



Lwanga v Board of Governors St. Andrews School Turi (Cause 127 of 2017) [2023] KEELRC 1209 (KLR) (18 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1209 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 127 OF 2017
DN NDERITU, J
MAY 18, 2023**

BETWEEN

BRUCE MUBIRU LWANGA CLAIMANT

AND

BOARD OF GOVERNORS ST. ANDREWS SCHOOL TURI RESPONDENT

JUDGMENT

i. Introduction

1. In a Statement of Claim dated 20th March, 2017 and filed in court on even date, the Claimant, through Odera Were, Advocate, prays for: -
 1. The Respondent be ordered to pay the Claimant Kshs.4,113,422/= for unlawful termination and/or dismissal being compensation for one year salary.
 2. The salary for the remaining months.
 3. That the Respondent do pay damages and costs of this Claim.
2. Together with the Statement of claim, as expected, was filed a verifying affidavit by the Claimant, a witness statement, and a list of documents and a bundle of the listed documents.
3. On 28th March, 2017 the Respondent appointed Mukite Musangi & Co Advocates to act for it in this cause and filed a reply to the claim on 29th March, 2017 alongside a bundle of documents. A witness statement by Alison Farago was filed on 16th May, 2017. On 17th November, 2020 the Respondent filed a witness statement by Andrew Boulle to substitute the earlier one. Again, on 3rd December, 2021 the Respondent filed a statement by Janet Ndiho (RW1) who finally testified for the Respondent during the hearing.



4. In its statement of defence the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.
5. This cause came up in court for virtual hearing on 16th February, 2022 when the Claimant (CW1) testified and closed his case. The defence was heard on the same day when RW1 testified for the Respondent and the Respondent's case was closed.
6. By consent, counsel for both parties summed up their respective positions by way of written submissions. Counsel for the Claimant filed written submissions on 18th March, 2022 while counsel for the Respondent filed on 12th July, 2022. Counsel for the Claimant filed supplementary submissions on 21st July, 2022.

ii. The Claimant's Case

7. The Claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by his Counsel, and the same is summed up as hereunder.
8. Vide a contract dated 11th April, 2015 the Claimant was engaged by the Respondent as estate manager for the period from March, 2015 to 31st August, 2017 at an annual salary of Kshs.4,113,422/= . A prototype/template copy of a similar contract was produced by the Respondent but the executed agreement was not availed, notwithstanding that Counsel for both parties had by consent undertaken to avail the same alongside the written submissions.
9. However, the existence and the terms and conditions of the contract are not contested as adduced in the evidence of the Claimant.
10. The Claimant alleges that he was constructively terminated by the Respondent in March, 2016 which termination was against his legitimate expectation that his contract was to run to the end. He alleges that the Respondent fundamentally changed the terms and conditions of his employment by demoting him. He alleged that he was replaced and ordered to stay away from his place of work. According to the Claimant, he was constructively dismissed and he thus filed this cause seeking compensation for the same as per the prayers set out above.
11. During the hearing in court, the Claimant testified that in or about March, 2016 he was invited to a meeting by the bursar and the human resources manager and informed that he was performing dismally and as such he was to be placed under a performance improvement plan (PIP). He resisted the process of placing him under a PIP and declined completion of the PIP Form as he felt the said officers were not guiding the meeting and the process properly. He requested that his supervisor be invited into the meeting but his request was declined. He decided not to take part in the meeting and refused to fill-in and sign the PIP Form. A sample of the said form was produced as an exhibit by the Respondent.
12. After the Claimant refused to participate in the PIP, the Respondent decided to dismiss him for misconduct. However, the decision to dismiss the Claimant was not effectual as the director of the Respondent intervened and the purported dismissal was conditionally set aside for being un-procedural. However, the Claimant was ordered to undertake the PIP process and sign the necessary papers.
13. As it turns out, the Claimant refused to take part in the PIP process and declined to sign the necessary papers. From that point on the evidence on record shows that the Respondent decided not to allocate any work to the Claimant but continued to pay his monthly salary and other dues to the end of the contract on 31st August, 2017.



