



**Njeru v Cobra Security Company Limited (Cause 138 of 2018)
[2022] KEELRC 12776 (KLR) (4 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12776 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 138 OF 2018
HS WASILWA, J
OCTOBER 4, 2022**

BETWEEN

JOSPHINE MUNEE NJERU CLAIMANT

AND

COBRA SECURITY COMPANY LIMITED RESPONDENT

JUDGMENT

1. The claimant instituted this suit against the respondent vide a memorandum of claim dated May 10, 2018, alleging to have been constructively terminated from employment and seeking for compensation for the alleged unfair termination. She sought the following reliefs; -
 - a) A declaration that the claimant's dismissal was unlawful, unjust and discriminative and the same amounts to constructive dismissal.
 - b) Compensation for unfair termination/constructive dismissal.
 - c) An order compelling the respondent to settle the outstanding payments per paragraph 22 of the claim of Kshs 490,000.
 - d) Costs of the suit and interest thereof at court rates.
 - e) Any other relief that this court may deem fit to grant.
2. The claimant was employed by the respondent on the February 16, 2015 as a sales and marketing executive in addition to other duties that she was assigned to from time to time. She was paid Kshs 25,000 per month for the said work.
3. The claimant avers that she worked for the respondent till March, 2017 when she was constructively terminated. According to the claimant the circumstances leading to her termination was that the claimant was not issued with a new contract of employment after the expiry of the previous contract,



- the respondent failed to issue her with payslips, failure to pay her salary for the month of February, 2017 when she was on official leave, made unlawful deduction on her salary and also failed to compensate her for a work injury that occurred in March, 2016. That she also worked for long hours without compensation. These issues contributed to her worsen working conditions, leading to her forced exit.
4. The respondent entered appearance on the July 5, 2018 and filed a response to claim on the July 16, 2018 denying the contents of the claim and instead stating that the claimant was employed by the respondent on the February 16, 2015 and served the respondent till February, 2017, where she took her leave never to return back to employment and upon following up, it was discovered that the claimant had taken up employment with one of its competitors, Superb Security Group, with effect from February 1, 2017.
 5. It is stated that the employment relationship between the claimant and the respondent was riddled with lack of diligence, attitude problems and outright dishonest.
 6. On February 28, 2017, the claimant applied for leave which was granted and upon lapse of the said leave, the claimant did not report back to work. Efforts to reach the claimant were futile. Within the same period the claimant applied for a loan from Metropolitan sacco and indicating her employer as Superb security group with effect from February 1, 2017, its at that point that the respondent learnt that the claimant was had left its employment.
 7. The respondent avers that since the claimant was already employed with Superb security group with effect from February 1, 2017, she did not deserve any benefits effective that date as such was not entitled to any salary for the said month of February.
 8. On the alleged deductions, the respondent maintained that they were statutory deduction as appearing in the claimant's payslips that was issued upon request. The respondent also denied the allegation of the claimant working overtime and stated that the claimant worked for 8 hours each day as per the appointment letter.
 9. The respondent maintained that the claimant was never terminated unfairly as alleged, neither did she resign to allege constructive dismissal therefore that the claim is without any basis.

Hearing.

10. The claimant testified as CW-1 and adopted her witness statement and in addition stated that she was employed on February 16, 2015 as per the employment contract marked as exhibit 1, which job he performed till February, 2017. She testified that she did not return back to work after taking her leave. The basis upon which the claimant did not return back to work was based on the letter of February 16, 2017 which she requested to be issued with an appointment letter upon expiry of the previous contract of employment and also for salary review, which letter did not elicit any response from the respondent.
11. Upon cross examination by Daye Advocate, the claimant testified that she was employed in February, 2015 on a six months' contract but continued working after expiry of the contract till February, 2017. She stated that the respondent had promised to issue her with another contract of employment but the same was not forthcoming. She testified that under clause 2 of the initial contract, the Kshs 25,000 was an all inclusive sum. She also testified that the payslips she received indicated the deduction as NHIF and NSSF. She further testified that she was injured in March, 2016 and not compensated but that she did not file any documents in support of the alleged claim.
12. On further cross examination, she testified that she started working for Superb security group in March, 2017 and not in February, 2017. She also admitted taking a loan with Metropolitan Sacco and



indicating his employer as Superb Security as from February 1, 2017. She stated that she came back to work after leave on March 26, 2017 only to be verbally dismissed.

13. The respondent's Branch manager, John Warui, testified as RW-1 and adopted his statement of November 4, 2019 and produced the documents in the further list of documents as their exhibits. In addition, the witness testified that once an employee signed a first contract, it was renewed automatically upon expiry. He also testified that the salary paid to the claimant was a consolidated sum and the claimant was given her payslips upon request. The witness testified further that the termination letter of March 30, 2017 was issued upon her when it was discovered that the claimant was working for the respondents competitors' from February 1, 2017.
14. Upon cross examination by Imbwaga Advocate, the witness testified that they issued their employees with payslips upon requests. He testified that the contract was renewed automatically annually but the same was not indicated in the contract of employment. The witness testified that he was not sure whether the letter of the claimant requesting for salary review and contract of employment was responded too, neither was he aware whether the letter from Kurere Advocate was received by the respondent. He testified that Metropolitan Sacco was a Sacco by the respondent but that he was not the one that manages it or signed the loan application forms by the claimant. He also testified that he did not issue the claimant with a notice to show cause or took her through any disciplinary action but that they issued him with a summary dismissal letter of March 30, 2017 upon learning that he was working for their competitor.
15. Upon re-examination the witness testified that the claimant took leave on February 27, 2017 for 23 days and was to report back to work on March 27, 2017 but failed to report back to work without any excuse.

