

REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT  
APPEALS DIVISION

APPEAL NO. E368 OF 2024

SGA GUARDING LINE .....  
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APPELLANT

VERSUS

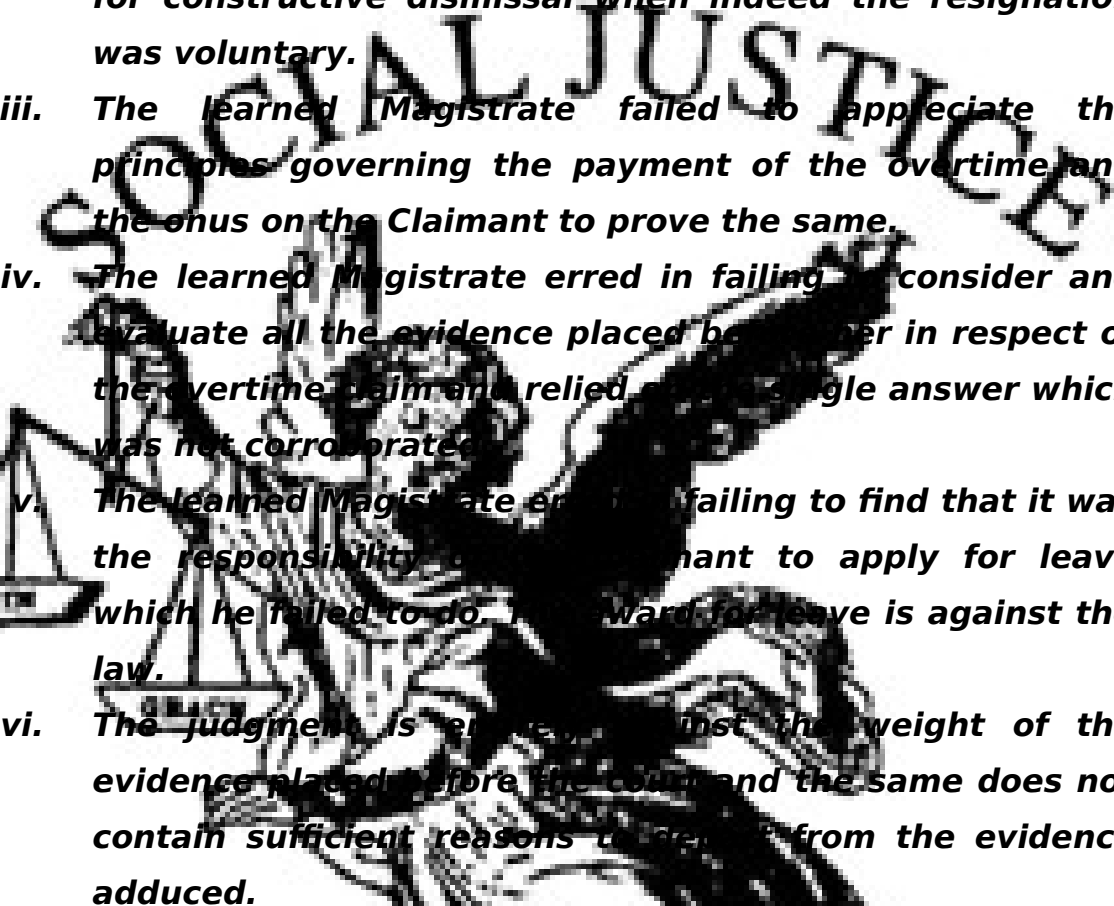
GEORGE OUMA OGIA .....  
.....

RESPONDENT

(Being an appeal from the Judgment of the Principal Magistrate Court at Nairobi (Honourable C.K Cheptoo) dated the 29<sup>th</sup> day of November 2024 in MCELRC/E297/2022)

**JUDGMENT**

1. Through the Memorandum of Appeal dated 1<sup>st</sup> December 2024, the Appellant appeals against part of the Judgment of Honourable C.K Cheptoo (PM).
2. The Appeal was based on the grounds that:
  - i. The learned Magistrate erred in the application of law in finding that the Claimant's resignation amounted to constructive dismissal.*

