



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1307 OF 2016**

**JOHN BOSCO MWANZIA MWANGANGI.....CLAIMANT**

**VERSUS**

**NUSU NUSU PRODUCTION LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claimant filed suit on 1<sup>st</sup> July, 2016 seeking the following reliefs:
  - (a) **A declaration that the forced resignation was wrongful, unfair and unlawful.**
  - (b) **That the claimant be reinstated to his job, and in the alternative he be awarded General damages for violation of his rights and breach of the contract equivalent to salary that would have been earned till retirement in the sum of Kshs 51,121,151.**
  - (c) **Exemplary damages for impunity, callousness on noncompliance of employment laws and the Constitution.**
  - (d) **Interest and costs.**
2. The suit was defended vide a Statement of defence dated 14<sup>th</sup> September, 2017 which defence was responded to by the claimant on 5<sup>th</sup> October, 2017.
3. The claimant testified as C.W.1 that he was employed by the respondent on 1<sup>st</sup> February, 2012 as an Accountant. That he worked continuously and diligently until 4<sup>th</sup> November, 2015 when he was forced to resign by the respondent in that the claimant refused to sign a new contract in which the respondent had introduced new terms of employment contrary to the terms of the running contract. That the claimant asked to be paid benefits from the previous contract before signing another one. The respondent declined and insisted that the claimant to sign the new contract.
4. The claimant wrote a letter of resignation dated 4<sup>th</sup> November, 2015 produced in Court addressed to the Director Fareed Khimani as follows: -

***“Fareed I accord you respect today 4/11/ 2015 as I tender my resignation. It has been very humble time to work with you. God bless your company to greater heights.***

***Thank you very much.***

***Yours***

***Johnbosco M. Mwangangi”***
5. The claimant produced a payslip for November, 2015, which shows that the claimant was paid a gross salary of Ksh 177,504.00 and that National Social Security Fund (NSSF), National Hospital Insurance Fund and Pay As You Earn (PAYE) was deducted from the salary.
6. The claimant wrote a demand letter to the respondent dated 20<sup>th</sup> January, 2016 via his advocate claiming payment of terminal benefits in the sum of Kshs 2,731,280 without specifying the particulars of the claimed benefits.

5. The claimant produced a response to the demand letter dated 25<sup>th</sup> January, 2006 from Mumia & Njiru Advocates in which it was denied that the respondent forced the claimant to resign and that the respondent accused the claimant of continuously refusing to hand over a number of passwords which are meant to assist the respondent compute his final dues.
6. The respondent stated in the letter that it was ready and willing to pay the claimant the final dues upon computation.
7. The claimant also produced the contract of employment dated 10<sup>th</sup> January, 2012 in which the terms and conditions of service are set out.
8. In terms of the letter of appointment, the contract could be terminated by either party giving one month's written notice.
9. The claimant also produced a new contract of employment dated 25<sup>th</sup> June, 2015, which the claimant declined to sign according to his testimony before Court as it purported to change his terms of service without his consent.
10. The claimant confirmed that as at the time of resignation his gross salary was Kshs 177,504 per month.
11. The claimant denied that he had refused to hand over to the respondent and denied the particulars set out in the Counter-Claim. The claimant stated that he handed over to one Lydia Wachira and did not know one Joyce Maina.
12. The claimant denied that he had caused any loss to the respondent by fraudulent means since he had lawfully used his credit card.
13. The claimant adopted his witness statement dated 1<sup>st</sup> July, 2016 as part of his evidence in chief and produced the list of documents attached to the Statement of Claim.
14. The claimant testified that the respondent ignored his 3 ½ years' service and introduced a new contract without paying terminal benefits for the previous contract. That he could not serve six months' probation since he was an old employee. That the respondent ignored his protestation and he was forced to resign. That he was sent an email threatening to terminate his employment if he did not sign the new contract. The claimant produced the email sent to him by one Anne Mwangi dated 2<sup>nd</sup> September, 2015. The claimant resigned on 4<sup>th</sup> November, 2015.
15. R.W.1, Joyce Maina, testified for the respondent and adopted a witness statement dated 14<sup>th</sup> September, 2017 as her evidence in chief. She also produced a list of documents marked exhibit '1' to 8.
16. The respondent claims payment of three (3) months' salary in lieu of notice in the counter claim in the sum of Kshs 352,298.04 by the claimant. The respondent further claims Kshs 308,100 spent by the respondent to recover password since the claimant allegedly declined to hand over to the respondent and the respondent also claims Kshs 132,109.75 which the respondent was forced to pay to close a credit card obtained by the claimant without official sanction.
17. That the claimant had also failed to account for cash receipts from customers in the sum of Kshs 4,000,000. The respondent counter-claimed Kshs 4,792,418.39 from the claimant therefore.
18. R.W.1 testified that she was on 4<sup>th</sup> November, 2015 introduced to the claimant by the Human Resource Manager. That the claimant treated R.W.1 coldly and refused to show her around or do a hand over to her on the items she was to take over from him as the manager.
19. That the claimant left the office 15 minutes later, came back to the office in the afternoon and delivered his resignation letter.
20. That reconciliation of accounts had not been done and the claimant deleted quick-books data – accounts information for 2015 leaving the company to engage an auditor to work backwards to get data at a cost of Kshs 200,000.
21. That the claimant used the company's credit card for his personal use amounting to Kshs 132,109.75. The respondent discovered that when the bank deducted the money from the account and informed the respondent accordingly.
22. That the claimant also refused to hand over passwords and handover files and accounting systems and the respondent had to engage a person to crack the passwords at a cost of Kshs 308,010.00.
23. That the claimant had also failed to account for cash received by him from customers in the sum of Ksh 4,000,000.
24. That the respondent counter-claims Kshs 4,792,418.19 from the claimant.
25. R.W.1 produced a letter dated 4<sup>th</sup> November, 2015 acknowledging the resignation of the claimant in which the respondent requested the claimant to clear with all Sections including any financial obligations owed to the respondent. The claimant was asked to provide handing-over notes to facilitate smooth hand-over which should include progress and any other administrative matters and forward the same to Fareed Khimani, the Director. Dues were to be calculated upon handing over.
26. The claimant wrote a reply to the acknowledgment letter on 7<sup>th</sup> November, 2015 in which the claimant demanded to be paid his dues first as at 4<sup>th</sup> November, 2015 before coming back to the respondent to handover.

