



REPUBLIC OF KENYA



KENYA LAW
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**Mitula v Vibe Nairobi Limited & another (Cause 904 of 2018)
[2025] KEELRC 912 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 912 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 904 OF 2018
MN NDUMA, J
MARCH 20, 2025**

BETWEEN

ELIAKIM OKUOM MITULA CLAIMANT

AND

VIBE NAIROBI LIMITED 1ST RESPONDENT

HON ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. The Claimant filed suit on 8/6/2018 against the 1st and 2nd Respondents seeking an order in the following terms:-Salary for the month of March 2017 Kshs. 37,500.00Service charge for the month of March 2017 Kshs. 10,000.0048 leave days Kshs. 74,976.0014 public holidays Kshs. 32,802.0082 days overtime Kshs. 192,126.00Severance pay – computed at 30 days pay
for every full year worked (1 year) Kshs. 37,500.00
General damages for constructive Dismissal @12 months’ salary Kshs. 450,000.00Advocate’s fees CR. 1128/2017 – Kibera Kshs. 60,000.00Forfeited police bail cash Kshs. 30,000.00General damages for malicious prosecution Kshs. 3,000,000.00
Total Kshs. 3,924,904.00
2. The Claimant adopted witness statement dated 29/5/2018 as his evidence in chief.
3. CW1 stated he was employed on 5/11/2015 by the Respondent on a six months contract and was promoted and confirmed to position of Senior Bar Supervisor by a letter date 12/5/2016.
4. On 16/3/2017, the 1st Respondent vide its manager Mr. Omprakash Ramchandani suspended the Claimant from work indefinitely on allegations that Claimant had mismanaged credit cards at News cafe Karen Hardy Branch causing a loss of Kshs. 542,669.00 to the Respondent. Letter of suspension was dated 16/3/2017.



5. That the Respondent used the services of one PC James Njuki a police officer stationed at Karen Hardy Police Station to intimidate and harass the Claimant despite his pleas to have matter resolved by letters dated 18th, 20th and 21st March 2016.
6. That the Claimant was branded a thief at the work place vide propaganda by the Respondent and the unsubstantiated reports to the Karen Police Station. That the Claimant was arrested on 20/3/2017 and was released on Kshs. 30,000.00 Bond.
7. That CW1 was on 4/5/2017 charged with the offence of stealing by servant contrary to section 268(1) of the Penal Code. That upon being presented before court he was released on Kshs. 20,000.00 cash bail after the police bond of Kshs. 30,000.00 was forfeited to the state for failure to attend court. That after numerous appearances in court, the Claimant was discharged unconditionally on 14/2/2018 since witnesses had failed to attend court severally. That there was no sufficient evidence to warrant the arrest and detention of the Claimant. That no internal or external audit report had linked the Claimant to the loss of alleged funds.
8. That the 2nd Respondent failed to advice prosecution not to pursue a hopeless case which was not supported by any tangible evidence. That the Claimant prays to be awarded as set out in the statement of claim.
9. CW1 was cross-examined by Mr. Ongachi for the 1st Respondent and Mr. Oure for 2nd Respondent stating that he was employed as Beverage Controller and that had resigned his employment due to harassment by the 1st Respondent. That he gave reasons for resignation in the letter. That his name and reputation was spoilt following the untruthful allegations levelled against him by the 1st Respondent and unlawfull prosecution by police leading to arrest and detention before being released on bail. That the case was not prosecuted due to lack of evidence. That no disciplinary hearing was held against the Claimant. That Claimant was labelled a thief unjustifiably at the work place and was arrested publicly at the work place upon the General Manager bringing a police officer at the work place. That he had not taken 48 days leave in two years. That he had worked 14 public holidays. That he worked overtime which was not paid in that he supervised staff amounting to 82 hours overtime over and above the 8 hours worked daily. That the extra time was over a period of two years. That he was paid Kshs. 37,500.00 monthly salary. That he was not paid any terminal benefits upon resignation which amounted to constructive dismissal.
10. That the illegal arrest and procedures at Kibera court implicates the 2nd Respondent. That he did not know if the Attorney General (A.G.) had anything to do with criminal proceedings. He said he was not aware ODPP office was independent of the AG's office. He said AG was responsible for advising Government and that no allegations are made against the AG in the court pleadings and evidence.
11. RW1, Joash Okongo Ochieng testified for the 1st Respondent. He adopted a witness statement dated 11/11/2022 as his evidence in chief. RW1 said he was still Human Resource Manager of the 1st Respondent. That from the records, the Claimant resigned vide an email dated 19/3/2017.
12. That the resignation was voluntary stating that it was "due to allegations that are meant to spoil my reputation."
13. RW1 denied that the Claimant had been indefinitely suspended by the Respondent. That the Claimant was not disciplined and filed this suit pre-maturely. That the claim for payment of full salary is not tenable since he had resigned on 19/3/2017.