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- ii. The learned Magistrate erred in awarding compensation for constructive dismissal when indeed the resignation was voluntary.*
- iii. The learned Magistrate failed to appreciate the principles governing the payment of the overtime and the onus on the Claimant to prove the same.*
- iv. The learned Magistrate erred in failing to consider and evaluate all the evidence placed before her in respect of the overtime claim and relied on a single answer which was not corroborated.*
- v. The learned Magistrate erred in failing to find that it was the responsibility of the Claimant to apply for leave which he failed to do. The award for leave is against the law.*
- vi. The judgment is erroneous against the weight of the evidence placed before the court and the same does not contain sufficient reasons to derive from the evidence adduced.*

3. The Appellant prayed that the judgment made by learned Magistrate on the 29<sup>th</sup> November 2024 be set aside in respect of the claim of constructive dismissal, overtime and the alleged unpaid leave and substitute with a judgment dismissing the Claimant's claim with costs of the lower court and this appeal being borne by the Respondent.

4. The Appeal was disposed of by written submissions.

### **APPELLANT'S SUBMISSIONS**

5. The Appellant's Advocates T.K Kariba Mbabu & Company Advocates filed written submissions dated 2<sup>nd</sup> May, 2025 and on the issue of whether the Claimant was constructively dismissed counsel relied on the Black's Law Dictionary (9<sup>th</sup> Edition) on definition of constructive dismissal. Further, counsel relied on among others the case of **Saupe Nuthoni Njagi v Rift Valley Railways (Kenya) Limited (2020) eKLR**, where the Court cited Cause Number 100 of 2009 between **Maria Kagai Ligaga v Coca Cola Bottling Central Africa Limited (unreported)** on how constructive dismissal occurs where an employee leaves employment of their will due to employer's conduct which must be culpable. That the foundation of the Claimant's claim was that he tendered his resignation out of the unfair and intolerable circumstances at the work place.

6. Counsel submitted that it was trite law that for a resignation to be deemed constructive dismissal, the employee must demonstrate that the employer's conduct created intolerable working conditions, leaving no reasonable option but to resign. However, when an employee voluntarily resigns, courts have

generally found such resignations to be wilful and not constituting constructive dismissal.

7. It was counsel's contention that in the present case, while the Respondent did not exhibit his resignation letter, the same was annexed to the Appellant's documents. That the reasons for the resignation were expressly stated in the letter as being "to continue with his education and pursue other things in life and that the Respondent wanted to thank the Appellant's management for the opportunity to work with them for eight years. The tone of the letter was cordial, friendly, and clear, which reflected a positive relationship between employer and employee, and that the Respondent was not wronged.

8. That the Respondent during cross-examination again confirmed that his reason for resignation was to pursue further studies to show that his resignation was wilful. The foregoing notwithstanding, the Learned Magistrate, though acknowledging that the resignation letter appears voluntary on its face, nonetheless found that the surrounding circumstances, including the Claimant's unchallenged allegations of unfavourable working conditions indicate constructive

dismissal. The Court went further to hold that the Appellant's failure to provide an employment contract or address the Claimant's complaints about working conditions support a finding that the resignation was not entirely voluntary but was prompted by the Appellant's conduct.

9. However, counsel submitted that the named magistrate grossly erred in reaching this conclusion, as demonstrated here below. Firstly, the trial magistrate overlooked the fact that, if at all the Claimant/Respondent had been grossly affected negatively by the Respondent, he would not have been willing to still work for the Respondent in the future. This was clear from the resignation letter where the Respondent penned off by stating that "*If any services are available, please let me know*".

10. Counsel submitted that the fact of the Respondent expressing willingness to offer further services if available only showed that his working conditions for the Appellant were not severe enough to force him out of the job. He was left for other personal reasons. These elements, strongly indicated that the resignation was voluntary and amicable, and not prompted by

coercion, dissatisfaction, or any grievance against the Respondent.

11. Counsel relied on among others the case of **Kamau v Panari Hotel (Cause 1874 of 2017) (2023) KEELRC 2107 (KLR) (20 September 2023) (Judgment)** where the court found the resignation not to amount to constructive dismissal as there was no frustration from the employer where just like in this case the employee was not frustrated by the employer for the opportunity to work.

