



**Brinks Security Services Limited v Chahasi (Appeal E037 of 2024)
[2025] KEELRC 44 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 44 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E037 OF 2024
JK GAKERI, J
JANUARY 23, 2025**

BETWEEN

BRINKS SECURITY SERVICES LIMITED CLAIMANT

AND

ELIJAH UKIRU CHAHASI RESPONDENT

JUDGMENT

1. This is an appeal from the judgment of the Chief Magistrate's Court (Hon. Douglas Ogoti) delivered on 12th July, 2024 entering judgment against the Respondent/Appellant as per the memorandum of claim dated 10th January, 2023.
2. Briefly, the facts are that the Respondent was an employee of the Appellant effective July 2015 and his monthly salary was Kshs.9,800 and later rose to Kshs.13,200 but varied owing to the various allowances paid, but generally lacked uniformity.
3. The Respondent alleged that he was constructively dismissed in October or September 2022 as the Appellant did not allocate him duties but no date in either October or September was disclosed or mentioned.
4. The Claimant alleged that he had been unwell and availed documents to show that he had sought medical attention sometime in September, October, November and December 2021, had been injured in July 2020, and had 2 days sick off in October 2021.
5. The appellant's case was that the Respondent was its employee and was not constructively dismissed as he was found sleeping at the work place on the night of September 15, 2022 by the supervisor and had not signed the Occurrence Book (OB) as required and when questioned about having been asleep, he became repulsive and the Appellant's supervisor wrote an email on the following day.



6. The supervisor testified that he instructed the Claimant to report to the office the following day, 16th September, 2022 and he did but refused to record a statement as requested, returned his uniform and left.
7. After hearing both parties and considering the submissions by counsel, the learned trial Magistrate found that the Claimant was constructively dismissed and thus terminated from employment unfairly and awarded judgment on all the prayers sought including underpayment. This is the judgment the Appellant has appealed against.
8. The Appellant faults the judgment of the trial Court on the grounds that the trial court erred in law and fact by:
 - a. Not considering the evidence placed on record by the Appellant.
 - b. Finding that the Respondent was constructively dismissed.
 - c. Awarding claims as prayed in the memorandum of claim without proper analysis.

Appellant's submissions

9. As to whether the Respondent was bound by his pleadings, the Appellant cited the sentiments of the Court in *Daniel Otieno Migore V South Nyanza Sugar Co. Ltd* [2018] eKLR and contended that having pleaded constructive dismissal the respondent was bound to prove it and nothing else.
10. As to whether the Respondent was constructively dismissed, the Appellant relied on the fact that the Respondent was found asleep on the night of 15th September, 2022 and admitted that he had not signed the Occurrence Book (OB), refused to record a statement on the events of the previous night, surrendered his uniform and left as evidenced by the email dated 16th September, 2022 to urge that the Respondent did not avail evidence to prove that the appellant had made his working conditions intolerable to amount to constructive dismissal.
11. Reliance was made on the decision in *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga* [2015] eKLR cited in *Herbert Wafula Waswa V Kenya Wildlife Services* [2020] eKLR on the essence of constructive dismissal and its determinants as was the decision in *Moses Kimanzi Katii V H. Young & Co. (EA) Ltd* [2018] eKLR on the burden of proving constructive dismissal, to submit that the Respondent failed to prove constructive dismissal.
12. Concerning the reliefs, the appellant urges that the Respondent was remunerated fairly, house allowance was paid as was overtime, the parties had no agreement on gratuity and the Respondent was a member of the NSSF as held in *Kennedy Wakoto V Secretary Board of Management Chebukwa Secondary School* [2021] eKLR, the Respondent proceeded on leave and was not constructively dismissed for compensation and pay in lieu of notice to ensue.

Respondent's submissions

13. The Respondent submits that the Appellant ought to have explained how the separation took place as there was no evidence of desertion by the Respondent hence the refusal to assign him duties terminated his employment.
14. According to the Respondent, he was entitled to all the reliefs as awarded as he worked 4 extra hours per day and copies of the pay slips from October 2019 had no overtime.



15. That the Respondent was underpaid and cited the sentiments of the Court in *Irungu Githae V Mutheka Farmers Co-operative Society Ltd* [2019] eKLR and the Appellant did not pay housing allowance and the payslips on record mention basic salary only.
16. Reliance was made on *Charity Wambui Muriuki V M/s Total Security Surveillance Ltd* [2017] eKLR and *Wells Fargo Ltd V Julius Ihomba Gatete* [2018] eKLR on gratuity.
17. The Respondent submits that the appeal lacks merit and ought to be dismissed with costs.

