



**Koech v Kenya Railways Corporation (Cause 48 of 2018)  
[2023] KEELRC 870 (KLR) (14 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 870 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 48 OF 2018  
SC RUTTO, J  
APRIL 14, 2023**

**BETWEEN**

**CHARLES KIPTOO KOECH ..... CLAIMANT**

**AND**

**KENYA RAILWAYS CORPORATION ..... RESPONDENT**

**JUDGMENT**

1. The claimant avers that he was employed by the respondent with effect from 4<sup>th</sup> January, 2010. That the respondent interdicted him on 19<sup>th</sup> June, 2015 and commenced investigations into his conduct. That he was then placed on suspension. He pleads that the investigation process was unreasonably delayed hence he resigned out of frustration. That his resignation was accepted by the respondent but it refused to pay his dues and instead, counter claimed against him. The claimant has termed the said counterclaim as not only malicious but unlawful.
2. It is against this background that the claimant seeks against the respondent the sum of Kshs 5,872,150.05 being salary arrears, telephone allowance, commuter allowance, leave allowance, three months' salary in lieu of notice, compensatory damages, severance pay and unremitted pension contributions.
3. The respondent opposed the claim through its Reply to Memorandum of Claim dated 23<sup>rd</sup> February, 2018. The respondent admitted interdicting the claimant and averred that there was no time limit to conclude the investigations. That the claimant resigned voluntarily and the same was accepted. That it calculated the claimant's dues and called upon him to clear an outstanding amount of Kshs 9,898,108.00. That it is not liable to pay the claimant the alleged consolidated pay of Kshs 5,872,150.00. Consequently, the respondent has asked the Court to dismiss the claim with costs.
4. The matter proceeded for trial on 2<sup>nd</sup> November, 2022, with both sides calling oral evidence.



### **Claimant's case**

5. The claimant testified in support of his case and at the commencement of the hearing, he asked the Court to admit his witness statement as his evidence in chief. He further produced the documents filed together with his claim as exhibits before Court.
6. It was the claimant's evidence that the investigations by the respondent were not concluded. That he was not given any update or outcome of the investigation despite his request to the respondent in 2016. That the delay in conducting his investigation was meant to frustrate him so that he can resign thus amounting to constructive dismissal.
7. That on 5<sup>th</sup> December, 2016, he succumbed to the respondent's pressure and he involuntarily resigned from the institution. That his resignation was accepted on 14<sup>th</sup> December, 2016 and he was advised that he will be paid his dues upon completing the clearance process. That after clearance, the respondent declined to pay his dues and instead counterclaimed against his demands.
8. He further stated that the unreasonable delay in concluding the investigations against him and failure to inform him on the progress of the same amounted to constructive dismissal thus in violation of his rights under Article 41 of the Constitution and Section 45 of the Employment Act hence amounting to unlawful termination.
9. That further, the purported surcharge by the respondent while the disciplinary process was terminated after resignation amounts to double jeopardy as he had already suffered enough as a result of unreasonable delay in concluding the investigations and which investigations were halted by the respondent's acceptance of his resignation. That the decision to surcharge him further amounts to disciplinary action without due process thus his right under Article 41 of the Constitution was violated. That the counterclaim by the respondent was the subject of the investigations against him. That as far as he is concerned, he did not have any liability against the respondent.
10. Concluding his testimony, the claimant asked the Court to order compensation as prayed in his Claim.

### **Respondent's case**

11. The respondent called oral evidence through Mr. Asava Kadima who testified as RW1. Similarly, he adopted his witness statement to constitute his evidence in chief and further produced the respondent's bundle of documents as exhibits before Court.
12. RW1 testified that the claimant's interdiction was procedural according to the respondent's Human Resource Manual as there were investigations by both the management and the Board of Directors on his conduct in the course of his duties. That the said investigations had no time limit so it is not true that the respondent unreasonably delayed the said investigations intentionally to frustrate the claimant.
13. That the claimant chose to resign on his volition and the same was accepted by the respondent and was informed that his final dues would be paid less any corporation liabilities. That further, payment of the claimant's final dues was subject to clearance. That a complete clearance certificate was submitted on 26<sup>th</sup> January, 2019 from which an amount of Kshs 9,898,108.00 was outstanding as unaccounted for or unpaid by the claimant. That the claimant was informed of the status of his indebtedness by a letter dated 27<sup>th</sup> April, 2017.
14. That the claimant was informed that it was upon him to clear the amount of Kshs 9,898,108.00 which was outstanding revenue and which was the subject matter of investigations pending disciplinary action prior to the claimant's resignation. That once the claimant resigned, the disciplinary process



could not proceed against a non-employee but the record still showed the amount outstanding by the claimant.

