



**REPUBLIC OF KENYA**

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

**CAUSE NO 1787 OF 2016**

**PATRICK KARIUKI.....CLAIMANT**

**VERSUS**

**MUSTEK EAST AFRICA LIMITED.....RESPONDENT**

**JUDGEMENT**

1. The claimant herein was employed by the respondent as a service technician with effect from 15<sup>th</sup> June, 2015. The manner in which the employment relationship was severed is at the core of the dispute herein. He prays for several reliefs including; damages for unfair and constructive dismissal from employment; refund of all deductions from his salary; one month's salary in lieu of notice, service pay at 15% for every year worked from 2014 to April, 2016, unpaid leave days, gratuity, certificate of service, interest and costs of the suit.

2. The claim is opposed vide the respondent's claim dated 17<sup>th</sup> October, 2016 wherein it denies the claimant's averments and asserts that it is him who tendered a resignation without giving the requisite notice and to that end, it filed a counterclaim.

3. The matter proceeded for hearing on 30<sup>th</sup> September, 2021 and each side called one witness.

**Claimant's case**

4. The claimant testified as CW1 and sought to rely on his witness statement which he asked the court to adopt as part of his evidence in chief. He also produced the bundle of documents which were filed together with the claim, as exhibits before court.

5. The claimant told court that he was employed as a technician but was not offered a job description from the outset, hence was forced to work as per the wishes of the respondent's Managing Director (MD). In particular, he stated that he was forced to undertake sales and marketing roles which were outside his area of expertise. He also told court that he was forced to work overtime and was never allowed to proceed on leave or off and that he was not compensated accordingly.

6. It was also the testimony of the claimant that the respondent effected illegal deductions from his salary on flimsy grounds, such as failing to pick the MD's call. He specifically recalled that the sum of Kshs 3,000/= was deducted from his salary in the month of February, 2016 when he failed to contribute to a post by the MD on the office WhatsApp group. The claimant further told court that he had not authorized any deductions from his salary in favour of a medical insurance or towards Jubilee Insurance. Nevertheless, the said deductions were effected from this salary.

7. The claimant further averred that the respondent would set unrealistic targets and there were attendant penalties in the event one failed to meet the set targets. It was also his testimony that he was subjected to hostile and deplorable working conditions as the respondent's MD would use all manner of insults and profanities against him and other employees.

8. That as a result of the deplorable working conditions, which he termed as amounting to unfair labour practices, he was forced to resign. He further averred that the respondent had failed to pay his terminal dues despite his request.

9. In cross examination, the claimant stated that the insults by the respondent's MD were verbal.

**Respondent's case**

10. The respondent's General Manager, Mr. Francis Wambua, testified as RW1. He also relied on his witness statement, which he adopted as part of his evidence in chief. He also produced the respondent's bundle of documents, as exhibits before court.

11. RW1 averred that the claimant was employed as a service technician and placed on probation for a period of 3 months. He averred that

the probation was later extended for a further period of 3 months. He denied the claimant's assertion that he was not issued with any job description. To this end, he referred the court to an undated document titled "Job Description" which was produced as part of the respondent's documents.

12. RW1 further told court that the claimant's duties entailed ensuring that the software supplied to the respondent's clients was running and functioning well. That since the respondent is a company that provides IT solutions, any downtime experienced by its clients attracts a penalty. It was also the testimony of RW1 that the claimant was responsible for installation, repair as well as maintenance of both hardware and software to the respondent's clients, hence he would ordinarily be required to provide after sale support service. That it is at that point that he would know if a client required a new software or such other IT component, which he would recommend for purchase hence the sales and marketing role. It was also his testimony that the claimant was trained on his new responsibilities just like all the other staff of the respondent so as to allow them render customer support service effectively.

13. RW1 admitted that the respondent introduced new changes to the claimant's contract and that he was notified of the same. It was also his testimony that the claimant had not completed one year in employment and had taken one and half leave days in 2015. That the claimant never applied for leave during the period and the same denied hence was not entitled to the untaken leave days.

14. As regards the deductions from the claimant's salary, RW1 stated that the respondent had a pension scheme arrangement with Jubilee Insurance, hence such deductions were made towards the said fund. He also averred that the claimant's contributions towards jubilee insurance were intact and that it is him who has never followed up a refund.

15. He averred that the claimant resigned from employment vide an undated letter and never gave the requisite notice. It was also his testimony that the claimant never went back to clear with the respondent. He further averred that some deductions in the sum of Kshs 500/= in March, 2016, were made from the claimant's salary on account of delays in responding to clients' calls/issues.

