



**Koech v National Bank Of Kenya Limited (Cause E416 of 2020)
[2022] KEELRC 1224 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1224 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E416 OF 2020**

**SC RUTTO, J
APRIL 28, 2022**

BETWEEN

REUBEN KIPKURUI KOECH CLAIMANT

AND

NATIONAL BANK OF KENYA LIMITED RESPONDENT

JUDGMENT

1. The claimant has averred vide his claim dated August 20, 2020 that he was constructively dismissed by the respondent. He claims that the same was preceded by the respondent's persistent repudiatory breach of his employment contract hence he was unable to continue working for the respondent. It is for the foregoing reason that he seeks the following reliefs against the respondent: -
 - a. An order declaring that the respondent constructively dismissed.
 - b. One month's gross salary in lieu of notice of constructive dismissal, Kshs 1,324,624.00.
 - c. An order for refund of Kshs 46,424.95 being an unlawful deduction from his terminal dues.
 - d. An order of payment of Kshs 19,7946.30 being the unremitted employer pension contribution for the month of February, 2020.
 - e. An order for compensation in the sum of Kshs 221,215,214.00 being the gross salary for the unexpired term of 13 years and 11 months of his employment contract.
 - f. An order for compensation in the sum of Kshs 15,835,704 being 12 months salary for wrongful and unfair constructive dismissal.
 - g. Costs plus interest at court rates from the date of termination until payment in full.
 - h. Any other better reliefs as the Honourable court may deem just and fit to grant.



2. The claim was defended through the respondent's Response dated October 22, 2020. The respondent denies having created circumstances or pattern under which the employment contract with the claimant was repudiated in any form whatsoever. The respondent asked the court to dismiss the claim with costs.
3. The matter proceeded for hearing on November 24, 2021 and each side presented oral evidence.

Claimant's case

4. The claimant testified in support of his case and at the outset, adopted his witness statement and bundle of documents to constitute part of his evidence in chief. The claimant told court that he was employed by the respondent with effect from July 26, 2013 as Head-Corporate Banking Department. It was his testimony that he worked with diligence and his performance was exemplary hence he rose through the ranks to the position of Director, Corporate Banking Division, a position he held until his resignation on January 29, 2020. That at the time of his exit from the respondent bank, he was earning a monthly basic salary of Kshs 1,319,642/= together with an airtime allowance of Kshs 5,000/=.
5. It was the claimant's further testimony that on December 4, 2019, as he was about to leave office, he received a call from Mr. Rodgers Mungumi, the respondent's Director-Human Resources (HR), who instructed him to go to the office of the Managing Director (MD). That upon arrival at the MD's office, he was handed two letters both dated December 4, 2019. One letter was a suspension from duty while the other letter was titled "show cause". That the allegation in the show cause letter was to the effect that the audit had revealed some non-performing loans to the tune of Kshs 6.242 billion. That it was also alleged that the corporate banking division, which was his docket, was non-performing.
6. That he requested for 48 hours to respond to the show cause letter before he was suspended from duty but he was advised by the MD that the issue of the suspension was not negotiable and that his direct report, a Mr. Charles Nyangito, had already been informed to take over his roles in an acting capacity. That the two letters had been signed by the MD in breach of the respondent's Disciplinary, Capability and Grievance policy, which vested such kind of a responsibility on the Director, HR.
7. That as it was too late in the evening, he returned to work the following day to collect his personal belongings and it was then that his laptop was taken away from him. That he was also disabled from all the bank network systems including the office email hence blocking his access to material evidence. He termed this as a calculated move by the respondent to deny him access to information, materials, and records that could have enabled him prepare a detailed response.
8. That he wrote an email to the Director, HR on December 10, 2019, requesting for information, which he listed. That the email was copied to the respondent's MD. That he did not receive any response hence he did a reminder, but the same did not elicit any response from the respondent. That among the documents he had requested for, was the audit report on the non-performing loans and the performance appraisal documents. That he therefore struggled to prepare his defence as he only relied on some scanty information which he had managed to get hold of, at the time he was leaving office.
9. He further stated that he was advised to drop his defence at the nearest branch, which in his case, was at Kericho. That in his defence, he denied any role in the allegations. It was also his testimony that some of the allegations were in respect of events and transactions that took place before he joined the respondent bank. That he further pointed out in his defence that he had not received any response to his emails and that he had not been given the information he had requested for.



