



**Murema v Treadsetters Tyres Limited (Cause 801 of 2019)
[2023] KEELRC 2136 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2136 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 801 OF 2019
NJ ABUODHA, J
SEPTEMBER 22, 2023**

BETWEEN

IBRAHIM MUREMA CLAIMANT

AND

TREADSETTERS TYRES LIMITED RESPONDENT

JUDGMENT

1. By a statement of claim filed on November 27, 2019, the claimant pleaded *inter alia* that:
 - a. At all material times necessary to this claim, the Claimant was employed by the Respondent at a salary of Kshs 247,000/= per month.
 - b. The Claimant states that he served the Respondent for a period of Twenty (20) years with a clean record putting the interest of the Respondent first and served dedicatedly, honestly, loyally and was faithful to the Respondent at all times.
 - c. That by a letter dated August 31, 2017 the Respondent wrote a retrenchment letter to the Claimant stating that the Claimant's services would no longer be required from October, 2017 knowing very well that there was no justifiable cause for that then just to re-employ the Claimant in the month of October 2017 before the commencement of retrenchment.
 - d. That the Respondent was not giving the Claimant any duties since his duties were then allocated to a new employee who had then occupied the claimant's work station.
 - e. The Claimant states that from the month of May 2018 the Respondent stopped allocating him any work and allocated his duties to one Mr Jairaj who occupied the Claimants work station and was using the Claimants computer thereby rendering the Claimant constructively dismissed.



- f. That in July 2018, the Respondent sent the Claimant on leave and upon completion of his leave, the Claimant went back to the office but was again sent away on compulsory leave without any justifiable cause which actions still amounted to constructive dismissal and the Claimant holds the Respondent liable for the same.
 - g. That at one time the Respondent stopped paying the Claimant's salary and upon receiving a letter dated September 11, 2018 the Respondent reinstated the Claimant's salary without giving reasons for the earlier stoppage and at the same time not addressing the issue of loss, damages and sufferings that the Claimant had been subjected to and the Claimant is holding the Respondent liable for loss, damages and sufferings he has been subjected to.
 - h. That on March 12, 2019 the Respondent wrote the Claimant a letter summarily dismissing him and the Claimant states that by the time the letter was written he had been constructively dismissed way back hence the letter was just an afterthought and it cannot cure the issue of constructive dismissal hence the Respondent is liable to the Claimant.
 - i. That the Respondent's decision to constructively dismiss the Claimant and the letter of March 12, 2019 were not only illegal but also unlawful, null and void.
 - j. The Respondent also stopped paying the Claimant mileage allowance at Kshs70,000/= plus Kshs 2,000/= internet allowance per month which allowances the Claimant is rightfully entitled to and the Claimant is claiming the same.
 - k. The Claimant states that due to the Constructive Dismissal which was illegal, unlawful and arbitrary he is entitled to and thus claims from the Respondent the following:
 - i. Compensation for Constructive Dismissal which was unlawful and illegal:
12 months x Kshs 239,000/= = Kshs 2,965,306.08/=
 - ii. One month's salary in lieu of notice:
1 month x Kshs 239,000/= Kshs 247,108.84/=
 - iii. Kshs70,000/= per month for mileage which has accrued since October 2017 till March 12, 2019:
=Kshs 1,190,000/=
 - iv. Kshs 2,000/= for internet which has accrued since October 2017:=Kshs 36,000/=
 - v. Accrued pension benefits
 - l. That since the re-employment in the year 2017 the Claimant had not been granted his annual leave which is his entitlement and is therefore claiming leave for the One (1) year finished that is September 2017 to September 2018 which is Twenty Eight (28) days and Fourteen (14) days for the period from October 2018 to March 12, 2019 which is equivalent to 1 and V2 month's salary hence the Claimant is claiming Kshs 370,663.26/=.
2. The respondent filed a statement of response dated January 27, 2020 in which it averred inter alia That:
 - a. The Respondent denies the contents of paragraph 3 of the Memorandum of Claim and states that the Claimant was entitled to a basic monthly salary of Kshs 167,442 and not Kshs 247,000 as alleged.



