



**Beru v Music Copyright Society of Kenya Limited (Cause E162 of 2021)
[2023] KEELRC 2337 (KLR) (5 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2337 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E162 OF 2021
L NDOLO, J
OCTOBER 5, 2023**

BETWEEN

SHANNEL ANGAITA BERU CLAIMANT

AND

MUSIC COPYRIGHT SOCIETY OF KENYA LIMITED RESPONDENT

JUDGMENT

Introduction

1. By a Statement of Claim dated 22nd February 2021 and filed in court on 23rd February 2021, the Claimant alleges constructive dismissal by the Respondent. The Respondent's defence is contained in a Response dated 15th April 2021, to which the Claimant responded on 16th April 2021.
2. At the trial, the Claimant testified on his own behalf and the Respondent called its Legal Officer and Operations Manager, Richard Sereti. Only the Claimant filed final submissions.

The Claimant's Case

3. By a letter of appointment dated 3rd April 2008, the Claimant was employed by the Respondent in the position of Licensing Officer. He was deployed at the Eldoret office and was later transferred to Nakuru, effective 1st February 2010.
4. The Claimant states that from 10th November 2010, he was assigned to take charge of the Nakuru office, where he was reporting to the Branch Manager. He adds that by letter dated 13th January 2011, he was transferred back to Eldoret to take up duties as Acting Branch Manager for a period of three (3) months.



5. The Claimant was subsequently transferred to Kericho and thereafter back to Nakuru, effective 18th July 2013. By letter dated 28th August 2013, he was deployed to take charge at the Meru office, effective 2nd September 2013.
6. As at 15th June 2015, the Claimant earned a monthly salary of Kshs. 46,000 plus a house allowance of Kshs. 13,800.
7. The Claimant accuses the Respondent of breaching his employment contract by failing to pay him his basic salary and house allowance on 25th January 2018 and subsequently on 25th February 2018.
8. The Claimant avers that as a result of the foregoing breach, he was unable to meet his basic needs. He alleges fundamental and repudiatory breach by the Respondent in the nature of constructive dismissal that compelled him to involuntarily tender his resignation on 28th February 2018.
9. The Claimant further accuses the Respondent of failure to remit his National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) dues.
10. The Claimant tabulates his claim as follows:
 - a. 1 month's salary as notice pay.....Kshs. 59,800
 - b. 12 months' salary in compensation.....717,600
 - c. Unremitted NSSF dues for October-December 2017.....1,200
 - d. Service pay for 10 years.....598,000
 - e. Unremitted NHIF dues for October-December 2017.....3,900
 - f. Certificate of Service
 - g. Costs plus interest

The Respondent's Case

11. In its Response dated 15th April 2021, the Respondent denies the Claimant's claim and states that the Claimant resigned voluntarily.
The Respondent denies having breached the employment contract.
12. The Respondent states that it is a Collective Management Organization (CMO) registered under the Copyright Act No. 12 of 2001. The Respondent adds that it was denied a licence for the year 2017, rendering it unable to fulfil its contractual/statutory obligations.

Findings and Determination

13. There are two (2) issues for determination in this case:
 - a. Whether the Claimant has established a case of constructive dismissal;
 - b. Whether the Claimant is entitled to the remedies sought.

Constructive Dismissal?

14. On 28th February 2018, the Claimant wrote to the Respondent as follows:

“The Human Resources Manager



Music Copyright Society Of Kenya

BOX 14806-00800

Nairobi

Dear Madam

Ref: Resignation From Duty

I kindly wish to bring to your attention that effective immediately, I hereby tender my resignation to work for your Company (sic). The upshot of the foregoing is that owing to the predicament with which the Society has undergone (sic) for the last one year, I am unable to meet the basic needs as to be able to render my services.

I understand that there is still a spirited effort to salvage the Company. It is therefore my humble request that in an event that the situation is restored I be considered as your employee.

Thanks

Yours Sincerely,

Shannel Angatia

Licensing Officer

Nairobi Region

(signed)”

15. The Claimant’s case is that he was forced to resign by the Respondent’s failure to pay his monthly salary for the months of January and February 2018. He therefore makes a claim of constructive dismissal.
16. In general terms, constructive dismissal or discharge occurs where an employer’s conduct makes the work environment so intolerable that the employee has no option but to leave employment.
17. The makeup of constructive dismissal was defined in Emmanuel Mutisya v Agility Logistics (Cause No 1448 of 2011) as a situation created by the employer, which renders the continuation of the employment relationship intolerable to such an extent that the employee has no other option but to resign.
18. In *Max Masoud Rosbankar & another v Sky Aero Limited* [2015] eKLR the Court stated as follows:

“...Constructive dismissal, also called constructive discharge, occurs when employees resign 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 is not voluntary, it is in effect a termination.”
19. In his final submissions, the Claimant relied on the decision in *Joseph Aleper & another v Lodwar Water and Sanitation Company Limited* [2016] eKLR where the Court stated as follows:

“Constructive dismissal has its roots in the law of contract under the doctrine of ‘discharge by breach.’ Under this doctrine, an employee was entitled to treat himself as discharged from further performance of his obligations where the employer’s conduct was a significant breach going to the root of the contract. The termination would be due to the employer’s conduct.”



20. In his resignation letter, the Claimant discloses that he was aware that the Respondent was undergoing serious challenges. In his testimony before the Court, he admitted being aware that the Respondent's licence had been withdrawn, making it impossible for the Respondent to carry out its operations.
21. There was no suggestion of any wrongdoing on the part of the Respondent and the Claimant cannot therefore claim that he was forced to resign by the Respondent's conduct. The claims for compensation and notice pay are therefore without basis and are dismissed.

Other Claims

22. The claims for unremitted NSSF and NHIF dues were not proved. At any rate, any unremitted statutory dues would payable to the respective statutory body and not to the Claimant.
23. No basis was established for the claim for service pay which is therefore disallowed.
24. In the end, the Claimant's entire claim is dismissed.
25. Each party will bear their own costs.
26. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF OCTOBER 2023

LINNET NDOLO

JUDGE

Appearance:

Mr. Makori h/b for Mr. Kigwamwa for the Claimant

Mr. Okubasu for the Respondent

