



IN THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. CAUSE NO. 1789 OF 2016

MESHACK MUTILANGI.....CLAIMANT

-VERSUS-

MUSTEK EAST AFRICA LIMITED.....RESPONDENT

JUDGMENT

INTRODUCTION AND FACTS THAT ARE COMMON CAUSE

1. At all material time the Claimant was an employee of the Respondent having been employed as a service technician on 1st August 2021. The Claimant remained in the employment of the Respondent till 7th April 2016 when he resigned. The resignation and the reasons thereof were expressed in his letter dated 6th April 2016.
2. The Claimant pleading constructive dismissal has sought numerous reliefs in his memorandum of claim against the Respondent.
3. The Respondent entered appearance and filed a response to the Claimant's claim. Besides, the Respondent filed a counter claim against the Claimant. A counter claim for Kshs. 42,500.
4. This matter came up for hearing on the 26th July, 2021. The Respondent and its counsel were absent. Satisfied that the hearing notice dated 13th July 2021 was duly served upon counsel for the Respondent and owing to the fact that an explanation to their absence was absent, I directed that the matter proceeds, their absence notwithstanding.
5. The Claimant adopted the witness statement and the factual contents of the Memorandum of Claim as his evidence in chief. He gave a brief oral evidence introducing the statement, producing the statements that were filed under the list of documents dated 30th August, 2019 as exhibits, and clarifying areas of the statements that needed clarification.

THE CLAIMANT'S CASE

6. The Claimant's case is straight forward and not complex to be understood. Through a letter of appointment dated 1st August 2014 – Exh. 1, the Respondent employed the Claimant as a service technician. His starting salary was Kshs. 20,000.00 gross.
7. On August 1, 2015 the Respondent issued a letter captioned **Employee contract amendment** to the Claimant. The letter brought on board the contract, new terms and conditions *inter alia* targets, bonuses and penalties/deductions. According to the Claimant, the amendment was without consultation, the terms and conditions that it came with were unreasonable, unrealistic and oppressive.
8. The salary was enhanced to Kshs. 42,500, and this the Claimant attributed to what he termed his faithful, diligent, and dedication to, work. To prove his gross salary as at March 2016, the plaintiff tendered as evidence the payslip for March, 2016. Exh. 2.
9. The Claimant testified that throughout the period of his employment, the Respondent through the Managing Director engaged in unfair labour practices, a foregoing premise notwithstanding.
10. The Claimant contends that though he was employed as a service technician, he was not accorded any job description. This exposed him to the Respondent's manager who would allocate him any work, work not relevant to his technical skills.
11. The Claimant would therefore be forced to undertake tasks outside his area of training. He was forced into working in the Sales and

Marketing department a very grey area to him. The Respondent did not care to have him trained in the space of sales and marketing.

12. The Claimant further testified that the Respondent introduced unattainable and unrealistic targets for the him to meet, a default in meeting the targets often led to a deduction of his salary.

13. The Respondent engaged in making unjustified and unlawful deductions of the Claimant's salary, the Claimant asserted.

14. It was his case, that the Managing Director of the Respondent company, notoriously resorted to insulting, abusing and using profanities against him. This even whenever the Claimant wanted to engage him over matters of concern.

15. The Claimant claims that he was forced to work overtime without pay and late in the night. He testified that he was under constant threats of termination of his employment, whenever he showed reluctance to work overtime without pay.

16. He stated that the working environment and conditions, were deplorable and unbearable, he decided to resign.

17. He alleged that the Respondent's actions and inactions throughout his employment period affronted his constitutional rights, provisions of the constitution and sections of the Employment Act.

18. The Claimant asserted that the Respondent failed to give him his terminal dues. The Respondent did not allow him to proceed for leave, contrary to the law.

19. According to the Claimant, circumstances created by the Respondent, and its managing director led to his resignation.

THE DEFENCE

20. As stated hereinbefore, the Respondent did not avail any witness to testify. The Respondent's counsel and or Respondent's witness were not present when the matter came up for hearing. At the close of the plaintiff's case, the Respondent's case was deemed closed for non-attendance.

CLAIMANT'S SUBMISSIONS

21. The Claimant in his written submissions, has first addressed this court on the implication of the failure by the Respondent to place evidence before the court, in the circumstances it [the Respondent] did. Second, on the claim on constructive dismissal and the reliefs he has sought in his statement of claim.

