



Greatlakes Trans [K] Limited v Mohammed (Employment and Labour Relations Appeal 147 of 2024) [2025] KEELRC 1166 (KLR) (24 April 2025) (Judgment)

Neutral citation: [2025] KEELRC 1166 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
EMPLOYMENT AND LABOUR RELATIONS APPEAL 147 OF 2024**

**K OCHARO, J
APRIL 24, 2025**

BETWEEN

GREATLAKES TRANS [K] LIMITED APPELLANT

AND

YAHYA MOHAMMED RESPONDENT

(Being an appeal against the judgment and Decree of the Senior Resident Magistrate – Hon R.N. Akee delivered on 27th June 2024 in Mombasa MCELRC No. E 721 of 2021)

JUDGMENT

Introduction

1. By a statement of Claim, the Respondent initiated the abovementioned suit against the Appellant claiming constructive dismissal, and consequently sought various reliefs against the latter. The Appellant filed a reply to the statement of claim, denying the Respondent’s cause of action and entitlement to the reliefs sought. They counterclaimed for one month’s salary in lieu of notice. The suit was heard on merit, and on the 27th June 2024, the trial court delivered its judgment, dismissing it.
2. Aggrieved by the judgment, the Respondent filed the appeal herein, assailing the judgment upon the premise of eight grounds of appeal as set out in the Memorandum of Appeal dated 18th July 2024.
3. When this matter came up before this Court for directions on the hearing of the appeal, I directed that the appeal be canvassed by way of written submissions. The direction was complied with. The parties’ respective submissions are on record.

The Respondent’s case before the Lower Court.

4. The Respondent’s case was that he first came into the Respondent’s employment on or about 1 February 2020 as a Mechanic at a monthly salary of KShs. 25,000. The salary was to be reviewed



- upwards after he completed his probationary period. The Respondent failed to review the salary as agreed.
5. He continuously and diligently served the Respondent until 10 July 2020, October 2014, when he issued a resignation letter containing a one-month termination notice. Upon receipt of the notice, the Respondent ordered him to leave immediately without paying him salary for the notice period.
 6. The resignation was prompted by the poor working conditions at his workplace, including working overtime without compensation, and threats and intimidation by the Respondent.
 7. He asserted that during his employment, he was never;
 - a. Paid any house allowance or provided with any accommodation.
 - b. Paid his salary for May 2020 to July 2021.
 - c. Proceeded for the annual leave.
 - d. Paid overtime for the period between 1st February 2020 and July 2021.
 - e. Paid allowance for working during public holidays in the period 1st February 2020 to 10th July 2021.
 8. He consequently claimed;
 - a. 1 month's salary in lieu of notice.....KShs. 25,000.
 - b. Full salary from May 2020 to July 2021...KShs. 280,000.
 - c. House allowance for the years worked.....KShs. 63 750.
 - d. Public holidays workedKShs. 26,667.
 - e. 1 rest day per week for the period between 1st February 2020 to 10th July 2021..... KShs. 32, 450.00.
 - f. Compensation for overtime [working from 8.00 am to 10.000 pm, thus 6 hours of overtime]53,104.
 - g. Pro-rata leave.....KShs. 51, 646.00.
 - h. Compensation for unfair termination [twelve months' gross salary]KShs. 132 000.00.

The Appellant's case before the Lower Court.

9. The Appellant admitted that the Respondent was its employee at all material times. Further, it was a term of the contract of employment that either party would give one month's notice when terminating the contract or pay one month's salary in lieu of notice.
10. The Respondent resigned from employment on July 10, 2021, without issuing a month's notice or paying one month's salary in lieu of notice.
11. The Respondent was never subjected to harsh working conditions, overtime, threats, or intimidation.
12. The Respondent became impatient at work when the Appellant's work significantly diminished during the COVID-19 pandemic, which resulted in the lockdown ordered by the Government of Kenya, which affected its transport business.



