



REPUBLIC OF KENYA



KENYA LAW
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Martineau & 3 others v Light House Property Company Limited (Cause 506 of 2017) [2022] KEELRC 13196 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 13196 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 506 OF 2017
K OCHARO, J
SEPTEMBER 22, 2022**

BETWEEN

**CLEMENT MARTINEAU 1ST CLAIMANT
AHMAD TAHIR MACHENGO 2ND CLAIMANT
NDINDIRI WAWERU 3RD CLAIMANT
BILDAD WAMBUGU GAKOMBE 4TH CLAIMANT**

AND

LIGHT HOUSE PROPERTY COMPANY LIMITED RESPONDENT

JUDGMENT

Introduction

1. The claimants herein, through their statement of claim dated December 13, 2016, sued the respondent seeking the following reliefs:
 - a. A declaration that the claimants were constructively dismissed from their employment with the respondent.
 - b. One month's salary in lieu of notice Kshs1,475,000
 - c. Service pay/Gratuity Kshs1,475,000
 - d. Damages for wrongful termination
Kshs.1,475,000 x 12 Kshs17,700,000
 - e. Costs and Interests
 - f. Any other relief the court may deem just to grant.



2. Upon being served with the summons to enter appearance, the respondent entered appearance on the March 5, 2019, but did not file a response to the statement of claim. Its application for leave to file the response out of time was declined by the court. The matter therefore technically proceeded as a formal proof.
3. The claimant called to the stand one Clement Martineau the 1st claimant who testified on his behalf and that of the other claimants. At the close of the claimant's case this court gave directions for the filing of written submissions, directions which the parties did oblige.

The Claimant's Case

4. At the hearing the 1st claimant moved this court to adopt his witness statement dated December 13, 2017 as his evidence in chief, and admit the documents that the claimant had filed under the list of documents dated December 13, 2016, as their documentary evidence.
5. The witness stated that the claimants were all employed by the respondent on different dates and designated different responsibilities as below:
 - a. The 1st claimant Clement Martineau was employed on March 31, 2014 as the company's General Manager at a monthly salary at Ksh 1,125, 000
 - b. The 2nd claimant Ahmad Tahiri Machengo was employed on January 25, 2016 as a company Accountant at a monthly salary of Kshs 30,000
 - c. The 3rd claimant Ndindiri Waweru was employed on January 1, 2014 as the company Project Manager.
 - d. The 3rd claimant Bildad Wambu Gakambo was employed on November 2, 2015 as company Head of Sales at a monthly Salary of Kshs 102,000.
6. The claimants stated that at all times they carried out their duties, in accordance with the terms and conditions of their respective contracts of employment, with a performance that exhibited competency, and that was satisfying to the respondent.
7. The claimants aver that notwithstanding the express terms of their contracts of employment, the respondent on or about April 2016 to date failed to pay them their salary, failure which maintained for a number of months subsequent thereto, notwithstanding that they continued rendering their services to the respondent, in accordance with their terms of employment.
8. Due to the persistence in the failure by the respondent to pay the claimants their monthly salary as and when it fell due or at all, the claimants were constrained to cease working in circumstances which they hold amounted to constructive dismissal. As at the time they ceased working, their cumulative unpaid salary amounted Kshs11,800,000, thus;
 - a. 1st claimant Clement Martineau salary for 8 months' Salary at Kshs 1,125,000
 - b. 2nd claimant Ahmad Tahir Machengo salary for 8 months Kshs 9,000,000
 - c. 3rd claimant Ndindiri Waweru salary for 8 months Kshs 1,760,000
 - d. 4th claimant Bildad Wambu Gakombe Salary for 8 months Kshs 800,000.
9. The 1st Claimant urged this court to find that they were constructively dismissed following the Respondent's failure to their pay salaries, failure which was a fundamental breach of its obligations under the contracts of employment. They are therefore entitled to payment of salaries amounting to



Kshs 11,800,000, one-month's salary in lieu of notice at Kshs 1,475,000- and 12-months' salary in compensation for unlawful termination, cost and interest.

