



**Rweria v Robinson Investment Limited (Cause 199 of 2017)
[2024] KEELRC 1908 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1908 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 199 OF 2017
DN NDERITU, J
JULY 25, 2024**

BETWEEN

PAUL WAWERU RWERIA CLAIMANT

AND

ROBINSON INVESTMENT LIMITED RESPONDENT

JUDGMENT

I. Introduction

1. The claimant commenced this cause by way of a statement of claim dated 3rd May, 2017 filed in court on even date through Maragia Ogaro & Co Advocates. As it is the procedure, the statement of claim is accompanied with a verifying affidavit sworn by the claimant, a witness statement by the claimant, a list of documents and a bundle of copies of the listed documents. The claimant filed a revised witness statement on 1st February, 2022.
2. The claimant is seeking for the following reliefs –
 - a. Underpayment - Kshs391,878.84
 - b. Overtime - Kshs486,414.65
 - c. Off days - Kshs162,229.43
 - d. Public holidays - Kshs 75,126.23
 - e. Leave - Kshs 37,763.10
 - f. Compensation - Kshs156,348.00Under section 49(i) C
Total - Kshs1,315,166.25



g. Plus costs and interest

3. The respondent entered appearance through Githiru & Co. Advocates on 24th May, 2017 and filed a memorandum of response to the claim on 12th June, 2017 wherein the claim is denied and the court urged to dismiss the cause with costs.
4. Alongside the response the respondent filed a bundle of copies of documents and a witness statement by Agnes Mukami Rutinu who was subsequently substituted with Stephen Mugusu (RW1).
5. The claimant filed a reply to the memorandum of response on 19th June, 2017 reiterating the contents of the statement of claim urging the court to enter judgment for the claimant as prayed.
6. Subsequently, the claimant filed two supplementary statements on 7th and 8th December, 2021.
7. By order and direction of the court the respondent filed a consolidated list and bundle of documents on 16th February, 2023.
8. After a considerably lengthy period of dormancy the cause came up in open court for hearing on 25th January, 2022 when the claimant testified and closed his case.
9. The defence was heard on 2nd February, 2023 and on 23rd March, 2023 when Stephen Mogusu (RW1) testified and the respondent's case was closed.
10. Counsel for both parties addressed the court by way of written submissions. Mr. Maragia for the claimant filed his written submissions on 20th April, 2023 while Mr. Githiru for the respondent filed on 19th May, 2023. Mr. Maragia filed supplementary submissions on 23rd May, 2023.

II. The Claimant's Case

11. The claimant's case is expressed in the statement of claim, the oral and documentary evidence adduced by the claimant (CW1), and in the written submissions by his counsel.
12. In the statement of claim, the claimant pleaded that the respondent is a limited liability company offering security services in Nakuru City and elsewhere in the Republic of Kenya. It is pleaded that in May, 2011 the claimant was engaged by the respondent as a security guard and worked continuously until December, 2016 when he was allegedly constructively dismissed by the respondent. It is pleaded that although the claimant resigned, the resignation was not voluntary but was caused by the unconducive work environment created by the respondent which was unbearable for the claimant.
13. It is further pleaded that the claimant earned a monthly salary of Kshs6,500/= which was allegedly an underpayment. It is pleaded that the claimant was denied overtime pay, off-duty pay, pay for public holidays worked, leave-pay, and even certificate of service upon leaving employment. It is those claims that the claimant is seeking to be relieved on as per the prayers set out in the introductory part of this judgment.
14. In his testimony in court the claimant relied on his filed statement dated 21st April, 2017, further statement dated 6th October, 2021 and supplementary statement of 3rd December, 2021 as his evidence-in-chief. He also produced his listed documents filed with the claim as exhibits.
15. He stated that he was not dismissed but rather he resigned due to alleged suffering that he ensured in the hands of the respondent in the course of his employment. He stated that he gave a notice for his resignation in a letter dated 1st November, 2016 wherein he stated that he had landed another job.



