



**Ngure v Huawei Technologies (Kenya) Co Ltd (Cause 335 of 2018)
[2023] KEELRC 3204 (KLR) (5 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3204 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 335 OF 2018
JK GAKERI, J
DECEMBER 5, 2023**

BETWEEN

GODFREY KAMAU NGURE CLAIMANT

AND

HUAWEI TECHNOLOGIES (KENYA) CO LTD RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim alleging breach of contract, misrepresentation and unfair termination of employment and prays for;
 - a. A declaration that the Respondent breached the Claimant's employment contract.
 - b. A declaration that the Respondent breached the Claimant's rights under Article 28 of *the Constitution*.
 - c. An order to the Respondent to pay outstanding salary arrears for 5 months;
 - i. Kshs.2,600,000/=.
 - ii. 15% of basic salary as house allowance Kshs.390,000/=.
 - iii. Fuel allowance Kshs.100,000/=.
 - d. 14 days salary in lieu of notice.
 - e. 12 months' salary for unfair termination Kshs.6,240,000/=.
 - f. Aggravated damages including exemplary damages for constructive dismissal, loss of career and breach of contract.
 - g. Costs of the suit and interest thereon at court rates.



The Claimant's case is pleaded as follows;

2. The Claimant avers that after he had applied for the position of Senior Channel Manager pursuant to an advertisement by the Respondent, he received a written offer via email which was explicit that if he had no questions for clarification, he could sign the document and insert the date "you shall report and send it back" which he did after inserting the reporting date as 11th September, 2018. His salary was Kshs.520,000/= per month, house allowance of 15% of the basic pay and fuel allowance of Kshs.20,000/= per month.
3. It is the Claimant's case when he reported on 11th September, 2018, he was informed that he could not begin work as the Respondent required time to organize terms of reference.
4. That subsequent calls on the reporting date yielded nothing.
5. It is the Claimant's case that he could not take up offers from Software Dynamics and Newport International Ltd as he had already accepted the Respondent's offer.
6. That in response to the counsel's letter, the Respondent admitted having offered the Claimant employment which he accepted but blamed the political activities in the country and offered him another job which the Claimant declined and thus remained jobless for the contractual period as a consequence of which his financial situation deteriorated as he had no other source of income.

Respondent's case

7. It is the Respondent's case that although it offered the Claimant employment and he accepted, reporting was not possible owing to the electoral violence and business uncertainty and approval of the Claimant's employment by superiors in Hong-Kong, a fact the Claimant was aware of having previously worked with the company as a Product Manager.
8. The Respondent further avers that as the approval was being awaited, the Claimant was becoming impatient and it offered the Claimant an alternative position with similar remuneration but he declined and filed the instant suit alleging loss of other opportunities which he had not disclosed to the Respondent.
9. On cross-examination, the Claimant confirmed that he did not understand that the first 6 months of employment were probationary terminable by 14 days notice. He admitted that the employment fell within the Presidential election re-run.
10. That he did not understand the need for approval by the parent company.
11. That the Respondent had requested him to accord it a few weeks to confirm the position.
12. The witness further confirmed that he did not render any services for the entire duration.
13. On cross-examination, the Respondent's witness confirmed that the offer signed by the Claimant constituted an employment relationship with the Respondent effective 11th September, 2017.
14. The witness confirmed that the Claimant inserted the reporting date on the offer letter as instructed by email dated 7th August, 2017 and the Claimant was aware of the approval procedure having been informed orally.
15. The witness further confirmed that Insight Management was the Respondent's outsource supplier and the contract was similar to the Respondent's offer which was untrue.



