



Besson v Centrale Humanitare Medico-Pharmaceutique (Cause 1616 of 2016) [2023] KEELRC 908 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 908 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1616 OF 2016**

**L NDOLO, J
APRIL 20, 2023**

BETWEEN

EMILIE KOUM BESSON CLAIMANT

AND

CENTRALE HUMANITARE MEDICO-PHARMACEUTIQUE ... RESPONDENT

JUDGMENT

Introduction

1. The Claimant instituted her claim by way of a Statement of Claim dated 19th July 2016 and filed in court on 12th August 2016, alleging unlawful and unfair termination of employment by the Respondent.
2. The Respondent filed a Memorandum of Defence and Counterclaim dated 19th March 2017. The Claimant filed a Reply to the Memorandum of Defence and Counterclaim on 11th April 2017.
3. The matter went to full trial where the Claimant testified on her own behalf and the Respondent called its Chief Executive Officer, Paul Lotay. Both parties further filed written submissions.

The Claimant's Case

4. The Claimant states that she was employed by the Respondent in the position of Country Representative in the Democratic Republic of Congo (DRC), for a period of two (2) years running from 1st May 2014 until 30th April 2016.
5. The Claimant further states that she earned a gross monthly salary of Kshs. 513,463 which was paid to her as follows:
 - a. Kshs. 177,000 paid into the Claimant's Euro account in France at the rate of Kshs. 118 to 1 Euro;



- b. Kshs. 123,250 paid in cash at the DRC-Goma office at the exchange rate of Kshs. 85 to 1 US Dollar.
6. The Claimant adds that any bank fees related to international bank transfers were to be paid by the Respondent.
 7. The Claimant claims to have performed her duties diligently and to the Respondent's satisfaction until 9th December 2015, when the Respondent terminated her employment on allegations of non-performance of duties assigned to her in 2015, which allegations the Claimant denies.
 8. By letter dated 15th December 2015 and an email dated 12th January 2016, the Claimant sought reasons for the termination of her employment, which she termed as unfair. This prompted the Respondent's letter dated 19th January 2016, admitting that the termination of the Claimant's employment was unfair and reinstating her back to her position.
 9. Subsequent to this, the Claimant received a letter from the Respondent dated 1st February 2016, informing her of the expiry of her contract on 30th April 2016. The letter also required the Claimant to report to the Respondent's office in Nairobi on 16th February 2016 for purposes of handing over her roles and duties. The Respondent threatened to take disciplinary action against the Claimant if she failed to attend the handing over meeting.
 10. The Claimant avers that the Respondent issued a memo dated 2nd February 2016, informing members of staff at the Goma office that the Claimant was no longer in charge of the office effective the date of the memo. The memo further stated that the Claimant was not authorised to gain access to the Respondent's Goma office premises.
 11. The Claimant adds that the members of staff were directed not to communicate with her and as a result, she was not able to pick her belongings as her designated driver could not pick her up from the border.
 12. The Claimant's case is that the Respondent's actions amounted to frustration of her contract of employment and as a result she was constructively dismissed unlawfully and unfairly. She maintains that the Respondent's actions made the work environment not conducive for her to discharge her contractual obligations with the Respondent leaving her with no option but to resign, which she did by her letter dated 4th February 2016.
 13. The Claimant further maintains that the Respondent's actions were in breach of Article 9 of her employment contract as read with the provisions of Sections 35 (1) and 41 of the *Employment Act*.
 14. Aggrieved by the Respondent's actions, the Claimant filed the instant claim seeking the following reliefs:
 - a. A declaration that the termination of her employment was unlawful and unfair
 - b. 3 month's pay in lieu of notice.....Kshs. 1,540,390.47
 - c. Unpaid balance of January 2016 salary..... 123,250.00
 - d. Unpaid salary for February, March & April 2016.....1,540,390.47
 - e. 12 months' salary in compensation.....6,161,561.88
 - f. Unpaid (45) leave days.....770,195.25
 - g. Travel expenses from Kigali to Goma..... 15,300.00



- h. Less amount received on 9th March 2016.....(397, 197.35)
- i. Certificate of service
- j. Costs plus interest

