

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
APPEAL NO. E187 OF 2023

(Before D. K. N. Marete)

ENDMOR STEEL MILLERS LIMITED.....CLAIMANT

VERSUS

JAMES WARO ONGWAE.....

RESPONDENT

JUDGMENT

This matter is originated by way of a Memorandum of Appeal dated 30th September, 2023. It comes out as follows;

1. *The Learned Honourable Magistrate erred in law and fact by entering judgment on in favour of the Respondent against the appellant when on the contrary the Trial Court misapprehended and failed to properly evaluate written submissions by the appellant and the evidence on record.*
2. *That the Learned Magistrate erred in failing to take cognizance of the fact that the claimant was never constructively terminated by the appellant at all but chose to abscond work on his own volition and joined another steel manufacturing company (Accurate Steel Millers Limited).*
3. *That the Learned Honourable Magistrate erred in law by failing to find that there was no evidence of constructive dismissal which was the basis of the respondent's case.*
4. *That the Learned Honourable Magistrate erred in law by awarding the maximum 3 months' salary as compensation for unlawful termination to the respondent when there was no evidence of unfair/unlawful termination.*

5. *That the Learned Honourable Magistrate erred in law and in fact in holding that the respondent had proved his claim for unfair and unlawful dismissal and compensatory damages on a balance of probabilities.*
6. *That the Learned Honourable Magistrate erred in law and in fact by awarding the respondent Kshs34, 500 as pay in lieu of notice contrary to the pleadings and evidence that the respondent's salary was at a daily rate of Kshs.600 which is within the prescribed law under Minimum Wages Act.*
7. *That the Learned Honourable Magistrate erred in law and in fact in failing to appreciate that the respondent was a casual labourer employed only on need basis.*
8. *That the Learned Honourable Magistrate erred in law and in fact in failing to sufficiently appreciate that the respondent's evidence was purely based on falsehoods, gaps and hypothesis with no basis at all.*
9. *That the Honourable Magistrate erred in law and fact by making conclusions that are not supported by evidence on record.*

The Appellant's case is that from 26th August, 2020 the Respondent without leave on lawful cause deserted work. This was deemed normal absenteeism as is usual with casual workers until it was established that he had left the Appellant on his own volition and joined another similar employer – Accurate Steel Millers. He did not return for clearance.

Therefore, there is no cause of action against the Appellant as the Respondent chose to abscond work for no reasons and without consent on authority of the employer. This was indeed gross misconduct on his part.

The Appellant considers and rubbishes that the Respondent was constructively dismissed. This, as the Respondent claims, was through the Appellants Human Resource Office, a Mr. Muriithi who asked him to go home until he was notified of when to return to work. This was never to be despite making several inquiries on the same.

The Respondent in her written submissions reiterates a case of constructive dismissal. He seeks to rely on the authority of **Coca Cola East Africa & Central Africa v. Maria Kagal Ligaga [2015] KLR** where the concept of constructive dismissal was discussed in the case of wherein the Court of Appeal found that constructive dismissal occurs where an employee is forced to leave his job against his will, because of his employer's conduct. That although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed. The Court proceeded to outline and summarize the following legal principles relevant in determining constructive dismissal

- (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 beach

h) The burden to prove repudiator breach or constructive dismissal is on the employee

(i) Facts giving rise to repudiator breach or constructive dismissal are varied."

He further submits that the learned magistrate was well guided by the doctrine of constructive dismissal, witness and documentary evidence in in holding in the Respondent's favour.

The Respondent further seeks to rely on the authority of **Leena Apparels (EPZ) Limited v Nyevu Juma Ndokolani [2018] KLR** the Court of Appeal re-affirmed the key issue in an allegation of constructive dismissal was the employer's conduct. The Court observed thus;

"However, it is worth remembering that in constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of employee - unless waiver, estoppel or acquiescence is in issue. In other words, an employer is required not to behave in a way that amounts to a repudiatory breach of contract."

The Appellant severally seeks to fault the conduct and findings of the learned magistrate but to no avail. It is this court's finding that the lower court also looked at the evidence of the Respondent as to earnings therein which had been raised to Kshs.1150 per day and was payable weekly.

The court also looked at the work history of the Respondent in that he had worked for the Appellant from 2010 to 29th August, 2020 when he was asked to leave. It is evident from the

judgment of court that the learned magistrate enlisted paragraphs 6 of the said judgment in coming up with the conclusion and findings of court.

The learned magistrate also methodically scrutinised the entitlement of the Respondent to the reliefs sought and issued the same. It is at this juncture of the award of the court that I find fault with the award.

The issue of compensation for leave days is faulty. The Respondent testified to this extent but never tendered any further evidence in support of his claim. Ordinarily, one would not work continuously for ten years without taking leave or a break. In the absence of evidence on leave days, I overturn and do disallow the award of Kshs.241,500= by the learned magistrate.

Again, this being an employment scenario, the issue of costs and interest, if at all, are not paramount. Even with the mantra of costs following the event, one must be warned of the nature and scenario we involved in. This is an employment situation and one of interplay between labour and capital. This delicate arena calls for immense accommodation *inter parties*. The workplace must be maintained as the worker must be compensated for the employer's misdeeds. Without the workplace, there would be no work. Costs therefore are not a primary issue of consideration in the circumstances. Costs are not a critical or do or die issue.

The appeal is therefore partially allowed on the following terms and award;

- (i) one (1) month salary in lieu of noticeKshs34,500.00
- (ii) Three (3) months compensation for unfair termination of employment
.....Kshs.34,500.00x3 = 103,500.00
- Total of awardKshs.138,000.00**

(iii) Each party shall bear its costs of the claim and this appeal.

(iv) All other awards crumble and fall by the way side.

Delivered, dated and signed this **26th** day of **February** 2025.

D. K. Njagi Marete
JUDGE

Appearances:

1. Miss Tuwei instructed by Kinyanjui Kiriimi & Company Advocate for the Appellant
2. Miss Nkatha instructed by Mwaniki Gachoka & Company Advocates for the Respondent