22. In his submission, the claimant acknowledges that upon being served with the statement of claim and the accompanying documents, the Respondent did file a memorandum of reply to the claimant's statement of claim, and a counter-claim. In addition to this, the Respondent filed a witness statement of one Caroline Mborani.

23. The Claimant submits that in absence of any tendered evidence in support the Respondent's pleadings and the witness statement, the contents of the Memorandum of Response and the witness statements, remained just statements, without more. The Claimant's testimony and evidence was not controverted therefore.

24. In this submission the Claimant, sought justification in the case of **Peter Ngigi Kuria & Another (suing as the legal representative of the Estate of Joan Wambui Ngigi) v Thomas Ondili Oduol & Another [2019]eKLR**, where Mwongo J stated:

"22. There are many authorities that deal with the question of uncontroverted evidence, such as the situation in the present case where the defence did not show up at the trial. The general position running through such authorities is that uncontroverted evidence bears a lot of weight and a statement of defence without any evidence to support the assertions therein will amount to mere statements.

*23. In the case of **Shaneebal Limited v County Government of Machakos [2018] eKLR, Odunga, J, relied on the cases below in reaching his judgment. In **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 i*****

"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence".

In **Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J.** held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. Mulwa J, however in the case of **Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR** stated:

"I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too

upon a balance of probability whether the evidence in unchallenged or not. 26. In light of all these authorities, I am of the view that the position taken by the trial magistrate in dismissing the suit was not warranted. I would reverse the lower court's determination and substitute with this court's determination, that the plaintiffs proved their case on balance of probabilities, and are entitled to damages."

25. The Claimant submitted that, the Respondent unlawfully, unfairly and constructively dismissed him. That through its acts and those of the Managing Director, an environment not conducive for the Claimant's work was authored. It became impossible for him to continue working prompting his resignation. In urging this Honourable Court to find that there was constructive dismissal the claimant cites the decision in **Coca Cola East and Central Africa....vs Maria Kagai Ligaga [2015] eKLR**.

26. The Claimant submitted that contrary to the provisions of section 10 of the Employment Act, the contract of employment between the Respondent and the Claimant lacked a job description for the latter. According to the Claimant this provision was violated. The violation goes to the root of the contract and therefore repudiatory of the contract. He further submitted that it was his legitimate expectation that the respondent was to provide him with a job description. Absence of the job description enabled the Respondent allocate him duties that did not agree with his technical skills for instance, sales and marketing, a field in which he had very limited skill on. That, notwithstanding the limited expertise in the field he was given targets to meet. In default of meeting the targets, he suffered a deduction of his salary. He equates this to slavery.

27. As regards the duty imposed by the provision upon an employer and the implication of an employer's default in giving an employee a job description, the claimant relies on the decision in the case of **Carolyn L Musonye vs-Panari Hotel Ltd [2017] eKLR**.

28. The Claimant submitted that he was forced to sign an agreement (Exh. 2) dated 1st August, 2015 That the amendment was done without him being consulted. That the Respondent withheld his salary for the months of August and September as a way of placing pressure on him, into signing the amended agreement. The Claimant further submitted that threats of dis-employment caused him to sign the agreement.

29. The amended agreement brought on board terms which were prejudicial to the Claimant, notwithstanding that he was never consulted on their incorporation as his terms of employment. Accordingly, this amounted to a repudiatory breach of contract and amounted to constructive dismissal.

30. The amendment worsened the job situation for the Claimant, due to the unrealistic targets and punitive deductions, it allowed. The Claimant states that the amendments did not benefit him. The amendments were propelled by a desire to pump him out of job.

31. The Claimant further submitted that his resignation was therefore neither voluntary nor unequivocal. It was prompted by the conduct of the Respondent.

32. It was submitted on behalf of the Claimant that he proved the claims on illegal salary deductions. According to the Claimant his exhibits 3(a) and 3(b) indicated that in two months a total of Kshs. 11,000, was deducted from his salary without reason. This was an affront on the provisions of section 19 of the Employment Act, 2007. That unlawful deductions of an employee's salary can be one of those conducts that can lead to a conclusion of constructive dismissal, the Claimant cited the decision in **Kennedy Mutua –vs Madison Insurance Company (K) Ltd [2020]eKLR**.

33. The Claimant submitted that in breach of the provisions obtaining in section 27 of the Employment 2007, the Respondent never allowed him to proceed for leave.

