



**Solvit Security Solutions Ltd v Omukubi (Appeal E076 of 2022)
[2024] KEELRC 456 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 456 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E076 OF 2022
AK NZEI, J
FEBRUARY 29, 2024**

**BETWEEN
SOLVIT SECURITY SOLUTIONS LTD APPELLANT
AND
AKIDA ABUTI OMUKUBI RESPONDENT**

*(Being an Appeal from the judgment of Hon. D.O. Mbeja –
PM delivered on 17/10/2022 in CM-ELR Case No. E30 of 2021)*

JUDGMENT

1. The Appellant herein was the Respondent in Mombasa Chief Magistrate’s Court Employment case No. 30 of 2021 whereby it had been sued by the Respondent herein seeking the following reliefs:-
 - a. A declaration that the Respondent’s dismissal/termination was unfair and unlawful.
 - b. Compensation for unlawful termination (ksh. 13,999x12).....kshs. 167,988
 - c. 1 month salary in lieu of noticeksh. 13,999
 - d. Unpaid salaries for the months of April and May 2020.....kshs. 27,998
 - e. 6 years accrued leave at 21 days’ per yearkshs. 67,841.31
 - f. Overtime payment (6,999.20x12 months X 6 years).....Khs. 755,913.60
 - g. Public holidayskshs. 71,071.85



- h. House allowance for 6 years (2,099.85 per month x 12 months x 6 years)kshs. 15,189.20
 - i. Issuance of a certificate of service.
 - j. Costs and interest.
2. Vide a memorandum of claim dated 21/1/2020 and filed in Court on 27/1/2021, the Respondent had pleaded that he had been employed by the Appellant as a security guard on 10/3/2015 at a monthly salary of ksh. 11,500, and worked upto 1/6/2020 when he was constructively dismissed from employment. The Respondent had further pleaded:-
- a. that on or about 1/6/2020, the Appellant stopped allocating him duties, and had not paid his salary for the months of April and May 2020 despite the Respondent having worked, and despite efforts to seek audience with the management.
 - b. that as a result of the Appellant's actions, the Respondent was forced to write a resignation letter on 10/8/2020, citing non-allocation of assignments and unpaid salary for April and May 2020.
 - c. that non-allocation of assignment and non-payment of salary amounted to constructive termination of employment, which was unlawful and unfair.
 - d. that the Appellant did not compute, and did not pay the Respondent's dues upon termination.
 - e. that the Respondent used to work from 6.00am to 6.00pm on day shift, and 6.00pm to 6.00 a.m. on night shift, working for 4 extra hours for which he was never paid.
 - f. that the Respondent never took leave, and was never paid in lieu, and that he worked on public holidays without compensation.
 - g. that the Respondent was neither paid house allowance nor provided with accommodation.
3. Documents filed by the Respondent alongside the memorandum of claim included the Respondent's written witness statement dated 21/1/2021, replicating the memorandum of claim, and an evenly dated list of documents listing 5 documents. The listed documents included copies of payslips, letters dated 11/8/2020, 30/7/2020 and 29/11/2020 respectively, and a resignation letter dated 10/8/2020. It is worthy noting that out of the listed documents, only a copy of a payslip (for October 2019) is included in the record of appeal filed herein. This despite the fact that on 1/3/2023, counsel for the Appellant told the Court that a complete record of appeal had been filed. Failure to include in the record of appeal documents produced in evidence at the trial contravenes Rule 8(4) of the Employment and Labour Relations Court (Procedure) Rules 2016 which provides as follows:-
- “
- “(4) A memorandum of appeal shall be accompanied by copies of the proceedings, all documentary evidence relied on and a copy of the judgment from the proceedings of the matter being appealed against.
Provided that where copies of proceedings are not filed with the memorandum of appeal, the Appellant shall file such copies as soon as possible and within a reasonable time.”
4. The Appellant is shown to have filed response to the Respondent's claim on 16/6/2021, admitting having employed the respondent and stating that the Respondent had resigned voluntarily vide a letter



dated 10/8/2020. The Appellant had further pleaded that the Respondent had severally taken leave during the period of employment, and had exhausted his leave days as at the time he resigned.

