



**DPL Festive Limited v Okuny (Appeal E070 of 2024)
[2025] KEELRC 2122 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2122 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E070 OF 2024**

**JK GAKERI, J
JULY 17, 2025**

BETWEEN

DPL FESTIVE LIMITED APPELLANT

AND

JORIM AWUOR OKUNY RESPONDENT

JUDGMENT

1. This appeal emanates from the Judgment of Hon. Gloria Baraza (SRM) delivered on 7th October, 2024 in Kisumu MCELRC No. E067 of 2023, *Jorim Awuor Okuny v DPL Festive Ltd.*
2. Briefly, the respondent sued the appellant alleging constructive dismissal, claiming salary in lieu of notice, 12 months compensation, salary for August 2018, underpayment and certificate of service.
3. The respondent alleged that the appellant's conduct of not paying his salary for August 2018, delayed salary in July 2021 and the employer's failure to complete the WIBA forms for purposes of compensation for an injury on 20th May, 2020 was unlawful and amounted to constructive dismissal.
4. The appellant's case was that the respondent was its employee from April 2017 to 22nd September, 2023 when he resigned from employment for personal reasons, that his salary was based on the Collective Bargaining Agreement (CBA) in force, was a bakery worker and was paid all his dues.
5. After considering the evidence placed before the court and submissions by counsel, the learned trial magistrate found that a case for constructive dismissal had not been made out but awarded the respondent one month's salary in lieu of notice, salary for August 2018 and certificate of service.
This is the decision appealed against.
6. The appellant faults the learned trial magistrate on five (5) grounds; that the trial court erred in law and fact by:



1. Failing to find that the claim for salary for August 2018 was time-barred.
 2. Awarding compensation for unpaid salary despite finding that the respondent had not proved his claim.
 3. Awarding one month's salary in lieu of notice after finding that claim for constructive dismissal was not substantiated.
 4. Awarding salary in lieu of notice after determining that the respondent had voluntarily resigned.
 5. The judgment was contrary to the weight of evidence and applicable laws.
7. The appellant prayed for setting aside of the judgment delivered by the trial court.

Appellant's submissions

8. On the award of salary in lieu of notice, counsel submitted that having found that the respondent was not constructively dismissed, that he resigned from employment, the award had no basis and the award as a "start up" was a misdirection.
9. Reliance was made on the provisions of Section 35(1) of the *Employment Act* and the decision in *Great Lakes Tans (K) Ltd v Mohammed* [2025] KEELRC 166 (KLR) to reinforce the submission.
10. Counsel submitted that the award was irregular and contrary to law and the trial court's findings.
11. Concerning the claim for salary for August 2018, counsel submitted that since the suit was filed in April 2023 4 years 7 months after the event, the claim was time barred and the trial court had no jurisdiction to entertain the suit. Counsel cited the sentiments of the court in *Salim Malakwen Kome v Attorney General* [2022] eKLR, to reinforce the submission.
12. It was further submitted that the respondent had admitted he was only seeking Kshs.9,145 as opposed to the full salary having failed to report to work.
13. Reliance was placed on the decision in *Ruthuku v Kenya Revenue Authority* [2023] KEELRC 2834 (KLR) to underscore the obligation of the employee to notify the employer about the sick off and avail valid documentation.
14. Although directions on the filing of submissions were issued on 29th May, 2025, in the presence of both advocates, the respondent had not filed by the time the court retired to prepare this judgment.

Analysis and Determination

15. The appellant's 5 grounds of appeal may be condensed into three (3) namely; limitation of actions, award of one month's salary in lieu of notice and the evidence before the court.
16. Appreciating that this is a first appeal, the duty of the court is to re-evaluate and reconsider the evidence on record afresh and arrive at its own conclusions and determination bearing in mind that it neither saw nor heard the witnesses, as succinctly captured by the Court of Appeal in *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR as follows:

An appeal to this court from a trial ... is by way of a 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 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”.

See also *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, *Selle & Another v Associated Motor Boat Co. Ltd* [1968] EA 123 and *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931.

17. On matters evidence before the court, the respondent’s written witness statement was emphatic that he was employed to perform duties such as packing/loading, cleaning, mixing, dividing, moulding bowl, lifting, oven man, deepening, machine operator and dispatch clerk and admitted on cross-examination that the appellant prepared the duty roster and his salary was Kshs.15,696 per month but added that he was an oven man and ought to have been paid more but had not evidence to prove that he was indeed an oven man or machine operator or any other role other than that designated by the contract of employment and payslip.
18. On cross examination, RWI confirmed that the respondent was a Bakery worker and his injuries in May 2020 did not take place at the workplace.
19. According to the respondent, the denial of salary in August 2018, delayed salary in July 2021, non-compensation under *WIBA* in May 2020 constituted constructive dismissal on 22nd September, 2022 when he resigned vide letter of even date.
20. Having found that the respondent had not substantiated the claim of constructive dismissal, the only reliefs which merited consideration were those relating to accrued rights including salary for August, 2018 and under payment as the learned trial magistrate did. The award however is a different issue.
21. In the court’s view, the trial court appreciated the evidence before it, evaluated it and arrived at a correct finding on constructive dismissal.
22. This is because an employee who alleges constructive dismissal is bound to discharge the burden of proof that the employer committed a repudiatory breach of the contract of employment.
23. It must be shown that the employer’s conduct showed that it is no longer bound by an essential term(s) of the contract of employment, which entitles the employee to treat the contract as repudiated. Thus, the employee resigns from employment because of the employer’s repudiatory breach of the contract of employment.
24. As aptly captured by Lord Denning MR in *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221, the conduct complained of by the employee must be one;

“...which is a significant breach going to the roof of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract the employer is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct”.
25. The court was emphatic that an employee could not allege to have been constructively dismissed if he/she takes unreasonably long to leave or acquiesces to the employer’s conduct or does anything which estops the employee from pleading constructive dismissal.



26. In *Coca Cola East & Central Africa Ltd v Maria Kagai Ligaga* [2015] eKLR, the Court of Appeal adopted the contractual approach test and affirmed it which meant that;

"...whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment..."

27. Significantly, the Court of Appeal proceeded to set out the legal principles relevant in determining constructive dismissal, such as the fundamental or essential terms of the contract, repudiatory breach, causal link between the resignation and the employee's conduct, employee must leave with or without notice and must not have accepted, or acquiesced the employer's conduct or stayed on beyond reasonable time.

28. In the instant case, and as correctly found by the trial court, the respondent failed to prove that he was constructively dismissed from employment by the appellant.

29. The alleged frustrations echoed during his examination in chief could not resonate with his written witness statement or resignation letter.

30. Similarly, even assuming that the appellant had committed a repudiatory breach of the contract in 2018, 2020, 2021 regarding unpaid salary, lack of compensation for injuries and delayed salary, which in the court's view do not run to the root of the contract, the respondent took inordinately long to resign and did not cite any form of frustration in his hand written resignation letter which he confirmed having authored.

In sum, the trial court made a correct finding.

31. The foregoing finding meant that the respondent was not entitled to any claim founded on unfair or unlawful termination of employment.

32. For the going reason, the court is satisfied that the award of one (1) month's salary by the trial court to "serve as start up" as he sought employment elsewhere amounted to a misdirection by the trial court as it ought not to have been awarded since the respondent resigned from employment voluntarily and gave the requisite one (1) months' notice.

33. Concerning the unpaid salary for August, 2018, it is clear that the respondent did not provide evidence as to why the amount remained unpaid for over 4 years by the time he instituted proceedings against the respondent.

34. Having tendered a written resignation letter, the respondent had reason to write to the appellant severally demanding the alleged unpaid salary.

35. Since it appears to have been a one off denial of salary and payment of salary continued thereafter, the claim falls within the ambit of the provisions of Section 89 of the *Employment Act* and was statute barred.

36. Simply because the cause of action arose at the end of the month of August 2018 when the salary was not paid and became statute barred 3 years later by a dint of Section 89 of the *Employment Act* which provides:

37. Notwithstanding the provisions of section 4(1) of the *Limitation of Actions Act* (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be



instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

38. The court is in agreement with the appellant's counsel's submission that the claim was statute barred and irrecoverable as held in *Salim Malakwen Komen v Attorney General & 2 others* (*supra*). The award ought not to have been made.
39. On the alleged underpayment, the court is in agreement with the findings of the trial court that it was not merited albeit for different reasons.
40. Although the respondent contended that he was an Oven man, the employer's witness testified that he was a Bakery worker and his duties could take any of the forms stipulated by the contract of employment, a fact that respondent underscored in his written witness statement.
41. The fact that the Letter of Appointment dated 1st April, 2017 outlined the respondent's job description and his written witness statement was emphatic that he was employed on permanent terms in the position of all of them, and had no shred of evidence to show that he was the appellant's oven man, the claim of having been the oven man remained unsubstantiated.
42. Relatedly, the appellant averred that its salary scales were consistent with the terms of the Operational CBA. This evidence was not controverted.

The claim was unproven as found by the trial court.

43. The principles that govern the circumstances in which a court may interfere with the, exercise of discretion by a trial court are well settled as articulated in a catena of decisions such as *Price and Another v Hilder* [1986] KLR 95 and *United India Insurance Co. Ltd, Kenindia Insurance Co. Ltd & Oriental Fire & General Insurance Co. Ltd v East Africa Underwriters (Kenya) Ltd* [1985] eKLR.
44. Having found as above, the court is satisfied that a case for interference with the judgment of the trial court has been demonstrated.
45. Consequently, the appeal herein is allowed and the judgment of the trial court is set aside in its entirety and its place an order dismissing the respondents case in the trial court save for the award of certificate of services, which is a statutory imperative.

Parties shall bear own costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 17TH DAY OF JULY, 2025.

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty



of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

