



**Obwogo v Verve KO Limited (Cause 621 of 2019)  
[2024] KEELRC 2741 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2741 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 621 OF 2019  
L NDOLO, J  
NOVEMBER 7, 2024**

**BETWEEN**

**FRANCIS NYAKUNDI OBWOGO ..... CLAIMANT**

**AND**

**VERVE KO LIMITED ..... RESPONDENT**

**JUDGMENT**

1. By a Statement of Claim dated 13<sup>th</sup> September 2019, the Claimant lays a claim of constructive dismissal against the Respondent. The Respondent filed a Response dated 13<sup>th</sup> March 2020 and amended on 29<sup>th</sup> June 2023. The Claimant filed a Reply to amended Statement of Response dated 11<sup>th</sup> July 2023.
2. The matter went to trial where the Claimant testified on his own behalf and the Respondent called its Technical Manager, Mwathi Kamau. The parties also filed written submissions.

**The Claimant’s Case**

3. By an employment contract dated 25<sup>th</sup> August 2014, the Claimant was engaged by the Respondent as a Systems Engineer/Consultant earning a gross monthly salary of Kshs. 250,000, which was later increased to Kshs. 275,000.
4. The Claimant states that sometime in 2018, the Respondent failed to pay his lawful dues, making it impossible for him to meet his financial needs or to discharge his duties as an employee. He claims to have inquired about the non-payment of his salary and bonus totalling Kshs. 1,457,000 upon which he was paid Kshs. 200,000 as part payment.
5. The Claimant’s case is that the Respondent’s action forced him out of employment. He therefore claims the following:
  - a. 1 month’s salary in lieu of notice.....Kshs. 275,000



- b. Outstanding salary for 2018 and 2019.....1,005,000
- c. Service pay for 4 years.....550,000
- d. 12 months' salary in compensation.....3,300,000
- e. Costs plus interest

### **The Respondent's Case**

- 6. In its Reply as amended on 29<sup>th</sup> June 2023, the Respondent admits having employed the Claimant but denies that he was constructively terminated. The Respondent accuses the Claimant of breaching his employment contract, by deserting work without notice.
- 7. The Respondent denies owing the Claimant Kshs. 1,457,00 in salary arrears but admits having paid him Kshs. 200,000 as part of his salary arrears. The Respondent claims to have paid to the Claimant an initial sum of Kshs. 50,000 in March 2019 in addition to the Kshs. 200,000 paid in May 2019.
- 8. The Respondent denies having defaulted in paying the Claimant his salary and adds that the Claimant was not contractually entitled to any bonus or service pay.

### **Findings and Determination**

- 9. There are two (2) issues for determination in this case:
  - a. Whether the Claimant has proved a case of constructive dismissal;
  - b. Whether the Claimant is entitled to the remedies sought.

### **Constructive Dismissal?**

- 10. The Claimant advances a claim of constructive dismissal against the Respondent. Constructive dismissal was defined in Nathan Ogada Atiagaga v David Engineering Limited [2015] eKLR in the following terms:

“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.”

- 11. 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.
12. The Claimant did not avail any resignation letter to the Court. In fact, from the evidence on record, it would appear that the Claimant simply walked away from his employment.
  13. On its part, the Respondent accuses the Claimant of deserting duty. However, desertion as an administrative offence must also be proved. As held in *Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School* [2015] eKLR an employer alleging desertion of duty by an employee is required to show efforts made towards summoning the employee to show cause why their employment should not be terminated on account of desertion.
  14. In the circumstances of this case, neither constructive dismissal nor desertion of duty has been proved. It seems to me that the parties allowed the employment relationship to fizzle out.
  15. The claims for compensation and notice pay are therefore without basis and are disallowed.

#### **Other Claims**

16. The Claimant also claims Kshs. 1,005,000 as outstanding salaries for 2018 and 2019. This claim would fall under special damages, which must be specifically pleaded and proved. The Claimant did not discharge his burden under this head and the only finding to make is that this claim was not proved.
17. By his own admission, the Claimant was a contributing member of the National Social Security Fund (NSSF). There is therefore no basis for the claim for service pay.
18. Finally, the Claimant's entire claim fails and is dismissed with an order that each party will bear their own costs.
19. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 7<sup>TH</sup> DAY OF NOVEMBER 2024.**

**LINNET NDOLO**

**JUDGE**

#### **Appearance:**

Mr. Orina for the Claimant

Mr. Omuganda for the Respondent

