



**Araka v Schenker (Kenya) Limited (Cause 232 of 2019)
[2023] KEELRC 2036 (KLR) (18 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2036 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 232 OF 2019
AN MWAURE, J
AUGUST 18, 2023**

BETWEEN

LEVINE ONSONGO ARAKA CLAIMANT

AND

SCHENKER (KENYA) LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Claim dated April 8, 2019 on grounds that the Respondent constructively dismissed his employment.

Claimant's Case

2. The Claimant averred that he was employed by the Respondent in May 2014 as the Warehouse Inventory Manager, earning a salary of Kshs 136,000 which was increased to Kshs 143,600 when he was appointed as a Business & Inventory Manager.
3. That on November 16, 2016, the Claimant's direct supervisor, also the Head of Contract Logistics, Ernest Musi circulated an email to the Respondent's staff citing that the Claimant had threatened his life without providing any evidence. The Claimant vide an email dated November 24, 2016 narrated his version of events with the Respondent's Managing Director, however, this was shared with his accuser who in turn alleged that the Claimant and other employees were guilty of bringing down the department.
4. The Claimant avers that on November 25, 2016, the Respondent directed the Claimant to take a polygraph test without his consent and the Respondent suspended the Claimant on the basis of the aforementioned accusation of undermining the department without the Claimant giving his side to the allegations.



5. The Claimant was invited for a hearing on November 30, 2016. However, it was rescheduled to December 2, 2016 to enable him prepare a defence and he was further suspended from work from December 7, 2016 to December 28, 2016.
6. On December 22, 2016, the Respondent served the Claimant with a notice of disciplinary hearing with new charges levied against him including gross negligence and insubordination of his superior. The Respondent directed the claimant to forward his defence on the new charges and the claimant denied them. The claimant says he was not provided the evidence tendered against him before the disciplinary hearing to enable him answer the allegations and provide a response for the hearing which was held on January 12, 2017.
7. The Respondent disciplinary committee exonerated the Claimant on the charges of gross negligence and threat to the life of the Head of Contract Logistics on January 17, 2017, however, he was found guilty of insubordination and sanctioned as follows: -That he immediately takes the remaining leave days of the year 2016, amounting to 16 daysThat he be paid only 50% of the bonus earned in 2016That he be placed on 3-month work performance evaluationThat he undertakes monthly performance evaluation with his supervisorThat he be served with a warning letter which would be valid for one yearThat he undertakes anger management and behavior counselling sessions at the cost of the Respondent.
8. The Claimant requested the Respondent for minutes of the disciplinary hearing held on January 12, 2017 and results of the polygraph test in order to prepare his appeal of the decision of the disciplinary committee however, the Respondent denied his request and further informed the Claimant that should he seek an appeal the accuser will be at liberty to bring new witnesses and that the appeal would lead to sanctions. Despite this, the Claimant proceeded to appeal the decision.
9. During the appeal hearing, the Respondent tabled the minutes of the hearing which was filled with inconsistencies and irregularities which the Claimant denied. His demands however were not addressed and upon conclusion of the appeal hearing the Respondent's appeal committee has never delivered a ruling on the same.
10. The Respondent redeployed the Claimant from its head office to the JKIA office with reduced responsibilities on May 19, 2017. The respondent revised the terms of contract such as his job description and reporting structure contrary to the employment contract and this was made unilaterally by the Respondent.
11. The Claimant further avers that the Respondent denied him to take paternity leave when the Claimant's wife was bedridden after delivery even after producing the required evidential documents as requested by the Respondent.
12. The Claimant avers the culmination of the above led to an intolerable work environment leading to his forced resignation amounting to constructive dismissal. He resigned on June 21, 2017.

