



REPUBLIC OF KENYA



**Ocholla v Ellams Products Limited (Cause 186 of 2017)
[2025] KEELRC 2338 (KLR) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2338 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 186 OF 2017**

**JW KELI, J
JULY 30, 2025**

BETWEEN

AUSTINE OLUOCH OCHOLLA CLAIMANT

AND

ELLAMS PRODUCTS LIMITED RESPONDENT

JUDGMENT

1. The claimant, vide a memorandum of claim dated the 1st of February 2017, sued the respondent and sought the following Orders:-
 - a. The sum of Kshs. 341,457/- particularised in paragraph 17.
 - b. Compensation for delay of payment.
 - c. Costs of this suit.
 - d. Interest on (a), (b) & (c) above at court rates.
 - e. Any other or further relief as this Honourable Court may deem fit and just to grant.
2. The claimant in support of the claim filed his statement, statement of one Patrick Wycliffe Odhiambo, list of witnesses, and list of documents, all filed on 2nd February 2017.
3. The Respondent entered appearance through the law firm of Oraro & Company Advocates and filed a memorandum of reply dated the 25th of June 2019, denying the allegations in the memorandum of claim. In support of the response, the respondent filed its list of witnesses and a bundle of documents, all dated 25th June 2019. They also filed the witness statement of Guyyira Nduma dated 26th April 2022 and a list of witnesses dated 26th April 2022.



Hearing and evidence

4. The claimant's case was heard before Justice Ocharo Kebira on the 20th July 2022, where the claimant testified and adopted his witness statement dated 2nd February 2017 as his evidence in chief and produced his filed documents under the list of even date. He was cross-examined by counsel for the respondent, Ms. Kavagi. The claimant further called as his witness of fact Patrick Odhiambo.
5. The respondent's case was heard before me on the 5th February 2025 with Guyvira Nduma as RW1. He adopted as his evidence in chief his witness statement dated 26th April 2022 and produced documents listed on 25th June 2019 as the respondent's evidence. Counsel cross-examined him for the claimant, Mberere.

The Claimant's case in summary

6. The Claimant herein was employed by the Respondent in February 2006 as a machine operator on a contract basis. He earned a gross salary of Kshs. 7,000/-. The Claimant was not issued with a contract, but the Respondent promised to prepare and provide it. Owing to the Claimant's good performance, he was promoted to machine operator trainer. In the year 2011, the Claimant states that he was forced to sign a document without any explanation. In November 2014, the Claimant avers that he asked for his contract of employment but was told to wait. In December of the same year, he began suffering mistreatment by being subjected to insults. The mistreatment came to a head on 9th February 2015, and the Claimant resigned, being unable to persevere any longer. It is the Claimant's case that he complained to management on several occasions before his resignation, but no action was taken. He was forced to resign by the Respondent's actions. He was never paid his January 2015 salary and terminal benefits. At the time of his involuntary resignation, the Claimant states that he earned Kshs. 16,126/- per month.

Respondent's case in brief

7. In their rejoinder to the Claimant's case, the Respondent admitted that the Claimant was its employee, save that he was employed on yearly renewable contracts as a Machine Attendant. The Claimant's first contract of service, which he freely executed, ran from 1st April 2011 for a term of one (1) year, while his final contract of service ran from 1st April 2014 to 31st March 2015, a period of one (1) year. The Respondent stated that the Claimant tendered his resignation on 9th January 2015 and immediately stopped coming to work, never even returning to complete the clearance process. The next time they heard from the Claimant was on 21st October 2016 when he sent the demand letter of the same date to the Respondent. It is the Respondent's position that the Claimant's said demand letter did not raise any of the issues pleaded in his claim, but instead complained of excess working hours without overtime. The Respondent confirms that it remitted NSSF dues during his employment. They deny that the Claimant is entitled to one month's salary instead of notice on the premise that he resigned from employment. They also deny that the Claimant is entitled to unpaid leave days on the premise that he went on leave in the year 2015. Since he voluntarily resigned from employment and was not declared redundant, it is denied that the Claimant is entitled to severance pay.

Determination

Issues for determination

8. The claimant identified the following issues for determination –
 - a) Whether the Claimant's employment was terminated unlawfully.



- b) Whether the Claimant is entitled to the relief sought.
9. The respondent did not file written submissions. The court adopted the issues addressed by the claimant.

