



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 299 OF 2018

ANDREW ODONGO OMONDI.....CLAIMANT

v

COCA-COLA EQUATOR BOTTLERS LTD.....RESPONDENT

JUDGMENT

1. The Claimant was employed as Area Sales Representative with the Respondent from 2007 until 22 December 2017 when he sent an email to the Respondent giving two weeks' notice of resignation. The resignation was to take effect on 6 January 2018 (later varied to 30 January 2018).
2. The Claimant did not give any reasons for the resignation.
3. On 24 September 2018, the Claimant instituted these legal proceedings alleging unfair termination of employment and breach of contract.
4. This Cause was heard on 16 September 2019 when Andrew Odongo Omondi (the Claimant) testified and closed his case.
5. The case for Coca Cola Equator Bottlers Ltd (the Respondent) was taken on 12 November 2020.
6. The Claimant filed his submissions on 19 January 2021 (should have been filed and served before 11 December 2020).
7. The Respondent filed its submissions on 2 February 2021.
8. The parties did not agree on the Issues, but in his submissions, the Claimant identified 2 Issues
 - (i) Whether the Claimant's resignation was involuntary and unlawful?
 - (ii) Whether the Claimant is entitled to the relief sought?
9. The Court has considered the pleadings, evidence, and submissions and will adopt the Claimant's identified Issues.

Involuntary resignation/constructive dismissal

10. In the witness statement which was adopted as part of the evidence, the Claimant stated that he was prompted to resign because of *several unlawful conducts against me, as laid out in my Statement of Claim.*
11. In the Statement of Claim, the Claimant set out the conduct on the part of the Respondent which he said led him to resign as failure to provide a job description, deployment to different jobs some of which he had not been hired to do such as accounting and finance, the setting of unrealistic targets, working overtime without requisite compensation, insults from Respondent's senior managers, and harsh working environment.
12. During cross-examination, the Claimant stated that after transfer to Kakamega, it became difficult to work with the Area Sales Manager and that despite raising the issue with the Managing Director who called a meeting, the Area Sales Manager did not attend the meeting and that after two weeks he was transferred to Vihiga.
13. Nevertheless, the Claimant admitted that an audit had been done and it was alleged therein that his performance on sales had gone down and that he resigned nine days after his salary had been increased.

14. In its Defence, the Respondent contended that the allegations by the Claimant were baseless and that it had not violated the Claimant's employment rights.
15. The Respondent called its Human Resources Manager to testify. He stated that the Claimant had a job description (produced) as Sales Representative/an account developer and that the Claimant was given sales targets which he did not meet.
16. The witness further stated that the Claimant was given time to improve his performance, but he did not and that the Claimant never complained of any frustrations while at work.
17. *Constructive dismissal* occurs when an employee resigns claiming that there was a fundamental breach of contract on the part of the employer and that this breach caused him/her to resign.
18. The employer's action must constitute a breach which is significant enough to go to the very root of the contract and, typically, would involve some major change to one of the key terms of employment, introduced without the employee's agreement. The effect is that the employee feels the situation is intolerable to the extent that there is no alternative but to resign.
19. The breach of contract may also be a breach of one of the express terms of the contract or a breach of an implied term (see *Western Excavating (ECC) Ltd v Sharp* (1978) IRLR 27 and *Coca Cola East & Central Africa Ltd v Maria Kagai Ligaga* (2015) eKLR).
20. In the case at hand, the Claimant alleged that he was not issued with a job description. The allegation was not true as the Respondent produced a copy of the contract and job description.
21. The Claimant also alleged that he was being tossed from job to job, including accounting and financial roles. The Respondent's witness testified that as a salesperson, the Claimant was expected to collect revenues and account for the same.
22. The evidence not being rebutted, the Court is of the view that the accounting or the financial role of revenue collection was not a unilateral variation of the terms of the contract to prompt a resignation and assert constructive dismissal.
23. The Claimant further alleged he was abused and insulted by his senior Managers. The nature of insults and the names of the Managers were not disclosed.
24. On the question of targets, the Claimant did not lay any cogent evidence as to the targets or disclose whether they were agreed in writing or verbally, or seek the production of sales targets.
25. The Claimant had a salary raise just before his resignation, and he did not give any reasons for the resignation. In fact, he thanked the Respondent for the patience extended to him.
26. In the view of the Court, and the Court so finds, the Claimant did not prove to the required standard that the Respondent had made the work environment hostile to warrant him resigning and claiming constructive dismissal.
27. Compensation and salary in lieu of notice are therefore not available to the Claimant as remedies.

Breach of contract

28. Among the heads of claims advanced by the Claimant were unlawful deductions made on the salary but during testimony, he said he had no particulars of the deductions, and so nothing turns on this head of the claim.

Certificate of Service

29. The Respondent's witness admitted that a Certificate of Service was not issued to the Claimant. A Certificate of Service is a statutory entitlement under section 51 of the Employment Act, 2007. The Respondent should issue one within 21 days.

Conclusion and Orders

30. The Court finds and declares that the Claimant did not prove the essentials or ingredients of constructive dismissal.
31. Save for an order that the Respondent issues a Certificate of Service within 21 days, the Cause is dismissed with costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 10th day of February 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Ms. Ochieng instructed by E.A. Ochieng & Co. Advocates

For Respondent Mr. Kabinga instructed by Kiragu Wathuta & Co. Advocates

Court Assistant Chrispo Aura