



**Kommo v Abc Insurance Brokers Limited (Cause 2053 of 2017)  
[2023] KEELRC 1335 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1335 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 2053 OF 2017**

**L NDOLO, J**

**MAY 25, 2023**

**BETWEEN**

**GERALD NDUNGU KOMMO ..... CLAIMANT**

**AND**

**ABC INSURANCE BROKERS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. By his Statement of Claim dated on October 12, 2017 and filed in court on October 13, 2017, the Claimant makes a claim of constructive discharge against the Respondent. The Respondent's defence is contained in a Reply as amended on July 27, 2021.
2. At the trial, the Claimant testified on his own behalf and the Respondent called its Group Head of Human Resources, Lucy Wariara. The parties also filed written submissions.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent in the position of General Manager, effective August 20, 2012. He earned a monthly salary of Kshs 350,000.
4. The Claimant was placed on probation for a period of six (6) months, which was to lapse on February 27, 2013. He contends that upon expiry of the probation period he continued to work for a period of five (5) months without any official communication from the Respondent.
5. He claims that in addition to failing to confirm him in his position, the Respondent did not issue him with a job description or performance targets.
6. The Claimant avers that following his persistent requests for a job description, the Respondent unlawfully, un-procedurally, illegally and without consultation extended his probationary period for a period of twelve (12) months effective February 28, 2013.



7. The Claimant contends that upon expiry of this probation period the Respondent failed/ignored and/or refused to confirm his appointment as required. He nonetheless continued to work for the Respondent for an additional seven (7) months up to October 29, 2014, when he tendered his resignation.
8. The Claimant asserts that his resignation was precipitated by the Respondent's acts of harassment, intimidation and discrimination including deliberate delays on payment of his salary causing him financial frustration and mental anguish.
9. The Claimant confirms having received partial settlement of his terminal dues and adds that a balance of Kshs 347,649.29 remains outstanding.
10. The Claimant seeks the following remedies:
  - a. A declaration that his employment was unfairly terminated.
  - b. Service/gratuity for 2years.....Kshs 350,000.00
  - c. Notice period (3 months) .....1,050,000.00
  - d. Withheld benefits.....347,649.29
  - e. Annual leave for 2 years.....700,000.00
  - f. Compensation for unlawful termination.....4,200,000.00
  - g. Compensation for discrimination & harassment.....4,200,000.00
  - h. Provident Fund for 21 months plus interest.....779,546.25
  - i. Anticipated Group Life Benefits.....5,130,000.00
  - j. Anticipated GPA/WIBA Benefits.....27,360,000.00
  - k. Costs plus interest

### **The Respondent's Case**

11. In its Reply as amended on July 27, 2021, the Respondent admits having employed the Claimant in the position of General Manager, effective August 20, 2012.
12. The Respondent terms the Claimant's performance as dismal, as a result of which his probation period was extended by letter dated August 29, 2013.
13. The Respondent denies deliberately delaying the Claimant's salary and explains that the delays were in fact caused by the Claimant who was responsible for generating pay roll for all employees.
14. The Respondent further concedes that it was experiencing financial constraints leading to salary delays, which situation was promptly explained to all the Managers.
15. The Respondent accuses the Claimant of issuing unauthorised credit in insurance premium, in complete disregard of policy, leading to poor cash flow and delayed salaries.
16. The Respondent denies any acts of harassment or discrimination as claimed by the Claimant.
17. The Respondent maintains that the Claimant was paid all his statutory dues upon his resignation, totalling Kshs 1,193,660.27, which the Claimant duly acknowledged as full and final settlement of his dues.



18. The Respondent maintains that the Claimant has no claim against it and therefore urges the Court to dismiss the claim in its entirety with costs to the Respondent.

### **Findings and Determination**

19. There are two (2) issues for determination in this case:
- a. Whether the Claimant has made out a case of constructive discharge;
  - b. Whether the Claimant is entitled to the remedies sought.

### **Constructive Discharge?**

20. On October 29, 2014, the Claimant sent the following handwritten letter to the Respondent:

“Dear Sir/Madam

RE: Resignation

The current work environment does not allow me to continue serving my roles at ABC Insurance Brokers Ltd.

I give a one (1) month notice to leave employment as per employment contract.

