



**Wabwire v Beta Bakes Limited (Employment and Labour Relations Cause E931 of 2021) [2025] KEELRC 1547 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1547 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E931 OF 2021**

**HS WASILWA, J  
MAY 29, 2025**

**BETWEEN**

**SYLVESTER WABWIRE ..... CLAIMANT**

**AND**

**BETA BAKES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this claim vide a Memorandum of Claim dated 8<sup>th</sup> November 2021 based on the unlawful termination of his employment. He prays for judgment against the Respondent for:
  - a. One months(s) gross salary plus in lieu of notice amounting to Kenya Shillings One Hundred and Fifty-Eight Thousand Five Hundred (Kshs. 158,500);
  - b. Compensation for wrongful dismissal the equivalent of twelve months' salary based on the gross monthly salary of the employee at the time of dismissal amounting to Kshs. 1,902,000;
  - c. Extraneous allowance for overtime worked both day and night at the government approved rate;
  - d. Confirmation of remittance of any statutory deductions (as applicable);
  - e. Issuance of certificate of service by the Respondent;
  - f. General damages;
  - g. Exemplary damages;
  - h. Interest on (b) to (e) above at court rates till date of full payment;
  - i. Cost of the suit; and



- j. Any other and/or further relief that this Honourable Court may deem fit and just to grant in the circumstances.

### **Claimant's Case**

2. The Claimant avers that vide an open-ended contract, he was employed by the Respondent on 27<sup>th</sup> November 2016 as Group Human Resource Manager and posted to Bakers Corner, Industrial Area. He was also engaged with the sister company Beta Bakers Limited in Matuu which required him to travel back and forth from Nairobi to Matuu.
3. The Claimant avers that he was earning a monthly salary of Kshs. 140,000 which was later reviewed upwards by 10% to Kshs.154,000 and a subsistence allowance of Kshs. 1,200 per day on travelling to Matuu.
4. The Claimant avers that on June 2017, the Respondent informed him of his permanent transfer to the sister company Beta Bakers Limited in Matuu retaining his position as Group Human Resource Manager.
5. The Claimant avers that was given house allowance of Kshs. 4,500 which was paid through voucher and not with his salary. His working hours in Matuu was increased to 70 hours per week from the 56 hours worked in Nairobi. His salary was also increased to Kshs. 158,500 and he was entitled to other benefits including and not limited to payment of medical insurance, contribution benefits, airtime benefit, paid leave days and sick pay.
6. The Claimant avers that he was served with a notice to show cause letter on 23<sup>rd</sup> October 2018 for poor performance. he refuted these allegations in writing within 24 hours and he was called the following day by the directors of the Respondent where he was informed of their decision to have him proceed on annual leave.
7. It is the Claimant's case that he reported from annual leave on 21<sup>st</sup> November 2018, when he was called by the Respondent's directors and informed that his employment had been terminated and released from his duties were effective immediately. He was also informed that he would be retained as a consultant for 6 months but he needs to hand a resignation letter, fearing to lose his source of income, he complied and was issued a six-month contract for consultancy.
8. The Claimant avers that he was never compensated for overtime worked at both stations.
9. It is the Claimant's case that he was not accorded a fair opportunity to be heard and /or defend himself rendering the termination unlawful. He was also never served with any warning letter about his performance or any complaints about his performance.
10. The Claimant avers that the Respondent's action to retain his contract for 6 months is an indication of his good work performance and that he took work seriously and was dedicated as characterised by hard work, fidelity and diligence.

### **Respondent's Case**

11. In opposition to the Claim, the Respondent filed a Statement Response dated 8<sup>th</sup> April 2022.
12. The Respondent admits that the Claimant was employed on 27<sup>th</sup> November 2016 as Group Human Resource Manager of Bakers Corner Company Limited, its sister company. He was later posted to the Respondent's offices in Matuu in line with the terms of the employment contract.



