



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 636 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 24th October, 2016)

ALICE MBITHE MWANZIA CLAIMANT

VERSUS

XPRESS IT COURIER LIMITEDRESPONDENT

JUDGMENT

1. Before the Court is a Memorandum of Claim dated 26th April 2013, where the Claimant prays for an award against the Respondent for:

- a) A declaration that the Claimant was constructively dismissed from work on 5th of April 2013.*
- b) A declaration that the said termination of the Claimant by the Respondent was unfair and unlawful.*
- c) An order compelling the Respondent to pay the Claimant her terminal benefits amounting to Kshs. 941,333.33 broken down as:*

<i>1. Salary for January, February & March 2013</i>	<i>Kshs 120,000.00</i>
<i>2. Three months' notice</i>	<i>Kshs 80,000.00</i>
<i>3. Arrears of Salary of February 2011</i>	
<i>– December 2012</i>	<i>Kshs 220,000.00</i>
<i>4. Outstanding leave days 31 days</i>	<i>Kshs 41,333.33</i>
<i>5. Maximum Compensation 12 months' salary</i>	<i>Kshs 480,000.00</i>
<i>GRAND TOTAL</i>	<i><u>Kshs 941,333.33</u></i>

Facts of the Claim

2. The Claimant was employed by the Respondent as a Customer Service Officer on the 15/6/2008 at a monthly salary of Ksh 40,000.00. In January 2011 without being given a reason as to why, she was sent on compulsory leave by the Director of the Respondent Mr. Njoroge Kirubi. She reported back after 30 days and was informed that her salary had been scaled down to Kshs 30,000.00, a decision she did not agree with but as she needed the job, she continued working.

3. In September of 2012, there was an attempt to orally dismiss her a move she resisted, demanding that the termination be put down in writing as stipulated in Clause 13.2 of her contract, or pay her 3 months' salary in lieu of notice. This was not done and she continued working until December 2012.

4. The Claimant was served with a letter of non performance dated 18/1/2013 where she was accused of not developing the wholesale courier centre in Nairobi and further as disciplinary measure her working hours and salary was reduced to Kshs 15,000.00. This disciplinary action was taken without warning or notice. She was not served with a show cause letter nor was she accorded an opportunity to be heard.

5. She wrote to the management on the 19/1/2013 via email and stated that the allegations levelled against her were false. She had worked beyond her duties and that the development of the alleged wholesale courier centre was not her core duty. She rejected the new terms of her contract, asking the company to stick to the previously agreed terms. The email is yet to receive a response.

6. The Claimant wrote a further letter on the 11/2/2013 asking Mr. Kirubi to issue her with an official termination letter and pay her terminal dues as the action taken thus far was frustrating. The Claimant then proceeded on 74 days leave which she was orally allowed. While on leave she wrote to the Respondent on several occasions seeking to resolve the matter, but she received no response.

7. The Claimant gave notice where she indicated that if the issues would not have been resolved by the 5/4/2013, she would presume her contract has been terminated. She reported back to the office on the 4/4/2013, but found her computer missing from her work station. She was not addressed by anyone and she therefore stopped reporting as of 6/4/2013 where she considered herself constructively terminated.

8. The Claimant was not paid her salary in January, February and March 2013. She had worked for the Respondent for five years and conducted her duties diligently and dutifully without any disciplinary action.

9. The Respondents have filed a Statement of Response dated 24th May 2013, where they admit that the Claimant was in their employment at the stated period but deny all allegations alluded to in the Memorandum.

10. They state that the disciplinary action alluded to were in accordance with the contract and the Claimant accepted the adjusted salary whilst continuing her employment with the Respondent.

11. Further, they state that the Claimant deserted work and proceeded to leave that was neither granted nor sanctioned or approved by the Employer/Respondent herein and is therefore not entitled to the reliefs sought as the Claimant was in breach of the contract.

