



**Kiprono v Unilever Tea Kenya Limited (Cause 23 of 2020)
[2022] KEELRC 1301 (KLR) (21 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1301 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE 23 OF 2020
ON MAKAU, J
JULY 21, 2022**

BETWEEN

RICHARD KIPRONO CLAIMANT

AND

UNILEVER TEA KENYA LIMITED RESPONDENT

JUDGMENT

1. The claim herein relates to alleged constructive termination of the Claimant's employment contract by the Respondent. The Claimant avers that he was forced to resign by the Respondent's Human Resource officer on September 13, 2017. By his statement of claim dated September 10, 2020 seeks the following reliefs: -
 - a) A declaration that the constructive termination of Claimant from service was unlawful, unfair, un-procedural and a fundamental violation of the Claimant.
 - b) A maximum compensation as per Section 49 (c) of the *Employment Act*, 2007.
 - c) A certificate of service as per Section 51 of the *Employment Act*.
 - d) Immediate release of motor vehicle registration number KCJ 688R to the Claimant.
 - e) Cost and interest of this suit.
 - f) Any other awards as the honourable court deems fit to grant in the circumstances of this case.
2. The Respondent admits that it employed the Claimant but denies that it forced him to resign. On the contrary, it averred that the Claimant resigned voluntarily to pursue his own interests outside the company. It further averred that it paid the Claimant all his terminal dues and clarified that the disputed car was paid for by it after the Claimant defaulted in his car loan.
3. The suit went to full hearing where both parties gave evidence and thereafter filed written submissions.



Evidence in Summary

4. The Claimant testified as CW1. In brief he stated that he joined the Respondent as a temporary clerk on 15th May 2000 but in August 2002 he was confirmed permanent and pensionable staff. Thereafter he rose through the ranks to become Principal Logistics Assistant Manager earning a gross monthly pay of Kshs.235,261. He worked for 15 years.
5. In 2016, his Director orally informed him that there was going to be a fall off structure which could lead to his position being declared redundant and therefore entitle him to payment of sendoff of package as per the Respondent's tradition. As a result, he took an unpaid leave in June 2017 until September 11, 2017 when he was called back to work by the HR officer, Mercy.
6. On arrival he was served with a bill for house rent arrears at the rate of Kshs.38000 per month and went to seek clarification from the Managing Director. On September 12, 2017 at 12.00noon he was called by the MD Mr. Ihanicks in his office and he found HR officer also present. The MD told him that the best way to be paid his terminal dues was to sign a resignation letter. He was promised a package of one month's salary for every of service.
7. However, after signing the resignation letter, he was ordered to vacate company with his family immediately because another officer was to occupy it. However, the house remained vacant for one year after his exit.
8. He did not go back to clear with the company because he was not paid the promised package. He contended that the said package was paid to all exiting staff as the practice of the company. He named Kipruto Chomboi, Jackline Ngaru, Francis Kiragu and Sheilla Kiplangat as some of the former employees who received the said package.
9. He contended that he was constructively dismissed because his resignation was not voluntary but rather forced by the employer in order to get paid his exit package. He therefore prayed for the reliefs set out in paragraph 16 of the claim plus certificate of service and costs.
10. On cross examination CW1 admitted that he was aware of Respondent's company policies and he had signed all of those he was shown. He further admitted that he sought for unpaid leave from his Line Manager Mr. Francis Kiragu who was also the Operations Director and later extended the same to the end of August 2017. However, he denied that the unpaid leave policy annexed to the Respondent's witness statement was in force when he applied for his leave.
11. He admitted that he was to resume work on September 1, 2017 but explained that he did not because his Line Director had granted another extension of his unpaid leave. The extension was done orally through phone call as had happened in the previous requests.
12. He further admitted that on September 13, 2017 he wrote a resignation letter and the same was accepted by the Respondent through the letter dated September 21, 2017 which required him to vacate the house by September 30, 2017. He also admitted that he was required to give a notice of two months but resigned with immediate effect due to the work environment. He admitted that the resignation letter stated that he wanted to pursue ministry work and other interests outside the Respondent.
13. He maintained that there were controversies which forced him to resign. He admitted that the company waived his liabilities but he was not paid his benefits as expected. He contended that he engaged the company through email until he filed this suit. However, he admitted that there was no documentary proof of any redundancy done in 2017 but maintained that his Line Director had promised him redundancy.



