



**Orwa v Ngorongoro Support Services Limited & another (Cause
341 of 2019) [2023] KEELRC 587 (KLR) (3 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 587 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 341 OF 2019
J RIKA, J
MARCH 3, 2023**

BETWEEN

MICHAEL ORWA CLAIMANT

AND

NGORONGORO SUPPORT SERVICES LIMITED 1ST RESPONDENT

MURIU MUNGAI & COMPANY ADVOCATES 2ND RESPONDENT

JUDGMENT

Rika J

Court Assistant: Emmanuel Kiprono

Mukunga Wathome & Company Advocates for the Claimant

Muriu Mungai & Company Advocates for the Respondent

1. The Claimant filed his Statement of Claim on May 24, 2019.
2. He states that he was engaged by the Respondents, and seconded to the 2nd Respondent Law Firm, as the Program Director of the Public Interest Litigation and Consultancy Department. He executed the contract of employment on September 13, 2017.
3. He served a probationary period of 3 months, which lapsed on December 13, 2017. He was confirmed.
4. In January 2018, the Respondents crafted a well-calculated witch-hunt against the Claimant, aimed at frustrating him out of employment.
5. He summarizes the witch-hunt to include: the team leaders stopped attending his meetings; the Claimant's performance was not assessed from the time of engagement to the time of dismissal; the partners and team leader did not react to the Job Description proposed by the Claimant; the team leader arbitrarily extended the Claimant's probation; no salary was paid in the months of February,



- March and April 2018; he was denied financial resources; he had no choice but to sign a mutual separation agreement to access funds; all the partners declined to respond to all issues raised by the Claimant; and the office became very hostile and thoroughly embarrassing place for the Claimant.
6. On February 12, 2018 the Claimant was ambushed with a meeting involving the Human Resource Manager and the Managing Partner. It turned out to be a performance review, with claims that the Claimant's department was not bringing in money.
 7. The following day, the Claimant was issued a cheque and termination letter. He was required to sign the letter, without reading it. He declined and was advised by the Partner responsible for Human Resources, not to report to work the following day.
 8. The Claimant made various efforts to resolve the dispute out of Court, which were frustrated by the Respondents. The Claimant states that due to pressing financial needs, he was forced to sign a Mutual Separation Agreement. He considers himself to have been constructively dismissed. No cause was shown, due process was not followed, and premeditation was clear.
 9. He prays for: -
 - a. Declaration that the treatment of the Claimant at the Respondent's workplace amounted to premeditated constructive dismissal for which the Claimant is entitled to compensatory and general damages.
 - b. Compensation equivalent of 12 months' salary at Kshs3,840,000.
 - c. General damages on account of unfair and ill-treatment, covered in discrimination, mistreatment, humiliation, public embarrassment and ridicule and the trauma resultant from all these.
 10. The Claimant filed an Answer to the 1st Respondent's Memorandum of Response on December 2, 2019. This would indicate that there was a Response filed, at least by the 1st Respondent, but unfortunately, the Court has not traced a copy in the Court file. The 2nd Respondent entered Appearance for both Respondents, on June 17, 2019. The Minute Sheet which is a record retained by the Court Registry on the file, capturing details of all Pleadings filed, does not capture the filing of any Memorandum of Response. It ends at the Memorandum of Claim, filed on May 24, 2019.
 11. The hearing date was scheduled before the Deputy Registrar by the Claimant's Advocates, and hearing notice issued upon the Respondents on September 15, 2022. There was no attendance on the part of the Respondents when the Claimant gave evidence, and closed his case, on November 1, 2022.
 12. The Claimant restated that he is a consultant in governance and development. He adopted his Pleadings, Witness Statement and Documents in his evidence –in-chief. He dealt with the 2nd Respondent throughout, and came to see the 1st Respondent's name for the first time, when he signed the employment contract. The 1st Respondent is the 2nd Respondent's Human Resource Arm. The Firms have shared Directors. The Claimant told the Court that he went through a very stressful period. He was beaten to a pulp, to use his own expression. His salary was stopped. He was just told not to report to work the following day. He had loan and insurance premium in default. No issue relating to performance was raised before termination. He had already developed strategic policy for the Respondents. He was a senior member of the Law Firm, with a name to protect. He signed the Separation Agreement, because he was in a bad place financially.
 13. The issues are whether the Claimant was constructively or unfairly dismissed by the Respondents; and whether he merits the reliefs sought.