34. The Respondent's Managing Director perpetually insulted the claimant using uncouth language and profanities even in front of customers. The claimant hoped that the director would change and leave the insults. It never happened. The working environment became unbearable. He had to leave.

ISSUES FOR DETERMINATION

35. From the material before me, the following issues are the issues that emerge as issues for determination.

- (a) In the circumstances of this matter, what is the implication of the respondent's failure to testify.
- (b) In the circumstances of the matter, was the claimant constructively dismissed?
- (c) Is the Claimant entitled to the reliefs sought?
- (d) Who should bear the costs of this claim and counterclaim.

[a]. Of the Respondent's Failure to Testify.

36. The Respondent has a counter claim against the Claimant. It had sought for Kshs. 42,500, asserting that under the employment contract that were between it and the latter, the claimant was under an obligation to give a one month's notice before terminating the employment, or one month's salary in lieu of the notice. This he did not do, the Respondent pleaded.

37. In the circumstances hereinabove brought out, the Respondent did not place any witness before court to testify to its defence and counter claim. The consequence here being that the counter claim wasn't prosecuted. It is hereby dismissed for want of prosecution.

38. The Claimant submits that the Respondent's failure to have a witness testify in fortification and justification of its defence, renders the Claimant's testimony and evidence uncontroverted. He urged this Court to be guided by the holding in **Peter Ngigi Kuria & Another [Suing as the legal representative of the estate of John Wambui Ngigi] v. Thomas Ondili Oduol & Another [2019] eKLR**. This Court did hold in the case of **Lydia Moraa Obara v-Tusker Mattresses Limited, Nairobi ELRC No. 1391 of 2019** that the mere fact that the respondent did not place any evidence before Court does not chip off the Court's duty to interrogate the truthfulness of the Claimant's evidence. A favourable judgement is not automatic.

[b]. Whether in the Circumstances of the Matter a Constructive Dismissal Occurred.

39. In his, statement of claim, testimony, and submissions, the Claimant asserted that his resignation from employment was a product of the Respondent's actions and inactions, and actions of its managing director. The actions and inactions were sustained throughout the employment period, making it impossible for the him to continue working. According to the Claimant these occasioned a fundamental breach going to the root of the contract. He urged this Court to find that a constructive dismissal occurred.

40. Constructive dismissal denotes action[s] or inactions on the part of an employer which drive the employee to leave [present or absent of a form of resignation]. Such actions or inactions can take a wide variety of forms. In **Jooste v Transnet Ltd [1995]5 BLLR 1[LAC]** the Labour Appeal Court of South Africa held that the circumstances of constructive dismissal are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not. It is a question of fact for the tribunal.

41. The test, the court ruled, is twofold. The first question is whether, but for the employer's conduct, the employee would have intended to terminate the employment relationship. If so dismissal is ruled out. If not, the enquiry proceeds to the question whether the employer's conduct amounted to constructive dismissal.

42. On the second inquiry, the Labour Appeal Court addressed it in **Pretoria Society for the Care of the Retarded v Loots [1997] 6 BLLR 721[LAC]** as follows:

“ When an employee resigns or terminates the contract as a result of constructive dismissal such employee is in fact indicating that situation has become so unbearable that the employee cannot fulfil what is the employee's most important function, namely to work. The employee is in fact saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that employer will ever reform or abandon the pattern of creating an unbearable working environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned.”

43. Lord Denning MR in **Western Excavating [ECC] Ltd -v- Sharp [1978] QB 761** authoritatively stated when constructive dismissal can be taken to have occurred, thus:

“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.

He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once.”

44. Here at home, the Court of Appeal in the case of **Coca Cola East Africa Ltd vs Maria Kagai Ligaga [2015] eKLR**, gave judicial attention to legal principles relevant to determining constructive dismissal posting:

“30. The legal principles relevant to determining constructive dismissal include the following:

- a. What are the fundamental or essential terms of 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 applied in evaluating the employer's conduct.*
- e. There must be a causal link between the employer's conduct and the reason for the 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 reasonable time terminate the employment relationship pursuant to the breach.*

h. The burden to prove repudiatory or constructive dismissal is on the employee.

i. Facts giving rise to repudiatory breach or constructive dismissal are varied”.

45. Now this brings me to the specific actions and or inactions on the part of the Respondent and or its managing director forming basis for the Claimant’s claim for constructive dismissal.