14. On re-examination, he maintained that he discussed his leave with his Line Director and the same was approved through phone call as it happened all the other times after writing a request. He reiterated that the leave policy filed by the Respondent was published after he left the company.
15. Ms. Beatrice Bett, Respondent HR and Business Partner testified as RW1. She has worked for the company for 5 years. She confirmed that the Claimant requested for unpaid leave of 3 months and it was granted from June 2017 to report back on September 1, 2017. The leave was initially from June – July 2017 but on July 26, 2017 he requested for an extension for one for one month up to end of August 2017.
16. RW1 further testified that on 31/8/2017 a letter was written to the Claimant to report back to work but he did not. On September 8, 2017, he was addressed another letter calling him back to work but he failed to heed. On September 11, 2017, another letter was addressed to him and he responded by his resignation letter dated September 13, 2017 which was effective the same date.
17. The resignation was accepted through the letter dated September 21, 2017 and considering the fact that he was away on unpaid leave the company waived liabilities including two months' notice and 7 absent days among others. She explained that an employee on unpaid leave is supposed to pay for the company house because there is no salary from which to deduct house rent and utility bills.
18. She further testified that there was no redundancy undertaken in 2017 and maintained that the Claimant merely resigned. The reason cited for the resignation was to pursue ministry and other interests outside the company. She denied that any package was agreed between the parties herein and stated that the emails between the Claimant and the company through Mercy and Judy never made any reference to redundancy of the Claimant. There are also no documents showing that the Claimant was declared redundant.
19. On cross-examination, RW1 confirmed that Mr. Kiragu was the Operations Director while Mercy Wanyonyi was the HR and Business partner. She denied being aware of any exit package discussed between the Claimant Managing Director and Mercy Wanyonyi. However, she admitted that the letter dated July 31, 2017 by Francis Kiragu referred to a package by Mercy. She also admitted that the unpaid leave policy filed was reviewed in 2019 after Claimant left the company.
20. On re-examination she contended that she worked closely with Mercy Wanyonyi and therefore she could have been aware of her correspondences with Francis Kiragu. She contended that Mercy signed the letter dated 31st August 2017 and it never approved package dated July 2017. Finally, she contended that the leave policy she produced was the one in force in 2017.

Submissions

21. It was submitted for the Claimant that his services were constructively terminated by the Respondent in complete violation of the law. The reasons cited by the Claimant for the above conclusion is that 2016, his Line Director informed him of a forth coming restructuring which would see his position declared redundant; that in 2017 the Respondent's managers gave him verbal assurance that he would be given a sendoff packages; that another person called Jack was appointed to replace him.
22. He submitted further that in September 2017 the Claimant was given a bill by the HR officer as rent arrears for the period he was away on unpaid leave; that upon going to seek clarification from the Managing Director he was unfairly dismissed and his staff house given to another person; that the evidence on record regarding the promise of an exit package has not been denied by the Managing Director and the HR officer; that on September 13, 2017, he was forced to sign a resignation letter by



- the HR officer in order for his exit package to be paid; that upon signing the resignation letter, he was hurriedly thrown out of the company house.
23. He also submitted that the Managing Director and the HR Manager were extremely abusive to him making it extremely hard for him to continue working since the working relationship had completely and irretrievably broken down; that the conduct and breach by the Respondent were fundamental and he considered the same to amount to a repudiatory breach and therefore he resigned in order to be paid his sendoff.
 24. He contended that his car KCJ 688 was forcefully taken by the Respondent in total violation of his right to property; and finally, that his legitimate expectation to earn his send off package was duly frustrated by the Respondent.
 25. For emphasis of the above submissions reliance was placed on the case of *Joseph Aleper and Another v Lodwar Water and Sanitation Ltd* (2015) eKLR, *Maina Kagai Ligaga v Cocacola East and Central Africa Limited* (unreported) and *Kenneth Kimani Mburu and another v Muigai Holdings Limited* (2014) eKLR, where the Courts discussed the concept of constructive termination and the principle involved in it.
 26. In view of his submissions above, the Claimant submitted that he is entitled to 12 month's salary as compensation for the unfair termination; gratuity pay and certificate of service. He also urged for costs of the suit plus interest.
 27. The Respondent however reiterated that the Claimant resigned voluntarily and he was paid his terminal dues. It maintained that the claimant has not adduced any evidence to prove that he was coerced to author the resignation letter on September 13, 2017. Again the Claimant did not deny that from June to October 2017 his car loan fell into arrears and that the loan was recalled. Finally, it contended that he did not deny that the Respondent paid the loan balance to redeem the car but the Claimant failed to refund the Respondent money it paid to clear the loan balance.
 28. In addition, the Respondent maintained that the allegation that Claimant was promised any redundancy was not substantiated. The Respondent submitted that no redundancy was undertaken in 2017 and no redundancy package was ever promised to the Claimant by the Respondent.
 29. Finally, the Respondent urged the Court to find that the Claimant is not entitled to compensation for unfair termination, gratuity and release of motor vehicle registration KCJ 688R for the reasons sated in its submissions above.