14. In his testimony, the Claimant admitted that he did not resign and the Respondent did not issue him with a letter of dismissal or termination in any form or manner. He also admitted that he was paid his salary in full until the agreed date of expiry of the contract in August, 2017. This means, and the Claimant admitted as much, that the Claimant was still receiving his monthly pay as at the time of filing this cause in March, 2017. He also admitted that the employee that he alleges took over his job was engaged and designated as facility manager and he admitted that his position/office of estate manager was not abolished. He stated that his last day at work was at the end of August or early September, 2016. He admitted that he had no formal letter or notice informing him not to report to work but insisted that he was constructively dismissed or terminated.
15. It is on the basis of the foregoing that the Claimant prays as set out in the memorandum of claim. The written submissions by his counsel shall be considered in the succeeding parts of this judgment.

iii. The Respondent's Case

16. The Respondent's case is contained in the reply to the claim, the oral and documentary evidence adduced through RW1, and the written submissions by Counsel and the same is summarized as hereunder.
17. The Respondent admits that it entered into employment contract as alleged by the Claimant but denies ever constructively or otherwise dismissing or terminating the Claimant. Through the pleadings and the evidence of RW1 the Respondent alleges that while it had good reason(s) for dismissing or terminating the Claimant for his failure to obey lawful instructions to enter into a PIP, it decided not to act and retained the Claimant and paid his monthly dues till the end of the contract in August, 2017.
18. The Respondent denies changing the terms and conditions of employment of the Claimant or acting in unreasonable manner towards the Claimant that would have amounted to constructive dismissal of the Claimant. The Respondent also denies replacing the Claimant or abolishing his position or demoting him. The Respondent alleges that it is the Claimant who decided not to report to work as his office was always open and that he was not dismissed as he continued to draw a monthly salary to the end of his contract.
19. It is on the basis of the foregoing that the Respondent prays that the Claimant's cause be dismissed with costs. The written submissions by counsel shall be considered in the succeeding parts of this judgment alongside those by counsel for the Claimant.

iv. Issues for Determination

20. After careful and thorough scrutiny of the pleadings filed, the oral and documentary evidence tendered from both sides, and the submissions by counsel, this court identifies the following issues for determination –
 - a. Was the Claimant constructively or otherwise dismissed or terminated by the Respondent?
 - b. If (a) above is in the affirmative, is the Claimant entitled to the reliefs sought in the claim?
 - c. Who meets the costs in this cause?

v. Was the Claimant Dismissed or Terminated?

21. The terms and conditions of service of the Claimant are not in dispute. They are as alluded to in the preceding parts of this judgment.



