. The Claimant avers that he reported back to work after annual leave on 22/5/2017, the Respondent's withdrew his duties and responsibilities. The colleague he had handed over to did not relinquish the accountant's duties as the Respondent failed to instruct him to do so.
4. The Claimant avers that he wrote letters to the Respondent's complaining of the same as this amounted to unilateral variation of terms of employment without his consent or negotiations.
5. The Claimant avers that the Respondent caused him to drop out of his university studies because the Respondent extended his work hours until late at night.



Respondent's Case

6. The Respondent avers that the Claimant having lost employment with Federation of Kenya Employers (FKE) in August 2006, he was taken by the Respondent to be trained on the job that the organization may require.
7. The Respondent avers that the Claimant was enrolled at Kenya Accountants Technician Certificate (KATC) level 1 which the Respondent committed to pay his college fees, house rent, transport and other personal expenses amounting to Kshs 5,440.
8. The Respondent avers that it continued to support the Claimant's education whereby after completion of KATC courses, he enrolled for CPA I, II, III and IV.
9. The Respondent avers that on 19/4/2010, the Claimant's allowance was increased to Kshs 13,800 and he was now expected to perform his duties as an Accountant but fell short of its expectation.
10. The Respondent avers that following the Claimant's failure to perform accounting tasks, it was compelled to address him through the National General Secretary on 25/7/2011; the Claimant responded the same day and apologised. The Claimant was then issued an appointment letter dated 25/7/2011 effective on 1/6/2010 to enable him take his responsibilities as an accountant seriously.
11. It's the Respondent's case that the Claimant's contract expired by application of law upon attainment of 60 years and as its mandatory practice, it disabled all systems and facilities connected to the Claimant's employment as he was no longer its employee.
12. The Respondent avers that during the Claimant's employment he performed poorly, despite this, it still reviewed his salary to try motivate him to perform better and was highly paid among the employees. At the time of his dismissal, he was earning a gross salary of Kshs. 102,520.
13. The Respondent avers that after completion of CPA, the Claimant enrolled for CPS which was financed by the Respondent although he was earning a salary.
14. It's the Respondent's case that upon completion of CPS, the Claimant requested the Respondent to support furtherance of his education in university. The Respondent paid the first trimester fees although its intention was to train up to account levels to enable it have its own accountant.
15. However, it could not continue to finance the Claimant's education due to financial problems and in consideration the Claimant was now able to finance his education as he had a full salary. The Claimant however informed the Respondent he was unable to finance his education and did not resume classes after that.
16. It's the Respondent's case that upon conveying its inability to continue financing the Claimant's education, he started undermining his duties and absenting himself severally claiming to be sick or he wanted to rest between 2016 and 2018 until 14/10/2018 when he resigned forgetting he was to produce medical reports to evidence why he was out of office for nearly one year but was still paid his salary in full.
17. The Respondent avers that it wrote to the Claimant on 28/5/2018 requesting him to forward documents pertaining to his training, medical report and other things required. The Claimant responded rudely that he should not be disturbed on work related matters.
18. The Respondent avers that the Claimant vide a letter dated 11/10/2018 complaining of persistent salary delays which the Respondent responded on 12/10/2018 and explained the late payment and



further instructed the Claimant to report to duty on 15/10/2018 as he failed to follow verbal instructions.

19. The Respondent avers that the Claimant responded vide a letter dated 14/10/2018 titled, 'Constructive dismissal effective 15/10/2018'. The Respondent ignored the same and wrote him a letter asking him to report back to work on 22/10/2018 and bring all medical reports he has undergone through 2017 to 2018. The Claimant replied on 19/10/2018 and confirmed he had discharged himself from his employment.
20. It's the Respondent's case that the Claimant's action was insubordination and disobedience which constitutes summary dismissal for gross misconduct.
21. The Respondent avers that before the Claimant's formal resignation, he acted unprofessionally as he opened a Mpesa business within the building hosting its offices and all the Respondent's Mpesa payments were sent to his Mpesa agent no. 113082 and supplied the Respondent with stationaries from a company he was a partner in.
22. The Respondent avers that the Claimant refused to produce medical reports as required by the law under section 30 (1) (2) of the Employment Act to prove his inability to work. The Respondent had no other option but to ask the Claimant to refund all salaries paid to him during the period he was not working from January 2018 to October 2018.

Evidence in Court

23. The Claimant (CW1) adopted his witness statement dated 21/1/2019 as his evidence in chief and produced his documents as exhibits to support his case marked 1-15.
24. During cross examination, CW1 testified that his employment started on 1/7/2011 and his engagement letter is dated 25/7/2011.
25. CW1 testified that from January 2007 to 2011 he was a part time student and the union paid for his studies. Part of his allowance was paid to himself and part of it to his education, his allowance was Kshs 5,440.
26. CW1 testified that he went on leave on 19/4/2017 and handed over his duties to Grace Wairimu in the presence of the National Treasury, however upon reporting back, Grace did not hand over back to him the books of accounts, records and reports which he was working on.
27. CW1 testified that he raised these concerns with the Union's National General Secretary but he did not receive any response or notification of any changes taking place.
28. CW1 testified that he resumed from leave on 27/5/2017, he worked till 15/10/2018 when he left employment. That he suffered from depression due to the work environment and from March 2018 he did not go back to work but he received his salary upto October 2018.
29. CW1 testified that from May 2017 to April 2018, he was sitting in the office and he communicated to the National General Secretary of this and his sickness.
30. CW1 testified that he resigned as he was still depressed and handing over was still not done properly.
Respondent's case
31. The Respondent's witness, Peter Ouko Onyango (RW1) produced his witness statement dated 23/10/2023 as his evidence in chief and bundle of documents dated as his exhibits 1-26 to support his case.



