



**Tresor Limited v Rotich (Employment and Labour Relations Appeal E054 of 2022) [2024] KEELRC 2729 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2729 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E054 OF 2022  
MA ONYANGO, J  
NOVEMBER 7, 2024**

**BETWEEN**

**TRESOR LIMITED ..... APPELLANT**

**AND**

**GLEN KIPNGETICH ROTICH ..... RESPONDENT**

*(Being an appeal against the Judgment and Decree of the Principal Magistrate Honourable B.K. KIPTOO delivered on 25th November 2022 in Eldoret CMELRC No. E054 of 2022)*

**JUDGMENT**

1. The Appellant herein was the Respondent, while the Respondent was the Claimant in Eldoret CMELRC No. E054 of 2022 where the Respondent had sued the Appellant vide a Statement of Claim dated 2<sup>nd</sup> June 2021 seeking compensation and terminal dues for the alleged unfair termination of her employment.
2. After hearing the parties, the trial court delivered its judgment on 25<sup>th</sup> November 2022 and held that the Respondent had been terminated unprocedurally from employment by the Appellant. The Respondent was awarded compensatory damages of 3 months' salary for the unprocedural termination and one months' salary in lieu of notice making a total of Kshs. 80,000.
3. The Appellant being dissatisfied with the said Judgement filed the instant appeal vide the Memorandum of Appeal dated 7<sup>th</sup> December 2022 and filed in court on 9<sup>th</sup> December 2022. It raises the following grounds of appeal:
  - i. That the Honourable Senior Principal Magistrate erred in law and/or fact by holding that the Appellant's conduct against the Respondent constituted constructive dismissal.
  - ii. That the Honourable Senior Principal Magistrate erred in law and/or fact that the Respondent procedure for dismissal was unlawful and unfair



- iii. That the Honourable Principal Magistrate erred in law and/or fact by failing to address herself to the clear contents of the Statement of Claim dated 25<sup>th</sup> June 2022, the evidence adduced by the Appellant in his testimony and their written submissions.
  - iv. That the Honourable Senior Principal Magistrate erred in law and/or fact by awarding compensatory damages, yet the Respondent employment contract was never terminated by the Appellant.
  - v. That the Honourable Principal Magistrate erred in law and/or fact to underscore fact that the no iota of evidence was adduced by the Respondent, to the effect that his employment contract was terminated by the Appellant.
  - vi. That the Honourable Principal Magistrate erred in law and/or fact by mis-directing himself by deeming a suspension of lending operation letter dated 16<sup>th</sup> March 2021, addressed to the Respondent; to be a termination letter.
  - vii. That the Honourable Principal Magistrate erred in law and/or fact by failing to address himself to the modus operandi of the Appellant company, when an issue audit process was instituted on the said companies lending system.
4. Consequently, the Appellant seeks the following orders:
- i. That the Appeal herein be allowed and the Judgment dated 25<sup>th</sup> November 2022 be set aside and dismissed with costs to the Appellant.
  - ii. That the Respondent be condemned to pay costs of this Appeal.
5. The appeal was disposed of by way of written submissions. The Appellant filed its written submissions on 17<sup>th</sup> October 2023 while the Respondent filed his submissions on 3<sup>rd</sup> October 2023.

#### **Appellant's submissions**

- 6. The Appellant submitted that the finding by the trial court that the Respondent was constructively dismissed vide the letter dated 16<sup>th</sup> March 2022 was erroneous as the letter dated 16<sup>th</sup> March 2021 only directed the Respondent to proceed on a non-working leave pending completion of the audit process.
- 7. The Appellant also submitted that the letter dated 16<sup>th</sup> March 2021 only dictated that the Respondent proceed on non-working leave and the company's lending operation system be suspended pending the completion of its audit process, and as such, the Respondent was never dismissed from employment as alleged. The Appellant submitted that the Respondent was still its bona fide employee.
- 8. For emphasis, the Appellant cited the cases of *Matesho v Newton (Cause No. 9 of 2019) (2022) KEELRC 1554 (KLR) (29 July 2022)*, *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga (2015) eKLR* and *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd (2013) eKLR* where constructive dismissal was discussed.
- 9. Regarding the compensatory damages awarded to the Respondent by the trial court, the Appellant urged the court to set aside the award of the trial court as the Respondent's employment was never terminated.
- 10. The Respondent on the other hand submitted that the trial court was right in finding that constructive dismissal had been proved. He contended that the Appellant sent him on an indefinite leave which action according to the Respondent is unfair and contrary to the best labour practices. The Respondent submitted that failure to pay an employee is a fundamental breach of the terms of an



employment relationship that discharges an employee from such employment engagement. In support of this position, the Respondent cited the case of *Humphrey Sitati v Board of Management Lenana School* (2020) eKLR