13. The Respondent's salary was consolidated; hence his claim for house allowance was not founded.
14. It was further asserted that despite the Covid-19 pandemic and its adverse effect on its business, the Appellant still paid the Respondent his salary between May 2020 and July 2021.
15. The Respondent never worked overtime or during public holidays, as he alleged, or at all.
16. The Appellant never dismissed the Appellant from employment. He resigned without the contractual notice or paying salary in lieu of notice.
17. Having terminated the contract of employment without notice, the Respondent was liable to the Appellant a month's salary in lieu thereof.

The Lower Court's Judgment.

18. After hearing the parties on their respective cases, and considering their evidence, the Learned Trial Magistrate rendered judgment, holding that the Respondent had proved his claim, and consequently, entered judgment for him, thus;
 - a. One month's salary in lieu of notice, KShs. 25,000.
 - b. Holiday pay KShs. 26,667.
 - c. Compensation for one rest day per week 132, 450
 - d. 3 months' salary for unfair/unlawful termination at Kshs. 75,000.
 - e. Costs of the suit and interest from the date of judgment till full payment.

The Appeal.

19. Aggrieved by the judgment, the Appellant filed the instant appeal, setting forth eight grounds, namely;
 - a. The learned trial magistrate erred in law and in fact in finding that the claimant's employment amounted to unfair termination without referring to the evidence presented in court. The learned trial magistrate thus meted out an injustice.
 - b. The learned trial magistrate erred in law and fact in holding that the claimant proved his claim for public holidays pay and gave an award on the same despite the lack of particulars of the public holidays claimed in the memorandum of claim.
 - c. The learned magistrate erred in law and fact in holding that the claimant proved his claim for one rest day per week without particulars, legal basis and justification.
 - d. The learned magistrate erred in law and fact in awarding the prayer for one month's salary in lieu of notice, despite clear evidence that the claimant voluntarily resigned from work.
 - e. The learned magistrate erred in law and fact in awarding three [3] months' salary as compensation for unfair termination, despite clear evidence that the claimant voluntarily resigned from work.
 - f. The learned magistrate erred in law and fact, failing to consider the respondent's counterclaim.
 - g. The learned magistrate erred in law and fact in failing to order that the award be subjected to statutory deductions as mandated by the law.



- h. The learned magistrate wholly and completely disregarded the evidence as led by the appellant, together with its written submissions summarising the evidence, applicable law and case law, hence arriving at an unjust decision.

Analysis and Determination.

20. I have carefully considered the eight grounds set out in the Memorandum of Appeal, the material that was placed before the learned trial Magistrate, and the submissions by the parties herein, and conclude that the appeal herein revolves around three principal grounds, thus:

- a. How did the separation between the Appellant and the Respondent occur?
- b. Was the Appellant entitled to the reliefs granted by the trial court?
- c. Did the learned trial Magistrate consider the Appellant's counterclaim, and if not, what is this court's verdict on it?

21. Before I delve further into the analysis and determination, it is imperative to point out that I appreciate the duty of the first Appellate Court, which this Court is, as to analyse and re-assess the material placed before the trial Court, and come up with an independent conclusion[s], without necessarily being bound by the findings of the trial Court. However, in exercising its authority as such, the Appellate Court should bear in mind that it neither saw nor heard the witnesses testify and give due allowance. Where it has to depart from the trial court's findings, it must give reasons thereof.

22. This position was aptly set out in the case of *Selle -vs- Associated Motor Boat Co.* [1968] EA 123) where the Court held: -

“An appeal to this Court from a trial by the High Court is by way of 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. In particular, this court is not necessarily bound to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)”.

23. In the *German School Society & another v Ohany & another* (Civil Appeal 325 & 342 of 2018 (Consolidated) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) the Court of Appeal held that: -

“A first appeal is a valuable right of the parties and, unless restricted by law, the whole case is open for reconsideration both on questions of fact and law. The judgment of the appellate court must reflect this court's conscious application of its mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of this Court. The first appellate court has jurisdiction to reverse or affirm the findings of the trial court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. In addition, we bear in mind that we,



unlike the ELRC, did not have the benefit of seeing the witnesses testify. (See Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212).”

