



**Thaiya v Twiga Foods Limited (Cause 15 of 2020)  
[2023] KEELRC 1960 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1960 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 15 OF 2020  
NZIOKI WA MAKAU, J  
JULY 27, 2023**

**BETWEEN**

**JOHN ERIC THAIYA ..... CLAIMANT**

**AND**

**TWIGA FOODS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent for the alleged unfair, unlawful and constructive dismissal from employment and unlawful withholding of terminal dues. The Claimant averred that he was employed by the Respondent and upon successful completion of his probation period was confirmed as an area sales manager earning Kshs. 121,307.90 a month. He averred that he worked faithfully and diligently with utmost dedication for the betterment of the Respondent.
2. The Claimant averred that despite the exemplary service, the Respondent through the Managing Director, Regional Sales Managers and the Human Resource Manager engaged in unfair labour practices to his detriment. These were enumerated and he averred that he was issued a notice to show cause demanding a written explanation on a complaint received. The Claimant averred that he gave a written explanation and despite the explanation the Respondents proceeded to form a disciplinary committee to adjudicate the matter and exonerated him of all the charges. He avers the whole process was flawed as the disciplinary committee comprised of the Respondent's very personnel who had accused him of the misconduct being the Regional Sales Manager, Commercial Manager Sales and the Human Resource Manager thereby grossly violating the rules of natural justice; specifically, that one cannot be a judge in their own case. The Claimant pleads the minutes from the said disciplinary meeting were not availed and/or disclosed and neither was the Claimant allowed to explain or have a representative present during the explanation. He avers the Respondent made the Claimant's working environment and condition deplorable, unconducive and as such he had no option but to resign at the earliest opportunity. He avers the Respondent was thus guilty of constructive dismissal and the



consequence was that he suffered loss and damages which he holds the Respondent liable for. He thus sought:-

- a. A declaration that the Respondents conduct in handling the Claimant's employment period amounted to unfair, unlawful and constructive dismissal and in breach of the *Employment Act* and principles of employment law.
  - b. Damages for unfair and unconditional admission liability from employment equivalent to twelve (12) months gross salary totaling to Kshs. 1,260,000/- with interest thereon at court rates from the date of Award until payment thereof in full.
  - c. Unpaid salaries made by the Respondent during his employment period.
  - d. Three month's salary being payment in lieu of notice.
  - e. Unpaid leave days.
  - f. Deduction of NHIF and NSSF deductions that were not remitted.
  - g. Payment for the extra hours.
  - h. Refund of motor vehicle service cost.
  - i. Certificate of service.
  - j. Costs of the suit plus interest thereon from the date of Award.
  - k. Any other relief that this Honourable Court may deem fit to and just to grant in the circumstances.
3. The Respondent filed a reply to claim and averred that the Claimant was an employee of the Respondent and was appointed to the position of area sales manager vide an offer letter dated 20<sup>th</sup> July 2018 and that the Claimant accepted the offer by appending his signature to the same. The Respondent averred that the start date of the Claimant's employment was 23<sup>rd</sup> July 2018 pursuant to clause 2 of the offer letter. The Respondent further averred that the remuneration of the Claimant was a consolidated gross salary of Kshs. 75,000/- and a variable pay of up to Kshs. 30,000/- subject to exceeding the preset targets pursuant to clause 4 of the offer letter dated 20<sup>th</sup> July 2018. The Respondent denied the particulars of unfair labour practices as listed in the claim and invited strict proof from the Claimant. The Respondent averred that the said paragraph contains falsehoods and that further thereto, no proof has been adduced as evidence of the said allegations.
4. The Respondent averred that the Claimant's job description was contained in the offer letter where it was indicated that his title would be Area Sales Manager reporting to the Commercial Manager and further that he would be field based and as part of his duties he may be required to travel within the Republic of Kenya from time to time. The Respondent denied that the Claimant was forced to undertake work in debt collection, accounts and finance department and further that there is no evidence that the Claimant raised those issues with the human resource manager and averred that the said allegations are mere falsehoods. The Respondent avers that the targets were not unattainable and unrealistic. The Respondent avers that the Claimant was aware when he signed his offer letter that he would be working on shift, from Monday to Sunday with one (1) day off and one (1) hours break each day per clause 3 of the offer letter. The Respondent avers that none of the Claimant's monies have been withheld and that the Claimant was issued with a certificate of service. The Respondent further avers that the Claimant resigned from his employment and the Respondent acknowledged his resignation vide a letter dated 24<sup>th</sup> July 2019 and was never subjected to any hearing as alleged. The



