



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 991 OF 2015**

**JACKLINE WASIALI MAKOKHA.....CLAIMANT**

**VERSUS**

**BYRON TRUSKETT LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimant filed the instant Claim on 9<sup>th</sup> June, 2015. Contemporaneously, she filed a witness statement and a bundle of documents. The gist of the claim is that the claimant sustained injuries on or about 17<sup>th</sup> April, 2014 while in the employment of the respondent. She seeks the following remedies;

- a) Compensation for injuries sustained.
- b) Service pay Kshs 4,615/=.
- c) I month salary in lieu of notice Kshs 6,000/=.
- d) Unfair termination Kshs 72,000/=.

2. On its part, the respondent entered appearance and replied to the claim through which it admitted the employment relationship and confirmed that the claimant indeed sustained injuries whilst in its employment. It contended that the claimant did not follow the requisite channels in reporting her injuries. The respondent further averred through its response that it had an existing WIBA plus cover with the ICEA for all its staff members which was up to a maximum of Kshs 2,000,000/=

3. The matter was listed for mention before the Deputy Registrar on 3<sup>rd</sup> June, 2021 for purposes of taking a hearing date. On the said date, there was no appearance by the respondent. Nonetheless, the matter was set down for hearing on 12<sup>th</sup> July, 2021 and the claimant instructed to effect service upon the respondent.

4. The matter did not take off on 12<sup>th</sup> July, 2021, hence it was once again mentioned before the Deputy Registrar and a fresh hearing date was issued. Notably, the respondent was not in attendance during the said proceedings.

5. On the said 12<sup>th</sup> July, 2021, the matter was slated for mention on 23<sup>rd</sup> July, 2021 before the Deputy Registrar to allow parties take a date that was mutually convenient. Yet again on this date, the respondent was absent but nonetheless, the matter was set down for hearing on 5<sup>th</sup> August, 2021 and the claimant instructed to effect service of the hearing notice as appropriate.

6. On 5<sup>th</sup> August, 2021, the matter came up for hearing and the respondent was absent. There is an Affidavit of service sworn by one Kevin Balongo on 29<sup>th</sup> July, 2021 through which he deposes that he served the hearing notice of 5<sup>th</sup> August, 2021 upon the respondent's advocates. The said hearing notice is annexed to the said Affidavit.

7. The court being satisfied with the return of service, proceeded with the hearing of the case in absence of the respondent.

**Claimant's case**

8. The claimant testified as CW1 and adopted her witness statement to constitute part of her evidence in chief. She also produced the bundle of documents annexed to her claim, as exhibits before Court. She averred that she was employed by the respondent company as a cleaner with effect from 23<sup>rd</sup> August, 2013. That on 17<sup>th</sup> April, 2014, she was performing cleaning services at the KICC, 2<sup>nd</sup> floor, when she was instructed by one of her supervisors to collect an old bulb which had overstayed in the sun and which had been left by construction workers.

That the bulb exploded in her hand and she temporarily lost consciousness. That upon informing her supervisors of the said accident, she was advised to go home.

9. It was the claimant's testimony that she was not given any immediate medical attention by the respondent. That she went back to work the following day where she met with one of her supervisors who treated her in a rude manner. She averred that she later went to the head office and reported the matter to the respondent's Operational Manager who gave her Kshs 1,000/= which money she used to seek medical attention. It was also her testimony that the money was later deducted from her salary.

10. She further stated that she was also required to go for a scan since some broken pieces from the bulb had pierced her skin. That the scan was quite expensive and she didn't have the required amount to meet the attendant treatment costs hence she sought financial help from the respondent through a letter dated 3<sup>rd</sup> October, 2014, but no assistance was forthcoming.

11. That she later resumed work but upon doctor's advice, she was required to undertake light duties. That the doctor's report notwithstanding, she was not allocated light duties. It was her testimony that she was forced to resign from her employment due to frustrations from the respondent.

