



**Ochieng & another v Pride Kings Services Ltd (Cause E057 of 2024)
[2025] KEELRC 213 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 213 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E057 OF 2024
JK GAKERI, J
JANUARY 30, 2025**

BETWEEN

FANUEL ABONG'O OCHIENG 1ST CLAIMANT

JOSPHAT ONDIMU CHAGA 2ND CLAIMANT

AND

PRIDE KINGS SERVICES LTD RESPONDENT

JUDGMENT

1. The Claimants filed the instant suit on 8th July, 2024 claiming that they were employees of the respondent company employed in January 2017 and 2020 respectively and rendered services diligently.
2. While the 1st claimant's net salary was Kshs.20,000, that of the 2nd Claimant was Kshs.25,000.00 per month.
3. The 1st claimant alleges that the respondent did not pay his salary for July, August, September, October and November 2023 as well as other allowances due.
4. That he resigned on 23rd November, 2024 by a written notice a copy of which he did not avail.
5. That NSSF deductions were made but not remitted and by the date of resignation, the amount owed was Kshs.1,538,280.00 comprising salary arrears for 5 months, house allowance, 7 years service pay, public holiday pay, off working days, overtime and leave days.
6. The 2nd claimant's case is that he resigned on 22nd March, 2024 and had not been paid for October, November and December 2023 as well as January, February and March 2024 and was owed Kshs.810,272.00 comprising items similar to those of the 1st claimant and his statutory deductions were not regularly remitted.
7. That the respondent issued him with a notice to show cause on 12th March, 2024.



The 1st and 2nd Claimant pray for:

- i. A declaration that the respondents action of withholding their salary and allowances violated their constitutional rights.
- ii. Outstanding salaries up to November 2024 for the 1st claimant and up to March 2024 for the 2nd claimant.
- iii. Compensation and allowances owed for the entire tenure of their employment.
- iv. Remit statutory deductions for the years worked.
- v. General damages for mistreatment and disturbance.
- vi. Any other just and expeditious relief.
- vii. Costs and interest at court rates.

Respondent's case

8. By a response to memorandum of claim filed on 30th October, 2024, the respondent denied all the averments made by the claimants and prayed for dismissal of the suit with costs.

In sum, the respondent's response comprises mere denials.

1st claimants' evidence

9. On cross-examination, the 1st claimant confirmed that he resigned from employment because he wanted to relax after 7 years of service and did not blame the respondent in anyway. It was his testimony that although he worked overtime, and off-days he had no evidence to prove it.

2nd claimant's evidence

10. The witness confirmed that he resigned from employment on his own volition and had stayed without payment for sometime and no reason was given and had not been notified that the respondent was grappling with financial challenges. That he received a notice to show cause after he had given the resignation notice and responded to it.

That he worked alone at the station and had no reliever .

11. The 2nd claimant confirmed that he had no evidence of having worked on off days and overtime and had worked for 4 years without a formal letter of employment from 2020.
12. Strangely, the witness testified that although he was called to go and clear he did not. In contradiction, he testified that he returned everything and cleared.
13. On re-examination, the 2nd claimant testified that the respondent owed him 6 month salary.

Respondents evidence

14. Although the respondent filed a witness statement he did not attend court on 26th November, 2024 when hearing took place.
15. Strangely, the statement is dated 23rd November, 2024 and was filed on 26th November, 2024 at 9:35am while the court was in session.
16. It is clear that the respondent never intended to avail oral testimony.