Whether The Claimant's Employment Was Terminated Unlawfully.

The claimant's submissions

10. The Claimant claims that the Respondent employed him from February 2006 until February 9, 2015, when circumstances forced him to tender his resignation. The Respondent has produced the Claimant's resignation, which clearly illustrates the Claimant's frustrations.
11. The Claimant has given his reasons for resigning as:-
- i. Injustices from the management.
 - ii. He is working with someone who is not respectful.
 - iii. He has complained severally, and the response was that he is a bad person.
 - iv. Jealousy and selfishness.
 - v. He was given an NHIF card.
12. Further to the Contents of the demand letter, the Claimant in his testimony stated how abusive the work environment was. The Claimant called one witness who confirmed the above position. Constructive dismissal has not been defined under the Kenyan *Employment Act* 2007. However, the Cambridge University dictionary defines constructive dismissal as "actions taken by an employer that intentionally make working conditions for an employee difficult or unfair so that the employee feels forced to leave their job". The Black's Law Dictionary (9th Edition) also defines constructive dismissal as "A termination of employment brought about by the Employer making the employee's working conditions so intolerable that. the employee feels compelled to leave." The Black's Law Dictionary defines constructive dismissal as "a termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave." In the leading case of *Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR, the Court of Appeal had this to say concerning constructive dismissal: "What is the key element and test to determine if constructive dismissal has taken place? The factual circumstances giving rise to constructive dismissal are varied. The key element in the definition of constructive dismissal is that the employee must have been entitled to leave without notice because of the employer's conduct. Entitled to leave has two interpretations, which give 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 constituted a repudiatory breach of the contract of employment - this is the contractual test." Fundamentally, constructive dismissal occurs when an employee is left with no choice but to leave their job owing to the employer's conduct. Therefore, since the employee is not dismissed from employment, the working conditions created by the employer are intolerable or there is a breach of fundamental terms of the employment contract by the employer such that the employee is entitled to regard themselves as having been unfairly dismissed. The constant insults humiliated and demoralised the Claimant, affecting him and forcing him to resign from his employment.



Decision

13. The claimant stated that on February 9, 2015, one Otieno insulted him, and that forced him to resign involuntarily. The insults started in December 2014 and increased in 2015. The claimant stated that the respondent, through its agents, forced him to resign. The claimant adopted his undated witness's statement, which stated as follows: '1. I was an employee of Ellams Company Limited until 2015, when my contract of employment was terminated
2. I was working with the claimant in the head office.
3. The agents of employers were mistreating the claimant and were trying to frustrate him
They took him to the factory. 4. The claimant was a dedicated employee whom the company relied on until he
Trained other persons to do the job that he was doing. 5. Due to pressure from the management, the claimant resigned from his position."
14. The resignation letter dated 1st February 2025 was as follows:- 'Resignation Letter AS OF 1/2/2015
- My name is Arstine Number 571. As Indicated On the headline this letter. I justified to inform the company as per the regulations of labar that as from first February I will no longer be in Ellam due to Some Injustice from the Management, I have decided to resign because it is not fair to work with Somebody who will not be respectful . I have been 9 Machine Operator for nine years, I do raise-up complains to the Management and the good answer I you are a bad person and the reason behind it they don't explain. The Issue of Selfishness and jealousy is the reason why I cannot be confirmed and paid a good Salary. You have been Complaining that iam a bad person and yet never at any time issued a warning Letter to me for all the nine years. You have been requesting me to resign,Even when I got Injured, when I was in head office, I reported the Matter and no action was taken. Even N-H.I.F Card I was denied, I just Sacrifice on My- Own Which means My future is not in Ellams.
- Austine Oluoch'
- Head Office 9 Jan 2015 E 15
- Received"(page 15 of response).
15. The respondent denied the allegations and stated that the claimant was employed on yearly contracts and entered into a contract of employment willingly as he signed a contract dated 1st April 2011 for 1 year. On 9th January 2015, the claimant tendered his resignation and immediately stopped work, and never returned to conduct the clearance process with the respondent. The respondent did not receive any further communication from the claimant until he sent a demand letter dated 21st October 2016, almost 2 years after his resignation, as an afterthought. The demand letter raised issues of excess working hours without overtime payment and did not address any issues currently raised in the claim, as at that material time, the respondent did not have documentation on the claimant's file. During cross-examination of the claimant, the claimant told the court (Justice Ocharo Kebira presiding) that he wrote a resignation letter dated 1st February 2015 effective immediately. That when he wrote the letter he was told to wait for a response. He told the court that before the resignation, he had not made a formal complaint to the respondent's management for the mistreatment. He tried to make a follow-up payment but was told to go to court.



