



**Kafwa v Sensations Limited (Petition E60 of 2021)
[2022] KEELRC 12913 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12913 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E60 OF 2021
AN MWAURE, J
OCTOBER 13, 2022**

BETWEEN

BRIAN OWARU KAFWA PETITIONER

AND

SENSATIONS LIMITED RESPONDENT

JUDGMENT

1. The Petitioner says that he was employed by the Respondent, Sensations Limited on the April 12, 2013 as a sales representative earning a monthly salary of Ksh 18,000, store allowance of Ksh 3,000 and was entitled to 2 % commission for the total monthly sale.
2. The Petitioner avers that his working relationship with the Respondent was good until the August 15, 2019 when he was sent on compulsory leave by the Respondent to look for his brother whom the Respondent alleged had stolen from them. That he was unable to get his brother and the Respondent through its Human Resource Manager, John Khaemba and deputy human resource Manager Mark Otieno hatched a plan to frustrate him so that he can resign.
3. The Petitioner claims that on several occasions he was sent on unpaid leave without any reason and discriminated by the Respondent. He says another employee who was a sales representative like him was sent on compulsory leave and paid the sum of the Ksh 5,000. But he was sent on compulsory leave on the July 16, 2020 but was not paid any monies thus the action by the Respondent of paying one Musa Odera and not paying him was discriminatory, illegal and unlawfully and in breach of his fundamental rights as provided for under Article 27 (5) of the *Constitution of Kenya 2010* and sections 5 (3) (b) and 5 of the *Employment Act* No 11 of 2007. The Petitioner avers that by discriminating him, the Respondent violated his rights to fair labour practices. The Petitioner also says that there was a failure to pay his wages which contravened section 17 of the *Employment Act* No. 11 of 2007.



4. The Petitioner says he was frustrated by mistreatment and discrimination at his work place forcing him to resign on July 21, 2020 thus his resignation was not voluntary and as such he was constructively dismissed. He says that he worked with the Respondent for a period of seven (7) years and as such he is entitled to service pay which he has not been paid.
5. The Petitioner prays for the following orders;
 - a. An order compelling the Respondent to pay the Petitioner the sum of ksh 69,000 being unpaid salaries for the months of May, June and July 2020 and commission for the month of April 2020.
 - b. A declaration that the Petitioner was constructively dismissed by the Respondent.
 - c. General damages for constructive dismissal.
 - d. An order compelling the Respondent to pay the Petitioner gratuity.
 - e. A declaration that the Respondent discriminated against the Petitioner thus violated his right under Article 27 of the [constitution of Kenya 2010](#) .
 - f. A declaration that the Respondent violated the Petitioner's right to human dignity as protected under Article 28 of the [Constitution of Kenya 2010](#).
 - g. A declaration that the Respondent violated the Petitioner's right to fair labour relations as protected under Article 41 of [the Constitution of Kenya 2010](#) .
 - h. A declaration that the Respondent violated the Petitioner's right to fair administrative practices as protected under Article 47 of [the constitution of Kenya 2010](#)
 - i. A declaration that the Respondents have contravened sections 5, 17 and 51 of the [Employment Act](#) No 11 of 2007
 - j. General damages for violation of the Petitioner's rights under Article 27 of [the Constitution of Kenya 2010](#) .
 - k. General damages for the violation of the Petitioner's rights under Article 28 of the [Constitution of Kenya 2010](#)
 - l. General damages for violation of the Petitioner's rights under Article 41 of the [the Constitution of Kenya 2010](#)
 - m. General damages for violation of the Petitioner's rights under Article 47 of the [Constitution of Kenya 2010](#)
 - n. An order fining the Respondent the sum of ksh 50,000 and committing its director in prison for three 3 months for contravening sections 5(6) as read together with section 88 of the [Employment Act](#) No 11 of the [Employment Act](#) 2007.
 - o. An order fining the Respondent the sum of Ksh 100,000 and committing its director in prison for six (6) months for contravening sections 17(2) as read together with 10 (b) of the [Employment Act](#) No 11 of 2007
 - p. An order fining the Respondent the sum of ksh 100,000 and committing its director in prison for six (6) months for contravening sections 51 of the [Employment Act](#) No 11 of 2007.