16. In cross examination, RW1 admitted that he did not have the evidence to prove that the respondent had advanced the claimant Kshs 11,000/= which was deducted from his salary in March, 2016. RW1 further admitted that he did not have evidence to prove the lateness in responding to clients' calls hence the deductions. He also admitted not being privy to the interactions between the claimant and the MD.

#### **Submissions**

17. After close of the hearing, both parties filed written submissions with the claimant submitting that he was constructively dismissed by the respondent when it unilaterally altered the terms of his contract thus imposing upon him unrealistic targets. He cited the case of **Coca Cola East and central Africa limited vs Maria Kagai Ligaga (2015) eKLR**. The claimant further submitted that the deductions from his salary were in breach of section 19 of the Employment Act and on this issue, he relied on the case of **Kennedy Mutua Mwangi vs Madison Insurance Company Limited (2020) eKLR**. It was also the submission of the claimant that the respondent violated the provisions of section 10 of the Employment Act when it failed to provide him with a job description. On this score, he invited the court to consider the authority of **Carolyne L. Musonye vs Panari Hotel Limited (2017) eKLR**.

18. On its part, the respondent submitted that the claimant was not subjected to any unfair labour practices as alleged, in that; he was issued with a clear job description; he was not forced to sign a new contract which provided for new terms; the deductions from his salary were justified; he had not adduced any evidence to support the claim that he worked overtime and that the MD used insults and profanities towards him. The respondent further denied constructively dismissing the claimant and submitted that there was no proof that that it had breached an essential term of the employment contract. On this issue it also placed reliance on the case of **Coca Cola East and central Africa limited vs Maria Kagai Ligaga (2015) eKLR** and **Sophie Muthoni Njagi vs Rift Valley Railways (Kenya) Limited (2020) eKLR**.

#### **Analysis and Determination**

19. From the evidence on record and the submissions by both parties, this Court is being called to determine the following issues;

- i. Whether the claimant subjected to unfair labour practice(s)?**
- ii. Was the claimant constructively dismissed?**
- iii. Is the respondent entitled to the prayers sought in the counterclaim?**
- iv. Is the claimant entitled to the reliefs sought?**

#### **Whether the claimant subjected to unfair labour practice(s)?**

20. The claimant has alleged that he was subjected to unfair labour practice(s) while employed by the respondent. He cited the following instances;

- i. the respondent unilaterally amended his contract without consulting him;**
- ii. the respondent effected unlawful deductions from his salary without any legal justification;**
- iii. the respondent created an environment that was not conducive for work; and**

**iv. the respondent's MD continuously insulted, demeaned and dehumanized him in front of clients without justifiable cause.**

21. **Article 41(1)** of the Constitution guarantees every person right to fair labour practices. This provision does not render any definition as to what would constitute an unfair labour practice. Nonetheless, it underpins most of the provisions contained in the Employment Act, in particular the rights and duties enunciated thereunder.

22. Indeed, the Court opined in the case of **James Ang'awa Atanda & 10 others v Judicial Service Commission [2017] eKLR**, as follows; **“although the primary statutes governing the employment and labour relations in this country predate the Constitution of Kenya, 2010, there are prescriptions scattered over the statutes which in one way or the other prescribe or direct as to what may comprise the content of fair labour practice(s) would be.”**

23. As such, it is not easy to pin point what constitutes an unfair labour practice. Rather, it would be circumstantial, hence the specific acts of violation alleged to have been committed by an employer, would determine whether or not, there has been an unfair labour practice.

24. The claimant has alleged that the respondent unilaterally amended the terms of his employment contract. This fact was denied by the respondent who averred that the changes to the contract were not unilateral as the claimant signed both contracts. On his part, the claimant alleges that he was coerced to sign the said contracts.

25. **Section 10(5)** of the Act is relevant in this case and provides as follows;

**“Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.”**

26. The employment particulars that may be subject to change include; employee's job description, duration of the contract, place of work, hours of work, remuneration and related benefits.

27. Indeed, it is discernable that Section 10(5) of the Act, contemplates negotiations and consultations prior to any amendment to an employment contract. In this instance, the job description of the claimant was amended to provide for targets which would attract bonuses and penalties/deductions in the event one failed to meet the set targets. No doubt, this was a significant amendment to the claimant's employment contract.

28. The court in the **James Angawa Atanda case (supra)** found as follows;

**“Further, in my view, the common law principle that a unilateral variation of an employment contract is unlawful and amounts to repudiation and or breach of contract, and the statutory requirement to consult with an employee where there is a variation to the employment contract, and more specifically to an essential of the contract such as duration and remuneration where the employee would be adversely affected are ingredients of and are subsumed in the fair labour practice principle.”**

29. In view of the principle espoused in the foregoing precedent, it is apparent that a unilateral amendment to an employment contract would be deemed to be an unfair labour practice. In the same breath, it is also apparent that the key word in determining the same, is “unilateral variation”. In this instance, for breach to be construed, the amendment to the contract should be unilateral. The Black's law dictionary (9<sup>th</sup> Edition), defines unilateral to refer to; **“One-sided; relating to only one of two or more persons or things”**.