Yours faithfully

(signed)

Gerald Kommo”

21. In response, the Respondent wrote to the Claimant on November 5, 2014 stating:

“Dear Mr. Kommo,

RE: Resignation Notice

We refer to your letter of resignation dated October 29, 2014 and would like to advise you that your resignation is accepted. As stipulated in your letter of employment, your applicable notice period is one months (sic). However, the Management has decided to waive your applicable notice period and relieve you of your duties effective October 29, 2014,

Your final dues will be computed less statutory deductions that may be lawfully effected and any liability you may have with the Bank.

You are expected to handover any Bank property in your possession to your immediate supervisor and the Bank’s identification card and the Medical Insurance Cards for yourself and your family members to the Human Resources Department on your last working day further to which, your dues if any, will be credited into your account.

We wish you well in your future endeavours.

Yours faithfully,

(signed)

Lucy Wariara



## Ag. Head Of Human Resources”

22. The Claimant’s case is that he was forced to resign by the Respondent’s unlawful and unfair treatment. He told the Court that at a meeting held on October 15, 2014, he was given the option to either resign or be dismissed. The Claimant further accused the Respondent of extending his probation unfairly and delaying payment of his salary without justification. He therefore lays a claim of constructive discharge.
23. Constructive discharge or 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 behavior 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.”
24. In *Milton M Isanya v Aga Khan Hospital* [2017] eKLR the Court stated:
- “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.”
25. According to the Respondent, the Claimant’s resignation was his way of walking out of a disciplinary process. Apart from complaints regarding the Claimant’s performance generally, the Respondent took issue with the Claimant’s decision to advance credit on insurance premium, without authorisation. The Claimant himself conceded having advanced the credit which remained unsettled at the time of his separation with the Respondent.
26. Regarding the issue of extension of the Claimant’s probation, the Respondent stated that the Claimant had not raised any issue at the time of extension. The Claimant himself confirmed this in his testimony. He told the Court that his only contention was the person under whose hand the letter of extension was issued. He nonetheless accepted the terms of the extension as stated in letter dated September 4, 2013.
27. On the matter of delay in salary payment, the Respondent conceded that due to cash flow challenges, the Claimant’s salary, alongside that of other employees was not always paid on time.
28. On the whole, it appears that the Claimant’s employment stint with the Respondent was troubled. The critical issue is whether these circumstances created a perfect match for constructive discharge.
29. In its decision in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR the Court of Appeal established the following guiding principles in determining constructive discharge claims:
- 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.
30. From the evidence on record, the Claimant's performance had been put into question and according to the Respondent, the Claimant circumvented a disciplinary process by tendering his resignation.
31. In its decision in *Stella W Muraguri v Edward Kamau Muriu & 4 others Cause 2027 of 2015* this Court stated as follows:
- “...not every involuntary resignation amounts to constructive dismissal. The threshold for constructive dismissal is achieved where the involuntary resignation has a direct causal link with the employer's conduct, which may reasonably be described as intolerable. It cannot be said to be constructive dismissal, when an employee resigns to get out of a tight spot.”
32. I have no reason to change my mind on this issue. The Claimant may have faced difficulties at work, which I must add are commonplace for employees holding senior positions like the one held by the Claimant, but I do not find any footprints of constructive dismissal by his employer.
33. Flowing from this finding, the claims for compensation on account of unlawful termination, discrimination and harassment are without basis and are dismissed.
34. There is evidence on record that the Claimant was paid for the waived notice period. In addition, all leave days were commuted for cash. These claims are therefore also without basis and are disallowed.
35. The claims for service/gratuity and provident fund were not proved and are dismissed.
36. The claims for Group Life and GPA/WIBA are anticipatory and contingent in nature and are not payable in the circumstances of this case.
37. The Respondent admits having withheld the Claimant's benefits in the sum of Kshs 347,649.29 on account of uncollected insurance premium. The only thing I will say on this is that any such recovery amounts to a surcharge, which is a disciplinary action that can only be taken pursuant to a disciplinary process as set out under Section 41 of the *Employment Act* (see *Kenya National Library Services Board v Beatrice N Ayoti* [2014] eKLR).
38. In the absence of evidence of a prior disciplinary process on this issue, I find and hold that the withholding of part of the Claimant's benefits was unlawful.



39. I therefore enter judgment in favour of the Claimant in the sum of Kshs 347,649.29 being withheld terminal benefits.
40. This amount will attract interest at court rates from the date of judgment until payment in full.
41. The Claimant will have the costs of the case.
42. Orders accordingly.

**DELIVERED VIRTUALLY AT NAIROBI THIS 25<sup>TH</sup> DAY OF MAY 2023**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Sigoma for the Claimant

Mr. Wairoto for the Respondent

