



REPUBLIC OF KENYA



**Musonye v Minolta Limited (Cause 136 of 2018)
[2023] KEELRC 645 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 645 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 136 OF 2018
JK GAKERI, J
MARCH 9, 2023**

BETWEEN

NICKSON MUSONYE CLAIMANT

AND

MINOLTA LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim alleging wrongful and unfair withholding of dues by the Respondent.
2. The Claimant avers that he was employed by the Respondent by a letter of appointment dated August 5, 2010 as a Truck driver at a salary of Kshs 25,000/= per month and the contract was terminable by a one month's notice or one month's salary in lieu of notice.
3. It is the Claimant's case that he served the Respondent diligently and efficiently until he opted to resign by giving a one month notice dated November 3, 2017.
4. The Claimant further avers that despite leaving procedurally, the Respondent declined and/or refused to pay his terminal dues.
5. The Claimant prays for;
 - i. A declaration that his terminal dues were wrongfully and/or unfairly withheld by the Respondent.
 - ii. Payment of full terminal dues as itemised in paragraph 7 comprising; Service pay for 7 years Kshs 187,684.00. Salary for the months of September and October, 2017 Kshs 55,624.00. Self-Help Group Dues deducted but not forwarded to the Self Help Group for 3 years and 4 months Kshs 40,000.00. NSSF contributions deducted but not remitted Kshs 8,000/= .NHIF deducted but not paid to NHIF Kshs 14,400/= Total Claim Kshs 305,708.00.



- iii. Costs of the suit.
- iv. Interest at commercial rates from date of lawful resignation.
- v. Any other relief that this Honourable Court may deem fit to award.

Respondent's case

6. The Respondent admitted that the Claimant had been its employee as a driver at the salary stated. It also admitted having received the Claimant's resignation notice.
7. The Respondent alleges that the Claimant was indolent and pathetic while undertaking his duties as a driver.
8. It is the Respondent's case that the Claimant was a member of the NSSF and was not entitled to service pay.
9. That the Claimant was duly discharged after tendering his resignation.
10. The Respondent prays for dismissal of the suit with costs.
11. The Claimant's counsel filed a Reply to the Memorandum of Response which merely affirmed the contents of the Memorandum of Claim.

Claimant's evidence

12. The Claimant adopted the written statement and rehashed the contents in court.

Respondent's evidence

13. Puzzlingly, although the Respondent filed its list of witnesses dated April 6, 2018 and identified one Michael Adede as its witness, it did not attach a witness statement and did not participate in the hearing on account of absence.
14. The suit was scheduled for hearing on June 8, 2022 but the Respondent did not attend. Despite the Claimant's counsel's readiness to proceed, hearing was postponed to October 24, 2022 and counsel was directed to serve and file affidavit of service which he did.
15. On the date of hearing, the Respondent's counsel was absent and the Claimant's counsel was ready to proceed and the hearing commenced at 11:27 am.

Claimant's submissions

16. The Claimant's counsel identified two issues for determination, namely;
 - i. Whether the Claimant was constructively dismissed.
 - ii. Whether the Claimant is entitled to the relief sought.
17. As regards constructive dismissal, reliance was made on the decisions in *Milton M Isanya v Aga Khan Hospital Kisumu (2017) eKLR* as well as *Douglas Omunyin Otungu v Board of Trustees Redeemed Christian Church (2022) eKLR* for an explanation of the concept of constructive dismissal and to urge that the Respondent was in breach of contract by failing to pay the Claimant's salary for 2 months which goes to the root of the contract and the Claimant gave notice of termination.



18. Other decisions relied upon to urge that the Claimant was constructively dismissed included the Court of Appeal decisions in *Leena Apparels (EPZ) Ltd v Nyevu Juma Ndokolani (2018) eKLR*, *Premier Construction Ltd v Joseph Bwire Lukala & 5 others (2017) eKLR*, and *Coca Cola East & Central Africa Ltd v Maria Kagai Ligaga (2015) eKLR*.
19. It was urged that the Claimant had satisfied the principles enunciated in *Coca Cola East & Central Africa v Maria Kagai Ligaga* (*Supra*).
20. As to whether the Claimant was entitled to the reliefs sought, counsel submitted that he was including a certificate of service which he had not prayed for.
21. The decision in *Morris Kavale Kasyoki v Narcol Aluminium Rolling Mills Ltd (2014) eKLR* was relied upon to urge that monies deducted for purposes of NSSF and/or NHIF but not remitted was recoverable by the employee.
22. The court was urged to find that the Claimant was constructively dismissed from employment.
23. The Respondent did not file submissions notwithstanding service by the Claimant as evidenced by the affidavit of service on record.