12. Secondly, the learned magistrate in finding in favour of constructive dismissal, found that the Respondent's failure to address the Claimant's complaints about working conditions supported a finding that the resignation was not entirely voluntary. Again, this finding was misplaced and unjustified. The Respondent during the pendency of his employment never complained about his working conditions. He only levelled various allegations of unfavourable working conditions as an afterthought while filing this suit. The Respondent could not possibly address complaints that were not raised in the first place.

13. That in fact, the Respondent, while testifying in Court, confirmed that he never raised any complaints about his working conditions. During cross-examination, he stated as such even to his union. That it was clear from the foregoing that the Respondent never raised any complaints that went unaddressed, therefore causing him resignation at the work place.

14. Consequently, counsel submitted that the allegations that the Respondent resigned because he was not given annual leave, house allowance, overtime, and public holidays cannot hold water. The reasons in the memo were backed by no evidence, and the content of the resignation letter were not retracted. Counsel placed reliance on the sentiments of Onyango J. in **Catherine Kinyany v MCL Githinji & Saatchi (2013) eKLR** where the court found no constructive dismissal but a voluntary resignation. In the light of the foregoing, counsel submitted that the fact that the Respondent wilfully resigned, and that no evidence was adduced to show unfair conditions at the workplace, the Court ought to find that there was no constructive dismissal and therefore set aside the

finding of trial court, including the award of Kshs.156, 816.00/=.

15. On the issue of whether the Claimant was entitled to an award of overtime in the sum of Kshs. 589, 896.00/= counsel relied on section 27 of the Employment Act on the hours of work which included the rest day in 6 days. Accordingly, any hours worked in excess of what was provided in the law must be compensated for under the Regulation of Wages (General) Order, for which the Respondent's employment falls under, provided for the formula for overtime calculation as provided under Rule 6.

16. That Rule 6 (1) stipulates that overtime shall be paid for time worked in excess of the normal number of hours per week at one and one-half times the normal hourly rate. This therefore meant that the rate to be applied should be an hourly rate, and not the salary in its entirety. That in the regulations of the security industry a guard ought to work for 52 hours spread out in 6 days. The basic hours are therefore calculated as follows 52 hours divide by Rule 6, which translated to 8.66 basic normal hours. From a 12 hours day less the basic hours, the

overtime normal hours would be 3.34 hours per day. Therefore, applying 4 hours as the day overtime was therefore outside the law. The daily overtime hours of 3.34 ought to have been applied. The Claimant's salary was based on the minimum wage salary guidelines of 2018 when the Claimant joined the Respondent. In the year 2018 the basic minimum wage was Kshs.14,038/= This was the amount that would be used in calculating the overtime according to the formula set out above. If indeed the court was based on the basic salary, the minimum basic wage would be applied.

17. That the Claimant had annexed to the case as exhibit G002 of Patrick Otieno - showing that the police guard's were earning a basic salary of KShs.15,000/- yet the trial Magistrate applied a figure of KShs13,600/- without any justification or basis. The Respondent was earning a daily income of KShs.726.5, which if divided with the 66-hour shift and an hourly rate would be KShs.83.8/- hence the correct rate in calculating overtime.

18. Counsel brought to the attention of the Court, the provisions on limitation of actions with regard to employment causes

while relying on section 89 of the Employment Act. That overtime was a continuous injury hence should be brought within 12 months of cessation thereof. Counsel relied on the case of **Charles Ogola & 2 others v Mansion Hart Kenya Limited (2019) eKLR** on this assertion.

19. Counsel submitted that the import of the above was that Courts could only award for the 12 months of overtime before cessation of the employment or the overtime, whichever is earlier. Even if the overtime spanned years, unless it was claimed within 12 months of cessation. As such, the Learned Trial Magistrate wrongly applied the principles of section 89 of the Employment Act by awarding overtime for three years yet only the duration of twelve months was tenable.

20. In view of the foregoing, counsel submitted that the proper mode of calculating the overtime payments for the Respondent would add up to Kshs 120,672/= and that the court should set aside Kshs 589,896.00/= awarded for overtime.