13. The Respondent avers that the Claimant illegally retrieve his own personnel file and all documents in the file including the employment contract.
14. It is the Respondent's case that the Claimant's performance was poor and satisfactory. On several occasions in 2028, he failed to undertake his role and duties diligently causing the Respondent tremendous losses in breach of his employment contract.
15. The Respondent avers that the Claimant failed to undertake tasks allocated during its Director's meeting held on 2<sup>nd</sup> February 2018; failed to streamline the recruitment process with complaints of various heads of departments obtaining financial and other inducements to employ staff and giving them preferential treatment causing demotivation among the staff; increase of absenteeism, selling of miraa and cigarettes during production at night, theft of company property, lateness, production of damaged products and syphoning fuel from its vehicles among the staff; late and delayed preparation of the management meeting minutes held on 28<sup>th</sup> August 2018 without any explanation given for the delay; failure to report to the Matuu office during the required hours without communication particularly on 15<sup>th</sup> and 16<sup>th</sup> October 2018 when the Claimant was absent without permission; and failure to keep proper records of its employees and advise the Respondent appropriately when discipline cases arise.
16. The Respondent avers that the Claimant was issued with a notice to show cause on 17<sup>th</sup> October 2018 and before it could proceed to convene a disciplinary hearing, the Claimant engaged it in good faith discussions to explore a mutual separation without having to subject him to a disciplinary hearing.
17. It is the Respondent's case that the Claimant agreed to a mutual separation and on 21<sup>st</sup> November 2018, he voluntarily resigned from his position, therefore, no claim for unfair and unlawful termination arises.
18. The Respondent avers that it offered the Claimant a consultancy services contract for a period of 6 months which he voluntarily accepted and the acceptance was not induced by fear as alleged.
19. The Respondent avers that there was no need to hold a disciplinary gearing as the Claimant resigned and took up the consultancy services. The Claimant did not raise any objection to the agreed mode of separation.
20. The Respondent avers that the Claimant was paid all his dues amounting to Kshs. 142,111.90 after taxes and statutory deductions and he acknowledged receipt of the same.
21. The Respondent avers that the Claimant worked within the normal working hours and is not entitled to overtime as pleaded. Further, he has not produced any evidence to demonstrate he worked overtime.

### **Evidence in Court**

22. The Claimant (CW1) adopted his filed witness statement as his evidence in chief and produced his filed documents dated 8<sup>th</sup> November 2021 and further list of documents dated 8<sup>th</sup> May 2024 as his exhibits 1 to 10.
23. During cross-examination, CW1 testified that he was not a custodian to his file and when he was leaving the company, he never left with his file.
24. CW1 testified that the salary review document of 5<sup>th</sup> January 2018 is not a forgery, the same was signed by the Director, Martin Kimeu whereas the confirmation letter of 1<sup>st</sup> July 2017 was signed by the Finance Manager.



25. CW1 testified that he worked overtime but he has not produced his work schedule in court. The employer is to produce them in court.
26. CW1 testified that he resigned from the Respondent and signed a consultancy agreement under duress but he did not indicate in his resignation letter that he under duress.
27. CW1 testified that he signed a final settlement clause which included leave days, holidays and ex gratia payments which were paid to him. He was deducted 2 days for absenteeism.
28. CW1 testified that the consultancy agreement had a dispute resolution clause which he did not exhaust; he signed the agreement on 22<sup>nd</sup> November 2018 and the suit herein was filed on 8<sup>th</sup> November 2021.
29. The Respondent's witness (RW1) Martin Kimeu stated that he is a Director and Chairman of the Respondent company. He adopted his witness statement dated 8<sup>th</sup> April 2022 as his evidence in chief and produced the Respondent's filed documents dated same date as his exhibits 1-4.
30. During cross-examination, RW1 testified that the Claimant's performance was poor and unsatisfactory, however, he did not review his performance. He knew his performance was poor due to indiscipline among the workers, lateness and absenteeism.
31. RW1 testified that indiscipline matters were to be handled by the heads of security and human resources whereas the night production supervisor handled the staff.
32. RW1 testified that they issued the Claimant with a NTSC which he responded to, however, before they could respond he proceeded on leave at his own accord. The Respondent did not force him to go on leave.
33. RW1 testified that the Claimant had a lot of experience in human resource and they knew he could help from outside as a consultant. He did not work as a consultant for the Respondent.