Analysis and determination

24. The issue for determination are;
 - i. Whether the Claimant was constructively dismissed by the Respondent.
 - ii. Whether the Claimant is entitled to the reliefs sought.
25. As to whether the Claimant was constructively dismissed from employment, the homeport is the doctrine of constructive dismissal.
26. According to *Black's Law Dictionary, 10th Edition*, Constructive dismissal means;

“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.”
27. The locus classicus exposition of the doctrine of constructive dismissal was by Lord Denning MR in *Western Excavating (ECC) Ltd v Sharp (1978) 2 WLR 344* as follows;

“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 reasons 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 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. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract”.



28. The doctrine of constructive dismissal was domesticated locally by the Court of Appeal in its seminal decision in *Coca Cola East and Central Africa v Maria Kagai Ligaga* (*Supra*) where the court adopted the contractual test approach. The court held as follows;

“The second interpretation is that the employer’s conduct is so grave that it constituted a repudiatory breach of the contract of employment. The contractual test is narrower than the reasonable test. The dicta in *Western Excavating (ECC) Ltd v Sharp* (1978) 1CR 222 adopts the contractual approach test and we are persuaded that the test is narrow, precise and appropriate to prevent manipulation or overstretching the concept of constructive dismissal. For this reason, we affirm and adopt the contractual test approach . . .”

29. The Court of Appeal went further and enunciated the legal principles that govern the applicability of constructive dismissal such as fundamental terms of the contract, repudiatory breach, conduct of the employer, objectively, causal link between the employers conduct and termination of contract i.e causation burden of proving constructive dismissal and the employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach.

30. The court is in agreement with the above-stated sentiments and the law as enunciated by the court.

31. Having unpacked the doctrine of constructive dismissal, I will now proceed to apply the law to the facts of the instant case.

32. It is essential to indicate that the Claimant neither pleaded that he was constructively dismissed by the Respondent nor prayed for a remedy and tendered no evidence to establish a repudiatory breach of the contract of employment by the employer.

33. It is common knowledge that the Claimant tendered his resignation vide a letter dated November 3, 2017 directed to one Mr Michael J Adede, designated as Chief Executive Officer of Minolta Ltd.

34. The letter read as follows;

REF: RESIGNATION

With reference to the above and with much regrets, am tendering my resignation as an employee of Minolta Ltd by giving a notice so as to adhere with my contract of employment. I have worked for this company since October 1, 2010 upto date (November 3, 2017).

I want to thank you personally for your support and assistance extended to me during my stay. I also take this opportunity to wish all the best to you and the company. Lastly, am hoping that there will be a reward for my service at Minolta Ltd Staff No 24.

Thanks in advance.

Signed

Claimant.

35. The tenor of the foregoing letter is that of an employee who resigned without a single complaint against the employer or its Chief Executive Officer.

36. The Claimant expresses satisfaction for having been the Respondent’s employee since 2010, a duration of about 7 years, expresses gratitude for the support and assistance given, wishes the company and its CEO well and asks for a reward for service.



37. Significantly, the Claimant did not state the reason for his resignation or adduce evidence that he resigned because of unpaid salaries. It is puzzling that the Claimant made no reference to the unpaid salary if that was the case and instead of leaving or lodging a complaint, he gave the Respondent an extremely warm-hearted resignation notice.
38. As explained by the Court of Appeal in *Coca Cola East and Central Africa v Maria Kagai Ligaga (Supra)*, the burden of proving a repudiatory breach or constructive dismissal is borne by the employee and in the instant case the Claimant did not furnish oral or written evidence to establish a repudiatory breach of the employment contract.
39. Intriguingly, the Claimant counsel's submission that the Claimant was not assigned duties for 2 months was neither captured in the Claimant's written statement nor the oral evidence adduced in court and is thus of no moment.
40. The entire gamut of the Claimant's evidence on record creates no impression or suggestion that the Claimant was constructively dismissed. There is nothing on the basis of which the court could infer constructive dismissal.
41. For the above stated reasons, it is the finding of the court that the Claimant has failed to establish on a balance of probabilities that he was constructively dismissed.
42. As courts have repeatedly observed, even in undefended suits, the party suing must prove its cause as a matter of law. The provisions of Section 107 and 109 of the *Evidence Act* are clear on the burden of proof. (See *Humphrey Munyithia Mutemi v Soluxe Group of Hotels and Lodges (2020) eKLR*).
43. In *George Kyalo Kilunda v Donjaves Ltd (2021) eKLR*, Onyango J stated as follows;
- “Regarding the first issue, it is trite law that he who alleges must prove. This claim proceeds undefended. However, the appellant still bore the burden of proof which he ought to have discharged in order to succeed in his claim . . . Caution and more attention should have been exercised as the burden of proof to be discharged by the appellant remained the same if not a little higher for his claim to succeed in the absence of the Respondent's evidence in rebuttal . . .”
44. The court is guided accordingly.
45. Consistent with the Claimant's averments and evidence on record, it is the finding of the court that the Claimant separated with the Respondent on account of a voluntary resignation.
46. As to whether the Claimant is entitled to the reliefs sought, the court proceeds as follows;

i. Having found that the Claimant voluntarily resigned from employment, a declaration is hereby issued that the Claimant was entitled to any terminal dues due to him.

