



**Murithi v Xplico Insurance Co Ltd (Cause 175 of 2018)
[2022] KEELRC 13491 (KLR) (2 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13491 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 175 OF 2018
AN MWAURE, J
DECEMBER 2, 2022**

BETWEEN

PATRICK NJINJU MURITHI CLAIMANT

AND

XPLICO INSURANCE CO LTD RESPONDENT

JUDGMENT

1. The claimant filed the amended memorandum of claim dated the 28th May 2018 on the 29th May 2018 alleging constructive dismissal from employment. The claimant asserts that he was engaged as IT Manager from 12th February 2014 to 14th July 2017 and served with diligence and was highly effective and productive. As a result, he says his salary was reviewed from Ksh.120,000.00 to Ksh.170,400.00 in March 2015 then to Ksh.250,000.00 in April 2017.

Claimant's case

2. The claimant avers that whereas the Respondent company cut back on benefits for some members of staff including himself citing financial constraints, this was just a ruse by the top management to get rid of some members of permanent staff by creating hardships.
3. The claimant states that the Respondent claimed that this was due to financial constraints but the claimant avers that this was an arbitrarily selectively implemented action the reason being that the Respondent had just set up the public service division which is known for high turnover and increased liquidity. The claimant says that there was more glaring reckless spending by the new ownership including in handling procurement which created some conflict between a shareholder with vested interests and the claimant whose responsibility was to secure suppliers in the IT section for interviewing by the relevant committee.



4. The claimant says that the financial woes were just a creation of top management conflicts and some employees became casualties. The claimant says he was particularly singled out by the resident shareholder who took up an overall supervision in the day to day running of the company, one Raj Saji.
5. That the said Raj Saji had a particular interest in choosing suppliers and he started by replacing the IT system providers with his preferred ones without observing proper handover procedures. The claimant states that he was expected to somehow gain access to the relevant old system information, to which he had no access and which could only be have been availed to the company if proper handover procedures had been observed.
6. The claimant avers that the IT department staff were put under unfounded allegations and singled out for warning letters in connection with premium reversals made in the system at the instance of top management and documents authorizing 15 million reversals in respect of the EPZ claim, and the resultant warning letters to IT department members.
7. The claimant prays for the following remedies;
 - a. A declaration that the claimant's forced resignation amounted to constructive dismissal.
 - b. A declaration that the dismissal was unfair and unlawful
 - c. An award of damages made up of 12 months' salary as compensation Ksh.2,160,000.00
 - d. General damages for unlawful and unfair treatment
 - e. 41 days accrued leave allowance
 - f. Leave days for August and 14 days worked in August less deductions Ksh.931,830/=
 - g. Cost of the suit and interests on d & g from the date of filing suit and e from the date of judgment.

Respondent Case

8. The Respondent filed the amended response to the amended claim on the 24/8/2018 and stated that the claimant was involved in unethical and unconscionable activities and without any instructions from the Respondent's management or justification, he formatted the respondent's IT server, wiped out the data base and applications of its binary system and upon the Respondent's discovery of his actions he opted to resign from the Respondent organisation leaving the Respondent with lots of losses, damage and inconvenience. The Respondent says that it is aware of the loss of antivirus software worth over Ksh.300,000/= that was never delivered to it and that he never advised the Respondent on the manipulation of the software.
9. The Respondent averred that the amended memorandum of claim discloses no cause of action against it, is frivolous, an abuse of court process and should be struck out with costs to the Respondent. The Respondent therefore prays for the dismissal of the claim.

Claimant's Case

10. CW 1 Patrick Njiju gave sworn testimony and said he does small business and he is an expert in IT. He adopted the witness statement dated the 15/2/2018 as his evidence in chief. He also adopted the documents contained in the list as exhibits in the case and asked for the prayers as set out in the memorandum of claim.
11. The Respondent did not have any witnesses in the case.



Claimant's written submissions.

12. No submissions in the file and CTS for the Respondent but claimant's brief submission were filed alongside the claim.