### **Submissions**

12. The claimant filed written submissions through which she averred that her exit from the respondent's employment amounted to constructive dismissal. She sought reliance on the case of **Nathan Ogada vs David Engineering Limited (2015)**.

### **Analysis and Determination**

13. In view of the claim before Court, the documentary evidence and the oral testimony of the claimant, I find that the issues falling for the court's determination are;

**i. Whether the claimant is entitled to compensation for work related injuries?**

**ii. Whether the claimant was unfairly terminated or was constructively dismissed?**

**iii. What reliefs if any, are available to the claimant?**

#### **Whether the claimant is entitled to compensation for work related injuries?**

14. The claimant avers that she sustained injuries while at work and while serving under the employment of the respondent. The respondent in its response admitted that the claimant sustained the said injuries while in its employment. The respondent's only contention was that the claimant was aware of the procedure to be followed in case of any work-related injuries. Be that as it may, it did not state what reporting mechanism it required the claimant to follow.

15. It is therefore not in contest whether the claimant sustained work related injuries, rather what reliefs is she entitled to?

16. The claimant averred that she verbally reported the accident to the respondent. This position was not contested as the respondent indicated that it was aware of the claimant's injuries.

17. **Section 22(1) of the Work Injury Benefits Act (WIBA) requires an employer to report an accident to the Director in the prescribed manner within seven days after having received notice of an accident or having learned that an employee has been injured in an accident.**

18. The respondent despite being aware of the claimant's accident, did not give any indication as to whether or not it reported the accident to the Director of Occupational Safety and Health (Director) as required under the WIBA. Further, it never adduced any evidence to that end hence it is apparent that no such report under section 22(1) was made to the Director.

19. The respondent also stated in its response that it had a WIBA plus cover with the ICEA insurance, for all its staff. It was therefore not clear why it did not facilitate compensation of the claimant under the said insurance cover.

20. In the circumstances, I find that the claimant is entitled to compensation under the WIBA.

#### **Unfair termination or Constructive dismissal?**

21. The claimant has alleged that following her injuries, the respondent made her work environment hostile to the extent that she could not continue working hence she had no option but to tender her resignation. To this end, she alleged constructive dismissal.

22. The claimant tendered a resignation letter dated 28<sup>th</sup> February, 2015 and whose contents I will reproduce hereunder;

**“RE: HANDING OVER THE COMPANY'S PROPERTIES**

**I appreciate the vacancy you gave me and I have decided to return the properties I owe you e.g (3 pairs of uniform and the**

name tag).

Thanx in advance.

Sign”

23. The resignation was not in explicit terms but the claimant admitted in her statement of claim that she was forced to resign from her employment with the respondent hence constructive dismissal.

24. Though not expressly stated, the claimant’s letter implies that she would not continue working for the respondent. There was therefore all indication that the claimant intended to stop working for the respondent hence her action could be termed as resignation.

25. The term constructive dismissal is defined by the Black’s Law Dictionary (10<sup>th</sup> Edition) as follows:

**“An employer’s creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer’s course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”**

26. The Court of Appeal, in the case of **Coca Cola East & Central Africa Limited v Maria Kagai Lugaga [2015] eKLR** stipulated the following, as the guiding principles in determining whether there has been constructive dismissal:

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 conduct himself to be estopped from asserting repudiatory breach; the employee must-within a reasonable time terminate the employment relationship pursuant to the breach.*

27. More significantly, the Court of Appeal in the **Coca Cola case (supra)** held that **“The criterion to determine if constructive dismissal has taken place is repudiatory breach of contract through conduct of the employer. The burden of proof lies with the employee.”**

28. In view of the foregoing findings by the Court of Appeal, it was incumbent upon the claimant to prove that there was constructive dismissal.

29. It is also imperative for the court to establish if there was constructive dismissal in the instant case and whether indeed, the respondent’s conduct constituted a repudiatory breach of the contract of employment.

