



**Wambui v Copy Cat Limited (Cause 255 of 2019)
[2024] KEELRC 13385 (KLR) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13385 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 255 OF 2019
DKN MARETE, J
NOVEMBER 27, 2024**

BETWEEN

CATHERINE WAMBUI CLAIMANT

AND

THE COPY CAT LIMITED RESPONDENT

JUDGMENT

1 The matter was originated by way of a Memorandum of Claim dated 15th April, 2019. The issue in dispute is therein cited as;

Unfair and unlawful termination of employment by way of constructive dismissal.

2 The Respondent in a Response to the Memorandum of claim and counter claim dated 14th August, 2019 denies the claim and prays that it be dismissed with costs. He also enters a counter claim of Kshs.25,064.63.

3 The claimant's case is that she joined the Respondent on 2nd October, 2017 vide a letter of offer of employment signed and accepted on even date.

4 The claimant's further case is that in the month of November, she did her first appraisal on probation with Angie Macharia and Priscila Ngugi. On 10th November, 2018, she was issued with a letter of appointment as the Respondent's employee with a confirmation on 25th April, 2018 as Project Management Officer.

5 The Claimant's other case is that in May, 2018 she was assigned a huge project, a construction site known as Ole Sereni2. She thereafter started being sickly and would be in and out of hospital. She however informed Priscilla Ngugi her immediate supervisor once time she visited hospital.

Other averments on the Claimant's case came out as follows;



In September, 2019, the sickness got worse and she visited AAR Hospital, Karen Branch and Westland – Sarit Centre. The AAR doctor advised the Claimant to stay away from construction site as it may even caused her illness to aggravate. On 19th October, 2018, she was invited to a staff engagement meeting at 0830 hours by the Human Resource Manager. It was not clear as to what the meeting was all about. Angie Macharia informed her that it was just a regular meeting of the HR office and Projects Management office. In the meeting were the Respondent's Head of HR, Human Resource Business Partner-Talent Management and her supervisor. At this meeting, she was asked about her work and relationship with her boss and answered by highlighting the challenges she was facing. Her supervisor, Pricilla Maina confirmed that she was having a hard time working with the Claimant due to her medical condition and her being unreliable. The Claimant's supervisor reported that the Claimant kept lying that she was on site without disclosing where exactly she was. The Claimant was subjected to grilling questions related to her body and privacy and she was not able to answer as there was a man in the meeting. She broke down. An issue was raised on the genuinity of the letter from AAR Sarit Center. She was informed that she had already booked a doctor's appointment at 10.00 at the same day at Care n Cure Health Services with DR Kahenya P.N.P. She was not consulted over this doctor's appointment and the resultant medical report was not shared with her. The medical report was given to May Nyaga the HR and on questioning this, she was referred to pick a copy from the doctor. She was falsely accused of shouting a casual worker, Fiona Mulandi on a project she had done wrong. On 11th December, 2018, she was issued with a letter headed final warning to which she raised issues. On the same day, the Service Delivery Manager called her to a meeting at around noon where work related issues were raised without allowing the Claimant time to explain that these allegations were not true. She was humiliated and abused at this meeting. On 17th December, 2018, the Claimant was issued with a show cause letter alleging negligible performance. Her query on the letter was received with hostility by Angie Macharia and May Nyaga who ordered that she accepts the letter and goes back to her desk. The Respondent created a hostile working environment for the Claimant which made her resign involuntarily. Due to this hostility, the Claimant got depressed and decided to save her mental health by a protest resignation. She was not given time to serve notice. She was not paid her final dues pronounced at Kshs.144,894.00. The Respondent made a claim of the Claimant for Kshs.119,533.33 as Management Professional training bond and demanded a shortfall of Kshs.25,064.00. The Claimant was not under any loan or legal obligations to pay the Respondent for training as an employee. Her final dues are being held unlawfully. She lost her further employment at InfoGain Consulting on grounds of a background check with the immediate previous employer.

