



**Ngabo v Bliss GVS Healthcare Limited (Cause 1236 of 2018)
[2023] KEELRC 2021 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2021 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1236 OF 2018**

**SC RUTTO, J
JULY 31, 2023**

BETWEEN

BILL ROBERT NGABO CLAIMANT

AND

BLISS GVS HEALTHCARE LIMITED RESPONDENT

JUDGMENT

1. It is the claimant's case that he was employed by the respondent as a medical doctor with effect from June 9, 2016. According to the claimant, he carried on his duties diligently and was not subject of any disciplinary process or action whatsoever. He avers that he was transferred to the respondent's clinic in Garissa on April 28, 2018 and that he appealed against the transfer but received no response from the respondent and thereafter, his salary was stopped. He has termed the stoppage of his salary as amounting to constructive dismissal. He further states that the respondent's conduct of terminating his employment is a demonstration of bad faith, devoid of merit, scandalous and/or intended to archive some mischievous purpose inconsistent with its mandate. It is against this background that the claimant seeks against the respondent the sum of Kshs 2,990,216.00 being compensatory damages, salary for April and May, salary in lieu of notice and leave pay.
2. Opposing the claim, the respondent avers that the claimant was involved in numerous disciplinary issues, negligently performed his duties and absented himself from work without lawful excuse. That following a disciplinary process, the claimant was transferred to its facility in Garissa, starting May 7, 2018. The respondent further avers that the claimant deserted employment in May, 2018 in that he refused to report to the said station. That consequently, he was issued with a show cause letter. The respondent avers that a hearing was scheduled for July 6, 2018 but the claimant refused to attend the said hearing hence it is proper to infer that he deserted his employment. According to the respondent, the claimant is not entitled to the prayers sought as the same are unfounded and lack merit in law and facts. The respondent further lodged a counterclaim against the claimant in the sum of Kshs 193,960.00, being one month's salary in lieu of notice.



3. During the hearing which concluded on March 14, 2023, both sides called oral evidence.

Claimant's Case

4. The claimant testified in support of his case and for starters, he adopted his witness statement and further witness statement to constitute his evidence in chief. He proceeded to produce the documents filed together with his claim as well as his further list and bundle of documents as exhibits before court.
5. The claimant stated in evidence that following his transfer to the respondent's Branch in Garissa County, he immediately did a letter to the Human Resource Manager indicating that he was a student at the University of Nairobi, pursuing a Masters in Health Systems Management hence specifically appealed against the said transfer.
6. Despite hand delivering the letter of appeal and sending an advance via email, the Human Resource Manager asked him to go and await communication in due course. He averred that up to date, he has never received any response. That the respondent immediately went ahead and stopped paying his monthly salary. He averred that all efforts to have the respondent respond to his appeal and reinstate his salary have proved futile.
7. The claimant further averred that the respondent's actions of asking him to go and wait for a response which he has not received and further stopping his salary, amounts to constructive dismissal.
8. The claimant further stated that he has never been paid any dues to date, even after officially writing and demanding the same through his Advocates on record.
9. Concluding his testimony in chief, the claimant asked the court to allow his claim as prayed.

Respondent's Case

10. The respondent called oral evidence through Ms Gloria Benlodgers who testified as RW1. She identified herself as the Regional Human Resource Manager of the respondent. At the outset, she sought to adopt her witness statement to constitute her evidence in chief and further produced the documents filed on behalf of the respondent as exhibits before court.
11. It was RW1's testimony that the claimant was involved in numerous disciplinary issues. She stated that in December 2017, the claimant negligently left the clinic unattended knowing very well he was the doctor on duty, thus exposing patients as well as the respondent to a possible lawsuit for such negligence. As such, he was given a warning letter on December 18, 2018.
12. On March 30, 2018, the claimant received a notice to show cause on his failure to wear a dust coat during work, lateness and leaving work earlier than the set working hours. He rudely and unsatisfactorily responded through his letter dated March 20, 2018 and he was issued with a letter on March 20, 2018 warning him of disciplinary action. On March 27, 2018, less than 7 days from receiving the warning letter, the claimant negligently referred a patient to Nairobi Women's Hospital for Gastro Esophageal Reflux (GERD) after he deliberately failed to note down the patient's medical history, investigations or any treatment given to the patient in clear violation of set medical standards and thus exposing the respondent to a possible law suit.
13. That on being asked to show cause through a memo dated April 10, 2018, the claimant gave an unsatisfactory response on April 16, 2018 which mostly blamed the patient and penned off his response at "there was nothing I could have done".



