

12. Under section 9 of the Employment Act, 2007, it is the responsibility of the employer to draw up a contract of employment.

13. The Respondent on its part produced an unsigned copy of the contract of employment.

14. Both contracts indicate that the Claimant was entitled to a monthly salary of Kshs 125,000/- , sales commission of 2% of gross sales and a 13th-month salary once a year among other benefits.

15. Since both contracts were not fully executed, the Court will by dint of section 10(7) of the Employment Act, 2007, find that the contract produced by the Claimant embodied the terms and conditions of service between the parties.

Constructive dismissal

16. In asserting *constructive dismissal*, the Claimant contended that he was forced to resign because the Respondent had failed to pay his salaries, save for the months of February and March 2010.

17. Addressing the question of how he survived without an income up to 2014, the Claimant stated that he survived on his savings and monies given to him by his siblings and petty cash approved by the Respondent.

18. The Respondent's witness did not rebut the Claimant's testimony on the failure to pay salaries in any meaningful way but contended that the delay on the part of the Claimant to leave sooner on account of *constructive dismissal* meant he waived any claim to assert *constructive dismissal*.

19. The doctrine of *constructive dismissal* was first discussed in detail in the case of *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344.

20. The Court discussed the rival tests and ended up endorsing the contract test.

21. The test, essentially as to what amounts to *constructive dismissal* as endorsed in the authority is that 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 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. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

22. From this test, the duty the Court is called upon to do is to look at the conduct of the employer which might have led to the employee leaving.

23. In the instant case, the Claimant testified that he was only paid his remuneration for the months of February and March 2010 but he resigned on 10 April 2014, some 4 years after the failure to fulfil the obligation to pay remuneration started.

24. The Claimant did not indicate in the resignation letter the failure to pay his remuneration as the cause for leaving.

25. The reason he gave was that he wanted to pursue other career interests.

26. In the view of the Court, the failure by the Claimant to make up his mind reasonably soon after his remuneration was not paid until some 4 years later, and not clearly setting out an intolerable work environment/repudiation of contract in the resignation letter, disentitles him from asserting *constructive dismissal*.

Validity of the Mutual Separation Settlement Agreement of 15 April 2014

27. Soon after tendering his resignation, the Claimant and the Respondent entered into a *Mutual Separation Settlement Agreement* on 15 April 2014 under which the Respondent was to pay Kshs 4,000,000/- in full and complete financial settlement.

28. The Claimant and the Respondent's witness did not disown the Agreement and the Court finds that it was and is still a valid agreement settling the dispute(s) and claims presented by the Claimant in this Cause.

29. The explanation by the Respondent's witness that it was not able to fulfil its part of the agreement because of financial difficulties cannot render the agreement unenforceable or invalid.

30. The Court will, therefore, find that the Respondent breached the *Mutual Separation Settlement Agreement*.

Breach of contract

31. The Claimant further alleged breach of contract in respect to 13th-month salary, housing allowance, pension, annual leave, overrides and shares.

32. In the view of the Court, all these alleged breaches, if at all, were compromised in the *Mutual Separation Settlement Agreement*.

Discrimination

33. The Claimant did not prove that he was discriminated against.

Conclusion and Orders

34. The Court finds and declares that the Claimant waived the right to assert constructive dismissal, but that the Respondent was in breach of contract by not fulfilling its obligations under the *Mutual Separation Settlement Agreement*.

35. Consequently, judgment is entered for the Claimant in the sum of Kshs 4,000,000/- with interest from 9 April 2015.

36. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 17th day of January 2020.

Radido Stephen

Judge

Appearances

For Claimant Ms. Bukachi instructed by Owino Bukachi & Co. Advocates

For Respondent Mr. Ayuka instructed by Mose Nyambega & Co. Advocates

Court Assistants Lindsey/Fred