Respondent's Case

13. The Respondent admitted the Claimant was its employee and served in the capacity of team leader at the time of his resignation but denies that the Claimant ever served as a Business and Inventory Manager.
14. The Respondent aver that the Claimant failed to carry out his duties resulting in one of its client not receiving their monthly stock reports for 3 months and the Claimant's supervisor Ernest Musi raised the issue with the Claimant. The claimant denied transmission of reports formed part of his duties



and exploded in anger to the extent of threatening the supervisor with physical violence and upon the Supervisor reporting the issue to the Respondent's human resource manager the Claimant was suspended to pave way for investigations.

15. The Respondent admits that upon the Claimant's end of suspension period on November 28, 2016, the Claimant was informed that the investigations had not been concluded and requested him to report back on December 2, 2016 and was subsequently invited for the disciplinary hearing on December 7, 2016. The hearing however was postponed twice as the Claimant sought more time to prepare a defence.
16. It is the Respondent's ground that the Claimant was served with a notice of disciplinary hearing which clearly highlighted the charges against him and on January 12, 2017, the Claimant was given an opportunity of defend himself and produce evidence in support to his defence and that a decision was made by the disciplinary committee as stated in the Claimant's claim above.
17. The Claimant subsequently filed an appeal to which the committee found no merit and vide a letter dated May 19, 2017 redeployed the Claimant to its new contract logistics warehouse located at JKIA offices and that at the time of his deployment Express Automation Limited was their only client and furthermore his job description was not reduced as claimed.
18. The Respondent admits the Claimant requested to be allowed to go on paternity leave however due to the work load he was only allowed 3 days leave and advised to take leave when the work load subsided.

Claimant's Evidence in Court

19. The claimant in his evidence in court on November 15, 2022 retaliated what was averred in his claim. Claimant said in his evidence in court tht he was accused of not giving reports to the client and yet that was not his role but was the role of his colleague called Joyce.
20. He also says he was accused of assaulting and threatening his superior Mr. Musi. He denies both charges. He says he wrote an explanation to the managing director who showed the letter to his accuser. He further says he was not given any evidence of his charges to use in the disciplinary hearing.

Respondent's Evidence in Court

21. The respondent witness Elizabeth Kioko gave her evidence on February 1, 2023.
22. The witness says she is the human resource manager of the respondent company. She says she wrote a suspension letter to the claimant due to threats to life of one of their staff due to questions on stock report on one of their clients known as GSK.
23. She says claimant was called for disciplinary hearing and everything was carried out fairly. He also says they never gave the claimant the documents requested but claimant did not aver there was unfair disciplinary process until the verdict was passed. She also admits the claimant was not given minutes of the disciplinary hearing.
24. She says the claimant was transferred to JKA as he was not getting along with his supervisor. He however states the claimant was not demoted but that this was just a change of location.
25. The court considered the Claimant submissions dated February 28, 2023 and as well the Respondent's submissions also dated March 28, 2023.



Analysis and Determination

26. The issues for determination are: -
- a. Whether the Claimant was constructively dismissed;
 - b. Whether the Claimant is entitled to the reliefs sought.
27. In *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR the court pronounced itself as follows with regard to the principles that guide what amounts to constructive dismissal: -

“29. 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 behavior 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 (ie causal link must be shown, ie the test is causation).

28. 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.”

