



REPUBLIC OF KENYA



KENYA LAW
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**Walter v Radar Limited (Cause 396 of 2018)
[2025] KEELRC 2601 (KLR) (26 September 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2601 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 396 OF 2018
JW KELI, J
SEPTEMBER 26, 2025**

BETWEEN

OKWARA WALTER CLAIMANT

AND

RADAR LIMITED RESPONDENT

JUDGMENT

1. Vide a memorandum of claim dated the 22nd of March 2018, the claimant sued the respondent, his former employer, and sought the following Orders:-
 - (a) A declaration be issued to declare the Claimant's dismissal from his position by the Respondent as illegal, unlawful and unconstitutional and contravenes the Claimant's rights guaranteed under Article 27 of *the constitution* of Kenya, 2010 of the right to equality, which includes the right not to be subjected to an arbitrary and capricious exercise of power by the Respondent.
 - (b) An order compelling the Respondents to see to it that the Claimant receives his terminal dues amounting to Kshs 209,860/=broken down as follows;
 - i. Payment of Kshs. 184,020/=being twelve (12) months' salary as compensation for unfair and unlawful termination pursuant to Section 49 of the *Employment Act*, 2007, broken down as follows:-
 - Basic salary Kshs. 11,069.00
 - House Allowance Kshs. 1,026.00
 - Over Time Kshs. 3,260.00
 - Monthly Gross salary Kshs. 15,355.00



- ii. Payment of Kshs 25,600/= being the unpaid money for the leave days he is entitled to and was never given the leave for the period he worked for the Respondent.
 - (c) General damages for unlawful and wrongful termination of employment.
 - (d) Costs of the suit.
 - (e) Interest on (b), (c) and (d) above.
 - (f) Any other award as the Honourable Court may deem fit.
2. The claimant in support of the claim filed his verifying affidavit sworn on 22nd March 2018 with a bundle of documents attached; list of witnesses of even date; an undated witness statement; and list of documents dated 22nd March 2018.
 3. The Respondent entered appearance through M/s Mwamuye, Mutabazi & Solomon Advocates and filed their Statement of Defence dated 20th April 2018. In support of the said defence, the respondent filed a list of documents dated 20th April 2018 with the bundle of documents attached; list of witnesses dated 19th September 2017; and witness statement of one Rina Ondego dated 4th January 2022.
 4. In response to the Respondent's defence, the claimant filed a reply to defence dated 8th May 2018.

Hearing and evidence

5. The claimant's case was heard on the 11th December 2024 where he testified on oath, adopted his witness statement dated 22nd March 2018 and produced documents under his list of even date as C-exhibit 1-4 as his evidence in chief. He was cross-examined by counsel for the respondent, Mr. Were.
6. The respondent's case was heard on the 22nd May 2025 where it called Beryl Odhiambo as RW1. She adopted the witness earlier filed by their employee Rina Ondego and dated 4th January 2022 and the filed statement of defence as the respondent's evidence in chief. She was cross-examined by counsel for the claimant, Ms Kibet.

The Claimant's case in summary

7. The Claimant's case is that he was employed by the Respondent as a permanent security guard vide a letter of appointment dated 8th November 2014, with his employment commencing on 1st January 2015. On or about April 2016, the Claimant fell ill and received treatment at St. Mary's Mission Hospital. After diagnosis and medication, the Claimant's doctor prescribed bed rest so as to avoid complications. Upon informing the Respondent of his illness and the ordered bed rest, and making a request for sick leave, the Respondent's Human Resource Manager declined his request with no justification whatsoever. The Claimant states that the Respondent instructed/forced him to resign by giving him an ultimatum that he should either resign or get back to work immediately. The Claimant resigned vide a letter dated 1st April 2016 after being forced to choose between his health and his work. Vide a letter dated 18th April 2016, the Respondent accepted the Claimant's resignation. They further committed to pay his terminal dues, but reneged on their promise. He has never received his terminal dues to date.
8. The Claimant's grievance against the Respondent relates to his constructive termination from employment. He contended that he was unfairly dismissed since his resignation was involuntary. He was also subjected to unfair labour practices. Finally, the Claimant complains that in the period that he worked for the Respondent, he was never afforded an opportunity to take leave.



Respondent's case in brief

9. The Respondent admits that the Claimant was its employee from in the position of security guard from 1st January 2015 to 1st April 2016. They also admit that they were aware that the Claimant fell ill on or about 13th October, 2015. The Claimant was incapacitated by the said illness such that his performance deteriorated with the progression of his disease. However, out of compassion, the Respondent continued to engage the claimant by reassigning him duties and granting him excessive sick leave. Eventually, the Claimant resigned of his own volition from his duties on 1st April, 2016, and the Respondent accepted the resignation, as the Claimant's medical condition made it impossible for the Claimant to perform his duties.
10. Conversely, in direct contradiction to their averment that the Claimant willingly resigned from employment, the Respondent states that the substantive reason for the Claimant's termination from employment was his poor performance. They state that the Claimant's health had deteriorated and his work had to be re-done by someone else. It would have therefore been both punitive and unreasonable to expect him to work, so the Respondent determined his employment in accordance with the requirements set out under section 41 of the *Employment Act*. It is the Respondent's case that the Claimant's contract of employment was terminated in accordance with fair procedure, the reasons for termination were explained to him, and all his dues were paid.

