



**Milly Fruit Processors Limited v Matete (Appeal E006 of 2025)  
[2025] KEELRC 1237 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1237 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E006 OF 2025**

**M MBARŪ, J  
APRIL 30, 2025**

**BETWEEN**

**MILLY FRUIT PROCESSORS LIMITED ..... APPELLANT**

**AND**

**ROBERT AGGREY MATETE ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. D. Orimba delivered  
on 31 July 2024 in Mombasa MCELRC No. E298 of 2020)*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 31 July 2024 in Mombasa MCELRC No. E298 of 2020. The appeal is on two grounds that;
  1. The learned magistrate erred in law and fact in finding that the respondent had, on the evidence, proven a case for constructive dismissal.
  2. The learned magistrate erred in law and fact in awarding the remedies sought without providing any, or any lawful basis, for the award.
2. The background of the appeal is the respondent's claim that he was employed as a carpenter in May 2011. On 6 November 2018, he was suspended on the allegation of stealing 39 pieces of metal worth Ksh.191, 929. He was arrested on 17 October 2018. The suspension was extended pending internal and police investigations.
3. The respondent claimed that he reported back to work and asked the human resource manager, Jacob Lejo, about the internal investigations or the terms of his reinstatement, but there was no response. He was allowed to continue with his duties but was subjected to humiliation and a non-conducive working environment as a suspect and a pending theft case by the police. Due to these circumstances, on 5 February 2019, the respondent followed up on the allegations made by the appellant. Still, the



manager refused to address him and directed him to resign if he wished. The respondent opted to submit his resignation. At the time, he was earning Ksh.18, 000 per month, and he claimed there was unfair termination of employment through constructive dismissal and claimed the following;

- a. Notice pay Ksh 18,000;
  - b. Severance pay for 9 years Ksh.81,000;
  - c. Leave pay for 2018;
  - d. Gratuity Ksh 83,077;
  - e. Damages for constructive dismissal;
  - f. Costs of the suit.
4. In response, the appellant admitted that the respondent was employed in 2011. Employment was not continuous as alleged since he was under fixed-term contracts. There was an incident under investigation, but the respondent opted to tender his resignation before a conclusion. Under such circumstances, the appellant did not need to issue notice or payment in lieu thereof; the claim for severance pay is not due, and all leave days had been utilised.
5. The learned magistrate heard the parties and delivered judgment and held that the respondent proved his case that he went through psychological stress, emotional pain and suffering due to being placed under intolerable working conditions and hence awarded the sum of Ksh 200, 077 with costs and interests.
6. Both parties attended and agreed to file written submissions. The pleading assessed and submissions, the same are analysed in the findings.

### **Determination**

7. This is a first appeal. The court must review the record, reassess the findings, and reach conclusions. However, the trial court had the opportunity to hear the witnesses.
8. The concept of constructive dismissal only arises where the employer's conduct is such that it constitutes a repudiatory breach of the employment contract. In the case of *Leena Apparels (EPZ) Limited v Nyevu Juma Ndokolani* [2018] KECA 308 (KLR), the court held that in constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of the 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.
9. This position is reiterated in the case of *Maingi v Bridge International Academy Limited* [2023] KECA 1211 (KLR), that constructive dismissal is the employer's conduct that suggests that the employer no longer wishes to be bound by the contract's essential terms. In such a case, the employee is entitled to treat himself as discharged from any further performance.
10. In this case, the respondent admitted that on 6 November 2018, he was suspended from duty on allegations that he had stolen 39 pieces of metal. The matter was reported to the police, who arrested and released him on bail. The suspension was extended pending investigations.
11. The respondent returned to work on 5 February 2019 to ask about the internal investigations. He was allowed to resume work, and when he asked about the status of the investigations, he was told that the human resources manager had asked him to resign, which he did. His case was that he was forced to



- resign due to humiliating circumstances, because he was a thief, and the working environment became hostile.
12. The respondent filed the resignation letter dated 6 February 2019, the resignation notice. He noted that on 18 October 2018, he was issued a notice to show cause following a case of theft. On 6 November 2018, he was suspended pending investigations. He was arrested and later released on bail. H reported back to work on 15 November 2018, and the suspension was extended.
  13. The respondent further noted that the working environment was not conducive when he was allowed to report back to work. He suffered psychologically, and despite the suspension pending investigations, the matter was not addressed to clear his name. He was forced to resign.
  14. The employer can discipline its employees for any misconduct or gross misconduct. There is also a civic duty to report any criminal incidents on the shop floor and allow the government agency tasked with conducting criminal investigations to address them.
  15. In this case, the respondent was issued a notice to show cause on 18 October 2018 regarding allegations that 39 pieces of metal were missing from his duty station. He was directed to respond to the notice by 19 October 2018, which he did. He denied that he was involved in the alleged theft.
  16. On 6 November 2018, the appellant suspended the respondent for 10 days pending investigations. He was to resume duty on 15 November 2018, which he did, and the suspension was extended until 21 November 2018, when he was to report to the human resources office.
  17. From his evidence, the respondent was allowed back to work. It appears he was uncomfortable with the disciplinary issue that led to his suspension and arrest by the police, which was not resolved. His efforts to seek the matter to be cleared by human resources went without a conclusion.
  18. The respondent opted to resign from his employment.

**Was there constructive dismissal?**

19. When the respondent decided to tender his resignation notice, he had been reinstated to work. He served the suspension, replied to the notice to show cause, and was allowed to resume work. However, the matter with the police was still pending and outside the appellant's control.
20. Can this be termed as constructive dismissal? The respondent must have been anxious to clear his name. Internally, the appellant did its part with the reinstatement. The anxiety of having the matter concluded was hence addressed. Upon the resumption of duty, the respondent cannot blame the employer for not issuing a sanction.

This is not a ripe case of constructive dismissal.

21. The findings by the trial court that the appellant caused the psychological distress and pain to the respondent are far-fetched. Upon the reinstatement to work, the appellant did its part. The appellant did not conduct a disciplinary hearing. The conclusion by the respondent that he was taken as a thief caused him anxiety, distress, or pain cannot be linked to the appellant. The respondent's perception that he was a thief was imaginary, and any psychological distress was his own. He cannot blame the appellant by claiming constructive dismissal.

**Notice pay and damages are not due.**

22. The claim for severance pay is not due as it only accrues upon a declaration of redundancy. Under the alleged constructive dismissal, it does not arise.



23. On the leave pay claim, the appellant accepted the resignation through a letter dated 2 March 2019 and offered to pay 30 accrued leave days plus 22 off days. The pay was to be less than 7 days in lieu of notice, statutory dues, and any accrued dues at work.
24. This addressed any claim the respondent had with the appellant.
25. A claim for gratuity only arises where it is provided under the employer's contract, collective agreement, or policy. There is no evidence of such benefit.
26. The appeal is meritorious, and the trial court judgment is hereby set aside. On this basis, the appellant is awarded the costs of the appeal.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 30TH DAY OF APRIL 2025**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