5. The Appellant had further pleaded:-
 - a. that the Respondent had been paid all his dues upon resigning, and that having voluntarily resigned, he was not entitled to one month salary in lieu of notice.
 - b. that the Respondent did not work overtime or on public holidays, and was being paid house allowance.
 - c. that the Respondent was first employed by the Appellant on 2/3/2015 but later resigned on 5/2/2018. That he re-applied for a security guard job on 3/9/2018 before submitting his resignation letter again voluntarily on 10/8/2020.
6. Documents filed by the Appellant alongside its response to the claim included:-
 - a. the Respondent's (job application) letter dated 2/3/2015.
 - b. the Respondent's resignation letter dated 26/2/2018.
 - c. the Respondent's resignation letter dated 7/3/2018.
 - d. the Respondent's (job application) letter dated 3/9/2018.
 - e. the Respondent's resignation letter dated 10/8/2020
 - f. the Appellant's letter to the Respondent dated 30/7/2020.
 - g. a bundle of the Respondent's leave application letters, endorsed with approvals thereon.
7. The Respondent filed reply to the Appellant's response to claim on 15/9/2022, and joined issues with the Appellant.
8. At the trial, the Respondent adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 3 of this judgment. Cross examined, the Respondent testified that he worked for the Appellant from March 2015 upto August 2020 when he wrote a resignation letter. That he applied for work for a second time and was told to stay away and would be called when work was available. That he resigned while at home. That in July, he was told that there was no work, and that he resigned in August. That he was not paid his salary for two months, April and May. That he resigned because he was told to wait for too long.
9. The Appellant called one witness, Charles Obara Nyakoni (RW-1), who adopted his filed witness statement as his testimony, and further testified that the Respondent had no complain as at the time he resigned, and that he had voluntarily resigned, that all his dues had been paid, and that no employee of the Appellant worked overtime as every body worked for 8 hours. That the Appellant had three shifts, from 6.00am to 2pm, and from 2pm to 9pm. That the Respondent never worked on public holidays, and that his salary was consolidated; hence he was paid house allowance.
10. The trial Court delivered its judgment on 17/10/2022 and rendered itself as follows:-

“...In the opinion of the Court, the Respondent made the work place for the claimant agonizing and difficult for the claimant to work. He was simply unwanted at the work place and that explains why the claimant was not assigned duties for the few weeks leading to his resignation. Plain and simple. This Court is satisfied that the claimant has established a prima facie case against the Respondent on a balance of probabilities.....”



...I find a case of wrongful, unfair, and unlawful constructive termination of the claimant by the Respondent, and the claimant is entitled to the reliefs sought in the memorandum of claim guided by the evidence so far on record.

.....judgment is entered in favour of the claimant against the Respondent as follows:-

- a. Notice in lieu of terminationksh.13,999
 - b. April and May 2020 salary.....ksh. 12,180
 - c. Unpaid leave allowance for 5 years
.....ksh.56,534.42
 - d. Unpaid overtimekshs. 629,928
 - e. Public holidays.....kshs. 59,266.54
 - f. House allowance.....kshs. 125,198.2
 - g. Six months' compensation for
unfair terminationksh. 83,999
- Total ksh. 981,060.16

The award shall carry costs of the suit plus interest at Court rates from the date of filing suit.”

11. Aggrieved by the said judgment, the Appellant preferred the appeal herein and set forth the following 4 grounds of appeal:-
 - a. the learned magistrate erred in law and in fact in finding that the Respondent wrongfully, unfairly and unlawfully, constructively terminated the claimant's employment.
 - b. the learned magistrate misdirected himself by failing to fully appreciate and to correctly analyse the pleadings and evidence before him.
 - c. the learned magistrate erred in law and in fact by allowing all the claims prayed in the memorandum of claim.
 - d. the learned magistrate erred in law and in fact by directing that the claimant pays costs to the Respondent.
12. the Appellant seeks the following reliefs on appeal:-
 - a. that the appeal be allowed.
 - b. that the judgment dated 17/10/2022 be set aside and be substituted with an order dismissing the claimant's claim.
 - c. that costs of the appeal be awarded to the Appellant.
13. I will handle all the grounds of appeal together. This being a first appeal, the whole evidence presented in the trial Court is before me for review and re-evaluation, both on matters of law and of fact. This Court appreciates that it never heard or saw the witnesses testify first hand.
14. Having considered the pleadings filed in the primary suit and evidence presented thereon, issues that present for determination, in my view, are as follows:-



- a. whether the Appellant constructively terminated the Respondent's employment.
 - b. whether the Respondent was entitled to the reliefs sought in the trial Court.
15. I must start by pointing out that I have noted from the proceedings and evidence herein that there were three (3) instances of resignation by the respondent herein during the period between 10/3/2015 and 10/8/2020; and two instances of employment of the Respondent by the Appellant.
 16. From the documentary evidence presented by the Appellant at the trial, which evidence the Respondent never challenged, the Respondent was first employed by the Appellant in March 2015 pursuant to the Respondent's application for employment dated 2/3/2015. The Respondent is shown to have resigned vide a letter dated 26/2/2018, citing disagreement with the controller regarding redeployment. The Respondent is also shown to have resigned vide a letter dated 7/3/2018, again citing the reason for resignation as disagreement with the controller.
 17. The Respondent is shown to have subsequently applied for employment vide his letter dated 3/9/2018 and addressed to the Appellant. This second phase of employment is shown to have come to an end on 10/8/2020 when the Respondent resigned vide a letter dated the said date (10/8/2020), whereby he talked of having worked for the company for 5 years (from 10/3/2015-1/6/2020), and non-payment of his April and May salary.
 18. It is clear from the wording of the said letter that the respondent was writing the resignation letter of (10/8/2020) after leaving employment over two months earlier (on 1/6/2020). None of the parties adduced evidence and/or cogent evidence on how the Respondent had left employment on 1/6/2020, and on what basis he was "resigning" over two months after leaving employment.
 19. The Appellant's letter to the Respondent dated 30/7/2020 makes the water even more murkier by stating:-

"This is to notify you that you are pending for assignment.

