



**Deya v Safaricon Limited (Cause 630 of 2019)
[2022] KEELRC 13561 (KLR) (16 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13561 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 630 OF 2019
J RIKA, J
DECEMBER 16, 2022**

BETWEEN

TIMOTHY OLUOCH DEYA CLAIMANT

AND

SAFARICON LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on September 24, 2019. He states he was employed by the Respondent on September 8, 2010, as a Customer Experience Assistant. He was initially on part-time contracts, which were always renewed, after every 6 months. On September 29, 2013, he was appointed as a Customer Experience Executive, on permanent and pensionable terms, earning a monthly salary of Kshs 83,000.
2. On August 13, 2014, he became Customer Experience Executive Line 200, on a monthly salary of Kshs. 84,057. He held this position to the date of termination.
3. His work involved receiving calls from Respondent's Customers and typing for long hours. In, or about late 2014 and early 2015, he started feeling pains to his ears and experiencing vertigo and dizziness. He felt pain in his left wrist. He visited Valley ENT Clinic at Nairobi, where he was diagnosed to be having Acoustic Shock Syndrome [Noise, Pain, and Irritation in his ears].
4. The Medical Report from the Clinic was sent directly to the Respondent's Human Resource Manager, who declined to share it with the Claimant.
5. He visited Nairobi West Hospital, Meridian Hospital, where he was diagnosed with Carpal Tunnel Syndrome, caused by continued typing. At the Aga Khan Hospital, he was found to be suffering from Complex Regional Pain Syndrome Type 1 on the left hand.



6. With his health frailing, and compelled to visit hospitals frequently, the Claimant faced incessant harassment from the Human Resource Manager, who insisted that the Claimant presents himself at the workplace for duty, even when the Claimant was on sick off, or on medical appointments.
7. The Claimant's medical cover became exhausted in 2016. The Respondent refused to bail the Claimant out. The Human Resource Manager deployed the Claimant to another department in mid-2016. The Claimant was not able to discharge his assigned duties there, because of his poor health. The Claimant brought this to the attention of the Human Resource Manager, who told the Claimant to resign, if he was no longer able to work.
8. These frustrations, and overall hostile work environment, rendered the Claimant's employment untenable, prompting him to resign on October 28, 2016. He avers that his resignation amounted to constructive dismissal. He prays for Judgment against the Respondent for: -
 - a. Notice pay at Kshs 87,057.
 - b. 12 months' salary for unfair termination at Kshs 1,008,693.
 - c. Costs.
 - d. Interest.
 - e. Any other relief.
9. The Respondent filed its Statement of Response dated March 15, 2021. Its position is that it is a Limited Public Company, registered under the Companies Act, Cap 486 the Laws of Kenya.
10. It accepts that the Claimant was its Employee, as pleaded in the Statement of Claim. He worked until September 28, 2016, when he voluntarily tendered his letter of resignation.
11. The Respondent was aware of the Claimant's diagnosis with an Ear, Nose and Throat [ENT] ailment. He communicated his Complex Regional Pain Syndrome Type 1 diagnosis to the Respondent. The Respondent conscientiously allowed the Claimant medical leave, whenever needed. His salary continued to be paid in full.
12. Sometime in August 2016 the Respondent's Ethics and Compliance Team, conducted investigations into irregular access to Customers' call records. It was discovered that between April-July 2016, the Claimant accessed the Respondent's Customer mobile line MSISDN O721599405, fifty-six [56] times. It was on diverse dates, and on all occasions, without the Customer's knowledge and authorization. He failed to enter the interactions on the Respondent's Siebel System, as required under the Respondent's Call Care Centre Procedure, on handling of service requests from unofficial sources.
13. The Claimant was required to record a statement, which he did, conceding that he irregularly accessed the Customer's account. He alleged that the Customer was a close family friend, who had requested the Claimant to assist on all occasions.
14. Notwithstanding the misconduct, the Respondent invited the Claimant for a meeting to discuss his redeployment on medical ground. The Claimant declined to attend the consultative meetings, instead opting to resign. At all material times, the Respondent assigned the Claimant duty in accordance with his medical condition. He resigned on September 28, 2016 voluntarily. The Respondent accepted his resignation.