15. Closing his testimony in chief, RW1 told Court that the respondent is willing to pay the claimant his final dues of Kshs 2,118,407.05 after clearing the amount outstanding at Kshs 9,898, 108.00.

### **Submissions**

16. It was submitted on behalf of the claimant that the respondent's conduct amounted to constructive dismissal thus unfair termination for the reason that he was frustrated to the extent that he was unable to carry on as the respondent's employee. That the respondent's conduct was a repudiatory breach of the employment contract between it and the claimant. In support of this position, the authorities of *Max Masoud Roshankar & another vs Sky Aero Limited* (2015) eKLR, *Paul Mwaura Mbugua vs Kagwe Tea Factory Ltd & another* (2012) eKLR, *Marete vs Attorney General* (1987) KLR 690 and *Bartholomew Wanyama vs Moses Gitari and 2 others* (Industrial Court cause No. 973 of 2011) were cited.
17. It was further submitted that the wording in the claimant's letter of resignation confirms that he resigned involuntarily thus unfair termination.
18. The claimant further argued that upon acceptance of his resignation, any pending investigation and or disciplinary action against him came to a halt, as such he cannot be subjected to a surcharge process as undertaken by the respondent. That being surcharged amounts to double jeopardy and in violation of Article 47 of the *Constitution* hence illegal.
19. That further, the claimant was a mere employee of the corporation hence cannot be liable for its debts. That the respondent's failure to pay the claimant his dues was unjustifiable and illegal.
20. On the part of the respondent, it was submitted that the claimant has failed to demonstrate that it conducted itself in a manner that was unreasonable hence damaged the employment relationship between the parties herein. That from the facts of the case, it is clear that there was no repudiatory breach of contract by the respondent. That neither has the claimant demonstrated that the respondent's behavior was so heinous making it difficult for him to continue working. To buttress these arguments the respondent placed reliance on the cases of *Coca Cola East & Central Africa Limited vs Maria Kagai Ligaga* [2015] eKLR, *Peterson Guto Ondieki vs Kisii University* (2020) eKLR and *Milton M. Isanya vs Aga Khan Hospital Kisumu* (2017) eKLR.
21. It was the respondent's further submission that the claimant is not being surcharged but is being subjected through a clearance process which is provided for under clause 22 of the employment contract. That clearance is not a disciplinary measure in the circumstances.

### **Analysis and determination**

22. Flowing from the pleadings before Court, the evidence on record and the opposing submissions, the following issues stand out for determination: -
  - i. Whether there is a case for constructive dismissal.
  - ii. Whether the respondent is justified in withholding the claimant's dues.
  - iii. What reliefs if any, avail to the claimant?



## Constructive dismissal?

23. It is common ground that the claimant was interdicted through a letter dated 19<sup>th</sup> June, 2015 and that he resigned through a letter dated 5<sup>th</sup> December, 2016. It is the claimant's case that his resignation was not voluntary and that the same was as a result of the frustrations he underwent due to the delayed investigations by the respondent. It is for this reason that the claimant has cited the respondent for constructive dismissal.
24. The respondent on the other hand, has disputed the claimant's assertions and stated that the investigations had no time limit and that the alleged delay of the said investigations was not meant to frustrate the claimant. The respondent further avers that the claimant resigned voluntarily on his own volition.
25. 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 the case of *Coca cola East & Central Africa Limited vs Maria Kagai Ligaga* [2015] eKLR, 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.”
26. 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.
27. It is common ground that the claimant was interdicted through a letter dated 19<sup>th</sup> June, 2015. In terms of the said letter, the said interdiction was to pave way for investigations on the allegations levelled



against him. The claimant was further informed that he would be addressed separately on the findings of the investigation and the alleged offences associated with the case. Essentially, the respondent had commenced a disciplinary process against the claimant through the letter of interdiction.