Determination

14. The court has carefully considered the submissions filed by the parties and the testimony by CW1 and RW1 and has delineated the following issues for determination: -
- i. Whether the A.G. is a proper party in this matter
 - ii. Whether the Claimant was constructively dismissed
 - iii. What reliefs if any the Claimant is entitled to.
15. With regard to the 1st issue, office of the A.G. is established under Article 156(1) of the Constitution of Kenya 2010 and the powers and authority of the A.G. under Article 156(4) include:
- (a) is the principal legal advisor to the Government
 - (b) shall represent the National Government in court or in any other legal proceedings to which the National Government is a party other than criminal proceedings.
16. The office of the Director of Public Prosecutions is established under Article 157(1) of the Constitution and vide Article 157(4):
- The Director of Public Prosecution shall have power to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector General shall comply with any such direction.”
- and
- Under Article 156(6)
- The Director of Public Prosecution shall exercise state powers of prosecution and may-
- (a) Institute and undertake criminal proceedings against any person before any court...”
17. It follows that the ODPP is a necessary part to any suit where a party claims illegal arrest and prosecution of a person has happened and seeks reliefs for the same.
18. The A.G. has been wrongly included in this matter and did not participate in any manner set out in the pleadings and or any reliefs sought from the A.G. in the suit to warrant the inclusion of A.G. in the matter as the 2nd Respondent. Accordingly, the A.G. is struck off as 2nd Respondent in this matter.
19. With regard to whether the Claimant was constructively dismissed from employment the court finds that the Claimant was suspended from employment by the Respondent by a letter dated 16th March 2017 pending investigations in a matter of theft of Kshs. 542,664.00. It was alleged that the Claimant was responsible as the most senior supervisor of the News Café Hardy and had failed to manage the outlet property to avoid the said theft which action/omission amounted to mis-conduct.
20. The evidence before court is that the Claimant was subsequently arrested and charged with the offence of theft at Kibera court.



21. By a letter dated 19th March 2017, the Claimant resigned from employment as a senior supervisor stating as follows:-

“I would like to inform you that I am resigning from my position as senior supervisor for the Newsafe, effective March, 19 2017.

Thank you for the support and opportunity that you have provided me during the last two years. I have truly enjoyed my tenure with vibe Nairobi company, and am more than grateful for the encouragement you have given me in pursuing my professional and personal growth objective. But due to allegations that are meant to spoil my reputation that I have build a long the years and hurt my family, I have decided to chase my dreams elsewhere. I would like to thank the company for the employment and wish you well.”

22. In this letter, the Claimant did not demonstrate that there was a history of mis-treatment or harassment of the Claimant by the Respondent. To the contrary, the Claimant painted a very good relationship between himself and the Respondent upto the date of suspension, on grounds of failure to prevent theft by staff. In the said letter of suspension, the Respondent, did not allege that the Claimant was guilty of any theft but the Claimant was accused of a failure in management as the top supervisor of the Respondent.

23. The evidence by the Claimant is that police then were called to investigate the matter leading to the arrest and preference of charges by the office of ODPP at Kibera Law Courts.

24. The court is not satisfied that the Claimant has proved that he was harassed and or discriminated upon by the police or by the Respondent during the report or before. The Claimant was made to step aside as in-charge to allow investigations to be carried out.