The court finds:-

14. The Claimant was employed by the Respondents through a contract dated September 13, 2017. He was employed as a Program Director, in Public Interest Litigation, and seconded to MMC Africa, the 2nd Respondent herein.
15. The Parties disagreed on their mutual obligations, and spent most of the time between September 13, 2017, and April 23, 2018 when they executed Mutual Separation Agreement, discussing how they should disengage, from what in many ways was a dysfunctional employment relationship.
16. There was no clear way out for the Parties, and on one occasion, the Respondents issued the Claimant a notice of termination on account of redundancy, dated March 28, 2018. The redundancy process was not followed to the end, and Parties continued to exchange correspondence on how the relationship should be ended.
17. In the end they executed Mutual Separation Agreement dated April 23, 2018. The Claimant complains about ill-treatment by the Respondents, arguing that work environment was turned hostile by the Respondents. He was beaten to a pulp. He states that he was constructively dismissed. He did not however resign, to come within the principles of constructive dismissal, enunciated in the Court of Appeal decision, *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] e-KLR. The Claimant did not resign, believing himself to have been fired, or believing that the Respondents were no longer willing to honour the terms of his contract. He instead executed a Mutual Separation Agreement.
18. He veers off from his position that he was constructively dismissed, going into the statutory field of unfair termination. He pleads that the Respondent did not show cause and follow fair procedure, which brings in Sections 41, 43 and 45 of the *Employment Act*. Constructive dismissal is not statutory termination at the instance of the Employer; it is resignation by the Employee. It is a common law principle, which does not call on the Employer to show valid reason and fair procedure.
19. The only issue the Court should look into, in disposing of the Claim, is whether Mutual Separation Agreement, was voluntary, validly entered into by the Parties, and binding.
20. There is no evidence that the Claimant was coerced to execute the Agreement. He is a Lawyer and understood the legal effect of his execution of the Agreement.
21. The Agreement is valid in form. It is executed by the Parties. It is dated. It refers from the outset, to several discussions held by the Parties, which culminated in agreement that the contract would be terminated on a mutual and amicable basis.
22. The Claimant may have felt frustrated at the time it took to find a way out, but in the end, it was by Mutual Separation Agreement.
23. The Agreement contains a discharge clause. It states that, "Upon signing this Separation Agreement, the Employee agrees on his own behalf and anyone claiming through him, to discharge the Company, its Officers, Directors, Employees and Shareholders in each individual, joint and/or corporate capacities and also MMC and its Partners from all claims and liabilities arising out of, or relating to the employment with the Company, howsoever occurring..."
24. The separation amounts were agreed. The amount of Kshs 1,200,000 paid to the Claimant was defined as full and final settlement. It included salary for 14 days worked in February 2018 at Kshs 160,000; 3 months' salary in lieu of notice at Kshs 960,000; 2 days of outstanding annual leave at Kshs 21,333.33; *ex gratia* of Kshs 537,846; and pro-rated salary for January 2018 at Kshs 24, 615.



25. Discharge was further underscored in the clause on separation amount, which states that, 'Upon payment of the separation amount of Kshs1,200,000 as set out above, the Employee will have no further or other claim against the Company or MMC or any of them or their representatives arising from the employment contract dated September 13, 2018 or termination of his employment or otherwise.'
26. Parties confirmed that they executed the Mutual Separation Agreement willingly, without coercion or misrepresentation. The Claimant's submission that he signed because he was in dire straits, and needed the money, is discounted by this clause. He agreed in writing that he executed the Agreement willingly and without coercion.
27. There is no evidence that the Claimant was constructively dismissed or unfairly dismissed. Termination was by way of a willingly executed Mutual Separation Agreement, in which Parties freed each other from mutual employment obligations.

IT IS ORDERED:-

- a. The Claim is declined.
- b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 3RD DAY OF MARCH 2023.

James Rika

Judge