The Respondent's Case

- 15. In its Memorandum of Defence and Counterclaim dated 19th March 2017 and filed in court on 20th March 2017, the Respondent admits having employed the Claimant in the manner pleaded in the Statement of Claim.
- 16. The Respondent states that the Claimant's performance as Country Representative was dismal and that her conduct towards the then Chief Executive Officer, Olivier De Santi was disrespectful and characterized by insubordination.
- 17. The Respondent denies terminating the Claimant's employment unlawfully or unfairly and points out that the termination letter issued to the Claimant was subsequently withdrawn on 19th January 2016, before it took effect.
- 18. The Respondent further denies the Claimant's allegations of constructive dismissal.
- 19. The Respondent notes that the Claimant did not contest the withdrawal of the termination letter and that she continued to interact willingly with the Respondent as a member of staff, following her reinstatement back to duty.
- 20. The Respondent admits having communicated to the Claimant, by letter dated 1st February 2016, of its intention not to renew her contract of employment and advised that she proceeds on compulsory leave, pending the termination of her contract on 30th April 2016.
- 21. The Respondent accuses the Claimant of defiance and insubordination, by failing to hand over as required by letter dated 1st February 2016.
- 22. The Respondent raises a Counterclaim against the Claimant for three (3) months' salary as notice pay, following her resignation.
- 23. In addition, the Respondent states that after her resignation, the Claimant, contrary to her contract of employment, failed and/or refused to release, hand over and/or surrender highly sensitive information, of which she had sole possession.
- 24. Further, the Respondent accuses the Claimant of engaging in a concerted and fervent effort to disparage the Respondent and its Chief Executive Officer.
- 25. Flowing from the foregoing averments, the Respondent seeks the following remedies in Counterclaim:
 - a. Kshs. 1,540,390.47 being the equivalent of three (3) months' pay;
 - b. General damages for breach of the employment contract;
 - c. General damages for libel;
 - d. Exemplary/aggravated/punitive damages;
 - e. Costs plus.



Findings and Determination

26. There are three (3) issues for determination in this case:
- a. Whether the Claimant has made out a case of constructive dismissal;
 - b. Whether the Claimant is entitled to the remedies sought;
 - c. Whether the Respondent has made out a proper Counterclaim against the Claimant.

Constructive Dismissal?

27. On 4th February 2016, the Claimant wrote to the Respondent as follows:

“Subject: Resignation from employment

Referring to your letter of 9th December 2015 by which you terminated my employment, the subsequent letter of 19th January 2016 purporting to cancel the said termination and further letter of 1st February 2016 headed terminal leave which has expressly demanded that I report to your Nairobi offices on 16th February 2016 for immediate hand over of my duties. Given the grounds set out in your dismissal letter to me dated 9th December 2015, which you have subsequently admitted to have been unjustified, you are in breach of the Employment Contract entered into between ourselves dated 28th April 2014. Due to the current circumstances, I feel compelled to resign from my employment as the working environment has considerably deteriorated. Therefore, I am unable to undertake any further duties at the office, including the demanded hand-over. In accordance with Article 9 bullet 3 of the Employment Contract aforesaid, I hereby tender my resignation from employment effective from the date of this letter.

Meanwhile, I have copied this letter to my lawyers in Nairobi who shall be addressing you shortly on the issue of breach of contract.

Sincerely,

(signed)

Emilie Koum Besson”

28. Prior to writing this letter, the Claimant had been issued with a termination letter dated 9th December 2015 which was cancelled by a subsequent letter dated 19th January 2016.

29. The cancellation letter states as follows:

“Dear Emilie,

Subject: cancellation of your termination letter

We are pleased to let you know that your termination letter dated 9/12/2015 has been cancelled.

After reviewing the Kenyan [Employment Act](#), it appears that your dismissal was not properly justified. As consequence, we will be glad to see you working in our team until the end of your contract with CHMP.

We regret the inconvenience caused.