Issues for Determination and Analysis

30. Having considered the pleadings, evidence and submissions presented by both parties, it is a fact that the Claimant was employed by the Respondent until September 13, 2017 when he resigned with immediate effect. It is also a fact that the said resignation was accepted by the Respondent vide the letter dated September 21, 2017 by which the notice requirement of 2 months was waived. The issues that fall for determination are: -
 - i. Whether the resignation was voluntary or the Claimant was constructively dismissed.
 - ii. Whether the Claimant is entitled to the reliefs sought.



Resignation or Constructive Dismissal

31. The resignation letter dated September 13, 2017 was written to the Operations Director who was Claimant's supervisor. The letter stated as follows: -

“Resignation

Many thanks for the opportunity to work for Unilever East Africa and Unilever Tea Kenya Limited.

I hereby humbly request to resign from the business as discussed in details with effect from September 13, 2017 to pursue Ministry work and other interests outside Unilever.

I am however very grateful for the support I have got from Unilever leadership even during the most trying moments. Many thanks God bless you big.

This organization has taught me to live a life of integrity, honesty, God bless Unilever forever. Above all I am whom am because of the exposure I got from Unilever. Thanks very much.

May God bless Unilever and its leadership not forgetting employees

Sign

Thanks

Richard Kiprono

WCM Manager

Unilever Tea Kenya Limited.”

32. The Claimant contends that the above letter was not written by him voluntarily but rather forced on him by the HR officer as a condition to receive his exit package. For that reasons he contends that the resignation amounted to constructive dismissal by the Respondent. However, the Respondent contends that the letter was voluntary in every aspect including the language used and there is no evidence of coercion as alleged by the Claimant.
33. In common parlance, voluntary resignation from employment refers to the instance where an employee decides to terminate his contract of service in his or her volition. According to the [*Concise Oxford English Dictionary*](#) 12th Edition, to “resign” is to “voluntarily leave a job or position of office.”
34. On the other hand the Black's Law Dictionary 10th Edition defines resignation as: -
- “A formal notification of relinquishing an office or position, an official announcement that one has decided to leave one's job or organization, often in the form of a written statement.”
35. Resignation by an employee is a right that is provided for under the Section 35 and 36 of [*Employment Act*](#) and is normally found in most of the written contracts of employment including collective Agreement and employer's HR Manuals. The said right is fundamental because without it an employee could be forced into employment against his/her wish and therefore lead to slavery.



36. Constructive dismissal on the other hand is not provided for in statutory laws of Kenya or any written contracts but it is a creature of a case law. According to *Concise Oxford English Dictionary* 12th Edition, constructive dismissal refers to
- “the changing of an employees job or working conditions with the aim of forcing their resignation.”
37. The *Black’s Law Dictionary* 10th Edition defines constructive dismissal or constructive discharge as: -
- “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.”
38. In the case of *Coca Cola East and Central Africa* (2015) eKLR, the Court of Appeal held that: -
- “The criterion to determine if constructive dismissal has taken place is repudiatory breach of contract through conduct of the employer. The employer’s conduct must be such as when viewed objectively, it amounts to a repudiatory and fundamental breach of the contractual obligations...there must be a causal link between the employers’ conduct and the reason for employee terminating the contract.”
39. From the above precedent and the others cited by the parties herein and the definition given by the dictionaries, it is clear that in a claim for constructive dismissal, the Claimant must prove that he was forced to resign by the employer’s conduct; that the conduct was in the nature that was intolerable or that the employer fundamentally breached the contract of employment that he treated it as a repudiation of the contract. The employee must show that he did not condone the said conduct but he resigned without much delay.
40. In the instant suit, the Claimant alleges that he got information from his Line Director that there was an intended restructuring of the Respondent which may lead to his position being declared redundant. The said information was verbal and therefore no documentary evidence was produced as an exhibit. Nevertheless, the Claimant stated that he hoped to be laid off and receive a sendoff package according to the practice of the company.
41. With the foregoing background and for Claimant’s own reason, he took an unpaid leave for 2 months and extended it for another month. As a result, his car loan fell into arrears and it was recalled but the employer paid the loan balance and repossessed the car from the Claimant. At the same time he never paid for his staff house and his bills allegedly accrued at the rate of Kshs.38,000 per month.
42. The Claimant had also failed to report back to work for 7 days until he resigned vide the letter dated September 13, 2017. He was also said to have taken extra 8 leave days all of which were liabilities he owned to the company. The question that begs is, what breach of the contract of employment or intolerable conduct did the employer commit that left the Claimant with little or no option but to resign.
43. Having considered the evidence on record I see no breach of the terms of the contract or intolerable conduct by the employer that forced the Claimant to resign. If anything the tone and the language in the resignation letter and the reasons cited is in consistent with the alleged foul conduct or violation by the employer. The claimant poured a lot of praises to the employer for good relationship and support.