Respondent's Case

6. The Respondent entered an appearance through the firm of Mwaniki Njuguna and Co Advocates. The Respondent filed a replying affidavit and said through the affidavit deposed by its Human Resource Officer, Mark Odiwuor Otieno that the Petitioner was employed by the Respondent and his employment is not in dispute. What is in dispute are the circumstances that led to the end of employment relationship.
7. He deposes that the Petitioner introduced his brother, one Oliver Kafwa, to the Respondent and vouched for his character as a person of good standing. That since the Petitioner had been working for the Respondent for a while and he was competent and faithful to the Respondent, his vouching for his brother was taken at face value and his brother was employed by the Respondent. It is said the brother later stole from the Respondent and left employment.
8. The Respondent witness says that despite the fact that his brother had stolen from the Respondent and despite the fact that his brother was employed as a result of the Petitioner vouching for him, the Petitioner was least inclined to assist the Respondent with investigations and every time he was advised to assist in looking for his brother, he would say he was not his brother's keeper and that his work schedule did not permit him go to look for his brother.
9. He deposes that sometimes on or about August 15, 2019 or thereabouts, the Petitioner and the Human Resource Manager of the Respondent, John Khaemba agreed that the Petitioner take a few days to go trace his brother's whereabouts. He says the Petitioner appended his signature indicating that he was in agreement with compulsory leave granted to him to trace his brother's whereabouts. That the Petitioner after lapse of the seven days compulsory leave granted to him resumed work sometimes on the August 22, 2019 or thereabout.
10. The Respondent says that the allegation that he and Brian Khaemba were conspiring to have the Petitioner's services terminated constitutes hearsay evidence as the same was purportedly conveyed to him by a third party, one David Osano who had not sworn an affidavit to that effect and thus the allegations therein are of little to no evidentiary value whatsoever.
11. The witness says that the Petitioner was sent on unpaid leave due to the effects of Covid 19 which affected the Respondent's business and maintaining full capacity was not tenable hence unpaid leave days being enforced on all the employees of the Respondent and not the Petitioner only. The main reason for asking the Petitioner to take unpaid leave was not as a result of him being asked to trace his brother.
12. The respondent says petitioner resigned on his own volition and was not forced to resign.
13. The witness says that sometimes on or about January 15, 2021, after the Petitioner's dues had been calculated by the Respondent, the Petitioner was advised to come and collect a cheque in his favour for ksh 64,727.00 but he declined to do so and stated that he would be filing a suit against the Respondent. The witness further says that the Respondent has been ready and willing to pay the Petitioner his dues save for his reluctance to collect the dues.

PETITIONER'S SUBMISSIONS

14. The Petitioner submits that he resigned due to frustrations and unreasonable working conditions. He resigned on the 21st July 2020. He contends that his efforts to get his dues were futile as not even the demand letters by his advocate on record were responded to by the Respondent. He was left with no option but to file this petition seeking the reliefs sought.



15. The Petitioner submits that he was constructively dismissed. The Petitioner has relied on the case of *Coca Cola East and Central Africa Limited versus Maria Kagai Ligaga* 2015 where the Court of Appeal had held that:

The “Key element in the definition of constructive dismissal is that the employee must have been entitled to or have a right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which give rise to the test to be applied. The first interpretation is that the employee could leave when the employer’s behaviour towards him was so unreasonable so that he could not be expected to stay. This is the unreasonable test. The second interpretation is that the employer’s conduct is so grave that it constituted a repudiatory breach of employment and this is the contractual test.

16. The Petitioner has also relied on case of *Kenneth Mburu and Another versus Kibe Muigai Holdings Limited* 2014 eKLR.

Constructive dismissal occurs where an employee is forced to leave his job against his will, because of the employer’s conduct. Although there is no factual dismissal, the treatment is sufficiently so bad that the employee regards himself as having been unfairly dismissed