Determination

Issues for determination

11. The claimant outlined the following issues for determination in the suit-
 - a) Whether the Claimant was constructive dismissal by the Respondent?
 - b) Whether the Claimant's dismissal was unfair, unlawful, and in violation of his constitutional and statutory rights?
 - c) Whether the Claimant is entitled to the prayers sought?
12. The respondent outlined the following issues for determination –
 1. Whether the Claimant dismissal from his position by the Respondent was illegal, unlawful and unconstitutional.
 2. Whether the Claimant voluntarily resigned from employment and whether the Claimant was constructively dismissed
 3. Whether the Claimant is entitled to the reliefs sought.
 4. Who should bear the cost
13. The court finds that the parties were in agreement on the issues for determination in the suit to be-
 - a) Whether the Claimant was constructively dismissed by the Respondent?
 - c) Whether the Claimant is entitled to the prayers sought?

Whether the Claimant was constructively dismissed by the Respondent?

14. The claimant pleaded that on 13th October 2015 he fell ill and visited a doctor at St. Mary's Mission Hospital, Langata and upon diagnosis and medication he was advised to take bed rest so as to avoid



further complications and for quick recovery. That in exercise of his right to sick leave he presented the Doctor's note as prove of incapacity to work thus seeking sick leave. That the Human resources office declined the request without justification. That he was asked to give his resignation by the respondent which he did vide letter dated 1st april 2016. That the respondent accepted the resignation on 18th April 2019 and committed to pay his terminal dues but failed to do so. That the conduct of the respondent amounted constructive dismissal and he sought for compensation for unfair dismissal. In support of his case the claimant produced letters, receipts and treatment notes at St Mary's Hospital, Langata, of 13th October 2015, and copies of his resignation letter and the Respondent's acceptance letter. He also produced the demand letter on his terminal dues being unpaid.

15. The respondent denied the claim for constructive dismissal. It stated that it was aware that the claimant was entitled to sick leave. That the claimant resigned on own volition based on medical condition which the claimant stated made him unable to satisfy the provision of the contract with the respondent. That the respondent cannot be faulted it settled dues which were due when the claimant was on sick leave. That if this was constructive dismissal the respondent would have failed to pay the claimant's dues a while back as he had been warned of absconding on several occasions.
16. During the hearing, on cross-examination the claimant admitted that after the 13th October 2016 treatment the doctor told him to take bed rest. He said the evidence of having applied for sick leave was in his bundle of documents. On being asked if he applied for sick leave, the claimant answered, ' Mr. Mwanzia told me he cannot give me sick leave. ' On being asked if this was by letter, he answered it was in the documents. He told the court he was sick and unable to do his job. On being asked whether it was true he resigned voluntarily as per letter in court the claimant answered he was unwell. In re-examination, the claimant stated that he resigned because Mr. Mwanzia told him they could not give him sick leave, and he regarded his health as a priority.
17. The respondent called as its witness Beryl Odhiambo (RW1), who said she was the Human Resources Manager of the respondent. RW1 testified that the claimant resigned from his post due to medical issues and was paid his terminal dues. During cross-examination, RW1 told the court the claimant vide letter dated 30th March 2016 apologised to the employer for absconding duty and stated that he was issued a warning for absconding duty without informing the employer the reason for the absence. RW1 was not aware the claimant had filed a medical report and sought for sick leave. She confirmed that the employer gave the claimant extensive paid leave. On payment of terminal dues, RW1 said the claimant should prove he was not paid. The witness told the court that it was not true that the warning of 30th March 2016 prompted the claimant to resign and stated the reason for the warning was the claimant's absconding from duty.
18. On re-examination, RW1 confirmed that by letter dated April 8, 2016, the resignation was accepted, and that on several occasions the claimant apologized for absconding from work, and he was given a final warning. RW1 confirmed that the claimant was paid terminal dues after resignation.

Decision on issue 1.

19. The doctrine of constructive dismissal is founded on common law. It is not provided for under the *Employment Act*. The court on perusal of the judgment of the trial court found that the trial court relied on relevant definition of the doctrine as follows;- 'The Black's Law Dictionary (9th Edition) defines constructive dismissal as-"A termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave."
20. This concept of constructive dismissal was discussed in the case of Coca Cola East Africa & Central Africa v Maria Kagai Ligaga [2015] eKLR wherein the Court of Appeal found that constructive



dismissal occurs where an employee is forced to leave his job against his will, because of his employer's conduct. That although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed. The Court proceeded to outline and summarize the following legal principles relevant in determining constructive dismissal:-

“The legal principles relevant to determining constructive dismissal include the following:

- a) What are the fundamental or essential terms of the contract of employment?
- b) Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?
- c) The conduct of the employer must be a fundamental or 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.
- d) An objective test is to be applied in evaluating the employer's conduct.
- e) There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e. causation must be proved.
- f) An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.
- g) The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
- h) The burden to prove repudiatory breach or constructive dismissal is on the employee.
- i) Facts giving rise to repudiatory breach or constructive dismissal are varied.”