Claimant's Submissions

32. The Claimant submitted that the Respondent's failure to allow him to attend to his duties and responsibilities is a breach that goes to the root of the employment contract. It is a clear demonstration that the Respondent no longer intended to be bound by the contract. Further, the Claimant would report to work only to be subjected to threats and ridicule by his supervisors as evidenced by the letters produced in court.
33. It is the Claimant's submission that he has sufficiently proved that the Respondent's conduct created an intolerable work environment and it committed a significant breach of the employment contract and that he resigned due to the frustrations by the Respondent at the work place.
34. The Claimant submitted that he was constructively dismissed due to unfair, wrongful and illegal actions of the Respondent. He therefore prays for payment in lieu of notice and compensation for loss of employment for 12 months.

Respondent's Submissions

35. The Respondent submitted that it invested so much on the Claimant and gave him a profession as an accountant and further to this employed him. It is trite law that no one can invest, support, aid and/or sponsor only to destroy the same, be it individual, group, organization and or institution.
36. It is the Respondent's submission that the Claimant's resignation letter dated 15/10/2018 raised various issues and further wanted to be compensated. From this, the Claimant had no intention to continue working for the Respondent, therefore, the Respondent did not in any way compel, suggest and/or make the work environment intolerable for the Claimant to render his resignation.

Analysis and Determination

37. Having considered the pleadings, affidavits, evidence in court and submissions, the main issue for determination is whether the Claimant was constructively dismissed or resigned voluntarily.
38. The definition of constructive dismissal was given by the Court of Appeal in the case of Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR as –
 - 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 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 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.”

39. The court further stated in its decision in *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga* [supra] as follows:

“The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer’s behaviour towards him was so unreasonable that he could not be expected to stay- this is the unreasonable test. The second interpretation is that the employer’s conduct is so grave that it constitutes a repudiatory breach of the contract of employment- this is the contractual test.”

- 40. In the instant case, the Claimant himself testified that he suffered from depression due to the work environment and from March 2018 he did not go back to work but he received his salary up to October 2018. He produced several sick sheets forms from Mater Hospital, however, there is no evidence that these documents were submitted to the Respondent for approval and neither did he produce any medical reports/records on the said condition and why he did not avail himself at work for nearly a year.
- 41. It is the Respondent’s case and RW1 testimony that during the aforementioned period, the Claimant was paid his salary in full despite his absenteeism.
- 42. In the Claimant’s resignation letter dated 15th October, 2018 he cited several complaints but however he has failed to show that the Respondent acted in any manner that was in breach of the employment contract. It is evident that the Claimant due to the alleged illness which has not been proved was away from office and it would have been unreasonable to leave the position vacant for an indefinite period.
- 43. The letters annexed in court by the Claimant dated 14th October 2018 and 15th October 2018 were complaints by the Claimant and the one of 15th October 2018 he said he had been constructively dismissed and that the respondent no longer deserved to be called his employer. He then made a list of demands of the dues he expected to be compensated.
- 44. Meanwhile the Respondents had written to him on 2nd October 2018 asking him to provide the medical reports as he was alleging he was unwell. He was asked to report back to work by 15th October 2018. The communication by the respondent was not consistent with an employer who created a toxic working environment consistent to justify constructive dismissal. The court finds this is a case where the Claimant discharged himself voluntarily from his employment.
- 45. The court has also noted that the Claimant used unsavoury language in his letters and at some point even the Respondent asked him to be careful with his communication. He complained that the Respondent curtailed his university program and that led to embarrassment and inconvenience. The Respondent instead says he paid the Claimant’s university fees for a semester and could not pay any more. It was also not part of the contract to pay for the Claimant’s fees and hence that allegation does not hold water.



46. The court does not find the behaviour of the Respondent consistent to a situation where the employer places an employee under intolerable conditions forcing him to resign from his employment.

In case of Shighadi Sinoya -Vs- Avietech Systems Limited (2017) eKLR the court held

“The duty is upon the employee to demonstrate such intolerable circumstances and conditions for the court to make a finding that indeed placed under such conditions, the employee was justified in tendering resignation, such a claim must be pleaded and evidence advanced to this effect.”

47. The Claimant admitted he never went to work from March 2018 to 15th October 2018 and he admitted he received his salary during the period. This as earlier said is not a behaviour of an employer who is harassing an employee in order to force him to resign from his employment.

48. From the pleadings and evidence tendered herein the court is well satisfied that the Claimant discharged himself from his employment with no pressure and so his claim for compensation per his claim fails and so is dismissed.

49. He is however to be given his certificate of service within 30 days.

50. The court orders each party to meet their respective costs of the suit.

Orders accordingly.

Dated, Signed and Delivered virtually in Nairobi this 4th Day of October, 2024.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

