



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

**AT NAIROBI**

**CAUSE NO. 267 OF 2017**

(Before Hon. Justice Dr. Jacob Gakeri)

**JAMES SHAKOMBO.....CLAIMANT**

**VERSUS**

**SIMBA TELECOM LIMITED.....RESPONDENT**

**JUDGMENT**

1. By a Memorandum of Claim dated 6<sup>th</sup> February 2017 and filed in court on 13<sup>th</sup> February 2017, the Claimant sued the Respondent alleging that he had been unfairly, wrongly and unlawfully constructively dismissed.

2. The Claimant prays for the following reliefs:

a. Declaration that he was wrongfully, and unfairly constructively dismissed from his employment.

b. Mandatory injunction directed towards the Respondent company to return the Claimant's KCSE Certificate and Logbook for motorbike KMDE 218Q.

c. One month's salary in lieu of notice..... Kshs.26,000

d. Outstanding pay..... Kshs.1,091,000

comprising of

i. unpaid leave----- Kshs.89,000

ii. Unpaid salary January 2015 – January 2017

21,000 x 12 = 252,000

26,000 x 13 = 338,000

Total:- Kshs.590,000

iii. Fuel subsidy 360 x 100 weeks- Kshs.360,000

iv. Service x 5 x 4----- Kshs.52,000

e. 12 months compensation for wrongful and unfair termination..... Kshs.321,000

f. Punitive and aggravated damages for breach of the Claimant's constitutional rights.

g. Costs and incidental to this Suit.

3. The Respondent filed a reply to the Memorandum of Claim on 29<sup>th</sup> March 2017 including a counter claim of Kshs.21,360.00 and prayed for dismissal of the Claimant's claim with costs.

### **Claimant's Case**

4. The Claimant's case is pleaded as follows:

5. The Claimant states that on or about 2<sup>nd</sup> May 2012, the Respondent employed him as a Sub-dealer Manager at a monthly salary of Kshs.21,000/= and the salary was subsequently reviewed upwards to Kshs.26,000/=. The Claimant further states that on or about 10<sup>th</sup> October 2014, the Claimant lost a sum of Kshs.45,600/= and was suspended on 11<sup>th</sup> October 2014 but was reinstated in April 2015 after repaying the sum of Kshs.45,600/= but alleges that the Respondent continued making deductions.

6. It is further averred that in late July 2015, the Respondent unfairly, wrongfully and unlawfully constructively dismissed the Claimant's employment without any notice or payment of outstanding wages, severance and vacation pay.

7. That as a result of the termination, the Claimant sustained aggravated damages consisting of mental distress, inconveniences and psychological injury. It also averred that the Respondent's conduct was highhanded, outrageous, reckless, wanton, entirely without cause, deliberate, callous, disgraceful, wilful and actuated by malice.

### **Respondent's Case**

8. The Respondent on the other hand avers that it employed the Claimant as Sub-dealer Marketer on 2<sup>nd</sup> May 2012 and his salary was based on sales made. He was entitled to retainer fee of Kshs.500,000/= and after probation, the retainer fee was Kshs.7,000/= for sales over Kshs.7,000 for sales over Kshs.850,000. The Respondent denied having paid the Claimant a salary of Kshs.21,000 or Kshs.26,000 per month.

9. It avers that the Claimant's salary vacillated depending on the sales made.

10. It is further averred that on or about 10<sup>th</sup> October 2014, the Claimant negligently and or recklessly or carelessly lost the sum of Kshs.45,600/= and was suspended thereafter but paid the sum and was reinstated in May 2015.

11. It is alleged that sometime in August 2015 the Claimant lost or unlawfully appropriated Kshs.30,000 without the Respondent's knowledge and resigned and/or absconded duty, by which time he had been paid the salary for July 2015.

12. It is also averred that if the Claimant sustained aggravated damages, the same is not attributable to the Respondent and the Claimant is not entitled to any compensation since he was fully compensated at the time he absconded duty.