12. In their submissions, the Claimant states that the dictum of the Employment Appeals Tribunal was distilled from the English law. The English law on constructive dismissal is outlined in Harvey on Industrial Relations and Employment law Vol. 1 at 403 and 404 as follows:

1. There must be breach of contract by the employer. This may be either an actual breach or an anticipatory breach.

2. That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving.

3. *He must leave in response to the breach and not for some other, unconnected reasons.*

4. *He must not delay too long in terminating the contract in response to the employer's breach otherwise he may be deemed to have waived the breach and agreed to vary the contract.*

5. *If the employee leaves in circumstances where these conditions are not met he will be held or have resigned and there will be no dismissal without the meaning of the legislation at all.*

13. In Ndebele vs. Foor Warehouse (pty) Ltd t/a Shoe Warehouse (1992) 13 ILJ 1247, the then Industrial Court of South Africa Deputy President stated as follows regarding the subject of constructive dismissal:

“Constructive dismissal arises when the employee terminates the employment contract in circumstances such that he is entitled to terminate it without notice by reason of the employer's intolerable or unreasonable conduct. It may also arise where an employee resigns and the resignation cannot be held to be voluntary in the real sense as it was promoted by the employer's unlawful or improper conduct, such as assault, sexual harassment or unsubstantiated allegations of theft or dishonesty.”

14. They submit that the Court should look at the conduct of the employee and that the Claimant has shown that there was no voluntary intention to resign. Further in Gladys Mutanu Mutellah vs. Bonface Kamau T/A Highland Annexe Restaurant Alias Highland Foods Industrial Cause No 271 of 2012 the Court stated that:

“This case turns on the allegation by the Claimant that she was compelled by the circumstances created by her employer to resign. In other words she is putting up a case for constructive dismissal. A constructive dismissal is essentially unfair dismissal within Section 45 of the Employment Act.

The basis are that constructive dismissal may be defined as a situation in the workplace, which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee to such an extent that the employee has no other option available but to resign.

In the South African case of Pretoria Society for the Care of the Retarded vs. Loots (1997) 6 BLLR 721 (LAC), the Labour Appeals Court has stated that the first test was whether, when resigning, there was no other motive for the resignation in other words, the employee would have continued the employment relationship indefinitely had it not been for the employers unacceptable behavior.

It went further to state that when any employee resigns and claims constructive dismissal, he is in fact stating that under the intolerable situation created by the employer, he can no longer continue to work, and has construed that the employer's behaviour amounts to a repudiation of the employment contract. So in view of the employer's repudiation, the employee terminates the contract.

In addition, the court further held that in bringing such a dispute, it is for the employee to resolve that the employer was responsible for introducing the intolerable condition and for the employee to prove that there was no other way of resolving the issue except for resignation....”

15. It is the Claimant's submission that the harassment and the frustrations brought upon her by the Respondent made her unable to perform her duties and impossible to continue working. She submits that she did not abscond, and the Respondent has failed to provide proof of such abscondment. They submit that desertion or abscondment or absence from duty or place of work is a gross misconduct under Section 44(4) it is punishable by summary dismissal.

16. They submit that the implication is that even in cases of absence from duty, the Claimant must still be

given an opportunity under Section 41 of the Act to explain what caused him to desert work.

17. The Claimant submits that the Respondent did not follow procedure as to termination as articulated in Section 35 and 41 of the Employment Act. The employer has to justify the grounds for termination as well as prove that the reasons were valid and fair under Section 45 of the Act.

18. They submit that the remedies available to the client include compensation for unfair termination of upto 12 months' salary, which the Court should give in the circumstances herein. They submit that the Claimant is entitled to all the reliefs sought as well as a letter of service.

19. In Response the Respondent submits that the Claimant left her employment under her own volition. They rely on the case of **Joseph Aleper & Another vs. Lodwar Walter and Sanitation Company Limited [2015]eKLR** where it was stated that:

“Constructive dismissal has its roots in the law of contract under the doctrine of 'discharge by breach.' Under this doctrine, an employee was entitled to treat himself as discharged from further performance of his obligations where the employer's conduct was a significant breach going to the root of the contract. The termination would be due to the employer's conduct. Such conduct may include unilateral reduction in pay or failure to pay the employee.