21. Applying the foregoing definition and case law on the doctrine of constructive dismissal, the claimant told the court he had produced the application for sick leave but the same was not filed. He produced the medical notes of October 2015 and undated handwritten letter which stated he had been diagnosed with Broncho Pneumonia (faint handwriting) and was advised to have sick rest until he improves fully to avoid complications. RW1 denied having seen the letter. The respondent produced a letter by the claimant dated 30th March 2016 titled apology. The claimant apologised for absconding duty and stated he would not repeat the mistake again. The employer made a note on the letter that this was a final warning and further repetition would lead to dismissal. On 1st April 2016 the claimant submitted the resignation letter and stated he was resigning due to medical grounds. The Claimant stated that due to the sickness, he felt he could not discharge his duties. The burden of proof of constructive dismissal lay with the claimant. The claimant relied on the letter of 30th March 2016 and submitted the warning was in response to the request for sick leave.

22. A document ought to be construed on its face value and given ordinary meaning if the words are not ambiguous. The letter of 30th March 2016 by the claimant was an apology for absconding duty and it was thus untrue to state the warning was in response to the denial for sick leave. The documents relied on issue of sick rest was for October 2015. The letter advised sick leave of which the claimant stated was denied. Sick leave is provided for under section 30 of the *Employment Act* as follows:- ‘30. Sick leave



- (1) After two consecutive months of service with his employer, an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of seven days with half pay, in each period of twelve consecutive months of service, subject to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre.
- (2) For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and "The reasons for it." The Respondent denied having received the medical notes. The statutory provision of sick leave is for 7 days, and thereafter another 7 days, subject to the production by the employee of a certificate of incapacity to work. The court finds the undated letter was not a certificate, nor was it indicated to have been signed by a medical practitioner. It was signed by Juma Blentine. There was no evidence before the court that the document was ever received by the employer. The resignation was 5 months later. That is material time difference. The claimant did not specify the exact date he presented the medical documents to the employer seeking sick leave. He did not produce any letter applying for sick leave. Considering that the medical treatment was in October 2015, and having been issued with a warning letter on 30th March 2016, and resigned on 1st April 2016, the court found no link between the medical notes and the warning letter of 30th March 2016 to prove a causal connection between the employer's conduct and the reason for the employee terminating the contract, i.e., causation must be proven (*Ligaga case, supra*). The final warning on absconding of work was not unique as the claimant received a similar warning vide letter dated 9th December 2011. The claimant did not prove that the employer materially breached the terms of employment, leaving him with no option but to resign. In the resignation letter, the claimant wrote. "This status of sickness leaves me no choice but to resign as I do not feel that I can... my work efficiently." The sickness was not attributed to the employer. The court finds that the claimant did not prove, on a balance of probabilities, that his resignation amounted to constructive dismissal. The case of unfair dismissal does not lie. The resignation is held to have been voluntary, based on the reason of sickness as disclosed by the claimant.

Whether the claimant was entitled to relief sought

23. The claim based on unfair dismissal cannot lie, the court having found no proof of constructive dismissal. The claim was for terminal dues of 12 months' salary compensation and unpaid money for leave days. The claimant testified that he was never given leave for the period he worked for the respondent. The claimant stated the he was not paid terminal dues. In response the respondent stated that the terminal dues were paid. That the claim or leave and overtime were spent. RW1 told the court it was the claimant to prove he was not paid. The claimant filed reply to response to the effect that the terminal dues were not paid. The court finds the terminal dues under the claim were for leave and overtime. On leave, the claimant submitted that he was entitled to 21 days of leave under section 28 of the *Employment Act*. The employer kept on saying it paid but produced no evidence to that effect, being the custodian of leave records of the employer under section 74 of the *Employment Act*. RW1 was evasive on the payment of terminal dues. The court finds on balance of probabilities that the claimant proved his case on due leave days payment in lieu on a balance of probabilities. Nothing would have been easier for the respondent than to prove the alleged payment for the leave days as alleged by the production of payment documents. The court made an adverse finding that the claimant was not paid for outstanding leave days.



24. The claim for overtime is a special damages claim and ought to be proved strictly. Any time worked beyond the official hours must be pleaded with specificity. That was not done and the claim for overtime is disallowed.

Conclusion

25. In conclusion, the court dismissed the claim for constructive dismissal and held the resignation was voluntary based on ill health. The claim for leave was successful and judgment is entered for the claimant against the respondent for payment of 21 annual leave days in lieu for the amount of Kshs. 25600 with interest at the court rate from the date of filing the suit. The claimant is awarded costs of the suit.

26. Stay of 30 days is granted.

27. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Claimant: Ms. Kibet h/b Eshuchi

Respondent: Wachaka