Claimant's submissions

17. On whether the claimants were employees of the respondent the claimant's submitted that the respondent availed copies of their payslips and recommendation letters confirming that the claimants were indeed its employees.
18. On reliefs, the claimants submitted that the respondent owed them unpaid salaries and general damages.
19. Reliance was made on the sentiments of the court in *Prem Lata V Peter Musa Mbiyu* [1965] EA 592 to urge that the claimants are entitled to the reliefs sought.
20. As to whether the claimants were constructively dismissed, reliance was made on *Milton M. Isanya V Aga Khan Hospital Kisumu* [2017] eKLR and *Godfrey Allan Tolo V Tobias O. Otieno & Another* [2022] eKLRs on when constructive dismissal may be inferred, to urge that the withholding of salary by the respondent created a hostile work environment leading to resignation.
According to the claimants their resignation was justified.
21. On entitlement to unpaid salaries, unremitted statutory deductions and compensation, the claimants urge that they were since the respondent was obligated to pay them as its employees and it admitted that salaries had not been paid.
22. Sentiments of the Court in *Nicodemus Ochieng Ogutu V Village of Hope Kenya* [2018] eKLR were cited to urge that unremitted NSSF dues ought to be refunded to the claimants.

Respondent's submissions

23. Also whether termination of the claimants employment by the respondent was unfair and unlawful, the respondent submitted that no termination of employment took place as the claimants resigned on their own accord and cannot claim to have been dismissed from employment.
24. The respondent urges that the claimants are not entitled to the claims made as they had not availed evidence of non-payment and did not file any payslip to show that house allowance was not paid and were not entitled to service pay, overtime, public holidays for want of proof and the case ought to be dismissed.

Analysis and determination

25. The totality of the evidence before the court is that the claimants were employees of the respondent having joined at different times from 2017 and 2020 respectively as they testified.
26. Although the 1st claimant was sure of the month of employment as January, 2017, the 2nd claimant had no idea as to when he joined in 2020 which suggest he may not have been certain about the year as well. However, suffice it that the respondent did not provide any controverting evidence.
27. The respondent's witness Mr. Fredrick Okello Mashuke who did not testify attached copies of four (4) letters namely notice to show cause to the 2nd claimant, dated 12th March, 2024, which the 2nd claimant admitted having received; letter to the claimant's advocates dated 28th May, 2024 stating that the 2nd claimant had sent a resignation notice dated 22nd February, 2024 while on leave and did not return to clear, a related letter in respect of the 1st claimant dated 28th May, 2024 stating that he resigned on 23rd November, 2023, cleared and his dues were computed at Kshs.199,507 and signed for it but delay in payment was occasioned by financial challenges by the respondent.



28. The last letter is acceptance of the 1st claimant's resignation letter received on 23rd November, 2023.
29. These letters establish beyond peradventure that the 1st and 2nd claimant were employees of the respondent and separated by way of resignation.
30. Regrettably, none of the claimants provided a copy of the resignation letter to prove the reasons or context of the resignation.
31. On cross-examination, the 1st claimant testified that he resigned from employment because he wanted to relax and had no problems with the respondent.
32. He tendered no evidence to show that the work environment had become hostile and thus left.
33. Similarly, the 2nd claimant testified that he resigned from employment on his own volition but had stayed for sometime without payment.
34. Were the claimants constructively dismissed as submitted by their counsel?
35. The doctrine of constructive dismissal was exquisitely explained by Lord Denning in *Western Excavating (ECC) Ltd V Sharp* [1978] ICR 222 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, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct.

He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once...”

36. Similarly, in *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga* [2015] eKL, the Court of Appeal domesticable the principle of constructive dismissal by adopting the contractual approach test and setting out the determining principles such as essential terms of the contract, fundamental breach or repudiatory breach, conduct of employer, objectivity in evaluation of the employers conduct, causal link between the employers conduct and the separation with or without notice, employee must not have accepted, acquiesced or waived the conduct and must not have stayed beyond reasonable time.
37. In the instant case both claimants resigned in writing on 23rd November, 2023 and 22nd February, 2024 and none of them testified that they did so because of the respondent's conduct and did not plead the same.
38. Both are claiming claimant salary arrears of 5 and 6 months respectively, and none of them attributed their resignation to the absence of pay. However, the 2nd claimant mentioned it but confirmed that he left on his own volition.
39. Counsel's submission that the two claimant's were constructively dismissed lack supportive evidence as neither claimant adduced evidence of the respondent's conduct. Indeed, none testified having followed up the salary issue notwithstanding the fact that non-payment of salary amounts to a repudiatory breach of the contract of employment. However, in this case, the claimants stayed on for too long and it is thus arguable that they waived their right to allege that it was the proxima causa for the resignation



and they did not leave within a reasonable time and were thus estopped from alleging that they were constructively dismissed.