Claimant's submissions

16. The Claimant's counsel addressed three issues, on whether there was an employment contract between the parties, whether the Respondent violated the Claimant's rights and entitlement to the reliefs sought.
17. On the 1st issue, counsel submitted that there was an employment relationship between the parties effective 11th September, 2017 and relied on the sentiments of the court in *Fedelix Mwendwa Muli V Bamburi Cement Ltd (2018) eKLR* to buttress the submission.
18. Counsel submitted that the Respondent unilaterally varied the Claimant's contract by introducing a 3rd party thereby repudiating the contract of employment.
19. As regards violation of the Claimant's rights, counsel cited the provisions of Article 41 of *the Constitution* of Kenya, 2010 and sentiments of the court in *Esther Njeri Maina V Kenyatta University (2020) eKLR*, *John Muikiria Waweru V Judicial Service Commission (2020) eKLR*.
20. Counsel, further submitted that the provisions of Article 41 of *the Constitution* of Kenya, 2010 and Section 4(1) of *Fair Administrative Action Act* were violated and the Claimant was constructively dismissed. Counsel cited the sentiments of the Court of Appeal in *Leena Apparels (EPZ) Ltd V Nyevu Juma Ndokolani (2018) eKLR* as well as *Premier Construction Ltd V Josephat Bwire Lukale & 5 others (2017) eKLR* to reinforce the submission.
21. As regards the reliefs sought, reliance was made on the sentiments of the court in *John Muikiria Waweru V Judicial Service Commission (Supra)*.

Respondent's submissions

22. As to whether there was an employment relationship between the parties, counsel submitted that the reporting date was never agreed upon by the parties though the offer had been accepted by the Claimant.
23. Counsel further argued that the reporting date was subject to final approval by the Respondent's headquarter officers in Hong Kong and the period in question was characterised by heightened political tension and business uncertainty, facts counsel invited the court to take judicial notice of as held in *Ngunjiri Wambugu V Inspector General of Police & 2 others (2019) eKLR*.
24. According to counsel, the Respondent attempted to mitigate the situation by the offer from Insight Management Consultants Ltd dated 1st February, 2018.
25. Counsel urged that the Respondent did not breach the contract of employment but the contract was frustrated by political unrest and economic uncertainty.
26. On the alleged violation of rights, counsel submitted that the Respondent had not violated the Claimant's fundamental rights as it had to await approval of the hiring, there was political tension and uncertainty and the Respondent kept the Claimant informed, in addition to mitigating his situation.
27. As regards the reliefs sought, counsel submitted that the Claimant was not entitled to any as the Respondent was not to blame for the impasse.
28. Counsel submitted that the prayer for 12 months compensation was unreasonable and disproportionate in the circumstances as held in *Anytime Ltd V Fredrick Mutobera Omuraya (2022) eKLR*, where the Court of Appeal reduced the 12 months' salary compensation awarded by the trial court to 3 months.



29. According to counsel, the prayer for aggravated and exemplary damages was unjustified.

Findings and determination

30. It is common ground that Respondent offered the Claimant employment pursuant to an advertisement and application by the Claimant and the Claimant accepted the offer.
31. Unchallenged email communication between the Claimant and the Respondent's Human Resource Department reveal that the firm offer was made on 7th August, 2017.
32. The email communication from M/s Faith Nancy was unambiguous that if the Claimant had no questions that needed clarification, he was to sign the letter, insert the reporting date and send it back.
33. Evidence shows that the Claimant inserted 11th September 2017 as the reporting date and notified the Respondent and subsequently availed the signed copy.
34. The contract was probationary for 6 months and made no reference as to what would follow.
35. It is equally not in dispute that when the Claimant reported to the work place on 11th September, 2017, the Respondent was not ready to receive him and allegedly told him to await further communication which was not forthcoming despite inquiries by the Claimant.
36. This far, it is clear that the parties had an employment relationship, a fact both parties are in agreement.
37. Equally, and contrary to the Respondent's counsel's submission that the reporting date had not been agreed upon, the Respondent gave the Claimant liberty to insert the date, which he did as adverted to elsewhere in this judgement.
38. In employment contracts, it is trite that the employer makes the offer to the prospective employee who must accept the same for an employment relationship to arise.
39. The Claimant's acceptance of the Respondent's undated offer created the employment relationship between the Claimant and the Respondent.
40. Was the employment contract between the parties frustrated?
41. Simply stated, a contract is said to be frustrated when further performance of the contractual obligations is rendered impossible, illegal or commercially useless by unforeseen supervening events or occurrences for which neither of the parties is to blame.
42. The effect of frustration is to discharge the parties from their obligations.
43. Frustrating events include Act of God, death in contracts of personal service, government interventions, non-occurrence of an event or circumstances upon which the contract is based among others.
44. The Respondent's counsel submitted that the contract of employment between the parties was frustrated by political unrest and economic uncertainty at the time.
45. It is common knowledge that Kenya held its General Election on 8th August, 2017 and the Presidential election was nullified by the Supreme Court and a re-run held on 25th October, 2017 and a winner declared.
46. Although the Respondent's counsel submitted that the political unrest and economic uncertainty frustrated the Claimant's contract of employment, no evidence was availed as to the nature of the political unrest or economic uncertainty and for how long the alleged circumstances obtained.



