



**Ramogi v Great Lakes University of Kisumu (Cause 2 of 2022)
[2022] KEELRC 13032 (KLR) (2 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13032 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 2 OF 2022
S RADIDO, J
NOVEMBER 2, 2022
(ORIGINALLY, KISUMU ELRC CAUSE NO. 101 OF 2021)**

BETWEEN

PAUL ODHIAMBO RAMOGI CLAIMANT

AND

GREAT LAKES UNIVERSITY OF KISUMU RESPONDENT

JUDGMENT

1. Paul Odhiambo Ramogi (the claimant) sued the Great Lakes University of Kisumu (the respondent) before the magistrates court, alleging unfair termination of employment and breach of contract.
2. The respondent filed a response on August 12, 2021, prompting the claimant to file a reply to the response on August 19, 2021.
3. On March 11, 2022, the magistrates court declined jurisdiction in light of gazette notice No 6024 of June 10, 2018, and the cause was transferred to this court (the transfer order was issued in Misc application No 25 of 2022).
4. The parties filed agreed issues on June 14, 2022, and the Cause was heard on June 27, 2022.
5. The claimant filed his submissions on August 3, 2022, and the respondent did not file submissions as directed.
6. The court has considered the pleadings, evidence, and submissions.

Constructive Dismissal

7. Issues 2 and 3, as identified by the parties, questioned whether the respondent constructively dismissed the claimant or whether he deserted work.



8. Constructive dismissal does not have a statutory underpinning in Kenya, but the courts have accepted it.
9. As a legal principle, the English Court of Appeal outlined what constitutes constructive dismissal in *Western Excavating (CC) Ltd v Sharp* (1978) ICR 221, where it stated:

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.
10. Within the local jurisdiction, the Court of Appeal addressed the question of constructive dismissal in *Coca-Cola East & Central Africa Limited v Maria Kagai Lugaga* (2015) eKLR, wherein it stated:

The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives 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 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 constitutes a repudiatory breach of the contract of employment- this is the contractual test.....
11. The claimant pleaded that the respondent constructively dismissed him in March 2021 and testified that the reasons which led to the constructive dismissal were that the respondent had failed to pay him salaries from October 2020 to March 2021 and had instructed the guards not to allow him into the workplace allegedly because he was affiliated to a Vice-Chancellor who had been replaced.
12. The claimant produced a letter dated January 15, 2021 that he had written to the respondent, raising concerns about his safety, being locked out of the workplace, and indicating a readiness to resume work.
13. The respondent's Human Resource Manager replied to the letter informing the claimant that he was required to submit his employment records for reconciliation and that he had failed to provide the same by the date of the communication (email-around February 3, 2021).
14. The claimant responded on February 5, 2021, indicating that he had sent a colleague the previous day to deliver the documents.
15. However, the respondent took the position that the claimant abandoned work around December 2020 and that his employment was not terminated.
16. The respondent's witness testified that the claimant stopped reporting to work when a new administration took over and that despite written instructions to produce professional and academic documents when the new administration took over, he failed to comply (stated to have been destroyed by the previous administration).
17. According to the witness, the claimant left without a trace and that his contract had not been terminated.
18. The payment of a salary or remuneration is essential of an employment contract. It is a fundamental term, and a breach thereof would amount to a grave and unreasonable conduct on behalf of the employer, warranting the employee asserting so and leaving.



19. The claimant herein did not indicate an intention to leave. His demonstrated intention was to resume work through the letter dated January 15, 2021, and the court finds the separation was not on account of constructive dismissal.

Desertion

20. The respondent had insisted that the claimant deserted work.
21. This court rendered itself on the question of desertion in *Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers v Cool Rivers Hotel Ltd* (2017) eKLR as follows:

The question of what constitutes desertion in employment law is not a straightforward one.

Desertion is not the same as being absent from the place appointed for work without permission or lawful cause as envisaged under section 44(4)(a) of the *Employment Act*, 2007.