ii. Service pay for 7 years

47. The evidence on record including a copy of the Claimant's National Social Security Fund (NSSF) statement stamped by the NSSF Statement Section on December 11, 2017, reveal that the Claimant was a member of the NSSF and thus not eligible for service pay as ordained by the provisions of Section 35 (6) (d) of the *Employment Act*, 2007.

The prayer is dismissed.



iii. Salary for the months of September and October 2017

48. Since the written statement of the Claimant and the oral evidence adduced in court make an allegation that the salaries for September and October 2017 were not paid, the court is persuaded that the prayer is sustainable and is thus granted.

iv. Self-help dues deducted but not forwarded to the Group

49. Copies of the Claimant's payslips for March, July, August and September 2016 show that the Claimant was making a voluntary contribution of Kshs 1,000/= per month designated as Chama contribution and additionally attached a Group Membership Card dated April 8, 2014.
50. The two documents show that the Claimant was indeed a member of the Self-Help Group and made regular contributions. Although the payslips on record relate to 2016 exclusively, and the Respondent tendered no evidence in rebuttal, the court is satisfied that the Claimant has demonstrated his entitlement to the sum of Kshs 40,000/= which is accordingly awarded.

v. NSSF deductions not remitted or 20 months

51. Under the provisions of the *National Social Security Fund Act*, it is mandatory for an employee and employer to make contributions to the fund. The NSSF Board administers the Act. The deductions made from the employee's salary are mandated by the provisions of Section 19(1) of the *Employment Act* and thus legal.
52. As submitted by the Claimant and held by this court, it is incumbent upon the employer to remit such deductions to the NSSF.
53. If the deducted sum(s) is not remitted to the NSSF, the deductions becomes unjustifiable and the same should be refunded to the employees.
54. As copies of the Claimant's pay slips on record reveal that he was contributing Kshs 200/= as NSSF contribution, the court is persuaded that the amount deducted from the Claimant's salary but not remitted to the NSSF is refundable and is thus recoverable at Kshs 200/= per month, Kshs 4,000/=.

vi. NHIF deductions not remitted to the National Health Insurance Fund

55. Under the provisions of Section 15 of the *National Health Insurance Fund*, 1998, persons who are ordinarily resident in Kenya, have attained the age of 18 years and their total income derived from salary or self-employment is of such amount as the Board may, in consultation with the Cabinet Secretary prescribe, are obligated to make contributions to the fund.
56. The contribution is mandatory and employers other than the National and County Governments or their entities are liable to pay a matching contribution.
57. The deduction of the contribution by an employer is thus permitted by law for a defined purpose.
58. It would appear to follow that if the amount deducted is not remitted to the National Health Insurance Fund, the deduction ceases to be justifiable and is refundable to the contributor as it was in this case.
59. The Claimant's payslips for 2016 reveal that the Respondent routinely deducted Kshs 900/= per month as NHIF contribution.



60. Although the Claimant did not furnish a copy of his NHIF statement, as evidence of the non-remission of the contributions, the Respondent tendered no evidence to rebut the allegation and the court awards the sum of Kshs 14,400/= claimed.
61. In conclusion, judgement is entered for the Claimant against the Respondent as follows;
- a. Declaration that the Claimant is entitled to terminal dues.
 - b. Kshs 55,624.00 being the unpaid salaries for September and October 2017.
 - c. Kshs 40,000/= being the Self-Help Group dues deducted from the Claimant's salary.
 - d. Kshs 4,000/= being the NSSF contributions deducted from the Claimant's salary but not remitted to the National Social Security Fund.
 - e. Kshs 14,400/= being the NHIF contributions deducted from the Claimant's salary and not remitted to the National Health Insurance Fund.
- TOTAL Kshs 114,024/=
- f. Costs of this suit.
 - g. Interest at court rate from date of judgement till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9TH DAY OF MARCH 2023

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 March 15, 2020 and subsequent directions of April 21, 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.

DR. JACOB GAKERI

JUDGE

