



**Mutuli v Africana Energy Limited (Cause 1707 of 2016)
[2022] KEELRC 75 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 75 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1707 OF 2016**

J RIKA, J

MAY 27, 2022

RIKA J

COURT ASSISTANT: EMMANUEL KIPRONO

**JAMA & COMPANY ADVOCATES FOR THE CLAIMANT
OCHIENG' KOKUL & VELO ADVOCATES FOR THE RESPONDENT**

BETWEEN

WINFRED AKINYI MUTULI CLAIMANT

AND

AFRICANA ENERGY LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed her Statement of Claim on 25th August 2016.
2. She states that she was employed by the Respondent in July 2013, through an oral contract, as an Accountant, earning a monthly gross salary of Kshs. 70,000. She worked at Nairobi.
3. She was coerced by the Respondent's Director, Noor Ahmed Hari, to execute a contract dated 1st January 2014, reviewing her existing terms. Her salary was reduced to Kshs. 50,000 monthly. It was further reduced to Kshs. 40,000 in March 2015.
4. On 16th June 2016, she was served with a letter of transfer to a sister Company Elay Kenya Limited. She sought facilitation from the Respondent. It was not forthcoming. The Respondent told her that her complaint would be addressed once she was at her new station in Malili.
5. She wrote an undated letter to the Respondent, tendering her resignation, stating that she had been denied housing and transport facilitation to enable her move.



6. She prays for Judgment against the Respondent as follows: -
 - a. 1- month salary in lieu of notice at Kshs. 70,000.
 - b. 12 months' salary in compensation for unfair termination at Kshs. 840,000.
 - c. Annual leave for 2015 and 2016 respectively each at Kshs. 44,106.
 - d. Unpaid salaries at Kshs. 760,000.
 - e. Overtime [unspecified]
Total...Kshs. 1,758,212.
 - f. Declaration that termination amounted to unfair and/or constructive dismissal.
 - g. Declaration that the Claimant is entitled to pro-rata annual leave for 2015 and 2016.
 - h. Certificate of Service to issue.
 - i. Costs and interest.
7. The Respondent filed its Statement of Response on 30th September 2016. Its position is that it opened its business on 12th July 2013. Its Employees were vast and undefined. The Claimant was an Accountant, but carried out auxiliary duties, which warranted a salary of Kshs. 70,000 monthly.
8. The business had settled and offered its Employees contracts with defined roles, beginning 1st January 2014. The Claimant became Coordinator/ Administrator. She was not coerced into executing contract. She continued to work for 2 ½ years. She resigned voluntarily on 17th June 2016.
9. The Respondent restructured its business. The Claimant's role was reviewed and restricted to accountancy only. Her salary was therefore revised to Kshs. 40,000 beginning March 2015. She did not complain and continued to work for 1 ½ years.
10. Employees could be transferred to any outlet. The Claimant was transferred to Malili which is closest to the Respondent's Head office, at Nairobi. She declined, saying there is no modern accommodation at Malili. The Respondent reconsidered transfer, and offered her transfer to the town of Emali. She declined. She then issued a letter dated 16th June 2016 resigning.
11. She was paid salary for the whole of June, although she did not work the entire month. She declined to collect her annual leave dues, stating that the matter was in Court. She was not constructively dismissed.
12. The Respondent states it is entitled to notice pay equivalent of the Claimant's 1-month salary. It counterclaims the sum of Kshs. 40,000.
13. Hearing proceeded and closed, in the absence of the Respondent, on 16th December 2021. There is an Affidavit of Service on record, sworn by Process-Server Michael Rodgers Okola on 22nd November 2021, showing that service was effected upon the Respondent's Advocates, and acknowledged, on 22nd November 2021.
14. The Claimant told the Court that she was employed by the Respondent in July 2013, on a monthly salary of Kshs. 70,000. She exhibited a bundle of documents, including the pay slips. She adopted her Witness Statement. She explained that her salary was reduced as detailed in the Statement of Claim. Malili was undeveloped. She asked for time to acquire suitable accommodation. She wished to continue working. The Director told her she should go to Malili, or leave employment. She was compelled to resign. She signed the contracts reducing her salary through coercion from the Director Ahmed.



15. The Claimant confirmed filing of her Submissions at the last mention before the Court, on 15th February 2022.
16. The issues are: whether the Claimant was unfairly or constructively dismissed; whether her salary was irregularly reduced; and whether she merits the remedies sought.