13. It is the Respondent's case that the Claimant refused to proceed on leave even after being reminded to do so. That he stayed on to increase his monthly sales. In addition his contributions to the NSSF were being remitted.

14. It is the Respondent's case that the Claimant defaulted in the payment of instalments towards the motor cycle. The Respondent also confirms that it is in possession of the Claimant's KCSE Certificate as it had been given as a security for performance of his obligations.

### **Counter-claim**

15. The Respondent avers that before the Claimant absconded duty on 6<sup>th</sup> August 2015 he had incurred a loss of Kshs.30,000/= which he did not disclose. As a consequence, his commission of Kshs.5,500/= was used to offset the shortage as was the sum of Kshs.3,140/= held by the Respondent. The sum of Kshs.21,360/= was outstanding and a further Kshs.6,799/= in respect of the motorcycle making a total of Kshs.28,159.40.

16. Relatedly, the Claimant did not give the requisite one month's notice before he left employment. The Respondent is therefore claiming:

- a. Kshs.28,159.40
- b. One month's salary in lieu of notice of Kshs.20,790 (based on the highest commission earned).
- c. Costs of the suit.
- d. Interest

### **Claimant's Evidence**

17. The Claimant adopted the written statement which rehashed the statement of claim and was cross-examined. He testified that he was not informed the reason for the suspension. That he was to be recalled but was not even after visiting the office. He denied having absconded duty. He testified that the Respondent did not pay anything for the motorbike. That after payment, it would have been his.

18. On cross-examination, the witness confirmed that his salary was dependant on sales and was payable monthly. He admitted having lost the Respondent's cash, was suspended but subsequently reinstated after payment of the amount cost. He denied having absconded duty.

19. The witness told the court that the contents of an email from Gloria of Simba Moi's Bridge to Audit Ke dated 13<sup>th</sup> August 2015 at 9.53 with him as subject was untrue.

20. The witness further admitted owing the Respondent in respect of the motorcycle but had no evidence to support the claim that the same were to be deducted from his proceeds.

21. The witness finally confirmed that the thirty (30) payslips on record were his.

#### **Respondent's Evidence**

22. RW1, MR. RICHARD JELICAN MAGOMA testified that the Claimant left in May 2015 after a shortage of Kshs.45,000/= which he paid but caused another shortage of Kshs.30,000/= in August 2015 after which he absconded duty and attempts to have him report to work to clear the same were unsuccessful. That he was called by Gloria Auma.

23. On cross-examination, the witness confirmed that the Claimant's work was to sell cards given to him by the Respondent and on reconciliation there was a shortage. The shortage of kshs.30,000/= was noticed from a reconciliation for the day and the Claimant was notified of the same by the auditor.

24. As regards the motorcycle, the witness testified that the Respondent would pay 60% of the cost and the Claimant 40% but had no documentary evidence to reinforce the testimony.

25. RW1 confirmed that NSSF contributions were being made as per the payslips on record.

26. On re-examination, the witness testified that the shortage of Kshs.30,000/= was discovered in August 2015 and the Claimant henceforth refused to report to the office.

#### **Claimant's Submissions**

27. The Claimant identifies three issues for determination, namely whether:

- a. The parties had a contract of service or consultancy contractual relationship;
- b. The Claimant's termination was wrongful, unfair and unjustified or he deserted duty;
- c. The Claimant is entitled to the reliefs sought.

28. On the first issue, the Claimant uses the decision in **Stanley Mungai Muchai v National Oil Corporation of Kenya [2012] eKLR** to urge that the parties had an employer and employee relationship. The Claimant relies on the Provisions of the Employment Act, 2007 and the tests that have been developed to determine the character of the relationship.

29. It is submitted that the fact that the Claimant was paying income tax as opposed to withholding tax meant that he was an employee, a fact the Respondent did not contest.

30. As regards the alleged termination, reliance is made on Section 45(2) of the Employment Act as well as the decision in **Walter Ogel Anuro v Teachers Service Commission [2013] eKLR** to highlight to the attributes of a fair termination. The decision in **Pamela Nelima Lutta v Mumia Sugar Co. Ltd [2017] eKLR** is also relied upon.

