



**Mugo v SOS Children’s Village Kenya (Cause 146 of 2017)  
[2023] KEELRC 1191 (KLR) (17 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1191 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 146 OF 2017  
NJ ABUODHA, J  
MAY 17, 2023**

**BETWEEN**

**REUBEN WACHIRA MUGO ..... CLAIMANT**

**AND**

**SOS CHILDREN’S VILLAGE KENYA ..... RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed a statement of claim on 21<sup>st</sup> April 2016 against the Respondent seeking for the following reliefs;
  - a. A declaration that the Claimant was constructively dismissed from employment by the acts of the Respondent that triggered the involuntary resignation of the Claimant from employment thus the termination is unfair and unlawful
  - b. One month pay in lieu of notice @ Kshs.43,099
  - c. 12 months’ salary as compensation @ Kshs.43,099 – Kshs.517,188
  - d. 15% basic salary of Kshs,28,099 i.e Kshs.4,214.85 to cater for house allowance as of the month of September 2009 until the month of November 2013 – Kshs.214,957
  - e. 4 years’ service pay based on the sum of Kshs.43,099 per complete year of service- Kshs.172,396
  - f. Costs and interests.
2. In the statement of claim, the Claimant avers that he was engaged in employment by the Respondent from the year 2009 performing the duties of a data clerk/secretary at a monthly salary of Kshs.43,099/ =.



3. He stated that the Claimant diligently and dutifully served the Respondent as such until 1<sup>st</sup> November 2013 when owing to the acts of the Respondent the Claimant caused an involuntary resignation from employment leading to a constructive resignation.
4. According to the Claimant, the Respondent created an unsuitable and hostile work environment in order to provoke an involuntary resignation; that it put pressure on the Claimant to resign from employment; that it falsely subjected the Claimant to the criminal justice process in order to exercise coercion upon him to resign from employment and that subjecting him to an unwarranted criminal process over matters unrelated to his employment thus leaving the Claimant with no option but to resign.
5. He averred that as a consequence of the involuntary resignation and constructive dismissal, he has suffered a breach of his right under the law and the employment contract.
6. The Respondent filed a response to claim on 12<sup>th</sup> May 2016 and denied that it caused the Claimant to retire involuntarily.
7. The Respondent stated that the Claimant had been seconded to perform duties of data clerk/ secretary which included collecting money from customers which amount he was to bank in the respondent's account.
8. According to the Respondent, between the year 2011 and 2013, the claimant used to collect the said funds and embezzle them and that upon being discovered, he verbally undertook to repay the sums of up to Kshs.1,886,296 but later changed his mind and refused to repay.
9. The Respondent averred that the claimant was guilty of his actions and his conduct that he voluntarily opted to save face since he feared that he could be summarily dismissed.
10. It was the Respondent's contention that the claimant was not entitled to any of the prayers he is seeking in the claim.
11. The matter was then set down for hearing on 16<sup>th</sup> November 2021.
12. The Claimant testified on the said date as CW1. He adopted his witness statement recorded on 21<sup>st</sup> February 2017 as his evidence in chief.
13. It was his testimony that he was employed by the Respondent as a data clerk/secretary and that on 1<sup>st</sup> November 2013, he was summoned by his supervisor and was taken to Central Police station and told that some money had been lost and that he was culpable.
14. The claimant stated that he had no previous warnings or information about the said loss and that as a result of what he called emotional torture he resigned from employment.
15. On cross examination, he stated that he was arrested and charged with a criminal case and that he was convicted where he paid a fine of Kshs.80,000.
16. He also conceded that on the civil case filed by the Respondent against him for the recovery of the said monies, the court ordered him to repay the stolen money.
17. As regards the resignation letter, the Claimant admitted that it came from him.
18. He sought for this court to grant him the prayers he is seeking in his memorandum of claim.
19. The Claimant then closed his case.



20. The Respondent did not call any witnesses in furtherance of this case and after several adjournments at its instance, the court ordered on the 21<sup>st</sup> September 2020 that the defence case be deemed as closed.
21. Directions were given for parties to file written submissions.
22. The Claimant filed his submissions on 10<sup>th</sup> October, 2022 and the respondent on 1<sup>st</sup> December, 2022. The Court has considered the submissions.