24. I have carefully considered the Respondent’s pleadings before the trial court, and it would be remiss of this Court if I didn’t point out that they do not appear to duly appreciate that a determination of an employee’s employment is either at the initiative of the employer or the employee. The pleadings on the one hand suggested the Respondent’s claim against the Appellant as unfair termination, as the termination of his employment lacked substantive justification and procedural fairness. Therefore, at the initiative of the employer, the Appellant.
25. On the other hand, the pleadings revealed that the Respondent’s claim was that of constructive dismissal. Therefore, at his initiation as an employee.
26. The Respondent’s witness statement [turned evidence in chief] expressed the same state of affairs as did the pleadings.
27. As the two initiatives cannot contemporaneously cause the end of a contract of employment, the pleadings of the person seeking remedy on the basis of the manner in which the contract was terminated must be unambiguous regarding whose initiative the termination was. I state this fully aware that the factors considered in the claims that flow from the various terminations are never similar.
28. The court presented with a claim for determination, as was the trial court, should be spared from finding itself in that space of speculation and confusion. Where the claimant presents their case in a manner suggesting that they are unclear on the anchor of their case, the court would be left with no option but to find the claim unproven.
29. The learned trial magistrate’s Judgment fell into the trap of confusion that was set by the Respondent’s pleadings, when she went into length considering the provisions of sections 43, 45[2] and 47[5] of the Employment, and the substantive test, and at one point concluding that the “termination procedure was unlawful”, all that relate to a claim for unfair termination of an employee’s employment or wrongful summary dismissal against an employee. Therefore, matters relevant to terminations initiated by the employer.
30. On the other hand, the learned trial magistrate held that the Respondent was constructively dismissed. Thereby, she concluded that the termination was at the initiative of the Respondent.

In my view, the judgment was erroneous by reason of the circumstances.

31. Constructive dismissal is not codified in Kenyan statutes; however, it has gained definition through judicial jurisprudence. Although it has no common law antecedent, it corresponds to the concept of the employer repudiating the contract of employment and acceptance thereof by the employee, thus ending the contract. The courts have accepted constructive dismissal to mean actions on the part of the employer that drive the employee to leave, whether or not there is a form of resignation.
32. The circumstances of constructive dismissal are so infinitely various that an exhaustive list of what circumstances justify and what do not. It is a question of fact for the court.
33. As held in Porter v N.B Legal Aid [2015]1. S.R.C. constructive dismissal has two branches. First, the Court must identify an express or implied contract term that has been breached and determine whether the breach was sufficiently serious to constitute constructive dismissal. However, an employer’s conduct will also constitute constructive dismissal if it more generally shows that the employer intended not to be bound by the contract. This approach is necessarily retrospective, as it requires



consideration of the cumulative effect of the past acts of the employer and determination of whether those acts evinced an intention to be no longer bound by the contract.

34. The Court of Appeal in *Coca Cola East & Central Africa Limited v Maria Ligaga* [2015] eKLR summarised the factors for consideration in a constructive dismissal claim, thus;
- a. “What were the fundamental or essential terms of the contract of employment?
 - b. Is there a repudiatory breach of the fundamental terms of the contract through the conduct of the employer?
 - c. The employer's conduct must be a fundamental or significant breach that goes to the root of the contract of employment or shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.
 - d. An objective 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 the 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 employer must not have accepted, waived, or 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 breach.
 - h. The burden of proving the repudiatory breach or constructive dismissal is on the employee.
 - i. Facts giving rise to a repudiatory breach or constructive dismissal are varied.
35. The Respondent contended that he was prompted to resign as his work environment became unbearable. The Appellant subjected him to intimidation and threats. The Respondent being a company, the allegation of intimidation and threats could only be attributed to an individual or individuals within the Appellant's enterprise, and then vicarious liability will attach to the Appellant, a legal person. Additionally, I see the allegation as bald, as there was no substantiation regarding the threats.
36. The Respondent pointed out another factor that affected his work environment over time, but he didn't clearly explain how this factor contributed.
37. With these, had the learned trial magistrate applied her mind to the fact that the onus to prove constructive dismissal lay on the Respondent at all times, dismissing the Respondent's claim was the most appropriate verdict to reach.
38. There isn't any doubt that the Respondent wrote a resignation letter dated 10th July 2021, which read in part;
- Ref: Resignation Letter Mechanic – Emp. No 69
- I write to tender my resignation as indicated above. This is due to personal interest that cannot allow to serve the Company as required.
- I take this opportunity to wish the Company a very prosperous future.
39. While this Court appreciates the legal position that in circumstances of constructive dismissal the employee may leave employment without or with notice, it is its view, that where he or she elects to



