



**Namale v Yako Supermarket Company Ltd (Civil Appeal
202 of 2019) [2025] KECA 1017 (KLR) (30 May 2025) (Judgment)**

Neutral citation: [2025] KECA 1017 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 202 OF 2019
MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA
MAY 30, 2025**

BETWEEN

KELVIN REYNOLD NAMALE APPELLANT

AND

YAKO SUPERMAKET COMPANY LTD RESPONDENT

*(Being an Appeal from the judgment and decree of the Employment
& Labour Relations Court of Kenya at Bungoma, (M. N. NDUMA,
J) dated 1st February, 2019 In ELRC CAUSE NO. 63 OF 2017)*

JUDGMENT

1. The appellant, Kelvin Reynold Namale, initiated the suit, the precursor to this appeal on 19th December 2014, by filing a Memorandum of Claim in the Employment and Labour Relations Court at Bungoma “the ELRC” seeking reinstatement to the position he held previously or, in the alternative payment of compensation for unlawful and unfair dismissal. He also sought terminal benefits, punitive damages and a certificate of service.
2. The appellant had been employed by Yako Supermarket Company limited “the respondent” as an Information Technology Technician in 2011 on permanent terms, earning a monthly salary of Kshs 19,380. His performance remained satisfactory until in May, 2014, when he allegedly stumbled upon an unusual digital transactions involving the movement of funds at his workplace. These discrepancies occurred after business hours and involved alteration of VAT payments. The money was then reassigned to sales of zero-rated items such as generators, despite no actual sales of these items taking place. This manipulation seemed designed to deprive the government of tax revenue.
3. The appellant reported these irregularities to his supervisor, Mr. Sudhir Shambhulal Khetia. However instead of investigating the reported anomalies, Mr. Khetia accused the appellant of theft, assaulted him by slapping him across the face and subsequently called the police to have him arrested. The



appellant documented the assault through a P3 form, which indicated physical injuries consistent with the reported incident. Despite the accusations of theft, the appellant was not formally charged. Following these events, the appellant sensing that the work environment had become toxic opted not to resume work deeming that the respondent had thereby constructively terminated his services. Subsequent thereto he initiated the claim.

4. On 7th January, 2015, the respondent filed its response to the Memorandum of Claim, where it admitted several uncontested facts regarding the appellant's employment, such as his role, the date of employment, and his monthly salary of Kshs 19,380. However, it strongly contested the appellant's allegations of unfair dismissal and mistreatment. The respondent accused the appellant of gross misconduct, specifically theft of funds resulting in a significant financial loss of Kshs 9.5 million to the respondent. It claimed that the appellant had absconded from work following his arrest by the police after being reported for theft.
5. The respondent also denied the accusations of physical assault by Mr. Sudhir Shambhulal Khetia, asserting that such an incident did not occur and that there were no grounds for the appellant's claim for punitive damages therefor. In the ultimate the respondent counterclaimed for general damages from the appellant for breach of fiduciary relationship that led to the loss of the unspecified amounts of money.
6. On July 25, 2018, the ELRC recorded a consent order for the claim to be disposed of on the basis of the pleadings, list of documents filed and written submissions.
7. On 1st February, 2019, the ELRC rendered its decision. The court found that the appellant, had failed to provide sufficient evidence to prove claims of unlawful and unfair dismissal or assault by the respondent. As a result, his claims for general and punitive damages were dismissed. However, since the respondent had admitted to the appellant's employment details and salary, and no evidence was presented to refute the appellant's claims of unpaid terminal benefits, the court awarded the appellant a total of Kshs 34,000, being Kshs 17,000 payment in lieu of leave, and Kshs 17,000 being salary for July 2014, with interest from the date of filing the claim until full payment. The respondent's counterclaim was dismissed as it was not substantiated. The court further directed the respondent to issue the appellant with a Certificate of Service within 30 days and awarded the costs of the claim to the appellant.
8. Being aggrieved by the judgment and decree of the ELRC, the appellant has proffered this appeal through his Memorandum of Appeal dated 14th September, 2019. The appellant raised several grounds of appeal but in the main, he asserts that the ELRC erred in law and fact by concluding that no evidence was tendered to support the claim of assault; failed to recognize that the assault directly led to constructive dismissal of the appellant, rendering the dismissal unlawful; dismissal of claims for both General and Punitive damages was a legal and factual error; criticized the Judge for focusing on extraneous matters, challenged the holding that he was not entitled to payment in lieu of notice; faulted the court for failing to order the payment of his withheld remuneration from the time of constructive dismissal until the claim's determination. Consequently, the appellant sought several orders, including a declaration that the dismissal was unlawful, an award of both General and Punitive damages, payment in lieu of notice, compensation for withheld remuneration from the time of constructive dismissal, costs and interest.
9. The appeal was heard by way of written submissions with limited oral highlights. During the plenary hearing on our virtual platform on 17th March, 2025, Mr. Moni Wekesa, learned counsel appeared for the appellant whereas Mr. Mulama, learned counsel represented the respondent.



