



**Simiyu v Kaymart Company Limited (Cause 1061 of 2017)
[2023] KEELRC 274 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 274 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1061 OF 2017
SC RUTTO, J
FEBRUARY 3, 2023**

BETWEEN

NOBERT WALELLA SIMIYU CLAIMANT

AND

KAYMART COMPANY LIMITED RESPONDENT

JUDGMENT

1. The claimant avers through his statement of claim dated 8th June, 2017, that he was employed by the respondent as a General Manager with effect from 12th April, 2014. That sometimes in November and December, 2016, the chief accountant and auditor failed to record purchase orders made and alleged that the non-Muslims managers were the ones who had not done their work properly. That on 16th January, 2017, the respondent through its strategic advisor issued him with a letter of suspension which was to take effect from 17th January, 2017. That subsequently, he visited the respondent's premises on 28th April, 2017 but was not allowed in.
2. He avers that the respondent did not engage him to get his side of the story hence was condemned unheard. The claimant further states that the respondent's conduct of keeping him out of its premises smacks bad faith and clearly showed him as an unwanted person. It is on account of the foregoing that the claimant now seeks against the respondent the sum of Kshs 8,113,333.33 being withheld salary from January to May, 2017, compensation for unwarranted discrimination, salary underpayment for 40 months, notice pay, compensatory damages for loss of employment, unutilized leave days, off days, prorate leave and service pay for three years.
3. Opposing the claim, the respondent stated that sometimes in January, 2017, its business was in a long-standing financial difficulty and kept suffering poor performance. That as such, it engaged a strategic advisor who deployed an audit team which reviewed the purchase records and discovered that the claimant was not keeping proper receipts of the inventory purchases and that most of the inventory items were reflecting negative stock. That the strategic advisors prepared their report demonstrating



that the claimant had been massively stealing from the respondent. That the claimant's suspension was therefore for just cause and was done procedurally. The respondent further denied the allegations of discrimination on the basis of race or religion. The respondent further denied any liability as alleged by the claimant and asked the Court to dismiss the claim with costs.

4. The matter was canvassed by way of oral evidence and production of exhibits. The claimant's case proceeded on 5th July, 2022 while the respondent presented its case on 26th July, 2022.

Claimant's case

5. At the start of the hearing, the claimant adopted his witness statement and bundle of documents filed together with his claim, to constitute his evidence in chief. He also produced the said documents as his exhibits before court.
6. It was his evidence that he worked for the respondent without blemish until 16th January, 2017 when he was suspended from work. That he responded to the letter of suspension on 24th February, 2017. That further, the respondent stopped his salary without informing him. He further stated that sometimes in July, 2014, the respondent's managing director by the name Mr. Ahmed Rashid Elmi having been impressed by his job and upon request for salary increment, promised to increase his salary from Kshs 50,000.00 to Kshs 100,000.00. That this was not effected despite his several reminders to Mr. Ahmed.
7. The claimant further averred that the respondent through its managers perpetrated discrimination on social, racial and religious grounds. That the Muslim employees were more favoured than their Christian counterparts while Kenyan Somalis were more favoured than non-Kenyan Somalis. To this end, the claimant cited the respondent for not taking any action on this issue. It was his further testimony that he was marked for dismissal for raising the issue of discrimination.
8. That the respondent's managing director approved his suspension and tactfully avoided his calls and failed to grant him audience or conduct a disciplinary hearing. That on 28th April, 2017, he visited his work place and the Manager pulled him out of the premises saying he was no longer needed there. That therefore, he presumed that he was constructively dismissed.
9. He further testified that the respondent's managing director had on 11th April, 2017, sent him an email saying "let me follow up and revert". That the said managing director is yet to revert yet he is aware of his plight. That todate, he is still on suspension and he has financial obligations to meet hence without a definitive position of his employment status, he has suffered beyond words.