16. The claimant called as his witness Patrick Odhiambo, who told the court the claimant was transferred to a sister company in the same position. He told the court that the information he had about the new workplace and transfer was from the claimant. He told the court he witnessed the mistreatment.
17. The respondent called as its witness Guyvira Nduma who adopted his witness statement dated 26th April 2022 as his evidence in chief. He produced the letter of resignation, which indicated it was effective 1st February 2015. During cross-examination Nduma told the court that the reason for resignation by the claimant was stated as harassment by management. Nduma told the court that he was assistant HR and had not heard from the claimant before (on the claims). He told the court that they did not owe the claimant as he resigned.
18. The court perused the demand letter dated 21st October 2016 (page 18 of respondent's bundle) and noted that the letter was titled constructive dismissal and dues owed to the claimant. It stated that the claimant had complained to the management about pay, working conditions, and excessive working conditions. That he was placed on contract in 2011 in disregard of previous years of work and put on new working hours 8-6.30 pm, that he resigned on 9th January 2015 following pressure from Nduma and Otieno and negative treatment by the said agents.
19. The Black's Law Dictionary (9th Edition) defines constructive dismissal as "a termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave."

In the leading case of *Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR, the Court of Appeal had this to say concerning constructive dismissal: "What is the key element and test to determine if constructive dismissal has taken place? The factual circumstances giving rise to constructive dismissal are varied. The key element in the definition of constructive dismissal is that the employee must have been entitled to leave without notice because of the employer's conduct. Entitled to leave has two interpretations, which give 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." Fundamentally, constructive dismissal occurs when an employee is left with no choice but to leave their job owing to the employer's conduct. Therefore, in as much as the employee is not actually dismissed from employment, the working conditions created by the employer are so intolerable or there is a breach of fundamental terms of the employment contract by the employer such that the employee is entitled to regard himself or herself as having been unfairly dismissed. We submit that the constant insults humiliated the Claimant, demoralized the claimant, affected the Claimant and forced him to resign from his employment." Applying the foregoing, I found the instant case met the test of constructive dismissal taking into account the content of the resignation letter and the demand letter. The respondent responded to the demand letter and requested for the matter to be put on hold for it to look into their records and conclusively address the issue. No further action was taken on the demand letter. The claimant stated the names of the agents of the respondent who harassed him/mistreated him leading to the resignation. CW2 spoke of a sister company where these agents were the bosses of the claimant. He corroborated the evidence of the claimant that he was mistreated and harassed by management. The claimant had worked as machine operator for 9 years, under short



contracts. The employer had responsibility to ensure that the claimant was afforded fair labour rights by the said sister company.

20. The court finds that the respondent as responsible for the unfair treatment of the claimant. Nduma said he was assistant HR and did not receive the complaints before the resignation. The officers who were alleged to have harassed and mistreated the claimant leading to resignation were mentioned by name in the claim, the respondent did not deny they were their agents, did not bother to investigate the matter and file a report in court. Indeed, the documents filed by the Respondent had no NHIF statement to controvert the allegation by the claimant of having taken care of his medical expenses after being injured on the shop floor. The evidence of the claimant of constructive dismissal was not diluted by failure to of the claimant to make demands earlier. The claim was valid for 3 years post-resignation. The court finds that the claimant proved his case of constructive dismissal on balance of probability, that the maltreatment of the claimant at the shop floor by the management made the employment no longer tenable and he was left with no choice but to resign.