40. Having found as above, the Court is satisfied that the claimants left employment by resignation, which is a unilateral termination of the employment relationship by the employee and requires no acceptance by the employer as held in *Simon Dlodlu V. Emalangi Foods Industries* (IC Case No. 471/2004) cited with approval in *David Njuguna Mungai V Registered Trustees of Sisters of Mercy t/a Mater Hospital* (2015) eKLR.
41. The employment relationship ceases when the letter of resignation is received by the employer.
42. After resignation, an employer is liable to pay the former employee all accrued salary allowances and other entitlements due to the employee and in the instance suit the claimants are entitled to salary arrears, leave days arrears, leave days if any, public holidays worked if any, off days worked, if any, and pension dues as per the pension scheme rules.
43. The claimant's prayer for service pay is in the court's view unsustainable on account that although the claimants were members of the NSSF although the remitted deductions inconsistently.
44. In law, NSSF deductions are a statutory deduction and must be remitted to the NSSF, an obligation the law imposes on the employer. Under the *National Social Security Fund Act*.
45. However, it is not the obligation of this Court to enforce the provisions of the NSSF Act, as the National Social Security Fund is a state Corporation with a Board whose mandate is to administer the Act.
46. Consequently, the respondent shall compute and refund the claimants the total amount deducted as NSSF deductions but not remitted to the NSSF as evidenced by the illegible NSSF statements on record.
47. The prayer or claim for house allowance is unsustainable as neither of the claimants had raised the issue with the employer. Similarly, the claimants did not allege that their salary did not include house allowance.
48. Having resigned voluntarily it is presumed that the employee had no outstanding complaints or issues unless they are proven in court. Only accrued dues are payable by the employee.
49. The claimants tendered no evidence that they were not being paid house allowance. The claim is decline.
50. Similarly, the claims for public holidays, off working days, overtime and leave days are unsustainable for want of proof as none of the claimants provided particulars for each of the reliefs sought. More significantly, these claims fall under the rubric of special damages and must be specifically pleaded and strictly proved as held in *Hahu V Singh Civil Appeal No. 42 of 1983* (185) KLR 716. See also *Jackson K. Kiptoo V Attorney General* (2009) KLR 657.
51. Puzzlingly, the witness statements of the 1st and 2nd claimant dated 28th June, 2024 are silent on:
 - i. the specific public holidays on which they worked and year(s);
 - ii. off-working days on which they rendered services and were unpaid;
 - iii. the days, months and the years during which they worked overtime and for how many hours;
 - iv. the year or years in which they did not proceed on leave, whether then applied and it was denied and how many days were pending when they resigned.



52. A claim grounded on an allegation that an employee worked overtime for 7 days a week, worked on all public holidays, off-working days and did not proceed on leave of any nature for 7 or 4 years, in the court's view sound less than truthful as the nature of the claims require specificity. For instance, what was the reporting and exit times, was there a clocking system or recording system, supervision and records.
53. The upshot of the foregoing is that the claims for public holidays off-working days, overtime and leave are declined for want of supportive evidence.
54. The claim for general damages lacks a foundation and supportive evidence and it is declined.
55. In conclusion judgment is entered in favour of the claimants against the respondent in the following terms:
- a. Declaration that withholding of the claimant's salary and allowances was unfair.
 - b. Outstanding salary and allowances.
 - 1st claimant
 - i. Salary arrears, Kshs.96,000.00
 - ii. Deducted and unremitted NSSF dues.
 - iii. Any other dues as per the employer's records.
 - 2nd claimant
 - i. Salary arrears, Kshs.102,000.00.
 - ii. Deducted and unremitted NSSF dues
 - iii. Any other dues as per the employer's records.
 - c. Costs of this suit, interest at court rates from the date hereof till payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 30TH DAY OF JANUARY, 2025.

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the *Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the *Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