28. Through a letter dated 19<sup>th</sup> August, 2016 addressed to the respondent's Managing Director, the claimant requested for information on the status of his interdiction. The letter reads as follows: -

“RE: Request for information on the status of my interdiction

As you are aware I was interdicted from duty vide your letter ref: P/00077 dated 19<sup>th</sup> June, 201, and since then I have not received any information.

This is therefore to kindly request for an update on the status of this matter, as I am at a loss as to my fate.

Your update will be highly appreciated...”

29. What followed was the claimant's letter of resignation dated 5<sup>th</sup> December, 2016, which is couched as follows: -

“RE: Resignation

I refer to your letter ref: P/00077 dated 19<sup>th</sup> June, 2015, issued to me on 23<sup>rd</sup> June, 2015 which interdicted me from duty with effect from 19<sup>th</sup> June, 2015. I also refer to my letter to you dated August 19, 2016 (copy attached) requesting for an update on the status of my interdiction. Please note the said letter has not been replied to date and I have not received any information on this matter, therefore I am in darkness as to what is going on.

On that regard, I wish to inform you that the matter has taken too long against the Constitution, the rules of natural justice as well as the Employment Act, 2007.

In addition,

1. Article 50 of the Kenyan constitution on fair hearing provides that every accused person has the right to have the administrative action begin and conclude without unreasonable delay.
2. Article 4 clause (1) of the fair administrative action act, 2015 provides that:
  - (1) Every person has the right to administrative action which is expeditious, lawful, reasonable and procedurally fair.
3. Part 4, clause (d) of the Disciplinary Manual for the Public Service May, 2016 states that:
  - (d) disciplinary cases shall be dealt with promptly and finalized within a period of six months.
4. Our courts have also held that 6 months should be the maximum suspension period and that an indefinite period amounts to constructive dismissal amounting to unfair termination...

Based on the circumstances therefore, I have suffered a lot of unfairness and injustice and hence to avoid further suffering from the delay of this case, I wish to tender my resignation effective from the date of this letter..”



30. What can be deduced from the claimant's letter of resignation is that the same was provoked by his interdiction and the pending disciplinary process commenced against him. According to him, the matter had taken too long and he had suffered as a result of the delay of his disciplinary case. At the time, it is notable that the claimant had been on interdiction for close to 17 months.
31. Further, it is apparent that after the claimant was placed on interdiction, there was no word or action from the respondent. I say so because seemingly, the respondent did not revert to the claimant's letter dated 19<sup>th</sup> August, 2016, as there is no response to that effect on record. In addition, the claimant alluded to this in his letter of resignation.
32. It may very well be said that from the time the claimant was placed on interdiction, he was in the dark for 17 months and was not in the know as to how the investigations and or his disciplinary process were progressing. Indeed, this was contrary to the respondent's own letter through which it interdicted the claimant, as he had been promised that he would be addressed on the findings of the investigation.
33. As it came to be, the investigations commenced against the claimant were never concluded and following his resignation, he was notified that his disciplinary case had been terminated.
34. Having been subjected to a disciplinary process, it was the claimant's legitimate expectation that the same would be concluded within a reasonable time either in his favour or against him. This never happened hence eventually, the claimant threw in the towel and opted out of the employment relationship.
35. Regardless of the allegations leveled against him, the claimant deserved to know his fate in the respondent's employment. From the evidence of RW1, the investigation had no time limit hence cannot be termed as prolonged. It can thus be inferred that the same was indefinite and could take ages. By all means, it is not fair and just for an employer to keep an employee in abeyance for close to 17 months without communicating its decision from a disciplinary process. In this case, the claimant deserved to know his fate in the respondent's employment and move on with his life.
36. In the circumstances, the respondent's action of placing the claimant on interdiction for an indefinite period, entitled the claimant to treat himself as constructively dismissed. Indeed, he stated as much in his letter of resignation. As I see it, this was a classic example of constructive dismissal.
37. Granted, the respondent had all the right to place the claimant on interdiction, subject to investigations and a disciplinary process. However, the same ought to have been fair, reasonable and undertaken within the confines of the law. Without doubt, placing an employee on interdiction for 17 months without any word or action cannot be termed as reasonable, fair and just. If anything, it is very inhumane and inconsiderate.
38. In light of the foregoing, it is my finding that the claimant has proved on a balance of probability that he was constructively dismissed hence was unfairly and unlawfully terminated from employment.

