



**Andika v Soloh World Inter-Enterprises Limited (Cause 1518 of 2017)
[2023] KEELRC 106 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 106 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1518 OF 2017
SC RUTTO, J
JANUARY 20, 2023**

BETWEEN

SOSPETER INZOFU ANDIKA CLAIMANT

AND

SOLOH WORLD INTER-ENTERPRISES LIMITED RESPONDENT

JUDGMENT

1. The claimant avers that he was employed by the respondent on August 1, 2007 as a machine operator. He avers that he worked with loyalty, dedication and diligence. That he was promoted to the position of Senior Production Supervisor in July, 2014 hence his salary rose to Kshs 45,000.00. That at the time of leaving the respondent's employment, his salary was Kshs 49,500.00.
2. The claimant further states he chose to retire early owing to unbearable working conditions. That at the time of his exit from employment, the respondent promised to pay him severance pay of Kshs 300,764.00 and unpaid leave of Kshs 22,836.00. That as a condition to receiving his dues, he was advised to write a letter indicating his desire to retire early. That the respondent did not pay his dues hence the instant claim through which he now seeks the sum of Kshs 323,582.00 being severance pay and unpaid leave days.
3. Opposing the claim, the respondent avers that after the claimant's promotion to Senior Production Supervisor, he was completely unable to cope with the pressure of work resulting in wastage, misuse and unaccounted printing materials. That despite warnings and the claimant's promise to improve, he was completely overwhelmed by his job and in June, 2015, he conceded that he was unable to perform and offered to resign. That the respondent does not have any package for early retirement for its employees and none was offered to the claimant. Consequently, the respondent has asked the Court to dismiss the claim with costs.
4. The matter proceeded for hearing on March 30, 2022 with each side calling oral evidence.



Claimant's case

5. The claimant testified in support of his case and to start with, he adopted his witness statement to constitute his evidence in chief. He proceeded to produce the documents filed together with his claim as his exhibits before court. This was with the exception of the internal memo which comprised a tabulation of his terminal dues. The same was therefore marked for identification.
6. The claimant stated that he believes his performance with the respondent was stellar as he did not receive any negative score in his appraisals. That in the period leading to his retirement, he started receiving unacceptable ill treatment by the directors of the company which comprised a married couple. That he was unduly harassed on account of a business rivalry between the said directors and he found himself caught in a difficult work environment.
7. That on June 16, 2015, he held a meeting with the management of the respondent where he aired his frustration as to how the company was treating him. That consequently, he was given three options; to deploy himself to another section, tender his resignation or do what he thought was right. That he chose to retire from employment. That in exchange of leaving the respondent's employment amicably, a retirement package was arranged and the respondent undertook to pay him a severance pay of Kshs 300,764.00 and Kshs 22,836.00 being unpaid leave days, on account of the fact that they had precipitated the unhappy events leading to his leaving employment.
8. That as a condition to receiving his dues, he was advised to write a letter indicating that he had made a decision to go on early retirement. That following his retirement, he made several enquiries from the Chief Executive Officer (CEO) of the respondent on the fate on his terminal dues but he was referred to the human resources department, who were supposedly computing his final dues.
9. That sometimes in July, 2015, he learnt that the respondent's human resources department had worked out his final dues and forwarded the same to the respondent's CEO, who refused to pay the same for inexplicable reasons. That he was given a copy of the said internal memo addressed to the respondent's CEO. That the said internal memo shows a retirement package of Kshs 300,764.00 and unpaid leave days of Kshs 22,836.00. That it also has deductions which the claimant contends are illegal.
10. That on May 10, 2017, he instructed his advocates to formally demand payment from the respondent who in turn, denied liability. The claimant avers that he is entitled to Kshs 323,582.00 being his retirement benefits and the respondent is estopped from denying this fact as his package was offered after he had agreed to leave the company's employment amicably.
11. The claimant asked the court to allow his claim and award him exemplary damages on account of the malice exhibited by the respondent in refusing to pay him his terminal dues more than two years after leaving employment.