30. Thus, was the claimant's employment contract amended unilaterally? The answer to this question lies in the wording of the amended contract. The relevant portion of the said contract reads as follows;

*“We are hereby pleased to extend your probation for three months starting from September to November, 2015. Your terms shall be amended as indicated below starting August 1, 2015...”*

31. A literal interpretation of the above statement gives the impression that the amendment was a decision of the employer. It did not refer to any past negotiations or consultation. It merely stated *“your terms shall be amended as indicated below...”*. In as much as the claimant appended his signature to the amended employment contract, it doesn't change the fact that the amendment emanated from the respondent hence was one sided.

32. In this case, the claimant was the weaker party in the contractual arrangement, hence was at the mercy of the respondent and had everything to loose in the event he refused to accept the new contractual terms. Besides, I have noted that the first amendment is dated 1<sup>st</sup> August, 2015 whilst the claimant executed the same on 23<sup>rd</sup> October, 2015. In addition, the second amendment which introduced higher targets and penalties is dated 13<sup>th</sup> January, 2016 but was executed in 5<sup>th</sup> February, 2015. The lull is not explained. Could it be an indication that the claimant was reluctant to sign the same?

33. The upshot of the foregoing is that the amendments to the claimant's contract were unilateral and went to the root to the employment contract and were indeed, detrimental to him.

34. The claimant has also alleged that the respondent effected unlawful deductions from his salary. He annexed a pay slip for the month of March, 2016 which indicated deductions of Kshs 11,000/= referred to as “other deductions”, lateness deductions in the sum of Kshs 208/= and telephone allowance in the sum of Kshs 500/=.

35. Section 17 of the Act requires an employer to pay the entire amount of wages to an employee. This is subject to the authorized deductions provided for under section 19(1) of the Act. The respondent did not present any evidence to prove that the deductions fell within the ambit of section 19 (1), hence were authorized.

36. RW1 did not give any plausible reasons to justify the deductions from the claimant's salary. He stated that the deductions in the sum of Kshs 11,000/= was in regards to an advance made to the claimant but did not adduce any evidence to back up this claim. Ordinarily, when an employee is given a salary advance, the same is maintained in some sort of record which indicates as much. In this case, no record or such other evidence was adduced and thus it can only be inferred that the deduction was not justified.

37. The respondent further averred that it had a contractual arrangement with Jubilee Insurance through which it made pension contributions in favour of the claimant, hence the deductions itemized as "Jubilee". However, it did not provide any evidence in the form of a statement in regards to the claimant's contributions. Having been sued in the instant matter and a claim in regards to the deductions made against it, it was incumbent upon the respondent to obtain all evidence it needed to justify its position. This included obtaining a statement from the said insurance company. Afterall, the claimant was not privy to the contract alluded to by the respondent and did not seem to be aware of such a contractual arrangement.

38. In any event, the respondent produced the claimant's National Social Security Fund (NSSF) statements. Thus the question, why was it not able to produce the statements from Jubilee Insurance? In absence of any evidence, I find that the respondent did not sufficiently rebut the claimant's assertion to prove that the deductions were authorized and justified.

39. Similarly, the respondent did not adduce any evidence to justify the deductions titled "medical insurance". To this end, it did not provide any contract to indicate that it had a staff medical scheme. As a matter of fact, a medical card in the name of the claimant would have sufficed, but none was provided.

40. All in all, the respondent has failed to provide any justification as to why it effected deductions from the claimant's salary.

41. The claimant has also stated that the respondent's MD used insults, profanities, abusive and uncouth language against him in front of clients. This assertion was denied by the respondent and was not backed by evidence on the part of the claimant. For that reason, I find that the same has not been substantiated and proved, hence I will leave it at that.

42. The total sum of the foregoing is that, the unilateral amendment of the claimant's contract by the respondent and the act of effecting unauthorized deductions from his salary was by all means unjustified hence amounted to unfair labour practices against him and I so find.

#### **Whether the claimant was constructively dismissed?**

43. The claimant averred that the respondent created a work environment that made it impossible for him to continue working. In particular, he cited the unilateral amendment to his contract, the deductions made from his salary, and the continuous insults from the respondent's MD.