27. The claimant alleged that nothing was handed over to him when he joined the respondent.
28. The respondent wrote to the claimant a demand letter dated 27<sup>th</sup> November, 2015 through its advocate requesting the claimant to hand over documents, password and property to the respondent. The respondent reiterated that it was ready to pay terminal dues to the claimant provided the claimant handed over as requested.
29. The list of documents, password and properties to be handed over by the claimant to the respondent are listed in the said letter produced by R.W.1.
29. A further letter dated 25<sup>th</sup> January, 2016 was written by the advocates for the respondent to the advocate for the claimant on the issue of handing- over.
30. By a letter dated 21<sup>st</sup> April, 2016, produced by R.W.1, the respondent informed the claimant of the misuse of a credit card by the claimant and the monies now paid by the respondent on behalf of the claimant as a result thereof.
31. R.W.1 testified that the respondent was owed the dues counter-claimed by the respondent and the Court dismiss the claim and award the counterclaim in favour of the respondent as prayed.
32. In the response to the statement of defence and counterclaim, the claimant had made general denial to the defence and counterclaim in the reply to the respondent's statement of response. The claimant also made general denial of the particulars of the counter-claim in his testimony before Court.
33. R.W.1 was cross-examined by counsel for the claimant and in answer thereto R.W.1 stated that she joined the respondent on 1<sup>st</sup> July, 2016 after the claimant had left employment. R.W.1 stated that the new contract which the claimant refused to sign was done for all staff following a restructuring process. R.W.1 admitted that the claimant was to serve probation again in terms of the new contract. R.W.1 admitted that the claimant was not paid any terminal benefits since he had refused to hand over.
34. R.W.1 admitted that no report was made to the police regarding the allegations made in the counterclaim by the respondent.
35. R.W.1 admitted that she did not produce any documents before Court showing the expenses incurred by the respondent due to failure by the claimant to handover; failure by the claimant to pay credit card monies guaranteed by the respondent and due to negligence of duty by the claimant. R.W.1 stated that the linkage of the credit card to the respondent was subsequently cancelled.
36. R.W.1 stated that from the letter produced by the claimant, it was a friendly, voluntary resignation and not a forced one.
37. R.W.1 stated that the claimant was not given Certificate of Service since he did not clear and has not been cleared by the respondent.
38. R.W.1 testified that she only relies on the personal records of the claimant as she was not present when the claimant resigned.

### **Determination**

39. The parties filed written submissions which the Court has duly considered together with the evidence adduced by C.W.1 and R.W.1.

