



**Lokamiti & 4 others v Olsuswa Farm Limited (Appeal E058 of 2024)
[2025] KEELRC 992 (KLR) (28 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 992 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E058 OF 2024**

**J RIKA, J
MARCH 28, 2025**

BETWEEN

**JOHN KISHILI LOKAMITI 1ST APPELLANT
PETER ROTICH 2ND APPELLANT
PETER KIPKOECH LANGAT 3RD APPELLANT
DENNIS OESE EMURUON 4TH APPELLANT
DAVID MURIRA 5TH APPELLANT**

AND

OLSUSWA FARM LIMITED RESPONDENT

(An Appeal from the Judgment of the Hon. Y. B. Mukhula, Principal Magistrate Naivasha, dated 19th day of July 2024 in C.M.E.L.R Cause Number 141 of 2020)

JUDGMENT

1. The Appellants were employed by the Respondent in various positions.
2. The 1st Appellant and the 2nd Appellant, were security guards; the 3rd, a tractor driver; the 4th, an electrician; the 5th, a cook; and the 6th, a general worker.
3. They filed Claim at the Chief Magistrate’s Court Naivasha. The 1st Appellant’s position was that he was unfairly and unlawfully dismissed by the Respondent. The 2nd to 6th Appellants’ position, was that they were constructively dismissed by the Respondent.
4. They pursued compensation for unfair, unlawful and constructive dismissal, as well as terminal benefits, including underpayment of salaries; rest days; overtime; holiday pay; annual leave; and salary arrears.



5. In total, they claimed a sum of Kshs. 1,704,811. They claimed grant of certificates of service, costs and interest.
6. The Trial Court agreed with the 1st Appellant, that he was unlawfully and unfairly dismissed, and awarded him notice, compensation equivalent of 12 months' salary, annual leave, half the costs, and interest.
7. The 2nd to 6th Appellants' claims were declined in their totality.
8. The Appellants lodged this Appeal through a Memorandum of Appeal, dated 30th July 2024.
9. Their grounds are that the Trial Court erred, by: -
 - a. Finding that the 2nd to 6th Appellants were not constructively dismissed.
 - b. Finding that they willingly resigned.
 - c. Introducing its own opinion, that the Respondent was experiencing tough economic times, hence unable to pay the Appellants' salaries.
 - d. Failing to consider the evidence tendered by the Appellants on their resignation letters, and demands for unpaid salaries.
 - e. Failing to find that the Appellants were entitled to unpaid salaries.
 - f. Finding that 2nd to 6th Appellants' claims for overtime, holiday pay and underpayments were time-barred under section 90 of the *Employment Act*.
 - g. Failing to appreciate the evidence tendered by the Appellants.
10. They propose that the Appeal is allowed; Judgment of the Trial Court is set aside; and the Appellants granted costs.
11. Parties agreed to have the Appeal considered and determined, on the strength of Record of Appeal and Submissions. They confirmed filing and exchange of Submissions, at the last appearance before the Court, on 30th January 2025.

The Court Finds: -

Constructive dismissal 2nd to 6th Appellants.

12. The Appeal revolves around the concept of constructive dismissal. Ground [a], [b], [c] and [d] relate to the concept, and how the Trial Court handled the law and facts applicable to the concept.
13. The 2nd to 6th Appellants all pleaded that they resigned, owing to the Respondent's failure and/or delay, in paying their salaries.
14. The 2nd Appellant restated this reason in justifying resignation, at paragraph 4 of his witness statement; the 3rd Appellant at paragraphs 4 and 5 of his witness statement; the 4th Appellant at paragraph 3 of his witness statement; the 5th Appellant at paragraph 4 of his witness statement; while the 6th Appellant underscored that he resigned, because his salary was always paid late, at paragraph 6 of his witness statement.
15. The Trial Court declined the claims for constructive dismissal on the ground that the 2nd to 6th Appellants had not established these claims, on the balance of probability.



