



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 30 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

NAHASHON OTARARO KHAOYA.....CLAIMANT

VERSUS

JOSEPH IRERI.....RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a memorandum of claim dated 22nd December 2015 and filed in Court on 15th January 2016. The Claimant alleges that he was unlawfully terminated by the Respondent and prays for –

(i) A declaration that the termination of the Claimant's employment was unfair, unlawful and wrongful.

(ii) The sum of Kshs.77,200 as particularized in paragraph 9 of the memorandum of claim comprising

. One month's salary in lieu of notice.... Kshs.12,000

. Leave pay for 8 months..... Kshs.5,600

. Rest days 52..... Kshs.41,600

. Service pay..... Kshs.180,000

Total..... Kshs.77,200

(iii)..... A certificate of service

(iv) Costs of this suit plus interest from the date of filing the suit.

(v) Any other relief as this Court would deem fair, just and expedient.

Claimant's Case

2. The Claimant avers that he was employed by the Respondent as a chef sometime in August 2011 and served the Respondent with loyalty and diligence and obtained salary increments and was confirmed as a permanent employee and as of 2014 his basic monthly salary was Kshs.12,000/- and was promoted to the position of senior chef. In addition, he received a recommendation letter on 5th August 2014.

3. It is averred that on 20th September 2014 the Claimant reported to work as usual but was turned away by the Respondent's officials who informed her that there was no position/work for him but promised to recall him which the Claimant avers did not materialise.

4. That the Respondent barred him from the work place and refused to pay the salary for September 2014 despite several requests to do so.

5. It is averred that the Claimant thereafter sought assistance from the Ministry of Labour, Social Security and Services and three letters

dated 27th November 2014, 22nd December 2014 and 15th January 2015 were dispatched to the Respondent directing it to deposit the sum of Kshs.59,200/-, being the Claimant's one month's notice, leave days for 8 months and 52 rest days. The letters elicited no response from the Respondent.

6. The Claimant avers that he was constructively terminated by the Respondent and has neither been paid nor reinstated by the Respondent despite demand.

Respondent's Case

7. The Respondent neither entered appearance nor filed a response to the claim. At its sitting on 7th July 2021, the Court directed that the suit proceeds to formal proof which took place on 27th October 2021. The Claimant applied 14 days to file submissions and an affidavit of service.

8. On 16th November 2021, the Claimant did not attend Court and further mention was slated for 27th January 2022 on which date the Counsel holding brief for the Claimant's Counsel informed the Court that his instructions were that Counsel for the Claimant would not file submissions but would rely on the evidence tendered on 27th October 2021.

9. The Court gave a judgment date.

Evidence

10. The Claimant adopted the written statement and produced the documents on record as exhibits and prayed for the reliefs as tabulated in the memorandum of claim.

11. The statement rehashes the contents of the memorandum of claim.

12. There were no submissions filed in this suit.

Analysis and Determination

13. From the pleadings, evidence on record and documents, the issues for determination are whether: -

- a) The Claimant was constructively dismissed by the Respondent;
- b) The Claimant is entitled to the reliefs sought.

14. This case turns on whether the Claimant was constructively dismissed.

15. Although the Employment Act, 2007 does not expressly provide for constructive dismissal, it is now part of the employment law of Kenya. The principle has been domesticated by the Court of Appeal.

16. The classical articulation of the principle of constructive dismissal are the celebrated words of Lord Denning in **Western Excavating (ECC) Ltd v Sharp [1978] QB 761** where the Judge expressed himself 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, 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 that 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 disregarded as having elected to affirm the contract”.

17. In **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR**, the Court of Appeal addressed the principle of constructive dismissal in detail and not only adopted the contractual test approach, but moved further and developed the legal principles relevant to the determination of whether a constructive dismissal has taken place.