The issues for determination are: -

- (i) Was the claimant constructively dismissed from employment or he voluntarily resigned.**
- (ii) Is the claimant entitled to any of the reliefs sought?**
- (iii) Has the respondent proved the counterclaim against the claimant?**

39. Constructive dismissal is not specifically provided for and/or defined in the Employment Act.

40. There is a plethora of Case law on the subject matter and the basic ingredients to be proved by a party who pleads that he/she was constructively dismissed are as follows: -

- (a) That he/she was forced to leave the employment of the respondent due to intolerable conditions of employment pertaining to him/her for a considerable period of time and that attempts to have the situation remedied had failed.**
- (b) That the employer had fundamentally breached the terms and conditions contained in the contract of employment so that the employee had no alternative but to repudiate the same.**
- (c) That in both scenarios described in (a) and (b) above, there is sufficient oral and/or documentary evidence to demonstrate either the sustained intolerable situation experienced by the employee in case of (a) above and/or explicit evidence of material breach of the contract of Employment.**

41. In the case of **Coca Cola East & Central Africa Limited v. Maria Kagai Ligaga** the Court of Appeal quoted with approval Lord Denning MR in *Western Excavating (ECC) Ltd. -v- Sharp* [1978] ICR 222 or [1978] QB 761 on the issue of 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 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.)”***

42. In the present case, the claimant alleges sudden intention to fundamentally breach the contract of employment by the respondent by requiring the claimant to sign a fresh written contract of employment that placed the claimant on six (6) months’ probation despite having served the respondent for a period of over 3 ½ years and in terms of a written letter of appointment.

43. The claimant produced the original letter of appointment; the new contract he was supposed to sign, an email demanding that he signs a new contract or else his employment will be terminated and his letter of resignation which was quickly acknowledged and accepted by the respondent.

44. The claimant has in the circumstances proved on a balance of probabilities as guided by Section 107, 108 and 109 of the Evidence Act, Cap 80, Laws of Kenya that the respondent had fundamentally breached the terms of the existing contract of service leaving the claimant with no choice but to repudiate the same, which the claimant proceeded to by tendering to the respondent the letter of resignation.

45. The claimant was an employee protected by Sections 35, 41, 43, 44, 45 and 46 of the Employment Act, 2007 and the constructive dismissal by the respondent violated the aforesaid provisions.

46. The Court finds that the claimant was unlawfully and unfairly constructively dismissed by the respondent for no valid reason and without following a fair procedure.

47. The claimant is therefore entitled to payment of general damages/compensation for the loss of his employment in terms of Section 49(1) (c) and (4) of the Act.

48. In this respect, the claimant had served the respondent for a period of 3 ½ years. No disciplinary process was conducted before dismissing the claimant from employment and so the claimant did not contribute to the dismissal. The claimant lost a good job and career advancement and suffered loss and damage. The claimant was not paid any terminal benefits upon dismissal.

49. R.W.1 proved that the claimant contributed to non-payment of his terminal benefits and computation of the same due to his intransigent behavior of refusing to hand over to the respondent upon resignation.

50. Indeed, the claimant’s document in his own handwriting shows the blatant refusal to hand over to the respondent upon his resignation.

51. R.W.1 was however unable to prove the special damages counter-claimed against the claimant in that no documentary evidence was produced before Court to prove any and or all the specific claims made by the respondent against the claimant.

52. Indeed, R.W.1 admitted that she had no personal knowledge of these matters since she joined the respondent after the claimant had resigned. That her role would have only been to receive the clearance report from the claimant which report the claimant refused to handover.

53. Accordingly, considering the specific behavior of the claimant upon resignation, the Court finds that he is entitled to minimal compensation if at all, and the Court awards him the equivalent of one (1) month salary in compensation for the unlawful and unfair constructive dismissal.

54. The claimant is not entitled to any exemplary damages, considering all the circumstances of the case.

55. All other reliefs sought by the claimant against the respondent are dismissed.

56. In view of the exegesis above, the Counterclaim by the respondent is equally dismissed for want of proof.

57. In the final analysis, Judgment is entered in favour of the claimant against the respondent as follows: -

***(a) One-month salary in compensation for the unlawful and unfair constructive dismissal in the sum of Kshs 177,504.***

***(a) Interest at Court rates from date of judgment till payment in full.***

(b) *Costs of the suit.*

58. For the avoidance of doubt, the Counterclaim is dismissed.

**DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF APRIL, 2022.**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of 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, this judgment has been delivered to the parties online with their consent. 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 18 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.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances**

Mr. Ochako for claimant

Mr. Njeru for Respondent

Ekale – Court Assistant.