In England, constructive dismissal was given statutory clothing through the Redundancy Payments Act 1965 and later the Trade Unions and Labour Relations Act, 1974 and the same was discussed in Western Excavating (ECC) Ltd vs. Sharp [1978] ICR 221.

This doctrine has not been given any statutory backing in Kenya and therefore we submit and agree with Justice Radido when he stated in Anthony Mkala Chitavi vs. Malindi Water & Sewerage Company Ltd Cause No.64 of 2012 that:

“The doctrine and principles developed in other comparative jurisdictions would be equally applicable in Kenya because of the entrenchment of a justiciable right to fair labour practices under Article 41 of the Constitution.”

In the above quoted case of Western Excavating (ECC) Ltd vs. Sharp [1978] ICR 221 Lord Denning MR noted that an assessment of what was a constructive dismissal applied the ordinary 'contract test' so that a dismissal must first be established 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.”

Therefore a distinction should be made of the two facets of the definition of constructive dismissal:

a. The employer making a unilateral alteration or breach of the employment contract to the detriment of the employee.

b. The employer making or otherwise permitting working conditions of the employee to be intolerable for him to continue working.

The second facet of this definition is in fact what was stated by Mbaru J in Emmanuel Mutisya Solomon vs. Agility Logistics Cause No.1418 of 2011 Justice Linnet Ndolo in Benuel Mariera vs. Awand Enterprises Limited Mbsa. Cause No 191 of 2013 defined constructive termination under both limbs and stated as follows:

“It is trite law that when an employer by action or omission materially breaches the contract or

otherwise makes it impossible for an employee to perform his contract of employment then the contract is deemed to have been constructively terminated by the employer.”

20. They submit that constructive dismissal or termination must be specifically pleaded setting out the specific particulars which the employee believes pushed him or her out of employment involuntarily. This they submit is an instance of vexatious litigation, the Claimant left employment on her own accord breaching her contract by absconding from duty. They submit that in the matter of **Kenneth Kilimani Mburu & Another vs. Kibe Muigai Holdings Limited [2014] eKLR** the basic ingredients in constructive dismissal were listed as:-

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 resign after the breach has taken place, otherwise the court may find the breach waived.

e) The employer must be in breach of the contract of employment.

21. The Respondent submits that at no time breached the contract of employment. Clause 7 of the employment contract clears that adjustments to the remuneration would be dependent on performance. The Claimant's performance was wanting and hence the downward adjustment in salary; a decision that was duly communicated to the Claimant.

22. They submit that it is the Claimant who breached the contract of employment.

“The employee must delay in resigning after the breach has taken place, otherwise the court may find the breach waived”.

23. Perhaps pertinently, is the fourth consideration as listed by the learned Justice Rika in **Kenneth Kimani Mburu & Another vs. Kibe Muigai Holdings Limited [2014] eKLR** that the Claimant falls way short of the threshold. The Claimant, at paragraph 4 of her Memorandum of Claim states that her salary was reduced from Kshs 40,000.00 to Kshs 30,000.00. This was a decision arrived at after poor performance and failure to meet the set targets by the Claimant and the same communicated at her in the presence of the Company CEO and Operations Manager and she duly accepted the decision.

24. The Claimant therefore waived any right to claim for breach when she accepted the terms of her new contract. To this end, they rely on **Coca Cola East & Central Africa Limited vs Maria Kagia Ligaga [2015] eKLR** where it was stated that:

“The employee must not have accepted, waived, acquiesced or conducted himself to be stopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach..”

25. Finally they submit that the Claimant has not established her claim for constructive dismissal and that in fact it is the Claimant who is in breach of her contract of employment leaving at her own volition. Constructive dismissal has not been specifically pleaded, nor set out in the specific particulars which pushed her out of employment. They pray that the claim be dismissed with costs.

26. Having considered the submissions and evidence of the parties herein, the issues for determination by this Court are as follows:

1. Whether the Claimant left her employment on her own volition or she was constructively dismissed.

2. If dismissed, if there were valid reasons.

3. If dismissed, whether due process was followed.

4. What remedies if any to grant in the circumstances.

27. On the 1st issue, the Claimant told Court that the way the Respondent treated her they had the intention to terminate her. The events were as follows:- In January 2011 she was sent on compulsory leave for no reason. She came back after 30 days and she was informed her salary had been scaled down to 30,000/= a decision she did not agree with. In September 2012 there was an attempt to orally dismiss her, a move she resisted demanding termination in writing.