44. The said good relationship is evident in the manner in which the employer handled the Claimant just before the separation. First he paid the balance of the car loan to avoid it being repossessed by the bank. Secondly the Claimant was given 2 months' unpaid leave and his request for extension was granted. Third, when he failed to report back from the unpaid leave the employer wrote to him severally but he failed to report back. Finally, when the Claimant resigned the employer waived his financial liabilities to the company including 2 months' salary in lieu of notice, rent and utility bills, 7 absent days, 8 leave days, and even offered to pay his terminal dues and even after clearance.
45. Having put all the above matters into consideration, I am not satisfied that the Claimant has established a case of forced resignation. What the Court finds is that the Claimant had lost interest in his employment and opted to pursue ministry work and other interests outside the Respondent as indicated in the resignation letter.
46. Even if the Claimant was asked by the Managing Director and the HR officer to resign in order to be paid an exit package, the said request cannot be deemed to amount to coercion to resign. In my view that was the only rational advice from any reasonable employer in the circumstances of this case because the Claimant had lost interest in the job and was only desirous to leave with an exit package
47. It would be very absurd for an employee to lose interest in a contract of employment and to require his employer to declare him redundant and pay him redundancy package, and if the employer refuses the employee tenders a voluntary resignation and asks the court to declare that the resignation is constructive dismissal. Holding in favour of the employee would amount to punishing the innocent part unfairly. Therefore, the Court finds and hold that the Claimant was not constructively dismissed but he resigned voluntarily.

Reliefs

48. In view of the foregoing I decline to make declaration that the Respondent is the one who constructively dismissed the Claimant from employment. For the same reason, I find that the Claimant is not entitled to compensation for unfair termination and salary in lieu of notice under Section 49 of the Employment Act. Therefore the claimant will have to contend with is pension.
49. The Claim is however granted the prayer for certificate of service as required under Section 51 of the Employment Act.
50. The Claim for immediate release of the motor vehicle KCJ 688R is allowed but subject to the Claimant refunding to the Respondent the amount paid on his behalf when the car loan was recalled due to arrears when the Claimant was on unpaid leave.
51. As regards the claim for gratuity/sendoff package, the burden of proof lies with the Claimant. The basis of the said claim is that it was a practice by the company to pay his exiting employees gratuity/sendoff package. My understanding of the Claimant's case is that he expected to get a sendoff package if he was declared redundant. He did not show how else an employee would be paid exit package upon being dismissed by the employer or if he resigned.
52. The Claimant produced his pay slips which shows that his employer was contributing pension for him and also NSSF. In the circumstances, I find that without evidence to the contrary, the only exist benefits availed to the Claimant under his contract of service are the pension and NSSF benefits. Such benefits are payable to the employee pursuant to the rules governing the respective funds. Consequently, I find and hold that the Claimant has not proved by evidence that he is entitled to the gratuity/sendoff package sought herein.



53. In conclusion and subject to the orders on certificate of service and the conditional release of the motor vehicle registration number KCJ 688R, the rest claims are dismissed. Considering that the suit succeeded partially, I will not award the Claimant costs of the suit.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 21ST DAY OF JULY, 2022.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

