



**Mokaya v Zhongfa Asia Africa Hotels Co. Ltd (Cause 1836 of 2017)
[2022] KEELRC 3890 (KLR) (16 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3890 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1836 OF 2017
SC RUTTO, J
SEPTEMBER 16, 2022**

BETWEEN

MICAH KEPHA MOKAYA CLAIMANT

AND

ZHONGFA ASIA AFRICA HOTELS CO. LTD RESPONDENT

JUDGMENT

1. The claimant avers vide a memorandum of claim dated August 9, 2017, that he was initially employed by the respondent as a cook on a three months contract with effect from July 20, 2013. That after expiry of the three months contract, he was engaged for a further three months as a chef, with effect from October 20, 2013. That it was after the end of the second contract that he was employed permanently with effect from February 1, 2014.
2. The claimant further states that in the course of his employment, the respondent systematically and consistently breached the terms of his contract, with a view to forcing him out of employment. Consequently, he has cited the respondent for constructive dismissal, hence seeks the sum of Kshs 2,666,400/= being compensatory damages, salary underpayment, deductions not remitted to NSSF as well as unpaid rest days, overtime and holidays.
3. The respondent opposed the claim through its response dated April 18, 2018 and which was later amended on August 17, 2021. Together with the amended response, the respondent filed a counterclaim. The respondent although admitting that it engaged the claimant as a cook with effect from July 20, 2013, denied designating him as a chef. It further denied breaching the contractual terms during the subsistence of the employment relationship. Through its counterclaim, the respondent contended that the claimant resigned on his own volition hence claimed against him the sum of Kshs 18,000/= being one month's salary in lieu of notice. Subsequently, the respondent has asked the Court to dismiss the claim and allow its counterclaim.



4. The claimant opposed the counterclaim and maintained that his resignation was not voluntary as it was forced upon him through the respondent's persistent breach of the contract of employment. He asked the court to dismiss the counterclaim with costs.
5. During the hearing on May 11, 2022, each side called one witness.

Claimant's case

6. The claimant testified as CW1. He adopted his witness statement as his evidence in chief. He also produced the bundle of documents filed together with his claim and the supplementary bundle of documents as his exhibits before Court.
7. It was his testimony that he left employment because he was forced to do so. He told the Court that the respondent was not paying his salary as they had initially agreed. That further, he was forced to work for long hours beyond the statutory eight hours per day, from 5:00 am until 10 pm and at times, he would go on until 1:00 pm, as some guests would stay on until then. That nonetheless, he was not paid for work done overtime or when he worked during his rest days.
8. The claimant stated in further testimony that he was the head of the kitchen and worked as a chef but was only paid Kshs 18,000.00 which was below the salary of Kshs 45,000.00, which he ought to have earned. He further testified that when he was unwell, he was given an unpaid off and was not allowed to proceed on sick leave. That further, whenever he went on leave, he was not paid salary and neither was he paid travelling allowance.
9. That he made numerous pleas to the respondent to honour the terms of the employment contract by following the law but instead, it persisted in its oppressive treatment. That further, the respondent deducted NHIF dues from his salary but failed to remit the entire amount as required. That as a result of the respondent's failure to honour the terms of his contract of employment, which rendered the continuation of his employment intolerable, he resigned with effect from 16th December, 2014.

Respondent's case

10. The respondent called evidence through its Human Resource Manager, Mr. Gilbert Ooga Ouma, who testified as RW1. He proceeded to adopt his witness statement as his evidence in chief. He also sought to rely on the documents filed on behalf of the respondent, which he produced as exhibits before Court.
11. RW1 testified that the claimant voluntarily resigned from the respondent's employment without communicating to the respondent. That the respondent observed the terms of the claimant's contract of employment. That during the subsistence of the employment relationship, the respondent paid the claimant his salary and other benefits in full. That the respondent also remitted the National Hospital Insurance Fund (NHIF) and National Social Security Fund (NSSF) statutory deductions to the relevant authorities. RW1 in further testimony, stated that the claimant was never subjected to work outside the statutory working hours and if he was, then he was compensated at the rate stipulated in the contract of employment. That the claimant was further granted sick off on occasions when he fell sick as per the terms of his contract of employment.

Submissions

12. Citing the case of *Anthony Mkala Chitavi vs Malindi Water and Sewerage Company Limited* (2013) eKLR, the claimant submitted that he was constructively dismissed from employment. That he had reasons to terminate his contract of employment as having been constructively terminated, hence had no option but to resign.



13. On its part, the respondent submitted that the claimant had failed to meet the threshold of proving constructive dismissal. To support its argument, the respondent placed reliance on the cases of *Herbert Wafula Wafwa vs Kenya Wildlife Services* (2020) eKLR and *Coca Cola East & Central Africa Limited vs Maria Kagai Lugaga* [2015] eKLR.