10. Cross examined by counsel for the Respondent, the 1st Claimant testified that he was aware that the Respondent at the material time had issues with the Central Bank of Kenya. He confirmed that before the month of April 2016, the Claimants were receiving their salaries as and when they fell due.
11. The witness testified that if at all the Claimants wrote an email to KDIC, requesting for payment of their unpaid salary, then the same must have been informed by the fact that the Respondent was under receivership. The Respondent never wrote or communicate to them in any manner, concerning the unpaid salary at any time.
12. The witness asserted that receipt of salary by an employee who has worked is as of right, he need not have to claim for it, before it is paid by the employer.
13. The witness stated that he is currently in employment elsewhere, and prior to getting employed as such, he was doing consultancies.

The Claimant's Submissions

14. The claimants counsel submitted that the claimants were constructively dismissed. According the *Black's Law Dictionary*, constructive dismissal is defined 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."
15. Further the Claimants' counsel submitted that the concept of constructive dismissal is underpinned on the notions, *inter alia*, that:
 - a. there is implied in a contract of employment, a term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or highly likely, to destroy or seriously damage the relationship of confidence and trust between the employer and employee;
 - b. breach of that trust and confidence will entitle the employee to treat himself as constructively dismissed; and
 - c. employers do not have carte blanche to change the employment relationship.
16. It was stated that constructive dismissal is not codified in the Kenyan law, consequently in rendering themselves on matters constructive dismissal, Courts have placed reliance on common law and jurisprudence from other jurisdictions. To support this, point the holding in *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* [2013] eKLR, thus;

“...The doctrine and principles developed in other comparative jurisdictions would be equally applicable in Kenya because of the entrenchment of a justifiable right to fair labour practices under Article 41 of the Constitution”.
17. As to when constructive dismissal can occur, the Claimant's counsel placed reliance on the decision in *Western Excavating [ECC] Ltd v Sharp* [1978] 1 All ER 713 where the court expressed itself, thus;

“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 that instant without giving notice at all, alternatively, he may give notice and say 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. Moreover, he must make up his mind soon after the conduct of which he complains; if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

18. Crosser home, the Claimant cited the Court of Appeal decision in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR, where the court developed conditions that an employee asserting constructive dismissal must establish in order for him or her to succeed in the claim. That;
 - a. The employer is in breach of the contract of employment, breach which must be fundamental as to be considered a repudiatory breach;
 - b. the employee must leave employment in response to that[breach];
 - c. there must be a causal link between the employer's conduct and the reason for employee leaving employment; and
 - d. an employee could leave with or without notice if the employer's conduct was the effective reason for the termination.
19. The claimants submit that the Respondents failure and or refusal to pay the claimants their salaries, was a repudiatory breach of the contract of employment, hence the constructive dismissal. To bolster this submission, reliance was placed on the holding in in *Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited* [2014]eKLR, thus;

"... The salary or wages of an employee are protected under part 4 of the Employment Act,2007. An employer who wilfully fails to pay an employee's salary or wages not only acts in repudiation of the contract of employment but commits a wage offence under section 17 and is liable to criminal prosecution. The non-payment of the Claimant's salaries amounted to repudiation of the contracts, and an offence under the Employment Act 2007. The Claimants were entitled to consider themselves as dismissed from employment. They were constructively dismissed, and are entitled to damages"
20. It was contended that regardless of the Respondent's financial difficulties or intention of paying the Claimants, the Respondent ought to have known or knew that a failure to pay salaries for almost 4 months would leave the employees with no option other than resigning. No employee can be ready to work for nothing.
21. On the reliefs, it was submitted that under the Claimant's employment contracts, the Respondent was under an obligation to give a one month's termination notice or pay in lieu. The notice was not issued, therefore entitling them to notice pay.
22. On damages for wrongful dismissal, counsel submitted that the Claimants are entitled to the compensatory damages under section 49[1][c] of the *Employment Act*. Further, that in the circumstances of the matter, damages to an extent of 12 months' gross salary will serve justice.
23. On the claim for gratuity, it was submitted that as the name implies, it is a gratuitous payment made to the employee for the services rendered. It is paid to an employee by the employer either at the end of the contract or upon resignation or retirement, or death of an employee in lumpsum. That their claim, is hinged on an implied term of employment contracts and established practice.



