



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 319 OF 2017

DAVID WAIHAKA.....CLAIMANT

v

WORLD VISION INTERNATIONAL.....RESPONDENT

JUDGMENT

1. David Waithaka (Claimant) was offered employment as a People and Culture Director by World Vision International (Respondent) through a letter dated 26 July 2012. The contract was to run until 30 September 2014.
2. On 16 February 2017, the Claimant instituted legal proceedings against the Respondent alleging unfair termination of employment/constructive dismissal. The Claimant sought compensation, salary in lieu of notice and service pay. There was also a claim for lost personal items.
3. In a Replying Memorandum filed on 16 March 2017, the Respondent contended that the separation with the Claimant was pursuant to a voluntary Mutual Separation Agreement grounded on the Claimant's health, and that the Claimant's performance was wanting.
4. The Claimant joined Issue with the Reply on 23 March 2017.
5. On 10 May 2018, the Court directed the parties to file a list of Agreed Issues. Instead of complying, the parties filed separate Issues for determination.
6. The Cause was heard on 12 June 2019. Pursuant to leave granted by the Court, the Claimant's evidence was taken through video conferencing. The Respondent's Financial Accountant testified on its behalf. The parties also adopted their witness statements.
7. The Claimant filed his submissions on 5 July 2019 while the Respondent filed its submissions on 24 July 2019.
8. The Court has considered the pleadings, evidence and submissions and condensed the Issues for determination as discussed hereunder.

Constructive dismissal

9. Issues 1 and 2 as proposed by the Claimant and Issues 1, 2 and 3 as identified by the Respondent addressed the question of the lawfulness, validity and voluntariness of the Mutual Separation Agreement.
10. In order to establish whether the facts as demonstrated meet the standard for *constructive dismissal*, it is necessary to understand what constructive dismissal is. The concept has not been given express statutory grounding in our legal framework.
11. One of the earlier cases (from comparative jurisdictions) to discuss the concept of *constructive dismissal* was *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344.
12. The Court discussed the rival tests and ended up endorsing the contract test.

13. 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.

14. From this test, the duty the Court is called upon to do is to look at the conduct of the Respondent herein prior to the Mutual Separation Agreement.

15. The Claimant was based in South Sudan. On 12 December 2013 he left South Sudan for Kenya for holidays.

16. Shortly thereafter, civil war broke out and the Claimant was asked to operate from the Respondent's East Africa Regional office in Nairobi.

17. On 3 January 2014, the Respondent's Program Director issued a final warning to the Claimant. The letter outlined several performance concerns which the Claimant had failed to address.

18. Around 25 February 2014, the Respondent's Regional Director, People and Culture sought to meet the Claimant after 5.00pm. The meeting did not materialise because, according to the Claimant, he had family commitments.

19. The Regional Director again reached out to the Claimant on 26 February 2014 seeking for a meeting.

20. The Claimant sent an email to the Regional Director, People and Culture indicating that he could not make it to the meeting because a doctor had given him 1 week rest. He also indicated that he had been sick for a long time. The Claimant sought to be emailed documents which the Regional Director wanted to discuss with him.

21. The Regional Director emailed the documents to the Claimant on 27 February 2014 (hard copies were delivered to the Claimant's residence). The documents included an Exits Benefits Summary Letter dated 24 February 2014. According to the Exit Summary Benefits upon separation, the Claimant's final date of employment was indicated as 28 February 2014.

22. The Respondent expected a commitment from the Claimant by 28 February 2014.

23. The Claimant shared with a colleague friend the happenings through an email on 3 March 2014 and on 6 March 2014, the Regional Director, People and Culture sent him an email expressing concern that he had not signed and returned the Exit Benefits letter as agreed by 4 March 2014. The email gave the Claimant an ultimatum, deliver the signed exit letter by 9.00am 7 March 2014 or risk withdrawal of the exit offer and substitution thereof with a letter of termination of employment.

24. The Claimant signed and delivered the Exit Benefits letter on 6 March 2014 and on the same day, the Respondent informed the staff that the Claimant was leaving due to *health reasons* effective 28 February 2014.

25. It was the case of the Claimant that his signing of the exit package was not voluntary because there were no prior negotiations; that he was threatened with termination and he believed this would affect his future career prospects; that the Respondent informed the staff the separation was on health grounds while the Respondent indicated in a reply to demand that the real reason was performance; that the exit package was not commensurate with benefits he would have got if the exit was really on health grounds and that he was never put on a performance improvement plan.

26. The Respondent took a contrary view and asserted that the Claimant voluntarily signed the Exit package and that there were no threats from the Regional Director, People and Culture.

27. If the Claimant's performance was wanting, the Respondent did not demonstrate such as laying the basis for the separation. It was not disputed that the Claimant had been appraised in September 2013. The appraisal was not produced and the Court will therefore take the Claimant's testimony on oath that he was rated well.

Prior negotiations

28. The Respondent attempted to engage the Claimant before the consummation of the *Exits Benefits* package at least twice. The Claimant was not available for those meetings and he gave several reasons. Without doubting the reasons, the Court notes that the Claimant did not exhibit any medical certificate granting him sick leave and that the Respondent on its part did not deny that the Claimant was on sick leave.

29. Assuming that the Claimant was on a 1 week sick leave starting on 25 February 2014, the leave was to last until 4 March 2014.

30. This fact was within the knowledge of the Respondent, as can be evinced from the Claimant's email of 26 February 2014.

31. It was therefore unconscionable for the Respondent to engage with the Claimant on a separation discussion during his sick-off and go as far as giving him an ultimatum to sign the Exits package by 28 February 2014.

Communication at Unusual hours

32. The Respondent did not deny or attempt to explain why the Regional Director, People and Culture would send mobile texts to the Claimant and/or seek meetings after normal working hours (5.00pm and 8.00pm).

33. The Court is satisfied that the Claimant has demonstrated on a balance of probabilities that the Respondent had exhibited conduct that it was unwilling to be bound by the contract in place in a fundamental way and therefore the Claimant did not willingly sign the Exit benefits agreement. This was a case of not only the Respondent repudiating the contract but one of constructive dismissal.

Lost personal items

34. The Claimant did not prove to the required standard the value of the personal items purportedly lost or title or beneficial title thereto.

35. As to any items lying at the Respondent's warehouse, the Claimant should arrange to collect the same.

Appropriate remedies

Compensation

36. The Claimant was on a 2 year fixed term contract. By the time of separation, he had about 7 months to serve.

37. Considering the length of service, and the balance of months to expiry of contract, the Court is of the view that the equivalent of 4 months' gross salary as compensation would be appropriate (gross salary at point of separation was US \$ 5,750).

Salary in lieu of notice

38. The contract provided for at least 1 month notice of termination or salary in lieu thereof.

39. The Court finds that the Claimant is entitled to 1 month salary in lieu of notice in the sum of US \$ 5,750.

Conclusion and Orders

40. The Court finds, holds and declares that the Claimant was constructively dismissed and awards him

(i) Compensation	US \$ 23,000
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(ii) Salary in lieu of notice	US \$ 5,750
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TOTAL	US \$ 28,750.
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41. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 20th day of September 2019.

Radido Stephen

Judge

Appearances

For Claimant Mrs. Kayugira instructed by Munyao-Kayugira & Co. Advocates

For Respondent Mr. Nyaburi instructed by Iseme Kamau & Maema Advocates

Court Assistant Lindsey