



**Michieka v Nyankoba Tea Factory Co Ltd (Cause 6 of 2017)
[2022] KEELRC 14684 (KLR) (23 March 2022) (Judgment)**

Neutral citation: [2022] KEELRC 14684 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

CAUSE 6 OF 2017

S RADIDO, J

MARCH 23, 2022

BETWEEN

LINET GESARE MICHIEKA CLAIMANT

AND

NYANKOBA TEA FACTORY CO LTD RESPONDENT

JUDGMENT

1. The Cause was heard on 8 July 2019, when Linet Gesare Michieka (the Claimant) testified on 18 November 2021 and 9 December 2021, when a former Production Manager with Nyankoba Tea Factory Co Ltd (the Respondent) testified.
2. The Claimant filed her submissions on 3 February 2022 (should have been filed and served before 9 January 2022), while the Respondent filed its submissions on 9 February 2022.
3. The Court has considered the pleadings evidence and submissions and has adopted the Issues as set out by the parties in their submissions.
4. Before examining the substantive Issues, the Court notes that in the submissions, the Claimant sought a cumulative award of Kshs 49,002,415/- while in the Statement of Claim, she had pitched for an award of Kshs 15,009,337/-.
5. Without an amendment of the pleadings or foundational evidence, the Court will ignore the figures introduced with the submissions.

Background

6. The Respondent offered the Claimant employment as a general worker through a letter dated 16 June 2011 (the Claimant had previously served on contract).



7. Upon the employment, the Respondent initially deployed the Claimant to the tea infusion section, where she served until 2012 (she was redeployed to the leaf inspection section).
8. On or around 11 June 2015, the Respondent issued a show-cause to the Claimant to explain why she had fought another employee in the workplace (on 5 June 2015).
9. The Claimant responded on 15 June 2015, questioning the events set out in the show-cause. The Claimant also stated that the payroll clerk (named) had assaulted her when she raised concerns over deductions from her May 2015 remuneration.
10. The Respondent thereafter invited the Claimant to appear for a disciplinary hearing.
11. The Claimant attended the hearing, and on 1 September 2015, the Respondent wrote to her to inform her that the Disciplinary Committee had found her response unsatisfactory. That letter served as a first warning.
12. On 31 December 2015, the Respondent issued another show-cause to the Claimant.
13. The charges were late reporting to work on 28 December 2015 and insubordination on 29 December 2015 (refusing redeployment to leaf inspection unit).
14. The Claimant was requested to respond within 24-hours, and she responded on 9 January 2016.
15. On 21 April 2016, the Claimant was redeployed to the feeding section and feeling frustrated, the Claimant resigned on 22 April 2016.
16. The Claimant gave the reasons for resignation as unfair treatment, discrimination, witch hunt and humiliation, and underpayment of wages.
17. The Claimant then moved to Court.
18. In the Statement of Claim, the Claimant alleged that the Respondent had forced her to resign (constructive dismissal) in that she had been redeployed to perform manual work whereas she had developed expertise in tea infusion; her allegations of assault against the payroll clerk were turned over against her through a show-cause; the payroll clerk was never subjected to disciplinary action for assault; she was underpaid; there was a delay in concluding the disciplinary process (from 15 June 2015 to 1 September 2015) and issuing a warning letter on vague allegations.
19. The Claimant also contended that the disciplinary process she was put through was meant to intimidate and victimise her and constituted inhuman treatment.
20. The Claimant further asserted that she was subjected to long work hours; her wages for May, June and November 2015 were unlawfully deducted and that her system password was assigned to another employee.
21. The sum of the allegations against the Respondent, the Claimant, posited constituted unfair labour practices and forced her to resign.
22. However, the Respondent took the view that the Claimant's resignation was prompted by the disciplinary cases she was facing and the findings of gross misconduct (absenteeism, fighting at work and reporting to work late).
23. On allegations of discrimination, the Respondent contended that the Claimant and the payroll clerk were issued show-cause notices. Both appeared before the Disciplinary Committee and were heard, and the Claimant was found culpable.



24. The disciplinary process, the Respondent maintained, was fair and lawful.
25. The Respondent denied that the Claimant was subjected to long work hours or was victimised or intimidated.
26. The Respondent contended that the Claimant's resignation was not because of a hostile work environment or unfair labour practices.
Whether the Respondent created a hostile work environment warranting the Claimant's resignation?
27. The Court will examine each of the grounds relied on by the Claimant to determine whether the threshold for constructive dismissal was met.
28. Although the concept of constructive dismissal has not been given statutory anchor, it has been accepted and applied in numerous cases, including by the Court of Appeal in *Coca Cola East & Central Africa Ltd v Maria Kagai Ligaga (2015)* eKLR where the Court stated:
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... 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.

