



**Guantai v Great Lakes Ports Limited (Cause 5 of 2019)  
[2022] KEELRC 13289 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13289 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 5 OF 2019  
AK NZEI, J  
NOVEMBER 24, 2022**

**BETWEEN**

**JOSEPHINE KAGWIRIA GUANTAI ..... CLAIMANT**

**AND**

**GREAT LAKES PORTS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant sued the respondent vide a memorandum of claim dated January 24, 2019 and filed in court on February 12, 2019, and pleaded that she was employed by the respondent in its finance department on permanent and pensionable terms around about December 10, 2011, earning a gross salary of Kshs 117,474 per month.
2. The claimant further pleaded that on or about December 16, 2016, a meeting was held at the respondent's premises whereby the claimant's position of accounts payable was discussed, and that subsequently, the respondent wrote a letter to the claimant dated December 19, 2016, informing her that her position was being abolished.
3. The letter written by the respondent to the claimant on December 19, 2016 read in part:-

“Further to our meeting held on December 16, 2016, this is to formally advise you that there is a potential of your position in Great Lakes Port Limited being rendered redundant.  
You will be required to reapply afresh for your position when the new organizational structure has been communicated to all the affected staff within a few days..”
4. The claimant further pleaded:-
  - a. That the abolition of her post was under a disguised redundancy, but after she was removed from her position in accounts payable, someone else was given the same position.



- b. That an accounts receivable position was then advertised internally via email on December 24, 2016, and other members of the staff were asked to apply. That the claimant had no choice but to apply to the aforesaid role.
  - c. That the claimant was on February 6, 2017 offered the position of Accounts Receivable Team Leader on probation basis.
5. The letter dated February 6, 2017 read in part:-
- “Re: Internal Transfer
- ...we are pleased to inform you that following the recent interviews and internal re-organization, you have been appointed to the position of Accounts Receivable Team Leader. The position is reporting to the Chief Accountant and the commencement date will be March 1, 2017.
- Please note that all the other terms and conditions mentioned in your employment contract shall remain the same.
- A probationary period of 6 months shall apply. During your probation, the employment may be terminated by either party as per the terms and conations of your contract...”
6. It was the claimant’s pleading that her new role as an Accounts Receivable Team Leader involved ensuring that the respondent received payment for all services offered or goods sold to clients, which involved sending out bill reminders and statements to clients, posting financial transaction to an accounting system and making bank deposits. That the claimant’s old role as Accounts Payable Clerk involved ensuring that the respondent paid its bills on time and that the respondent was being billed the proper amounts; which involved receiving, opening and logging invoices and getting approval to pay invoices from departmental heads where necessary.
  7. The claimant further pleaded that the new role that she was given was not compatible with her skills and expertise, and that to end her frustration at work she resigned from her work place. That the respondent constructively dismissed the claimant from her role as Accounts Payable and that such termination was unlawful, abrupt and was in contravention of the Constitution of Kenya, 2010, rules of natural justice, labour laws and fundamental International Labour Conventions.
  8. The claimant further pleaded that termination of her employment was without a fair and valid reason and was without notice. The claimant set out the following claim against the respondent:-
    - a. One month notice pay.....Kshs 117,474
    - b. 21 accumulated leave days.....Kshs 166,044
    - c. Severance pay at 15 days for every year worked (78.75 days) .....Kshs 355,792
    - d. Maximum compensation for wrongful and unlawful termination under sections 49 and 50 of the Employment Act (Kshs 117,474X 12).....Kshs 1,409,688
    - e. Certificate of service.
    - f. Costs and interest.
  9. The claimant filed her written witness statement dated January 24, 2019, replicating the averments made in the memorandum of claim, and a list of documents evenly dated, listing the documents/letters mentioned in the memorandum of claim, all of which accompanied the statement of claim.



10. The respondent entered appearance on August 1, 2019 and filed a statement of response on November 15, 2019. The respondent pleaded, *inter-alia*:-
  - a. That the claimant was on December 10, 2012 engaged by the respondent as an accounts payable and that pursuant to a change in the respondent's organizational structure towards the end of 2016 the claimant's position of accounts payable was rendered redundant.
  - b. That the claimant was required to re-apply, which she did, and that after interviews, she was promoted to the position of Accounts Receivable Team Leader, which position she held until February 28, 2017 when she resigned.
  - c. That the claimant was earning a monthly salary of Kshs 117,474 at the time of her resignation.
11. The respondent admitted at paragraph 3 of its statement of response that the claimant had been employed by the respondent on permanent and pensionable terms on December 10, 2011.
12. The respondent denied that the claimant had been constructively dismissed from her role as Accounts Payable, or that she was unlawfully terminated from employment.
13. On October 16, 2020, the respondent filed a witness statement of one Juliet Wangechi Wachiuri dated October 14, 2020 and an evenly dated list of documents listing some five documents. Documents listed included the claimant's employment contract dated December 10, 2012 and the claimant's resignation letter dated February 28, 2017, among others.
14. When trial opened on May 10, 2021, the claimant adopted her filed witness statement as her testimony. The claimant further testified:-
  - a. That she was employed by the respondent on December 10, 2012, that she served and completed a six month's probationary period, and that the contract was for an indefinite period.
  - b. That the claimant was on December 19, 2016 issued with a letter informing her that she would be required to re-apply afresh for her position. That although the Accounts Payable position was to be declared redundant, it was given to another person, Mercy, who had usually worked under Accounts Receivable.
  - c. That the claimant was given a letter dated February 6, 2017, which referred to a probationary period of six months; and stated that the claimant's terms of contract would, however, remain as per her contract.
  - d. That the claimant felt bad being put back to probation, and being given a new job description which she was not conversant with as she was not conversant with KRA and KPA systems which was a real challenge to the claimant. That she was being framed up as she could not achieve her targets as it was difficult to learn that system.
  - e. That she resigned as she felt frustrated.
  - f. That the new position was not a promotion as there was no salary increment.
15. The respondent called one witness, Juliet Wachiuri (RW-1) who adopted her filed witness statement as her testimony. She also produced in evidence the documents listed on the respondent's list of documents. The witness (RW-1) further testified that the claimant was, according to the letter dated February 6, 2017, supposed to start the job to which she was appointed on March 1, 2017, but voluntarily resigned vide an undated letter received by the respondent on February 28, 2017.