The Court Finds: -

17. The Respondent did not adduce evidence before the Court, and its bare pleadings cannot pass for evidence.
18. The Claimant states she was orally employed in July 2013 as an Accountant, on a monthly salary of Kshs. 70,000.
19. There was no written contract showing that the Claimant was employed in July 2013, but she exhibited pay slips for July and August 2013, showing that she indeed was paid a salary of Kshs. 70,000 for each month, by the Respondent. The Court would therefore agree, that she was employed by the Respondent, initially on an oral contract, earning Kshs. 70,000 monthly.
20. She then executed a contract dated 1st January 2014, where she was re-designated as Coordinator / Administrator earning a monthly salary of Kshs. 50,000.
21. The Claimant has not adduced adequate evidence to show that she was coerced into executing this contract. She accepted the new terms and continued to work. There is not a single letter exhibited by her, showing that she complained to the Respondent about the new terms. She did not give details of coercion in her evidence or pleadings. A party claiming coercion must demonstrate that, she was impaired or harmed, or threatened with impairment or harm, on her person or property, directly or indirectly, and that such actions or threats, influenced her decision to execute the contract. It is not enough to just make an unsubstantiated allegation that the Claimant was coerced by Director Ahmed.
22. The reduction in salary at any one point, is not shown to have been made through coercion. The Claimant acquiesced, and went on working, receiving the salary that was offered. She only complained, after she left employment. The claims about coercion have no support in evidence. The claim for arrears of salary is without foundation. It is declined.
23. In the absence of any evidence from the Respondent, the Court is persuaded that the Claimant was constructively dismissed, relying on the Court of Appeal decision in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR.
24. The Claimant was initially transferred to Malili. She wrote to the Respondent accepting transfer, but requesting that she is availed transport allowance, to be able to be commuting daily to Malili. Malili did not have residential rental houses, according to the Claimant.
25. The Respondent through its Director Ahmed, replied, stating that transfer to Malili stood, and that the concerns raised by the Claimant would be addressed while she was at Malili.
26. The Respondent appears to have at the same time, changed its mind and transferred the Claimant to Emali, which apparently is more urban, and possessed of reasonable housing accommodation.
27. This time, the Claimant wrote back saying she needed assistance in relocating to Emali. It was in the middle of June 2016, and she disclosed that she was broke. She had used most of her salary for June 2016. She asked to be given 30 days to re-organize, presumably in anticipation of her salary at the end of that month. She was required to be at Emali by 1st July 2016.



28. The Respondent did not grant the request.
29. The Claimant resigned against this background.
30. The facts fit well within the principles in the Court of Appeal decision cited above, in establishing the concept of constructive dismissal.
31. The Respondent made it completely impossible for the Claimant to continue discharging her role. She was at first transferred to a barren landscape, where she could not trace residential premises. She asked to be facilitated to commute daily. She was willing to continue working. The Respondent declined her request. It then offered her transfer to another outlet at the town of Emali. The Claimant was required to report within 14 days. It was mid-month, and she was broke. She could not travel to Emali to work or to secure accommodation. The Respondent offered her nothing. Its position was that the Claimant reports, and raises her concerns from the new station. How was she to travel, and secure accommodation, without the facilitation of the Respondent? The Respondent did not show that it was willing to continue being bound by the terms and conditions of employment. It did not make it possible for the Claimant to continue working. Resignation was involuntary, induced by a set of circumstances wholly authored by the Respondent. She has established constructive dismissal.
32. The Respondent concedes at paragraph 16 of the Statement of Response, that the Claimant was owed annual leave days, at the time of her exit. It is pleaded that the Claimant declined to collect her dues, citing the pendency of the Claim herein. No specific amount is disclosed in the concession made by the Respondent.
33. The applicable base rate, for purposes of computing the monetary awards, is the salary of Kshs. 40,000 monthly captured in her salary slip of March 2015. No other slips after March 2015 are exhibited, and the Claimant told the Court this was her last rate.
34. She is allowed annual leave of 45 days for the years 2015 and half of 2016, at Kshs. 60,000.
35. Notice pay is granted at Kshs. 40,000.
36. There is no evidence to support the prayer for overtime pay. The excess hours worked, and the amount claimed are not stated.
37. The Claimant worked from July 2013, to June 2016, a period of 3 years. She expected to go on working. She was willing to be transferred, but was not facilitated. She did not contribute to the circumstances leading to her constructive dismissal. She is not shown to have had disciplinary or performance-related issues, in her 3 years of service. She was entrusted various roles, which she discharged satisfactorily. She did not disclose to the Court, if she mitigated loss of employment, by securing alternative job. She is granted 3 months' salary for constructive and unfair dismissal at Kshs 120,000.
38. Certificate of Service to issue.
39. Costs to the Claimant.
40. Interest is allowed at court rates, from the date of Judgment, till payment is made in full.
41. Other declaratory orders sought are not necessary.

In Sum, It Is Ordered: -

- a. It is declared that the Claimant was constructively and unfairly dismissed.



- b. The Respondent shall pay to the Claimant: annual leave at Kshs. 60,000; notice at Kshs. 40,000; and compensation at Kshs. 120,000 for constructive and unfair dismissal- total Kshs. 220,000.
- c. Certificate of Service to issue.
- d. Costs to the Claimant.
- e. Interest allowed at court rates, from the date of Judgment till payment is made in full.

Dated, signed and released to the Parties electronically, at Nairobi, under the Ministry of Health and Judiciary Covid-19 Guidelines, this 27th day of May 2022.

James Rika

Judge