10. That on January 7, 2020, he received another letter from the respondent's MD extending his suspension for another 30 days. He contended that the same was the responsibility of the Director-HR as opposed to the MD's.
11. He further testified that the year was not yet over hence the allegation of non-performance was premature. That as such, he interpreted the respondent's move, as pushing him out since he was a good performer.
12. The claimant further stated that he later received a letter from the Director, HR informing him that his disciplinary case had been scheduled for January 30, 2020. That since he had not been given the relevant information he needed, he felt dismissed since the letter inviting him for the disciplinary hearing used the term "he had failed in his responsibilities". That therefore, and in a bid to protect his illustrious career, he offered to resign upon serving one month notice as provided for, under policy. That the respondent did not allow him to serve the notice period but instead, offered to pay him one month salary in lieu of notice. He further told court that his resignation was accepted, within two (2) hours after he had tendered the same. That subsequently, he was paid one month's salary plus airtime allowance but there were some unexplained deductions from his terminal dues. He asked the court to compensate him for constructive dismissal.
13. In cross examination, the claimant admitted that he had not stated his frustrations in his letter of resignation but maintained that he was pushed out of employment. That the invitation to the disciplinary hearing, had deemed him guilty of the allegations.
14. In reexamination, he stated that in the event there was non-performance from his end, then he ought to have been placed under a Performance Improvement Plan (PIP).

Respondent's case

15. The respondent presented oral evidence through Mr. Rodgers Mungumi who testified as RW1. He identified himself as the Director-HR, at the respondent bank. He also adopted his witness statement and bundle of documents filed on behalf of the respondent, to constitute part of his evidence in chief. The documents were also produced as evidence before court.
16. RW1 stated before court that the allegations against the claimant were articulated in the show cause letter and in the audit report which had been admitted as an exhibit before court. He defended the deductions from the claimant's terminal dues by stating that the same was on account of an insurance premium, in respect of a mortgage facility advanced to the claimant and which was payable at the beginning of every year.
17. He denied that the claimant was constructively dismissed and that he was in the middle of a disciplinary hearing as he was set to appear before the respondent's Board. That when he resigned, he failed to give the Board an opportunity to hear and consider his case.
18. RW1 stated in further testimony that the claimant did not require any further information since he had all the information, specifically, the audit report, by the time he was suspended from duty.
19. In cross examination, RW1 stated that the claimant was not taken thought a PIP as his suspension was not in relation to performance only. He further disputed the claimant's averment that he was the one who was to issue the suspension letter to him. That the MD was his immediate supervisor hence could issue the same. That the relevant clause in the policy as regards suspension, excluded Directors. He further stated that the claimant's performance was not great. He admitted that the claimant's salary was increased when he met his target for the year 2017. That the claimant also exceeded his targets in



2018 hence he was given a bonus. When questioned about a text message to the claimant in regards to resignation, he stated that he only gave him the option to resign but denied telling him to do so.

Submissions

20. Upon close of the trial, both parties filed written submissions. It was submitted on behalf of the claimant that he was constructively dismissed as the respondent commenced a disciplinary action on issues that that could have been handled under the Performance Improvement Plan; that he was invited for a disciplinary hearing before investigations were conducted and/or completed; that he was also denied crucial and information to enable him prepare his defence documents.
21. The claimant further submitted that the respondent constructively dismissed him without any valid reason and in so doing, failed to follow due process. In support of his submissions, the claimant invited the court to consider the determination in the case of *Coca Cola East & Central Africa Limited vs Maria Kagai Ligaga* (2015) eKLR, *Beth Nyawira Gathomi vs Unilever Kenya Limited* (2020) eKLR, *Fredrick O Kombija vs National Bank of Kenya limited* (2020) eKLR,
22. On its part, the respondent, submitted that the claimant chose to forego the disciplinary process and resigned hence cannot be heard to say that he was constructively dismissed. That the claimant's resignation was meant to avoid a possible dismissal and did not cite frustration in his resignation letter. On this issue, it placed reliance on the cases of *Coca Cola East & Central Africa Limited vs Maria Kagai Lugaga* [2015] eKLR, *Peter Sasaka vs Trustees of Agricultural Society of Kenya* (2017) eKLR and *Milton M. Isanya vs Aga Khan Hospital Kisumu* (2017) eKLR.

Analysis and Determination

23. In view of the claim before Court, the evidence on record and the rival submissions, I find that the issues falling for the court's determination are;
 - i. Whether the claimant voluntarily resigned or was constructively dismissed by the respondent?
 - ii. What reliefs if any, are available to the claimant?

Constructive dismissal or resignation?