16. The witness (RW-1) further testified that the respondent's letter to the claimant dated February 6, 2017 stated that the claimant would be on probation for six months and that the letter was titled "internal transfer." The witness further testified that she had nothing to show that the claimant had been paid her dues.
17. Having considered the pleadings and evidence adduced by both parties, issues that present for determination, in my view, are:-
- Whether the claimant was constructively terminated by the respondent.
  - Whether the claimant is entitled to the reliefs sought.
18. On the first issue, the respondent's allegation that the position of Accounts Payable held by the claimant was rendered redundant is not tenable in law. Section 40 of the [Employment Act](#) sets out a mandatory procedure that must be followed step by step by employers in declaring redundancies. Such steps were not followed in the present case. The [Black's Law Dictionary](#) defines redundancy as follows:-
- "A situation in which an employee is laid off from work because the employer no longer needs the employee".
19. In the present case, the claimant was instructed by the respondent, vide a letter dated December 19, 2016, to re-apply a fresh for her position on completion of the respondent's new organizational structure. There was no proper or lawful redundancy. I recently held as follows in the case of [Dr Judy Njeri Kairo -vs- John Hopkins Programme for International Education in Gynecology and Obstetrics \[JHPIEGO\] Kenya](#) [2022] eKLR:-
- "...a process that is undertaken by an employer that includes re-absorption of terminated employees back to the employer's employment/workforce at lower or even higher levels of employment is not redundancy. Such a process bears the countenance and hallmark of an illegal process whose end goal may be to illegally change employee's terms and conditions of employment without consulting the employees as contemplated in section 10(3) of the Employment Act."
20. The respondent in the present case purported to re-absorb the claimant into its work force but on a different job description upon the claimant's previous position being allegedly rendered redundant, but on the same terms as set out in the claimant's contract of employment under which the claimant had been employed on permanent and pensionable terms. The respondent, however, purported to put the claimant on six months' probation, during which the claimant's employment could be terminated by either party as per the terms and conditions of the claimant's contract. The claimant testified that she had previously served and completed probation under that contract.
21. The claimant further testified that she felt frustrated, framed up, and unable to achieve her targets on the new roles for which she lacked expertise. She resigned and brought the present suit, seeking compensation for constructive termination of employment, among other reliefs.
22. The Court of Appeal stated as follows in the celebrated case of [Coca-cola East & Central Africa Limited-vs- Maria Kagai Ligaga](#) [2015] eKLR:-
- "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. The employer's behavior in either case must be shown to be heinous, so intolerable, made it considerably difficult for the



employee to continue working. The employee initiates the termination believing himself 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 that 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."

23. It is my finding that the claimant's employment was constructively terminated by the respondent.
24. On the second issue, I award the claimant the equivalent of eight months salary being compensation for unfair termination of employment. That is Kshs 117, 474 X8 = 939,792.
25. The claim for one month salary in lieu of notice is allowed at Kshs 117,474 under section 35(1) (c) of the *Employment Act*. The claim for unpaid leave days was not pleaded, and was therefore not proved. The same is declined. The claim for severance pay is declined as the claimant's termination was not on account of redundancy. The claim for issuance of a certificate of service is allowed.
26. Finally, and having considered submissions filed by Counsel for both parties, Judgment is hereby entered for the claimant against the respondent for:
  - a. The equivalent of eight months' salary being compensation for unfair termination of employment.....Kshs 939,792
  - b. One month salary in lieu of notice .....Kshs 117,474Total Kshs 1,057,266
27. The awarded sum shall be subject to statutory deductions pursuant to section 49(2) of the *Employment Act*.
28. The respondent shall issue a certificate of service to the claimant pursuant to section 51(1) of the *Employment Act* within thirty days of this judgment.
29. The claimant is awarded costs of the suit and interest at court rates. Interest shall be calculated from the date of this judgment.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022**

**AGNES KITIKU NZEI**

\_\_JUDGE\_\_

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

N/A for Claimant

Mr. Mugambi for Respondent