31. On the procedural aspects of termination, **Section 41** of the Employment Act is relied upon. That the Claimant was asked not to report to work at the end of July 2015 due to shortage while the Respondent alleges that the Claimant absconded duty. The South African decision is **Seabolo v Belgravia Hotel [1997] 6 BLLR 829 (CCMA)** is relied upon to demonstrate the distinction between desertion and absence without leave.

32. It is submitted that the Claimant was entitled to a fair disciplinary process. The decision in **Felistas Acheha Ikatwa v Charles Peter Otieno [2018] eKLR** is relied upon to demonstrate the obligations of the employer where an employee has deserted duty.

33. The decision in **Janet Nyandiko v Kenya Commercial Bank Ltd [2017] eKLR** as well as the Court of Appeal decision in **National Bank of Kenya v Anthony Njue John [2019] eKLR** are relied upon to demonstrate the essence of section 41 of the Employment Act.

34. On reliefs, the Claimant contends that it is entitled to pay in lieu of notice as contained by Section 35 of the Employment Act, unpaid leave days, unpaid salaries for October 2014 to April 2015.

35. On 12 months' compensation for wrongful termination, reliance is made on the decision in **Tom Otieno Midianga v Wilham Kenya [2021] eKLR** as well as **Moses Kaunda Moro v CMC Motors Group Ltd [2013] eKLR** and **Loice Rose Obengo v Nyanza Reproductive Health Society [2013] eKLR**.

## Respondent's Submissions

36. The Respondent isolates seven issues for determination, namely, whether;

- a. The Claimant was employed as a sub dealer marketer or his salary was based on sales made;
- b. The Claimant negligently or carelessly lost Kshs.45,600/= or about 10<sup>th</sup> October 2014;
- c. The Claimant lost and/or unlawfully appropriated Kshs.30,000/= on or about 6<sup>th</sup> August 2015 and thereafter absconded duty;
- d. The Claimant received a notice of termination, payment in lieu of notice, outstanding wages and vacation pay;
- e. The Claimant is entitled to the remedies sought.

37. On the first issue, Counsel relies on the clause on remuneration in the letter of appointment dated 2<sup>nd</sup> May 2012 to urge that the Claimant was paid a retainer and a commission of 1% on sales made above Kshs.500,000/= and Kshs.850,000/= and as a consequence his salary.

38. The decisions in **Margaret Njeri Muiruri v Bank of Raroda [2014] eKLR** and **Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR** are relied upon to urge that it is the duty of the parties to write the terms of the contract not the courts and parties are bound by such terms. The Respondent acknowledges that it did not deny the fact of having employed the Claimant.

39. As regards the loss of Kshs.45,600/= in October 2014, it is submitted that the Claimant admitted having made the loss paid the sum in full and was reinstated.

40. On the alleged subsequent loss of Kshs.30,000/=, the Claimant states that the Respondent instructed him to return the cards and did not hear from the Respondent thereafter. The Respondent on the other hand testified that the Claimant failed to show up at the work place or pay the Kshs.30,000/=.

41. Reliance is made on Section 8(2) of the Evidence Act on similar fact evidence. The decision in **Makin v Attorney General of New South Water [1894] AC 57** is relied upon to demonstrate the place of similar fact evidence in criminal cases.

42. It is submitted that there is evidence to show that the Claimant indeed absconded duty after the shortage of Kshs.30,000/= was discovered. That the shortage occurred four months after the Claimant had been reinstated.

43. As regards notice of termination and pay in lieu of notice outstanding wages and vacation pay, the Respondent contends that the Claimant left employment voluntarily and was not terminated or dismissed. That he was not ready to face the consequences of his actions and no termination notice could have been issued.

44. It is further submitted that the Claimant had no intention of returning to work, he deserted work as explained in **Seabolo v Belgravia Hotel (supra)**. It is submitted that no payment in lieu of notice or leave is due.