18. In the words of the Court,

*“The contractual test is narrower than the reasonable test. The dicta in **Western Excavating (ECC) Ltd. -v- Sharp [1978] ICR 222** adopts the contractual approach test and we are persuaded that the test is narrow, precise and appropriate to prevent manipulation or overstretching the concept of constructive dismissal. For this reason, we affirm and adopt the contractual test approach. This means that 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. Whether a particular breach of contract is repudiatory is one of mixed fact and law.”*

19. The Court is bound and guided by these sentiments.

20. The principle of constrictive dismissal has been applied in legions of decision. In **Joseph M. Kivilu v Kenya National Examination Council [2021] eKLR** where the Claimant had been on suspension without pay for almost 12 months and had to report to the Nairobi Area CID Headquarters weekly, as a consequence of which he resigned, the Court held that the Respondent's conduct entitled the Claimant to treat the contract of employment as repudiated and the Claimant had been constructively dismissed.

21. In the instant case, the Claimant's evidence is that on 20th September 2014, he reported to work as usual but was turned away by the Respondent on the premise that there was no position or work for her and would be recalled, a promise that fell through. In addition, the Respondent did not pay the Claimant's salary for September 2014.

22. Consistent with the foregoing, the Claimant reported the dispute to the Ministry of Labour, Social Security and Services and the first letter was written to the Respondent on 27th November 2014, a reminder on 22nd December 2014 and actual demand notice on 15th January 2015. None of the letters two letters on record indicate when the Claimant was allegedly terminated or the reason. The instant suit was filed in early 2016.

23. The Claimant led no evidence of the Respondent's conduct capable of being construed as a significant breach going to the roof of the contract of employment or intention not to be bound by the essential terms of the contract.

24. Puzzlingly, a copy of letter of recommendation produced by the Claimant as evidence in support of the claim herein, dated 5th August 2014 and stamped by the Respondent on 10th August 2014 is explicit that that Claimant was an employee of the Respondent from 12th May 2008 to 31st July 2014 and had since left.

25. The letter is reproduced in full herein below: -

"LINKS PLACE BAR AND RESTAURANT

Outering Road Embakasi

Tele: 020-2010312

P. O Box 4117 – 00100

5.8.2014

LETTER OF RECOMMENDATION

TO WHOM IT MAY CONCERN

RE: NASHON KHAOYA

I certify that the above named person was our bona fide employee in this company. He has served this company from 12th May 2008 to 31st July 2014.

During his stay with us, he served as a chef and due to this handwork, he was promoted to a senior (sic) chef. We have found him hardworking, honest, co-operative and competent team paler in the company.

I therefore not hesitate to recommend him to any employer

or any company where he seeks employment.

Yours faithfully

DENNIS MUNYOKI

MANAGER"

26. The contents of this letter contradict the Claimant's averments and testimony in their totality and undoubtedly the substratum of the claim. The letter is implicit that the Claimant had left employment as at 5th August 2014.

27. The Claimant makes reference to recommendation letter as evidence of his diligence and loyalty but did not contest the dates of service.
28. It is unclear whether the Claimant applied for the recommendation or it was given by the Respondent on its own volition.
29. Be that it may, the contents are clear that there was no employment relationship between the Claimant and the Respondent by the time the recommendation letter was written.
30. Unmistakably, the recommendation letter is written in past tense. The Claimant appears to confuse letter with a commendation letter typically given to serving employees in recognition or appreciation of their performance or service.
31. The Claimant's letter is recommending him for employment by any other employer. It is the Respondent's testimony of how he was when he was its employee, a past relationship.
32. From the contents of this letter, the Court is of the view that the Claimant and the Respondent would appear to have separated amicably.
33. For the foregoing reasons, it is the finding of the Court that that Claimant has on a balance of probabilities failed to demonstrate that he was constructively dismissed by the Respondent.

Reliefs prayed for:

34. Having found that the Claimant has not discharged the burden of proof under Section 47(5) of the Employment Act, the Claimant is not entitled to any of the reliefs and the suit is dismissed with no orders as to costs.
35. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21ST DAY OF MARCH 2022

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