



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 2066 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

SOPHIE MUTHONI NJAGI

CLAIMANT

VERSUS

RIFT VALLEY RAILWAYS (KENYA) LIMITED RESPONDENT

JUDGMENT

Vide her statement of claim dated 17th November, 2014 and filed in Court on 18th November, 2014, the claimant avers that she was constructively dismissed from her employment by the Respondent herein, a registered limited liability company.

Her case is that she was employed by the respondent effective 4th February, 2013 in the position of General Manager- Human Resource Services earning a gross monthly salary of Kshs.608,575/-. Her terms of employment were subject to the Respondent's Staff regulations as contained in the respondent's Human Resource Manual as well as the laws of Kenya.

The Claimant avers that in the course of 2013 she commenced treatment for an orthopaedic condition and underwent reviews beginning January 2014 to 5th February 2014. She further avers that she was placed on yet another sick off effective 20th and 21st February, 2014 by her doctor at Meridian Medical Centre and was to resume normal duties on 24th February 2014 as evidenced by the various sick sheets.

The Claimant avers that on the said 24th February, 2014, she attended a consultation for her condition and her doctor advised that she proceeds on sick off. However, due to the urgency of matters she was forced to attend to a meeting chaired by the Chief Human Resource Officer. She further stated that in the course of the said meeting she was forced to excuse herself due to her medical condition and that she later communicated the same to her supervisor.

The Claimant further avers that effective 25th February 2014 she was placed on yet another sick off up to and including 4th March, 2014, which she brought to the attention of the Chief Human Resources Officer who in turn directed her via email to hand over her office.

The Claimant avers that on 3rd March, 2014 while she was away on sick leave she received a phone call from the head of security, Peter Musyoki on behalf of the Chief Human Resource Officer summoning her to hand over her duties and company property in her possession.

The Claimant maintained that she did report as requested on 4th March, 2014 but in a shocking twist of events she was denied access into the Respondent's premises and her work station. She further contends that as a consequence of the frustrations from the Respondent she was forced to tender her resignation which was duly accepted by the Respondent.

The Claimant avers that the Respondent's action amounted to constructive dismissal by the respondent contrary to her employment Contract and the Employment Act, 2007.

The Claimant states that the Respondent failed to pay her terminal dues at the time of separation despite requests by the Claimant.

In her Memorandum of Claim the Claimant seeks the following reliefs:-

- (i) A declaration that the Claimant was unlawfully constructively dismissed from her employment.
- (ii) A corrected Certificate of Service reflecting 4th March, 2014 and not 24th February 2014 as her last working day.
- (iii) Payment to her of Kshs.9,061,767/- as quantified below:-

- a) One month's salary in lieu of notice Kshs.608,575
- b) Unpaid salary and car allowance for February 2014 Kshs.728,575
- c) Salary and car allowance for days worked up to and inclusive 4th March, 2014 Kshs.97,143
- d) 16 leave days earned but not paid Kshs.324,573
- e) 12 months' salary as compensation Kshs.7,302,900

Total Kshs.9,061,767

- (iv) Interest on item (iii) above at Court rates.
- (v) Costs of this Suit.
- (vi) Any other remedy that the Court may deem fit to grant.

The Respondent in its Memorandum of Response to the Claim dated 10th December, 2014 and filed in Court on 11th December, 2014 admits having engaged the Claimant in the manner stated in the Memorandum of Claim. The Respondent however denies any knowledge of any medical condition suffered by the Claimant.

The Respondent avers that the Claimant failed to follow set procedure to have her sick off form properly completed by her supervisor and therefore maintained that her sick offs were not properly authorised.

The Respondent states that the Claimant did storm out of a meeting where she was expected to make a crucial presentation to the Company without any reason and/or explanation being given to her supervisor.

The Respondent states that the Claimant was not devoting her time to her duties at the Respondent and that it resulted into her lagging behind in her role, of specific significance being the crucial Uganda CBA.

The Respondent denies that it in any way used coercion, duress and/or undue influence to force the Claimant to tender her resignation as alleged and maintains that the claimant's separation with the respondent was lawful. It avers that she (the Claimant) has failed, ignored and/or neglected to clear with the Respondent for purposes of receiving her terminal dues.

It is on this basis that the Respondent maintains that the instant suit is based on falsehoods and that the same is baseless. It urges this Court to dismiss the same with costs to the Respondent.

The matter proceeded for hearing on 25th October, 2018 with the Claimant testifying on her behalf in the absence of the Respondent whose case was subsequently marked as closed.

Claimant's Case

In her evidence the Claimant, adopted her witness statement filed in Court on 24th October 2018 as her evidence in chief. In her statement reiterates the averment made in her Memorandum of Claim.

She further urged this Court to allow her Claim in terms of the reliefs sought therein.

The Claimant thereafter filed her submissions in support of the Claim.

Submissions by the Claimant

The Claimant submitted that she was constructively dismissed from her employment by the Respondent as the Respondent through its Manager created a hostile working environment making it intolerable for her to work and/or carry out her mandate thereby leading to her subsequent resignation from duty. The Claimant relied on the Court of Appeal decision in the case of **Leena Apparels (EPZ) Limited v Ngewu Juma Ndokolani (2018) eKLR**.