30. It is notable that no contract of employment was produced before court hence there are no express terms of contract to be construed by the court and applied against the guiding principles set by the Court of Appeal.

31. The claimant has alleged that despite her accident, the respondent continued allocating her more work, hence putting her health at risk. The claimant produced the comprehensive medical report to support her claim. It is notable that the relevant part of the report indicates that she was to *“maintain good standing and pay attention to rest and to avoid prolonged standing without activities”*.

32. The report did not expressly state that the claimant should be allocated lighter duties and neither did she provide evidence that she requested the respondent for lighter duties on account of the said report, and that the same was denied.

33. It cannot therefore be said that there was repudiatory breach on the respondent’s part. Further, the claimant did not produce any evidence to prove that it protested the actions of the respondent and requested for lighter duties in view of her medical condition.

34. Besides, the claimant’s resignation letter did not make any mention of the hostile working environment as being the reason for her resignation. It was silent and no reason for the resignation was indicated in the letter.

35. The upshot of the foregoing is that the claimant has not proved that there was constructive dismissal and as result, the court finds that she indeed resigned and there is no evidence to suggest or prove that she was forced to do so. Therefore, her case does not fit the requirements to justify a claim for constructive dismissal.

36. The claimant also alleged that she was unfairly terminated and claimed for damages to that end. Indeed, she submitted extensively on the same.

37. Section 47(5) of the Employment Act places the burden of proving unfair termination of employment or wrongful dismissal on the employee. Once this burden is discharged, then the employer has the burden of justifying the grounds for the termination of employment or wrongful dismissal.

38. The claimant was therefore required to prove that there was unfair termination in this case. No termination letter was produced before court hence the claimant failed to discharge this burden. Therefore, the respondent had no burden to prove the reasons for the termination.

39. In any event, there is a resignation letter on record, hence the claimant's exit from employment could only have been through resignation and not termination as alleged.

40. I therefore find that the claimant was not unfairly terminated.

#### **Remedies**

41. The claimant has sought various remedies against the respondent which I will proceed to consider hereunder.

#### **Compensation for injuries sustained**

42. I have found that the claimant is entitled to compensation for injuries under the WIBA. However, I note that there is no report from the Director of Occupational Safety and Health (Director) pursuant to the provisions of WIBA. Under section 23(1) of the WIBA, the Director has authority to make inquiries that are necessary to decide upon any claim or liability. This position was reaffirmed by the Supreme Court in the case of **Law Society of Kenya v Attorney General & another [2019] eKLR**. In the circumstances, I will direct that the claimant appears before the Director for assessment and computation of compensation within 30 days of this Judgment. The court will make its final orders in regards to the said computation after receiving the appropriate report from the Director.

#### **One month salary in lieu of notice**

43. Having found that the claimant resigned willingly from employment, I find that she is not entitled to one month salary in lieu of notice.

#### **Unfair termination**

44. The claimant is also not entitled to a relief under this head on account that she did not prove the fact of termination.

#### **Service pay**

45. The claimant has prayed for the sum of Kshs 4,615/= being service pay for the period she worked for the respondent. Her claim is pursuant to Section 35 (5) of the Employment Act. It is notable that service pay under that section is subject to termination by notice which was not the case herein. For that reason, the claim for service pay fails.

46. The claimant has also submitted on the claim for special damages. This was not specifically pleaded in the claim hence cannot be awarded. This claim being specific, was already known by the claimant at the time she filed the suit hence she ought to have specifically pleaded for the same. To this end, I decline to award the same.

#### **Orders**

47. In conclusion, Judgement is entered in favour of the claimant against the respondent in terms of prayer (d) of the claim.

48. The final orders in regards to compensation payable to the claimant under WIBA will be issued upon receipt of the assessment and computation report from the Director.

49. The respondent shall bear the costs of this suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF OCTOBER 2021.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant      Mr. Muchiri

For the Respondent No appearance

Court assistant Barille Sora

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**STELLA RUTTO**

**JUDGE**