24. The claimant has alleged that his resignation was triggered by the respondent's persistent repudiatory breach of the employment contract between December 4, 2019 to January 20, 2020. That as such his resignation was not voluntary. The respondent has disputed this assertion and aver it is the claimant who declined to attend a disciplinary hearing and opted to resign.
25. The term constructive dismissal is defined by the *Black's Law Dictionary* (10th Edition) as follows:

“An employer's creation of working conditions that leave a particular employee or group of 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 detrimental to an employee, leaves the employee almost no option but to quit.”
26. Vide an email of January 29, 2020, the claimant tendered his resignation, whose contents I will reproduce hereunder;

“The Managing Director,
National Bank of Kenya Limited,



Box 72866-00200 Nairobi

RE: RESIGNATION FROM BANK SERVICE

Dear Sir,

I wish to tender my resignation as Director, Corporate Banking Division at National Bank of Kenya Limited effective January 29, 2020. This has been necessitated by my desire to pursue other career interests. I have arrived at this decision after a thorough soul searching session.

I will serve the one month notice as prescribed in the HR policy and consequently my last working day will be February 29, 2020.

I thank the Bank for giving me an opportunity to work and grow career wise in the seven years I have been with the bank.

Kindly acknowledge receipt of this resignation by appending an official received stamp and scan a copy of this letter to my email address and let me know the next steps.

Regards

Reuben Koech”

27. The resignation by the claimant was accepted by RW1, the respondent’s Director Human Resource, by a letter which reads in part: -

“We acknowledge receipt of your letter dated January 29, 2020 wherein you gave notice of your intention to resign from the bank’s service. The bank has acceded to your resignation request. However, please note that the acceptance of the resignation by the bank does not in any way whatsoever preclude its rights to pursue any other action, administrative or otherwise against you, should there be any need post your exit. It is however, not the Bank’s desire that you serve the notice period. In this regard, the bank management has exceptionally decided that you be paid one month’s salary in lieu of notice. Your last employment date with the bank will therefore be January 29, 2020. Arrangements will be made to compute and pay you your terminal dues (if any) including any outstanding leave days for the period upto and including January 29, 2020 less any monies owed to the Bank upon presentation of the staff clearance certificate.....we take this opportunity to thank you for the service you have rendered to the bank and wish you well in your future endeavours...”

28. The question that must now be resolved is whether given the circumstances presenting herein, the claimant was constructively dismissed from employment or whether he resigned voluntarily.
29. The Court of Appeal in the case of *Coca Cola East & Central Africa Limited vs Maria Kagai Lugaga* [2015] eKLR cited with approval the case of *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 222 or [1978] QB 761, in which Lord Denning MR 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 (emphasis ours). (See also Nottingham County Council v Meikle (2005) ICR 1).”

30. The Learned Judges of the Court of Appeal thus went ahead and pronounced the following guiding principles in respect of claims of constructive dismissal, thus:-
- a. What are the fundamental or essential terms of the contract of employment?
 - b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?
 - c. The conduct of the employer must be a fundamental or 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.
 - d. An objective test is to be applied in evaluating the employer’s conduct.
 - e. There must be a causal link between the employer’s conduct and the reason for employee terminating the contract i.e causation must be proved.
 - f. An employee may leave with or without notice so long as the employer’s conduct is the effective reason for termination.
 - g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting repudiatory breach; the employee must-within a reasonable time terminate the employment relationship pursuant to the breach.
31. The Court further determined that the burden of proof lies with the employee. The import of the foregoing principles is that constructive dismissal arises where there has been repudiation of a fundamental term of the employment contract.
32. The claimant has cited various instances which he alleges amounted to the repudiation of his employment contract. Briefly that: -
- a. the arbitrary commencement of disciplinary action against on allegations whose nature are clearly issues that ought to be handled as poor performance issues under the Performance Improvement Plan;
 - b. the arbitrary breach of the disciplinary procedure in that he was suspended by the MD whilst the policy provides that it is the director HR to suspend an employee from duty;
 - c. there was inordinate delay in bringing some allegations against him. That some loan facilities had become non-performing three (3) to five (5) years prior to the date of his suspension;
 - d. he was invited to a disciplinary hearing regardless of non-existence of an investigation report;
 - e. the respondent did not comply with its own policy/procedure; and
 - f. the arbitrary denial of supply of documents, information, materials, bank system access to enable him prepare adequate response to the show cause letter.
33. From the principles established in the *Coca Cola case*(*supra*), and in light of the definition of the term constructive dismissal, it is apparent that a claimant ought to demonstrate that there is a fundamental