Analysis and Determination

14. In view of the claim before Court, the evidentiary material before me, and the rival submissions, I find the issues falling for the court's determination to be: -
- i. Whether the claimant was constructively dismissed by the respondent
 - ii. What reliefs if any, are available to the claimant?

Constructive dismissal?

15. The claimant has alleged that his resignation was not voluntary and that he was forced out of employment due to persistent contractual breaches by the respondent. It is on this account that he has alleged that he was constructively dismissed by the respondent. This claim has been refuted by the respondent who maintains that the claimant left employment on his own volition.
16. In light of the opposing positions presented by both parties, it is evident that the crux of the dispute, is whether the claimant was constructively dismissed from employment.
17. I will start by considering the definition of the term constructive dismissal as per the *Black's Law Dictionary (10th Edition)*, thus: -
- “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.”
18. Turning to case law, the Court of Appeal had the occasion to consider the question of constructive dismissal in the case of *Coca Cola East & Central Africa Limited vs Maria Kagai Lugaga* [2015] eKLR thus pronouncing the following as being the guiding principles: -
- a. What are the fundamental or essential terms of the contract of employment?
 - b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?
 - c. The conduct of the employer must be a fundamental or 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.
 - d. An objective test is to be applied in evaluating the employer's conduct.
 - e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e causation must be proved.
 - f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.



- g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
19. What manifests from the foregoing principles is that for a claim of constructive dismissal to pass muster, there must be contractual breach on the part of the employer, with such breach being so fundamental as to go to the root of the employment contract. This could be a breach of either an express or implied contractual term but, in any event, must be sufficiently serious so as to justify termination of the employment contract.
20. Back to the case herein. The claimant tendered a resignation vide a letter dated December 16, 2014, whose contents I will reproduce hereunder: -

“REF: SURRENDERING LETTER

It is know(*sic*) about 1 ½ years being working with this company. Since then I had been humbling my work systems in this company due to the starting gear. Remember you had no overtime, service-charge, and other allowances in this company, But you have gone beyond following the points below:

1. (Underpaying) for this point I was given a job discription(*sic*) of a sours-cheff without being given the salary as it is surposed(*sic*) to be.
2. When I was sick at work I used my own saraly (*sic*) to go to hospital and finanally(*sic*) instead of being given a sick leave, I was sent home in my two week off days.
3. I don't get my N.S.S.F & N.H.I.F funds while they are being detacted (*sic*) from my monthly saraly(*sic*).
 4. Having been working, so had and in long hours, you dint forcus (*sic*)this but sending me to unpaid leave.
 5. Depending only on my small salary I'm forced to pay my hospital pills, Buy shoes for the companie (*sic*) job and even to buy a soap and was my working uniforms on my own.
 6. The hottest point that has mad(*sic*) me loos(*sic*) apetite(*sic*) of this job is to be sent home for my annua(*sic*) leave without any leave allowance which forced me to bollow(*sic*) my transport money from somebody that is after being slept for four days.

Finally I have decided to surrender from A.A. Lodge, but then if you can promise to add me money and rectfy (*sic*) other points, also promise you to come back and continue working together as we were.

Yours faithfully

SIGNED”

21. As can be discerned from the claimant's letter of resignation, the following issues were cited as being the reason behind the said resignation: -
- i. Underpayment; On this, he stated that his job description was a chef but he was not remunerated accordingly.



- ii. Not being given sick off when he was unwell.
 - iii. Being sent on leave without any leave allowance.
 - iv. Failure by the respondent to deduct NHIF and NSSF.
 - v. Paying for his uniform at work and his hospital bills using his own money.
22. Applying the guiding principles established in *Coca Cola East & Central Africa Limited vs Maria Kagai Lugaga* (*supra*), the following questions arise; Can the issues raised by the claimant be termed as constituting fundamental or essential terms of his contract of employment? if so, was there a repudiatory breach of the said terms of the contract through the conduct of the respondent? if yes, was the conduct of the respondent so fundamental or significant as to go to the root of the contract of employment?
 23. With these questions in mind, I will proceed to revisit the claimant's contract of employment vis a vis the evidence presented before me.
 24. As per schedule 1 of the claimant's contract of employment, which he signed on 1st February, 2014, his job description is indicated as "cook" while his remuneration is indicated as Kshs 18,000/= . Whereas the claimant has averred that he was employed as a chef but remunerated as a cook, he did not tender evidence to support the said assertion. Indeed, the exhibited contract of employment does not indicate that the claimant was designated as a chef and that he was entitled to be paid Kshs 45,000.00. There was therefore no proof that the respondent breached the contract of employment as regards the claimant's remuneration.
 25. As regards the issue of sick leave, clause 14 of the claimant's contract of employment, entitled him to sick leave as per the *Employment Act*. The claimant exhibited two medical certificates dated April 26, 2014 and May 7, 2014 bearing in his name. Notably, the claimant was granted three days sick off as per the medical certificate dated April 26, 2014.
 26. Pursuant to Section 30 (1) of the *Employment Act*, an employee is entitled to sick leave of at least seven days with full pay and thereafter, to sick leave of seven days with half pay, subject to production of the requisite certificate of incapacity to work, signed by a duly qualified medical practitioner.
 27. More importantly, subsection (2) of section 30 provides that "For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it."
 28. This therefore places a precondition for the grant of sick leave by an employer to an employee. The sick leave is not automatic. The onus is on the employee to notify the employer of his or her absence from employment on account of illness.
 29. In the case herein, Clause 4.2.2 of the respondent's Employee Handbook provides for the procedure of applying for sick leave.
 30. The claimant having been granted sick off by a medical practitioner, had a duty to notify the respondent through making an application for sick leave in the manner stipulated in the Employee Handbook.
 31. The claimant did not present evidence to demonstrate that he indeed complied with the requirements in the handbook and applied for sick leave but the respondent denied him the same or granted it without pay.



