



**Kikaya v Afrodip Limited (Cause E083 of 2023)
[2024] KEELRC 13317 (KLR) (3 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13317 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E083 OF 2023
JK GAKERI, J
DECEMBER 3, 2024**

BETWEEN

ANNET KANG'ASHI KIKAYA CLAIMANT

AND

AFRODIP LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit vide a statement of claim filed on 24th October, 2023 alleging constructive termination of employment by the Respondent.
2. It is the Claimant's case she started working for the Respondent on 5th October, 2020 at its Nairobi office and was transferred to Kisumu after 5 months from March 2021, at Kshs.85,788.92 per month and was designated as an Accountant in February 2022 and worked until 31st May, 2023 when he was suspended allegedly for gross misconduct and disruptive behaviour, although the Respondent had not expressed any dissatisfaction with her performance previously.
3. The claimant avers that she was invited for a disciplinary hearing held on 2nd June, 2023 but had no specific allegations and the outcome of the hearing was never communicated and no dues were remitted.
4. The Claimant alleges that she wrote a resignation letter at the instigation of the Respondent's Human Resource Representative, one Suzan Wairimu Muiruri as she feared losing her dues and was thus constructively dismissed.

The Claimant prays for:

- a. Declaration that termination of her employment and/or dismissal was unfair, wrongful, unprocedural and unlawful.
- b. Sum of Kshs.1,120,855.96 comprising;



- i. One months salary in lieu of notice.
- ii. 12 months compensation.
- iii. NSSF deductions for 8 months.
- iv. NHIF deduction for 8 months.
- c. General damages for sexual harassment.
- d. Certificate of service.
- e. Costs of this suit.
- f. Any other relief the Honourable Court may deem fit to grant.

Respondent's Case

5. The Respondent admits that the Claimant was its employee serving at its office in Kisumu as the Accountant.
6. That on or around 30th May, 2023 a stock count was conducted at the Kisumu Branch where significant disparities were identified in various products and money had been lost and the matter was reported to the police under OB No. 14/31/5/23 and the Claimant was suspended. That the Claimant and other employees were invited for a meeting held on 2nd June, 2023 to explain the disparities but the Claimant's explanation was unsatisfactory and she expressed her intention to resign and after a short break she presented a resignation letter and thus separated with the Company.
7. It is the respondent's case that the allegation made in her claim were not raised in the resignation letter.
8. It is the Respondent's case that the Claimant resigned from employment voluntarily and was not constructively dismissed.
9. The Respondent prays for dismissal of the Claimant's suit with costs and Kshs.55,941 as notice pay.

Claimant's Evidence

10. On cross-examination, the Claimant testified that she started working on with attachment, was appointed a marketer and later as an accountant.
11. It was her testimony that she was given a termination letter dated 31st May, 2023 but did not have a copy of the purported letter and read out the letter she had provided that she had been suspended from employment, not terminated.
12. That the meeting held on 2nd June, 2023 was a disciplinary hearing and was notified of the charges against her namely gross misconduct and destructive behaviour.
13. The witness denied having written a resignation letter but admitted having met Suzan Wairimu Muiruri after the meeting on 2nd June, 2023.
That she did not participate in the stock take but signed the same.
14. That the Manager, one Mr. Gokan sexually harassed her by pointing at her and calling her names.
15. The Claimant testified that she was not accorded a chance to speak after the meeting and went back to her place of work but could not access it until 5th June, 2023 when she went to collect her items.



16. The witness admitted that the contract of employment required either party to give a one (1) months notice of termination.
That she attended the meeting alone and no other letter was given.
The witness maintained that her employment was unlawfully terminated.
17. On re-examination the Claimant testified that she was notified of the two charges she faced and attended the disciplinary meeting.

Respondent' Evidence

18. CWI, Suzan Muiruri testified that she was the Head Accountant of the Respondent.
19. It was her testimony that on 30th May, 2023 a stock count was conducted and certain discrepancies were found and the relevant document was filed though it was not on the Respondent's letter head and the Claimant was the Accountant in Kisumu.
20. It was her testimony that the document prepared by the Respondent did not show that the Claimant was responsible for the discrepancies.
21. The witness confirmed that the matter was reported to the police and investigations conducted but no report was availed and the Claimant was not charged.
22. That the Claimant was invited for a meeting to discuss the issues and was not informed of the right to be accompanied by another employee as it was not a disciplinary hearing but a discussion and the Claimant was called upon to explain the discrepancies but expressed her desire to resign.
That the minutes of the meeting were not filed.
23. That the Claimant had no previous warning and had not filed NSSF and NHIF payments.
24. On re-examination, RWI testified that the Claimant's employment contract had a job description and it was her role to reconcile invoices and identify discrepancies.
25. That she participated in the stock count and signed the same and it was her duty to ensure that stocks were in order and the loss was of over Kshs.514,000.00 for the negative stock.
26. The witness testified that after she reported the matter to the police, it was their duty to investigate the matter.
27. That the letter dated 31st May, 2023 invited the Claimant "to attend a meeting" and not a disciplinary hearing.
28. The witness testified that the respondent could suspend an employee to investigate a particular matter.
29. It was her testimony that the Claimant's signature on the suspension letter was similar to that on her resignation letter.
That a warning could only be issued after a disciplinary hearing.
30. It was RWI's testimony that the Claimant's employment was not terminated and the Claimant had not availed evidence of any unpaid NSSF and NHIF deductions.