[a]. Amendment of the employment contract.

46. I have considered the Respondent’s letter dated 1st August,2015, captioned, **Employee Contract Amendment**, the letter reads in part;

“In relation to the above mentioned, we would like to draw your attention to the following amendments to your contract.

This amendment is with effect from August 1,2015 and is as follows:

.....

3. Invoices raised amounting to Kshs. 1M and below for sale of hardware; repairs and maintenance; Installation by the 30th of every month

- *Basic salary 30,000*
- **Penalty/deductions: Kshs 10,000**

4. Invoices raised amounting to Kshs. 500,000 and below for sale of hardware; repairs and maintenance; installation by 30th every month

- *Basic Salary 30,000*
- **Penalty /deductions: Kshs 15,000.”**

47. Though the letter is dated 1ST August, 2015 and the amendments allied to it expressed to take effect on the same date, the acceptance of the same was done by the Claimant on the 23rd October,2015.

48. The tone of this letter is overt, the amendments were arrived at without the involvement of the Claimant. The letter makes no reference to any discussions between the Respondent and the Claimant, I am of the view that if there were any, reference would have been made to it. In situations, amendment of contract, this is a vital aspect. I have not lost sight of the fact that the Claimant testified that he was not consulted at all prior to the amendment. The Respondent did not controvert this. A safe conclusion can be drawn here, and it is so drawn, that the Claimant was not consulted prior to the amendment of the terms of his contract of employment.

49. The Claimant contended that he signed the letter, and intimated acceptance of the contents thereof, involuntarily. The Respondent manipulated him to sign by withholding his salary for August and September 2015. This contention finds support in the fact that though the amendment was expressed to take effect on the 1st August,2015, the acceptance comes in on the 23rd October,2015.

50. Did this amendment bring on board terms detrimental to the Claimant? Yes, it did. Nothing can one discern from the appointment letter, that the Claimant was being appointed as a sales person. The amendment however brought in the aspect of sale of hardware, and targets tied to it. Failure to meet the targets, led to deductions of the Claimant’s salary. Indeed, the two pay slips the Claimant placed before the court have an item-**other deduction**.

51. I have agonized over what justification an employer would have through a term in a letter of employment, to deduct an employee’s salary, upon a reason that some targets were not met by the employee. I have not seen any. However, I am able to say with certainty, that the act of deducting an employee’s salary on a term like that, amounts to, unjustified self-enrichment, deprivation of property, oppression, and unfair labour practice.

52. Some of these incidences really justify the equity inspired jurisprudence in the space of employment and labour law.

53. Section 10 [2] of the Employment Act provides for essentials of an employment contract. Sub-section 5 thereof, requires that whenever any of the essentials change, the employer shall in consultation with the employee revise the contract to reflect the change.

54. In **James Ang’awa Atanda &10 others v-Judicial Service Commission [2017] eKLR**, the court observed;

“34. Along chain of authorities on common law suggest that for a variation of an employment contract to be lawful, there should be mutual agreement between the employer and the employee [or their representatives where there is organized labour].

38.The authorities further show that a unilateral variation of an employment contract without consent of an employee would amount to breach of contract or repudiation [Rigby v Ferodo Ltd [1987] IRLR516, Security and Facilities Division v Hayes

54. This court concludes that the variation of the contract of employment was without consultation, unlawful and amounted to an unfair labour practice. It was a fundamental breach of the contract and repudiatory. The Claimant's claim on constructive dismissal does not stand on lose ground. It is well anchored.

[b]. Salary deductions.

55. The Claimant contended that premised on the amendment of the contract of employment, and the consequential new terms, the Respondent got the boldness of deducting his salary. The pay slips, exhibit 3[a] and 3[b] exemplifies this. The court is in agreement with the Claimant that the deductions were made, and without justification.

56. Remuneration is one of those superior rights the law accords an employee. This is exemplified by the protection given even against attachment by third parties. I have no doubt that the protection is accorded in realization that salaries can be used by employers to manipulate employees.

57. Section 19 of the Employment Act permits an employer to make lawful deductions for a lawful cause. The deduction[s] must be with the employee's consent. The list of what may constitute lawful deductions is placed forth in Section 19[1]. I find that the deductions that were made as alleged by the Claimant fall outside the list. Further it is imperative to state that there was no evidence brought forth by the Respondent to justify the deductions and bring them within the list, a further justification for this finding.