Redeployment

29. The Claimant was a general worker. Initially, she was deployed to the tea infusion section but was later redeployed to the feeding section.
30. According to the Claimant, considering her educational qualifications and expertise developed in the tea infusion, it was unfair for the Respondent to deploy her to work of manual nature.
31. The Claimant did not produce a copy of her job description or any other contractual document restricting the Respondent's discretion to assign her other duties.
32. She did not demonstrate that the redeployment(s) was a unilateral alteration of the contract or repudiation by the Respondent given her designation as a general worker.
33. Therefore, the Court cannot determine whether the redeployment by itself was an unfair labour practice or could amount to a hostile work environment.

Disciplinary process: discrimination

34. It is not in dispute that the Claimant fought with a colleague in the workplace. Both were subjected to disciplinary action, were allowed to be heard, and the Claimant was found at fault and was issued with a warning letter.
35. The collective bargaining agreement upon which both parties relied provided for disciplinary action. The *Employment Act 2007* also contemplates disciplinary action.
36. Placing an employee on a disciplinary process by and of itself is not a fundamental breach going to the root of a contract.
37. Based on the record, the Court does not find any unfairness or discrimination in the disciplinary process against the Claimant.



Disciplinary process: delay

38. The Claimant also contended that the delay in concluding the disciplinary process was an unfair labour practice that entitled her to resign and claim constructive dismissal.
39. The Claimant faced separate disciplinary cases, the first was instigated through a show-cause dated 11 June 2015 and the second one on 31 December 2015.
40. The first disciplinary case was concluded by issuing a warning on 1 September 2015.
41. On the second show-cause, the Claimant sought legal advice instead of responding, alleging a plot to dismiss her from work.
42. On 22 April 2016, the Claimant resigned.
43. The Claimant has relied on a collective bargaining agreement. This suggests she was an unionisable employee. She never requested the Union to intercede on her behalf. She did not give an ultimatum to the Respondent to clarify the status of the disciplinary case.
44. A disciplinary process is one contemplated by law. The Respondent issued a show-cause to the Claimant on 31 December 2015. She was requested to respond within set timelines. She did not respond but instead sought legal advice prompting the legal advisers to send a demand letter the same day, giving the Respondent a 30-days window to respond or face legal action.
45. Despite the demand, the Claimant did not directly respond to the show-cause nor take any further action until the Claimant resigned.
46. An employee has an obligation to cooperate with the employer in and during a disciplinary process. Generally, the process does not involve advocates. By introducing advocates into the process, who gave a 30-days notice of legal action, the process took a tangent.
47. In the circumstances, the Court finds that the four or so months it took before the Claimant resigned did not amount to a hostile work environment as the Respondent had already been put under notice of legal action.

Disclosure of password

48. The Claimant further relied on the fact that her system password was assigned to another employee to assert that the Respondent intended to hound her out of work.
49. The Claimant did not disclose whether she created the password to enable her to log into the Respondent's system or whether the Respondent created the password and then issued it to her.
50. The Court finds the password assignment was not an unfair labour practice as the Respondent retained the right to log into its systems.

Breach of contract

Overtime

51. The Claimant alleged breach of contract in that she worked but was not compensated for overtime from June 2011 to April 2016.
52. In seeking the overtime, the Claimant contended that while she was a permanent employee enjoying a fixed salary, the Respondent converted the contract to a piece-rate contract.



53. The Claimant did not demonstrate that her contract was altered from permanent terms to piece-rate, and relief is declined.

Gratuity

54. The Claimant sought Kshs 197,629/- as gratuity.

55. Clause 15 of the collective bargaining agreement provided for payment of gratuity to employees who resigned.

56. The Respondent did not dispute this head of the claim, and the Court will allow it.

Unpaid leave travelling allowance

57. On account of leave travelling allowance, the Claimant prayed to be awarded Kshs 15,800/- for 2010-2016.

58. The collective bargaining agreement in place at the material time made provision for leave travelling allowance, and without this head of the claim being controverted, the Court will allow it.

Lost income

59. The Claimant did not place before the Court any contractual or legal foundation to the income she would have earned until retirement and relief is declined.

Conclusion and Orders

60. From the foregoing, the Court finds and declares that the Claimant did not prove constructive dismissal, and the reliefs attendant upon such a finding are declined.

61. The Court, however, finds the Respondent in breach of contract and awards the Claimant:

- (a) Gratuity Kshs 197,629/-
 - (b) Leave travelling allowance Kshs 15,800/-
- Total Kshs 213,429/-

62. The Claimant has only partially succeeded. She is awarded costs of half-scale.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 23RD DAY OF MARCH 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Nyamweya Mamboleo Advocates

For Respondent Nyachiro Nyagaka & Co. Advocates

Court Assistant Chrispo Aura