11. It is the Respondent's submission that the Appellant's claim that he is still its employee is a contradiction as the Respondent has not received any remuneration since being placed on indefinite leave, and he has not been assigned any tasks or duties by the Appellant. The Respondent submits that the engagement of the employee in work is a fundamental term of an employment contract. The Respondent placed reliance on the case of *Coca Cola East Africa v Maria Kagai Ligaga* (2015) eKLR Civil Appeal No. 20 of 2020.
12. Lastly the Respondent submitted that there is no basis to interfere with the compensation awarded by the learned magistrate as the Appellant has not demonstrated that the trial court erred, was misled, considered issues it should not have or omitted to consider relevant matters.
13. The Respondent urged the court to dismiss the appeal with costs.

### **Analysis and determination**

14. This being a first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123.
15. Having considered the record of appeal and the submissions made by both the appellant and the respondent, the following issues fall for determination:
  - a. Whether the Respondent was constructively dismissed
  - b. Whether the compensatory damages awarded to the Respondent by the trial court should stand.
16. The Black's Law Dictionary (Tenth Edition) defines constructive dismissal or discharge as:

“An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”
17. In the Court of Appeal decision in *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga* [2015] eKLR, cited by both parties in their submissions, the court while addressing itself to the issue of constructive dismissal observed 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.”
18. Based on the above authority, the question that this court ought to answer is whether the circumstances under which the Respondent left employment would constitute constructive dismissal.



19. The letter dated 16<sup>th</sup> March 2021 addressed to the Respondent by the Appellant read:

16<sup>th</sup> March 2021

To

Glen Rotich,

Senior Credit officer

0726037196

Dear Glen,

RE: Suspension of Our Lending Operations and Request to Proceed on Leave

As you are aware, we have noted an extensive bridge of our lending system – MIFOS on 14<sup>th</sup> February, 2021, where select client loans repayments were effected without our notice or evidence of payment!

We are therefore suspending all our operations with immediate effect to allow for an audit of all transactions and system controls. Access to our MIFOS system shall remain restricted for all staff until the audit process is complete.

This is to therefore notify you that you are expected to handover all loan application documents in your possession, including any company documents, promotional material, etc by close of business 16-March 2021. You will thereafter proceed on a non-working leave until further notice.

Please do prepare a summary list (typed) of all clients with overdue loans that you have been following up on as part of your handover notes to me today.

Thank you for your Cooperation,

Signed

Jushua Kibet/Managing Director

20. According to the Appellant, above letter did not have the effect of terminating the Respondent's employment but was just a measure taken to allow completion of the audit process of the Appellant's lending software. In this regard, the Appellant submitted that the Respondent is still its bona fide employee.
21. The Respondent on his part pleaded that the unpaid leave for an indefinite period amounted to constructive dismissal as he was not paid any remuneration from the time of being placed on indefinite leave and had not been assigned any tasks or duties by the Appellant since he was issued with the impugned letter.
22. The letter dated 16<sup>th</sup> March did not indicate to the Respondent the terms under in terms of duration and payment of his salary. At the time the Respondent moved to court he had not been paid salary. The Appellant stated in its Response to the Statement of Claim that it had not terminated the Respondent's services yet it was not paying salary as agreed. The Respondent was also left in suspense as to when he would resume work. These were clearly conditions that were not tolerable and entitled the Respondent to deem his employment as having been constructively terminated as was held in the cases cited by the parties in their submissions.



23. I therefore find that the trial court was right in concluding that the Respondent had been constructively dismissed. The court was also right in concluding that the constructive dismissal amounted to unfair and unlawful termination.

24. Having found I have no justification to disturb the award by the trial court.

25. The appeal is accordingly dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024**

**MAUREEN ONYANGO**

**JUDGE**