Whether the claimant was entitled to reliefs sought

21. Claim for unpaid salary for January 2015- The Claimant said his employment was terminated before he had received his salary of Ksh. 16,126/- for the Month of January. The respondent stated he absconded after tendering the resignation. The resignation was effective 1st February 2015. The respondent did file evidence of having taken action on the alleged absconding. The claim of absconding was not proved. The claimant is entitled to salary for January 2015. The respondent did not deny the monthly salary claimed. The court awards as per the pleaded salary of Kshs. 16,126.
22. Notice in lieu- The court having held the resignation amounted to constructive dismissal the notice pay was due and is allowed for the sum Kshs. 16126.
23. Payment for service -the Claimant Claims that he was employed by the Respondent in the February 2006. The Respondent in its Response claims that the Respondent was employed on 1st April 2011. The respondent on page 17(trial bundle) produced a computation of dues, which indicated the claimant joined the company on 1st October 2006. The Claimant worked for the Respondent for 9 years with a salary of Ksh. 16,126/- . The claimant claims for a total of Ksh. 72,567/- under this head for the years worked. Section 35 (5) the Employment Act provides that- ‘ An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.’ The respondent pleaded the claimant was on NSSF and produced NSSF statement to that effect. There was no reply to controvert that. Section 35(6) of the Employment Act disallows service pay where the employer is registered under NSSF as follows:- (5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.
- (6) This section shall not apply where an employee is a member of—
- (a) a registered pension or provident fund scheme under the Retirement Benefits Act;
 - (b) a gratuity or service pay scheme established under a collective agreement;
 - (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
 - (d) the National Social Security Fund.’ The Court finds that the claimant was a beneficiary of NSSF and thus service pay claim fails.



24. Unpaid leave days for 1 year- The claimant in his testimony and pleadings stated that he did not take his leave for the year preceding his termination. The claimant submitted that there is no evidence adduced to controvert this position. That Section 74 of the Employment Act confers responsibility on the employer to keep employee records. The Respondent did not produce any record to show that indeed the claimant had been allowed to go for his leave. During cross-examination the claimant told the court that he was not allowed leave. The respondent produced before court what it called leave forms at ages 51-54 of its bundle of documents. During cross-examination the claimant was referred to a documents at page 17 of the respondent's bundle which indicated leave balance of 10 days. The respondent's witness stated the document was a computation of dues and had been passed to the claimant . The court found from the said documents only 4 days were indicated as on leave. Under section 74 of the Employment Act the respondent had burden to produce documents once the claimant pleaded he had untaken leave days claims for entire of 2015. The court relying on the records of the respondent find evidence of 4 days leave days taken out of the statutory 21 days. The court claimant is awarded untaken leave of 17 days thus Kshs. 16126/30x 17 days. Payment in of leave in lieu the sum of Kshs. 9138/- is awarded.
25. Claim for unpaid weekends and public holidays that the claimant worked- The claimant stated that he had no off days. He worked every day including weekends. The claimant submitted that It is worth noting that this piece of evidence was not controverted by the Respondent in its witness statement, evidence in chief and even in cross examination. The court on perusal of the claim dated 1st February 2017, paragraph 17 which gave particulars of terminal dues found the claimant never sought for off days. Parties are bound by their pleadings. The claim is disallowed.
26. The claim for severance pay had no basis as this was not a claim founded under redundancy where severance pay is payable under section 40 of the Employment Act. The Claim for severance pay is disallowed.
27. Claim for 12 months' salary for wrongful termination- Having submitted on this issue substantially above; the claimant urged that the court makes a finding that the claimant was unlawfully terminated via constructive dismissal and he be awarded one years salary the same being Ksh. 193,512/- The claimant had worked for 9 years. He was subjected to unfair labour practices leading to resignation. . He was a machine operator for that period. The court finds that the claimant may not be able to get such opportunity. The claimant did not contribute to his termination and was not paid terminal dues on resignation. All these are factors to guide the court under section 49(4) of the Employment Act. Taking into account the foregoing the court awards the claimant the equivalent of 10 months salary at Kshs 16126 salary thus Kshs. 161260.

In conclusion

28. The claim is allowed. The court holds that the termination through resignation of the claimant amounted to constructive dismissal. Judgment is entered for the claimant against respondent as follows:-
- a. Notice pay of Kshs. 16126
 - b. Salary for January 2015 Kshs, 16126
 - c. Untaken Leave pay for 17 days Kshs. 9138/-
 - d. Compensation for unfair termination equivalent of 10 months salary Kshs. 161,260



- e. Total sum of Kshs. 202650 (a to d above) awarded with interest at court rate from date of filing suit.
 - f. Cost of the suit.
29. Stay of 30 days is granted.
30. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF JULY, 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Claimant: Mberere

Respondent: absent

