



**Warui v Carlingwood Investments Limited (Cause E126 of 2021)
[2024] KEELRC 1218 (KLR) (21 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1218 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E126 OF 2021
NZIOKI WA MAKAU, J
MAY 21, 2024**

BETWEEN

MUTUKU IAN WARUI CLAIMANT

AND

CARLINGWOOD INVESTMENTS LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed this suit against the Respondent Company through a Memorandum of Claim dated 16th February 2021. He averred that by an appointment letter signed on 1st June 2017, the Respondent employed him as a Clerk of Works on a monthly salary of Kshs. 100,000/-. His case is that the Respondent verbally dismissed him from employment on 13th January 2021 without according him any warning letter or notice, hearing or reasons for the dismissal and he had not committed any offence. That the Respondent also failed to pay him terminal benefits and had unlawfully withheld his salary for 11 ½ months – September 2019 to August 2020, having last received a salary of Kshs. 50,000/- in September 2019. He thus seeks unpaid salary, one month’s pay in lieu of notice, unpaid leave for 5 years, severance pay at 15 days for each completed year of service, 12 months’ salary compensation for unfair termination, unpaid overtime and a certificate of service. Further, the Claimant prays for judgment against the Respondent for:
 - a. a declaration that the Respondent’s decision to terminate his Employment Contract rendered on 13th January 2021 was wrongful, unfair and unlawful;
 - b. general damages for breach of contract of employment;
 - c. compensation for unlawful termination as enumerated in the Memorandum of Claim;
 - d. cost and interest of the suit;
 - e. and any other relief this Court may deem fit and just to award.



2. In response, the Respondent filed a Statement of Defence dated 26th April 2021, wherein it denied that the Claimant was dismissed from employment. It averred that on the said 13th January 2021, the Claimant had an altercation with his supervisor within the Respondent's organization. That he then failed to show up at work on the following and subsequent days without any authorization or permission from the Respondent and that his absence prompted concerns and follow ups from the Company. The Respondent asserted that on 17th January 2021, the Claimant informed it through a Short Message Service (SMS) that he was unwell and in hospital and on 20th January 2021, it received a Demand Letter from the Claimant's advocates demanding compensation for alleged unlawful termination.
3. The Respondent's case is that sometime in June 2019, its business fell into financial turmoil that led to stoppage of all its projects in the property construction business thereby necessitating its temporary shutdown. It notified all its employees of the situation and encouraged its workers and labourers to explore alternative sources of income until the situation became bearable and noted that the Claimant was fortunate enough to get alternative employment during the intervening period. It stated that when it resumed operations in September 2020, the Claimant among others were recalled to their duties and the Claimant worked until he decided to absent himself from employment. The Respondent's stance is that the Claimant is not entitled to any of the terminal emoluments enumerated in his Claim and that his suit should be dismissed with cost.
4. The Respondent also filed a Witness Statement made by Mr. Hassan Mohamed, who asserted that during the period the Respondent business went into temporary shutdown, the Claimant would report to work and together with other employees, would go back home due to lack of business/work to do. That the Respondent tried to cushion all its employees and paid them during the said period and that the Claimant was well aware that the Company's financial constraints were aggravated by the COVID-19 Pandemic leading to the prolonged closure of its business. Mr. Hassan stated that he called the Claimant when he failed to show up at work after the altercation with his supervisor on 13th January 2021 and on all occasions, the Claimant never mentioned the alleged dismissal from work or that he was unwell. That it was until he requested the Claimant via WhatsApp on 17th January 2021 to send a report that the Claimant informed him he was unwell. That he was further shocked when he received a demand letter from the Claimant's advocates alleging unlawful termination of the Claimant's employment. Mr. Hassan maintained that the Claimant is not entitled to the prayers sought because he absconded work and his employment was not terminated as alleged.
5. The Claimant's rejoinder in his Reply dated 30th April 2021 was that the Respondent did not follow the procedural law in terminating his services. He averred that he did not breach any known Respondent's policy as alleged and he followed the laid down procedures to the letter. He contended that his dismissal from employment was predetermined, ill intended, harsh, unreasonable and based on the unilateral decision of the Respondent's Manager and maintained his entitlement to damages and terminal dues. The Claimant prays that the Statement of Defence be struck out and judgment be entered as prayed in the Memorandum of Claim.

Claimant's Submissions

6. The Claimant submitted that the following issues are for determination before this Honourable Court:
 - a. Whether the Claimant was unfairly terminated/constructively dismissed.
 - b. Whether the reason for termination of the employment was fair.