58. A keen reading of Section 19[1][g] would reveal that the provision prohibits deductions where an employer has a direct or indirect interest. The proceeds of the deductions that were being made upon failure on the part of the Claimant to meet targets obviously were for a direct benefit of the Respondent.

59. The breach of this provision of the law had a consequential effect on the employment contract, it exhibited a conduct on the part of the Respondent, which in nature was a significant breach going to the root of the of the contract. It entitled the Claimant to bolt out of the contract, with or without notice.

[c]. Abuses, and insults.

60. There was no evidence brought forth to counter the Claimant's on this. Abuses and insults can make work environment intolerable, not losing sight that work environment may include the psychological environment for example, prevalent attitudes among management towards a person or a group of persons. Hostile attitudes like the one the Claimant suffered may constitute a formidable barrier to advancement in employment.

61. The total sum of foregoing, leads this court to a conclusion that the conduct of the Respondent amounted to fundamental breach, giving rise to constructive dismissal.

62. In matters constructive dismissal, it is the conduct of the employer that is primarily in issue not the employee. - **Coca Cola East and Central Africa Ltd v Maria Ligaga [2015] eKLR**. The Respondent failed testify to the conduct. The consequence being that the conduct is taken as was testified to by the Claimant.

Of the Reliefs Available to the Claimant.

63. The conduct of the Respondent hereinabove discussed is one not admirable in the contemporary equity spirited and constitutionally inspired and fortified employment and labour relations law space. For the constructive dismissal, the Claimant is awarded 7 months gross salary as compensation under the provisions of Section 49 of the Employment Act, 2007.

64. The Claimant has proved that Kshs. 11,000 for the two months in respect of which he tendered pay slips, was deducted from his salary without justification in law. He is hereby awarded Kshs. 11,000. The claim for deductions being in nature one for special damages, a court can only award that which has been specifically proved.

65. On the claim for leave days untaken, the contract of employment provided for annual leave of 21 working days. The Claimant claims for leave days for the period 2015 to 2016. I have considered the documents [leave application forms] filed by the Respondent, and note that in the year 2015, the Claimant applied, and the applications were approved, for a total number of 4 days, namely, 29th May 2015-2nd June 2015, 10th August 2015- 12th August 2015, and 19th October 2015-21st October 2015. In the year 2016, which was worked up to April, the Claimant took two days leave. Therefore, for the year 2015, the untaken leave days were [17] seventeen. In the four months that he worked in the year 2016, pro-rata he earned 3 days. Therefore, unutilized here was one day. The total leave days for which this court can order pay are [18] eighteen. Therefore Kshs. 25,500.

66. With regard to service pay as sought by the Claimant, I note from the documents placed on record by the Respondent that it was making remittances to NSSF. There are pay-in slips and a statement of account. From the statement of account, the name of the Claimant is noticeable. As a court of justice, I am not able to ignore this. Ignoring this will equate to unjustly enriching the Claimant. The Claimant never testified to not being a member of any of those entities mentioned in Section 35 of the Employment Act. I find that under Section 35[5] the Claimant is not entitled to this relief as her was a member of NSSF.

67. The Claimant has claimed for one month's salary in lieu of notice. In the circumstances of a constructive dismissal as is here, where it is taken that it is the employee terminating the contract of employment, I am not convinced that the remedy is available to him.

68. A certificate of service under Section 51 of the Act, should issue as a matter of course, whenever a contract of employment is terminated.

69. In the upshot, judgement is hereby entered for the Claimant in the following terms;

[a]. A declaration that owing to the conduct of the Respondent that amounted to a repudiatory breach, constructive dismissal occurred.

[b]. The Respondent shall pay the Claimant compensation in the sum of Kshs. 297,500, being seven months gross salary, pursuant to Section 49 [c] of the Employment Act,2007.

[c]. Deducted wages Kshs. 22,000.

[d]. Annual leave pay Kshs. 25,500.

[e]. A certificate of service shall issue in accordance with the provisions of section 51 of the Employment Act,2007.

[f]. interest on [b],[c] and[d], above from the date of filing this suit till full payment.

[f]. Costs of this suit and counter claim.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF SEPTEMBER 2021.

OCHARO KEBIRA

JUDGE

In presence of

..... For the claimant

..... For the Respondent.

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

OCHARO KEBIRA

JUDGE