47. Similarly, no evidence was adduced as to when the Respondent deemed the contract frustrated and thus discharged from further performance.
48. Interestingly, the Respondent's witness testified that the delay was occasioned by the approval of the employment by the Respondent's Head Office in HonKong, a fact he alleged the Claimant was aware of.
49. Puzzlingly, the Respondent availed no scintilla of evidence to show that an approval had been sought and it was being awaited. Neither a copy of letter or email was availed as evidence. The Respondent adduced no evidence of any reminder or response from August 2017 to early 2018.
50. Equally, the email from Faith Nancy to the Claimant dated 7th August, 2017 at 5.32 pm had no indication that the employment was dependent upon approval by the Head Office, assuming that was indeed the case, and the time frame.
51. Finally, if the alleged reasons were the *causa causan* of the impasse, why did the Respondent not commit itself to the same in writing to justify its position?
52. In the absence of credible evidence to justify its claim, it is the finding of the court that the Respondent has on a balance of probabilities failed to demonstrate that the Claimant's employment contract was frustrated or that the unexplained delay to on-board him was occasioned by an external approval process.
53. As regards violations of the Claimant's Constitutional rights as alleged by the Claimant's counsel, the court is in agreement with the Respondent's submissions that the Claimant availed no credible evidence to prove that his constitutional rights were violated. The court is not satisfied that the Claimant has adduced any evidence to demonstrate any violation of Constitutional rights.
54. The Claimant had a written contract with unambiguous terms and was not on suspension.
55. The Respondent's wrong doing, if any, in the court's view is in the domain of contract not constitutional.
56. As to whether the Claimant was constructively dismissed, the court proceeds as follows;
57. According to Black's Law Dictionary (10th Ed), Constructive dismissal means;

“An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, by fundamentally changing the working conditions or terms of employment; an employer's course of action that being detrimental to an employee, leaves the employee almost no option but to quit.”
58. The *locus classicus* articulation of the principle of constructive dismissal are the celebrated sentiments of Lord Denning MR in *Western Excavating ECC Ltd V Sharp* (1978) 2 WLR 344 as follows;

“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, 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 . . .”