16. The Trial Court concluded that the 2nd and 3rd Appellants attributed their resignation to personal reasons. The 4th to 6th Appellants were said to have resigned because of salary delay, with the Trial Court concluding however, that they did not show that they demanded for their salaries, as and when the salaries fell due.
17. The Trial Court went on to hold that the Respondent could have been facing tough economic terms, resulting in delayed release of the Appellants' salaries.
18. The Trial Court erred in its reading of evidence and application of the law, on constructive dismissal.
19. The 2nd to 6th Claimants all adopted their witness statements as their evidence. They all gave evidence through the witness statements, that they resigned because of non-payment of their salaries when they fell due.
20. Peter Rotich, the 2nd Appellant, stated at the handwritten page 197 of the Record of Appeal, "I was not paid for 5 months by the Respondent."
21. Upon redirection at page 198, he stated, "I resigned because I was not paid for 5 months."
22. The Trial Court misinterpreted the 2nd and 3rd Appellants' resignation letters, by holding that because they stated resignation was for personal reasons, the 2nd and 3rd Appellants did not resign on account of delayed salaries.
23. They clarified in their witness statements, and at least in the case of the 2nd Appellant, through their oral evidence, that they resigned on account of delayed salaries.
24. In any event, did their allusion to personal reasons, exclude delayed salaries? Are salaries not personal, and the effects of delayed salaries, such as inability to feed their families, and the necessity to resign in order to look for alternative sources of income, personal to the Appellants? The 3rd Appellant, in his witness statement stated that, "I resigned because I had a family to feed and I had to look for alternative work."
25. These were personal reasons, all tied down to delay in payment of the Appellants' salaries.
26. The Trial Court erred, by justifying delayed salaries on tough economic times, a justification which none of the parties advanced before the Trial Court, in their respective cases.
27. It is noted that the Appellants closed their case on 16th May 2024. The Respondent's case was scheduled by consent, to be heard on 20th June 2024.
28. But on 20th June 2024, the Respondent's Advocate did not present any witness and applied to close the Respondent's case and file submissions.
29. There was no evidence at all, from the Respondent concerning tough economic times, or any other reasons, to justify delay or non-payment of the Appellants' salaries.
30. There is nothing in the [Employment Act](#), 2007, which required the Appellants to demand for payment of their salaries, as and when they fell due.
31. Sections 17 and 18 of the [Employment Act](#) demand that an Employee's salary is paid when it falls due, with no obligation imposed on the Employee, to apply to his Employer to be paid.
32. The salary payable to an Employee, is a fundamental term of the contract of employment. It is always, at the heart of the essentialia negotii, during contract making. An Employer can trifle with other terms,



- but not the salary. So sacrosanct is the term, that the *Employment Act*, dedicates a whole part IV, on its protection. When it is withheld, an Employer is in breach of a fundamental term of the contract.
33. When their salaries were delayed, or not paid for as many as 5 months, the Appellants were entitled to conclude that the Respondent had repudiated their contracts, and was no longer interested, in honouring a fundamental term of the contract.
 34. They were entitled to consider their contracts to have been terminated constructively, by the Respondent. They allude to frustrations that they encountered, including their inability to feed themselves and their families.
 35. A work environment in which an Employee is rendering his labour with no income, or with persistently delayed income, fits well the description of a hostile work environment, and borders on conditions of slavery and servitude, outlawed by *the Constitution*.
 36. If an Employer is encountering tough economic times as stated by the Trial Court, there are legal options of meeting the challenges, including resort to Section 40 of the *Employment Act*. An Employer is not allowed to unilaterally take away the statutory protections conferred on an Employee's salary by Sections 17 and 18 of the *Employment Act*. When such protection is removed, and the salary paid at the convenience of an Employer, a hostile work environment is inevitable. A fundamental term of the contract of employment, perhaps the most fundamental, is vandalized, warranting the presumption on the part of an Employee, that his contract has been terminated.
 37. The Court is satisfied that the Trial Court erred, by finding that the 2nd to 6th Appellants resigned voluntarily, and that they did not establish constructive dismissal.
 38. They established constructive dismissal under the principles laid down by the Court of Appeal in *Coca Cola East Africa Limited v. Maria Kagai Ligaga* [2015] e-KLR, a decision which they availed to the Trial Court.
 39. Other decisions underlining that an Employee is constructively dismissed when he resigns, after his Employer breaches a fundamental term of the contract, include E&LRC decision, *Deya v. Safaricom* [2022] KEELRC [13561] [KLR], and a relatively old UK decision, *Western Excavating ECC v. Sharp* [1978] ICR, 221. The UK Court defined constructive dismissal much the same way as the Court of Appeal of Kenya did, in the case of *Maria Kagai Ligaga* above, stating: -

“ If an 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.”
 40. The withholding of the Appellants' salaries, for as much as 5 months, was a breach, that struck at the root of their contracts of employment. The Respondent showed to the Appellants that it no longer intended, to be bound to pay them their monthly salaries, as and when they fell due. They resigned on account of the Respondent's breach of the most basic term of the contract- payment of their salaries, at regular intervals.
 41. Grounds [a] [b] [c] and [d] of the Memorandum of Appeal, have merit and are upheld.
 42. Ground [e] relates to unpaid salaries. There was no evidence placed before the Trial Court showing that the Respondent paid the arrears of salaries claimed by the Appellants. There were no pay rolls, pay statements or bank transfers brought before the Court showing payment. There was no witness brought before the Court by the Respondent.