21. On the issue of whether the Claimant was entitled to an award for leave days in the sum of Kshs. 156, 816.00/= counsel submitted that the trial court in this case, while

granting an award for leave, noted that the Appellant did not produce any records confirming that the Respondent took his leave and as such, the award was justified. However, the trial court fell into error by failing to recognise that it was not upon the Appellant to compel the Respondent to proceed on leave. The Respondent himself chose not to proceed on leave. No evidence had been tendered to show that any such leave was applied for and declined, placing the burden on the Respondent was unwarranted. The court relied on the case of **Togom v Radar Limited (Employment and Labour Relation, Appeal E363 of 2023) (2024) KEELRC 112 (KLR) (1 February 2024) (Judgment)** on the assertion that the employee never applied for leave but it was not.

22. That the Respondent had a duty to notify his employer if he felt entitled to leave, yet he remained silent throughout his employment and failed to file any leave form suggesting that he had no issue with the leave arrangement. Based on the foregoing, counsel urged the court to find that the award of compensation for leave days was untenable and ought to be

set aside. Further the award of leave for 3 years was against the express provisions of Section 28(4) of the act.

# SOCIAL JUSTICE

## RESPONDENT'S SUBMISSIONS

23. The Respondent's Advocates Wetaba Wani & Associate Advocates filed written submissions dated 22<sup>nd</sup> November, 2025. Counsel submitted the role of the appellate court while relying on among other the case of **Peters v Sunday Post Ltd (1958)**. Counsel further submitted on parties being bound by the pleadings while relying on among other the case of **Paints Company limited v Falcon Guards Limited** Appeal case number 219 of 1998. On the first issue whether the Claimant was constructively dismissed counsel submitted that the trial court found there was constructive dismissal. That the question must be looked at beyond the language used in the termination letter and the employee's conduct must be analysed given that the employee was treated as a casual employee without any rights all along with no leave and other entitlements. Counsel relied on Cambridge Dictionary and the

Black's Law Dictionary 9<sup>th</sup> Edition on definition of constructive dismissal.

24. Counsel further submitted that the Claimant was employed in the year 2013 in the month of June and left in the year 2021 and as to the status of his employment the Respondent's witness testified that the Claimant was a casual employee. The testimony labeling the Claimant as a casual employee was rebutted by the employee's exhibits clearly showing that the same was false. The Claimant was equally discriminated against as fellow employees who had overtime and house allowance when he was denied.

25. Counsel relied on the case of **Karnal Kheri Farmers' Co-operative Society Limited [2024] KLR 2195 (KLR)** on when constructive dismissal arises. That the court arrived at the correct assessment when it found in favour of the Claimant with regard to unfair termination and that the court should uphold the same.

26. On ground 6 on annual leave not taken counsel submitted that the Respondent herein categorized the Claimant as a temporary and casual guard distinct from the other guards

they employed and in this characterization the employee was not given the privilege that the other guards were afforded and one of those was leave. Counsel relied on Section 28(1) of the Employment Act on leave entitlement.

27. It was submitted that the employer was before this court arguing that the Claimant was a casual employee then argue that the Claimant did not tender an application for leave. Is the argument that leave was denied because the Claimant did not make an application on the employee's behalf and did not deserve leave. The argument that a casual employee must apply for leave was one that fails to accept that casual employees that are protected by law and were vulnerable employees. Counsel relied on Section 15 of the Employment Act which required employers to display employee's rights in a conspicuous place.

28. Counsel submitted that the employer did not even notify the employee that he could not be a casual employee for 3 years and that was the context of his client's state of mind to the extent that despite the evidence, the Claimant even in the proceedings referred to himself as casual. Counsel relied on

section 74 of the Employment Act on requirement of employer to keep employment records.

29. That the obligation to track an employee's leave days remained with the employer and as such the employee was aware that this employee had not been proceeding on leave and section 5 mandated them to bring to the attention of the employee such issues. If the argument was that the employee must apply for leave then it must be satisfied that the employee was notified or knew he needed to apply for leave. Counsel relied on Section 74 of the Employment Act on provision of contract of employment to employee by employer. Counsel submitted that the employer in this matter did not issue a contract and there was no specific mention of the issue of leave as to enable the employee realize that he needs to apply for leave and the procedures thereto for such application. According to Counsel, the respondent was seeking to capitalize on its failure to issue a contract specifying the issues of leave and entitlement to the same and now wants the ignorant employee to be denied a right that they deliberately kept away from him and continued assigning him work with full knowledge

that he deserved to take a rest. There was a danger of assuming all employers have a conscience and will do the right thing.