Respondent's case

10. The respondent presented oral evidence through Mr. Alex Juma, who testified as RW1. Mr. Juma sought to rely on his witness statement as well as the bundle of documents filed on behalf of the respondent, which he asked the Court to adopt to constitute his evidence in chief.
11. RW1 stated in evidence that at the time in question, he held the position of floor supervisor and was a colleague of the claimant. That the report by the strategic advisors engaged by the respondent demonstrated theft by the claimant, which was evidenced by unchecked collusion with suppliers to inflate prices of stock purchased, delivering low volumes than those actually paid for and/or purchased alongside other financial and operational lapses.
12. That since theft by servant is a criminal offence, the respondent duly filed a complaint of the theft with the Directorate of Criminal Investigations (DCI) and submitted a detailed report. That however, the DCI is yet to update the respondent on the action taken.



13. That the respondent proceeded to suspend the claimant from duty so as to avoid interference with the audit process and to allow the strategic advisors complete their mandate and produce a final report. That therefore, the claimant's suspension was for just cause.
14. RW1 further stated that he believes that the respondent is an equal opportunity employer and does not discriminate against any person whether on account of race, nationality or religion and the claimant's allegations on this account are false and unsubstantiated.
15. He further testified that upon the claimant's suspension, he kept harassing the respondent's employees and directors and sending them insulting and vulgar messages via video recording. That this constituted conduct unbecoming of an employee and through a letter dated 17th February, 2017, he was asked to show cause why action should not be taken against him. That a complaint to this effect, was also recorded at the DCI.
16. That the respondent remains desirous of recovering moneys stolen by the claimant by way of collusion with suppliers. That as a General Manager, the claimant was responsible for approving his own leave and remitting contributions to the National Social Security Fund (NSSF).
17. That he is aware that the claimant separated from the respondent's employment on 17th January, 2017 more than four years ago, and that the employment relationship irretrievably broke down.

Submissions

18. It was submitted on behalf of the claimant that he was unfairly suspended without pay or hearing. That this was unfair and unlawful and amounted to constructive dismissal contrary to section 41, 43 and 45 of the *Employment Act*. That further, the prolonged suspension without pay and failure to grant the claimant a chance to be heard and defend himself of the allegations made against him ran contrary to the principles of natural justice, equity and fair play. It was further submitted that the respondent acted contrary to the provisions of section 5 of the *Employment Act* and Article 27 of *the Constitution*. That the respondent's actions further offended the International Labour Organisation Convention (ILO) No. 158 and sections 42, 43 and 45 of the *Employment Act*.
19. On its part, the respondent submitted that the claimant did not prove that he had been dismissed from employment. That without proof, the burden did not shift to the respondent to justify the reason for termination. To buttress its submissions, the respondent placed reliance on the cases of Richards Nyaundi Marasi vs Board of Management Geturi Mixed Secondary School (2017) eKLR and Luka Koriri vs Moi Teaching and Referral Hospital (2021) eKLR.
20. It was further submitted that the claimant was aware that his suspension was subject to no payment of salary and he did not raise any objection. The respondent cited the case of Francis Okumu Oketho vs Buzeki Enterprises Limited (2019) eKLR in support of its position.
21. It was the respondent's further submission that the exchange of letters sufficed and amounted to a fair hearing. To this end, it made reference to the cases of Kenya Revenue Authority vs Menginya Salim Murgani, Civil Appeal No. 108 of 2009 and Jacob Oriando Ochanda vs Kenya Hospital Association T/A Nairobi Hospital (2019) eKLR and Kenya Railways Corporation vs Gideon K. Mundi & 2 others (2018) eKLR.
22. With regards to the claim for constructive dismissal, the respondent submitted that the claimant did not tender any resignation from employment. That there is also no evidence that the claimant was frustrated by the respondent and that he had to leave employment. On this issue, the respondent relied



on the cases of Milton M Isanya vs Aga Khan Hospital Kisumu (2017) eKLR and Nathan Ogada Atiagaga vs David Engineering Limited (2015) eKLR.

Analysis and Determination

23. Flowing from the pleadings before Court, the evidence on record and the opposing submissions, the issues falling for the Court's determination are: -
- i. Whether the claimant's suspension amounted to constructive dismissal;
 - ii. Whether there is a case for discrimination; and
 - iii. What reliefs if any, avail to the claimant?