25. The Claimant adduced evidence that he was subsequently discharged for no case to answer by the Kibera court. The Claimant ought to have sued the ODPP and/or the office of the Inspector General of police for malicious arrest, detention and prosecution but did not do so.

26. The Claimant has not demonstrated that the allegations of theft and/or loss of money by the staff under the Claimant’s watch was a false allegation and or was meant to frame the Claimant or harass him at the work place.

27. The Claimant resigned after only three (3) days upon being placed on suspension. The Claimant did not first write a letter to exonerate himself and/or protest the suspension before taking the step to resign.

28. There is no evidence disclosing a pattern of harassment that may be construed as an attempt on the part of the Respondent to unlawfully force the Claimant from his employment. That does not come out at all from the letter of resignation which is the only letter written by the Claimant while he was at the employment of the Respondent.

29. In the case of Cocacola East and Central Africa Ltd versus Marie Kegai Lugaga [2015] eKLR the court stated:-

“The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer’s behaviour towards him was so unreasonable that he could not be expected to stay – this is the unreasonable test.



The second interpretation is that the employer's conduct is so grave that it constitutes a repudiatory breach of the contract of employment – this is the contractual test.”

30. The court finds that the Claimant failed to discharge the burden of prove placed on him by the law in terms of section 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya, as guided by the authority above.
31. The case of malicious prosecution also fails the Claimant having failed to sue the necessary parties in this matter who arrested, detained and prosecuted the Claimant before he was discharged under section 210 of the Criminal Procedure Code for no case to answer.

Terminal benefits

32. The Claimant testified that he was not paid salary for the month of March 2017. The Claimant resigned on 19th March 2017 and so could only receive salary for the days he worked. The Claimant earned Kshs. 32,500.00 per month and is entitled to payment of Kshs. 23,750.00 for the 19 days worked in March. The claimant was a hotelier and service charge is payable. The Claimant seeks payment of Kshs. 10,000.00 owed to him before he resigned. The Respondent did not adduce any tangible evidence to rebut this claim. The court finds that the Claimant proved that he was owed Kshs. 10,000.00 as service charge.

Leave days

33. The Claimant claims payment of 48 days salary in lieu of leave days not taken for the period he served the Respondent. Again, RW1 did not rebut that claim sufficiently. The Claimant proved that he was owed Kshs. 79,976.00 in lieu of 48 leave days not taken for the two-year period he served the Respondent.

Public holidays

34. The Claimant testified that he had worked during the public holidays and was not paid twice the normal rate. RW1 again did not sufficiently rebut this claim. The court awards the Claimant Kshs. 32,802.00 being double salary for the work done during 14 public holidays.

Severance pay

35. The Claimant was not declared redundant and was not entitled to payment of severance pay for the two (2) years he served the Respondent. The Claimant did not prove the claim and thus is dismissed.

Overtime

36. The Claimant testified that he had worked 82 hours over and above the 8 hours he worked daily and was not paid overtime. RW1 did not again sufficiently rebut this prima facie evidence adduced by the Claimant. The court awards the Claimant Kshs. 192,126.00 being overtime for 82 hours he had worked. Other claims including advocate fees; forfeited police bail, general damages for malicious prosecution and for constructive dismissal have no merit and are dismissed.
37. The Claimant is awarded costs and interest in respect of the reliefs awarded to him.
38. In the final analysis judgment is entered in favour of the Claimant against the 1st Respondent as follows:-
 - a. Kshs. 23,750.00 arrear salary.



- b. Kshs. 10,000.00 service charge
- c. Kshs. 74,976.00 in lieu of 48 leave days.
- d. Kshs. 192,126.00 overtime for 82 hours.
- e. Kshs. 32,802.00 for 14 public holidays worked.
Total award Kshs. 333,654.00
- f. Interest at court rates from date of judgment till payment in full.
- g. Costs of the suit.

DATED AT NAIROBI THIS 20TH DAY OF MARCH 2025.

MATHEWS NDUMA

JUDGE

Appearance:

Mr. Masolia for Claimant

Ms. Ongicho for Respondent

Mr. Kemboi – Court Assistant