24. As costs follow the event, the Claimants should be awarded costs of this suit.

The Respondent's Submissions

25. The Respondent distilled the following issues for determination;

- I. Whether the claimants were constructively dismissed;
- II. Whether the claimants are entitled to the reliefs sought.

26. On the first issue the Respondents counsel, submitted that as to what amounts to constructive dismissal was elaborately expressed by the Court of Appeal in case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR, thus;

“constructive dismissal occurs where, “an employee terminates the contract under which he is employed, (with or without malice) in circumstances in which he is entitled to terminate it without notice, by reason of the employer’s conduct. ”... constructive dismissal as a repudiatory breach by the employer of the contract of employment. The employer's behaviour in either case must be shown to be so heinous, so intolerable, that it made it considerably difficult for the employee to continue working. The employee initiates the termination, believing herself, to have been fired. The employee needs to show that the employer, without reasonable or proper cause conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is regarded as constructive dismissal if the employer's conduct is a significant breach of the contract of employment and that the conduct shows the employer is no longer interested in being bound by the terms of the contract. The employee's resignation is therefore treated as an actual dismissal by the employer and the employee may claim compensation for unfair termination. The onus of proof in this form of employment termination, unlike in other termination, lies with the employee. While under Sections 43 and 45 of the Employment Act 2007 the duty in showing that termination was fair is on the employer, constructive dismissal demands the employee demonstrates that his resignation was justified. Other collateral issues that must be shown by the employee are; that the employer made a fundamental change in the contract of employment, and that such change was unilateral; that the situation was so intolerable the employee was unable to continue working; that the employee would have continued working had the employer not created the intolerable work environment; and, that the employee resigned because he did not believe the employer would abandon the pattern of creating unacceptable work environment. These are some of the rules governing a claim for constructive dismissal”

27. The Respondents in its submissions appreciates that the Claimants were at all material times its employees, who it employed on various dates between 2014 to 2016, and designated different responsibilities.

28. It was further submitted that the Respondent was a special purpose vehicle of Chase Bank (Kenya) Limited, which has since been taken over by SBM Bank Limited. Further that on the April 6, 2016 Chase Bank Kenya Limited was placed under statutory management of the Kenya Deposit Insurance Corporation (KDIC). Following this, the Directors of Chase Bank [Kenya] Limited including its SPVS were stripped of their powers to run the affairs of Chase Bank. Consequently, the Kenya Deposit Insurance Corporation is responsible for any conduct that stirred up the cause of action by the Claimants.



29. It was argued that the Kenya Deposit Insurance Corporation's interference affected the Respondent's general performance of the employment contracts in question. The Claimants cannot allege therefore that the Respondent is responsible for the unpalatable working conditions- non-payment of salaries that led to their resignation.
30. Upon taking over the management of the Respondent, in essence the latter got incapacitated in the discharge of all its contractual obligations, such as the one the subject matter of the Claimants' claim. This action by KDIC amounts to tortious interference. In support of this submission counsel cited the holding by the Court of Appeal in *Joseph Ochieng & 2 others t/a Aquiline Agencies v First National Bank of Chicago* [1990] eKLR, thus;

“The essential ingredients of the tort of inducing a breach of contract are (1) that the wrongdoer knew or acquired knowledge of the contract in question and its essential terms, (2) that he so acted or interfered whether by persuasion, inducement or procurement or other means as to show that he intended to cause a breach of the contract or prevent its performance by one party to the detriment of the other party, (3) that the breach of contract was directly attributable to such act or interference, and (4) that damage was occasioned or was likely to be occasioned to such other party.”
31. The Respondent's counsel submitted that the claimants have not proven their case for constructive dismissal as the Respondent did not in any way create the unfavourable working conditions that led to their resignation. That the Respondent has been sued for the actions of a 3rd party.