28. On 18/1/2013 she was now served with a letter of non-performance and her salary was reduced to 15,000/=. Then she tried to seek clarification which was not given to her. She proceeded on 74 days leave in February 2013 and came back to work on 4.4.2013. She found her work station empty. Her computer missing and she presumed she had been dismissed and stopped reporting on 6.4.2013.

29. The contract of employment with Claimant is dated 16/6/2008 paragraph 7 stated as follows:

“Remuneration

Your net salary shall be Kshs.40,000/= (Kenya Shilling Forty Thousand only) per month payable in arrears on the last day of each month..... Any increase that may be given hereunder shall be at the sole discretion of the company, depending on your performance”.

30. The Respondent indicate that the salary of Claimant was reduced to 30,000/= with her acceptance but they didn't exhibit this acceptance. Section 10(5) of the Employment Act 2007 states that:

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

31. For the case of the Claimant employment, there is no written change and so the assertion that the Claimant accepted her salary reduction is not true and it spells out an illegality.

32. The salary was further reduced to 15,000/= on 18/1/2013 and also issued with a Notice of Non-performance. Her working hours were also reduced. This definitely was a change in fundamental terms of the contract which the Respondent paid no regard to. This also does not conform to the provision of Section 10(5) of Employment Act above because there was no communication with the Claimant. This was in my view aimed at forcing the Claimant out.

33. The Claimant avers that she didn't accept the new changes and she assumed she had been terminated and so left on 6.4.2013. Though the Respondent avers that the Claimant deserted duty, their conduct spells out a different think.

34. In Ndebele vs. Foor Warehouse (pty) Ltd t/a Shoe Warehouse (1992) 13 ILJ 1247, the then Industrial Court of South Africa Deputy President stated as follows regarding the subject of constructive dismissal:-

“Constructive dismissal arises when the employee terminates the employment contract in circumstances such that he is entitled to terminate it without notice by reason of the employer's intolerable or unreasonable conduct. It may also arise where an employee resigns and the resignation cannot be held to be voluntary in the real sense as it was promoted by the employer's unlawful or improper conduct, such as assault, sexual harassment or unsubstantiated allegations of theft or dishonesty.”

35. Looking at the conduct of the employer and in light of the definition of constructive dismissal, the Court finds that the conduct of the Respondent was obviously geared towards making the employment environment intolerable for the Claimant by the substantial breach of the employment contract where the Respondent varied the terms of the contract unilaterally without due regard to the Claimant's rights. This breach is seen from the Respondents act of reducing the salary of the Claimant on different occasions and further by reducing the working period without regard to the law.

36. It is my finding that the Respondent by his conduct contractually dismissed the Claimant.

37. The answer to issue No. 2 above, the Respondent did not assign any reasons to the dismissal and therefore there were no valid reasons to warrant dismissal of the Claimant.

38. On the 3rd issue, the Respondent also failed to follow due process even if they felt that the Claimant was under performing. Section 10(5) of Employment Act makes it mandatory for the employer to vary terms of the contract after consultation with the employee.

39. In the case of the Claimant there was no consultation and the variation was actually meant to push the Claimant out of employment.

40. Having found as above, I find the termination of the Claimant unfair and unjustified and I proceed to award her as follows:

1. 3 months salary in lieu of notice being 40,000 x 3 as per the employment contract Clause 13.2.1 = 120,000/=

2. Unpaid salary for January, February and March 2013 = 120,000/=

3. Arrears of salary of February 2011 to December 2012 = 220,000/=

4. Leave days owing 31 days = 41,333/=

5. 12 months salary as compensation for unlawful dismissal = 12 x 40,000= 480,000/=

TOTAL = 981,333/=

6. Plus costs.

7. Issuance of Certificate of Service.

Read in open Court this 24th day of October, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mukai holding brief for Rakoro for Claimant – Present

No appearance for Respondent