It needs no debating that absence without permission or lawful cause attracts summary dismissal. But the employee who is absent has no intention of not resuming work.

Desertion, on the other hand, in employment law, is a repudiation of the contract of employment. The employee who deserts is in breach of contract, and an employer is entitled to dismiss him on the ground of repudiation of contract. This is because he has no intention of turning up for work.

Repudiation of contract, generally in common law, does not terminate an employment contract. The innocent party should accept the repudiation (see my decision in *Philomena Aromba Mbalasi v Uni-Truck World Ltd* (2015) eKLR citing with approval *London Transport Executive v Clarke* (1981) IRLR 166).

The court also wishes to observe that in *Geys v Societe Générale, London Branch* (2012) UKSC 63, the Supreme Court of the United Kingdom confirmed the principle that a repudiated employment contract does not end until the repudiation is accepted.

Where an employer alleges desertion, it must prove the ingredients of desertion. A primary ingredient of desertion to be proved by the employer is that the employee has no intention of returning to work. The employer must also demonstrate that it accepted the repudiation (the same would apply to an employee who asserts an employer has repudiated a contract).

Establishing the intention not to return to work will depend on the facts as presented in evidence.

The respondent did not present any facts from which the court could conclude that the grievant had no intention to return to work. The respondent failed to discharge the burden of proving that desertion was a reason for termination of employment as required by section 43 of the *Employment Act*, 2007.

Further, under the statutory framework in our jurisdiction, even the deserting employee is entitled to a hearing. And to ensure that due process is followed, the employer should make reasonable attempts to contact the employee. This can be through phone, email, colleagues or even contact details in the employee's file (records).

An employer can also issue an ultimatum, such as through a show cause letter addressed to the employee's contact details on its records.

22. The respondent here did not prove that the claimant deserted work. On the contrary, the claimant's letter dated January 15, 2021 indicated an intention to continue with work only if he would be granted access to the workplace.
23. The court, therefore, finds that the claimant did not desert duty.



Breaches Of Contract

24. The respondent issued an employment contract signed on January 1, 2007 appointing the claimant to the position of office assistant.
25. Clause 5.2 of the contract provided:

As an office assistant you will be in grade 1 step 3 of the GLUK salary structure. In addition, you shall be given 30% of your basic salary as house allowance and Kshs 2,000 per month as a medical allowance. In addition, you will benefit from a contributory pension scheme where the university will contribute 12.5%, and you will contribute 12.5% of your basic salary towards the provident fund. Further, the University will invest 10% of your basic salary into your TICH Sacco shares towards a permanent housing scheme. Part of the medical allowance may be applied to AAR medical insurance cover.
26. The claimant alleged that the respondent breached this clause of the contract and other terms as addressed hereunder.

Saccho Deductions

27. The claimant contended that the respondent used to make monthly deductions of Kshs 500/- from his salary but did not remit the same to a Saccho and that by March 2021, the respondent had deducted but not remitted Kshs 80,000/-.
28. The respondent denied that the claimant's contract had any express or implied terms concerning the saccho contributions.
29. However, the witness statement, which was adopted as part of the evidence, was silent on the contentions of the deductions.
30. The claimant produced copies of his contract and pay slip to show that there was a clause on Saccho contributions and that the deductions were reflected therein.
31. Since the respondent was making deductions at source (from the payroll), the least it should have done was to produce records to show it forwarded the deductions to the Saccho. It did not.
32. The court is satisfied that the respondent was in breach of contract on Sacco deductions and finds it culpable in the sum of Kshs 80,000/-.

Housing Scheme

33. The claimant's appointment letter indicated that the respondent would invest 10% of his basic salary towards a housing scheme.
34. The respondent did not provide any records to establish that it fulfilled this part of the contract, and the court will allow the relief claimed of Kshs 402,139/90.