Analysis and Determination.

32. From the pleadings, the evidence and the submissions by the parties herein, the following issues emerge for determination thus:
 - a. What is the import of the Respondent's failure to a response to the Claimants' Claim?
 - b. Whether the claimants were constructively dismissed.
 - c. Whether the claimants are entitled to the reliefs sought.

What is the import of the respondent's failure to file a response to the claimant's claim?

33. Through its Notice of Motion application dated March 24, 2021, the Respondent sought inter alia to be granted leave to file a response to the Statement of Claim dated December 13, 2016 out of time. Through its ruling herein dated June 9, 2021, the court declined to grant the order. In essence therefore, the Claimants' matter became one for formal proof, with the Respondent having only a right to cross examine them and or their witness[es], on their case.
34. It is imperative to state that the fact that the Respondent didn't file a response to the Claimants' Statement of Claim, didn't in any manner take away the burden of proof, from the Claimants' shoulders. They remained enjoined to discharge their legal burdens as the law required them to.
35. The Court notes that the Respondent's Counsel has heavily submitted on the relationship between Kenya Deposit Insurance Corporation, the Respondent and Chase Bank [K]Ltd, that in the circumstances of this matter KDIC, should be held liable, that the breach of the employment contracts was by it and not the Respondent, and that the Respondent was a special purpose vehicle of Chase Bank Limited. All these do not flow from any pleadings and evidence by the Respondent. The submissions cannot therefore in any manner come to the aid of the Respondent's case. Submissions



will never be a substitute for evidence. This was aptly captured in the Court of Appeal decision in *Toroitich Moi v Stephen Muriithi & another* [2014]eKLR, thus;

“Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language” each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.....”

Whether the claimant was constructively dismissed

36. There is no contest that the Claimants were employees of the Respondent, who were employed at various dates between 2014 to 2016, to render services to the Respondent in different positions under their respective contracts of employment. There is no dispute that commencing the month of April 2016, the Respondent failed to pay them their salaries, a situation that persisted for some time thereafter, constraining them to quit their employment with the Respondent. They asserted that they so quit as a result of the Respondent’s conduct, which amounted to a significant breach of its obligations under the contract, breach which was repudiatory in nature, hence they were constructively dismissed.
37. True as submitted by counsel for the Claimant, constructive dismissal, is not codified in any statute in Kenya. However, courts have not been helpless in interrogating matters constructive dismissal and rendering themselves thereon. Jurisprudence from other jurisdictions has been borrowed, the scope of the right to fair labour practices under Article 41 of the *Constitution* and its scope has been interpreted liberally as a basis for the application of the doctrine of constructive dismissal, and through judicial pronouncements, there is now a home-grown basis for consideration of the doctrine.
38. In Cause No 1463 of 2018, Nairobi- *Geoffrey Muriithi Mthee v Xplico Insurance Co Limited*, this court stated;
- “..... From the onset it is imperative to state that constructive dismissal does not have any statutory anchorage within the Employment Act, 2007 or any of our statutes. It is a creature of Common law. It is trite law that where an employer’s conduct evinces an intention no longer to be bound by the contract of employment, a path gets available to the employee to either accept the conduct or changes made by the employer or treat the conduct or changes as a repudiation of the contract and sue wrongful dismissal. In the instant case, it is clear that the Claimant settled for the latter choice.”
39. Setting out what an employee alleging constructive dismissal has to prove before succeeding in a claim on that basis, the Court of Appeal in the case of *Leena Apparels [EPZ] v Nyevu Juma Ndokolani*[2018]eKLR, stated;
- “..... Whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment. The employer’s conduct does not have to be intentional or in bad faith before it can be repudiatory..... “
40. Having in mind the tests enunciated in the decisions cited by the parties on constructive dismissal, and those that this Court has cited immediately hereinabove, I now turn to consider, whether the conduct



of the Respondent that stirred the claimant's move to quit was one with the gravity that could attract the doctrine of constructive dismissal to set in against it.