Analysis and determination

18. This being a first appeal the sentiments of the Court of Appeal in *Selle & Another V Associated Motor Boat Co. Ltd* [1968] EA 123 are instructive that:

“...An appeal to this Court... is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled.

Briefly put they 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 witnesses and should make due allowance in this respect...”

19. These sentiments were affirmed in *Okeno V Republic* [1972] EA 32. (See also *Ganp at V State of Haryana* [2010] 12 SCC 59).
20. From the documents on record, it is common ground that the Respondent was an employee of the Appellant from July, 2015 and the two separated sometime in 2022.
21. From the evidence on record, none of the parties appears to know how the separation occurred.
22. While the Appellant appeared to suggest that the Respondent resigned, or deserted the workplace, the Respondent’s evidence before the trial Court is unclear as to how the separation took place and when.
23. Notably however, the Respondent admitted on cross-examination that on 15th September, 2022 he was on night shift at Sidian Bank and further admitted that he talked to RWI, Mr. Justus Nyatwanga at the same place and did not sign the OB on that date because it was not yet time, but did not testify as to when Mr. Justus Nyatwanga visited him at Sidian Bank. He also admitted having been called and went to the office on 16th September, 2022 but did not disclose why he was called or what transpired when he reported to the office.
24. In his witness statement, the Respondent testified that the Appellant refused to assign him duties sometime in September 2022 and in his memorandum of claim he averred that he served diligently until October 2022 when the Appellant refused to assign him duties or pay salary.
25. Strangely, the Respondent adduced no evidence of having reported to Sidian Bank or the Appellant’s offices after 16th September, 2022.
26. Similarly, the Appellant tendered no evidence of the two of them having interacted at any other time thereafter until the claim was filed in 2023.
27. The respondent’s evidence would, in the Court’s view, appear to corroborate Mr. Justus Nyatwanga’s email dated 16th September, 2022 at 9:48am on what transpired on the night of 15th September and morning of 16th September, 2022, which would appear suggest that the Respondent absconded duty.



28. In his evidence in chief, the Respondent added that he was not assigned duty after 15th September, 2022 and did not testify as to when duty was not assigned as there is no evidence that RWI requested him to leave his work place that night or on the morning of 16th September, 2022 or what steps he took when duty was not assigned.
29. A panoramic view of the evidence availed to the trial Court would appear to suggest that the email by Mr. Justus Nyatwanga captures the events of the night of 15th September, 2022 and the morning of 16th September, 2022 having regard to the fact that it was unsolicited by anyone and was intended to capture the events on the two days.
30. The trial Court did not give the foregoing evidence the in depth interrogation it required to unearth what had transpired.
31. This far, the Court is satisfied that the trial Magistrate erred in law and fact by not interrogating all the evidence adduced by the appellant in response to the Respondent's claim.
32. As to whether the Claimant was constructively dismissed, it is trite law that parties are bound by their pleadings as submitted by the appellant and the respondent.
33. The sentiments of the Court of Appeal National Land Commission V Munubi & 4 Others [2022] KECA 391(KLR) are instructive;

“It is axiomatic that parties are bound by their pleadings. However, there are exceptions as was held in *Odd Jobs vs Mubea* (1970) E A 476, where the Court held that a court may base its decision on an issue that is not in the pleadings as long as the same arises in the course of the proceedings and the same is fully canvassed by the parties...”
34. It follows that the Respondent was obliged to prove that he was constructively dismissed from employment.
35. In his written statement, the Respondent stated that sometime in September 2022 the appellant refused to assign duties or pay him and enquiries were unsuccessful and thus was constructively dismissed.
36. In the claim, the Respondent alleged that the Appellant refused to assign him duties or pay salary in October 2022.

In both instances no specific date or dates are mentioned.
37. It is axiomatic that both months have at least 30 days and the Respondent could not recall the relevant dates on 10th January, 2023 yet the alleged events took place barely, 3 months earlier and having admitted that he and the supervisor had an encounter on the night of 15th September, 2022 and morning of 16th September, 2022 and none thereafter, it is highly unlikely that the Respondents testimony was truthful.
38. The principle of constructive dismissal in Kenya is traceable to judicial pronouncements and in particular the Court of Appeal decision in *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga* (Supra) where the Court adopted the contractual test approach which requires the party alleging constructive dismissal to demonstrate that the employer's conduct amounted to a repudiatory breach of the contract of employment as aptly captured by Lord Denning in *Western Excavating (ECC) Ltd V Sharp* [1978] Q.B 761.