30. Counsel wondered what the Respondent's leave policy with regard to casual employees was, to bring that argument before court and deny the Respondent the privilege of proceeding on leave or getting compensation for the same. That the decision in *Togom v. [Redacted] Limited* did not apply in this matter given the consistent and deliberate misleading the Claimant encountered as he was led to believe he was a temporary guard and on casual basis and by law casual employees were not entitled to leave as his engagements did not surpass a year. It was Counsel's position that the decision in *Togom case* was bad law when it was protected and vulnerable employees and that the entitlement to leave was not forfeited just because the employee did not make an application for the same. and we all know that an employer has the power to direct an employee to proceed on leave if the employer feels that the same was due.

31. Counsel relied on the case of **Matoke v Suchak (Appeal E046 of 2022) [2023] KEELRC 2393(KLR)(5 October 2023) (Judgment)**, to submit that the employer had the burden to provide evidence to show employee was not entitled to claimed terminal dues. That the trial court was in order to grant that particular prayer and counsel argued that the court upholds it.

32. On the claim for overtime, counsel submitted that the Respondent also admitted that the respondent worked 108 hours per week far exceeding the legal limit of 52 hours. The Appellant in their submissions also brought the issue of limitation of time and continuing injury which was a defence which was not raised at defence level but raised at appeal stage. Counsel relied on the case of **Jackson v Muri Wathigo t/a Murtown Supermarket v Lilian Wathigo (2021) KECA 388 (KLR)** which considered the raising of limitation issues at the appeal stage.

33. According to the respondent, this court was meant to determine whether the trial court committed an error but was now being asked to do that on the basis of a defence that was

not raised at trial. It was wrong on both the Respondent and the judicial officer for that interrogation to be done on the basis of a new defence. Counsel relied on section 26 of the Act on the employee filing complaint within three years' time and further submitted that denying an employee overtime when the same was worked amounted to a wrongful withholding remuneration which if the Act gave an employee three years within which to pursue such amounts and the act expressly indicated that the employee could recover the same.

34. Counsel relied among others on the case of **AA v SGA Security Solutions Limited (Employment and Labour Relations Appeal E002 of 2022) [2022] EELRC 1553 (KLR) (29 July 2022) (Judgment)** where the court found that without the employer providing evidence to the contrary of section 10(7) of the Act overtime should be awarded.

35. That the Appellant's offer of calculations of the overtime in its submission ought to have been done earlier and the trial court should not be faulted for adopting its calculations. That they proceed to calculate and use 83.8 Kenya Shillings as the

hourly rate when the 2018 minimum wage provided Kenya Shillings 136.56 as the hourly rate and that made the proposed figures erroneous. Counsel proposed 20 (hours) x 4 weeks x 12 (months) 136.55x1.5 =196,632/=

36. On the question of whether court should disturb the amounts awarded counsel submitted that there was no reason to disturb the awards and any reason must be based on the proceedings and not fresh arguments. Counsel relied on the case of **Jackson Mururi Wathigo v. Mwanjama Supermarket v Lilian Mutune (2021) KLRJ 1031 (KLRJ)** on when the appellate court should interfere with the trial court discretion on award of damages.

37. On whether the court could proceed on the grounds that were not raised before the trial court as a defence the court found no need to disturb the computations by the trial officer. That the appeal should be dismissed.

### **DETERMINATION**

38. The court has considered the grounds in the memorandum of Appeal, the Record of Appeal and the submissions filed by the parties herein and authorities relied on and would as usual

state as follows that it is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its own findings and conclusions as held in **Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, where it was stated that:-

*“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record, to then determine whether the conclusions reached by the learned trial judge stand or not and give reasons either way.”*

39. The Judgment of the trial court was that the Claimant's suit was allowed and that the trial court found that there was constructive dismissal of the Claimant even though the resignation letter appeared voluntary. The surrounding circumstances including unfavourable working conditions, failure to issue employment contract, and address the Claimant's complaints led to a constructive dismissal. The Claimant was awarded 8 month's compensation for unfair termination of Kshs 156,816/=, unpaid leave of Kshs 56,670.90/= capped at three years, over time of Kshs 589,896.00/= capped at three years with costs of the suit.