16. He stated that he worked for 12 hours a day without pay for overtime, off-duty, or public holidays. He stated that for the five years that he served with the respondent he was not allowed to go on annual leave. He alleged that he had a clean disciplinary record for the entire period of his service. He stated that upon leaving employment he was not paid terminal dues.
17. In cross-examination the claimant conceded that he must have been engaged after June, 2011 as his application for the job is dated 2nd June, 2011. He admitted, and unequivocally so, that he resigned from the respondent's employment after he secured another job where he was to start as from 1st January, 2017 hence his resignation letter dated 1st November, 2016. He stated that he was abandoning the claim for unfair termination as he had actually resigned. He also abandoned his claim on notice pay.
18. He stated that the monthly salary was agreed between him and the respondent at the time of engagement and that the pay was reviewed upwards in the course of his employment culminating in an alleged final monthly pay of Kshs6,500/=. However, based on his availed bank statements he admitted that the pay varied from month to month at times going as low as Kshs2,050/=. He insisted that he was not a casual worker. He admitted that he did not raise any of the issues in this claim during his time of employment. Further, he admitted that after he left employment he did not get in touch with the respondent until his lawyer addressed the demand letter dated 11th April, 2017 to the respondent.
19. It is on the basis on the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in his favour as prayed in the statement of claim. The submissions by his counsel shall be considered in a succeeding part of this judgment.

III. The Respondent's Case

20. The respondent's case is contained in the statement of response to the claim, the oral and documentary evidence adduced through RW1, and the written submissions by its counsel.
21. In the response to the statement of claim the respondent vehemently opposed the prayers in the statement of claim. The respondent states that the claimant was an employee of the respondent as a day security guard reliever but he resigned voluntarily via a letter dated 1st November, 2016. It is pleaded that following an application dated 2nd June, 2016 the claimant was as such engaged by the respondent on 9th June, 2011.
22. It is pleaded that having resigned voluntarily after locating another job, as expressed in his letter of resignation, the claimant cannot plead constructive dismissal. The allegation of constructive dismissal is termed as an afterthought, false, and malicious aimed at defrauding the respondent and to unjustly enrich the claimant.
23. It is denied that the claimant was underpaid. Further, it is pleaded that the claimant did not work overtime, that he took all his off-duty and leave days, and that he did not work on any public holiday. It is pleaded that the claimant is not entitled to any of the reliefs sought.
24. In his evidence in court RW1, the human resources manager of the respondent, stated that the claimant was engaged by the respondent as a day guard reliever in June, 2011. He testified that the claimant was not engaged on permanent basis but as a casual guard reliever to come in and work on need-basis subject to availability of work. He stated that the claimant was paid at the end of the month based on the days worked and this is self-evident and self-explanatory in the bank statements filed by the claimant and as per the muster-roll availed by the respondent.
25. He produced the documents filed by the respondent as exhibits 1 to 15. He stated that as per the letter of resignation the claimant indicated that he was resigning having found another job. He stated that



the claimant did not work overtime or on public holidays and was paid for all the days worked. He stated that permanent employees enjoyed working on public holidays so as to earn more and as such casuals did not get a chance to work on such days. He stated that since the claimant was a casual the issue of leave does not arise and in any event the claimant always worked for less than 15 days a month. He reiterated that having resigned voluntarily the issue of compensation to the claimant does not arise at all.

26. In cross-examination, RW1 stated that the application by the claimant is clear that he was joining the respondent as a “day guard reliever”. He stated that the claimant was issued with pay-slips and paid through the bank. He stated that due to passage of time the pay-slips could not be traced in the system. He stated that the claimant was paid above the minimum wage applicable at the time.
27. He stated that the respondent was neither served with a letter allegedly inviting them to attend a conciliation meeting at the labour office nor with the demand notice before action. He stated that the respondent was always ready and willing to issue the claimant with a certificate of service if the claimant asked for the same. He clarified that a day guard reliever is essentially a day guard engaged on casual basis to relieve the regularly employed guards. He stated that the reliever is ordinarily on standby and engaged on need-basis.
28. It is on the basis of the foregoing evidence and circumstances that the respondent prays that the claimant’s cause be dismissed with costs. The submissions by the respondent’s counsel shall be considered in the succeeding parts of this judgment alongside those by counsel for the claimant.

IV. Submissions

29. On the one hand, the claimant’s counsel identified the following issues for determination –
 1. Whether the claimant has demonstrated the case for underpayment.
 2. Whether the claimant is entitled for leave-pay.
 3. Whether the claimant has established that he worked overtime and also during his off duties and public holidays.
 4. Whether the respondents documents (the check list and Muster-Rolls) are a reflection off flaw entries of records as per section 75 of the *Employment Act*.
 5. Who should bear the costs of the suit.
30. On the first issue it is submitted that the respondent admitted, in the pleadings and through the evidence of RW1, that the claimant was engaged as a day-guard reliever. This position is further buttressed by the letter of employment dated 9th June, 2011. It is submitted that under Section 37 of the *Employment Act* (the Act) after serving for 30 continuous days the claimant should be deemed to have been on a month to month contract. Further, it is submitted that the claimant is entitled to file the cause in court as the respondent ignored all overtures to settle the matter out of court.
31. It is submitted that the claimant is entitled to the reliefs as sought. The said reliefs shall be tackled in a succeeding part of this judgment.
32. The documents availed and produced as exhibits by the respondent are termed as fake and false since the same were filed long after the respondent had filed a response to the claim and that the respondent is guilty of making false entries against the provisions of Section 75 of *the Act*.
33. On the other hand, the respondent’s counsel identified the following issues for determination –



- a. Whether the claimant’s employment was terminated constructively or otherwise, or whether he resigned.
 - b. Whether the claimant is bound by his pleadings, wherein he states that he resigned.
 - c. Whether the claimant was underpaid.
 - d. Whether the claimant worked overtime and during public holidays
 - e. Costs.
34. On the first issue, it is submitted that the claimant unequivocally resigned from employment as per his letter dated 1st November, 2016 on the ground that he had located another job where he was to commence serving as from 1st November, 2017. It is submitted that there is no ambiguity in the letter of resignation and as such the issue of termination, dismissal, or constructive dismissal does not arise.
35. Counsel cited *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR and *Douglas Omunyin Otungu v Board of Trustees, Redeemed Christian Church of God* [2022] eKLR in supporting the argument that the resignation by the claimant does not meet the threshold of or amount to constructive dismissal.
36. Further, it is submitted that the claimant departed from his pleadings and contradicted himself by acknowledging his voluntary resignation while in the same breath claiming constructive dismissal and compensation. It is submitted that this broke a cardinal rule of evidence and pleadings – that a party is bound by its filed pleadings.
37. The submission on the reliefs shall be considered in a succeeding part of this judgment.
38. Counsel for the claimant filed supplementary submissions wherein it is submitted that the claimant in his testimony in court admitted that he resigned and abandoned the claim on constructive dismissal and compensation therefor. It is submitted that nonetheless the claimant is pursuing the other reliefs as pleaded in the statement of claim.

V. Issues for Determination

39. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for the parties. The following issues commend themselves to the court for determination-
- a. Whether the claimant resigned voluntarily or he was constructively dismissed from his employment.
 - b. Whether the claimant is entitled to the reliefs sought.
 - c. Who should bear the costs of the cause?

VI. Resignation or Termination

40. The terms of engagement of the claimant by the respondent should not really be in contest. The claimant applied for the position of a guard in a letter dated 2nd June, 2011. In a letter dated 9th June, 2011 the claimant was engaged as a “Day Guard Reliever”. Amongst other terms of the engagement, the claimant was to earn Kshs335/= per day and work for a period of no longer than eight hours a day. The letter is very clear that “You will be a reliever subject to your competency and availability of work. This means, you shall only work when called upon to report to work when work is available”.



41. My understanding of the above terms and conditions of engagement is that the claimant was to work on-call and on-need basis subject to availability of work. That is a casual engagement whereby the accumulated daily pay was calculated and paid at the end of each month. This position is buttressed in a letter of casual employment form/agreement that was executed by and between the parties on 9th June, 2011 which reiterated the terms and conditions alluded to above. Those were the agreed terms of engagement by and between the parties and this court has no business rewriting or amending the same.
42. Based on the above evidence, the court finds and holds that the claimant was engaged on casual basis as a “day guard reliever”. This is as clear as it can be that the claimant was a casual employee on Kshs335/ = per day worked. He was on-call to relieve other guards on-need basis. According to the evidence of RW1, and the court has observed as much, the payments made to the claimant, as per the bank statements that he availed, varied from month to month based on the number of days worked on the pay rate stated above.
43. On the manner and style of exit, on 1st November, 2016 the claimant wrote to the respondent as follows –
- Paul Waweru Rweria
Box 522
Nakuru
1st November, 2016
To The Manager
Robinson Security
Box
Nakuru
Dear Sir/Madam,
Ref: Resignation Notice
- This letter is to notify you that I have decided to resign from this company. The reason is that I have found another job beginning from 2nd January, 2017. I thank you for the years I have been working for in this company. Sir, I kindly request for a recommendation letter since the other employer need to know how many years with experience.
- Sir, according to labour laws I am required to give 2 months’ notice. Therefore, my last day will be on 1st January, 2017. Thank you for the opportunity you have given me during my time here in this company.
- Yours Sincerely
Signed
Paul Waweru
44. It is on the basis of the above evidence that on cross-examination the claimant admitted that he voluntarily resigned and as such he abandoned the claim for constructive dismissal and any compensation therefor.
45. The court finds and holds that the claimant resigned voluntarily as above and as such the issue of constructive dismissal and compensation therefor does not arise.



VII. Reliefs

46. Flowing from the finding and the holding in the foregoing part of this judgment, there are no grounds for making any award or compensation to the claimant in regard to the alleged constructive dismissal. The court shall thus consider the other reliefs sought as hereunder.
47. Prayer (a) is for payment of underpayments. As noted above, the claimant was a casual employee on-call and on-need basis. For every day worked, the claimant was paid Kshs335/= . That being the agreed pay, the claimant carried the burden to demonstrate and prove that indeed that daily pay was lower than the gazetted minimum wage. As per the Gazette Notice (GN) No. 64 the daily wage for a day watchman or a day guard as from 1st May, 2011 was Kshs205.15. The minimum daily rate for the same cadre as from 1st May, 2012 remained the same. As from 1st May, 2013 the same was raised to Kshs264.50 and from 1st May, 2013 the pay remained the same. From 1st May, 2015 the pay was raised to Kshs296.20.
48. All the above stated rates are less than the Kshs335/- that was agreed by and between the parties in the terms of engagement alluded to above. In the circumstances, the court disagrees with the claimant that he was at any point underpaid. The bank statements availed and filed by the claimant and produced as exhibit confirm that the claimant was on casual employment and did not at any point work for a continuous period of 30 days. He was paid based on the days worked at the agreed rate which has been established to have been more than the minimum gazetted wage.
49. The respondent availed records on the days on which the claimant worked and it is on those number of days that the claimant was paid as per his bank statements. The claimant did not avail any other record as to dislodge the muster-roll availed by the respondent. In the circumstances, the claim for underpayment shall fail and the court so holds. The claimant did not prove such underpayments.
50. Likewise, there is no evidence that the claimant worked on any public holidays. Similarly, the claim for leave shall fail for the reason that he was a casual employee and at no time was he entitled to such leave. For the record, he mostly worked for less than 15 days each month.
51. The claimants cause shall fail on all counts.

IX. Costs

52. Each party shall meet own costs.

X. Orders

53. For all the foregoing reasons the claimant's cause is hereby dismissed with each party ordered to meet own costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 25TH DAY OF JULY, 2024.

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DAVID NDERITU

JUDGE