Issues for Determination

- a. Whether the claimant was constructively dismissed
 - b. The remedies, if any, the court should grant
13. 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.”
14. 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.
15. In *Coca Cola East & Central Africa Limited versus Maria Kagai 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.
16. The claimant in the witness statement dated the 15th February 2018 says that as the head of the IT department, he was supposed to be part of the team sourcing for supplies. He says they would be required to get about 3 to 5 different suppliers. He says Mr Raj Saji a shareholder who preferred suppliers of his choice made him a scapegoat and without any basis kept accusing him of having deals with the suppliers whom the said Raj Saji would invariably change to his own choice instead of the committee's choice.
 17. The Claimant also says the said Raj Saji sent him an email dated 14th August 2017 where he asked him to surrender all laptops, desktops, passwords, door access systems and programs and access codes. He was asked to email inventory of all staff and how to add and delete. These demands seems to indicate the claimant had no more relevance to the organisation.
 18. The claimant also says that on 14th August 2017 the said Raj Saji recruited a new person to take over all the duties of the claimant and hence wrote the email dated same date to handover everything within his control. This was orally communicated.
 19. The court is also aware of an internal memo dated 3rd December 2016 which gives warning to the claimant in relation to the hacking of the system with the intention to manipulate the data of debtors. The claimant is warned of severe disciplinary action in case of any such other incidences of manipulations happen again. The said communication does not give evidence to clarify why it was assumed the claimant was the one culpable of the alleged hacking simply because he was the head of IT at the time. There definitely seems to have been some bad blood between the claimant and some of the respondent's shareholders.
 20. By the time the claimant tendered his resignation of 14th August 2017, there was a lot that had happened between him and the respondent. By 13th July 2017 their medical insurance had to been terminated and yet it was an entitlement in his letter of appointment. The respondent claimed the cover had been withdraw due to financial situation. The Employment Laws and best practice provide the benefits of an employee should not be removed without the consent to the employee.
 21. There is a letter from one Ngeru holdings Limited who seems to be the claimants landlord who indicated claimant was in arrears of three months. This was a letter dated 22nd January 2017. Then on the same year around October 2017 claimant wrote to the respondent alluding to his rent arrears and also revealing that his wife had been in and out of hospital and he had exhausted his pension and savings. He wrote several letters about his financial difficulties thereafter and the court is not availed any response from the respondent.
 22. The claimant had left a lucrative seeming position with Pitstop Technologies in 2014 and on 3rd October 2017 he received a high recommendation letter from the said organisation. He joined the respondent's organisation in February 2014 and worked till July 2017. He had risen over that period and his salary had been renewed thrice from Kshs.120,000/= to Kshs.250,000/= at the time of his exit.
 23. But sometime in the year 2017 things seemed to have changed for the worse and one shareholder in particular Mr. Raj Saji seemed to want to choose his suppliers and generally micromanage the organisation and especially the IT Department. He even recruited a staff to replace the claimant. The claimant's salary was not being paid on time and as already observed the staff medical cover was stopped without consulting the staff.



24. The court finds this is definitely tantamount to unfair labour practices which pushed the Claimant to resign involuntarily. That is what is regarded as constructive dismissal. In the case of *Joseph Alper & Another –vs- Lodwar Water And Sanitation Company Limited* 2016 eKLR the court held:-

“Constructive dismissal has its roots in the law of contract under the doctrine of discharge of breach. Under this doctrine an employee was entitled to treat himself as discharged from performance of his obligations where the employer’s conduct was a significant breach going to the root of the contract. The termination would be due to the employer’s conduct.

25. In the case of *Coca Cola East And Central Africa Limited –vs- Maria Kagai Ligaga*(2015) eKLR the court found that:-

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

26. This is one such case where the respondent’s behavior and attitude was so negative towards the Claimant that when he decided to resign he did not even want to stay a day longer. In return the respondent accepted resignation without any hesitation and did not even demand to be served the one month notice as provided in his contract of employment.

27. So this is a case where even though the Claimant tendered his resignation, it is clear it was forced resignation due to the toxic environment at the place of work. The court therefore does not hesitate to declare the Claimant’s forced resignation amounted to constructive dismissal.

28. At the same time the dismissal was unfair and unlawful and judgment is entered in favour of the Claimant.

29. Consequently and having entered judgment in favour of the Claimant he is awarded the following remedies:-

(a) General damages at 4 months equivalent amounting to Ksh.1,000,000/-

This covers general damages for unfair and wrongful treatment.

(b) The prayers for leave allowance is a special damage prayer and leave days and without specific proof of the same the court is inclined to decline the same.

The only other award to the claimant is costs of the suit and interest at court rates from date of Judgment till full payment.

Total award is Ksh.1,000,000/-.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 2ND DECEMBER, 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