- b. The Respondent denies the allegations contained in paragraph 5 of the Memorandum of Claim. The Respondent in further answer to paragraph 5 of the Memorandum of Claim states that the Claimant's own documents expressly state the valid and justifiable reasons for the intended retrenchment. In any case, the retrenchment process was called off and is not the subject of the suit herein.
 - c. The Respondent also denies the allegations of paragraph 6 and 7 of the Memorandum of Claim and states that at all material times, the Claimant had a defined role and job description in the Respondent Company. The Claimant was the sole person in charge of the company's MIS system. The Respondent wishes to emphasize that this was a role that was exclusive to the Claimant.
 - d. The Respondent denies the averments In paragraph 8 and 9 of the Memorandum of Claim and puts the claimant to strict proof. In further answer to the said paragraphs, the Respondent wishes to state as follows:
 - i. That the Respondent experienced an extensive IT systems fraud that resulted in theft of tyres during the tenure of the Claimants the MIS system manager. There was deletion of crucial data from the system through the back end and failure to back up the data.
 - ii. Due to the unique role that the Claimant played as the systems manager, the Respondent vide a letter dated June 13, 2018 asked the Claimant to provide a detailed and conclusive explanation of the alterations in the IT system that left the Respondent exposed to theft.
 - iii. The Claimant duly responded but the explanations given were vague and unsatisfactory.
 - iv. The Respondent, being dissatisfied by the explanation given and having conducted substantive investigations into the fraud, invited the Claimant for disciplinary hearing on July 26, 2018.
 - v. The Respondent throughout the investigations and disciplinary process duly considered all the representations made by the Claimant and weighed them against the evidence and found that the Claimant's conduct was unsatisfactory. The Respondent negligently and carelessly performed his duty as MIS system manager to the detriment of his employer.
 - e. The Respondent denies the allegations that it constructively dismissed the Claimant as alleged in paragraph 10 and 11 of the Claim. The Respondent in further response to the said paragraphs states that its decision to summarily dismiss the Claimant was justified, procedural and lawful.
3. At the trial the claimant stated that he currently did carpentry work. He filed his witness statement on November 25, 2019 which he relied on as his evidence in chief. He also relied on the documents filed with the claim. The claimant further stated that he had looked at the respondent's documents and was not aware of the deleted invoices. He denied deleting any invoice and that it was very hard retrieving deleted documents from a laptop. He was never shown the laptop where the documents were allegedly deleted. The respondent took away his office laptop.
 4. The claimant further stated that he was not aware of the delayed invoices. It was his testimony that he was not shown the audit report showing theft and that tyres could not be stolen without physically



leaving the company's premises. There was physical documentation for dispatch, stores and finance. According to the claimant, his dismissal was not lawful and that he raised the issue of constructive dismissal before he was actually dismissed. When he raised the issue of constructive dismissal his salary was reinstated but was sent on compulsory leave. When he returned from compulsory leave, he was not allocated any work and his office had been occupied by someone else.