Whether the claimant's suspension amounted to constructive dismissal

24. It is not in dispute that the claimant was suspended from duty with effect from 17th January, 2017. The reason given for the suspension was pending data collection, consolidation and compilation of findings. Immediately thereafter, the claimant was issued with another suspension letter dated 17th February, 2017. The claimant's second letter of suspension set out allegations against him and his response to the same was required before 24th February, 2017. He was also reminded through the letter of suspension, that he was still on suspension and that the suspension was without pay.
25. It is that suspension from duty that the claimant has termed as unfair and unlawful and thus alleges constructive dismissal. The respondent holds otherwise and contends that there was no constructive dismissal as the claimant did not tender any resignation. It further contends that the claimant's suspension was justified and was undertaken procedurally.
26. The *Employment Act* has not assigned a definition to the term "constructive dismissal". Nonetheless, there have been ample judicial pronouncements on the issue. Case in point is Coca cola East & Central Africa Limited vs Maria Kagai Ligaga [2015] e KLR, where the Court of Appeal cited with approval the English case of Western Executive (ECC) Limited v Sharp [1978] 1 CR 222 in which Lord Denning held that: -
- "If the employer is guilty of conduct which is a significant breach that goes to the root of the contract of employment or which shows that the employer no longer intends to be bound by the 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."
27. The Court proceeded to highlight the following as the guiding principles in determining a case of 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.

28. In this case, the claimant's contract of employment was silent on the issue of suspension. Nonetheless, from the wording of the claimant's second letter of suspension, allegations were spelt out against him and he was required to show cause why disciplinary action should not be taken against him. Therefore, it marked the commencement of a disciplinary process against him. It can very well be said that it was in partial fulfilment of the requirements of section 41 of the *Employment Act*. The letter stated in part:

“In light of the above, your conduct is totally unbecoming of an employee of the company and you are therefore, required to submit a written explanation to the undersigned on or before 24.2.2017 as to why disciplinary action, including summary dismissal, should not be taken against you.”

29. From the record, the claimant responded to the allegations contained in the letter of suspension. However, it is apparent that upon the claimant submitting his response to the allegations leveled against him, there was no word or action from the respondent. This is evidenced by an email from the claimant to the respondent on 11th April, 2017, through which he was making an enquiry on the verdict of his suspension. The respondent reverted to the said enquiry through an email dispatched from ahmedrash62 to the claimant, stating as follows: “Let me follow and revert”.

30. There is no evidence from the respondent's end that beyond the claimant's second letter of suspension which also doubled up as a show cause, that it proceeded and concluded the disciplinary process commenced against him.

31. Having been subjected to a disciplinary process, it was the claimant's legitimate expectation that the same would be concluded either in his favour or against him. Indeed, he had been informed that summary dismissal was a possible outcome of the disciplinary process.

32. What manifests from the foregoing is that the claimant was placed on an indefinite suspension and his employment status remained unknown for a considerable amount of time. As a matter of fact, it was his evidence that at the time of the trial, he was still on suspension. This position was not controverted by the respondent and indeed, it confirmed that on its part, the claimant was on suspension and had not been terminated.

33. Regardless of the allegations leveled against him, the claimant deserved to know his fate in the respondent's employment.

34. By all means, it is not fair for an employer to keep an employee in abeyance for close to five years without communicating its decision from a disciplinary process.