39. More significantly, the Court of Appeal enunciated the guiding principles in making a determination whether a constructive dismissal has taken place such as what are the fundamental or essential terms of the contract of employment, whether a repudiatory breach of the fundamental terms of the contract has been occasioned by the employer's conduct, conduct of the employer must be a fundamental or significant breach going to the roof of the contract, causal link between the employer's conduct and reason for termination of the contract, leaving with or without notice, employee must not have accepted, waived, acquiesced or be estopped from asserting a repudiatory breach, the employees must prove repudiatory breach and an objective test is applied.
40. In *Godfrey Allan Tolo V O. Otieno & Another* [2022] eKLR Onesmus Makau J. stated as follows:
- “For constructive dismissal to be inferred, the employee must have resigned within reasonable time from his employment with or without notice as a result of the employer's hostile treatment or hostile working conditions at his workplace. The employer must not have expressed the desire to terminate the employee”.
41. In the instant case the Respondent did not allege that he resigned or left for non-assignment of duties and non-payment of salary.
42. In fact, he neither alleged nor testified that he resigned or left on any day for non-payment of salary or non-allocation of duties and when it was.
43. Based on the evidence adduced by the Respondent at the trial the Court had no evidential grounding to find that the respondent had been constructively dismissed.
44. More importantly, the trial Court's finding was not proceeded by an analysis of the elements of constructive dismissal and thus erred in law and fact.
45. From the evidence on record, the appellant would appear to suggest that the Respondent deserted his work place and even if he did, the Respondent was obligated to prove the desertion by adducing evidence to prove the reasonable steps it took to have the Respondent resume duty or subject him to a disciplinary process as held in *Felistas Acheha Ikatwa V Charles Peter Otieno* [2018] eKLR and *Judith Atieno Owuor V Sameer Agriculture and Livestock Ltd* [2020] eKLR among others.
46. The appellant availed no evidence of desertion or fair termination of the respondent's employment.
47. Concerning the reliefs, the trial Court allowed all the reliefs as prayed for without interrogating the merits each relief separately.
- i. Underpayment
- It is discernible that the Respondent was underpaid and his salary lacked consistency. Whereas it was Kshs.9,800.00 in 2015, and 2016, it was Kshs.10,300 in December 2016 and January 2017 but Kshs.9,800.00 for the rest of the year.
- In 2018, it varied from Kshs.13,200 to Kshs.9,800.
- In 2022 it was Kshs.11,500.00 and will be taken as the salary as at the date of separation.
- Guided by the Regulation of Wages (General) Amendment Order 2022, the Respondent was underpaid as follows
- $Kshs.15,141.95 - Kshs.11,500 = (Kshs.3,641.95 \times 36) = Kshs.131,110.2$
- ii. House allowance



This is one of the statutory rights of an employee under Section 31 of the Employment Act and the Respondent was entitled to the same as follows.

iii. Overtime

Whereas some of the payslips reflect payment for overtime some do not and the Respondent furnished no evidence why it was not paid if he indeed worked extra hours.

This prayer lacked supportive evidence and ought not to have been awarded.

iv. Rest days 2019 – 2022

This prayer lacked any supportive evidence and ought not to have been awarded.

v. Gratuity

The contract between the parties had no provision for gratuity, which is nothing but a gratuitous amount paid by an employer in appreciation for services rendered by the employee.

It is not obligatory unless provided for contractually and ought not to have been awarded in this instance.

vi. Leave allowance

Whereas the Claimant proceeded on leave in 2019, 2020 and 2021, no leave allowance was paid.

Although leave allowance is not a statutory right, it is an amount traditionally paid once a year to enable the employee travel to his or her rural residence, outside the work place in the city or town which is not always the case today.

Significantly, it is determined by the employer and it is typically not a one months salary.

In this case, the Court is persuaded that the claimant is entitled to leave allowance for 3 years computed on the basis of his salary of Kshs.15,141.95 and the same is awarded.

vii. Salary in lieu of notice

The Respondent is entitled to pay in lieu of notice as it was not paid, Kshs.15,141.95.

viii. Compensation for unlawful termination

Having found as above, the Court is satisfied that the provisions of Section 49(1) of the Employment Act apply and considering that the Respondent served for 7 years which is not long, did not appeal the dismissal or write to the Appellant on the alleged non assignment of duties or salary or in any way express his wish to remain in the Appellant's employment and contributed to the separation the equivalent of 3 months salary is fair, Kshs.45,425.85.

The other reliefs awarded by the trial Court are affirmed.

48. In the end the judgment of the trial Court is interfered with to the extent that the total amount payable to the Respondent for unfair termination of employment is Kshs.273,444.53.

49. In addition, the appellant shall compute and pay the actual leave travelling allowance due to the respondent based on his salary of Kshs.15,141.95.

50. As the appeal is partially successful each party shall bear own costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 23RD 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