40. The Appellant was aggrieved by the part of the judgment concerning the finding on constructive dismissal when the respondent resigned and the award of compensation for unfair termination, unpaid leave and overtime. The Appellant fronted six grounds in its Memorandum of Appeal dated 20<sup>th</sup> December, 2024 which this court will condense in to two issues for determination as follows: -

- a) Whether the trial court erred in finding that the Respondent was constructively dismissed.
- b) Whether the trial court erred in awarding the Respondent damages for unfair termination, unpaid leave and overtime as it did.

**Whether the trial court erred in finding that the Respondent was constructively dismissed.**

41. It is not in dispute that the Respondent was engaged as a security officer by the Appellant since June, 2013 until he resigned on 4<sup>th</sup> August, 2021. The trial court found that although the tone of the resignation letter was voluntary the Respondent's testimony pointed to unfavourable working conditions where he alleged that he worked excessive hours

with no rest days, unfair treatment, failure to be issued with employment contract and failure to address his complaints on working conditions. This according to the respondent amounted to constructive dismissal.

42. The concept of constructive dismissal was fully articulated by Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp (1978) 1 GR 221** 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, the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by his own act, but the employer's conduct."*

43. The Court of Appeal explained this doctrine of constructive dismissal and in the case of **Coca Cola West & Central Africa Limited v Maria Kagai Ligaga [2015] 1 KLR 1** it was observed as follows: -

*The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first*

*interpretation is that the employee could leave when the employer's behavior towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constituted a repudiatory breach of the contract of employment - this is the contractual test. The contractual test is narrower than the reasonable test.*

44. Finally, recently the court of Appeal in the case of **Mwaura v CIC Insurance Group Ltd (Civil Appeal 548 of 2019) [2026] KECA 250 (KLR) (13 February 2026) (Judgment)**

held that;

*From the foregoing authorities, it is discernible that a core aspect of the term constructive dismissal is existence of intolerable working conditions brought about by the employer, which ultimately compel the employee to resign.*

45. The court is of no doubt the resignation letter of 4<sup>th</sup> August 2021 was voluntary in nature as the reason the Respondent was resigning was to continue with education and pursue other opportunities. He thanked the Appellant for the opportunity and even wished to work in future if there was such an opportunity. The trial court found there was constructive dismissal based on surrounding circumstances as seen above.

46. The court notes that parties are bound by their own pleadings and the Respondent ought to have particularized the

discrimination he faced as well as the unfavourable working conditions. This court further interrogates the evidence after the Respondent resigned and finds that the letter by Kenya Human Rights Commission of September, 2021 termed the termination as lawful and only requested for unpaid salary arrears. Thereafter the demand letter of October, 2021 requested for the Respondent's terminal dues after he resigned. It never mentioned anything to do with constructive dismissal.

47. The court therefore disagrees with the trial court finding that there was constructive dismissal since the Respondent voluntarily resigned, there is no evidence of him complaining of the working conditions which he confirmed during oral hearing. The Court therefore takes the view that ingredients of constructive dismissal such as the employer creating intolerable working conditions had not been proved. What was clear was that the respondent was never paid his terminal dues hence the dispute all along. The Resignation letter did not disclose any frustration suffered by the Respondent and the

preceding correspondences showed that the termination was lawful.

48. In the recent Court of Appeal case of **Mwaura v CIC Insurance Group Ltd (Civil Appeal 548 of 2019) [2026] KECA 250 (KLR) (13 February 2026) (Judgment)**, the court while finding that such resignation did not amount to constructive dismissal the court placed reliance on the case of **EDWARD MACHUKA NYAMORA Vs. KENYA ANIMAL GENETIC RESOURCE CENTRE formerly (CENTRAL ARTIFICIAL INSEMINATION STATION) (2018) eKLR**, the court held as follows;

*"...In the present case the Claimant... the court to believe that he was forced to resign from his employment with the Respondent was unlawful termination and not a voluntary resignation. ...If the resignation was not voluntary as claimed by the Respondent, a reasonable employee in a senior position as held by the Claimant would tender the resignation under protest and state that the resignation was not voluntary but was forced. To the contrary the resignation produced by the Claimant was not under protest and did not state the reasons for the resignation and whether the action was forced"*

49. This court finds that nothing stopped the Respondent who had worked for 8 years from indicating in the resignation letter if he was frustrated with work and that the resignation was not voluntary. The Court therefore agrees with the appellant the the trial Court erred in reaching the conclusion that the respondent was constructively dismissed. This finding is therefore set aside.