32. Being granted the sick off by the medical practitioner was not an end in itself. The claimant was required to do his part and apply for sick leave based on the recommendation in the medical certificate. In absence of compliance from his end, the respondent cannot be faulted. Over and above, there is no evidence that he transmitted the medical certificate to the respondent thus bringing to its attention his medical situation.
33. Consequently, the claimant failed to prove that the respondent breached the contract of employment by failing to grant him sick leave.
34. The claimant has further averred that he was not paid any travelling allowance when he proceeded on leave. From his contract of employment, there is no provision for such an allowance. The respondent cannot therefore be held liable for failing to pay an allowance that is neither statutory nor contractual.
35. The claimant also contended that the respondent failed to remit NHIF and NSSF deductions, to the relevant authorities. Yet again, this assertion was not supported by evidence. This he could have achieved by exhibiting the relevant statements from the NHIF and NSSF. One may ask how the claimant came to know that the respondent was not remitting the statutory deductions as required? It is through the same means that he could have proved the alleged non-remittance by the respondent.
36. The claimant further alleged that he paid for his work uniform and hospital bills using his money. Nonetheless, this claim was not supported by evidence in whatever form or manner. For that reason, the claim to that extent was not substantiated.
37. It was also contended by the claimant that he was not paid for work done overtime or during rest days and public holidays. Notably, the claimant did not particularize his claim by specifying the days and hours worked and the rate he was entitled to at any particular time.
38. Clause 3.4 of the respondent's Employee Handbook, provides for entitlement to overtime paid as per the rates specified therein. In this regard, the claimant was bound to prove the hours he worked overtime or on public holidays but was not paid, in order to justify entitlement.
39. My position is fortified by the determination by the Court of Appeal in *Patrick Lumumba Kimuyu vs Prime Fuels (K) Limited* [2018] eKLR, where the learned Judges cited with approval the case of *Rogoli Ole Manadiegi vs General Cargo Services Limited* (2016) eKLR, as follows: -

“Addressing a similar issue this Court in its decision in *Rogoli Ole Manadiegi vs. General Cargo Services Limited* (2016) eKLR expressed as follows;

“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at...”

The Court disallowed that claim. This case is on all fours with the above case and we reiterate the above finding. The finding by the trial court that the appellant had failed to prove his claim with regard to compensation for public holidays and Sundays worked is without fault. That ground of appeal must therefore fail.”



40. I will hold similarly since the claimant has not discharged its burden by proving and establishing the hours or days served in excess of the legal maximum.
41. Having analyzed the issues cited by the claimant as being the reason for his resignation, I am not persuaded that there was a repudiatory breach of a fundamental term of the contract of employment by the respondent.
42. It is notable that the Court of Appeal in the *Coca Cola case* (*supra*), found that where constructive dismissal is claimed, the burden of proof lies with the employee.
43. Ultimately, it was incumbent upon the claimant to prove that there was constructive dismissal from the respondent's end. As it is, the alleged breaches complained of, have not been proved by the claimant hence I find that he has not proved on a balance of probability, that he was constructively dismissed.

Reliefs?

44. Having found that the claimant was not constructively dismissed, the claim for compensatory damages flops.
45. For the reasons set out herein, the claim for overtime, rest days and public holidays is declined as the claimant failed to prove the same.

Orders

46. The upshot of the foregoing is that the claim is dismissed in its entirety with no orders as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 16th day of September 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Amuga

For the Respondent Ms. Gichuhi

Court assistant Abdimalik Hussein

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 April 21, 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 had 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 *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.

STELLA RUTTO

JUDGE