35. What's more, RW1 stated in evidence that "the claimant separated from the respondent's employment on 17th January, 2017, more than 4 years ago."
36. One then wonders how the said separation took place if the claimant was never notified of the same. It can only be deduced that the respondent was in effect terminating the claimant's employment in the guise of a "suspension".
37. In the circumstances, the respondent's action of placing the claimant on suspension indefinitely without further action, clearly shows that the respondent was no longer interested in continuing with the employment contract. This amounted to a significant breach that went to the root of the employment contract. Therefore, the claimant was entitled to treat himself as constructively dismissed.
38. Indeed, the claimant's prolonged indefinite suspension without pay amounted to breach of a repudiatory term of the employment contract of service and fits the classic definition of constructive dismissal.
39. I must also add that the respondent's contention that there was no constructive dismissal as the claimant did not resign, does not hold water. In constructive dismissal, it is the conduct of an employer that is in question and not the employee's. In this case, the conduct of the respondent clearly indicated that it did not want to continue being bound by the terms of the employment contract. In such a case, what was the claimant supposed to do? How was he expected to resign when he was already out of employment indefinitely? What purpose would his resignation have served?
40. Granted, the respondent had all the right to place the claimant on suspension and subject him to a disciplinary process. However, the same ought to have been fair, reasonable and undertaken within the confines of the law. By all means, a suspension spanning close to five years cannot be termed as reasonable and fair.
41. In light of the foregoing, it is my finding that the claimant's prolonged and indefinite suspension amounted to constructive dismissal hence he was unfairly and unlawfully terminated from employment.

Whether there is a case for discrimination

42. The claimant has alleged that the respondent practiced discrimination on grounds of race, religion and ethnicity. Having alleged as much, the claimant had the burden of proving his claim to this extent, on a balance of probabilities.
43. The question as to what amounts to proof on a balance of probabilities was determined by Kimaru, J in the case of *William Kabogo Gitau vs George Thuo & 2 Others* [2010] 1 KLR 526, thus:

"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."
44. This position is also premised on the age long principle of law of "he who alleges must prove" and section 107 of the *Evidence Act*.



45. As per the Black's Law Dictionary, (10th Edition), the term "discrimination" is defined to mean: "Differential treatment; a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."
46. From the record, there is no evidence from the claimant's end to demonstrate that he was treated differently or less favourably compared to his counterparts on grounds of race, religion and ethnicity.
47. As I have stated before, the claimant had the onus to prove his case on a balance of probabilities and in absence of evidence to back up his claims, I cannot help but find that his allegations are unsubstantiated.
48. I now turn to determine the reliefs available to the claimant.

Reliefs

49. As the court has found that the claimant's termination was unfair and unlawful on account of constructive dismissal, he is entitled to compensatory damages under section 49 of the [Employment Act](#), 2007. To this end, I award him damages equivalent to eight (8) months of his gross salary. This award has taken into account the indefinite and prolonged suspension without pay, that the respondent subjected the claimant to. It is no doubt that this conduct exposed him to unfair labour practices and pecuniary embarrassment. In addition, he was placed in an unenviable position of anxiety as he was in the dark regarding his employment situation with the respondent.
50. The claimant is also entitled to one month's salary in lieu of notice as the court has found that his termination through constructive dismissal was unlawful.
51. With regards to the claim for underpayment, no evidence was adduced by the claimant to prove that he was entitled to payment of salary in the sum of Kshs 100,000.00. To this end, there was no documentation to suggest or indicate that the claimant had been promised the said salary increment. On that account, the claim collapses.
52. The claim for leave arrears partially succeeds as the respondent did not exhibit leave records in fulfillment of its obligation under section 74 (1) (f) of the [Employment Act](#), to prove that the claimant proceeded on leave as required under the law. However, pursuant to section 28(4) of the [Employment Act](#), any pending leave days can only be claimed upto 18 months preceding the claimant's exit from employment. Therefore, he is only entitled to leave pay for 18 months.
53. The claim for service pay is denied as there is evidence that the claimant was a registered member of the National Social Security Fund (NSSF). Therefore, this places him within the exclusions under section 35(6) (d) of the [Employment Act](#).

Orders

54. In the final analysis, I enter Judgment in favour of the claimant against the respondent and he is awarded: -
 - a. One month's salary in lieu of notice being the sum of Kshs 50,000.00.
 - b. Compensatory damages in the sum of Kshs 400,000.00 which sum is equivalent to 8 months of his gross salary.
 - c. Unpaid leave in the sum of Kshs 52,500.00.
 - d. The total award is Kshs 502,500.00.



e. Interest on the amount in (d) at court rates from the date of Judgement until payment in full.

55. The claimant shall have the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 3rd day of February, 2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Ongicho

For the Respondent Ms. Koko

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