**Whether the trial court erred in awarding the Respondent damages for unfair termination, unpaid leave and overtime as it did.**

50. Having found that there was no constructive dismissal, the award for damages for unfair termination will obviously be set aside. The respondent lawfully resigned hence not entitled to any damages for unfair termination. However, there are dues payable to an employee whether there is unfair termination or not like in this case.

51. On the award for overtime and unpaid leave the court capped the awards to 3 years preceding the dismissal while relying on section 90 of the Employment Act. The court finds that the trial court took a wrong interpretation of the said section since courts have in a number of cases clarified this section of the law to mean that for continuing injuries, the claimant needs to file their claim 12 months after cessation of employment in order to claim the continuing injuries irrespective of the number of years it has taken.

52. In the Court of Appeal decision in **the *Man School Society & another v Ohany & another* (Civil Appeal 325 & 342 of 2018)** **(Consolidated)**

**[2023] KECA 894 (KLR) (24 July 2023) (Judgment)** while relying on India decisions the court had this to say:-

*Normally, a belated service related claim will be rejected on the ground of delay and laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy. In reference to the date on which the continuing wrong commences, if such continuing wrong creates a continuing source of injury. Borrowing from the excerpts reproduced above and considering that the respondent continued to work under the same circumstances, we find and hold that the breach complained of was of a continuing nature, capable of giving rise to a legal injury which is of the nature of a continuing wrong. It follows that the appeal is allowed, that the claims were time barred fails. On the contrary, the claims fall within the ambit of a continuing wrongs contemplated under section 90.*

53. The court therefore finds that the Respondent resigned in August, 2021 and the claim was filed in January, 2022 hence within 12 months period anticipated by section 90 of the Employment Act. The same if claimed within time could not therefore be limited to three years as the trial court did. The Respondent was entitled to overtime for the 8 years as well as the leave payment.

54. On the claim for unpaid leave the Appellant alleged that the Respondent did not apply for the same while it referred all

along to him as a casual employee. The Appellant was mandated by section 74 of the Employment Act to produce employment records showing that the Respondent took his leave. The Appellant only claimed that he did not apply for the same. This court therefore agrees with the trial court that the Respondent was entitled to his unpaid leave but for 8 years.

55. On the claim for overtime the trial court found that the Respondent was working for 72 hours per week as per evidence provided which was the time sheets. The Respondent alleged he was working for 108 hours per week which is humanly impossible and no evidence was provided. In the claim the Respondent rightfully claimed that he worked 72 hours a week. The Regulation of Wages (Protective Services) Order required him to work for 52 hours hence overtime was 20 hours a week as held by the trial court. The trial court again capped this award to three years which was again a wrong interpretation of law it ought to be 8 years.

56. The trial court used Kshs 19,602/= as the Respondent's last salary. This court finds that from the last pay slip of August

2021 the Respondent's gross salary was Kshs 19,802/= and that is what ought to have been used in the calculations.

57. On the calculations of the overtime the Regulations of Wages (General) Order 2018 provided for hourly rate and there is no need for complex calculations as submitted by the Appellant. The normal overtime is 1.5% the hourly rate. The trial court found that the hourly rate was Kshs 136.55/= which is the right position. The best approach would be 20 hours x 52 weeks in a year x 8 years x 136.55 x 1.5=1,704,144/=

58. **In the upshot the Appeal partially succeeds as follows: -**

- a. **8 years unpaid leave 26x726.55 x 8..Kshs 151,122 /=**
- b. **Unpaid overtime.....Kshs 1,704,144/=**

**TOTAL KSHS 1,855,266/=**

- c. **Since the appeal partially succeeds each party shall bear their costs of this appeal.**

59. **It is so ordered.**

**Dated at Nairobi this 13<sup>th</sup> day of March 2026**

**Delivered virtually this 13<sup>th</sup> day of March 2026**

**Abuodha Nelson Jorum**

**Presiding Judge-Appeals Division**