45. Finally, as to whether the Claimant is entitled to outstanding pay, fuel subsidy, SIMTEL SACCO Shares, compensation and service pay, it is submitted that the Claimant's commission of Kshs.5,500/= was utilised to offset the shortage occasioned in August 2015. That the fuel subsidy was a discretionary incentive to boost sales and non-contractual. The balance of the SIMTEL SACCO shares of Kshs.3,140/= was used to offset the shortage in August 2015.

46. The Respondent appears to confuse service pay with severance pay and contends that severance pay is applicable in redundancies under Section 40 of the Employment Act yet the Claimant was not declared redundant.

47. The Claimant prays for service not severance pay.

48. As regards the counter claim, the Respondent submits that it has adduced evidence in support of the counter claim and should be granted as prayed.

## Analysis and Determination

49. After careful consideration of the pleadings, evidence before the Court, submissions by Counsel and the law, the issues for determination are whether;

- i. The Claimant was constructively dismissed by the Respondent or absconded duty;
- ii. The Claimant is entitled to the remedies sought.

50. From the evidence, pleadings and submissions, there is no contest that the Claimant was employed by the Respondent on 2<sup>nd</sup> May 2012. The letter of appointment provided for a three (3) months' probationary period and apart from a fixed retainer of Kshs.5,000/= the Claimant's salary was dependent on the sales he had made in the course of the month. The payslips on record attest to this fact.

51. Annual leave was 21 days and either party could terminate the contract by one month's notice or payment in lieu of notice.

52. Although the Claimant raised the issue of whether there was a contract of service between the parties, nothing turns on it as the Respondent did not deny the fact of having employed the Claimant.

53. As to whether the Claimant was constructively dismissed by the Respondent or absconded duty, it is important to note at this early stage that the Claimant led no direct evidence on how he was terminated albeit wrongfully, unlawfully or unfairly. Paragraph 9 of the memorandum of claim states that: -

“That in late July 2015 without any colour of right, the Respondent herein unfairly, wrongfully and unlawfully, constructively dismissed the Claimant's services.”

54. Relatedly, paragraph 6 of the Claimant's written statement states that –

“That in late July 2015, I was forced to consider my services constructively dismissed when the Respondent company asked me to return the stock I had been given after I inquired about my salary deductions despite making a full repayment of the loss of Kshs.45,600/=.

That the termination was done despite my protestation and utter disregard of my right to be heard.”

**Was the Claimant constructively dismissed by the Respondent and when?**

55. According to the **Black's Law Dictionary, 10<sup>th</sup> Edition** constructive dismissal is defined as –

**“An employer's creation of working conditions that leave a particular employee or group employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment: an employer's course of action that, being determinate to an employee, leaves the employee almost no option but to quit.”**

56. In **Western Excavating ECC Ltd v Sharp [1978] 2WLR 344** Lord Denning defined constructive dismissal 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 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 regarded as having elected to affirm the contract.”

57. In **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR**, the Court of Appeal discussed the scope and applicability of principle of constructive dismissal in Kenya as follows –

“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. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behaviour towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constituted a repudiatory breach of the contract of employment – this is the contractual test. 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”

58. The Court of Appeal went further and formulated the legal principles relevant to the determination of whether constructive dismissal has occurred.

59. I will now proceed to apply the above propositions of law to the instant case.

60. Constructive dismissal is grounded on a breach of a fundamental term of the contract of employment by the employer which makes it untenable for the employee to remain in employment compelling him/her to resign. See **Premier Construction Limited v Josephat Bwire Lukale & 5 others [2017] eKLR**.

**Did the Respondent in the instant case breach a fundamental term of the contract?**

61. From the evidence on record, while the Claimant alleges that he considered his services constructively dismissed when he was asked to return the cards he had been given by the Respondent, after having enquired about salary deductions of the shortage of 10<sup>th</sup> October 2014, the Respondent alleges that the Claimant deserted duty after being made aware of the shortage of Kshs.30,000/= sometime in early August

2015.