15. In accepting resignation, the Respondent noted that a disciplinary process had been initiated against the Claimant for professional misconduct, and that the Respondent reserved its right, in ensuring the investigation and disciplinary processes continued.
16. He was invited for disciplinary hearing, scheduled on October 4, 2016. The notification of disciplinary hearing is dated September 29, 2016. The Claimant resigned on September 28, 2016, to avoid the disciplinary process.
17. He does not merit notice pay, having resigned voluntarily, to avoid the disciplinary process. Out of goodwill, the Respondent paid to the Claimant, the salary for October 2016, despite his resignation on September 28, 2016.
18. The Respondent did not terminate the Claimant's contract constructively or otherwise. He willingly left employment. The Respondent did not in any way act in a manner to suggest that it no longer intended to be bound by the contract between it, and the Claimant. There was no evidence that the medical condition suffered by the Claimant was work-related.
19. The Respondent urges the Court to dismiss the Claim, with costs to the Respondent.
20. The Claimant gave evidence and rested his case, on March 11, 2022. Odhiambo Ooko, the Respondent's Senior Manager, Employee Relations, gave evidence on July 21 2022, closing the hearing. The Claim was last mentioned on September 30, 2022, when Parties confirmed filing and exchange of their Closing Submissions.
21. The Claimant adopted his Witness Statement on record, and documents exhibited from number 1 to 12. He restated the medical problems he experienced, while working for the Respondent. He consulted his Supervisor, and was called to meetings, to discuss his redeployment. He was offered duty at Respondent's Regional Centre, where he was to perform the same type of duties he was performing previously, albeit physically rather than on the phone. He was to continue typing. He was advised that the Respondent did not have any other alternative work. He was advised if he could not work at the Call Centre, it was time he considered leaving the Organization. He was compelled to write the letter of resignation dated September 28, 2016, because his condition could not allow him to continue working.
22. He did not resign to avoid disciplinary proceedings. His letter was on September 28, 2016, and was accepted by the Respondent on the same date. Invitation to attend disciplinary hearing was on September 29, 2016. Redeployment as offered was not genuine.
23. Cross-examined, the Claimant told the Court that his salary was raised to Kshs. 83,000 in 2013, and 84, 057 in 2014. He was promoted at various points. The Medical Reports were not clear what caused his condition. The ENT Report was sent directly to the Respondent. The Doctor advised that the Claimant could get the Report from the Respondent. He did not request for a copy as advised, at that time.
24. He was constantly harassed by the Respondent's Human Resource department, even when he was ailing. He was called and asked by the Respondent why he was not at work, even when the Respondent knew he was unwell and on sick-off. The genuineness of his sick-offs was doubted by the Respondent. He was invited to attend a meeting to discuss redeployment. He did not attend. He was accused of misconduct before resignation. It is true that he had accessed a Customer's number 56 times. The Customer was someone the Claimant was familiar with. He resigned because he could not work at Regional Centre, Retail Department. The accusation on irregular access to a Customer's account, came before September 28, 2016 when the Claimant resigned. He did not resign as a means of avoiding disciplinary proceedings. He did not attend disciplinary hearing. He was still serving the notice period,