- c. Whether the Claimant is entitled to the reliefs sought in the Memorandum of Claim.
- d. Who should bear the cost of this suit.
7. It was the Claimant's submission that in Cause No. 611 (N) of 2009, *Maria Kagai Ligaga v Coca Cola East and Central Africa Limited* (unreported), the Court held that constructive dismissal occurs when an employee is forced to leave his job against his will, because of his employer's conduct and that although there is no actual dismissal, the treatment is sufficiently bad that the employee regards themselves as having been unfairly dismissed. The Claimant in the instant case noted that his testimony before Court, which the Respondent did not deny, was that he never originated the resignation and was forced to resign by the Respondent. That the Respondent breached the terms of employment when it failed to pay its salary for almost a year as and when required to. He argued that he would have continued to work for the Respondent if it had paid his salary arrears and that the Respondent did not make any proposals to pay the arrears even after he left the employment. The Claimant relied on the decision of the Court of Appeal in the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR affirming the judgment of the trial Court as follows:

“...constructive dismissal occurs where, “an employee terminates the contract under which he is employed, (with or without malice) in circumstances in which he is entitled to terminate it without notice, by reason of the employer’s conduct.”The employer’s behaviour in either case must be shown to be so heinous, so intolerable, that it made it considerably difficult for the employee to continue working. The employee initiates the termination, believing herself, to have been fired. The employee needs to show that the employer, without reasonable or proper cause conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is regarded as constructive dismissal if the employer’s conduct is a significant breach of the contract of employment and that the conduct shows the employer is no longer interested in being bound by the terms of the contract.The employee’s resignation is therefore treated as an actual dismissal by the employer and the employee may claim compensation for unfair termination.”

8. The Claimant submitted that under section 43 of the *Employment Act*, the Respondent has the burden of proving the reason for the termination to challenge the legality of the termination. That he had the constitutional right to be paid of his salary after working for the Respondent and in this case, the Respondent must prove the reasons for dismissing him from employment and prove that the same are valid and fair per the Court of Appeal decision in *Pius Machafu Isindu v Lavington Security Guards Ltd* [2017] eKLR. It was further submitted by the Claimant that he is therefore entitled to the reliefs he seeks. That his testimony was that he was never asked by the Respondent to look for alternative work and he never worked for any other company besides the Respondent. That the Respondent did not produce any document such as a memo, notice of closure of site or letter addressed to employees informing them that the site would be closed from September 2019 to August 2020. That the Respondent did not also refute his claim that his salary was not paid as pleaded, which this Court ought to therefore award him. The Claimant argued that the burden of proof in employment matters is usually placed upon employers to prove through documentation that they actually paid the employee and that the employee’s leave and overtime records.

Respondent’s Submissions

9. It was the Respondent’s submission that the Claimant’s appointment letter provides at clause 9 that termination shall be by either party by giving one month’s notice. That however in this case, no notice was issued to the Claimant thus demonstrating that his employment was never terminated.



It noted that the Claimant was sick on 17th January 2021 and caused a letter to be sent from his advocates on 20th January 2021 alleging that his employment was terminated on 13th January 2021. That the Claimant having confirmed during hearing in court that he never received any notice or letter or termination demonstrates that the Respondent could not have terminated his employment. The Respondent cited the case of *Ann Njoroge v Topex Petroleum Limited* [2013] eKLR in which the Court observed that when an employee's claim is based on unfair termination that is countered with a defence of absconding, the Court should carefully look at the circumstances of such a case because when an employee is proved to have absconded duty, the same is tantamount to gross misconduct that is sanctioned through summary dismissal without notice. Further, in the case of *Nancy C. Maritim v Sot Tea Growers Sacco Ltd* [2018] eKLR, the Court observed that the claimant absconded from duty and/or deserted employment and found that the respondent did not terminate her employment.

