



REPUBLIC OF KENYA



**Njuguna v Lochab Transport Limited (Cause 613 of 2017)
[2023] KEELRC 92 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 92 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 613 OF 2017
AN MWAURE, J
JANUARY 19, 2023**

BETWEEN

ELIUD KIARIE NJUGUNA CLAIMANT

AND

LOCHAB TRANSPORT LIMITED RESPONDENT

JUDGMENT

1. The claimant claims unfair termination/dismissal and non-payment of terminal dues. By the memorandum of claim dated the 24/2/2017 and filed on the 30/3/2017, the claimant says that he was employed in July 2005 as a driver at a salary of ksh 25, 000/= per month. The respondent filed an amended reply to the claim dated the October 29, 2021.

Claimant's Case

2. Claimant states that around March 2014 he fell ill and upon being advised by the respondent he sought medical attention. He was to resume work upon full recovery. He underwent rigorous medical attention for months and upon attaining full recovery and being so certified to be fit to work he consequently reported back to duty in August 2015. He says that was in accordance to the respondent's advice to report back to work once he was healed.
3. He however says that to his surprise once he reported back to work he was turned away by the Assistant Manager telling him to wait for a call from the respondent which call never happened. The claimant avers that despite the assurance that he would be called back he was not called back and the respondent's Assistant Manager, declined to receive his calls and even ordered that he should never be allowed into the respondent's premises.
4. The claimant is of the position that the respondent's actions amounted to constructive dismissal from employment without any valid grounds to warrant such dismissal. He says that as a result of the abrupt and unfair termination from employment, he suffered loss of income, trauma and inability to meet his



continuing obligations for which he seeks compensatory damages calculated at 12 months gross salary being ksh 25,000 x 12 months.....Ksh 300,000/=.

5. The claimant prays for judgment against the respondent for:
 - a. A declaration that the constructive dismissal and /or termination of the claimant's employment was unlawful and unfair and that the claimant is entitled to payment of his terminal dues and compensatory damages
 - b. An order for the respondent to pay the claimant his due terminal benefits and compensatory damages totalling ksh 2, 611,667/= plus interest thereon.
 - c. Costs of the suit plus interest thereon.

respondent's Case

6. The respondent filed a notice of appointment on the May 9, 2017, and a reply to the claim on the May 17, 2017. The respondent says that the contract of service with the claimant was properly terminated as required by the law. That due notice to terminate was issued in April 2014 as provided for by the law due to persistent and unexplained absence from duty. The respondent however filed an amended response dated and declared they never terminated claimant's termination but that he got sick and could not work anymore as a truck driver.

Claimant's Evidence

7. Claimant's witness Eliud Kiarie Njuguna gave sworn testimony and adopted the witness statement dated the 24/2/2017 as his evidence in chief. He also produced the documents in the list dated the same date as exhibits 1-6 in the order in which they appear.
8. He testified that he was employed by the respondent from 2005 to 2014 and was terminated after falling sick. He was informed to go home without being given a sick off and with no information as to when to report back. He testified that when he returned to the office, he met Sarah who asked him to see her in the afternoon of August 2015 but she disappeared. He went the following day but was ordered not to go to the office again. He says that he was then informed not to enter the offices and so had no choice but to go and see an advocate. He said that he was not asked to produce a medical report and never received a salary when he was on sick leave.
9. On cross examination he said that he is aware of his contract dated the 22/8/2008 and stated that he started working in 2005 and contract reads 2008. Upon being referred to the contract, he said that he signed it though he was not sure who the other person who signed the contract on behalf of the respondent was.

Respondent's Evidence

10. Respondent witness Sarah Njambi gave sworn testimony. She adopted the witness statement dated the 15/2/2022 as her evidence in chief. She also adopted the documents in the list dated the 24/2/2022 as her exhibits in the case. On cross examination she said that she was informed by the claimant's supervisor of his illness but did not give the claimant leave letter as he was under supervision of the workshop Manager who was dealing with drivers. She informed the court the claimant was not summarily dismissed and she never reached out to the claimant as he was not reporting to her. She said she could not confirm if the claimant was subjected to medical assessment as she was in a different department.



Claimant's Submissions

11. The claimant submits that under section 45 of the *Employment Act*, 2007, the employer must not only prove the reason for the termination is valid and fair but also that the employment was in accordance with fair procedure. It is also the claimant's submissions that even if the respondent testifies in their defence that they never terminated the claimant however they did not file any document in court to show that they had called the claimant to resume his duties even after he had made follow ups. Therefore the assumption that the claimant was summarily dismissed is based on valid grounds.
12. The claimant relied on the case of *Anthony Mkala Chitavi v Malindi Water and Sewerage Company Limited* 2013 eKLR where it was held that 'his termination though procedurally fair, was substantively unfair because the respondent failed to prove the reasons for termination and that the reasons were valid and fair reasons. The claimant argued that in this case the claimant's termination was not justified and it was unlawful and unfair.
13. The claimant also relied on the case of *Walter Ogal Anuro versus Teachers Commission* 2013 where the court held that:

“For a termination of employment to pass the fairness test, there must be both substantive and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect termination.”
14. The claimant submits that the fairness test in this case was never achieved as there was no substantive justification for the respondent to terminate the claimant's employment and equally the claimant was never taken through a fair process before being dismissed.

Respondent's Submissions

15. The respondent submits that the claimant has failed to prove that the termination actually happened and that in this case, the claimant has failed to discharge his burden of proof under section 47(5) of the *Employment Act*. The respondent relied on the case of Kisumu ELRC Cause No 352 of 2014 *Maxmilla Bushuru v Anvi Emporium Limited* 2017 Eklr where Justice Maureen Onyango found that the

“respondent having denied that her employment was terminated, it was for her to prove on a balance on probabilities that she did not desert duties as alleged by Mr Pal who said that he was summoned to the Labour Office several months after the claimant failed to report back to work from annual leave.
16. The respondent argues that the import of this case is twofold. Firstly, the claimants in the foregoing case and the current one has commonality as in both cases the employee left the employer for one reason or the other and failed to come back and claims of having been dismissed were denied by the respective respondents. Both deserted their employment and should be treated equally under the doctrine of stare decisis. Secondly, where dismissal is denied as in this case, it is upon the claimant to prove that he did not desert. That in this case, the respondent's witness was the claimant's colleague and could not have been in a position to dismiss him.
17. The respondent further quoted the Court of Appeal in *Coca Cola East and Central Africa versus Maria Kagai Ligaga* 2015 e KLR for the proposition that 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 is so unreasonable that he could not be expected to stay. This is the reasonableness test. The second interpretation is that the employer's conduct is so grave that it constitutes repudiatory breach of the contract of employment. This is the contractual test. The respondent submits that neither the unreasonableness test nor the contractual test was pleaded and proven. The claimant did not demonstrate that the respondent conducted himself in such way that left him with no option but to leave or resign.

Issues for Determination.

- a. Whether the claimant was constructively dismissed
 - b. The remedy, if any, the claimant is entitled to.
18. It is common cause that the claimant was employed by the respondent as a driver. The court also has seen the first contract of employment signed on the 4/9/2007 indicating the commencement of the employment to be on the 21/7/2005. The claimant had therefore worked for the respondent since 2005 until 2015. According to the claimant's evidence, he fell ill in 2014 and had to seek medical attention.. It is stated in the claim that he reported back to work in August 2015. From the evidence of respondent witness, Sarah Njambi, she had learnt at the work place that indeed the claimant fell ill whilst at work. It is therefore beyond doubt that the main reason for the claimant's absence from work beginning March 2014 was that he fell ill necessitating medical intervention. In the amended response the respondent stated that claimant suffered epilepsy and could not continue working as a driver.
 19. In the witness statement of the respondent the witness on paragraph 6 of the statement states that the respondent impressed upon the claimant to receive adequate treatment since the duties of the driver could not and cannot allow someone who may suddenly have seizures to drive any kind of motor vehicle and put his life and that of other pedestrians at risk. At paragraph 9 and 10 the witness proceeds to state the concerns the respondent had in relation to the illness before informing the claimant to seek treatment and report back to work once certified medical professional certified that that he could be allowed to drive. At the same time, the respondent also maintains that the claimant voluntarily stayed away from workplace and was not terminated constructively as claimed.
 20. There is no evidence before the court that following the illness the claimant was asked to come back with the medical report certifying his fitness to drive. The court finds that nothing could have barred the respondent from asking the claimant for the medical report if at all this is what it required before allowing him back to the organisation. Indeed, the request for the report could have been made even after the claimant had engaged an advocate who wrote the demand letter. There is also no document before court that the respondent wrote any notification to the claimant regarding his alleged absence from work or had concerns on the prolonged absence of the claimant from workplace. The court accepts as the true account, the evidence given by the claimant that he went to the workplace on a number of occasions but the concerned respondent's personnel evaded him and that he was barred from going to the workplace.
 21. The reality of the case before court is that the respondent, as can be deduced from paragraph 5 of the witness statement, somehow felt that the medical condition of the claimant presented a long-term challenge to his work as a driver but was at pains explaining this to the claimant directly. It therefore resorted to strategic silence, ambiguity and being non-committal on steps that would have reasonably been expected of it in having the matter sorted out.



In section 41 of *employment act* the law provides the mandatory requirement of terminating employee for poor performance, gross misconduct or physical incapacity. The specific wording of section 41 of *employment act* is as follows: Section 41 *employment act*

41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
22. The employer cannot just remain silent and indifferent to the plight of his employee who is ailing and not even pay him his salary. This is an employee who had served the respondent for about nine years and it was in keeping with fair labour practice to follow the law of employment. The behaviour of the employer in this case cannot be interpreted in any other way but unfair termination.
23. In the case of *Coca Cola East & Central Africa Limited versus Maria Kagai Ligaga* 2015 e KLR the Court of Appeal set out the legal principles relevant to determining constructive dismissal to include the following:
- 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 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.
24. The court considering the claimant's evidence of being barred from entering the respondent's offices and the failure of the respondent to meaningfully engage the claimant regarding his work after reporting back entitled the claimant to consider himself constructively dismissed. It is curious that the respondent allocated a vehicle to the claimant to be driving by his letter dated November 2015 and yet goes ahead to inform the court that they were not aware that claimant was healed. This does not ring honest.



25. The respondent in its response claim they terminated the claimant fairly but in their amended response they claim that the claimant left employment because of his health and never reported back to work. This is a contradiction and of course is bound to raise questions.
26. Flowing from the foregoing the court finds the claimant's termination from employment was by dint of constructive termination and so was therefore unfair and contrary to section 41 as read with section 43 of the Employment Act 2007.
27. Judgement is therefore entered in favour of the claimant and he is awarded the following remedies:
- 1) The court considering the factors listed under section 49 (4) of the Employment Act 2007 awards under section 49 (1) (c) the equivalent of 12 months gross salary compensation for unfair termination. 25,000 x 12 = Kshs 300,000/-.
 - 2) The claimant is also awarded 1 month salary in lieu of notice Kshs 25,000/-.
 - 3) There was no evidence led in chief and the adopted statement explaining how the other benefits under paragraph 11 of the claim arose. These are service pay/gratuity, overtime, off days, public holidays and leave days. The prayers are therefore rejected.
 - 4) The respondent is to pay costs of the claim plus interest at court rates from date of judgment till full payment.

The final award to the claimant is Kshs 325,000/-.

Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JANUARY 2023.

ANNA N. MWAURE

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.

ANNA N. MWAURE

JUDGE