Claimant's Submissions

31. As to whether there was a repudiatory breach of contract by the Respondent, reliance was made on *Western Excavating (ECC) Ltd V Sharp* [1978] ICR 22, *Humphrey Sitati V Board of Management Lenana School* [2020] eKLR and *Naomi Achieng Oketch & 3 Others V Seeds of Peace Africa International (SODA) & Another* [2021] eKLR to urge that suspension of the Claimant was a repudiatory breach of contract of employment as it was indefinite and without pay.
32. As to whether the Claimant was accorded a fair hearing, Counsel cited the decision in *Anthony Mkale Chitavi V Malindi Water & Sewerage Co. Ltd* [2013] eKLR to urge that the Claimant was not accorded procedural fairness and the Respondent did not issue a notice to show cause as the letter dated 31st May, 2023 was not a notice to show cause.
33. On the alleged resignation, Counsel submitted that the Claimant did not accept or condone, the Respondent's actions and resigned on 2nd June, 2023 because of the improper trial after an indefinite suspension from employment.
34. Reliance was made on the sentiments of the Court in *Geoffrey Allan Tolo V Tobias O. Otieno & Another* [2022] eKLR. According to the Counsel, the sequence of events amounted to a repudiatory breach of the contract of employment.
35. In conclusion, counsel submitted that the Claimant was subjected to an intolerable and hostile environment and resigned and was thus constructively dismissed from employment.

Respondent's Submissions

36. By 28th November, 2024, the respondent had not filed submissions and no extension was granted as it had been served on time to file its submissions.

Analysis and determination

37. It is not disputed that the Claimant was an employee of the Respondent serving as its Accountant at the Kisumu Branch.
38. Equally not in contest is the fact the stock count took place at the Kisumu Branch on 30th May, 2023 and the claimant signed the outcome form as the Branch stock charge.
39. Documents on record also reveal that by letter dated 31st May, 2023, the Respondent, through one Gokhan Tokgozlu suspended the Claimant from employment for gross misconduct and disruptive behaviour.
40. Additionally, the letter invited the Claimant for a meeting scheduled for 2nd June, 2023 for a discussing on employment matters within the Claimant's knowledge.
The Claimant acknowledged receipt of the letter on the same day.
41. RWI also confirmed that the loss of monies was reported to the police as evidenced by a copy of OB No. 12/31/05/23 on record. However, no investigation report was filed nor was the Claimant arrested or charged.
42. Strangely, the Claimant alleges that she was constructively dismissed and unfairly terminated from employment simultaneously and was not accorded a hearing before the constructive dismissal.



43. The Respondent on the other hand maintains that the Claimant resigned from employment voluntarily and availed a copy of the resignation letter which the Claimant alleges was vitiated by the fear of loss of her terminal dues.

The issues for determination are:

- i. Whether the Claimant's employment was unlawfully terminated by the Respondent or she was constructively dismissed.
- ii. Whether the Claimant is entitled to the reliefs sought.

44. As to whether the Respondent terminated the Claimant's employment unfairly or unlawfully, the Claimant alleges that she was not accorded a fair hearing by the Respondent, nor allowed to be accompanied by a colleague and the charges lacked particulars.

45. The Respondent testified that it did not terminate the Claimant's employment, and in any case it did not issue a letter of termination.

46. Puzzlingly, on cross-examination the Claimant testified under oath that her employment was terminated and had been provided with a termination letter dated 31st May, 2023 but had no copy of the letter and when shown the suspension letter by the Respondent's advocate, she read it aloud that she had been suspended.

47. The Claimant was aware of the suspension and may have intended to mislead the Court as she later testified that the meeting scheduled for 2nd June, 2023 was a disciplinary hearing and was denied the right to be heard.

48. It is common ground that the Claimant attended the meeting on 2nd June, 2023 as an employee of the Respondent which contradicted her evidence that her employment was terminated vide letter dated 31st May, 2023, a copy of which she could not avail as none existed.

Under Section 47(5) of the *Employment Act* -

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

49. Emerging jurisprudence of this Court on the import of Section 47(5) of the *Employment Act* is that the employee is required to demonstrate a prima facie case of unfair termination of employment or wrongful dismissal for the burden of proof to shift to the employer under Section 41, 43, 44 and 45 of the *Employment Act*, to prove that it had a substantive justification for the termination of employment or wrongful dismissal and employed a fair procedure.

See Walter Ogal Anuro V Teachers Service Commission [2013] eKLR.

