



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME J.J.A)

CIVIL APPEAL NO. 19 OF 2018

BETWEEN

LEENA APPARELS (EPZ) LIMITED.....APPELLANT

AND

NYEVU JUMA NDOKOLANIRESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court at Mombasa (Makau, J.) delivered on 8th December, 2017 in E&LRC Cause No. 624 of 2016)

JUDGMENT OF THE COURT

[1] What is constructive dismissal from employment and when does it occur? That is the sole issue for determination in this appeal. Nyevu Juma Ndokolani (respondent) successfully sued Leena Apparels (EPZ) Ltd, (appellant) for constructive dismissal before the Employment and Labour Relations Court (ELRC) at Mombasa and was awarded Kshs.120,505/-; being damages for the unlawful dismissal.

[2] The background of the matter is that sometime in February 2015, the respondent was engaged in the appellant's employ as a helper; earning a basic salary of Kshs.10,955/-. In the course of that employment, she is said to have been involved in an industrial accident and was out of work for a while. She however made partial recovery and resumed work. Nonetheless, she instructed her advocates to pursue compensation in respect of the injuries suffered. At the time of this claim, the proceedings in respect of that compensation were still ongoing.

[3] Meanwhile, the respondent continued her usual duties and come Christmas break on or about December 2015, the appellant closed business, advised all employees to resume duty on 4th January, 2016. The respondent alleged that when she reported back for duty on 4th January, 2016 she was turned away and verbally instructed to return on 11th January, 2016 instead. When she tried to access the place of work as advised on the said 11th January, she was once again directed to return home and report back in February, 2016. She alleged that when she went back on 1st February, 2016; she was shown some demand letters written by her advocate in respect of the claim for compensation and told that unless she withdrew her complaint in respect of the compensation, she would never work for the appellant again.

[4] The respondent contended that she was desirous of working for the appellant, and she was of the view that she was well within her rights to seek compensation in respect of the injuries she had suffered while in the appellant's employ. Further, that the appellant's conduct since the 4th of January, 2016 was unlawful, unfair and amounted to constructive dismissal of the respondent; as a result of which she was entitled to damages. Accordingly, she sought compensation on the following terms:

- | | |
|--|-----------------------|
| a. One month's salary <i>in lieu</i> of notice | Kshs. 10,955/- |
| b. Damages for unfair and unlawful termination | |
| of employment (10,955 x 12) | Kshs. 131,460/- |
| c. Salary for the months of January | |
| and February, 2016 (10,955 x 2) | <u>Kshs. 21,910/-</u> |

TOTAL

Kshs. 164,325/-

[5] On the part of the appellant, it was admitted that the respondent was indeed employed as alleged and had suffered injury from an industrial accident; but was quick to add that the injuries thereby sustained were not life threatening as claimed. With regard to constructive dismissal, the appellant conceded that on 4th January, 2016; the respondent turned up for work but was instructed to go back home and report for duty on 1st February, 2016; but the appellant asserted that on the said date, the respondent failed to turn up for work and was duly deemed to have absconded duty. This prompted the appellant to write to the respondent on 8th February, 2016; enquiring about her whereabouts and asking her to return to work. In the appellant's view, the claim for constructive dismissal was misplaced and premature, as it was the respondent who had absconded duty on 1st February, 2016.

[6] The matter proceeded by way of written submissions and considering the matter, the learned trial Judge found the claim to be merited and awarded the respondent the sums as claimed.

[7] Dissatisfied with that outcome, the appellant lodged the present appeal, in which she contends that the learned Judge erred by; finding the respondent to have been constructively dismissed, yet she had wilfully absconded duty; failing to consider the evidence, thereby coming to an erroneous finding and; finding that the defence had no witness statement to corroborate the appellant's statement of defence.

[8] In her submissions before this Court, learned counsel for the appellant **Ms. Opolo**, stated that constructive dismissal under the Kenyan statutory framework is to be found under **Section 12** of the **Labour Institutions Act (No. 12 of 2007)**. She added that constructive dismissal can only arise where the employer's behaviour is shown to have been heinous and intolerable and that the burden of proof thereof, rests upon the employee. In this case, counsel stated, the appellant's decision not to have the respondent back on duty on 4th January, 2016 was necessitated by failure of another employee, a machine operator to turn up for duty; leaving the appellant with no alternative but to re deploy some of the helpers to work as machine operators while asking the rest of the helpers (the respondent included) to go back home until 1st February, 2016 when their services would be required.

[9] It was further submitted that the learned Judge failed to consider the correspondence exchanged between the parties; particularly the appellant's letter of 8th February, 2016, prior to arriving at his decision. Counsel reiterated that the claim for constructive dismissal was not only pre mature but misplaced because despite having been told to return to work on 1st February, the respondent failed to turn up on the said date and instead resorted to proffer threats to sue for constructive dismissal.

