

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT NAKURU
APPEAL NUMBER E005 OF 2023**

BETWEEN

PELT SECURITY SERVICES LIMITED
APPELLANT

AND

JARED MAKANARESPONDENT

[An Appeal from the Judgment and Decree of the Chief Magistrate's Court at Nakuru, E&LR Cause Number 66 of 2022 between the Parties herein, delivered by Hon. A.P. Ndege, S.R.M, on 23rd March 2023]

Rika J

Court Assistant: Emmanuel Kiprono

Kwamboka Marie & Associates, Advocates for the Appellant

S.K. Mburu & Company Advocates for the Respondent

JUDGMENT

1. In his Claim before the Trial Court, the Respondent herein, pleaded that he was employed by the Appellant as Day and Night Watchman.
2. He was employed on 1st November 2019, and pleaded that he was constructively dismissed by the Appellant, on 2nd February 2022.

3. The Respondent explained that he had been transferred from Nakuru to Meru. He disputed transfer, and his salary was stopped by the Appellant, in March 2022.
4. He considered himself to have been constructively dismissed, and sought compensation and an assortment of terminal benefits before the Trial Court, amounting to Kshs. 783,847,04.
5. The Appellant filed a Statement of Response dated 14th June 2022. It denied to have constructively dismissed the Respondent. The Appellant explained that the Respondent was regularly transferred from Nakuru to Meru.
6. He was offered transfer allowance. He declined to collect the allowance, and remained away from work from the date of transfer in January 2022. He was not constructively dismissed; he declined transfer.
7. Hearing before the Trial Court was scheduled in the presence of the Parties, for 16th March 2023.
8. The Appellant and its Advocate did not attend Court on the date of the hearing. The Respondent gave brief evidence relying on his witness statement, and called a witness, who also adopted his witness statement. Hearing closed on 16th March 2023, and Judgment reserved for 4 days later, on 20th March 2023.

9. The Appellant filed an application on the day after the hearing, dated 17th March 2023, seeking to set aside the *ex parte* proceedings of the previous day, and to reopen proceedings for full hearing.
10. The Trial Court ruled that the application was not urgent, and was meant to delay delivery of Judgment. It was the view of the Trial Court, that the Appellant ought to have applied and read the proceedings first, before reacting to the Court's notice of delivery of Judgment.
11. The Trial Court refused to certify the application as urgent, and ordered that Judgment would be delivered on 20th March 2023, as scheduled.
12. The record does not disclose if the application itself, was dismissed on 17th March 2023, or any date before the Judgment. The record indicates that the application was not certified as urgent.
13. The Judgment was delivered on 23rd March 2023, not 20th March 2023. The Court declared that the Respondent's contract was terminated by the Appellant unlawfully and unjustifiably. He was awarded all the prayers, amounting to Kshs. 783,847.88.
14. The Appellant filed a 10-ground Memorandum of Appeal, dated 4th April 2023. In summary, the Appellant states that the Trial Court erred, in finding that the Appellant terminated the Respondent's contract unlawfully and unjustifiably, without establishing if the Respondent's contract was at all terminated by the Appellant; the Trial Court erred in granting compensation and terminal benefits as prayed, in the sum of

Kshs. 783,847.88; the Trial Court erred in denying the Appellant the right of a fair hearing; the Trial Court erred in failing to set aside *ex parte* proceedings; and, erred in failing to consider that there was a Statement of Response on record, raising triable issues.

15. Parties agreed to have the appeal considered and determined on the strength of the Record of Appeal and submissions. The confirmed filing and exchange of submissions at the last appearance before the Court, on 2nd October 2025.

The Court Finds: -

16. At the heart of the Claim before the Trial Court, was the concept of constructive dismissal.
17. The Trial Court needed to satisfy itself, that the Respondent was constructively dismissed by the Appellant, applying the principles laid down by the Court of Appeal in **Coca Cola East and Central Africa Limited v. Maria Kagai Ligaga [201] KECA 394 [KLR]**.
18. Some of the key principles are: -
 - a. That the Employer has repudiated a fundamental term of the contract of employment.