Respondent's case

12. The respondent presented oral evidence through its CEO, Mr. Solomon Gitundu who testified as RW1. He adopted his witness statement to constitute his evidence in chief and proceeded to produce the documents filed on behalf of the respondent as exhibits before court.
13. RW1 denied the existence of any rivalry between himself and his wife in the running of the respondent company. That the two of them are the only shareholders and owners of the respondent and signatories to its bank accounts. That it is therefore impossible for the two of them to have a competition for business in the same company. He further stated that the claimant was overwhelmed by work when he



was promoted to the position of a supervisor hence his early retirement. That the claimant willingly and voluntarily left the respondent's employment and his dues were fully paid.

14. He further denied offering the claimant a retirement package. That the respondent does not have any package for early retirement of its employees. That he did not approve the internal memo as it was not provided for in the employment contract. That further, the claimant's contract of employment was strictly governed and or based on the terms of his signed contract dated July 14, 2014.
15. That he is not aware how the claimant got hold of the internal memo. That he did not approve the package as he was advised by the respondent's legal counsel that upon paying the claimant's National Social Security Funds (NSSF) benefits, there was no basis for the retirement package that was being proposed. He concluded his testimony by stating that the respondent does not owe the claimant any amount of money.

Submissions

16. The claimant submitted that his early retirement was prompted by the conduct of the management of the respondent. That the respondent through its management created a hostile working environment making it intolerable for him to work and or carry out his duties thereby leading to his subsequent resignation from duty. To support his submissions, the claimant cited the case of *Western Excavating (ECC) Ltd v Sharp* (1978) ICR 222. The claimant further submitted that his resignation was coerced by the actions of the respondent's management.
17. With regards to the benefits, the claimant submitted that the internal memo bears the word "approval signature" meaning the computation was approved by the respondent thereby entitling him to the payments.
18. On the other hand, the respondent submitted that the claimant resigned on his own volition. That there is nothing in the claimant's letter of resignation that can point an accusing finger on the respondent. In support of its submissions, the respondent invited the court to consider the determination in the case of *Coca Cola East and central Africa Limited v Maria Kagai Ligaga* (2015) eKLR and *Samuel Mbugua Kang'ethe v University Council Inorero University* (2016) eKLR.
19. The respondent further submitted that early retirement is a mutual agreement that must be accepted by the employer in a situation where it is applied by the employee and as such there cannot be early retirement if the same has not been approved by the employer. To this end, the respondent placed reliance on the case of *Gedeon Ikengu Ng'ang'a v Hon Attorney General* (2013) eKLR.
20. The respondent stated in further submission that the claimant had the burden to prove by tendering satisfactory evidence, that the parties mutually agreed to end the employment contract by way of early retirement.

Analysis and determination

21. Flowing from the pleadings on record, the evidence exhibited, and the opposing submissions, the court is being called to determine the following issues: -
 - i. Whether the claimant's early retirement was forced by the respondent.
 - ii. Whether the claimant is entitled to the reliefs sought.



Whether the claimant's early retirement was forced by the respondent

22. It is the claimant's case that his application for early retirement was not voluntary and that the same was occasioned by unbearable working conditions at the respondent company. The claimant specifically cited conflicting instructions from the directors of the respondent and averred that each wanted him to prioritize their assignments. The respondent on the other hand maintains that the claimant left its employment voluntarily upon conceding that he was unable to perform his responsibilities as a Senior Production Supervisor.
23. Essentially, the claimant is asserting that he was constructively dismissed from employment. Constructive dismissal is defined by the *Black's Law Dictionary* (10th Edition) to mean:
- “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.”
24. This issue was considered by the Court of Appeal in the case of *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga* [2015] eKLR and ultimately, the learned Judges pronounced the following, as the guiding principles in determining whether indeed, there is a case for 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 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.
25. The court further determined that the burden of proof lies with the employee. Drawing from the foregoing principles, the bottom line is that constructive dismissal arises where there has been repudiation of a fundamental term of the employment contract.
26. The question that now presents is whether given the circumstances in the instant case, the claimant retired voluntarily or was constructively dismissed.
27. I will start by revisiting the claimant's application for early retirement which is couched as follows:

“REF: EARLY RETIREMENT



As per the meeting we held in your office on Tuesday June 16, 2015, you gave me three options. So I have made up my mind to go on early retirement as from July 1, 2015. I sincerely thank you very much for the last eight years that I have worked with you. And also for the trust and cooperation for the time I have worked with Solohworldwide Ltd.