10. The Respondent submitted that having found that the Claimant's employment was never terminated, he is not entitled to any reliefs therefore. That considering the Claimant was not working for the Respondent for that intervening period when the business shut down its operations, and has also not proved that he worked during the said period, he is not entitled to the claim for unpaid salary. It further submitted that since the Claimant failed to adduce any evidence that he applied for leave and was denied, he is not entitled to any relief for unpaid leave. That the Claimant did not also show logs indicating when he worked overtime and that considering the evidence of RW1 that the construction site had been barred from working past 6.00pm by NEMA, the Claimant failed to prove the claim for overtime. According to the Respondent, the Claimant had failed to prove his case and the Claim should thus be dismissed with costs to be paid by the Claimant.
11. This suit hinges on the Claimant's assertions that he was terminated without cause. On the part of the Respondent, it was its case that the Claimant absconded from work and thereafter caused a demand notice to be issued for his alleged dismissal. From the evidence adduced, it was not shown that the Claimant ever demanded payment for the alleged salary arrears until after he left the Respondent's employ. He did not demonstrate how he notified the Respondent of his illness a few days before he asserted dismissal. In sum, the Respondent's follow up about the Claimant's well being and whereabouts shows the Respondent did not terminate the Claimant as he alleges. It is more probable that the events leading to his disappearance from his work place are as narrated by the Respondent who avers there was an altercation between the Claimant and his supervisor leading to the Claimant's absence.
12. In discussing the elements of constructive dismissal in the case of , Cause No. 611 (N) of 2009, *Maria Kagai Ligaga v Coca Cola East and Central Africa Limited* (supra) Rika J. held that the termination by such means is where the employee is compelled to terminate the employment but that is deemed to be a termination by the employer as constructive dismissal. The Learned Judge stated thus:
 - 3.1 There are several issues that could be framed for the purpose of settling this dispute. The core issue is whether Maria terminated her contract of employment of her own free will or whether she was let into doing so. Both parties did not put their finger on the basic principle at play in this dispute. They skirted around the implicated legal concept without giving it a name. The matter revolves around the concept known in employment law as "constructive dismissal." It is defined in most employment statutes in other jurisdictions but unfortunately, has not been defined in our employment and labour statutes. It is adequately defined in common law. Some of the statutes that have defined the concept include the English Employment Rights Act of 1996 and the South African *Labour Relations Act* Number 66 of 1995. Under a majority of statutory laws, constructive dismissal occurs where, "an employee terminates the contract under which he is employed, (with or without malice) in circumstances in which he is entitled



to terminate it without notice, by reason of the employer's conduct." These Acts of foreign parliaments do not of course bind this Court, but an overall understanding of the concept is gained from a comparative look, particularly in view of the omission in our own statutory law. Common law, which has been embraced in our law through section 12 of the *Labour Institutions Act* Number 12 of 2007, treats constructive dismissal as a repudiatory breach by the employer of the contract of employment. The employer's behavior in either case must be shown to be so heinous, so intolerable, that it made it considerably difficult for the employee to continue working. The employee initiates the termination, believing herself, to have been fired. The employee needs to show that the employer, without reasonable or proper cause conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is regarded as constructive dismissal if the employer's conduct is a significant breach of the contract of employment and that the conduct shows the employer is no longer interested in being bound by the terms of the contract. There is no practical difference in terms of effect, between the statutory and the common law concept on constructive dismissal; it is unlikely that an employer is in fundamental breach of the contract of employment, but all the same is found to have acted fairly. It is very unlikely that a common law breach occurs without amounting to a statutory wrong. The employee's resignation is therefore treated as an actual dismissal by the employer and the employee may claim compensation for unfair termination..... The onus of proof in this form of employment termination, unlike in other termination, lies with the employee. While under Sections 43 and 45 of the *Employment Act* 2007 the duty in showing that termination was fair is on the employer, constructive dismissal demands the employee demonstrates that his resignation was justified. Other collateral issues that must be shown by the employee are; that the employer made a fundamental change in the contract of employment, and that such change was unilateral; that the situation was so intolerable the employee was unable to continue working; that the employee would have continued working had the employer not created the intolerable work environment; and, that the employee resigned because he did not believe the employer would abandon the pattern of creating unacceptable work environment. These are some of the rules governing a claim for constructive dismissal."

13. This was affirmed by the Court of Appeal in the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* (*supra*). The Court of Appeal held as follows:-

13. 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.

[Emphasis supplied]

14. There was no demonstration before this Court that the employer made it intolerable for the employee to work. There is no evidence that the employer made it considerably difficult for the employee to continue working for the Respondent. In my considered view, the Claimant opted to cease presenting himself to work and when minded to, decided to hazard a suit against the Respondent in the hope he would cash in on his own termination of the employment. In this, the court is emboldened by the actions of the Claimant which do not demonstrate any ill motive on the part of the Respondent. The suit being tenuous at best is amenable to only one outcome – dismissal with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MAY 2024

NZIOKI WA MAKAU

JUDGE