- b. Repudiation must be significant, indicating that the Employer no longer intends to be bound by one, or more, of the essential terms of the contract.
 - c. An objective test is applied in evaluating the Employer's conduct.
 - d. There must be a causal link, between the Employer's conduct, and the reason for the Employee terminating of the contract.
 - e. The burden of proof of repudiatory breach or constructive dismissal, is on the Employee.
19. The Judgment of the Trial Court does not indicate whether the Respondent brought his Claim within these principles, to establish constructive dismissal.
20. The Trial did not even mention the term constructive dismissal, in its Judgment. It declared that termination was unlawful and unjustified, and contrary to the Employment Act 2007, and other unspecified laws.
21. The burden of proof, even in the absence of the Appellant at the hearing, rested with the Respondent.
22. There was no evidence that the Respondent resigned, believing the Appellant, through its conduct, to have terminated his contract.

23. The Pleadings and documents before the Trial Court, indicated that the Respondent was transferred from Nakuru to Meru. He disputed transfer, but did not resign, believing the circumstances of transfer to have amounted to constructive dismissal.
24. The transfer would seem to have been within the discretion of the Appellant, in accordance with the contract of employment exhibited before the Trial Court.
25. The right of a fair hearing to the Appellant, seems to have been compromised.
26. Having failed to appear in Court for hearing on 16th March 2023, the Appellant made an application the following day, to reopen the hearing.
27. The Court declined to certify the application as urgent, suggesting that the Appellant should have applied for proceedings and read the proceedings, before rushing to present the application.
28. When would the proceedings be typed and supplied, while Judgment had been reserved for 20th March 2023?
29. There were no procedural orders issued on service of the application upon the Respondent, and on hearing of the application in the presence of both Parties.

30. There was no consideration and determination of the substantive aspects of the application. There was no ruling on the merit of the application, just a ruling that the application was not urgent, and was merely intended to delay delivery of the Judgment.
31. The Appellant, whatever its reasons for not attending hearing on 16th March 2023, deserved a fair hearing on 17th March 2023.
32. The Trial Court appears to have rushed in its delivery of justice to the Respondent, while not serving the Appellant justice in full. In this Court's **Kowino v. Populations Services Limited [2023] KEELRC 699 [KLR]**; and **Mwangi v. Githinji, KEELRC 741 [KLR]**, it was observed that while Courts are under immense pressure to deliver justice quickly, under the maxim that *justice delayed is justice denied*, Courts must also take into account, *that justice hurried is justice buried*.
33. There is considerable doubt as to whether, even in the absence of the Appellant at the hearing, the terminal benefits awarded to the Respondent, were specifically proved. The Trial Court stated at paragraph [b] of its Judgment that: -

“The Claimant here is awarded compensation of damage as follows...”

34. It went on to list compensation of damage, to include: unlawful and unjustified termination at Kshs. 193,724; 1-month salary in lieu of notice at Kshs. 16,143; unpaid leave allowance at Kshs. 36,853; underpayment at Kshs. 149,526; unpaid overtime at Kshs. 139,948; unpaid off/rest days

at Kshs. 131,309; unpaid public holidays at Kshs. 48,377; unpaid annual leave at Kshs. 29,388; and service pay at Kshs. 18,867- amounting to Kshs. 783,847.

35. What was compensation of damage, and how did it relate to the Claim for constructive dismissal?

36. The Court would therefore uphold the Appeal on the grounds that the Appellant's right to a fair hearing was compromised; the Respondent did not establish his claim for constructive dismissal; and there was no proof of the award characterized as compensation of damage, in the Judgment of the Trial Court.

IT IS ORDERED: -

- a. The Appeal is allowed.***

- b. The Claim shall be heard afresh, before any other duly qualified Magistrate, other than the Trial Magistrate.***

- c. No order on the costs.***

Dated, signed and delivered electronically at Nakuru, pursuant to Rule 68[5] of the E&LRC Rules, 2024, this 28th day of November 2025.

James Rika
Judge

Handwritten signature or mark