



**Kambo v SYBL Kenya Limited (Cause 1505 of 2016)
[2022] KEELRC 12695 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12695 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1505 OF 2016
J RIKA, J
SEPTEMBER 29, 2022**

BETWEEN

MICHAEL WAICHIGO KAMBO CLAIMANT

AND

SYBL KENYA LIMITED RESPONDENT

JUDGMENT

1. The claimant filed his statement of claim dated July 29, 2016, amended on October 15, 2021.
2. He states that he was employed by the respondent between May 24, 2012 and June 30, 2016.
3. His letter of appointment indicates he was appointed as engineer- voice systems. The respondent was at the time, named Gestalt Gild Limited.
4. He worked diligently and undertook a course called Cisco Certified Internetworks Expert [CCIE], becoming one among less than 10 candidates, who have passed the lab exam in Kenya. He worked long hours.
5. The respondent however, belittled the claimant, making it difficult for him to work. The work environment became more intolerable for the claimant, in the months of April, May and June 2016.
6. He was instructed by the Human Resource Manager, Njoki Gathiri, on June 30, 2016 that his services were no longer required, and he should cease working on July 1, 2016.
7. He ignored the instructions and reported to work on July 1, 2016. He found his work e-mail deactivated, his work mobile phone disconnected, and work fuel card withdrawn. He could not access online services. The Human Resource Manager directed that the claimant is ejected from respondent's premises, on July 1, 2016. His contract was verbally terminated.



8. His salary for June 2016 was withheld until September 2016, when it was paid upon demand. Termination was unfair. There was no hearing, and no opportunity was accorded to the claimant to appeal.
9. His last monthly salary was Kshs 365,473. He was the lead systems engineer.
10. The claimant prays for judgment against the respondent for: -
 - a. Declaration that termination was unfair and unlawful.
 - b. Declaration that statutory requirements preceding termination were not adhered to. [repetitious in view of [a].
 - c. Certificate of service to issue.
 - d. 1-month salary in lieu of notice at Kshs 365,473.
 - e. Severance pay at 15 days' salary for each complete year of service at Kshs 730, 496.
 - f. 30 days of annual leave at Kshs 365,676.
 - g. 12 months' salary in compensation for unfair termination at Kshs 4,385,676.
 - h. Damages for mental anguish and degradation.
11. The respondent filed its statement of response on July 16, 2016, amended on November 18, 2021.
12. It is conceded that the claimant was employed by the respondent on May 24, 2012 as pleaded. It is denied that the respondent terminated his contract unfairly and unlawfully, or at all. He failed to report to work, from July 1, 2016 without leave or lawful cause.
13. It is true that the claimant sat and passed CCIE becoming one, in less than 10 candidates to have passed the lab exams in Kenya. The respondent catered for the claimant's costs of training. He wanted the respondent to finance him for further training in Las Vegas, US. The respondent declined financing the course, and from then on, the claimant started neglecting his work.
14. The respondent did not belittle the claimant. It financed his training, making him one of the experts in his field.
15. The work environment became intolerable in April, May and June, because the claimant became rude, and lagged behind in his work, after the respondent declined to sponsor him for the training in Las Vegas.
16. There was no communication from the human resource manager to the claimant, not to report to work. It was after he failed to report, that his password was changed for administrative and security reasons. His fuel card and official phone were suspended. He was advised through a letter dated August 8, 2016 addressed to his advocates, that these would be restored, once he reported back and explained his unauthorized absence. The respondent did not therefore terminate the claimant's contract. He was asked to report back to work severally. The respondent prays the court to dismiss the claim with costs.
17. The claimant, and respondent's CEO Shailendra Yadav, gave evidence on March 29, 2022, closing the hearing. The claim was last mentioned on June 9, 2022, when the parties confirmed filing, and/or undertook to file and exchange their closing submissions.
18. The claimant adopted his witness statement and documents on record, in his evidence. He restated his employment history with the respondent, and terms and condition of employment.