- on the date disciplinary hearing was scheduled. The cause of the medical condition was not established. He seeks notice, although he resigned and served the notice period.
25. Redirected, the Claimant told the Court that he resigned, because of his inability to do the work he was assigned. He was unwell and could not attend disciplinary hearing and redeployment meetings. His initial salary was Kshs 63,000 monthly. There were subsequent increments. His last salary was about Kshs. 84,000. The medical problem started around the year 2014, during the Claimant's employment with the Respondent. He was on bed-rest when the disciplinary hearing was scheduled to take place. He communicated this orally, with the Human Resource department. Most communication was oral. He has not secured another job, after leaving the Respondent.
 26. Odhiambo Ooko adopted his Witness Statement and 11 documents, filed by the Respondent, in his evidence. He confirmed that the Claimant was employed by the Respondent, and that he resigned voluntarily, on September 28, 2016. He had pending disciplinary issues. He was summoned to attend disciplinary hearing for tampering with a Customer's phone number. It was an act of gross misconduct. He recorded a statement, and resigned before he could be heard. He alleged that resignation was on medical ground. He had not brought to Respondent's attention, his medical condition.
 27. Cross-examined, Ooko told the Court that he had worked with the Respondent for 6 years, at the time of giving evidence. Ooko was employed on September 1, 2016. He found the Claimant in employment. The email at page 67 of the Claimant's documents, is addressed to Ruth, by the Claimant. It refers to the Claimant's medical condition. Ooko insisted that the Claimant did not make it known to the Respondent, that he had a medical condition. Ruth worked in the Human Resource department. The email refers to medical report from Valley ENT. The Claimant was going to discuss the report with Ruth. The Claimant was offered redeployment. He said he did not wish to continue working. He was not required to type at the Customer Care department. Not all Employees type at this department. Ooko was not privy to the communication between the Claimant and Ruth on the subject. He did not know what duties the Claimant was assigned at Customer Care. The Claimant said he could not continue to work, because the new position required him to continue typing. He stated in his resignation letter that his medical condition had not improved. He was under investigation. Resignation was accepted on September 29, 2016. He resigned on September 28, 2016. He was still an Employee of the Respondent, and serving notice, and therefore, subject to the disciplinary process. He was to leave end of October, 2016. Disciplinary process provided for 3 warnings. It is not true that the Respondent compelled the Claimant to resign, by giving him duties he could not perform. Resignation was accepted, and his dues processed. His dues were paid. The disciplinary hearing did not take place. He handed over on October 22, 2016. He was paid October 2016 salary. He said he was still ill, at the time of resignation. He must have been in communication with his Line Manager. Ooko was not personally in communication with the Claimant.
 28. Redirected, Ooko told the Court that he relied on the Claimant's employment record, in giving his evidence. The Health and Safety Department would have been involved, if the Claimant was unwell. The Respondent retains a Health Advisor. The Customer Care department would have accommodated the Claimant. He resigned, in the middle of a disciplinary hearing.
 29. The issues as understood by the Court are: whether the Claimant's resignation amounted to constructive dismissal; whether it could be deemed as unfair termination; and whether he merits compensation, notice, costs and interest.