Claimant's Submissions.

16. The claimant submitted on three issues; whether there existed an employer-employee relationship between the claimant and the respondent, whether the termination of the claimant's employment was valid both procedurally and substantively and whether the claimant was entitled to the reliefs sought.
17. On the first issue it was submitted that the claimant was an employee of the respondent from February, 2015 to February, 2017 in the position of Sales and marketing executive. That this fact was admitted by the respondent's witness in cross examination therefore the claimant has proved that fact to the required standard.
18. On the second issue, it was submitted that the termination of the claimant's services was not done in accordance with section 43(1) of the *Employment Act*. To support her case she relied on the case of *George Onyango Akuti v Security Service Kenya Limited* [2013] eKLR. where the court held that;

“An unfair termination could be because no notice was given as required by section 35(1); no reasons were given or because the employee was not afforded a hearing as required by section 41 of the Act. The reasons can be various based either on failure to comply with the statute or the terms of the actual employment contract. The obligation on an employee is not as onerous as the obligations on an employer”



19. On reason leading to the constructive termination, it was submitted that the respondent's conduct made her engagement with the respondent so difficult that she had to resign. In this she relied on the case of *Coca Cola East and Central Limited v Maria Kagai Ligaga* [2015] eKLR where it was held that;

“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.” These acts of foreign parliaments do not of course bind this court, but an overall understanding of the concept is gained from a comparative look, particularly in view of the omission in our own statutory law. Common law, which has been embraced in our law through section 12 of the *Labour Institutions Act* Number 12 of 2007, treats constructive dismissal as a repudiatory breach by the employer of the contract of employment. The employer’s behavior 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. There is no practical difference in terms of effect, between the statutory and the common law concept on constructive dismissal; it is unlikely that an employer is in fundamental breach of the contract of employment, but all the same is found to have acted fairly. It is very unlikely that a common law breach occurs without amounting to a statutory wrong. 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.”

20. It was submitted that the termination failed to adhere to the provisions of section 41 and 43 of the *Employment Act* as such it was unfair in the circumstances and the respondent ought to be compelled to compensate the claimant as prayed in the memorandum of claim.

Respondent’s Submissions.

21. The respondent on the other hand submitted on two issues; whether the claimant’s dismissal was justified and whether the claimant was entitled to the reliefs sought;
22. On the first issue, it was submitted that section 47(5) of the *Employment Act* mandates the claimant to demonstrate that her services were terminated unfairly. It was argued that contrary to clause 7 of the claimant’s employment contract the claimant failed to report to work after the lapse of her leave and also breached clause 8 of the said employment contract that required her to devote all her time



to her employer and instead engaged in another employment with Superb Security Group, while still working for the respondent, therefore that the termination letter of March 30, 2017 was justified as it was done in accordance with section 44 of the *Employment Act*. In support of their case they relied on the case of *Kenya Revenue Authority v Reuel Waitbaka Gitabi and 2 others* [2019] eKLR, where the Court of Appeal held that;

“The appellant(employee) in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

23. It was argued that notice of termination could not be send to the claimant because the claimant through Kirere and company advocates had, vide the letter of March 9, 2017, indicated that she was no longer working for the respondent when the respondent was on the believe that the claimant was on leave and still working for it. It is argued that in the circumstances the claimant was the one that ought to have given notice of termination.
24. The respondent maintained that the claimant has not discharged the burden of proving her case on a balance of probability and therefore is not deserving of the reliefs sought.
25. With regard to notice pay, the respondent submitted that the claimant left employment while on leave and joined the employment of its competitor, therefore that the Notice pay is not justified. On February and March ,2017 pay, the respondent submitted that the claimant was paid her February, 2017 salary as evidence by Rexh1, however, March salary is not payable as the claimant did not work for the said month, having taken up employment with another employer that month.
26. On house allowance pay, it was submitted that the Kshs 25,000 paid to the claimant was an all inclusive sum. On service pay the respondent submitted that the claimant was an NSSF paid up member therefore is not deserving severance pay and on gratuity it was submitted that the contract of employment did not provide for any gratuity as such is not payable.
27. In conclusion, the respondent urged this court to disallow the claim in its entirety with costs to the respondent.
28. In this claim the claimant has averred that she was constructively dismissed by the respondents but has admitted that she worked for the respondents and took up another job with another company with effect from February 1, 2017.
29. The claimant also admitted that she was a member of NSSF and NHIF and therefore the issue of pension and service pay does not arise.
30. It is also evident that the claimant took up another appointment with another company with effect from February 1, 2017 when she was still in employment of the respondent in February, 2017.
31. The issue of termination does not in the circumstances arise.
32. The claimant has sought to be paid notice pay, salary arrears, service gratuity, leave allowance and compensation for unfair termination.
33. The claimant having admitted taking up another job in another organization, the issue of notice does not arise.



34. The claimant also having been a member of NSSF she is not entitled to payment of service pay on gratuity.
35. Her salary was also a consolidated sum inclusive of house allowance and so the claim for payment of leave allowance does not arise.
36. It is my view that the claimant has not proved her claim as envisaged.
37. Having found that she was not terminated, I find the entire claim fails and I dismiss it accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 4TH DAY OF OCTOBER, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Awuor holding brief for Daye for respondent – present

Imbwaga for claimant – present

Court Assistant – Fred