19. He was leading a group of engineers. He dealt with all technical escalations. He headed networks and security. The respondent was involved in setting up and support of clients' networks.
20. He paid for cisco training in Dubai. He passed and gained certification, which was a plus, for the respondent. He needed salary increment. He consulted the Human Resource Manager, Njoki. She told the claimant in July 2016, that he needed to resign. He told her that if he wanted to resign, he would do so voluntarily.
21. He was told not to report to work from July 1, 2016. He continued to report. He tried to log in. He found that his e-mail had been disabled. He could not use his official phone and fuel card. He was supposed to be online, and on call anytime. He could not reach respondent's clients.
22. His salary for June 2016 was withheld, and only later paid upon demand. He wrote demand through his advocates on July 6, 2016. The respondent wrote back when the claim was already filed in court.
23. He worked for 4 years. His record was clean. He had outstanding annual leave of 30 days. He assumed it was redressed as part of his lump sum.
24. Cross-examined, he told the court that the respondent was in IT business. He worked for an Italian IT firm, before joining the respondent. He left that firm honourably through notice terminating his contract.
25. He executed his contract of employment around July 1, 2012. He was given a job description. He undertook to devote his time at the service of the respondent. His contract had a termination clause. Either party could initiate termination, through a written notice, or notice pay equivalent of 30 days' salary.
26. He was belittled by the respondent on June 30, 2016. Work environment was intolerable. He was told not to report on July 1, 2016. This was verbal. He continued to report because he had not received a written letter of termination. He did not write to the respondent immediately, asking for the reasons. It was not for him to ask for reasons; it was for the respondent to supply reasons. He was not even supplied with verbal reasons.
27. He discovered his email was deactivated, mobile phone disabled and fuel card withdrawn, on July 2, 2016. He wrote demand letter for remedial action through his advocates. He also wrote to the CEO seeking his advice. It was his own letter, not his advocates'. His advocates delivered the letter for him. He was not aware that the CEO was out of the country, at the time his letter was delivered.
28. The respondent wrote a letter dated August 8, 2016, replying to claimant's advocates' demand letter, advising the claimant to return to work without delay.
29. He had been sponsored for training to India by the respondent. He sponsored himself to Dubai. He never went to Las Vegas. There was a tender for services which the respondent was interested in, which required the respondent to have an expert in the field, with certain qualifications. The respondent sponsored the claimant in India, to acquire those qualifications, for purposes of bidding for the tender.
30. He also attended Cisco Expo in Germany at the expense of the respondent. He represented the respondent in Germany.
31. There were no complaints about his performance. He did not attend a disciplinary hearing. The respondent was supposed to increase his salary. It was not made. He did not abscond. He handled very sensitive account. He was not aware that security was a concern, in his absence.



32. Redirected, he told the court that his email and mobile phone were disabled on July 2, 2016. He was still in employment. He did not abscond. He did not resign. He did not receive any letter of termination. There was no reply to his letter of July 6, 2016. Reply was made after the claim was already filed in court. He was entitled to work online from anywhere
33. CEO Shailendra Yadav, told the court he was at the time of giving his evidence, CEO of the respondent for 11 years. He adopted his witness statement on record, and exhibited documents filed by the respondent. It is true that the claimant worked for the respondent as lead systems engineer. It is not true that his contract was terminated verbally. He absconded. The respondent called on him to report back. He did not.
34. Cross-examined, the CEO told the court that the claimant was integral to the business. He handled internet. He needed to have access to the whole system. Njoki dealt with human resources. In the period June 30, 2016 to July 2016, the CEO was still in employment. He travelled to India around this time. He did not have travel documents showing this. He was not available at the respondent, at the time. He was attending to personal matters. Managers could reach him. The CEO was made aware of the demand letter written by the claimant in person. The claimant's advocates also wrote demand letter. The CEO was not to respond to the claimant directly, but through Njoki. There was no response, until the claim was already in court. The claimant's e-mail was deactivated, because he was unavailable. It could be reactivated, if he came back.
35. The respondent did not pay for any trip by the claimant to the US. The claimant had asked to go to the US for training. He had been to Dubai recently, and had also travelled to India and Germany. He was called for disciplinary hearing verbally. His manager held a disciplinary meeting with him. The CEO was not in the meeting. He did not know on which date the meeting was held. There was no written invitation to the meeting. The meeting was *ad hoc*. It was not documented. The salary for June 2016, was paid at the end of the month. The CEO was not aware of disciplinary proceedings. He did not know if the certificate of service issued.
36. Redirected, the CEO told the court that the claimant was probably not paid his salary after he absconded. Disciplinary meeting was *ad hoc*. It was not necessary to take minutes. He stormed out of the meeting. His wish to travel to Las Vegas was vetoed by the respondent. He was demanding for higher salary. He was unhappy for these 2 reasons. The respondent looked for him, before deactivating his working tools. He was a repository of plenty of sensitive customer information. The respondent took action to protect customer confidentiality. Deactivation did not mean termination of employment.
37. The issues are whether the claimant's contract of employment was terminated by the respondent fairly or at all; and, whether he merits the remedies pleaded.

