



**Kiliru v Proctor & Allan (EA) Limited (Cause 231 of 2021)  
[2023] KEELRC 2496 (KLR) (3 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2496 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 231 OF 2021  
NZIOKI WA MAKAU, J  
OCTOBER 3, 2023**

**BETWEEN**

**RAYMOND VIDONYI KILIRU ..... CLAIMANT**

**AND**

**PROCTOR & ALLAN (EA) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this suit against the Respondent claiming unlawful and unfair termination from employment, failure to reimburse him medical expenses incurred, failure to issue him with itemised payslips, and payment of accrued and unpaid leave. It was the Claimants' averment that the Respondent employed him on 13<sup>th</sup> March 2017 in the position of a Plant Manager, earning a consolidated monthly salary of Kshs. 480,000/- that was later increased to Kshs. 504,252/- in February 2019. He was also entitled to post-paid telephone benefit of Kshs. 5,200/-, 24 working days leave, travel allowance at 15% of his basic salary for each completed year of service, and was also eligible to join the Respondent's medical scheme. He averred that he diligently served the Respondent for three years and seven months despite Respondent failing to pay his salary for 14 months, from August 2019 to October 2020 and that he in effect worked without pay.
2. The Claimant averred that the Respondent's continued non-payment of his salary made it difficult for him to continue working and he could not continue to discharge his obligations under the contract without pay. That he was thus constructively dismissed from employment and was forced to resign from employment on 14<sup>th</sup> October 2020 against his will because of the continued non-remittance of his salary. The Claimant therefore further prayed for Judgment against the Respondent for a declaration that the Respondent's actions constituted a fundamental breach of his employment contract and his rights as an employee and that it amounted to constructive dismissal. He further sought for notice pay, unpaid salary and post-paid telephone benefit, unpaid travel allowance for each



complete year of service, 12 months' salary as compensation for unfair and unlawful termination, and pension claims from employer.

3. In response, the Respondent filed a Statement of Reply denying that the Claimant's consolidated salary was increased to Kshs. 504,252/- in February 2019. It averred that following the outbreak of the novel COVID-19, the company took drastic measures to curb the spread of the virus, including sending non-critical employees on unpaid leave effective from April 2020 as there was no on-going production and that critical employees such as the Claimant were requested to work from home. That consequently, the Claimant unilaterally terminated his employment with the Respondent by neglecting his duties and absconding work without notifying it of the reasons. That the Claimant particularly failed to show up for the preparation of the tolling between July 2020 and October 2020 and that his allegations of unlawful and unfair termination from employment are unfounded, an afterthought and should be disregarded.
4. It further averred that in any event, the Claimant's resignation through the letter dated 14<sup>th</sup> October 2020 failed to factor in the adequate and requisite three (3) months' notice thus breaching the Employment Contract of 16<sup>th</sup> February 2017. That despite this breach, it offered to make an ex-gratia payment on a purely without prejudice basis but which the Claimant has failed, refused and/or neglected to collect. It argued that in view of the foregoing, the Claimant was thus disentitled to the reliefs he was seeking from this Honourable Court. The Respondent concluded that the Claimant's claim lacked any merit and should be dismissed with costs to the Respondent.
5. In a rejoinder, the Claimant averred in his Reply to the Response that salary payments were made to him in part up until mid-2020 and that all payments made him cumulatively amounted to a full salary of July 2019 as evidenced by the copy of the P9 form that the Respondent's finance department shared with him. He stated that communication to the effect that non-critical staff proceed on unpaid leave was irregular and unprocedural and that the notice on unpaid leave was ironically placed on the Respondent's notice boards yet the employees were not at the premises. Furthermore, there were no consultation and discussions with employees then signed letters for consent before the decision on unpaid leave was made. He denied the Respondent's averments that he failed to show up at work, asserting that he was in communication with the Respondent's Managing Director, finance department and the rest of the team through phone and email and was always giving all necessary information as and when required.
6. Evidence  
The Claimant testified under cross-examination that his P9 forms prove that his salary was increased in February 2019. Whereas he admitted having not given the Respondent a demand letter, he asserted that he did not voluntarily resign but left because he was not being paid salary. The Claimant stated in re-examination that the Respondent had not filed documents to rebut his claim for 14 months' salary and that since it also kept records of leave forms, it did not produce any evidence rebutting his claim for leave. He further testified that he submitted receipts with respect to his medical claim forms and that he never got any email seeking for more receipts from him.
7. The Respondent's witness, Mr. Paul Nduati (RW1), testified that when the company recalled the critical employees during the Covid-19 pandemic, the Claimant did not return despite repeated calls between July 2020 and October 2020 and that he only showed up in October to give his resignation. He stated that the Claimant was not eligible to be paid pension dues as the same would be availed to him upon retirement at 60 years. RW1 confirmed that the Claimant was not paid from August 2019 to January 2020 except for Kshs. 20,000/- and that the Claimant's gross salary was Kshs. 509,452/- for 2019 as per the KRA P9 form produced. He further stated that the Claimant was not paid his terminal