22. The evidence on record indicates that by March, 2016 the Respondent felt that the Claimant was not performing in his duties as estate manager. A meeting was called by the bursar and the human resources manager, ostensibly on the instructions from the director, for the Claimant to explain the non-performance. It is during that meeting that the Claimant was directed to enter into a PIP and execute the binding documents so that his performance could be monitored and or assessed from time to time with the aim of improving the same.
23. According to the Claimant he was ambushed in that he had not been informed of the agenda of the meeting and as such he requested for his supervisor to come to the meeting before he could agree on execution of the PIP which request was denied and he hence decided not to go through the PIP process and or sign the applicable form.
24. Although no minutes or letters were produced in regard to that meeting, it would appear, and this is admitted by the Respondent, that after the meeting it was decided that the Claimant be dismissed. However, the decision to dismiss was rescinded by the director for lack of procedural fairness. The Claimant was reinstated but on condition that he entered into a PIP and execute the applicable form.
25. It is admitted by both parties that the Claimant flatly refused to enter into the PIP and or execute the applicable form.
26. In the meantime, the Respondent decided to hire a facility manager, ostensibly to supervise the Claimant and or to perform his duties in case the latter did not want to work and or failed to perform. An assistant was also hired to assist the facility manager. It would appear that the Respondent then decided not to allocate any duties to the Claimant but continued to pay his monthly salary and dues till the contract expired on 31st August, 2017.
27. According to the Claimant, the PIP was intended to change the terms and conditions of his contract of service. However, no evidence was adduced by the Claimant to demonstrate how the said PIP was to change and or affect the terms and conditions of the contract.
28. It is in the considered view of this court that the relationship between the Respondent and the Claimant was irretrievably broken when the Claimant failed and or refused to enter into a PIP. The Respondent appears to have resigned to the fact that it was dealing with a difficult employee whose dismissal would probably have caused more trouble. Instead of dismissing or terminating the Claimant in any other way, the Respondent decided to retain the Claimant in the pay-roll and pay his monthly salary as and when the same fell due, but allocating him no duties. In fact, the evidence on record is that the Claimant did not attend to work from the end of August or beginning of September, 2016 till the expiry of his contract on 31st August, 2017.
29. An employer has two basic obligations under any contract of service. Firstly, to provide and allocate work to the employee and, secondly, to pay all wages and benefits as and when they fall due and payable as agreed by and between the two. No employer is expected to hire an employee and allocate no work to such employee and or fail to pay wages and other agreed or statutory benefits.
30. In the same breath, an employer is entitled to manage the performance and discipline of an employee and use all lawful means to ensure that an employee performs and remains productive. It is not and cannot be the duty of this court to supervise and or direct an employer on how to manage the workplace and the employees. This court can only be called upon and may interfere with such internal mechanisms if the same are unlawful both in substance and procedure adopted by the employer in their enforcement.



31. The question that arises then is this – In the context of the events and circumstances of this cause, based on the evidence as summarized above, was the Claimant constructively dismissed by the Respondent as alleged? Constructive dismissal occurs whereby an employer creates circumstances or a situation that makes it difficult and impossible for an employee to continue in employment. This may arise from unreasonable conduct by the employer towards the employee or unilateral action by the employer that goes to change or fundamentally change or affect the terms and conditions of employment. This common law principle was noticeably developed in the case of *Western Excavating ECC Ltd V Sharp* (1978) 2 WLR 344.
32. For constructive dismissal to be deemed to have occurred, therefore, a number of ingredients need to be proved or demonstrated by an employee who pleads as such – See *Coca Cola East & Central Limited V Maria Kagai Lugaga* (2015) eKLR. An employee has to prove unreasonable conduct on the part of the employer or fundamental breach of the terms and conditions of employment by the employer. The burden of proof is squarely in the court of the alleging employee and counsel for the Respondent has ably submitted on this issue alluding to the unreasonableness and contractual tests.
33. Once an employee proves that there was unreasonable conduct and or fundamental breach of the contract by the employer, such as to entitle an employee to repudiate the contract, the employee must also demonstrate that he did not acquiesce to or waive the constructive dismissal – See *Herbert Wafula Waswa V Kenya Wildlife Services* (2020) eKLR.
34. Once the employee decides that the conduct of the employer is unreasonable and or in fundamental breach of the terms and conditions of the contract of service or any term or condition thereof, as to entitle him to repudiate the contract, the employee is entitled and must of essence resign or issue notice to quit. If or where the employee stays on and does not resign or terminate the contract, it is presumed that such employee has acquiesced to and or waived the conduct of the employer. Such an employee cannot be heard to complain down the road.
35. But given the circumstances and the evidence in this matter, was the Respondent guilty of unreasonable conduct or fundamental breach of the contract? The emphatic verdict of this court is in the negative for the following reasons.
36. The genesis of the differences between the Claimant and the Respondent is a direction given by the latter to the former to execute and enter into a PIP and sign for the same. This was founded on an observation by the Respondent that the Claimant was not performing as expected. As stated elsewhere in this judgment, an employer has a duty, an obligation, and indeed a right to supervise an employee and take all reasonable steps to ensure that an employee is performing optimally and to even take disciplinary action against a deviant employee. It is a ground of summary dismissal for an employee to fail to perform either through neglect of duty, recklessness, or carelessness and also for failing to obey lawful orders or directions from the employer and or those placed in authority by the employer – See Sections 41 and 44 of the *Employment Act* (the Act).
37. In this cause the employee adamantly refused to enter into and execute a PIP as directed by the employer. He was at first dismissed but the dismissal was reversed by the director of the Respondent who rightly found that the dismissal was un-procedural. However, the Claimant was directed to sit with the bursar and the human resources manager and execute a PIP. He flatly, defiantly, and adamantly refused to comply and communicated his decision in writing.
38. It is in the considered opinion of this court that the conduct of the Claimant as analyzed above was completely out of order and the Respondent was lawfully entitled to act by dismissing the Claimant under Section 44 of the Act. However, the Respondent decided to avoid “trouble” and play safe by not