The Court Finds: -

30. Evidential divergence on the Claimant's employment history, his terms and conditions of employment, as expressed in Claimant's contract of employment, is minimal and insignificant to the issues in dispute.
31. It is common ground that he was initially employed by the Respondent as a Customer Experience Assistant, on September 8, 2010. He continued to work under part-time contracts, until August 13, 2014, when he was offered regular employment, as a Customer Experience Executive Line 200.
32. Although he had been working from September 8, 2010, on part-time contracts spread over periods of 6 months each, he was still required to undergo 3 months' probation, when the Respondent determined to place him on regular, time-indefinite contract, commencing August 18, 2014.
33. There are medical records exhibited by the Claimant, establishing that he was unwell from 2014 to the time he left in 2016. There is not truth whatsoever, in the evidence given by Ooko, that the Respondent was unaware of the Claimant's medical condition.
34. That evidence is not even consistent with the Respondent's Pleadings or Ooko's own Witness Statement. At paragraph 3 of the Witness Statement, Ooko states, "in the course of the Claimant's employment, he was diagnosed with an Ear, Nose and Throat ailment. To this end, an ENT specialist recommended his redeployment, noting that the Claimant's diagnosis was acoustic shock syndrome."
35. The Respondent, in the Statement of Response at paragraph 10, acknowledges it was made aware by the Claimant, about his Complex Regional Pain Syndrome diagnosis. Ooko's evidence on cross-examination, was that, "I insist he did not communicate about medical condition," is unabashedly false and very unfortunate, coming from a Senior Manager, Employee Relations, of a blue chip Organization.
36. The Court is satisfied that the Claimant was indeed unwell, and this was known to the Respondent.
37. Did resignation amount to constructive dismissal? The Claimant acknowledged in his evidence, that he accessed a Customer's account 56 times. He was under investigation by the time he resigned. He did not attempt to explain to the Court what necessitated him to access a Customer's account 56 times, without authorization, only alleging that he had some familiarity, with the concerned Customer. He did not justify the irregular access.
38. The irregular access took place, before September 28, 2016, when the Claimant tendered his resignation. Investigations had not absolved the Claimant. He issued notice of termination, which was to lapse at the end of October 2016. By the time he was due to be heard on the allegation of professional misconduct on accessing the Customer's Safaricom Account, on October 4, 2016, the Claimant was still serving the notice period. He was at the infancy of the notice period. He was still in employment, and subject to the disciplinary process.
39. He made himself scarce at the disciplinary process, where he could have challenged, or even disproved, allegations of misconduct. He justified his absence on the ground that he was ill, during his evidence on redirection. He did not exhibit any letter he wrote to the Respondent, or medical evidence, to show that on 4th October 2016, he was bedridden. The Claimant did not convince the Court that he was ready to be heard at the disciplinary forum.
40. Most likely, the Claimant believed he was an ex- Employee of the Respondent, having successfully in his mind, short-circuited investigations into allegations of professional misconduct, and the proposed disciplinary process, by his resignation on September 28, 2016.



41. The circumstances leading to resignation, cannot be attributed to the Respondent. It was not the Respondent who initiated the Claimant's unauthorized access to a Customer's Account. It was not the Respondent who made it necessary to have the follow-up investigations and disciplinary process against the Claimant.
42. The second set of circumstances that would inform the Court, on whether the Respondent created a hostile environment, making it impossible for the Claimant to continue working, relates to the Claimant's medical condition.
43. The e-mail from the Claimant to Ruth from the Human Resource department, dated September 28, 2016 at 3.29 PM, is very helpful in resolving the second issue. The Claimant writes: -
- “Following the communication from Valley ENT recommending my redeployment after being diagnosed with acoustic shock syndrome, and further to your communication to appear for the discussion on the above subject above, I do thank you for your kind gesture to accord me an opportunity to discuss about the same. However, it is with a heavy heart that I do not wish to take up redeployment, as my hand cannot allow me to perform duties using my hand as well. I do wish therefore to retire my services on medical grounds and request you to humbly proceed to process my entitlements...”
44. It is clear from the Claimant's email above, that the Respondent was still open to discussions on the Claimant's medical condition, and suitable duty placement, in light of his diminished capacity to discharge normal duties. He acknowledges, that Ruth had invited him for further discussions on the subject. He told her: no thank you, but I am resigning. There is no mention in his e-mail, that Ruth told him to take the last offer to work at Customer Care, or leave employment. He left employment, while the Respondent was still open to further discussions, to salvage the employer-employee relationship.
45. The locus classicus in our jurisdiction on the subject of constructive dismissal, is the Court of Appeal of Kenya decision, *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] e-KLR. The main principles are that, the Employer must be shown to have created a hostile work environment, making it difficult for the Employee to continue discharging his contractual obligations; the Employer must be shown to have breached the fundamental terms of the contract; it must be shown that that the Employer no longer considered itself to be bound by the terms of the contract; and the Employee must have resigned, believing himself to have been fired.
46. The Respondent, going by the Claimant's own e-mail to Ruth, dated September 28, 2016, did not act in a manner suggesting that, it did not consider itself bound by the terms of the contract of employment. It had invited the Claimant to discuss further his medical condition, and capacity to continue working. The Claimant had no reason to consider himself fired, while the Respondent was still open to discussions. He was living under a cloud of disciplinary uncertainty, and would perhaps have considered himself fired on disciplinary grounds, and resigned to obviate such an eventuality. But this would not be a relevant element, in establishing constructive dismissal. He would only be deemed to have been constructively dismissed, if he had established that the Respondent was not willing to reconsider his medical condition, and perhaps reasonably accommodate him, by assigning lighter or alternatively suitable work. The Claimant's e-mail suggests to the Court that the Respondent was still discussing all options available to the Parties, in reasonably accommodating the Claimant. The Claimant resigned, not because he considered himself to have been dismissed on account of his diminished capacity to work; he probably resigned to avoid the disciplinary process. To succeed on constructive dismissal, and Employee must show that there were no other factors, that would have culminated in termination on other grounds, other than those attributable to the Employer's conduct.