17. The Petitioner contends that whether the unreasonable test or contractual test is applied, the conclusion is that he was constructively dismissed. The Petitioner says that from his statements it is clear that the petitioner resigned as a result of frustrations on the part of the Respondent and its agents.
18. The Petitioner argues that it was unreasonable of the Respondent’s agents to frustrate the petitioner because of the alleged theft by his brother. The Petitioner asserts that although the Respondent have disputed that the theft of his brother had nothing to do with the termination of their relationship, this is not true but the evidence shows that at the heart of their dispute
19. To support the contention, the Petitioner says that the letter dated August 15, 2019 sending the Petitioner on compulsory leave addressed to the Petitioner by the Respondent’s Human Resource and Administration Manager stated that the Petitioner was to go and look for his brother. That on the May 5, 2020 he was sent an email by Mark Otieno sending him on unpaid leave without any justification.
20. The Petitioner says that he was on the June 10, 2020 sent on unpaid leave to look for his brother. That even though the letter stated Covid 19 as the reason for rotational unpaid leave, this is not true as there is no evidence by the Respondent that other employees too were sent on unpaid leave during that period of Covid 19.
21. The Petitioner also submits the respondent withheld his salary. The Petitioner relied on the cases of *Kenneth Kimani Mburu and Another versus Kibe Muigai Holdings Limited* (2014) eKLR and *Kangogo Chelanga versus Kenya Farmers Association* 2022 eKLR for the proposition that failure to pay salary is a fundamental breach which derogates from the terms of the contract and is definitely constructive dismissal.
22. The Petitioner further submits that the Respondent’s claim that the Petitioner refused to go for his dues, is not true as the annexed cheques are dated December 15, 2020 and January 15, 2021 and this was long after the Petitioner had resigned on the July 21, 2020. That there is no evidence to proof that the petitioner was called to pick the cheques or a letter to that effect. The Respondent did not reply to the demand letters by the Petitioner’s counsel and the demand letters are dated July 21, 2020 by Keengwe advocates and November 5, 2020 by Calistus & Co Advocates.
23. There are no submissions in the file by the Respondents.



Issues for Decision

- a. Whether the Petitioner was constructively dismissed from employment or there was mutual separation ie the Petitioner left employment voluntarily.
 - b. The remedies, if any, the Petitioner is entitled to.
24. The Petitioner has filed a Petition in response to the events leading to his leaving the employment of the Respondent Company. The issues raised on constructive dismissal, in my view, are comprehensively covered under section 45 of the *Employment Act* 2007 on fairness or otherwise of the actions on the part of the Respondent that are impeached by the subject Petition. I will accordingly address the issue of valid reason as if the petition originated by way of a claim.
25. Section 45 (1) and (2) of the *Employment Act* 2007 provides that—
- “(1) No employer shall terminate the employment of an employee unfairly.
 - (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - i. related to the employee’s conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”
26. Section 47(1) (5) of the *Employment Act* 2007 provides that
- “For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.
27. In *Milton M Isanya versus Aga Khan Kisumu* 2017 eKLR Maureen Onyango J held that:-
- In constructive dismissal, the desire to resign is from the employee as a result of a hostile working environment or treatment by the employer. Constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tenders as resignation.
28. In *Nathan Ogada Atiagaa versus David Engineering Limited* 2015 eKLR it was held that:-
- “Constructive dismissal occurs when an employee resigns because the employer’s behaviour has become so intolerable or made life difficult so that the employee has no choice but to resign. Since the resignation is not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect constructive discharge.
29. In *Coca Cola East & Central Africa Limited versus Maria Kagaai Ligaga* 2015 eKLR the Court of Appeal set out the legal principles relevant to determining constructive dismissal to include the following:



- 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 the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
 - h. The burden to prove repudiatory breach or constructive dismissal is on the employee."
 - i. Facts giving rise to repudiatory breach or constructive dismissal are varied.
30. The process in which the petitioner tendered his resignation are as follows:-
- i. On August 15, 2019 he was sent on compulsory leave for 7 days to look for his brother in order to complete investigations.
 - ii. He then received an email advising him to go on unpaid leave from May 5, 2020 and he was not to report back to work until otherwise advised. The email was apparently from the HR manager Mark Otieno. It is not quite clear where this originated from as his employer was sensations limited but the email is signed salute holdings Ltd.
 - iii. the petitioner wrote a response to one he refers as "sir" and raised the issue of witch-hunting for being sent on unpaid leave. The email is not clear who he was addressing the same to but he referred to Mr Khaamba who apparently was Human Resource manager of the respondent company. He said in the email that Mr Khaamba had threatened him and more so had insinuated he could send him on 30 days leave.
 - iv. On June 10, 2020 the petitioner was placed on unpaid leave and was told the reason was due to Covid 19 pandemic. He was nevertheless asked to try to trace his brother Oliver Kafwa who the writer said had gone underground after stealing from the company. He was sent on one month unpaid leave.
 - v. On July 16, 2020 he was sent on yet a further unpaid leave for 2 months.
 - vi. The petitioner then tendered his resignation by his letter dated July 21, 2020. He explained that he resigned because of the conflict between him and the Human resource department because of his brother Oliver Kafwa. He purported he had co-operated in tracing his brother and even given his new telephone number to them but still the situation had not improved their relationship. He therefore gave one month notice.