29. The summary from the above are that the principles relevant to determining constructive dismissal include the following:
- a. What are the fundamental or essential terms of the contract of employment?
 - b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?
 - c. The conduct of the employer must be a fundamental or 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.
 - d. An objective test is to be applied in evaluating the employer’s conduct.
 - e. There must be a causal link between the employer’s conduct and the reason for employee terminating the contract i.e. causation must be proved.
 - f. An employee may leave with or without notice so long as the employer’s conduct is the effective reason for termination.
 - g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
 - h. The burden to prove repudiatory breach or constructive dismissal is on the employee.”
 - i. Facts giving rise to repudiatory breach or constructive dismissal are varied.”
30. The Claimant vide his letter of resignation and memorandum of claim illustrates the conduct and/or actions of the Respondents which led to his resignation which include *inter alia*: -
- i. The unfair disciplinary process he underwent with regard to the alleged threat to his supervisor’s life which involved a forced polygraph test;
 - ii. an email he sent in confidence to the Respondent’s Managing Director being sent to his accuser without his involvement and no action being taken against the supervisor although the email raised allegations against the said individual, the Respondent’s witness admitted that only the Claimant was suspended and submitted to a disciplinary process;
 - iii. failure of the Respondent to submit to the Claimant information with regard to the allegations tabled before him before the hearing and the minutes and evidence tabled during the hearing to enable him prepare for an appeal, the Respondent’s witness statements and evidence did not address in any manner and only submitted that the fact that the Claimant was acquitted of all charges shows that the Respondent did not act unfairly or discriminatory during the disciplinary process, the court differs with this notion.
 - iv. Respondent’s refusal to grant the Claimant paternity leave in breach of Section 29 (8) of the [Employment Act](#).
31. The claimant avers he was demoted when he was transferred to JKA office and his roles were changed. Also his reporting structures were changed. He actually states he was not given any duties at the airport, no office and no computer. In the case of [Richard Kioko Kkuli vs Saj Raj Limited](#) (2020) eKLR court held that: “a warning and a demotion are both disciplinary processes.”



In the above case the court held that the employer must take an employee through a disciplinary process before demoting him. In this case the claimant says he was transferred to JKA office with no explanation.

32. The respondent witness admits the claimant was transferred to the JKA office as he was not getting along with his supervisor.
33. The same time the claimant asked for paternity leave to attend to his wife who was sick after delivering a baby. The leave was not granted. In fact the respondent said he gave claimant 3 days leave and the other days later. The maternity and paternity leave should be granted immediately in order to take care of the unborn baby and mother. If leave is granted later it will not serve the purpose for which it was intended to serve.
34. All the foregoing therefore constituted unfair labour practice contrary to article 41 of the Constitution and this pushed the claimant to tender his resignation and was elaborate that his resignation was not voluntary but was because of the conduct of the respondent. His title was changed from inventory manager to team leader.
35. It is also crucial to refer to the disciplinary process which the claimant was taken through. He was alleged to have been guilty of insubordination to his superior and gross negligence. He however wrote several letters to the respondent asking for details of the aforesaid charges and was not provided with the same. The respondent witness also admitted they did not provide the requested evidence.
36. The employee as per employment law is entitled to be provided with the evidence of allegations against him to enable him to prepare for his defence. In the case of Benjamin Mwendawa Nduati & 4 Others vs East Africa Portland Cement (2016) eKLR the court held:

"every accused person has a right to a fair trial which include the right to be informed of the charge with sufficient details to answer it. To also have adequate time and facilities to prepare a defence."
37. In this case the court finds the claimant was not given specifics of his accusations and the said accusations kept changing from threatening his supervisor to insubordination and gross negligence. The last straw that broke the camel's back is when he was transferred to another office with altered terms and was not facilitated with office space and a laptop. When he requested for paternity leave he was not granted the full days but was given 3 days. He also says he was put on a polygraph test without his consent and he was never availed results of that test or the minutes of the disciplinary hearing that he was put through.
38. Flowing from the pleadings, evidence and submissions the court is satisfied the claimant has provided evidence that satisfies the principles of constructive dismissal and has demonstrated ably the respondent's action led to his forced resignation which amounts to constructive dismissal. The court therefore enters judgment in favour of the claimant.

Remedies

39. Having found the claimant was constructively and therefore unfairly and wrongfully dismissed he is awarded the following reliefs.
 - a. Compensation for unlawful termination will be awarded to equivalent to 4 months' salary considering the period he worked for the respondent Kshs 574,400/-



- b. Claimant is declared to have been unlawfully terminated but prayers for discrimination are not proved and so are not granted.
- c. The claimant is awarded costs and interest at court rates from date of judgment till full payment.
- d. He is also to be given a certificate of service under section 51 of the [employment act](#) within the next 30 days.
- e. Total award is khs 574,400/-.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF AUGUST 2023.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