dues because he had not cleared with the Respondent even with advice to do so. RW1 asserted that the Respondent claimed from the Claimant three months' pay in lieu of notice which he ought to have paid or given notice thereof. For the claim for medical reimbursement, RW1 informed the Court that the Respondent never paid the same and there was no basis to claim the same from the company. He however could not confirm to the Court whether the Claimant was subjected to disciplinary proceedings for being absent from July 2020 to October 2020.

8. Claimant's Submissions

According to the Claimant, the issues for determination are whether he was constructively dismissed from employment; and whether he is entitled to the reliefs sought. The Claimant submitted that the Court of Appeal in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR, set out the legal principles for determining constructive termination including, that an employee may leave with or without notice so long as the employer's conduct is the effective reason for termination. He further cited the case of *Milton M. Isanya v Aga Khan Hospital Kisumu* [2017] eKLR in which the Court expressed that in constructive dismissal, the desire to resign is from the employee as a result of a hostile working environment or treatment by the employer. It was the Claimant's submission that in the instant suit, the Respondent had admitted not paying his salaries as and when the same fell due for a period of 14 months, which was a fundamental breach or repudiation of his employment contract. That he had established a causal link between his resignation and the Respondent's failure to pay his salaries hence the claim for constructive dismissal.

9. He further cited the case of *Peter Kaburu Karanja v Kirinyaga Construction (K) Limited* [2020] eKLR, in which the Court while determining constructive dismissal arising from an employer's failure to pay his employee's salaries in direct breach of the contractual terms, held as follows:

“The Respondent's failure to pay the Claimant his salary for a cumulative period of 9 months was a fundamental breach. The breach was compounded by the Respondent's failure to pay the Claimant his salary for the three consecutive months leading to his resignation. This meant the claimant could not cater for his needs, a fact he explained in his resignation letter.”

10. It was submitted by the Claimant that the Respondent's failure to pay his salaries as per the terms of the contract was not only unfair but unlawful. The Claimant submitted that clauses 5 and 3 of the employment contract entitled him to annual leave, leave traveling allowances, salaries and post-paid telephone benefit. That undeniably, the Respondent's failure to pay salary to the Claimant thus amounted to a contractual breach as has been affirmed in case law hereinabove. That the Court has further held in the case of *Mutai v Kisa & another (Cause E002 of 2020)* [2022] KEELRC1543 (KLR) (25 May 2022) (Judgment) that the claimant was justified to resign and sue for breach of an integral part of the employment contract being that his salary had been withheld without excuse and that he had proved on a balance of probability that his resignation was not voluntary and amounted to a constructive dismissal by the Respondents within the meaning of section 45 of the *Employment Act*.

11. The Claimant submitted that clause 10 of the Employment Contract provided that termination of service between him and the Respondent would require giving of 3 months' notice in writing or three months' salary payment in lieu of such notice. That having demonstrated he resigned against his own wish and will, the constructive dismissal amounted to unfair dismissal within the meaning of section 45 of the *Employment Act*. That in any event, the Respondent had not filed any counterclaim seeking payment of the 3 months' salary from him and it was only fair and just that he be paid three months' salary on account of the Respondent's unfair labour practice. It was the Claimant's submission that the Court ought to find in his favour as the Respondent had not demonstrated that the said amounts claimed was ever paid to him as per the contract of employment. That the Respondent's breaches



can only be remedied through award of compensation for constructive dismissal per the case of Peter Kaburu Karanja v Kirinyaga Construction (K) Limited [2020] eKLR in which the claimant was awarded 6 months' salary as compensation for constructive dismissal. In the instant case, the Claimant urged the Court to award him maximum compensation. The Claimant submitted that clause 8 of the employment contract entitled him to entry into retirement benefits scheme for which the Respondent was required to make monthly contributions in addition to his basic salary. That the same being a contractual benefit the Respondent was required to meet in his favour, the Court ought to award him the pension claims from the Respondent as sought.