44. 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."***

45. The Court of Appeal, in the case of **Coca Cola East & Central Africa Limited vs Maria Kagai Lugaga [2015] eKLR** extensively dealt with the issue of constructive dismissal and stipulated the following, as the guiding principles in that respect;

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.*

46. More significantly, the court that **"The criterion to determine if constructive dismissal has taken place is repudiatory breach of contract through conduct of the employer..."**

47. In the instant case, the respondent materially altered the terms of the claimant's contract by introducing targets which attached bonuses and penalties/deductions against the same. This was a fundamental shift from the initial contract since the claimant was employed as a service technician and not a sales executive. However, the amendments to his contract introduced the element of "sales" of hardware and software products. This was a very fundamental amendment which went to the root of the claimant's contract.

48. In this regard, I will reiterate and adopt the findings in the case of the **Board of Governors Cardinal Otunga High School Mosochi & 2 others v Elizabeth Kwamboka Khaemba [2016] eKLR**, in which the Court of Appeal held thus;

**“In the circumstances that gave rise to the case before the trial court, we find and hold that the appellants' action of unilaterally assigning the respondent new duties amounted to significant breach that went to the root of the employment contract.... This was a classic case of constructive dismissal of the respondent by the appellants. The respondent was rightly entitled to damages for unfair termination of her employment under section 49 of the Employment Act, 2007.”**

49. Further, the respondent proceeded to effect unauthorized deductions from the claimant's salary. It was an agreed term of the contract that the claimant would earn the sum of Kshs 30,000/= as gross monthly salary, subject to statutory deductions. There is no evidence that the claimant authorized further deductions from his salary besides what was agreed initially. This amounted to change in the claimant's remuneration thus resulting in breach of contract.

50. It is also notable that the claimant resigned almost immediately after the unauthorized deductions from his pay slip in the month of March, 2016. It can therefore be inferred that this may have been the final trigger to his resignation.

51. In the circumstances, I find that the foregoing actions by the respondent fully satisfied the requirements necessary to establish constructive dismissal, hence amounted to repudiatory breach of the employment contract and in the end, left the claimant with no option but to resign.

52. In addition, the court in the **Coca Cola Case (supra)** approved the finding in **Western Excavating (ECC) Ltd vs Sharp [1978] 1 CR 222** where Lord Denning held as follows: **“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.”**

53. I fully adopt the legal position taken in the precedent above and find that the claimant was justified in terming the conduct of the respondent as amounting to repudiatory breach hence his resignation from employment. In the circumstances, he stood constructively dismissed.

#### **Is the counterclaim by the respondent justified?**

54. The respondent has lodged a counter claim in the sum of Kshs 32,500/= against the claimant, on the basis that he did not give one month's notice prior to his resignation, as contractually required. As I have found that the claimant was constructively dismissed, this claim falls on that account.

#### **Available Reliefs**

55. The claimant has sought various reliefs which I will proceed to consider hereunder.

#### **Damages for constructive dismissal**

56. The claimant has prayed for damages equivalent to 12 months gross salary under this head. Having found that there was a fundamental contractual breach on the part of the respondent, I will award the claimant damages equivalent to 4 months gross salary. This award is informed by the claimant's length of service and the fact that he was subjected to unfair labour practices whilst in the employment of the respondent.

#### **Deductions**

57. From the pay slip of March, 2016, which was produced before Court, the respondent made unauthorized deductions totaling the sum of Kshs 14,500.39, being medical insurance, Jubilee, other deductions, lateness deduction and telephone allowance. Having found that the same were unauthorized, the respondent is liable to refund the same.

#### **Unpaid leave days**

58. The claimant has prayed for unpaid leave days on grounds that he was not allowed to proceed on leave for the years 2015 and 2016. The respondent adduced evidence that the claimant had taken leave of one and a half days in 2015. In this regard, the claimant's contract of employment provides as follows, *“Any accrued leave not taken within the calendar year will be forfeited unless the company has approved for carry forward to the following year.”* The claimant did not adduce evidence to show that he applied for leave in 2015 and the same was rejected or approved for carry forward. In absence of such evidence, I will only address myself to leave in respect of 2016.

59. The claimant worked for 3 months in the year 2016 whilst his annual leave entitlement was 21 days. When prorated, he had earned leave of 5.25 days at the time he resigned from employment.

**Orders**

60. In the final analysis, I enter Judgment in favour of the claimant against the respondent as follows;

|   |                          |
|---|--------------------------|
| Compensation equivalent to 4 months' gross salary | 130,000.00               |
| Accrued leave days for 2016 (5.75 days)           | 5,687.50                 |
| Refund of unauthorized deductions                 | 14,500.39                |
| Total   | <b><u>150,187.89</u></b> |

61. The award shall be subject to interest at court rates from the date of judgment until payment in full. This is with the exception of the refund of unauthorized deductions whose interest will be effective from the date of filing of the suit.

62. The respondent shall bear the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER 2021.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Mr. Wafula

For the Respondent Ms. Wambui

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**