- 6 The Claimant avers that the Respondent's actions were unlawful, discriminatory and amounted to unfair termination of her employment. She suffered loss, damages, prejudice, humiliation and embarrassment for which she holds the Respondent responsible and further claims against the Respondent.
- 7 Particulars of unlawfulness and unfairness
 - a. Forced medical examination and non-disclosure of the results.
 - b. Fabricated charges and faulty disciplinary procedure.
 - c. Subjecting Claimant to humiliation and grilling her on her feminism in front of a man in the room, making her break down.
 - d. Forced resignation and unnecessary loss of employment.
 - e. Refusal to pay final dues.
 - f. Malicious slander and lies resulting in another loss of job.



- g. Refusal to issue certificate of service till it was demanded by Lawyer.
- 8 She prays as follows;
- a. Maximum compensation of 12 months for unfair and unlawful termination.
 - b. Monies withheld under the guise of training bond.
 - c. 7 days worked till 7th January, 2019.
 - d. 4.5 days of unutilized leave.
 - e. One month's salary in lieu of notice.
 - f. Five years' salaries lost at InfoGain Consulting, caused by Respondent.
 - g. Commitment to civil jail of Angie Macharia, May Nyaga and Priscilla Cheptoo for committing offences under the Employment Act, 2007.
- 9 The Respondent's case is that admission of employment of the Claimant. She was assigned the supervision of Ole Sereni 2 Project as she reported to her immediate supervisor who was in charge of the project.
- 10 The Respondent's other case is that the Claimant submitted the medical Report from AAR Medical after her supervisor had requested her about leaving projects unattended and client dissatisfaction. She had previously not complained of any illness.

Other averments by the Respondent include;

The Claimant submitted her medical report from AAR Medical and requested off site based on the medical advice by the doctor. The Respondent provides Personal Protection Equipment (PPE) to all her field officers including the Claimant. The meeting of 19th October, 2019 was called by the head of HR after being presented with the medical facility report to clarify issues raised in it and also discuss her failure to attend to her project sites. This was upon complains on the Claimant's failure to attend project sites. It was suggested to the Claimant that the Respondent wanted her to undergo a second medical test by a doctor in the company panel of medical providers to confirm the diagnostics by the AAR doctor. This test was agreed on by the parties. The Claimant was issued with a final warning letter for feigning sickness to abscond duty. The meeting complained of was held to discuss Claimant's conduct while dealing with employees under the Service Delivery Department and in particular her altercation with Fiona. The Claimant never objected to the warning letter and had no right to appeal over the same. The Respondent is an institution that upholds human rights and dignity and fair labour practices. It has created a conducive and friendly working environment for all its employees. The Claimant's resignation was voluntary and to avoid disciplinary hearing scheduled for January 2019. Loan with Standard Bank was declined due to disciplinary issues and again, she opted to resign. That her terminal dues went on to offset training bond monies which had been executed and agreed on. She owed Kshs.119,533.33. The Respondent counter claims Kshs.25,064.00 in respect of unpaid bond monies. She was released instantly upon resignation due to her poor performance and that she would not add any value to the business.

- 11 The issues for determination are;
1. Whether the Claimant voluntarily resigned or was constructively dismissed by the Respondent.
 2. Whether the Claimant is entitled to the reliefs sought.