[10] On the part of the respondent, counsel too relied on their clients written submissions and defended the Judgement by the trial Judge. It was submitted that the respondent proved her case as indeed it was common ground that she was an employee of the appellant and she was asked to stay away until 4th January, 2016. This date was further postponed in a manner suggesting the respondent's services were no longer required by the appellant. Being turned away severally the respondent suffered frustrations that was caused by the appellant. The respondent was able to prove on a balance of probabilities that she was subjected to a constructive dismissal and was entitled to an award of damages. Counsel urged us to dismiss the appeal.

[11] The duty of this court on first appeal was rehashed in the case of *Abok James Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR* as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that:-

“On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

[12] Having regard to the grounds of appeal, the evidence before the trial court, the entire record of appeal and submissions made before us, the sole issue that fall for our determination herein as stated in the opening paragraph of this judgment is whether the respondent was constructively dismissed. Though **Ms. Opolo** submitted that constructive dismissal finds recognition under **Section 12** of the **Labour Institutions Act (No. 12 of 2007)**, that is not the case, as that provision was repealed by **Section 31** of the **Industrial Court Act (No. 20 of 2011)**. However, be that as it may, constructive dismissal is still recognized under common law and would similarly find anchor under **Article 41(1)** of the **Constitution** which stipulates that:

‘Every person has the right to fair labour practices’

In the case of *Western Excavating (ECC) Ltd vs. Sharp [1978] ICR 222 or [1978] QB 761*, 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 (Emphasis ours).

(See also **Nottingham County Council vs. Meikle (2005) ICR 1**.)”

[13] As a result, 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. The employer’s conduct does not have to be intentional or in bad faith before it can be repudiatory (See **Office vs. Roberts (1980) IRLR 347**). In this case, the appellant submitted that the trial court erred and misapprehended the evidence because the court should have considered that the respondent absconded duty and thereby voluntarily terminated the contract of employment; proof of the respondent’s absconding of duty was said to be as evidenced by the subsequent exchange of correspondence between the parties; more specifically, the appellant’s letter of 8th February, 2016.

[14] However, it is worth remembering that in constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of employee – unless waiver, estoppel or acquiescence is in issue. In other words, an employer is required not to behave in a way that amounts to a repudiatory breach of contract. (See **Coca Cola East & Central Africa Limited vs. Maria Kagai Ligaga [2015] eKLR**). The appellant’s conduct in this case supported the respondent’s assertion that the appellant had repudiated the employment contract. This is because, though the respondent turned up for work on 4th January, 2016 she was directed to go back home on account of her co workers’ failure to report which (according to the appellant) forced it to either re deploy the respondent’s calibre of workers or send them home. These were issues beyond the respondent’s control, but which materially affected her employment contract.

[15] It would seem to us that as at 4th January, 2016, the respondent was well within her rights to treat the contract as having been repudiated by her employer. Consequently, the letter of 8th February, 2016 which was written by the appellant asking why the respondent failed to return to duty on 1st February, 2016 is in our view a belated attempt to unringing the bell. Though the appellant purported to write letters to the respondent’s claiming ‘desertion’ of duty on 1st February, 2016, the letter was written a whole week later, on (8th February, 2016) and was thus a mere attempt by the appellant to regularize an already repudiated contract. As a result, we find the learned Judge’s findings that constructive dismissal had arisen cannot be faulted.

[16] As to the remedy available to the respondent, it was common ground that in the circumstances, the respondent’s termination of work was sudden and that no notice thereto had been issued. Consequently, she was entitled not only to a salary for the months of January and February, 2016 but the Judge awarded her a global sum of Ksh.120,505 with costs and interest. Knocking off the two months’ salary and perhaps one month salary *in lieu* of notice, the rest of the award would perhaps amount to about 9 months’ salary which strictly speaking was the damages for unlawful termination. We have gone through the grounds of appeal, the appellant has not challenged the award of damages or the Judge’s exercise of discretion in assessing the same. The decision on how many months’ worth of compensation a litigant ought to get under **Section 49(1) (c)** above is left to the courts’ discretion. Also important is that this Court can interfere very sparingly with discretionary decisions of the trial court. As stated in **Mary Njoki vs. John Kinyanjui Muthuru [1985] eKLR**:-

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong the appellate court will not hesitate to decide. Watt vs. Thomas, [1947] AC 484.” (Emphasize provided)

[17] In the instant appeal, it has not been demonstrated the exercise of discretion by the learned trial Judge was in any way improper or injudicious. This is crucial considering the dicta in **S. M. vs. E. N. B. [2015] eKLR**:-

“We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions.”

See also;- **Mbogo vs. Shah [1968] E.A. 93**:

“.....A court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice.”

[18] We are not persuaded the learned Judge erred at all in arriving at the conclusion he made, and further that an assessment of damages cannot merely be upset simply because another Judge would have issued a lesser award. It is not our mandate to merely substitute the Judges conclusion, we have pointed out there was no improper appreciation of the evidence or the law. For the aforesaid reasons we find the appeal lacking in merit and we order it dismissed with costs to the respondent

Dated and delivered at Malindi this 27th day of September, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

WANJIRU KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR