



Sang & another v Bechy Tours and Travels Limited (Cause 957 of 2018) [2023] KEELRC 1811 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1811 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 957 OF 2018**

**JK GAKERI, J
JULY 27, 2023**

BETWEEN

**NELLY JELAGAT SANG 1ST CLAIMANT
JOB LUBANGA ASIEMA 2ND CLAIMANT**

AND

BECHY TOURS AND TRAVELS LIMITED RESPONDENT

JUDGMENT

1. The Claimants commenced this suit by a Statement of Claim filed on June 11, 2018 alleging constructive dismissal by the Respondent.
2. They allege that the Respondent engaged them as Tours and Travel Consultants from March 2017 to April 26, 2018 at a gross salary of Kshs 70,000/= per month and were not issued with a written contract and served diligently and honestly.
3. That the salary was deposited in their bank accounts through Co-operative Bank and Equity Bank respectively.
4. It is the Claimants' case from December 2017 the Respondent's conduct changed in that, he did not pay salaries as expected, harassing and intimidating the Claimants and none payment of statutory deductions.
5. That the Claimants as a consequence resigned from employment and were thus constructively dismissed.
6. The Claimants pray for;
 - a. A declaration that termination of the Claimants' employment by the Respondent was a violation of the Constitution.



- b. An order directing the Respondent to pay the sum of Kshs 1,285,262.46 comprising:
 - i. Notice pay Kshs 70,000/=
 - ii. Damages for unlawful termination Kshs 840,000/=
 - iii. NSSF unremitted deductions Kshs 5,600/=
 - iv. NHIF unremitted deductions Kshs 11,900/=
 - v. PAYE unremitted deductions Kshs 212,632/=
 - vi. Service pay 15 days per year Kshs 35,000/=
 - vii. Leave due Kshs 56,53.46/=
 - viii. Salary for April 2018 Kshs 53,592/=

Total Kshs 1,285,262.46
- c. Certificate of service.
- d. Costs of this suit with interest at court rates.
- e. Any other relief as the court would deem just and expedient.

Respondent's Case

7. By a Defence and Counter-Claim filed on July 26, 2018, the Respondent avers that the Claimants presented themselves as travel consultants team led by one, Ms Azmina Abdalla and had given sales projections that formed the basis of their recruitment under an agreement dated February 28, 2017 for one (1) year.
8. That they were engaged on probationary terms, performed poorly in the mid-term review but were accorded another chance but did not improve as evidenced by the performance appraisal by the Director on February 20, 2018.
9. The Respondent avers that its request to the Claimants to prepare a proposal on raising revenues to pay for their direct costs and remuneration yielded no response and they opted to quit by letters dated April 25, 2018.
10. That all their dues were paid as consultants and were bound to remit statutory deductions but at their instigations, the Respondent paid NHIF and NSSF contributions and they resigned on their own volition.
11. The Respondent avers that based on the Claimants projections, the Respondent entered into commitments that led to loss of Kshs 2,048,986.4.

Counter-Claim

12. The Respondent prays for judgement for the sum of Kshs 2,048,986.4 with costs and interest and dismissal of the Claimants suit.

Claimant's Evidence

13. In her written statement, CWI Nelly Jelagat Sang testified that they joined the Respondent in March 2017.



14. It was her testimony that she redesigned the Respondent's website, created packages and introduced the Respondent to Safari bookings, prepared brochures and attended expos and worked weekends.
15. On cross-examination, the Claimants confirmed that they were engaged as consultants, and Mr. Job Lubanga was the team leader but later learnt that Azmina Abdalla was the team leader.
16. That she was unaware that the team leader executed a contract on their behalf and was unaware of the agreement on record.
17. The witness confirmed that they developed a business plan and submitted it to the Respondent.
18. That her engagement was not based on the sales projection made to the Respondent.
19. The witness could not recall that the projections were forwarded by Mr. Job Lubanga on their behalf.
20. That she was unaware of the duration of engagement and no review was undertaken though a meeting was held at the Respondent's office on a date she could not recall.
21. The witness confirmed that she resigned by letter dated April 24, 2018 and left on that day without notice.
22. That deductions were made but not remitted.
23. That she had no option but to resign owing to non-payment of salary and was not paid the salary for April 2018.
24. CWI testified that she had not complained about harassment.
25. On re-examination, the witness testified that she did not sign a consultancy agreement.
26. That they had been employed on the basis of a lie and had to resuscitate the business.
27. CWII did not testify or adopt the documents on record.

Respondent's Evidence

28. RWI, Mr. Barnabas Adino testified that the Claimants were known to him having served as consultants and were introduced by one Ms Azmina Abdalla.
29. That their agreement was based on the sales projection. That the Respondent had a website.
30. The witness testified that the Claimants had not achieved the break-even turn over within 6 months.
31. On cross-examination, the witness confirmed that the Respondent commenced operations in 2011 and he presented the Consultancy Agreement which Ms Azmina Abdalla signed though it was not witnessed or signed by the Claimants.
32. That the Respondent paid NSSF, NHIF and PAYE on May 11th 2018.
33. That the team leader negotiated on behalf of the team.