### **Claimant's Submissions**

34. The Claimant submitted on four issues: what was the nature of employment of the Claimant by the Respondents; whether the Claimant's terminated the contract out of free will or it was unfairly constructive termination; whether the Claimant is entitled to the relies sought in the claim; and who meets the costs in this cause.
35. On the fist issue, the Claimant submitted that him being an employee of the Respondent was not denied, therefore, they had an employment relationship.
36. It is the Claimant's submission that he was served with a NTSC dated 17<sup>th</sup> October 2018 to which he responded the same day. Subsequently, he was forced to go on leave on 22<sup>nd</sup> October 2018 and reported back on 19<sup>th</sup> November 2018 when the Respondent approached him and proposed he resigns and enter into a consultancy agreement. This was a guise to dismiss his employment without following due process as it did not have sufficient reason to dismiss him. This amounted to constructive dismissal. He relied on the principles of determining constructive dismissal set in the Court of Appeal case of Cocacola East & Central Africa Ltd -vs- Maria Kagai Ligaga [2015] eKLR.
37. The Claimant submitted that he resigned in response to the Respondent's conduct which was a repudiatory breach of contract. The Respondent issuing a NTSC letter alleging poor performance then offering the Claimant a consultancy agreement proves that the Respondent was frustrating him and he did not wish to be bound by the employment contract.



38. The Claimant submitted that constructive dismissal occurs when an employee resigns and not by formal decision of dismissal reached by an employer but instead an employer constructs circumstances that result in a dismissal.
39. On the third issue, the Claimant submitted that Section 45 of the *Employment Act* provides termination of employment is unfair if the employer fails to prove that it was grounded on a valid and fair reason in accordance with fair procedure. He therefore sought for damages for wrongful termination anchored on section 49(1) of the *Employment Act*.
40. The Claimant submitted that the contract of employment provides for one month's salary or payment in lieu of notice, in the circumstances herein, notice was not issued when the contract came to an end. Consequently, he entitled to notice pay under contract and section 49 of the Act.
41. It is the Claimant's submission that in his final dues, he was deducted 2 days pay that the Respondent allege absenteeism whereas they were aware of his whereabouts. He testified that he was absent because he was following up on approvals from NITA at DOSH offices on 15<sup>th</sup> September 2018 and was informed they had exhausted the abstracts and was referred to government press where he proceeded the same day and was asked to collect the same on 16<sup>th</sup> September 2018. The Respondent's deduction was therefore unfair and the 2 day pay should be awarded to the Claimant.
42. The Claimant submitted that the Respondent is expected to make statutory deductions as per section 49(2) of the *Employment Act*. The Respondent only made PAYE deduction and remittance for NHIF and NSSF for monthly contributions were never made. The Respondent has not provided any proof of the remittance to the specific authorities as required.

### **Respondent's Submissions**

43. The Respondent submitted on three issues: whether the consultancy agreement was validly executed; whether the claimant was constructively dismissed or unfairly terminated; and whether the claimant is entitled to the reliefs sought.
44. On the first issue, the Respondent submitted that there is no evidence that the Claimant was coerced to execute the Agreement. The Claimant admitted in his testimony that he was an experienced Human Resource Manager and understood the legal effect of his execution of the Agreement.
45. The Respondent further submitted that the Agreement is in valid form; it is dated, executed by the parties, and witnessed. It acknowledges that the parties wished to sever the relationship in a way that preserved the good will between them and leverage synergies by the Respondent engaging human resource consultancy services from the Claimant as and when required despite the voluntary resignation.
46. The Respondent submitted that the Claimant has not pleaded that the contract is vitiated by coercion, fraud or undue influence, he was a consultant and not an employee of the Respondent.
47. Further, the signed agreement under duress is discounted by the fact that each party to the agreement represented and gave warranty that no promise or inducement had been made for the execution of the agreement and that in entering the agreement no party relied on any statement, representation, assurance or warranty (whether innocently or negligently) that was set out in the agreement and no party shall have a claim for innocent or negligent misrepresentation based on any statement in the agreement.
48. Additionally, under clause B2, the Claimant agreed to release and waive any claims he may have against the Respondent or any of its representatives or agents including claims for additional compensation or



benefits arising out of the termination of employment and any claims of wrongful termination, breach of contract or discrimination.