Respondent avers that the averments in paragraph 8 the memorandum of claim are denied in so far as the Claimant states that he served the Respondent diligently. The Respondent further avers that the Notice to show cause letter described as annexure JET2 in the Claimant's pleadings has not been attached. The Respondent further avers that the Claimant had been issued with a warning letter dated 11<sup>th</sup> June 2019 in the cause of his service with the Respondent. The Respondent further avers that the Claimant's working conditions were favourable and good and the Claimant had never complained in writing concerning his working conditions to the Human Resource Manager and the court should not entertain falsehoods.

5. The Respondent avers that the resignation letter by the Claimant did not depict the picture of all the allegations contained in his claim. He in fact ended the same with a thank you note indicating "Once again, thank you. I have enjoyed my tenure at Twiga Foods Ltd." The Respondent avers that contrary to the assertions and allegations contained the Claim, the Respondent voluntarily resigned and was not terminated by the Respondent on grounds of gross misconduct. The Respondent avers that the Claimant's probation was initially running for a period of three months from 23<sup>rd</sup> July 2018 and this was extended vide a letter dated 15<sup>th</sup> November 2018 for a further period of three months. The Respondent avers the Claimant's employment was confirmed vide a letter dated 7<sup>th</sup> May 2019. It averred that he resigned on 2<sup>nd</sup> July 2019 and the Respondent acknowledged his resignation vide a letter dated 24<sup>th</sup> July 2019. The Respondent averred it did not terminate the Claimant's employment and could therefore not pay the Claimant in lieu of notice. The Respondent further avers that the Claimant is not entitled to terminal dues as claimed. The Respondent avers that the Claimant declined to pick the certificate of service

6. In response to the Reliefs sought, the Respondent avers that all prayers sought in the claim are unfounded. The Respondent avers that the Claimant is not entitled to three month's salary in lieu of leave.

The Respondent avers that the offer letter provided for one month's notice by either party. The Respondent avers it faithfully paid the Claimant's salary and the claim for unpaid salaries is unfounded. On the issue of leave, the Respondent avers the Claimant did apply for leave in his resignation letter. The Respondent avers that the Claimant has not proven by way of statements from NSSF and NHIF that the deductions were not remitted. The Respondent avers that the refund of motor service cost has also not been proven wherefore the Respondent prays that the court dismisses this suit with costs.

7. The parties presented the Claimant John Eric Thaiya and one Irene Wambui Kingori to testify. Thereafter the parties filed submissions.

8. The Claimant submitted that based on the evidence on record, the law and authorities, the Claimant's constant frustration at work and the subsequent constructive dismissal was unfair, unlawful, null and void ab initio. It was submitted that it shall be demonstrated that the Claimant is entitled to the reliefs sought in the claim. He submitted that the resignation was constructive dismissal and that the issues which fall for determination are:

- a. Whether the Claimant's resignation was involuntary and unlawful; and,
- b. Whether the Claimant is entitled to the reliefs sought.

9. As to whether the Claimant's resignation was involuntary and unlawful it is the Claimant's submission that the frustration that led to the constructive termination of his employment was without justification, unfair, unlawful, null and void ab initio. He prays that his resignation be declared involuntary and unlawful. He submits that to begin with, it is worth noting that he was subjected to unfair labour practices to his detriment as pleaded in the Claim.