62. This is an intriguing case where neither the Claimant nor the Respondent recalls the actual dates of the occurrences. For the Claimant it was the end of July while for the Respondent it was early August 2015. It is important to note the following:

- i. First, the Claimant did not disclose who gave instructions and the form they took and whether he complied.
- ii. Second, the Claimant led no evidence on the occurrences on the alleged date of termination, including what the employer did.
- iii. Third, on the allegations about salary deductions, the Claimant led no evidence on the deductions. He did not furnish the Court with a copy of the payslip to demonstrate the alleged deductions or even how much had been deducted and for how long.
- iv. Fourth, there is no evidence on record on when the Claimant resumed duty after payment of the shortage of October 2014 and for how long he had worked before the events of the end of July or early August 2015 took place.
- v. Fifth, the last communication on the Claimant is the email from Gloria to Audit Ke copied to other members of staff, namely Richard, Protus Wasai, Joan Kimacia and Seline dated 13<sup>th</sup> August 2015 at 9.35 am. The email reads as follows:

“Subject: **JAMES SHAKOMBO**

Good morning, I write to report that James Shakombo has absconded duty for one week now. According to him, the company owes him Kshs.33,000/= inclusive of bonus. I have tried calling him so that we can talk and find a solution but he is taking his time to compile his calculations. He also has his full limit with him worth Kshs.30,000/= which he says he cannot return.

I think he has decided to repay himself. Mr. Wasai please help me sort out this since you wrote the agreement with him. I will also let you know when he brings his calculations on the table.

Regards

Gloria”

63. Although the Claimant states that the contents of email were untrue, they speak for themselves. Relatedly, he did not puncture its authenticity. To the Court, this is an important piece of evidence in a barren sea. It provides a glimpse of what was going on and what actually transpired. The email confirms that the Claimant neither returned the cards in his possession nor reported back to the company as expected and the Respondent appears to have given up until the suit herein was instituted.

64. The email lays it bare that there was an impasse between the parties and neither took a decisive step to resolve the matter until the Claimant sued the Respondent.

65. The Court is in agreement with the Claimant’s submission that the Respondent had a duty to do more than it did in this case. The Respondent was obligated by law to require the Claimant to show cause why disciplinary action should not be taken against him for failing to report to work or return the cards as requested. The notice to show cause should have been followed by a termination letter.

66. The Court is guided by the sentiments of the Court in **Felistas Acheha Ikatwa v Charles Peter Otieno (supra)** where the Court expressed itself as follows:

“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”

67. Similar sentiments were expressed in **Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR** where Radido J. held that –

“... the Court wishes to observe that an employer who advances desertion as a ground must be alert to the legal prerequisites to prove desertion. And desertion is not the same as absence without permission or leave, which occurs when the employee has an intention to return to work. Desertion can only take place where an employee leaves employment with the intention of not returning or formulating such intention not to return after leaving. Such intention may be demonstrated by showing absence of communication from the employee, duration of absence, impact of the absence and nature of employee’s duties. The employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable inquiries as to the absence (post, email, phone calls, colleagues, neighbours or family members), issuance of ultimatums to the employee to resume duty and the like.”

68. It is not in dispute that Gloria Auma contacted the Claimant and it is apparent from the email above that they communicated. RW1 confirmed as much in his testimony.

69. For the foregoing reasons, the Court is satisfied that the Claimant has on a balance of probabilities not demonstrated that he was constructively dismissed.

70. In a similar vein, the respondent led no evidence of how the Claimant absconded duty and what it did not show that the Claimant had in fact absconded duty such as notifying the Labour Officer. The Respondent has on a balance of probabilities not shown that the Claimant absconded duty.

71. In the upshot, neither party has established its claim on a balance of probabilities.

#### **Conclusion**

- i. Having found that the Claimant has not established his claim, the same is dismissed.**
- ii. Similarly, the Respondent's counter claim which is founded on the allegation of absconding duty or desertion is also dismissed.**
- iii. Respondent to release the Claimant's K.C.S.E certificate within 30 days.**
- iv. The other prayers are dismissed.**

72. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 10<sup>TH</sup> 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**