Claimants' submissions

34. By June 13, 2023 when the court retired to prepare this judgement, the Claimant had not filed submissions.

Respondent's submissions



35. Counsel for the Respondent identified five (5) issues for determination including costs. He submitted on nature of engagement, termination, reliefs, counter-claim and costs.
36. On engagement, counsel relied on paragraph 3 of the Statement of Claim which states that the Claimants were engaged as consultants.
37. Reliance was made on dictionaries for a definition of consultant as was the decision in Razzel v Snowball (1954) 3 ALL ER 429 at 432 – 433 to urge that the Claimants were engaged as specialist staff for their expertise at a fee and had no regular routine at the Respondent’s place of work.
38. On termination, counsel urged that the Claimant admitted having resigned from employment by letter dated April 24, 2018 and her complains were new targets, methods of accomplishing them, employment letter, medical insurance and statutory deductions.
39. That the Claimant was not dismissed by the Respondent and had not raised any concerns with the Respondent.
40. On the reliefs sought, counsel submitted that she was not terminated from employment as she had resigned. Counsel further submitted that statutory deductions were paid and would not be due to her if they had not.
41. It was submitted that service pay was only payable to employees not covered by another social security mechanism as held in Ngararia Girls Secondary School V Kudbeiba Workers (2017) eKLR.
42. That consultants are not entitled to leave pay and adduced no evidence to prove it.
43. Counsel further submitted that having resigned without notice, the Claimant could not expect any salary for the month of April 2018.
44. Counsel admitted that the Claimant was entitled to a certificate of service.
45. Counsel urged the court to dismiss the 2nd Claimant’s case.
46. Finally, counsel urged that the counter-claim was based on breach of the consultancy agreement dated February 28, 2017 and represented the expenses incurred by the Claimants.

Findings and determination

47. The issues for determination are;
 - i. Whether the 1st Claimant was contracted as an employee or consultant.
 - ii. Whether the Claimant was unfairly constructively dismissed.
 - iii. Whether the Claimant is entitled to the reliefs sought.
48. As to the nature of the Claimant’s engagement, parties have adopted opposing positions. While the Claimant testified that she was an employee before admitting that the Claimants were hired as consultants, the Respondent maintained that they were engaged as consultants.
49. In addressing this issue, it is essential to trace how the 1st Claimant was engaged.
50. In her written statement signed on May 17, 2018, the Claimant stated that they joined the Respondent in March 2017. The actual date of engagement is missing. The statement clearly acknowledges that they were engaged as a team. “She promised that after we joined . . .”



51. The statement makes no reference to her title, job description, work week or hours or other terms or conditions of engagement including the salary paid or place of work. Paragraph 11 of the statement acknowledges that the pay was Kshs 70,000/=.
52. The statement is also unclear as to what she was engaged to do.
53. The foregoing gaps are explained by the Respondent's evidence and the Claimants testimony in court.
54. The Claimant admitted that the three of them were engaged as travel consultants and Ms Azmina Abdalla was the team leader as evidenced by the agreement dated February 28, 2017 signed by the Respondent's director and Azmina.
55. The date of agreement and the timing of the Claimants joining of the Respondent are generally in agreement.
56. This agreement would appear to confirm that the Claimants were engaged collectively and their remuneration was as contained in paragraph 5 of the agreement. Under the agreement, which has the Claimants name and colleague, they had neither a defined work schedule nor an indication that they would be based at the Respondent's premises.
57. However, paragraph 3 of the Statement of Claimant is unambiguous that the Claimants were employed as consultants and the witness confirmed as much on cross-examination.
58. Instructively, Mr. Job Lubanga forwarded the sales projections to Christine on behalf of the team.
59. Although the Claimant testified that she expected to sign an individual contract, she adduced no evidence of having made the request either to Christine Adano or any other director.
60. Reference to the absence of a written contract or insurance in the resignation letter would appear to the court to have been late in the day as the issues do not appear to have been highlighted during the subsistence of the contract.
61. Paragraph 3 of the Contract provided that the consultants had control and discretion over the means and manners of performance of the service in achieving the results and the Respondent would offer the basic support to ensure they achieve their targets.
62. This is uncharacteristic of employment contracts generally defined by control and facilitation to deliver.
63. Although the wording of an agreement does not necessary constitute it a consultancy agreement, the general tenor of the agreement on record and as confirmed by the Claimant, the three of them appear to have been engaged together as consultants.
64. Consultants/independent contractors typically enter into contracts for services as opposed to contracts of service in employment.
65. In determining this issue, the court is guided by the sentiments of Rika J. in [*Kenneth Kimani Mburu & another v Kibe Muigai Holdings Ltd*](#) (2014) eKLR as follows;

“A consultant performs work for another person according to his own processes and method. A consultant is not subject to another control, except to the extent admitted under the contract. The court in determining the first question is not bound by the parties' respective declarations on the character of these contracts, but should not disregard the parties' intention . . . A consultant is paid a fee . . . not a salary. A consultant is not eligible for company benefits such as health insurance . . . A consultant would not normally be



provided with the tools of work. A consultant would have the latitude to discharge his obligation according to his own processes and methods. . . Consultancies are limited in their duration . . .”