The Claimant submits the Respondent's witness confirmed this position when he testified by indicating that warning letters were issued to the Claimant without conducting proper investigations. The Claimant submitted that the Respondent often introduced unattainable and unrealistic targets contrary to the terms of the employment contract and labour laws with the penalty of dismissing the Claimant from employment if the targets are not met. He submitted that by failing to engage him in evaluation of performance process and/or failing to give him proper layout and backdrop that was used to measure his performance. The Claimant submitted that it was also not in dispute that commission was based on performance based on targets met. He submitted that failing to follow procedure or giving a hearing notification before issuing the Claimant with a warning letter and forcing the Claimant to work overtime without pay and very late in the nights, during public holidays and on Sundays with threats of termination of his employment if he does not, coupled with the perpetual insulting, threatening and abusing and use of profanities by the Respondent's Managing Director, General Sales Manager and Human Resource Manager from time to time against the Claimant verbally as evidenced shows that the Respondent acted in ways that made it extremely hard for him to continue working.

10. The Claimant submitted that the Court of Appeal in the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR held as follows:

“Constructive dismissal occurs where, an employee terminates the contract under which he is employed, (with or without malice) in circumstances in which he is entitled to terminate it without notice, by reason of the employer's conduct... constructive dismissal as a repudiatory breach by the employer of the contract of employment. The employer's behaviour in either case must be shown to be so heinous, so intolerable, that it made it considerably difficult for the employee to continue working. The employee initiates the termination, believing herself, to have been fired. The employee needs to show that the employer, without reasonable or proper cause conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is regarded as constructive dismissal if the employer's conduct is a significant breach of the contract of employment and that the conduct shows the employer is no longer interested in being bound by the terms of the contract. .... The employee's resignation is therefore treated as an actual dismissal by the employer and the employee may claim compensation for unfair termination.... The onus of proof in this form of employment termination, unlike in other termination lies with the employee. While under Sections 43 and 45 of the [Employment Act 2007](#) the duty in showing that termination was fair is on the employer, constructive dismissal demands the employee demonstrates that his resignation was justified. Other collateral issues that must be shown by the employee are; that the employer made a fundamental change in the contract of employment, and such change was unilateral; that the situation was so intolerable the employee was unable to continue working; that the employee would have continued working had the employer not created the intolerable work environment; and, that the employee resigned because he did not believe the employer would abandon the patters of creating unacceptable work environment. These are some of the rules governing a claim for constructive dismissal.

11. The Claimant also cited the case of *Peter Kaburu Karanja v Kirinyaga Construction (K) Limited* [2020] eKLR where the Court declared that the claimant's resignation was constructive dismissal and entered judgment for the claimant against the Respondent. The Claimant thus urged the Court to find in his favour and grant him the reliefs he had sought in his claim.



12. The Respondent on its part submitted that the Claimant resigned from employment and was not unlawfully terminated. It submitted that the issues for determination were
- a. Whether the Claimant Was unfairly terminated/constructively dismissed/resigned from employment
  - b. Whether the Claimant was constructively dismissed
  - c. Whether the statutory deductions made by the Respondent were remitted
  - d. Whether the unpaid leave days and issuing the Certificate of Service are issues in dispute
  - e. Whether the Claimant is entitled to the reliefs sought.

13. As to whether the Claimant was unfairly terminated/constructively dismissed/resigned from employment, the Respondent submits that the Claimant alleged in his Memorandum of Claim to have been unfairly terminated. It was submitted that section 43(1) of the Employment Act provides;

In any claim arising out of termination of a contract, the employer shall be required to provide the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

14. It submitted that under section 45(2) an unfair termination occurs when an employer fails to prove:

- (a) that the reason for the termination is valid;
- (b) that the reason for the termination is a fair reason-
  - i. related to the employees conduct, capacity or compatibility; or
  - ii. based on the operational requirement of the employer; and
- (c) that the employment was terminated in accordance with fair procedure".