(signed)

Best regards,

Olivier De Santi”

30. Soon after this letter, the Respondent issued the Claimant with another letter dated 1st February 2016. The latter letter under reference ‘Terminal Leave’ notified the Claimant that her contract of employment, which was due to expire on 30th April 2016, would not be renewed.
31. The letter further instructed the Claimant to immediately hand over her roles and duties to Olivier De Santi at the Nairobi office. In addition, the letter barred the Claimant from accessing the Respondent’s office in Goma-DRC, effective 2nd February 2016.
32. According to the Claimant, the foregoing actions by the Respondent made it impossible for her to continue working, forcing her to resign. She therefore lays a claim for constructive dismissal.
33. The question as to what constitutes constructive dismissal has been extensively discussed in many judgments by this Court and the Court of Appeal.
34. Constructive dismissal was defined in *Nathan Ogada Atiagaga v David Engineering Limited* (Cause No 419 of 2014) in the following terms:

“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.”
35. In its decision in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR the Court of Appeal established the following principles to be taken into account in establishing 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 the 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.
36. In *Milton M. Isanya v Aga Khan Hospital* [2017] eKLR it was 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 tenders resignation.”
- On 9th December 2015, the Claimant was issued with a termination letter, which was recalled slightly over a month later, on 19th January 2016. The Claimant did not however have a chance to report back to work because on 1st February 2016, she was issued with yet another letter instructing her to proceed on terminal leave, pending the expiry of her contract on 30th April 2016.
37. The Claimant was further instructed to travel to Nairobi to hand over her roles and duties and also was barred from accessing her place of work in Goma-DRC. The Respondent informed the Claimant that she would be provided with an air ticket from Paris to Nairobi. The Claimant however told the Court that at the time, she was unwell and was in Cameroon, a fact the Respondent was evidently aware of.
38. According to the Claimant, the Respondent’s actions not only prevented her from resuming work but also made it impossible for her to hand over as instructed in the letter dated 1st February 2016.
39. I have examined the Respondent’s actions running from 9th December 2015, when a termination letter was issued to the Claimant, the recall of the termination on 19th January 2016 to the letter dated 1st February 2016 sending the Claimant on terminal leave and instructing her to travel to Nairobi to hand over to Olivier De Santi.
40. In my view, these actions have all the stamps of an employer, bent on terminating the employment of an employee by conduct that makes the work environment so toxic that the employee has no choice but to leave. I therefore find and hold that the Claimant has proved a case of constructive dismissal against the Respondent.

Remedies

- 41. In light of the foregoing findings, I award the Claimant four (4) months’ salary in compensation. In arriving at this award, I have taken into account the Claimant’s length of service as well as the Respondent’s unlawful conduct that forced the Claimant out of employment prematurely.
- 42. I further award the Claimant three (3) months’ salary in lieu of notice as provided in Article 9 of her contract of employment.
- 43. There is evidence that the Claimant was paid her salary up to the last day of work. The claim for salary balance is therefore without basis and is dismissed.
- 44. The Claimant did not work in the months of February, March and April 2016 and the claim for unpaid salary is therefore also without basis and is disallowed.
- 45. The claims for leave pay and travel expenses were not proved and therefore fail.



The Respondent's Counterclaim

46. The first segment of the Respondent's Counterclaim against the Claimant is based on the averment that the Claimant resigned voluntarily, without giving the requisite notice. However, having found that the Claimant was in fact constructively dismissed by the Respondent, this claim fails and is disallowed.
47. The second segment of the Counterclaim is based on an allegation that the Claimant had failed and/or refused to hand over sensitive information in her sole possession. It was further alleged that the Claimant had disparaged the Respondent and its Chief Executive Officer.
48. However, none of these allegations were proved and the claims for general and exemplary damages are therefore without basis and are dismissed.
49. Ultimately, the Respondent's Counterclaim against the Claimant fails and is disallowed.

Final Orders

50. Finally, I enter judgment in favour of the Claimant as follows:
 - a. 4 months' salary in compensation.....Kshs. 2,053,854
 - b. 3 months' salary in lieu of notice.....1,540,390Total.....3,594,244

51. This amount will attract interest at court rates from the date of judgment until payment in full.

52. The Claimant is also entitled to a certificate of service plus costs of the case.

DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF APRIL 2023

LINNET NDOLO

JUDGE

Appearance:

Miss Ouma for the Claimant

Mr. Mitto for the Respondent