5. Regarding passwords, it was his evidence that IT department allocated passwords but they were managed by the user for confidentiality purposes. It was further his evidence that sharing of passwords was a common practice. He requested for it to stop but it was never implemented. Concerning forensic audit he stated that he was interviewed by the auditors and denied that he was negligent. He further stated that he was always busy online on Fridays hence it was easy to know what he did online.
6. In cross-examination he stated that he did not resign from employment and that he was summarily dismissed but much later. The reasons for summary dismissal was stated in the letter. It was on account of negligence and fraud. Prior to dismissal, he was issued with a show cause letter dated June 13, 2018. The letter raised several issues concerning his role as IT manager. He responded to the same. The issue of fraud was reported to the police and they interrogated him and that the police never told him he was exonerated from the allegations. The issues of fraud and negligence arose May, 2018 after he had complained about constructive dismissal.
7. Concerning his terms of service, he stated that he was a member of NSSF and that his salary was stated at Kshs 167, 442/- and further that his contract never provided for mileage and internet allowance.
8. The respondent's witness Mr Laban Chege stated that he was a Chartered Accountant practicing with Labchy Consulting and that he was a Managing Partner. They dealt with audit, taxes and assurances. It was his evidence that he was called by the respondent to confirm suspicion the management had over loss through collusion of staff. The management suspected fraudulent activities. He was called on June 20, 2018. They found out that sales done during the period in issue (January 1, 2016 to May 18, 2018), the invoices were deleted from the back backend in one of the modules that was linked to finance department. The items were found in stock module which was used by operations department. The loss totalled to 101,441,357/47. They also found that copies of documents for these transactions were missing from the respective files. When they asked for backup, it was not provided. From May 18, 2018 when the query/suspicion was raised, deletion stopped. The IT people reported that the deletion was by someone who had access to the system and was being done late at night. Appendix 5 of the audit report from the Vendor of the system showed how the deletion was done.
9. In cross-examination he stated that he did not look at the machines and laptops that were being used. What he relied on was information from the system vendors. They were IT experts. He further stated that his report was neither qualified nor unqualified. The report did not require the two tests but the audit was carried out in accordance with international standards.
10. Regarding his brief, he was told money was lost before commencement of his audit. He produced one of the vouchers which he analysed. It was in his report. The invoices were numerous and bulky but appendix 7 of his report had details of the invoices that were deleted.
11. The respondent's second witness Mr Gerald Mwaniki Nganga stated that he worked for the respondent as Human Resource Officer and that he recorded and signed a witness statement dated March 14, 2023 which he relied on as his evidence in chief. He also relied on the documents filed with the respondent. In cross-examination he stated that he joined the respondent on January 2, 2022. Between 2021 to 2023 he was the 3rd Human Resource Officer to join the respondent. It was his evidence that due process was followed in the termination of the claimant. He was aware the claimant raised the issue of constructive dismissal prior to his dismissal and that he had not withdrawn the claim. The claimant was



working from 1998 and at page 13 of the claimant's documents was a letter concerning the claimant's retrenchment but he was reengaged on September 1, 2017. He further stated that the respondent responded to the issue of constructive dismissal but could not confirm if the claimant was allocated work because he was not there at the time.

12. Regarding removing of goods from the respondent's premises, Mr Ng'ang'a stated that there was a procedure and it was very clear. There was a department wholly responsible for that. There were accompanying documents for removal of goods. Concerning the plucking of documents he stated that he relied on the auditors report on the issue. He did not know the custodian of the invoices and was not certain if the claimant was the custodian. He also did not know how many people had IT knowledge at the respondent.
13. The claimant alleged that the respondent constructively dismissed him while the respondent has maintained that the claimant was summarily dismissed on account of fraud and negligence. The respondent produced in evidence an audit reports the basis upon which the claimant was dismissed. The claimant did not deny that the respondent issued him with a show cause letter outlining the allegations against him and that he responded to the allegations.
14. In the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR it was stated that constructive dismissal occurs where an employee is forced to leave his job against his will, because of his employer's conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed. Further in the case of *Western Excavating ECC Ltd v Sharp* [1978] 2WLR 344 (per Lord Denning) it was stated that:

“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.”

15. The claimant herein while alleging to have been constructively dismissed did not set out in detail what treatment the respondent subjected him to that was sufficiently bad that made him regard himself as having been unfairly dismissed. The respondent had reasonable suspicion that there were acts of fraud and negligence occurring in its business and the claimant was one of the suspects. A forensic audit was conducted which detected that some invoices were deleted from the system. These deletions occurred at night. The claimant admitted that he used to spend a lot of time online on Fridays. Further, the claimant did not deny that it was his responsibility to ensure the integrity of the respondent's system in his role as Systems Manager. The alleged fraud occurred during the tenure of the claimant as such. The circumstances at the time and the calling upon the claimant to explain what he knew about the fraud could not be said to amount to bad treatment sufficient enough to result in constructive dismissal. The claim for unfair termination on account of constructive dismissal is therefore rejected. The Claimant in his evidence admitted that his contract never provided for payment of mileage and internet allowance hence this claim is also disallowed.



16. Concerning claim for leave, the respondent in the letter for summary dismissal stated that the claimant in addition to salary due, would be paid his accrued leave days. This claim therefore can only be sustained if the respondent never paid the claimant his terminal dues upon summary dismissal. No such allegation was made during the trial.
17. In conclusion the claim is found without merit and is hereby dismissed with costs.
18. It is so ordered

DATED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023

ABUODHA J.N

JUDGE

DELIVERED VIRTUALLY THIS 22ND DAY OF SEPTEMBER, 2023