14. It was RW1's further evidence that the respondent wrote to the claimant on April 16, 2018 suspending him from duty. He was invited for a disciplinary hearing on April 18, 2018 and was informed of his right to be accompanied by his fellow workmate.
15. On April 18, 2018, a disciplinary hearing took place in the presence of the claimant who was given a chance to be heard. He however opted not to bring a witness. The disciplinary committee though unsatisfied with the claimant's response, recommended that he be retained until the end of his contract. It was also agreed upon the claimant's request, that he be transferred to another facility.
16. RW1 further stated that on April 28, 2018, the respondent through the human resource department issued a lawful order transferring the claimant to its Garissa clinic starting May 7, 2018. The claimant in blatant disobedience of the order refused to report to Garissa and deserted his employment forcing the respondent to write to him on May 21, 2018 asking him to show cause why disciplinary action should not be taken against him. The claimant did not show cause prompting the respondent to send another memo on June 28, 2018 inviting him to a disciplinary hearing scheduled for July 6, 2018. In response, the respondent was served with a demand letter from the claimant's advocates on record, demanding for his terminal benefits.
17. It was RW1's evidence that neither the claimant nor his advocates on record attended the hearing scheduled for July 6, 2018 and thus it is proper to infer that the claimant deserted his employment in breach of the employment contract.
18. RW1 further stated that the claimant did not issue the respondent with a 30 days' notice or pay one month's salary in lieu of notice before leaving employment.

Submissions

19. On the claimant's part, it was submitted that the actions of the respondent in sending him on suspension on April 16, 2018, conducting a disciplinary hearing in which it was expressly stated in minutes that he was to be transferred as a consequence of the offence and issuing him with a transfer letter and failure to respond to his appeal, amount to constructive dismissal. That it is clear that the respondent no longer intended to be bound by the terms of the employment contract. In support of his position, the claimant placed reliance on the case of [*Coca Cola East & Central Africa Limited vs Maria Kagai Ligaga*](#) [2015] eKLR.
20. It was the claimant's further submission that the respondent had failed to demonstrate any efforts of reasonable attempts made to contact him knowing very well that he had appealed its decision for the transfer to Garissa and had been told to wait for communication from the respondent. He further submitted that the respondent's unilateral decision to stop paying his salary is not only unlawful but unfair.
21. The claimant stated in further submission that his termination was not for fair and valid reasons and that the respondent did not pass the procedural and substantive fairness in terminating his employment. The claimant buttressed his submissions with several authorities including the case of [*Walter Ogal Anuro vs Teachers Service Commission*](#) [2013] eKLR and [*Boniface Francis Mwangi v BOM Iyego Secondary School*](#) [2019] eKLR.
22. Citing the case of [*Coca Cola East & Central Africa Limited vs Maria Kagai Ligaga*](#) [*supra*] and [*Enid Nkirote Mukire vs Kenya Yearbook Editorial Board*](#) (2022) eKLR, it was the respondent's submission that it did not constructively terminate the claimant's employment.



23. It was the respondent's further submission that it tried its best to initiate contact with the claimant to no avail.

Analysis and Determination

24. I have considered the pleadings on record, the evidentiary material on record together with the rival submissions and the following issues stand out for determination: -
- i. Whether the claimant was constructively dismissed;
 - ii. Is the claimant entitled to the reliefs sought?