God bless you and God bless Solohworldwide.”

28. The claimant’s contention is that he opted to retire early upon being given three options by the respondent’s CEO. The three options according to the claimant were; to deploy himself to another section, tender his resignation or do what he thought was right. That consequently, he opted to proceed on early retirement. It is notable that the claimant did not state why opted to retire early. From his testimony, not all the options required him to leave the respondent’s employment. He had the option of remaining in employment but working in another section.
29. Further, the claimant did not cite the unbearable working conditions in his letter of early retirement. Quite to the Contrary, he thanked the respondent for the eight years of service. In the said letter, the claimant has neither laid blame on the respondent nor cited it for any wrong doing.
30. Applying the principles established by the Court of Appeal in the case of *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga* [supra] against the case herein, it is evident that the claimant has not stated any contractual breach on the part of the respondent that may have prompted him to exit its employment on early retirement. Indeed, he did not establish a causal link between his early retirement and the conduct of the respondent.
31. The fact that the respondent gave the claimant options to choose from, does not necessarily mean that he was constructively dismissed. This is further noting that he had the option to be deployed to another section hence he had an option to remain on the respondent’s employment.
32. In light of the foregoing, the court finds that the claimant has not established on a balance of probability that his early retirement was forced by the respondent hence was constructively dismissed. In any event, nothing turns on this issue as the claimant did not sue for constructive dismissal. His claim was essentially for the payment of his benefits.

Whether the claimant is entitled to the reliefs sought

33. The claimant has sought against the respondent severance pay and unpaid leave days. I find it imperative to clarify at this point that severance pay is payable under section 40(1) (g) of the *Employment Act* upon an employee’s exit on grounds of redundancy. Therefore, it is more probable that the claimant is seeking service pay which is payable under section 35(5) of the Act. My thinking accords with that of the court in the case of *Hema Hospital v Wilson Makongo Marwa* [2015] eKLR where it was held that:

“ There is, therefore, a distinction between “service pay” referred to in section 35(5) of the Act and “severance pay” under section 40(g) of the Act under which an employer is required to pay to an employee declared redundant severance pay “at the rate of not less than fifteen days’ pay for each completed year of service.” Based on the record, it was not the doctor’s case before the lower court that he was declared redundant so as to entitle him to claim severance pay. There was therefore no basis for the claim for severance pay.”

34. That said, I now turn to address the claimant’s claim. The basis of his claim is that the respondent undertook to pay him “severance pay” and leave days balance upon his amicable exit from its



employment. In support of his claim, the claimant placed reliance on an internal memo dated June 29, 2015, from the respondent's Human Resource Officer to the CEO.

35. The internal memo contains tabulations of the claimant's "severance pay" and leave days balance. The same contains the signatures of the respondent's head of finance and admin, the CEO and the director.
36. Notably, the said internal memo is an internal document within the respondent company hence the word "internal". Therefore, it is apparent that the same was meant for internal consumption within the respondent company. The same is not directed or addressed to the claimant. Indeed, despite the same containing approval signatures from the respondent's head of finance and admin, the CEO and the director, the same did not elicit an offer from the respondent to the claimant. Besides, the claimant did not state how he came to be in possession of the said internal memo.
37. The claimant would have rightfully claimed the sum contained in the said internal memo had the respondent extended an offer to him on that basis or made an express undertaking to pay the said sum. As it is, there is no express offer to the claimant on the basis of the said internal memo hence his claim to that extent cannot suffice.
38. In light of the foregoing, I am unable to find basis for the claimant's claim in the sum of Kshs 323,582.00.

Orders

39. In the final analysis, the claim is dismissed in its entirety with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JANUARY, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Inyangu

For the Respondent Ms. Njeri

Court Assistant Abdimalik Hussein

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 had 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.

STELLA RUTTO

JUDGE