And the company will give you the first priority as soon as there is an opening.

We would also like to stress that should you have secured work elsewhere, you will need to inform the office so as to take the necessary steps..."
 20. The foregoing letter was written two months after the Respondent had left employment as stated in his letter dated 10/8/2020. The Respondent never denied having received the letter dated 30/7/2020. It was after receiving the said letter (dated 30/7/2020) that the Respondent wrote the letter dated 10/8/2020. In view of the evidence analysed herein above, there was no subsisting employment relationship as at 10/8/2020 from which the Respondent could have purported to resign as at that date.
 21. It is evident from the evidence on record that resignation by the Respondent and subsequent re-employment/re-admission back to employment had become the hallmark of the employment relationship between the Appellant and the Respondent. This position is exemplified by 2 resignation letters dated 26/2/2018 and 7/3/2018 respectively, an application for employment dated 3/9/2018, re-employment, separation on 1/6/2018, the Appellant's letter dated 30/7/2018 expressing willingness to consider the respondent for assignment in future, and then a purported resignation dated 10/8/2018. Resignations appear to have been the Respondent's hobby at the time.



22. Turning to the first issue, the Black's Law Dictionary (10th Edition) defines constructive dismissal as:-
- “An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”
23. The Court of Appeal stated as follows in *Cocacola East & Central Africa Ltd v Maria Kagai Ligaga*[2015] eKLR:-
- “Constructive dismissal occurs where an employee terminates the contract under which he is employed, (with or without malice) in circumstances in which he is entitled to terminate it without notice, by reason of the employer's conduct. The employer's behavior in either case must be shown to be heinous, so intolerable, that it made it considerably difficult for the employee to continue working. The employee initiates the termination believing himself to have been fired. The employee needs to show that the employer, without reasonable or proper cause conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is regarded as constructive dismissal if the employer's conduct is a significant breach of the contract of employment and that the conduct shows that the employer is no longer interested in being bound by the terms of the contract. The employee's resignation is therefore treated as an actual dismissal by the employer and the employee may claim compensation for unfair termination.”
24. In the present case, the Respondent did not demonstrate at the trial that the Appellant had created a working condition that left him with little or no choice but to quit. The closest that the Respondent went in that direction was the allegation that his salary for April and May 2020 had not been paid, which allegation the Appellant denied. This Court looks at that allegation against the fact that the Respondent failed to disclose in his pleadings and in evidence that he worked for the Appellant in two contractual phases, from March 2015 to 7/3/2018 when he resigned, and from 3/9/2018 when he was re-employed upon fresh application until 1/6/2020 when evidence shows he left employment. This was a material non-disclosure and a sign of dishonesty which the Court cannot look at in isolation. As the saying goes, honesty is only second to godliness.
25. It is my finding that the Appellant did not constructively dismiss and/or terminate the Respondent's employment. On the second issue, it follows that the awards of Ksh. 13,999 being payment in lieu of notice and kshs. 167,988 being compensation for unfair termination must be set aside. The same are hereby set aside.
26. The claim for kshs. 27,998 being unpaid salary for April and May 2020 was not proved, in view of the evidence herein, and is declined. Further, such claims are in the nature of special damages and must always be strictly proved. The Respondent did not prove that claim to the required standard. The award made regarding the claim is hereby set aside.
27. The award of kshs. 67,841.31 being leave payment for 6 years is hereby set aside as the claim for the same was not proved to the required standard. The Appellant produced duly endorsed leave application letters by the respondent showing the leave days approved. The Respondent did not rebut that evidence. Further, the Respondent did not tell the Court which part of the claim related to the first phase of his employment and which regarded the second phase, as the law on limitation of actions (Section 90 of the [Employment Act](#)) would set in once an alleged injury occurring during employment



stops being a continuing injury once its continuity is broken by either regularization and thus cessation, or termination.

28. The award of kshs. 629,928 being overtime payment was not proved. The Respondent did not call or present any evidence to prove that he, indeed, worked overtime as alleged. He did not even call witnesses to corroborate his allegations. The burden of proof was on him to prove that claim, but he did not. The award is hereby set aside. The claim for kshs. 59,226.54 for alleged work done on public holidays was likewise not proved. The award is hereby set aside.
29. The award of kshs. 125,198 being house allowance was not proved, and is hereby set aside. The Respondent did not demonstrate, by reference to the applicable minimum wage orders, that the salary paid to him was not inclusive of housing. A look at the 2018 Minimum Wage Guidelines shows that it was inclusive of housing. The Appellant maintained that the salary paid was consolidated. I agree with the Appellant.
30. Having considered submissions filed by both parties, it is my finding that the appeal is merited. The same is allowed. The trial Court's judgment delivered on 17/10/2022 is hereby set aside, and is substituted with an order dismissing the Respondent's lower Court suit, being Mombasa Chief Magistrate's Court Employment Case No. 30 of 2021.
31. Each party will bear its own costs of the appeal and of proceedings in the Court below.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH FEBRUARY 2024

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform.

A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant

.....Respondent