50. Although the Claimant testified that she was denied a hearing at the meeting held on 2nd June, 2023 and the charges against her lacked specificity, she could not avail a letter of termination of her employment or the date of termination.

51. Without credible evidence to prove that the Respondent terminated her employment contract and did so unfairly and unlawfully, the Court lacks any basis to find or hold that any termination of employment or wrongful dismissal had taken place.



52. In sum, it is the finding of the Court that the Claimant has failed to prove on a balance of probabilities that the Respondent terminated her employment contract unfairly.
53. As regards constructive dismissal, the Claimant appears to be saying that since she wrote the resignation letter at the instigation of the Respondent's Human Resource Representative and feared loss of benefits it amounted to a constructive dismissal.
54. The Respondent relies on the resignation letter to urge that the Claimant voluntarily resigned from employment.
55. Intriguingly, the Claimant confirmed on cross-examination that she did not write a resignation letter, a fact she admits in her written statement and relies on to show that she was constructively dismissed.
56. Needless to belabour the concept of constructive dismissal was domesticated in Kenya by the Court of Appeal in its decision in *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga* [2015] eKLR where the Court affirmed the contractual approach test which requires the party invoking constructive dismissal to show that the employer committed a repudiatory or fundamental breach of the contract of employment.
57. The classical rendition of what constitutes constructive dismissal are the sentiments of Lord Denning MR in *Western Excavating (ECC) Ltd V Sharp* (Supra) thus;
- “If the employer is guilty of conduct which is a 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, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.
- The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once...”
58. See also *Milton M. Sanya V Agha Khan Hospital Kisumu* [2017] eKLR and *Nathan Ogada Atiagaga V David Engineering Co. Ltd* [2015] eKLR.
59. In *Coca East & Central Africa Ltd V Maria Kagai Ligaga* (Supra) the Court of Appeal not only affirmed the contractual test approach, it additionally articulated the guiding principles such as fundamental terms of the contract of employment, whether repudiatory breach of a fundamental term has taken place, conduct of the employer must be fundamental and run to the root of the contract, causal link between the employer's conduct and the employee's resignation, leaving with or without notice, employee must not have accepted, waived, acquiesced or conducted him or herself to be estopped from pleading constructive dismissal.
60. In her written statement, the Claimant states that she enquired about her fate from one Suzan Wairimu Muiruri who told her that she would only receive her dues if she resigned. That Suzan Muiruri gave her blank paper and dictated the contents of the resignation letter and signed the letter as requested and did so out of fear that she would not be paid her dues.
61. As adverted to elsewhere in this judgment, on cross-examination the Claimant denied having written a resignation letter but admitted having met Suzan Muiruri after the meeting on 2nd June, 2023.



62. The Court finds it strange that the Claimant could recall meeting Suzan Muiruri after the meeting but could not recall her dictating the contents of the resignation letter to secure her dues.
63. The Claimant appears to have been economical with the truth and her contradictory evidence on the resignation letter is in the Court's view of limited probative value.
64. The Claimant has neither pleaded that Suzan Muiruri misrepresented facts, unduly influenced her or forced her to write the resignation letter dated 2nd June, 2024.
65. In sum, there is nothing discernible to suggest that the Claimant did not write the resignation letter voluntarily.
66. The Claimant has not adduced evidence to prove that the Respondent's conduct, if any, amounted to a repudiatory breach of the contract of employment. The tenor of the letter is self-explanatory.
67. Flowing from the foregoing, it is the finding of the Court that Respondents account of the events appears more credible.
68. In the upshot it is the finding of the Court that the Claimant has failed to prove on preponderance of probabilities that she was constructively dismissed from employment by the Respondent.

Appropriate relief

a. Declaration

Having found that the Claimant has failed to prove that she was constructively dismissed or that termination of her employment was unfair or unlawful, the declaration sought is unmerited and it is declined.

b. Salary in lieu of notice

This claim is unsustainable as the Claimant resigned voluntarily.

c. 12 months salary for constructive dismissal

Having found as herein above, this claim is for dismissal and it is accordingly dismissed.

d. General damages for sexual harassment

The Claimant's written statement dated 6th October, 2023 makes no reference to sexual harassment and no particulars are provided.

Indeed, the relief does not appear in her witness statement.

The claim lacks particulars and supportive evidence and it is dismissed.

e. NSSF and NHIF deductions for 8 months

These two claims lack particulars and supportive evidence.

It is unclear to the Court which months deductions were unremitted.

Statements from the relevant bodies would have demonstrated the true state of affairs effortlessly.

The claims are rejected.

f. Certificate of service

The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*.



69. Finally, although the Claimant has failed to prove her case against the Respondent, she is entitled to terminal dues that had accrued as at the date of resignation on 2nd June, 2023, such as unutilized leave days among others, if any.

70. In the end, the Claimants suit against the Respondent is dismissed for want of proof save for the issuance of a certificate of service within 30 days.

Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 3RD DAY OF DECEMBER, 2024.

DR. JACOB GAKERI

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 *Civil 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.