The Court Finds: -

38. The employment contract between the claimant and the respondent, the terms and conditions of service, are not contested.
39. The claimant invokes decisions of this court in *Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited* [ELRC] [2014] e-KLR and the Court of Appeal in *Coca Cola East and Central Africa Limited v Maria Kagai Ligaga* [2015] e-KLR. These decisions relate to constructive dismissal. They are not relevant to this dispute. The claimant did not resign. He says he was verbally dismissed. According to him it was the respondent who terminated his contract. Although the claimant asserts that the work environment turned hostile against him, one of the elements in constructive dismissal,



he did not consider terminating his contract, and constructive dismissal cannot be inferred, where it is alleged that the employer has expressly terminated the employee's contract. The evidence from the claimant is that he was told by word of mouth that there was no more work, and his work tools were disabled. That is plain dismissal, not constructive dismissal under the above decisions.

40. Did the respondent terminate the claimant's contract unfairly, or at all? The claimant states at paragraph 3 of his amended statement of claim, that the respondent abruptly and unfairly terminated his contract on June 30, 2016.
41. The respondent denied termination, in its letter to the respondent's advocates, dated August 8, 2016. "Consequently, and in view of the above, we are duly instructed to inform you that your client should resume duty, without any delay."
42. Even if it were, to be assumed that that the respondent had earlier told the claimant not to report to work, here was a letter written to his advocates, expressly asking the claimant to return to work. If any work tools had been taken away during the period of interruption in his service, the respondent told the court that such tools would have been restored, once the claimant was back.
43. The respondent took active steps, to return the claimant to work. Action was taken to protect and perpetuate the contract between the parties. The claimant did not tell the court why he did not return to work. He did not establish that the respondent terminated his contract unfairly, as required under section 47 [5] of the Employment Act 2007. If there was any blameworthiness on the part of the respondent on June 30, 2016, and the court has not found any, remedial action was taken, and the claimant called back to work, on August 8, 2016.
44. Notice pay is not merited, as the claimant has not established that termination was instigated by the respondent. The prayer for compensation for unfair termination has no foundation, the claimant having failed to show that termination was at the instance of the respondent, and to give an explanation why he did not go back to work, when he was advised to do so by the respondent. The court has not found a clause on the claimant's contract, granting to him any form of severance. His position is not that his position was declared redundant, to extend to him severance pay under section 40 of the Employment Act. On annual leave, the claimant told the court that he had a balance of 30 days, which, "I assume was part of my lump sum payment." The court would assume that annual leave was paid as part the lump sum the claimant alludes to. There is no evidence to warrant any remedy under the Constitution of Kenya. The prayer for damages for mental anguish and degradation is declined.
45. It is ordered: -
 - a. The claim is declined.
 - b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 29TH DAY OF SEPTEMBER 2022.

James Rika

Judge