Pension Scheme

Octagon pension scheme

35. The claimant produced a member statement from Octagon Umbrella Retirement Benefits Scheme, showing that he joined the scheme on June 1, 2016.
36. The statement shows that the respondent made contributions from May 2016 to August 2016 but did not remit contributions from September 2016.



37. The claimant computed the unremitted contributions as Kshs 470,700/-. The respondent did not provide any records to demonstrate that the contributions were forwarded to the pension scheme, and the court will allow this head of the claim.
38. The court allows the head of the claim on the understanding that this is purely a dispute between an employee and employer on non-remittance of pension contributions, thus outside the remit of the Director of the Retirement Benefits Authority or the tribunal established under the Act.

Contributory Pension January 2007 to April 2016

39. Clause 5.2 of the claimant's letter of appointment provided for membership and contribution to a provident fund at a rate of 12.5% from both of the parties.
40. The claimant asserted that the respondent did not remit its portion of contributions amounting to Kshs 259,435.07 towards the pension scheme (from January 2007 to March 2016).
41. The respondent did not rebut the testimony or place before the court any records to show the contributions were made.
42. The court, therefore, finds a contractual basis to the claims for Kshs 259,435.07.

National Social Security Fund contributions

43. On account of contributions towards the National Social Security Fund, the claimant contended that the respondent failed to remit deductions from November 2020.
44. The Act establishing the fund has provisions for enforcing payment of deducted but unremitted contributions, including the imposition of penalties.
45. The claimant should invoke the provisions by making an appropriate report to the trustees of the fund.

Loan deductions: Rafiki Microfinance Bank

46. The claimant took a loan from Rafiki Microfinance Bank, and according to the claimant, the respondent deducted from his salary but did not remit Kshs 275,590/- (from April 2015 to February 2020). Copies of pay slips produced in court confirmed the deductions.
47. The respondent did not rebut or controvert the claimant's testimony, and the court will allow this head of the claim.

Loan deductions: NCBA

48. The claimant produced a copy of a letter dated May 12, 2021 demanding payment of a loan balance of Kshs 634,535/41.
49. However, the claimant did not produce any contractual or legal nexus between the loan and the respondent save for a copy of a pay slip for May 2019. The pay slip showed a nil balance in May 2019.
50. Without such a nexus, the court cannot determine the extent of the respondent's liability in the default to repay the loan.

Salary Arrears

51. The claimant further alleged that the respondent had not paid his salaries from October 2020 to March 2021, amounting to Kshs 357,030/-.



52. The *Employment Act* requires an employer to keep pay records. The respondent did not file such records in court, and the relief is allowed.

Damages For Breach Of Loan Check-off Agreement

53. The claimant did not place a copy of the loan check-off agreement before the court, and the court finds no basis to consider awarding damages for breach of such a contract.

Damages For Violations Of Human And Labour Rights

54. The claimant prayed for damages for the alleged violation of his human and labour rights with the contention that the respondent had violated the rights by failing to remit his loan repayments and to pay his salary for October 2020 to March 2021.

55. The claimant did not establish a legal link for the award of the damages.

Conclusion and Orders

56. The claimant did not prove constructive dismissal, but he proved breach of the contract warranting relief as awarded hereunder.

57. The claimant is awarded:

- i. Saccho deductions Kshs 80,000/-
- ii. Housing scheme Kshs 402,139/-
- iii. Pension scheme Kshs 259,435.07
- iv. Octagon pension Kshs 470,700/-
- v. Rafiki bank deductions Kshs 275,590/-
- vi. Salary arrears Kshs 357,030/-

Total Kshs 1,844,896/-

58. The claimant to have costs.

DELIVERED VIRTUALLY FROM MOMBASA, DATED AND SIGNED IN KISUMU ON THIS 2ND DAY OF NOVEMBER 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant ROW Advocates LLP

For Respondent Owiti, Otieno & Ragot Advocates

Court Assistants Chrispo Aura/Everlyne Nyaboke