- breach of the employment contract in order to sustain a claim for constructive dismissal. This could be a breach of either an express or implied contractual term but, in any event, must be sufficiently serious so as to justify termination of the employment contract.
34. Such a fundamental breach can either be demonstrated by a single incident or a continuing pattern of behaviour which might be serious enough to entitle the employee to consider himself or herself dismissed from employment.
 35. It is also incumbent upon the employee to show that the actions of the employer resulted in his or her resignation. That the employee resigned in response to the breach and did not waive or affirm the breach by the employer.
 36. Some of the instances of contractual breach that may arise as leading to an employee to consider himself or herself constructively dismissed include; reduction or failure to pay salary; withdrawal of a contractual benefit; demotion or reduction in rank; where an employer creates and/or perpetuates a hostile or toxic work environment; unreasonable altering of an employee's reporting structure, job description, hours of work, or working conditions; or failing to provide an employee with adequate support to do their job.
 37. The list is not exhaustive. What is imperative to note is that a breach ought to be very fundamental and not minor. It must also go to the root of the employment contract. As such, not all changes to an employment contract are sufficient to sustain a case of constructive dismissal.
 38. In the instant case, the claimant stated that his resignation was necessitated by his desire to pursue other career interests and that he had arrived at the decision after a thorough soul searching session.
 39. It is therefore evident that the claimant did not indicate the reason for his resignation as being anything close to repudiation of a term in his employment contract. The issues he now raise as having amounted to repudiation of his employment contract did not feature in his letter of resignation. As such, it is not possible to infer that the real reason for his resignation was the instances which he now cites in his claim, whereas he gave a totally different reason in his letter of resignation.
 40. According to the holding in the *Coca Cola case (supra)*, "There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e causation must be proved."
 41. The claimant was therefore bound to prove that there was a link between the alleged breach by the respondent and the reason for his resignation. I find that he has not, albeit remotely.
 42. As a matter of fact, I must say that what presents before me is a case of breach of fair procedure as opposed to a fundamental breach of the employment contract.
 43. It may be true that the respondent had breached its own procedural rules, but was the same so grave as to make him resign and cite constructive dismissal? I don't think so. Could the same have been cured through some other way? I think yes. For instance, the claimant upon noting that the respondent was stonewalling on granting him access to information, materials and documents, he had the option to move the court to seek appropriate orders. Further, he could have raised the issues of breach of the other procedural issues that he now raises, during the disciplinary hearing.
 44. To this end, I find that the issues raised by the claimant as amounting to contractual breach were best suited to be addressed in a claim where express termination of employment has occurred as opposed to one where constructive dismissal is alleged.



45. The total sum of the foregoing is that the claimant's exit from employment was not as a result of constructive dismissal as alleged.
46. The claimant has also stated that the respondent accepted his resignation and declined to allow him serve notice period. That on the converse, the respondent paid him one month salary in lieu of notice.
47. It would seem that the respondent waived the one month notice period and exercised the option availed under section 38 of the Employment Act, which provides that "an employer may waive the whole or any part of the notice, in instances of resignation provided it pays the remuneration payable for the notice period".
48. Accordingly, there was no irregularity in the respondent declining the claimant's option to serve the notice period.

Reliefs

49. The claimant has prayed for refund of Kshs 46,424.95 which he terms as an unlawful deduction from his terminal dues as well as an order of payment of Kshs 19,7946.30 being the unremitted employer pension contribution for the month of February, 2020.
50. In his testimony, RW1 stated that the deductions were regular as they related to an insurance for a mortgage facility which had been advanced to the claimant and which was payable at the commencement of every year. This line of defence was not controverted by the claimant. As such, the claim for refund is unsustainable.
51. As regards the unremitted employer pension contribution for the month of February, 2020, the same is also declined as the claimant left the respondent's employ in January, 2020, hence was not in its payroll during the month of February, 2020. As such, it followed that the pension contribution in favour of the claimant by the respondent was not payable in February, 2020.
52. As the court has found that there was no constructive dismissal, the claim as regards compensatory damages does not succeed.

Orders

53. The upshot of the foregoing is that the claim is dismissed in its entirety with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL 2022.

.....

STELLA RUTTO

JUDGE

Appearance:

For the Claimant Ms. Achieng

For the Respondent Mr. Awino

Court assistant Barille Sora

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 March 15, 2020 and subsequent directions of April 21, 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 had 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.

STELLA RUTTO

JUDGE