3. Whether the Respondent is entitled to the counter claim.
4. Who bears the costs of this cause?
- 12 The first issue for determination is whether the Claimant voluntarily resigned or was constructively dismissed by the Respondent. The Claimant in her written submissions dated 23rd February, 2024 brings out a case of constructive termination of employment in reiteration of her claim.
- 13 The Claimant reiterates her case and at paragraphs 14 to 19 of her written submissions he recites a case of constructive dismissal through the actions of the Respondent towards her at work. She also seeks to rely on the authority of *Coca Cola East and Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR where the Court of Appeal observed as follows;
- “Constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of the employee – unless waiver, estoppel or acquiescence is in issue. Conduct by an immediate supervisor or supervisor may be enough to justify constructive dismissal. . . An employer is required not to behave in a way that amounts to repudiatory breach of contract”.
- 14 The Respondent on the other hand denies constructive dismissal and seeks to rely on the authority of *Max Masoud Roshankar & Another v Sky Aero Limited* [2015] eKLR where the Court held thus;
- “ . . . Constructive dismissal, also called Constructive discharge, occurs when employees resign because their employer’s behavior has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntarily, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge. In the case of *Emmanuel Mutisya Solomon versus Agility Logistics*, Cause No. 1448 of 2011 the court held that the basics are that constructive dismissal may be defined as a situation in the workplace, which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee to such an extent that the employee has no other option available but to resign . . . ”
- 15 She further seeks to rely on the authority of *Nathan Ogada Atiagaga Vs David Engineering Limited Cause No. 419 of 2014* where the court observed thus;
- “Constructive dismissal occurs when an employee resigns because their employer’s behavior 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.”
- 16 The Respondent submits that the burden of proof of constructive dismissal lays on the employee and cannot be taken away by the provisions of Section 43(1) and 47(5) of the *Employment Act*, 2007 as was illustrated in the authority of *Kennedy Maina Mirera vs Barclays Bank of Kenya* (2018) eKLR. This is also illustrated in the authority of *Nathan Ogada Atiagaga vs David Engineering Limited* where the court held thus;
- “ . . . It is for the employee to prove that the employer was responsible for introducing the intolerable condition and for the employee to prove that there was no other way of resolving the issue except for resignation. In other words, it is not for the employer or the Respondent



in this case to show that he did not introduce any intolerable condition it is for the employee to show that he did.”

- 17 A scrutiny of the respective cases of the parties tilts this in favour of the Respondent. This is because the Claimant has failed to prove a case of constructive dismissal in the circumstances. The Respondent’s case is that from day one, the Claimant was not able to manage her docket appropriately and skipped duty, her assignments and site visits. These issues were raised before the Claimant and also discussed in meetings of which no solution was found.
- 18 The Claimant all this time lived in denial and would not accept default on her part. She would not exonerate herself from the suspicious medical letter from AAR health care, Sarit Center recommending a change of work environment. This also includes the work related issue of an altercation with Fiona, a junior employee of the Respondent.
- 19 It would appear that the Claimant’s conduct and performance led to the show cause letter and intended disciplinary proceedings and therefore her eventual resignation. The Respondent cannot be faulted for demanding performance and accountability on the part of the Claimant. She cannot also be faulted for demanding a comparative and second opinion medical report from her panel of doctors.
- 20 I therefore find a case of no constructive dismissal of the Claimant by the Respondent. There are no compelling circumstances that raise issues of hostility and animosity on the part of the Respondent. The Respondent merely insisted on performance on the part of the Claimant and this made her resign. This was on her own volition and not instigated by the employer. I therefore find a case of no constructive dismissal of the Claimant by the Respondent and hold as such. And this answers the 1st issue for determination.
- 21 The 2nd issue for determination is whether the Claimant is entitled to the reliefs sought. She is not. Having lost on a case of constructive dismissal, she becomes disentitled to the reliefs sought.
- 22 The 3rd issue for determination is whether the Respondent is entitled to the counter claim. The amount claimed is Kshs.25,064.00 being unpaid bond monies. This may not be a necessary award in the circumstances. Suffering an exit from employment is punitive enough and the Claimant has paid her price in this. It would not be necessary to involve her in any further altercation with the Respondent, or at all.
- 23 I am therefore inclined to dismiss the claim with orders that each part bears their costs of the same.

DELIVERED, DATED AND SIGNED THIS 27TH DAY OF NOVEMBER 2024.

D. K. NJAGI MARETE

JUDGE

Appearances

Mr. Githinji holding brief for Gatore instructed by Gatore, Jay & Co. Advocates for the Claimant.

Miss Akinyi instructed by Dennis Anyoka Moturi & Company Advocates for the Respondent.