- In this dispute, there were disciplinary proceedings, arising from allegations of professional misconduct against the Claimant, which could have culminated in summary dismissal for professional misconduct.
47. Unfair dismissal and Remedies. The concept of constructive dismissal is not the same as unfair dismissal. Unfair dismissal or termination is a statutory concept, regulated by Sections 41, 43, and 45 of the *Employment Act*, whose remedies are provided for under Section 49 of the *Employment Act* and Section 12 of the *Employment and Labour Relations Court Act*. Unfair dismissal is a statutory concept, and the applicable remedies are statutory remedies.
 48. Constructive dismissal is not in the *Employment Act*, or other labour statutes. It is a common law principle. The circumstances when it occurs are not determined by an Act of Parliament. The principles set down in the decision of the Court of Appeal above are not grounded on the *Employment Act*. The term constructive dismissal is not in the *Employment Act*. Constructive dismissal is a common law concept, distilled by decisions such as the one from the Court of Appeal of Kenya, cited above.
 49. To establish that unfair termination has taken place, there are statutory standards, relating to procedure and substantiation, under Sections 41, 43 and 45 of the *Employment Act*. These standards do not apply to constructive dismissal, and these concepts of express and implied employment termination, cannot therefore be the same, with the same remedies.
 50. The remedies for constructive dismissal are not similar to unfair dismissal / termination. It is doubtful for instance, if an Employee who is constructively dismissed, could validly claim the remedy of reinstatement. Courts have in most cases grant compensation, which is a remedy under unfair termination, in Claims for constructive dismissal. But in the view of this Court, an award of damages, rather than compensation, is most appropriate in constructive dismissal. Section 12 of the E&LRC Act makes a distinction between damages and compensation. Damages for constructive dismissal would not in the view of the Court, be subject to statutory cap. It is not a remedy that would be subject to the time-bar prescribed under the *Employment Act*, because constructive dismissal is not a statutory concept.
 51. The Claimant pleads constructive dismissal, but prays under paragraph 30 [b] for compensation for unfair termination. He appears to hold that constructive dismissal is a form of unfair dismissal. It is not.
 52. He has not established unfair termination, or constructive dismissal, to warrant either damages or compensation.
 53. He resigned. He gave notice of 30 days, his last day being October 28, 2016. He served his period of notice. Constructive dismissal requires that the Employee has initiated termination, through resignation. The Claimant initiated termination. How then, is he to claim notice pay from the Respondent?
 54. Lastly the Court is of the view that the Claimant ought to have sued for work-related illness against the Respondent, if he considered his medical condition was occasioned by the conditions at the workplace. He appears to have lost focus, presenting plenty of medical records, which would have been most useful in pursuing damages or compensation, in a work-related illness Claim. The period he started to experience medical problems according to his evidence, coincides with the period he worked for the Respondent. It would have been worth exploring, in a medical and judicial process, whether the nature of the work he did, had any contribution to the Claimant's illness. There probably was an alternative cause of action the Claimant should have considered pursuing, other than constructive dismissal. Unfortunately, this Court was not called upon to try the facts relating to the Claimant's illness, causation and probable judicial remedies.

It is Ordered:-



- a. The Claim is dismissed.
- b. No order on the costs.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI,
UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 16TH
DAY OF DECEMBER 2022.**

**JAMES RIKA
JUDGE**