59. The Court of Appeal domesticated the principle of constructive dismissal in its decision in *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga* (2015) eKLR where the court adopted the contractual test which is based on a repudiatory breach of the contract of employment.
60. The court went further and catalogued the guiding principles in determining whether or not a constructive dismissal had taken place.
61. In the instant case, it is not in contest that the Claimant and the Respondent had a legally binding employment contract under which the Claimant was to take up his duties on 11th September, 2017 but did not do so at the instance of the Respondent. The Respondent denied him the opportunity to undertake his duties and responsibilities as an employee.
62. Intriguingly, the Respondent provided no written evidence of its refusal to enable the Claimant take up his duties as an employee, verbal communication notwithstanding until 1st February, 2018 when the Respondent gave the Claimant an alternative offer by Insight Management Consultants Ltd, which he declined, the terms notwithstanding.
63. It is puzzling that the Respondent kept the Claimant on tenterhooks for over 4 months with unfulfilled promises only to surprise him with an offer by another company which it expected him to accept.
64. By then, the Respondent had committed a repudiatory breach of the contract of employment and the Claimant was entitled to have treated the employment as repudiated and pursued other interests.
65. In the court's view, the Respondent's refusal to allow the Claimant take up his duties as an employee constituted a constructive dismissal of the Claimant's employment and the court so finds.
66. Having found that the Claimant was constructively dismissed by the Respondent, I will now proceed to assess the appropriate reliefs.

a. Declaration

67. Having found that the Respondent denied the Claimant the opportunity to take up his duties as an employee and having agreed to employ him, the Respondent breached the contract of employment and a declaration to that effect is merited.

b. Declaration on fundamental rights

68. Having found that the Claimant failed to prove violations of *the Constitution* of Kenya, 2010, a declaration that the provisions of Article 28 were breached is unmerited and is denied.

c. Outstanding salaries for 5 months

69. It is common ground that the Claimant did not render any services to the Respondent and it would appear to follow that no salary had accrued to him as an employee.

The Claimant has not demonstrated entitlement to salary and the prayer is declined.

d. 14 days salary in lieu of notice

70. Having found that the Claimant was constructively dismissed by the Respondent, the claim for 14 days salary in lieu of notice is sustainable and is accordingly awarded.



e. 12 months compensation

71. Having found that the Claimant was constructively dismissed from employment, the Claimant is entitled to the relief under Section 49(1)(c) of the *Employment Act*, 2007 subject to compliance with the provisions of Section 49(4) of the Act.
72. In arriving at the quantum of compensation, the court has considered the following;
- i. The Claimant rendered no particular services to the Respondent for the duration of the contract.
 - ii. The Claimant's contract of employment was probationary for 6 months.
 - iii. The Claimant was desirous of working for the Respondent and maintained communication.
 - iv. The Claimant did not contribute to the termination of employment.
 - v. The Claimant declined to take up an alternative offer to mitigate his loss as required by the law.
73. In the circumstances, the court is satisfied that the equivalent of 3 months gross salary is fair.

f. Aggravated and exemplary damages

74. In *Rookes V Barnard & others* (1964) AC 1129, the court enunciated the scope of exemplary damages under the law of torts.
75. In *Obonyo & another V Municipal Council of Kisumu* (1971) EA 91, the Court of Appeal stated as follows;
- “. . . exemplary damages are appropriate in two classes of cases; oppressive, arbitrary and unconstitutional action by servants of government . . .”
76. In *Miguna Miguna V Standard Group Ltd and 4 others*, the Court of Appeal citing *John V GM Ltd* (1993) QB 58 stated as follows;
- “Aggravated damages will be ordered against a defendant who acts out of improper motive e.g when it is attracted by malice, insistence on a flurry defence of justification or failure to apologize.”
77. Although the Claimant pleaded the alleged particulars of malice, he did not adduce evidence to show that the Respondent's conduct was actuated by malice.
78. In sum, it is the finding of the court that the Claimant has not sustained a case for the award of aggravated or exemplary damages.
79. In conclusion, judgement is entered in favour of the Claimant against the Respondent as follows;
- a. Declaration that Respondent breached the Claimant's employment contract.
 - b. 14 days salary in lieu of notice.
 - c. Equivalent of 3 months gross salary.
 - d. Costs of this suit with interest from date hereof till payment in full.
- Orders accordingly.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5TH DAY OF
DECEMBER 2023**

DR. JACOB GAKERI

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 *Civil 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.

DR. JACOB GAKERI

JUDGE