66. The learned Judge further observed that;

“Consultancies/independent contracts are based on the periphery of the employers business. They are not integral to the business . . .”

67. Needless to underscore, Section 10 of the [Employment Act, 2007](#) details the essentials of an employment contract such as particulars of the employee and employer, addresses, job description, date of commencement of employment, form and duration of contract, place of work, hours of work, remuneration scale and methods of computation, interval of remuneration.

68. The agreement on record contains the remuneration only.

69. Section 2 of the [Employment Act, 2007](#) defines an employee as

“a person employed for wages or a salary and includes an apprentice and indentured learner.”

70. Employer on the other hand means;

“Any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.”

71. Based on the evidence adduced by the parties, including the written agreement, the court is persuaded that the Claimants intended to deal with the Respondent as consultants and the agreement on record attests to that intention. This is exemplified by the absence of the essential characteristics of a contract of employment.

72. For the foregoing reasons, it is the finding of the court that the Claimant has failed to prove on a balance or probabilities that she was an employee of the Respondent.

73. As to whether the Claimant was constructively dismissed, the Claimant alleged that the Respondent fundamentally breached the implied terms of the contract of employment.

74. The concept of constructive dismissal was wholesomely addressed by the Court of Appeal in [Coca Cola East and Central Africa Ltd V Maria Kagai Ligaga](#) (2015) eKLR which relied on the elucidation of Lord Denning in [Western Excavating \(ECC\) Ltd v Sharp](#) (1978) QB 761, who stated as follows;

“If the employer is guilty of conduct which is 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, 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 he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract”.



75. In the *Coca Cola East and Central Africa Ltd v Maria Kagai Ligaga* (*supra*), the Court of Appeal considered the two tests of constructive dismissal i.e unreasonable and contractual and affirmed the contractual test which is based on repudiatory breach of a contract of employment.
76. According to the court;
- “... 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. This means 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 . . .”
77. The court went further and elucidated the principles for determination of constructive dismissal including essential terms of the contract, whether a repudiatory breach of the contract has taken place, causal link between the conduct and termination, duration taken to leave and the effect of acceptance, waiver, estoppel or acquiescence.
78. The Claimants complaint letter by which she resigned itemises various issues namely; new targets and how to accomplish them, promise of employment letters, medical insurance when she joined in 2017, non-remission of statutory deductions, suggestion of payment by commission and late payment of salary. In sum, demands by the employee.
79. From the tenor of the letter, it is unclear as to when the new targets were agreed upon and what the terms were.
80. Equally, it is unclear as to which aspect of the original contract engagement was fundamentally breached.
81. On the employment letter, medical insurance and statutory deductions, the claimant took unreasonably long to raise the issue as to have acquiesced to the conduct.
82. In her written statement, the Claimant alleged that she was harassed and intimidated by Christine Adino who was also alleged to be quarrelsome.
83. The witness confirmed on cross-examination that she had not raised the issue of harassment or intimidation with the Respondent and tendered no evidence on when and how the alleged harassment or intimidation or quarrelsomeness manifested itself.
84. To the question whether the Claimant has demonstrated that the Respondent committed a repudiatory breach of the contract of engagement, the answer is in the negative.
85. For the above-stated reasons, it is the finding of the court that the Claimant has failed to demonstrate that she was unfairly constructively dismissed.
86. Having found that the Claimant has failed to demonstrate that the Respondent was guilty of a repudiatory breach of contract, the allegation of constructive dismissal is unsustainable.

Counter-Claim

87. Although the Respondent alleged that it entered into commitments based on the projections made by the Claimant and her colleagues, and thus suffered loss of Kshs 2,048,986.40, the Respondent adduced no evidence of the alleged commitments with whom, how much was involved and how the alleged loss occurred.



88. Neither the written statement dated July 26, 2018 nor the oral testimony adduced in court made reference to the commitments as alleged or how the alleged loss ensured.
89. In the circumstances, it is the finding of the court that the counter-claim is unproved and it is accordingly dismissed.
90. Finally, having found that the Claimant has failed to demonstrate that she was an employee of the Respondent and/or was constructively dismissed, it is clear that the suit herein is unsustainable and is for dismissal and it is accordingly dismissed.
91. Parties shall bear own costs.
Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF JULY, 2023

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE

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