43. The Trial Court agreed with the Appellants, that their salaries were in arrears, attributing the arrears to tough economic times, suffered by the Respondent.
44. So why was the prayer for payment of salary arrears not granted?
45. They resigned for non-payment of their salaries. There was no reason, not to grant the prayer, for payment of arrears of salaries.
46. The prayer is granted as pleaded in the Statement of Claim.
47. The last Ground is that the Trial Court erred, by declining the prayers for overtime, holiday pay and overtime to the 2nd to 6th Claimant, on the ground that the claims were time-barred.
48. The Court does not agree that the claims were time-barred. If the full Claim was not time-barred under Section 90, no claim under the employment contract which sought to be enforced would be subjected to a separate law of limitation of time, and severed from the main Claim.
49. Underpayment of a salary is a statutory violation, is discriminatory [based on what salary is paid to other similarly situated Employees under the Wage Order], and every time an Employee receives a cheque in underpayment and discrimination, the cause of action is renewed.
50. That said, there does not seem to have been sufficient evidence adduced by the Appellants, to support their respective prayers for holiday pay and overtime. They generally made recitals of the number of holidays there is in a calendar year, without attempting to give evidence, establishing that they actually worked on the stated holidays.
51. The claims for overtime, were not crystallized through their evidence. The Trial Court did not have sufficient evidence, to support the claim that the Appellants worked excess hours.
52. On underpayment, the Appellants availed to the Trial Court the relevant Legal Notices No. 111 of 2017, No. 3 of 2018, and No. 116 of 2015. They gave evidence on salary rates received, and the Trial Court had an obligation to ensure that those rates, were consistent with the minimum standards, laid down in the respective wage instruments.
53. The Appellants were not only denied their salaries, as and when they fell due; they were underpaid, when the salaries finally arrived.
54. The Ground on underpayment is merited and sustained.
55. The 2nd to 6th Appellants, do not mention notice, annual leave or certificates of service, in their Grounds of Appeal.

In sum, it is ordered: -

- a. The Appeal is allowed under Grounds [a], [b], [c], [d], [e] and in part, Grounds [f] and [g] of the Memorandum of Appeal.
- b. It is declared that the 2nd to 6th Appellants were constructively dismissed by the Respondent.
- c. The 1st Appellant's award by the Trial Court of notice, annual leave and compensation for unfair termination is upheld. In addition, the Respondent shall pay to the 1st Appellant underpayment of salary at Kshs. 21,651 and arrears of salary of Kshs. 31,117.



- d. The Respondent shall pay to the 2nd Appellant, equivalent of 12 months' salary as damages for for constructive dismissal at Kshs. 12,152 x 12 = Kshs. 145,824, underpayment of salary at Kshs. 122,507, and arrears of salary at Kshs. 60,761.
- e. The Respondent shall pay to the 3rd Appellant, equivalent of 12 months' salary as damages for constructive dismissal, at Kshs. 8,538 x 12 = Kshs.102, 456, underpayment of salary at Kshs. 22,482, and arrears of salary at Kshs. 42,960.
- f. The Respondent shall pay to the 4th Appellant, equivalent of 12 months' salary as damages for constructive dismissal at Kshs. 10,000 x 12 = Kshs. 120,000 and arrears of salary at Kshs. 50,000.
- g. The Respondent shall pay to the 5th Appellant, equivalent of 12 months' salary as damages for constructive dismissal at Kshs. 7,689 x 12 = Kshs. 92,268, underpayment of salary at Kshs. 3,188 and arrears of salary at Kshs. 30,759.
- h. The Respondent shall pay to the 6th Appellant equivalent of 12 months' salary as damages for constructive dismissal at Kshs. 7,300 x 12 = Kshs. 87,600 and arrears of salary at Kshs. 36,500.
- i. Costs of the Appeal to be borne by the Respondent.

DATED, SIGNED AND DELIVERED ELECTRONICALLY, AT NAKURU THIS 28TH DAY OF MARCH 2025.

JAMES RIKA

JUDGE

Court Assistant: Emmanuel Kiprono

Wachira Wanjiru & Company Advocates for the Appellants

Wairegi Kiarie & Associates, Advocates for the Respondent