15. The Respondent submitted that fair procedure consists of the process adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision. The Respondent submitted that it tendered evidence during the hearing to show that it issued the Claimant with a warning letter and further, the Respondent's Witness testified that they also issued oral warnings which he confirmed to have received and which would have constituted a fair and valid reason for termination had this been a case of termination. The Respondent submits that the Claimant however did not adduce any evidence of the termination. In fact, during the hearing he testified that he resigned vide an email dated 2<sup>nd</sup> July 2019 which he produced as Claimant's Exhibit 2. In the said email in paragraph 2 the Claimant wrote:

“Please accept this letter as my formal resignation from the position of Area Sales Manager Thika town depot...” He also admitted in the course of the hearing to having received the letter acknowledging his resignation from the Respondent which is dated 24<sup>th</sup> July, 2019 and he held on to it until he filed the present claim on 16<sup>th</sup> January, 2020. It was submitted that according to Black's Law Dictionary resignation is, "The act by which an officer renounces the further exercise of his office and returns the same into the hands of those from whom he received it." It was submitted that during the hearing, the Claimant not only admitted to drafting and sending the resignation letter but also to understanding the import of his letter and the consequences expected thereof. He cannot therefore be allowed to place the blame of the termination of his employment on the Respondent's head. It has been said



time without number that he who makes his bed must lie in it. It is a wanton abuse of the court process for the Claimant to attempt to use this Honourable Court's mechanisms to allow him have his cake and eat it.

16. As to whether the Claimant was constructively dismissed; the Respondent submitted that the Claimant is estopped from pleading constructive dismissal since he resigned voluntarily. It cited the case of Henry Ochido v NGO Co-ordination Board [2015] eKLR where the court observed as follows:

“Constructive dismissal or discharge has been defined by the Court in Nathan Ogada Atiagaga versus Davis Engineering Cause No.419 or 2014 as follows:

Constructive dismissal, occurs when an employee resigns because their employers 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..

Due to the conduct of an employer that make the work environment intolerable, the employee is thus forced to tender his resignation. As submitted by the Petitioner in the case of Emmanuel Mutisya Solomon versus Agility Logistics, Cause No, 1448 of 2011, and the basics of a constructive dismissal can be described as,

... Situation in the workplace, which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee to such an extent that the employee has no other option available but to resign. The concept of constructive dismissal is underpinned on the notion that there is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or highly likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Breach of that implied term will entitle the employee to treat him or herself as wrongfully dismissed.

The intolerable conditions set by the employer are of the nature that the continued employment of employee is not tenable and he has to resign. Thus, by the conduct of the employer there is a fundamental breach of the contract of employment, such breach has no reasonable cause, and such conduct has severely damaged the employment relationship. Such are matters that an applicant, Petitioner or claimant must address when claiming constructive dismissal.”

17. The Respondent submitted that the Claimant in this case did not bring any evidence before this Court to prove any hostility that rendered the execution of his employment contract. In fact, during the hearing he admitted he had no evidence whatsoever, whether before the Court or otherwise, to prove that the workplace had become so intolerable that he was forced to resign. Further, in his resignation letter, the Claimant expressed gratitude to the Respondent for the period he had been privileged to work in the company. In his own words he said:

... The one year plus has developed me in a positive way. Lessons learned during my tenure are lessons I will keep for a lifetime... I have enjoyed my tenure at Twiga Foods Ltd..”