41. Remuneration is undoubtedly one of the most important terms of an employment contract. In fact, this court has held before, that the right to remuneration is the most important right of an employee, considering the immense protection that the *Employment Act, 2007* accords, wages and salaries of an employee. Where an employer substantially alters [including by a significant reduction, or change of the manner of payment] of an employee's compensation without their consent such alteration may amount to a fundamental breach of the contract. An employee whose compensation or manner of compensation has been altered can successfully claim constructive dismissal.
42. No doubt in my mind that under the contracts of employment of the Claimants, and the *Employment Act*, the Claimants' salary was one that was payable at the end of every month without any authority on the part of the Respondent to unilaterally depart from this.
43. Applying the contractual test, enunciated in the case of *Coca Cola East and Central Africa Ltd v Maria Kagai Ligaga* [supra], I come to a conclusion that by failing to pay the Claimants their monthly salaries as and when they fell due under the terms of their contracts of employment and the law, amounted to a unilateral act, and a breach of the terms of the contract in a substantial manner. There was a repudiatory breach of the contracts therefore. The claimants were constructively dismissed.

Of the reliefs

44. The Claimants sought inter alia for damages for wrongful termination in the sum of Kshs17,700,000, representing twelve months' gross salary for all of them. It was submitted that this claim is anchored on the provisions of section 49[1][c] of the *Employment Act*. This Court is cognizant of the fact that grant of the compensatory relief contemplated under the provision is discretionary. The extent of the grant too. I have considered the conduct of the Respondent that this court has found amounting to constructive dismissal of the Claimants, that the conduct was counter to legitimate expectation of any reasonable employee, and that the Claimants did not in any manner contribute to the termination, and find that the claimants are entitled to the relief, and to the extent of 8 [eight] months' gross salary, Kshs 11,800,000.
45. Pursuant to the contracts of employment of the claimants, their contracts were terminable by one month's salary or payment in lieu. There is no doubt that in the circumstances the contracts came to an end, the notices were not issued. The claimants are consequently entitled to the notice pay both under the contract and the provisions of section 36 of the Act, Kshs 1,475,000.
46. The claimants sought for gratuity alleging that is usually an implied term of employment contracts that an employee who separates with his employer is entitled to be paid gratuity at the time of separation. This position does not have any legal foundation, in fact it is in ignorance of the true legal position that an employee's entitlement to gratuity must flow from an express term in the contract of employment between the employer and the employee. I decline the claim under this head.
47. In the upshot, judgement is entered in favour of the
 - I. A declaration that the claimants were constructively dismissed from employment.
 - II. One month's salary in lieu of notice, Kshs 1,475,000.
 - III. Compensation pursuant to the provisions of section 49[1][c] of the *Employment Act*, 8 [eight] months' gross salary, Kshs 11,800,000.
 - IV. Interest on the awarded sum at court rates, from the dated of this judgment till full payment.



V. Costs of this suit.

VI. The awarded sums to be apportioned between the claimants in the ration of their monthly salary.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2022

.....
OCHARO KEBIRA

JUDGE

Delivered in presence of

Mr. Vincent Odhiambo for the Claimant.

Mr. Kaaya for Wachira for Respondent.

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 March 2020 and subsequent directions of 21st April 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 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 1B of the 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.

A signed copy will be availed to each party upon payment of Court fees.

.....
OCHARO KEBIRA

JUDGE