leave by a resignation letter/ notice, the letter or notice must be expressive of the fact that the work environment had become unbearable courtesy of the actions or inactions of the employer or that the employer had committed a repudiatory breach. A plain reading of the Respondent's letter does not at all indicate or suggest that the Respondent was leaving his employment as a result of the conduct of the Appellant.

40. By reason of the foregoing premises, I come to an inescapable conclusion that the separation was at the initiative of the Respondent, not as a result of circumstances of constructive dismissal, but by voluntary resignation. The learned trial magistrate erred in law when she held that the Respondent was constructively dismissed.
41. The learned trial magistrate awarded the Respondent the compensatory relief contemplated under section 49[1][c] of the *Employment Act*, to an extent of three months' gross salary on the basis that he had succeeded in establishing that the termination of his employment was "procedurally unlawful". Having found, as I have, hereinabove, that the Respondent voluntarily resigned from his employment, the relief is unavailable to him. The award is hereby set aside.
42. The basis on which the learned trial magistrate awarded the Respondent one month's salary in lieu of notice after quoting the provisions of section 35 of the *Employment Act* is challenging to comprehend. The magistrate held;

"In this case, the claimant served a termination notice to the respondent, who did not challenge receipt of the same. In the circumstances, I find that the claimant is entitled to one month's salary in lieu of notice. The same is awarded at Kshs. 25,000.

In my view, this statement by the learned trial magistrate, with great respect, totally lacked a legal basis for the award.
43. In any event, this court has found that the termination of the employment contract was at the Respondent's initiative, through the resignation letter, which, in my view, terminated the contract with immediate effect, without giving the contractual 30 days' notice. As such, Appellant cannot be condemned to pay salary in lieu of notice.
44. The learned trial magistrate in awarding the Respondent "Holiday pay", stated;

"The claimant prayed for holiday pay of Kshs. 26,667 is granted as prayed, and one rest day per week, the same is awarded as pleaded at KShs. 132, 450."
45. I have thoroughly scanned through the pleadings, the Respondent's witness statement [turned evidence in chief], and his oral testimony before the trial court, and find no challenge in stating that in none did he lay forth a factual or legal basis for his claim for 'one rest day per week'. In situations where entitlement to relief is contested, it can only be granted where a factual basis for the same has been laid by the party claiming it in its pleadings and proved by sufficient evidence during the trial. As this was not the case here, the learned trial magistrate erred in granting the same.
46. Though the Respondent pleaded for compensation for holidays worked but not paid for, I am of the view that this claim was just thrown to the trial court and ought not to have been granted. The Respondent was too silent on which and how many holidays he worked. I state this bearing in mind that in the Kenyan situation, this year's holidays might not be the same in number as last year's, and that the claim was a special claim that required specific proof. The award was not merited.



47. I note that the learned trial magistrate just awarded the two reliefs without assigning a reason or reasons for the grant. I can only state that this approach is undesirable and affronts the canons of proper judgment writing.
48. True, as argued by the Appellant, the learned trial magistrate did not consider their counterclaim at all. It was made a term of the contract of employment, and it was not in dispute at the trial, that the contract could be terminated by either party giving a month's notice or payment in lieu. Having found, as I have hereinabove, that the Respondent didn't give a month's notice as per the terms of the contract, I hold that had the learned trial magistrate considered the counterclaim, she would have allowed the counterclaim. By reason of this, the Appellant's counterclaim is hereby allowed with costs.
49. In the upshot, the appeal herein succeeds. The trial Court's Judgment is hereby set aside, and substituted with this Court's dismissing the Respondent's suit, and allowing the Appellant's counterclaim. The costs of this appeal and those of the dismissed lower court suit shall be in favour of the Appellant.
50. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA THIS 24TH DAY OF APRIL, 2025.

OCHARO KEBIRA

JUDGE