18. The Respondent submits that those are not the words of a man so frustrated by the conditions at his workplace that he had no choice but to resign. In actual reality, they portray a man who is indebted to his former employer for the opportunity he had been granted to have gainful work and in an environment that was so conducive that he was able to gain lessons which some would argue are far more valuable than the generous monthly remuneration he received. It was submitted that the Claimant complained about the targets set by the Respondent which he confirmed did not affect his salary but only his commission. The Respondent submitted that the Claimant was well aware of his terms of employment which are all clearly spelled out in his contract. It submits he failed to exert himself and give his work his best effort and could not therefore reap the full benefits of his contract.
19. The Respondent cited the case of *Robert Indiazzi v Tembo Sacco Limited* [2018] eKLR where the Court while dismissing the Claimant's claim of unfair termination and constructive dismissal stated thus:
- “...it is clear that the respondent communicated the decision to summarily dismiss the claimant after finding him guilty of fraud, forgery and theft and that it is the claimant who requested to be allowed to resign instead of being summarily dismissed. I find no proof of constructive dismissal.
- Since the claimant requested and was allowed to resign instead of being dismissed, he cannot complain about the process at the hearing as he did not allow it to proceed to its logical conclusion. I therefore find no proof of unfair termination as the claimant's employment with the respondent was terminated by way of his resignation.”
20. Further, it was submitted that in the case of *Benard Muriuki Gikandi v Kenya Wildlife Service* [2022] eKLR the Claimant in that case wrote a letter resigning for his own personal reasons and the Court held that there is no indication that the reason for the resignation was prompted by harsh or unfair termination and therefore the prayer for unlawful and unfair termination cannot therefore stand or be granted. The Respondent submits the burden of proof under this head lies squarely on the Claimant and to say that he has not proved the claim is an understatement as his allegations can only be termed as unfounded and completely groundless.
21. As to whether the statutory deductions made by the Respondent were remitted, the Respondent submits that during the hearing, the Claimant did not bring any evidence to prove that his deductions were not remitted. It was submitted that the Claimant stated during cross examination that he never attempted to use his NHIF card in any hospital and therefore cannot state as a matter of fact that the deductions were unremitting. On the other hand, the Respondent filed documents generated from their payroll system that clearly showed the Claimant's name and employee number. They also had bank statements showing the amount of money remitted by the Respondent on a monthly basis. As to whether the unpaid leave days and issuing the Certificate of Service are issues in dispute, the Respondent submitted that in his letter of resignation, the Claimant requested for a total of 11 days which were granted and he therefore did not have any leave days remaining. He also confirmed during the hearing that his request for leave was granted and he took the days he had sought. The Respondent submitted that the Claimant also confirmed that he already received his letter of service and therefore has no further claim under this head. As to whether the Claimant is entitled to the reliefs sought, the Respondent submitted it had demonstrated that the Claimant did not prove his claim. It was submitted that in fact, knowing this, he is attempting to amend his pleadings through submissions and without leave of this Court. He is seeking for prayers in the Re-amended Complaint dated 23<sup>rd</sup> April 2007 which is foreign to the Respondent. The Respondent urged that the suit should be dismissed and no prayers ought to be granted.



22. The Claimant failed to prove non-remittance of his NHIF or NSSF dues. He had a burden to demonstrate the employer had failed to remit the sums. It is the Court's finding that the Claimant also went on leave and there were no outstanding claims for leave or unpaid leave. That leave only the case of constructive dismissal. The Claimant was required to demonstrate certain aspects of conduct that would lead to the inference that his resignation was coerced by circumstances at the work place. The case of Coca Cola East & Central Africa Limited v Maria Kagai Ligaga (supra) has captured the classic scenario for constructive dismissal. In my view, the elements of constructive dismissal are that the circumstances at the workplace were so intolerable that the employee could not continue to stay on as an employee; the unbearable circumstances were the cause of the resignation of the employee; there was no reasonable alternative at the time but for the employee to resign to escape the circumstances; the unbearable situation must have been caused by the employer and finally; that the employer must have been in control of the unbearable circumstances. None of these elements were demonstrated in this case. Indeed, in his resignation letter, the Claimant was effusive in praise of his employer. He demonstrated that he had served the Respondent and had obtained from it invaluable experience. The letter of resignation did not advert to any disgruntlement nor was it worded in any manner to suggest his hand had been forced. Having failed to demonstrate his resignation was coerced, the claim must fail and is accordingly dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JULY 2023.**

**NZIOKI WA MAKAU**

**JUDGE**