### **Determination**

23. From the pleadings and the evidence of the parties, the submissions on record, I find that the only emerging issue for determination is whether the Claimant made a case for constructive dismissal and if so, what reliefs should then issue.
24. The Claimant has submitted that he was constructively dismissed when the Respondent accused him of stealing Kshs 1,886,296 and instead of according him a hearing, he was processed and arraigned in court vide Eldoret Criminal case No. 5178 of 2013- Republic Vs Reuben Wachira. It was his contention that owing to the respondent's treatment, upon release from custody he tendered his resignation from employment.
25. The Respondent on the other hand has maintained that there was no constructive dismissal as the resignation was voluntary as the claimant was guilty of his actions of theft.
26. The Court of Appeal has had an opportunity to address the issue of constructive dismissal in the case of Coca-Cola East & Central Africa Limited v Maria Kagai Lugaga (2015) eKLR, where it held;

“What is the key element and test to determine if constructive dismissal has taken place? The factual circumstances giving rise to constructive dismissal are varied. The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behaviour towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constituted a repudiatory breach of the contract of employment - this is the contractual test. The contractual test is narrower than the reasonable test. The dicta in *Western Excavating (ECC) Ltd. -v- Sharp* [1978] ICR 222 adopts the contractual approach test and we are persuaded that the test is narrow, precise and appropriate to prevent manipulation or overstretching the concept of constructive dismissal. For this reason, we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment. Whether a particular breach of contract is repudiatory is one of mixed fact and law. (See *Pedersen -v- Camden London Borough Council* [1981] ICR 674). The criterion for evaluating the employers conduct is objective; the employer's conduct does not have to be intentional or in bad faith before it can be repudiatory (See *Office -v- Roberts* (1980) IRLR 347). The employee must be able to show that he left in response to the employer's conduct (i.e. causal link must be shown, i.e. the test is causation). In the case of *Jones -v- F. Sirl & son (Furnishers) Ltd.* [1997] IRLR 493, it was held that there can still be constructive dismissal if the employee waits to leave until he has found another job to go to. The employee



must leave because of the breach but the breach need not be the sole cause so long as it is the effective cause. (See Walker -v- Josiah Wedgwood & Sons. Ltd. [1978] IRLR 105). The criterion to determine if constructive dismissal has taken place is repudiatory breach of contract through conduct of the employer. The burden of proof lies with the employee. The employer's conduct must be such as when viewed objectively, it amounts to a repudiatory and fundamental breach of the contractual obligations. (See Wooder -v- Wimpey [1980] 1 WLR 277; see also Malik and Mahmud -v- Bank of Credit and Commerce International [1998] AC 20). If the employee makes it clear that he or she is working under protest, he/she is not to be taken to have waived the right to terminate the contract under constructive dismissal. We adopt the dicta in the above cited persuasive judicial decisions as establishing relevant principles in constructive dismissal.

27. Flowing from the above authorities, it follows that where an employee is pleading constructive dismissal, the court should evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment
28. This also means that it is not enough for an employee to plead constructive dismissal but must demonstrate through evidence that his resignation was compelled by the actions of the employer.
29. In the instant case, the Claimant tendered his resignation after he was charged with the criminal offence of stealing by servant. As much as it is important that this court notes that the criminal case is not related in any way to the issue at hand, it is not lost that the Claimant indeed voluntarily resigned because he felt humiliated after he felt he was not accorded a hearing but instead presented to the police and charged with a criminal offence. The act of the respondent to have the claimant prosecuted on reasonable suspicion of being involved in an offence to the detriment of the employer's property cannot be said to have constituted a behaviour towards the claimant that was unreasonable.
30. The Court has struggled to see how he was constructively dismissed when the actions he is complaining of were valid reasons to have a person summarily dismissed for gross misconduct within the meaning of section 44(4) of the *Employment Act*.
31. In the end, I find and hold that this claim is without merit and I hereby dismiss it with costs.
32. It is so ordered.

**ABUODHA J.N**

**JUDGE**

**DATED AT NAIROBI THIS 17<sup>TH</sup> DAY OF MAY 2023**

**DELIVERED VIRTUALLY, THIS 17<sup>TH</sup> DAY OF MAY, 2023**

**In the presence of:**

**Kagunza advocate for the Respondent**

**appearance for the Claimant**