Constructive Dismissal?

25. The claimant has averred that the respondent's action of asking him to go and wait for a response to his appeal transfer and stopping his salary amounted to constructive dismissal. On the other hand, the respondent avers that it is the claimant who deserted work without informing his employer of his whereabouts.

26. The term constructive dismissal is defined by the *Black's Law Dictionary* (10th Edition) to mean: -

“An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”

27. Courts have also made judicial pronouncements on the issue with one of the leading cases being *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.”

28. Similarly, in the case of *Nathan Ogada Atiagaga vs David Engineering Limited* (2015) eKLR, the court defined constructive dismissal as follows:

“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.”

29. Back to the instant case, the record reveals that the claimant was taken through a disciplinary process which was commenced through a notice to show cause dated April 10, 2018. The claimant responded to the notice to show cause on April 16, 2018. He was later suspended and invited to attend a



disciplinary hearing on April 18, 2018. Following the disciplinary hearing, the disciplinary panel recommended that the claimant be transferred to another clinic.

30. It is common ground that the claimant did not report to his new work station in Garissa. He admitted as much during cross examination. It was also his admission during cross examination that he did not report to the respondent's clinic in Nairobi. In essence, the claimant was not at work at either of the respondent's clinics. Seemingly, it is on that account that his salary was stopped.
31. Drawing from the determination in *Coca Cola East and Central Africa Limited versus Maria Kagai ligaga*, (*supra*) and *Nathan Ogada Atiagaga vs David Engineering Limited* (*supra*), it is evident that for constructive dismissal to be inferred, the employee must prove among other factors, that the employer committed a 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. Further the conduct of the employer must be so intolerable as to leave the employee with no option but to leave employment.
32. As stated herein, the claimant cited failure of the respondent to respond to his letter appealing the transfer and stoppage of his salary. As the claimant admitted not reporting to his work station, there was no obligation on the part of his employer to continue paying his salary. After all he did not render any service during the period in question. There was therefore no basis for the respondent to continue paying his salary. Indeed, section 17 (1) of the *Employment Act* contemplates payment of wages to an employee for work done. It therefore follows that an employee who has not rendered any service to his employer cannot possibly expect to be paid a salary.
33. With regards to the response to his appeal against the transfer, it is notable that the claimant did not provide any proof that he appealed against his transfer to Garissa. Supposing the claimant indeed tendered his appeal against the transfer and was awaiting a response, still, the same was not a justification on his part to keep away from his work station. As he admitted during cross examination, he did not report to work in Nairobi either.
34. The bottom line is that from the evidence on record, it is evident that the claimant was not constructively dismissed from employment and that it is him who opted to walk out of his employment. Therefore, there was no termination, fair or unfair.
35. It is also noteworthy that following the claimant's failure to report to Garissa, he was issued with a notice to show dated May 21, 2018 and later invited to attend a disciplinary hearing on July 6, 2018 but he did not attend. He cannot therefore turn around and allege constructive dismissal without considering his own actions led to the separation.
36. The upshot of the foregoing is that the claimant has failed to prove on a balance of probability that he was constructively dismissed from employment.

Reliefs

37. As the court has found that the claimant was not constructively dismissed and did not render any service to the respondent following his transfer, the claim with regards compensatory damages, unpaid salary and notice pay collapse.
38. The claim on leave pay succeed as the respondent did not avail the claimant's leave records in line with its obligation under section 74(1) (f) of the *Employment Act*.



Orders

39. In the final analysis, I dismiss the claim substantially and only award the claimant prorated leave pay from January to April, 2018, being Kshs 64,653.33. This figure shall be subject to interest at court rates from the date of judgment until payment in full.
40. There will be no order as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2023.

STELLA RUTTO

JUDGE

Appearance:

Ms. Odera for the Claimant

Mr. Mongeri for the Respondent

Abdimalik Hussein Court Assistant

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 15th March 2020 and subsequent directions of 21st 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