10. Mr. Wekesa, condensed the grounds of appeal into two key issues for determination: first, whether the ELRC erred in law and fact by concluding that the appellant was not unlawfully dismissed by way of constructive dismissal and secondly, whether the ELRC erred in dismissing the claim for both General and Punitive damages.
11. Counsel reiterated that the circumstances leading to the appellant's resolve not to go back to work amounted to constructive dismissal. This was because of the hostile and intolerable working environment created by the respondent's actions. It was submitted that the respondent's Managing Director accused the appellant of theft without evidence, physically assaulted him, and called the police to have him arrested. Despite these allegations, the appellant was neither charged with any offence nor subjected to any formal disciplinary processes, such as suspension, interdiction, or a disciplinary hearing. Instead, the respondent issued a notice to show cause letter four days after his arrest, demanding the appellant explain why his services should not be terminated.
12. In support of the claim that the actions of the respondent amounted to constructive dismissal of the appellant, counsel relied on the definition of constructive dismissal in Black's Law Dictionary and Lord Denning's interpretation in *Western Excavating (ECC) Limited v Sharp* [1978] QB 761, which recognized significant breaches of essential contract terms as grounds for constructive dismissal.

Additional reliance was placed on *Waswa v Kenya Wildlife Services* [2020] eKLR and *Coca Cola East & Central Africa Ltd v Kagai Ligaga* [2015] eKLR, which emphasize that an employee must prove a causal link between the employer's conduct and his departure. The appellant maintained that the respondent's conduct—including the assault, false accusations, arrest, and lack of due process constituted a significant breach of their employment contract and effectively forced the appellant to leave.
13. Regarding punitive damages, the appellant contended that such damages were warranted to deter similar reprehensible conduct by employers in the future. Citing the case of *Whiten v Pilot Insurance Co* [2002] SCC 18, counsel emphasized that punitive damages serve as a deterrent and express societal condemnation of egregious employer behavior. Counsel also referred to the case of *Charles Maina Gitonga v Karen Hospital* [2019] eKLR to highlight the psychological and reputational harm caused by the respondent's actions, which he argued justified both general and punitive damages.
14. In conclusion, counsel urged the court to declare the constructive dismissal of the appellant unlawful and grant the prayers sought in the appeal.
15. Mr. Mulama, in response asserted that the appellant's dismissal was lawful and complied with the provisions of the *Employment Act*.

Counsel relied on Section 44 of the *Employment Act*, which grants employers the right to summarily dismiss employees for gross misconduct, including absenteeism without lawful excuse. He argued that the appellant engaged in financial misconduct, manipulating receipts and the company's computer system to unjustly enrich himself and causing financial loss to the respondent to the tune of KShs. 9.5 million. That the appellant was issued with multiple warnings for misconduct during his tour of duty. That upon discovering the financial irregularities, the respondent reported the matter to the police and issued a notice to show cause on July 28, 2014, demanding an explanation from the appellant. However, the appellant neither responded to the notice nor returned to work, which acts amounted to desertion of duty, which the respondent argued constituted gross misconduct under Section 44(4) (a) of the *Employment Act*.
16. Counsel submitted that constructive dismissal was not applicable in this case. He relied on the case of *Paul Masinde Simidi v National Oil Corporation of Kenya & Another* [2015] KEELRC 189 (KLR),



to urge that no evidence of punitive working conditions was presented as to invoke the doctrine of constructive dismissal and that the appellant did not resign but instead abandoned his duties without formal communication or lawful justification.

17. In support of the position, counsel cited the cases of *James Kariuki Wanyamba v Kagumo Teachers College* [2015] eKLR and *Charles Njagi Nyaga v Air Connection Limited* [2016] eKLR. In both cases, the courts held that where proper procedures were followed, including issuing notices and conducting hearings, dismissals were justified. He argued that, like in these cases, the appellant was accorded procedural fairness by being issued with a notice to show cause and an opportunity to explain the allegations before any action was taken but ignored the same.
18. Furthermore, counsel contended that the appellant failed to discharge the burden of proof under Sections 107 and 108 of the *Evidence Act*, which requires the party alleging unlawful dismissal to present sufficient evidence to support the claim. He emphasized that the appellant neither provided a police statement implicating the respondent's director nor called any witnesses to corroborate the assault claims. Counsel pointed out that the medical report and police abstract presented were insufficient to prove the allegations of assault.
19. Addressing the claim for damages, counsel argued that the appellant was not entitled to either general or punitive damages, as the dismissal was lawful and procedurally fair. The respondent relied on *Stanley Maira Kaguongo v Isaac Kibiru Kahuthia* [2022] eKLR, which affirmed that the burden of proof lies on the claimant to demonstrate their entitlement to damages in cases of civil disputes.
20. In conclusion, counsel maintained that the dismissal was lawful, procedural, and based on valid reasons. That the ELRC's judgment was therefore sound and urged us to uphold the decision while dismissing the appeal with costs.
21. A first appellate court is required to subject the whole of the evidence to a fresh and exhaustive scrutiny and reach conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123 thus: -