49. It is the Respondent's submission that the Claimant signed a full and final settlement discharge certificate dated 21<sup>st</sup> November 2018 which indicated the sum payable as Kshs. 141,112. The dues referred to his last salary, holidays and off days worked, leave days and an ex-gratia payment equivalent to one month's salary. The Claimant testified that he acknowledged receipt of his dues having read and agreed there were no further payment due to him.
50. The Respondent submitted that the Claimant signed the discharge certificate willingly and voluntarily and was aware of its effect, he cannot recant his signature. The discharge forms a separate contract between the parties and unless vitiated by factors that would ordinarily vitiate a contract, it is a binding one on them as settlement agreement. They relied in the case of *Ben Otieno Aketch v Macharia Mwangi & Njeru Advocates* [2021] KEELRC 137 (KLR).
51. On the second issue, the Respondent relied in the Court of Appeal case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] KECA 394 (KLR) that found constructive dismissal occurs when an employee is forced to leave his job against his will because of his employer's conduct. 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 the legal principles in determining constructive dismissal.
52. The Respondent submitted that the Claimant is estopped from pleading constructive dismissal since he resigned voluntarily and accepted a consultancy agreement waiving any claims against the Respondent.
53. It is the Respondent's case that being issued with a NTSC letter is not a condition that could make a man frustrated by the conditions at his workplace that he had no choice but to resign. Further, there was no evidence that the reason for resignation was prompted by harsh or unfair treatment.
54. The Respondent submitted that constructive dismissal cannot be construed from the separation between the Claimant and the Respondent as the Claimant continued to engage the Respondent post resignation negating any claim of intolerable working conditions.
55. The Respondent noted that the Claimant veered off his position that he was constructively dismissed and pleaded the Respondent did not show cause or follow fair procedure bringing in Sections 41,43 and 45 of the *Employment Act*. It is Respondent's submission that constructive dismissal is not a statutory termination but a resignation by the employee. It is a common law principle that does not call on the employer to show valid reason and fair procedure.
56. The Respondent submitted that it is evidence that the Claimant resigned voluntarily and entered into a consultancy agreement at his behest and the employment relationship ended.
57. It is the Respondent's submission that clause C9 of the consultancy agreement provided for a dispute resolution mechanism which the Claimant ignored before resorting to commence the suit herein. The Respondent therefore argues that pursuant to section 10 of the *Arbitration Act* and in light of the dispute resolution clause, the Claimant was no longer an employee but a consultant and this court has no jurisdiction in the proceedings herein.
58. On the third issue, the Respondent submitted that the Claimant is not entitled to any of the reliefs sought.



59. I have examined all evidence and submissions of the parties herein. The Claimant has averred that he was constructively dismissed by the Respondents. He states that he was initially sent on compulsory leave by the Respondent and then asked issued with notice to show cause.
60. The notice to show cause was dated 17-10-2018 and by it the Claimant was asked to show cause why he should not be dismissed for acts of incompetence, insubordination and misconduct.
61. He responded to the same vide his dated 17/9/2018 which could be a letter wrongly dated since he couldn't be responding to a notice to show cause before it was issued.
62. It is after this that the Claimant and Respondent entered another agreement when it indicated that the Claimant had resigned from employment with effect from 22/11/2018.
63. The Claimant has averred that he was coerced into entering this agreement due to the events proceedings where he was being asked to show cause why he should not be dismissed and at the same time being threatened with a dismissal. He indicated that he never resigned voluntarily.
64. It is then that the Claimant was served with a show cause letter on poor performance. It is however suspect that he chose to resign and was still retained on a contract when he was a poor performer. His submissions that this was a constructive termination on the part of the Respondent is correct.
65. The Respondents aver that the Claimant signed a final settlement discharge certificate dated 21.11.2018 after payment of 141,113 and so they owe him nothing.
66. The final discharge pay in my view does not exonerate the Respondent from the constructive termination. The payment was only as relation to final dues.
67. Having found that the Respondent indeed constructively dismissed the Claimant and having found that they acted in an inhuman manner by threatening the Claimant with a notice to show cause and on other hand tossing a consultancy agreement before him, I find 6 months salary as compensation for unfair termination is adequate which I grant the Claimant being 6x158,500.
- I also award Claimant 1 month salary in lieu of notice = 951,000/=.
- Total awarded = 1,109,500/=
- Less statutory deduction.
68. The Respondent will pay cost of this suit plus interest at court rates with effect from the date of this judgment.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29<sup>TH</sup> OF MAY, 2025.**

**HELLEN WASILWA**

**JUDGE**