#### **Whether the respondent is justified in withholding the claimant's dues**

39. Following the claimant's resignation, which was accepted through the respondent's letter dated 14<sup>th</sup> December, 2016, he was notified through another letter dated 27<sup>th</sup> April, 2017, that his final dues as computed was Kshs 2,008,407.05. Through the same letter, he was informed that the sum of Kshs 9,898,108.00 was endorsed as outstanding revenue in relation to the undue credits he had conferred on tenants amounting to Kshs 24,659,660.40. The claimant was therefore advised that the respondent's Board had directed that his final dues will be released upon full settlement of the outstanding revenue of Kshs 9,898,108.00.



40. Basically, the claimant was not paid his final dues on account of the said outstanding revenue as tabulated by the respondent. According to the respondent, the amount remains unaccounted for in its books.
41. It is worth mentioning that the claimant was advised in the letter of 27<sup>th</sup> April, 2017, that the said outstanding revenue was the subject matter of the disciplinary case against him. This was further confirmed by RW1 in his witness statement as he stated that the amount was the subject matter of the investigations pending disciplinary action against the claimant.
42. What this means is that the said amount is founded on the disciplinary process that had been instituted against the claimant and which was terminated after he tendered his resignation. This discounts the respondent's argument that the same is a clearance process and not a disciplinary measure.
43. In this regard, several issues come to the fore. First, when the claimant's letter of resignation was accepted, he was informed that the disciplinary case against him had been terminated. Second, there was no evidence from the respondent's end that it had concluded the investigations commenced against the claimant and that indeed, it had been ascertained that the sum of Kshs 9,898,108.00 was outstanding against him. Therefore, one wonders how the respondent arrived at the said sum and attributed it to the claimant without concluding the investigations? Afterall, the same was the subject of the investigations.
44. Accordingly, I cannot help but conclude that the claim of Kshs 9,898,108.00 by the respondent against the claimant is unjustified and lacks basis. Therefore, the respondent has no right to withhold the claimant's terminal dues.

### **Reliefs**

45. As the Court has found that there was no basis for the respondent to withhold the claimant's final dues, he is entitled to the same as initially tabulated by the respondent.
46. Having found that the claimant's termination was unfair and unlawful on account of constructive dismissal, he is entitled to compensatory damages under Section 49(1) (c) of the *Employment Act*, 2007. To this end, I award him damages equivalent to eight (8) months of his gross salary. This award has been informed by the indefinite and prolonged interdiction of the claimant as well as the length of the employment relationship. Coupled with the foregoing, the claimant's prolonged interdiction placed in an unenviable position of anxiety as he was in the dark regarding his employment situation with the respondent.
47. As I have found that the claimant was constructively dismissed hence unfairly and unlawfully terminated from employment, he is entitled to notice pay of three months as per clause 23 of his letter of appointment.
48. The claimant is also entitled to unremitted pension during the period he was on interdiction moreso noting that the disciplinary case against him was terminated.
49. The claim for severance pay is declined as the same is only payable under Section 40(1) (g) of the *Employment Act* in instances where termination has occurred through redundancy. This was not the case herein.

### **Orders**

50. In the final analysis, I enter Judgment in favour of the claimant against the respondent in the following manner: -



- a. A declaration that the claimant was constructively dismissed from employment by the respondent hence was unfairly terminated.
  - b. The claimant is awarded the terminal dues tabulated by the respondent being the sum of Kshs 2,118,407.05.
  - c. The claimant is awarded three month's salary in lieu of notice being the sum of Kshs 509,931.00.
  - d. The claimant is awarded compensatory damages in the sum of Kshs 1,359,816.00 which sum is equivalent to 8 months of his gross salary.
  - e. The claimant is entitled to unremitted pension contribution in the sum of kshs 159,231.00. However, this shall be remitted directly to the Staff Provident Fund.
  - f. The total award due to the claimant is Kshs 3,988,154.05.
  - g. Interest on the amount in (f) at court rates from the date of Judgement until payment in full.
51. The claimant is also entitled to a certificate of service in line with Section 51(1) of the Employment Act. The same shall issue within 30 days from the date of this Judgment.
52. The claimant shall have the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF APRIL, 2023.**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Mr. Chege Kamau

For the Respondent Ms. Moraa instructed by Mr. Mutei

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