31. The petitioner through Keengwe & Company advocates wrote a demand letter to the respondent on July 21, 2020 and on October 5, 2020 through Calistus & Co advocates.
32. The Court did not have the benefit of any letter of respondent's response to the petitioner's demand letters.
33. The respondent however purport to have written cheques of kshs 64,727/- dated 15/1/2021 but the petitioner failed to collect them despite being called for them. These were to be his terminal dues. The petitioner however says he was never called to collect his cheques. There is no evidence tendered that the Petitioner was called to collect the said cheques.
34. The court finds the petitioner was subjected to unfair labour practices by being sent on numerous compulsory and unpaid leaves contrary to section 28 of *employment Act*. The said section provides that an employee is entitled to not less than twenty one days of leave with full pay.
35. The petitioner was sent on unpaid leave days for several months and that was quite unfair and wrong. That amounted to behaviour that would cause an employee to resign because it was clear his employment was not secure. That amounted indeed to constructive dismissal as held in the case of *Milton Isanya vs Aga Khan Kisumu* Supra where the court held :-

In constructive dismissal, the desire to resign is from the employee as a result of a hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tenders resignation.
36. The court also finds the respondent relied on factors external and not related to the employee to send him on unpaid leave. The issue of his brother had nothing to do with the petitioner's performance of his work and in fact if the brother had stolen from the company they should have engaged proper government agents to investigate the case.
37. The respondent has not raised any grounds on misconduct or poor performance on the part of the petitioner. The petitioner had worked for the respondent from 2013 to 2020 and indeed the respondent witness in his response says he was a competent and faithful employee.
38. The Court finds the act of sending the petitioner on multiple unpaid leave(s) without pay was wrongful and also discriminatory. Even though the respondent claims he sent staff on rotational leave to mitigate the effects of Covid 19 pandemic there is no proof that other staff members were sent on unpaid leave. Indeed only one Musa Odera was sent on compulsory leave and was paid at least Kshs 5,000/-. The court finds the petitioner was treated not only wrongfully and unfairly but also he was treated in a discriminatory manner as there is no evidence that other staff of the respondent were sent on unpaid leave.
39. As for the allegation that the petitioner was called to collect his terminal dues and he refused to do so that cannot be established for sure as there is no records that the respondent wrote to the petitioner to collect his dues. There is also no records from the respondent how the dues were calculated.
40. In conclusion the court finds the petitioner was constructively dismissed by the respondents and is therefore entitled to the following reliefs:
 - a. Unpaid salary of May, June, July 2020 and commission for April 2020 totalling Kshs 57,000/-.
 - b. General damages for unlawful dismissal by gross pay salary equivalent to 11 months $11 \times 18000 = 198,000/-$



- c. The order for payment of gratuity is not provided in the contract and so is not merited and is declined.
- d. The other prayers e, f, g, h, i, j, k, l, m & n are covered by the award for general damages provided in b above.
- e. The prayer to fine the Directors of the respondents for contravening sections 17(2) and 51 of employment act will not be imposed on the directors as they are ordered to settle the unpaid due plus interest at court rates from date of failure to pay the salary until fully payment and also to issue certificate of service.
- f. The respondent to pay costs of the petition.
- g. The respondent is to issue the certificate of service to the Petitioner within 14 days from today's date and total award is Kshs 255,000/- plus interest from date of failure to pay salary until full payments.
- h. Costs are awarded to the Claimant.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 13TH OCTOBER, 2022.

ANNA NGIBUINI MWAURE

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 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 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.

ANNA NGIBUINI MWAURE

JUDGE