“Briefly put they [the principles] are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

22. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. See *Kurian chacko vs. verkey Ouseph* AIR 1969 Kerala 316.
23. Having said as much, we have considered the judgment of the ELRC, record of appeal and submissions by counsel, and we determine that only two issues arise for our consideration: Whether the appellant's dismissal constituted constructive dismissal and whether the appellant was entitled to general and punitive damages.
24. Constructive dismissal arises where an employer creates a hostile working environment through its actions, compelling the employee to leave employment involuntarily. The appellant alleged that his dismissal amounted to constructive dismissal due to accusations of theft, physical assault by



a Mr. Khetia, and his subsequent arrest. He argued that these incidents created an intolerable working environment, effectively forcing him to leave employment without a formal dismissal letter or disciplinary proceedings. However, the respondent denied these allegations and argued that the appellant absconded from duty following gross misconduct, specifically financial manipulations leading to the loss of Kshs. 9.5 million to the respondent and his dismissal was therefore justified.

25. For constructive dismissal to hold, the burden of proof lies with the employee to demonstrate a significant breach of essential terms of the employment contract by the employer. In *Coca Cola East & Central Africa Ltd v Kagai Ligaga* (supra), the court observed thus:

“Constructive dismissal occurs where an employee resigns because their employer’s conduct has made it intolerable or impossible for them to continue working. The burden of proof lies with the employee to demonstrate the existence of such intolerable conditions and a causal link between the employer’s conduct and their departure.”

26. The court further stated

30. 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.

27. To determine whether the appellant’s case meets the criteria for constructive dismissal as highlighted above, it is essential to examine the relevant legal principles against the facts of the case. The essential terms of the appellant’s employment included the obligation of the respondent to provide a safe and conducive working environment, remuneration of Kshs. 19,380 per month, and adherence to due process in employment matters, including termination. The respondent’s Workplace Rights Policy also provided assurances of a healthy and non-disruptive workplace environment. The appellant alleged a repudiatory breach of these fundamental terms due to the aforesaid actions by the respondent. If indeed such actions were proved, they could constitute a significant breach of contract as they undermined the fundamental trust and confidence between the employer and employee.



Objectively, the alleged conduct could be considered intolerable by a reasonable employee under similar circumstances. However, such claims require sufficient evidence.

28. To establish causation, the appellant needed to demonstrate that the respondent actions directly led to his termination. This link, however, was not adequately proved, as the appellant failed to provide independent evidence to corroborate the allegations. It should be appreciated that though it was agreed that the claim would be disposed of by way of the pleadings, list of documents filed and written submissions, the appellant never filed written statements from either himself or any other would be his witnesses. As it is therefore, there was no evidence of constructive dismissal or assault as claimed by the appellant. Pleadings or written submissions cannot take the place of evidence. His written statement would have provided such evidence. The ELRC was therefore right in finding that there was insufficient evidence led by the appellant to validate the claims.
29. In the case of Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR, the court emphasized the need for tangible evidence to substantiate allegations of intolerable working conditions. In this case, the appellant failed to provide such evidence. The Police Abstract form and Medical Examination Report presented by the appellant were not corroborated by independent witnesses or additional evidence to substantiate the claim of assault by Mr. Khetia. The issuance of a show cause letter by the respondent, though after the arrest, indicates an effort to adhere to procedural requirements by the respondent. The least that was expected of the appellant was some sought of response to the show cause letter.
30. Based on the principles established in the aforesaid authorities, we are satisfied just like the ELRC that there was no sufficient evidence to support the claim of constructive dismissal. We note also that the appellant did not communicate during the subsistence of his employment in whichever manner or form with the respondent expressing his displeasure with the work environment and was contemplating quitting if the situation did not improve. Obviously then the threshold required for the application of the doctrine of constructive dismissal was not met. Having reached this conclusion, we do not think that it will serve any purpose for us to consider the other issue framed for our determination being whether the appellant was entitled to general and punitive damages.
31. Consequently, we find no basis to disturb the trial court's decision, as it was both sound and reasonable given the circumstances. The upshot is that this appeal fails and is dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF MAY, 2025

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