allocating any duties to the Claimant while at the same time paying him all his monthly dues and salary until the contract expired on 31st August, 2017. As stated elsewhere in this judgment, the Claimant has neither demonstrated nor proved that there was any unreasonable conduct or fundamental breach of the contract by the Respondent at any point during the life of the contract. A direction to the Claimant that he executes a PIP cannot be construed unreasonable conduct or breach of the terms and conditions of service. The Claimant has not given evidence on how the PIP was to fundamentally affect his terms and conditions of service.

39. Further, the Claimant did not resign as expected and the Respondent did not dismiss him. The Claimant continued to draw a salary and enjoy all the other benefits appurtenant to the contract until his contract expired in August, 2017. In other words, the Respondent, once the Claimant refused to obey lawful orders to enter into a PIP, decided not to allocate him any duties but pay him his dues for the entire balance of the contract period. In those circumstances – What does the Respondent owe to the Claimant?
40. In the considered view of this court, the Respondent owes nothing to the Claimant in the entire circumstances for the reasons given above.
41. The submission by Claimant’s counsel to the effect that the Claimant protested the constructive dismissal by way of filing this cause, yet he continued to draw a salary from the Respondent, is wrong and misleading. It was hypocritical, cynical, and dishonest for the Claimant to, without any protestation or rejection, continue drawing a salary while performing absolutely no work for the Respondent, and even file this claim in court without resigning, as was expected of him.

vi. Reliefs

42. Having held that the Claimant was not constructively or in any other manner dismissed or terminated by the Respondent, this court shall now consider each of the reliefs sought as set out at the introductory part of this judgment.
43. Prayer (1) is for Kshs.4,113,422/= being compensation for unlawful termination and or dismissal which is equivalent to pay for 12 months. This is a relief based on Section 49(1)(c) of the Act. This court has already found that the Claimant was neither constructively dismissed nor terminated in any other manner or form. This claim is thus denied and dismissed.
44. Prayer (2) is for the salary for the remaining months of the contract. It is not in dispute that the Claimant was paid his monthly salary and all other dues until the expiry of his contract on 31st August, 2017. This prayer makes no sense as the same is dishonest and only intended to unjustly enrich the Claimant. This claim is denied and dismissed.

vii. Costs

45. Was this cause necessary? Were there any justiciable issues that needed and or deserved the intervention of this court? Was the Claimant not the author of his own misfortune, actually fortune, for earning a salary for such a long period without performing any work for the Respondent? What wrong did the Respondent commit in the entire circumstances of this cause? The answers to all the above rhetorical questions are in the negative.
46. Costs follow the event and since this cause has been found to be devoid of merits in its entirety, the same is dismissed with costs to the Respondent.



viii. Disposal

47. In final disposal and for all the foregoing reasons this cause is hereby dismissed in its entirety with costs to the Respondent.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU THIS 18TH DAY OF MAY 2023.

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DAVID NDERITU

JUDGE