12. Respondent's Submissions

The Respondent submitted that the Claimant's resignation amounted to the unilateral termination of his employment contract without notice and that he was therefore not entitled to any reliefs sought in the Statement of Claim. That the Claimant failed to raise any concern or make any demand for the alleged non-payment of his salary prior to his resignation and he in fact accepted several monthly salary payments from the Respondent without question. It cited the Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR in which the Court of Appeal found that in constructive dismissal, the employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; and must have within a reasonable time terminated the employment relationship pursuant to the breach. The Respondent argued that since the Claimant took 14 months to tender his resignation, he was estopped from asserting repudiatory breach of the employment contract.

13. It further submitted that the Claimant is precluded from claiming that he was constructively dismissed because he had not satisfied the standard requirements for constructive dismissal as stated hereinabove. That the Claimant unreasonably delayed his resignation and therefore waived his right to the alleged repudiatory breach and in that regard, the claim for constructive dismissal failed. It relied on the case of Angela Gwiyo Kuria v Schenker Limited [2020] eKLR where the Court held that since the claimant appeared to have condoned the respondent's failure to pay, the breach could not be the reason for the claimant's resignation and that constructive dismissal had thus not been established in the case. It was the Respondent's submission that Claimant is not entitled to notice pay because he voluntarily resigned from his employment and even failed to issue it with the three (3) months' notice provided in the employment contract. As regards unpaid salary and post-paid telephone benefit, it submitted that if this Court was inclined to award the Claimant unpaid salary then it ought to consider the facts stated herein. That the Claimant was not entitled to the claim for accrued leave days since he did not utilize the said leave days within the leave earning period during his employment as contemplated under section 28(4) of the *Employment Act*. In respect of unpaid travel allowance, the Respondent submitted that the Claimant was not entitled to the claim as RW1 testified that the Respondent did not undertake any production operations due to financial challenges and that the Claimant did not therefore travel during the said period. That the Claimant did not produce any receipts to support his claim for medical expenses incurred and he was thus not entitled to the same since he who alleges must prove. The Respondent further submitted that the Claimant was not entitled to pension claim since he absconded work and voluntarily terminated the employment contract. Lastly, as it had substantially demonstrated that the Claimant had failed to establish his claim for constructive dismissal, he was not entitled to compensation for unfair and unlawful termination as the same was not available to him.

14. The Claimant was not paid for 14 months. That was basis for the Claimant to seek recompense in the manner he did. He asserts constructive dismissal. One of the elements of constructive dismissal is the conduct of the employer, creating a hostile working environment or acting as to demonstrate a repudiatory breach of the contract of employment. By failing to pay salaries to the Claimant, the



employer repudiated the contract with the Claimant thus entitling him to claim constructive dismissal. The Respondent admits not paying salaries for 14 months and this was really the gravamen of the claim. The Claimant claimed leave dues which the Respondent did not rebut by way of records showing the Claimant took leave. He thus would be entitled to the same. The matter of pension is for another forum and will not be determined here. The Claimant did not issue a demand thus disentitling him to any costs for the suit.

15. In the final analysis I enter judgment for the Claimant against the Respondent for:-
- a. 14 month's salary – Kshs. 7,132,328/-
  - b. Leave dues for 24 days – Kshs. 407,561.60
  - c. Compensation for the termination set at 3 months – 1,528,356/-
  - d. Interest at court rates on the sums in a) b) and c) above from the date of judgment till payment in full.
  - e. Certificate of service in terms of section 51 of the *Employment Act*.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER 2023**

**Nzioki wa Makau**

**JUDGE**