The Claimant made further reference to the case of **Western Excavating (ECC) Ltd v Sharp [1978] ICR 222 or 1978 QB 761** where constructive dismissal was defined 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. But the conduct must in either case be sufficiently serious to entitle him to leave at once."

The Claimant submitted that she is entitled to the reliefs sought in her Memorandum of Claim and therefore urged this Court to allow the same as prayed. The Claimant cited the case of **Pamela Nelima Lutta v Mumias Sugar Co. Ltd (2017) eKLR**.

Analysis and Determination

Having considered the facts of this cause, evidence, submissions and authorities cited, the issues for determination are:

1. Whether the Claimant voluntarily resigned or was constructively dismissed by the Respondent.
2. What sought the Claimant is entitled to the remedies.

Whether the Claimant was forced to resign or she voluntarily resigned.

In the instant case the Claimant in her pleadings, evidence and submissions contends that her resignation from the Respondent's employment was not voluntary. In other words, the Claimant claims to have been forced into resigning from her position following her medical condition that forced her to be out of duty.

She further maintained that she had the requisite documentation from her doctor for purposes of sick off and that she was lawfully away from duty.

The Respondent on the other hand maintained that it was not aware of any medical conditions the Claimant had and in fact accused her of failing to adhere to set guidelines on sick off where such documentation to be properly filled by an officer on behalf of the Respondent preferably the Claimant's immediate supervisor.

It is on this basis that the Respondent insisted that the Claimant was not away from work on any authorized sick off as alleged. The Respondent further accused the Claimant of poor performance. It averred that the Claimant failed to attend to a conciliation meeting that was set for the 8th October, 2013.

The Respondent denied any coercion, undue pressure or duress of any form exerted on the Claimant by it to force her to resign from her position. It maintained that the Claimant's separation from it was lawful and procedural.

The Respondent further contended that the Claimant is not entitled to any reliefs as sought in her Memorandum of Claim.

What is constructive dismissal

Black's Law Dictionary (9th Edition) defines constructive dismissal as

"A termination of employment brought about by the Respondent making the employee's working conditions so intolerable that the employee feels compelled to leave"

Constructive dismissal or discharge has been defined by the Court in **Nathan Ogada Atiagaga v David Engineering Limited Cause No. 419 of 2014** as follows:

"Constructive dismissal occurs when an employee resigns because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge."

Further, in **Cause Number 611 [N] of 2009 between Maria Kagai Ligaga v Coca Cola East and Central Africa Limited** [unreported], the Court held that –

"Constructive dismissal occurs where an employee is forced to leave his job against his will, because of his employer's conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed."

The basic ingredients in constructive dismissal are:-

- a. The employer must be in breach of the contract of employment;*
- b. The breach must be fundamental as to be considered a repudiatory breach;*
- c. The employee must resign in response to that breach; and*

d. The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.

In the case of **Milton M Isanya v Aga Khan Hospital (2017) eKLR** the Court in dismissing a claim for constructive dismissal stated that:

“In constructive dismissal the desire to resign is from the employee as a result of hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tender’s resignation. I find no evidence of constructive dismissal in the Claimant’s case.”

From the foregoing I find that the Claimant’s resignation does not amount to constructive dismissal. In her letter of resignation, the Claimant thanks the Respondent and its management team for a rewarding and fulfilling career. There is no evidence of frustration. From the tone of the letter the Claimant was under no duress from the Respondent.

What remedies is the Claimant entitled to

Having found that the Claimant voluntarily resigned from her employment prayer (i) being a declaration that she was constructively dismissed cannot be granted.

Corrected Certificate of Service

The Claimant is entitled to a corrected certificate of service reflecting 4th March, 2014 and not 24th February, 2014 as her last day of service by dint of Section 51 of the Employment Act. In absence of any evidence by the Respondent to rebut this assertion, the Claimant is entitled to the same.

Equivalent of 12 months’ salary as compensation for unlawful constructive dismissal

Having found that the Claimant’s resignation was voluntary, she is not entitled to this relief as prayed and as such the same is dismissed.

16 leave days earned but not paid – Kshs.324,573.50/-

In the absence of any evidence from the respondent to rebut this I find that the Claimant is entitled to this relief. I thus award her the same as prayed in the sum of **Kshs.324,573.50/-**.

Unpaid salary and car allowance for February, 2014 Kshs.728,575/-

In absence of any evidence to rebut this position I find that the Claimant is entitled to the same. I thus award her the same as prayed in the sum of **Kshs.728,575/-**.

Salary and car allowance for days worked up to and inclusive of 4th March 2014

In light of the Respondent’s averments that the Claimant’s sick off was not properly authorised by her supervisor and was therefore not properly authorized to be off duty the Claimant is not entitled to this relief.

The total award is Kshs.1,053,148.50/-.

The Claimant is also entitled to costs of this suit and interest from the date of the judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE