



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 20 OF 2017

COLLINS GITHINJI MUTAHA.....CLAIMANT

VERSUS

WIDRUPS GROUP LIMITED.....1<sup>ST</sup> RESPONDENT

JAMES RAPANDO.....2<sup>ND</sup> RESPONDENT

JUDGMENT

1. The Claimant sued the Respondents and averred that he was employed by the Respondents as a graduate engineer shop assistant from July 2013 till April 2016 when he resigned due to frustrations by the Respondent. He averred that at the time of his resignation he was earning Kshs. 150,000/- plus allowances amounting to Kshs. 15,000/-. He averred that upon giving notice of his resignation he was stopped from working immediately and the Respondent was thus required to pay him the salary for the month as well as the notice. He averred that the 2<sup>nd</sup> Respondent had been making random requests for money to be lent to the Respondents with a promise to reimburse them which request was never honoured. The Claimant thus sought to recover the unpaid part of January 2015 salary –Kshs. 35,000/- , salary for January 2014 – Kshs. 150,000/-, loans to the Respondents – Kshs. 254,000/-, unpaid allowances – Kshs. 120,000/-, monies expended on company activities not refunded – Kshs. 21,500/-, April salary – Kshs. 150,000/-, extraneous allowances for assignments taken at various sites – Kshs. 98,000/-. He also sought service pay for the 3 years he had worked with the Respondents amounting to Kshs. 225,000/- plus all his pension dues. He sought compensatory damages as well as a certificate of service and costs of the suit together with interest.

2. The Respondents filed a defence in which it denied the particulars of unpaid dues. The Respondents averred in the alternative that the Claimant was engaged by the 1<sup>st</sup> Respondent under a letter of appointment which set out the conditions of service *inter alia* as; that either party would terminate the contract of service by giving the other 30 days' notice or payment in lieu thereof and that the Claimant would maintain confidentiality and avoid incidents of conflict of interest. The Respondents averred that in breach of these obligations under the contract of service, the Claimant engaged in acts that constituted breach of the duty of confidentiality and amounted to conflict of interest with his employer. The Respondents averred that the Claimant did not give adequate notice of termination as stipulated in his letter of appointment. The Respondents averred that it paid the Claimant all his dues as set out in his letter of employment and that the Respondents did not owe him any dues. It was averred that the contract of employment did not entitle the Claimant to any service pay or pension dues as alleged or at all. The Respondents averred that the Claimant was not entitled to the prayers for compensatory or special damages. The Respondents urged the dismissal of the suit with costs.

3. The Claimant testified on 27<sup>th</sup> March 2019 when the case was scheduled for hearing but the Respondent did not attend the hearing. The Claimant reiterated his plea to court and stated that he had resigned and given adequate notice but was told not to report to work. The Respondent undertook to pay him the notice period pay but never did. He presented an unpaid cheque for Kshs. 150,000/- from the 1<sup>st</sup> Respondent which he was told not to cash. He stated the sum was never subsequently paid. He testified that from the records the Respondents owed him for money he lent the enterprise amounting to over Kshs. 250,000/- and that he was not paid the allowance of Kshs. 15,000/- which had been promised. He thus sought entry of judgment as per his claim.

4. The Claimant filed submissions in which he submitted that the evidence he had presented was not controverted by the Respondents who did not present a witness at the hearing. He submitted that he was constructively dismissed by the Respondent as the conditions at work were made so difficult by the Respondent making his continued service untenable. He submitted that **Black's Law Dictionary (9<sup>th</sup> Edition)** defined constructive dismissal as *a termination of employment brought about by the employer making the employee's working condition so intolerable that the employee feels compelled to leave*. The Claimant relied on the case of **Coca Cola East and Central Africa Ltd v Maria Kagai Ligaga [2015] eKLR** where the Court of Appeal held that:-

*The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behaviour towards him was so unreasonable that he*

*could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constituted a repudiatory breach of the contract of employment....*

The Claimant submitted that the determination by the Court of Appeal was that a court has to resort to a given set of facts to enable the court determine whether a given scenario gives credence to an inference of constructive dismissal. He submitted that the scenario he had presented gave a perfect example of what constructive dismissal is. He submitted that his resignation letter clearly set out the factors that had compelled him to resign. He submitted that the 2 Respondents were one and the same thing and that relying on the case of **Daniel Mutisya Masesi v Romy Madan and General Foods (K) Ltd [2013] eKLR** which held that the Employment Act 2007 defined the term employer expansively and that it did not bar the joinder of directors and their companies from being joined in the same claim. He prayed that the claim be allowed as prayed.

5. The Claimant asserts constructive dismissal. Constructive dismissal occurs where the employee resigns as a result of the employer creating a hostile work environment. In this case, the Claimant stated that the Respondents had begun grooming someone to take over from him. He said that it was curious that he had not been informed of this and that he was resigning to give the person room to take over. He also had been reliably informed that the Respondents were planning to frame him for the loss of the certificate of the 2<sup>nd</sup> Respondent which loss he is the one who had reported to the Respondents. As held by the Court of Appeal in **Coca Cola East and Central Africa Ltd v Maria Kagai Ligaga (supra)**, the test to be applied can be discerned from the dicta of the Court:-

*The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behavior towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constituted a repudiatory breach of the contract of employment - this is the contractual test. The contractual test is narrower than the reasonable test. The dicta in **Western Excavating (ECC) Ltd. -v- Sharp [1978] ICR 222** adopts the contractual approach test and we are persuaded that the test is narrow, precise and appropriate to prevent manipulation or overstretching the concept of constructive dismissal. For this reason, we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment. Whether a particular breach of contract is repudiatory is one of mixed fact and law. (emphasis mine)*

In the case before me, in evaluating whether the conduct of the Respondents was such as to constitute repudiatory breach of contract. By grooming the person the Respondents anticipated would take over the Claimant's employment, I find that the Respondents acted in a manner that repudiated the contract. As **Black's Law Dictionary Ninth Edition** states, the elements of constructive dismissal exist as the termination of employment in this case were brought about by the employer making the employee's working condition so intolerable that the employee felt compelled to leave by issuing his letter of resignation on 22<sup>nd</sup> April 2016.

6. Having found that the resignation by the Claimant amounts to constructive dismissal, the issue of reliefs the Claimant is entitled to naturally arises. On constructive dismissal, no notice is required to be given. The Claimant sought payment of the cheque for Kshs. 150,000/- which was never honoured, the balance of Kshs. 35,000/- being part of January 2015 salary, a sum of Kshs. 254,000/- owed by the Respondents, an allowance of Kshs. 120,000/- being a cumulative sum of the sum he was promised as an allowance, Kshs. 21,500/- owed to him and salary for April for the days worked till 22<sup>nd</sup> April. This letter was not controverted by the Respondents who merely stated that the dues he was entitled to were paid. No evidence was adduced or attached to the Respondents pleadings to show that the sums due were indeed paid. The Claimant resigned effective immediately. The Respondents in this case were properly joined in the suit as the 1<sup>st</sup> Respondent engaged the Claimant and the 2<sup>nd</sup> Respondent borrowed funds for the 1<sup>st</sup> Respondent as articulated in the claim. The Respondents never denied borrowing money from the Claimant or that there was an overlap in their dealings with the Claimant.

7. In the final analysis I enter judgment for the Claimant against the Respondents jointly and severally for:-

- a. Kshs. 150,000/- being the unpaid cheque
- b. Kshs. 35,000/- being part of January 2015 salary
- c. Kshs. 254,000/- owed by the Respondents
- d. Kshs. 120,000/- being a cumulative sum of allowances due
- e. Kshs. 21,500/- owed to the Claimant
- f. Kshs. 110,000/- being salary for 22 days worked in April
- g. Costs of the suit
- h. Interest at court rates on the sums in a), b), c), d), e) and f) above from date of judgment till payment in full.
- i. Certificate of service.

It is so ordered.

**Dated and delivered at Nyeri this 24<sup>th</sup> day of May 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a

true copy of the Original

**Deputy Registrar**