



**Khayo v Borderless Tracking Limited (Cause 538 of 2019)
[2023] KEELRC 518 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 518 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 538 OF 2019
AN MWAURE, J
FEBRUARY 23, 2023**

BETWEEN

LILY KHAYO CLAIMANT

AND

BORDERLESS TRACKING LIMITED RESPONDENT

JUDGMENT

Introduction

1. The claimant filed the suit on the 20/8/2019 alleging unfair, unlawful and constructive dismissal from employment. The memorandum of claim is dated 5th August 2009. He says that pursuant to letter of appointment dated the 1st November, she was employed by the Respondent as the Human Resource and Administration Manager at a net salary of ksh 120,000/ per month.

Claimant's Case

2. Claimant states that upon her employment she was posted to the Respondent's office in Nairobi on Mombasa Road where she worked until the time of her unfair and unlawful dismissal and at no time was, she ever the subject of a warning, reprimand nor any disciplinary process.
3. The claimant avers that despite her ceaselessly serving the Respondent faithfully and diligently over the period of her employment, the Respondent through its general manager and the finance manager, engaged in unfair labour practices to the detriment of the claimant by subjecting her to unfavourable and harsh working conditions, perpetually insulting, abusing, use of profanities by the Respondent, bad mouthing and engaging the claimant in unnecessary confrontation.
4. The claimant says that in totality, the Respondent made the claimant's working environment and conditions deplorable, unfavourable and impossible for the claimant to continue working.



5. The claimant state that she had a sitting with the Chief Executive Officer, personnel of the Respondent where she highlighted her pleas in a bid to try and address the issues amicably but that too was in vain. The harsh working conditions persisted and as such, she had no choice but to resign at the earliest time possible
6. The claimant prays for the following orders as against the Respondent;
 - a. A declaration that the Respondent's conduct in handling the claimant during the pendency of her employment period amounted to unfair, unlawful and constructive dismissal in breach of the *Employment Act* 2007 and principles of employment law.
 - b. Damages for unfair and constructive dismissal from employment equivalent to 12 months net salary totalling to ksh 1,440,000/ with interests thereon at court rates from the date of the award until payment in full.
 - c. Compensation for loss of income for the period pending official retirement age.
 - d. Certificate of service
 - e. Costs of the suit plus interests thereon from the date of the award.
 - f. Any other relief which the honourable court may deem fit and just to grant in the circumstances

Respondent's case

7. The Respondent filed the memorandum of response on the 29/10/2019 and averred that the claimant through a letter dated 8th April, 2019, to the Director offered to resign from her position as the Human Resource and Administrative Manager.
8. He says that the claimant has never raised any complaint protesting that the working conditions were inappropriate to force her out of the company. The Respondent avers that the claimant was never summarily dismissed but instead opted to resign, resulting into constructive dismissal. The Respondent further state that the claimant simply resigned and that it is willing to issue the claimant with certificate of service. The Respondent asks that the suit be dismissed with costs.

Claimant's Evidence

9. Claimant witness Lily Khayo gave sworn testimony and testified that she is a Human Resource administrator by profession and worked for the Respondent as HR and Admin from the year 2018 on 1st November. She worked with the Respondent for 5 months and the work environment was not friendly and professional. She said that there was no good environment to execute her duties and her advice like on compliance with labour laws were not well received.
10. She testified that on checking the HR records there were no clear structures and compliance with law like statutory deductions which she raised and also noted that some employees did not have contracts. She raised the issues with the CEO, General Manager and Finance Manager and it looked like she was bothering the CEO. The management became a bit harsh. As HR practitioner she is aware organisation needs clear structures. She decided to quit work and when she consulted the CEO he told her to put it in writing. She told court that she proceeded and put her concerns in writing and then the CEO asked her to resign.
11. On cross-examination the claimant said that there was no compliance with labour laws and she raised those concerns with her supervisor on emails and made a report. It was her responsibility to implement



the labour laws but needed support of management. She said that she left the company in 2019 and statutory deductions were not adhered to even then. She said that personally her NSSF & PAYE dues were not remitted. She said she was never sued as the HR Manager for noncompliance with employment laws but would at times represent the organisation in some forums and defend it as it were.

Respondent's Witness

12. Respondent witness Esther Njeri Wainaina gave sworn testimony and stated that she was the General Manager but now is the CEO of the respondent. She adopted her witness statement dated the 22/10/2019 as her evidence in chief. She also produced the documents contained in the list dated the 22/10/2019 as her exhibits in the case as well as the memorandum of response.
13. She testified that she was the General Manager and claimant was working for Respondent as HR and Administrative Manager. She said that they had a good working relationship and travelled with the claimant to Nairobi to evaluate her. She further testified that she was the immediate supervisor of the claimant and yet claimant never raised any concern on the work environment. She received claimant's resignation letter on the 8/4/2019 and was shocked as she thought that she was getting on well. She stated that the allegations in the claimant's letter of resignation are not true. She told the court that the claimant had a feeling this witness was younger than her and maybe she was uncomfortable working under her. The procedure at the workplace was to lodge it complaints with the supervisor and so she should have written a letter to the CEO who would then handle the matter through mediation.
14. The witness further said that the Respondent has been in operations for over ten years and procedure for disputes would be to raise such through the HR by a letter which would be heard and investigations would be done and mediations. She says that they always resolved issues and nobody has had to resign. She further stated that she never confronted the claimant and they used to learn a lot from each other. She also said that once the employee issues a letter the supervisor would accept it once clearance is completed.
15. On cross examination she said that after claimant's probation period they agreed to extend it for another 2 months then and they agreed with the claimant in writing to that effect.

Claimant's Written Submissions

16. The claimant submits that the circumstances of the case herein amounted to constructive dismissal. The claimant relied, *inter alia*, on the case of [Nathan Ogada Atiagaga versus David Engineering Limited](#) 2015 eKLR where the court held that 'Constructive dismissal, occurs when an employee resigns because behaviour of employer 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 of the employee, the employer is trying to effect constructive discharge.
17. It is the submission of the claimant that she involuntarily resigned from her employment as the Respondent Company subjected her to unbearable conditions that she could no longer work at the Respondent's Company as she was subjected to unfavourable and harsh working conditions, was perpetually insulted, abused and profanities used against her and the Respondent disregarded her professional advice whenever she pointed out a number of compliance issues. She submits that the Respondent also refused to issue her with employment contract after the probation period expired.



18. The claimant also relied on the case of *Coca Cola East & Central Africa Limited versus Maria Kagai Ligaga* (2015) eKLR where court held:

“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.”

19. The claimant submits that based on this that the conditions created by the Respondent were very unbearable and that it caused repudiatory breach on the employment relationship.

Respondent’s Written Submissions

20. The Respondent submit that the claimant’s resignation does not constitute constructive dismissal and she did not give a list of history that would be considered a hostile working environment at work. The Respondent relied on the case of *Milton M Isanya versus Aga Khan* 2017 eKLR where the Court held that in constructive dismissal the desire to resign is from the employee as a result of hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tender’s resignation.
21. The Respondent contends that the claimant was not terminated but voluntarily resigned. The claimant’s resignation did not amount to constructive dismissal and the Respondent undertook to pay the claimant all the dues upon successful completion of clearance formalities.

Issues for Determination

- a. Whether the claimant was constructively dismissed from employment or there was mutual separation;
 - b. Whether the claimant is entitled to the reliefs sought.
22. In the case of *Milton M Isanya versus Aga Khan Hospital Kisumu* (2017) eKLR, it was held that “In constructive dismissal, the desire to resign is from the employee as a result of a hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tender’s resignation.”
23. The court also is reliant on the case of *Nathan Ogada Atiagaga versus David Engineering Limited* (2015) eKLR, referred to in the claimant’s submission, the court held that a “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.”



24. Also the court is persuaded by the citing in *Emmanuel Mutisya Solomon vs Agility Logistics* Cause No 1148 of 2011 where court held:

“Basics are that constructive dismissal may be defined as a situation in the workplace, which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee to such an extent that an employee has no other option available but to resign. The concept of constructive dismissal is underpinned on the notion that there is implied in a contract of employment a term that the employer will not, without reasonable and proper cause conduct itself in a manner calculated or highly likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Breach of that implied term will entitle the employee to treat him or herself as wrongfully dismissed.”

25. The claimant testified that she was frustrated by the Respondent at the work place and had to resign as a result of this. She says, among other things, that the Respondent did not give her a contract after completing the five (5) months’ probation period and this issue is also raised in her letter of resignation. The Respondent contrary to what one would envisage in an employment set up never addressed the issue. There is also no response to other serious issues raised in the letter regarding hostile work environment. And the claimant in the claim as well as the evidence made the allegations that mandatory statutory deductions were not being remitted to the necessary bodies which the Respondent had ample notice of and should have addressed by filing the same in court but this was not done in this case.

26. The court is supported on the above averment by the case of *Joseph Matiti maema & Others vs Kabiro Building Limited* Cause no 2041 of 2014 where court held:

“It is trite that an employer is required to keep all employment records for each employee. Once a claim such as this one is filed in court, under Rule 4 of the Court procedure Rules, a party to the suit is required to submit all evidence and submissions in support of their case. In the case of a Respondent who is also the employer, the work records, statements of payments and schedules of taking leave, off days and or rests days, when challenged by a Claimant that such were never taken or paid for, as of necessity, that is an invitation to the employer to submit all such records as they become relevant for the effective arbitration of the dispute. In this case, the Claimant have set out their claims but the Respondent only set out general denials and failed to submit any employment records or offer any evidence to controvert the claims made. The claims are therefore not challenged in any material way.”

27. The court also expected production of evidence to counter the claim that there was general non-compliance with labour regulations by the Respondent. This was a very serious issue and the Respondent being in custody of the said materials ought to have disproved the allegations by way of documentary material once the claimant had made them live issues in the claim and at trial.

28. The claimant averred that in her evidence that she attempted to give her professional advice and especially as concerning compliance with statutory deductions but was not acted on. She says the emails she wrote she cannot access them now since she left employment and were in the office laptop.

29. The case of *Coca Cola East & Central Africa Limited versus Maria Kagai Ligaga* 2015 eKLR 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.
30. Applying the above principles, the court finds firstly that failure to give contract of employment and terms of employment to the claimant after the period of probation had elapsed demonstrates the fundamental breach of employment contract. There was no sufficient explanation for this and yet in the letter of appointment during probation she had been promised an appointment letter in conjunction with the unaddressed complaints of the claimant which were a significant breach of the employment contract entitling the claimant to treat the contract as breached fundamentally. The claimant as can be seen from the letter of resignation dated the 8th April 2019 resigned owing to the actions she complained of. She had legitimate grounds to justify constructive dismissal.
31. Here is a Human resource and administrative manager whose advise is not being considered pertaining to compliance with statutory payments and other labour laws. She had also not received her contract and terms of employment together with her other colleague's contracts. She also averred that she worked in a hostile environment. She says she raised her concerns with the management and the CEO asked her to resign. Going by the contents of her letter of resignation the court is persuaded she was constructively dismissed from her employment and this amounted to unfair dismissal under provision of employment Act section 45 in particular and so respondent has to compensate.

Remedies

1. Claimant having worked for the respondent for less than one year she is awarded compensation for unfair termination equivalent to 2 months salary totalling kshs 240,000/-
2. She is however not awarded compensation for loss of earning pending official retirement as is not provided in law.
3. She shall receive her certificate of service within 14 days from date of judgment.
4. Costs are awarded to the claimant and interest at court rates from date of judgment till full payment. The effect of her final award is kshs 240,000/-

Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 23RD DAY OF FEBRUARY 2023.

ANNA NGIBUINI 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

