



**Mini Bakeries (Nairobi) Ltd v Okindo (Appeal E028 of 2023)  
[2024] KEELRC 507 (KLR) (14 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 507 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E028 OF 2023  
S RADIDO, J  
FEBRUARY 14, 2024**

**BETWEEN**

**MINI BAKERIES (NAIROBI) LTD ..... APPELLANT**

**AND**

**JEPHTER OMWANDO OKINDO ..... RESPONDENT**

**JUDGMENT**

1. Mini Bakeries (Nairobi) Ltd (the Appellant) lodged a Memorandum of Appeal with the Court on 18 May 2023, contending:
  - (1) That the Learned Magistrate erred in law and fact in holding that the Respondent was constructively dismissed by the Appellant, yet the said issue of constructive dismissal had not been proved by the Respondent.
  - (2) That the Learned Magistrate erred in law and fact in holding that the Respondent was entitled to damages for wrongful termination of employment notwithstanding the fact that the Respondent had deserted employment.
  - (3) That the Learned Magistrate erred in law and in fact in holding that the Respondent was entitled to severance pay of Kshs 482,032/- yet the Respondent was never declared redundant and neither was the same proved by the Respondent.
  - (4) That the Learned Magistrate erred in law and fact in making excessive awards to the Respondent whereas there was no basis to make the said awards in view of the evidence presented before Court and failing to give reasons for the excessive awards.
  - (5) The Learned Magistrate erred in law and fact by dismissing the Appellant's counterclaim for lack of evidence.



- (6) That the Learned Judge erred in fact and law in her assessment of the submissions and evidence before the Court and the applicable law and this arrived at an erroneous award and decision.
2. The Court gave directions on 15 June 2023, 18 September 2023, 12 October 2023 and 27 November 2023.
3. Consequently, the Appellant filed its submissions on 31 January 2024, and the Respondent on 13 February 2024.
4. The Court has considered the Record of Appeal and submissions.

### **Role of the Court on a First Appeal**

5. The Court of Appeal pronounced itself on the role of a first appellate Court in *Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2 EA 212* thus:

On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.

6. The Court will keep in mind the caution.

### **Constructive dismissal**

7. One of the main causes of action advanced by the Respondent before the Principal Magistrate was constructive dismissal. The pleaded particulars were briefly, sending the Respondent on transfer to Migori without written instruction, failure to pay transfer allowance, failure to pay salaries for October and November 2020, and denial of access to the erstwhile workstation in Nyamasaria.

8. In making a finding of constructive dismissal, the Principal Magistrate reasoned:

From what has been presented before this Court, there was an element of frustration leading to the employee unable to work. The Respondent has not established to this Court that he issued the Respondent (sic) with the transfer letter and paid him his allowance to enable him move. The element of frustration has been established. The Claimant was transferred vide a verbal communication, there is no proof that he received the transfer letter.

He was not given a transfer allowance to enable him to move.

Therefore, the Respondent's conduct towards the Claimant was manifestly unreasonable and unconscionable leading to constructive dismissal.

.....

There is also no proof that the Claimant was paid his October and November salaries. The Court has been supplied with schedule of payment and not copies of the pay slips.

9. The Respondent admitted in his written statement of evidence and the Appellant produced a transfer form he signed acknowledging the transfer to Migori on 21 September 2020. The Respondent thereafter proceeded on annual leave which was to lapse on 2 November 2020.
10. The finding by the Principal Magistrate that there was no transfer letter was therefore an error of fact.



11. The Principal Magistrate also found that the non-payment of October and November 2020 wages and failure to pay a transfer allowance amounted to a frustration of the contract on the part of the Appellant warranting the Respondent asserting constructive dismissal.
12. The Court of Appeal addressed the question of constructive dismissal in *Coca-Cola East & Central Africa Limited v Maria Kagai Lugaga* (2015) eKLR wherein it stated:  

The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives 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.....
13. The Respondent was paid by the month. Under section 18 of the Employment Act, 2007, the Appellant ought to have paid him the October and November 2020 wages by the end of the respective months.
14. The records produced in Court indicate that the Appellant processed the wages in February 2021, long after separation.
15. The Appellant had a collective bargaining agreement with a trade union of which the Respondent was a member. The agreement provided at clause 30 for 30 days' notice of transfer, free transport, and a disturbance allowance.
16. The Appellant did not place before the Principal Magistrate any records to show that it had fulfilled these parts of the contract.
17. While these breaches may not have gone to the root of the contract between the parties, the cumulative effect is that there was an element of frustration on the part of the Appellant. It transferred the Respondent and expected him to move to a new duty station when it had not paid his wages for 2 months nor the disturbance allowance.
18. This Court agrees with the findings by the Principal Magistrate that a case for constructive dismissal was proved.

### **Excessive award**

### **Compensation**

19. The Principal Magistrate awarded the Respondent the equivalent of 6 months' wages as compensation. The Principal Magistrate failed to state which of the factors outlined in section 49(4) of the Employment Act, 2007 she considered. That was an error of law.
20. The Respondent served the Appellant from 2015 to 2020, a period of about 5 years.
21. Considering the length of service, this Court will not disturb the award of compensation.

### **Pay in lieu of notice**

22. Clause 3(a)(i) of the collective bargaining agreement between the Appellant and the Union of which the Respondent was a member provided pay in lieu of notice of 2 months for employees who had served for more than 5 years. The Respondent had served for 5 years.



23. The award was therefore not excessive.

### **Redundancy and Severance pay**

24. Under section 40 of the Employment Act, severance pay is an entitlement and or a remedy in cases of redundancy.

25. The Respondent's case was not pleaded as one of redundancy nor was a finding made that it was a redundancy dispute.

26. The Respondent did also not lay any legal or contractual foundation to the claim for Kshs 482,032/- severance pay.

27. The Principal Magistrate fell into an error of both law and fact in granting the award.

### **Counterclaim**

28. The Principal Magistrate dismissed the Appellant's Counterclaim for the equivalent of 2 months' pay in lieu of notice on the ground that it was not proved.

29. The claim had been anchored on the assertion that the Respondent had deserted work without due notice.

30. The Appellant alleged desertion on the part of the Respondent. It was therefore imperative that it proves that the Respondent had deserted work.

31. Legally, desertion would constitute a repudiation of the contract in that the employee demonstrates an intention not to be bound by a fundamental obligation of the contract (essentialia of an employment contract).

32. Repudiation of contract, as a general rule in common law, does not terminate an employment contract. The innocent party should accept the repudiation (see *Philomena Aromba Mbalasi v Uni-Truck World Ltd* (2015) eKLR citing with approval *London Transport Executive v Clarke* (1981) IRLR 166).

33. Where an employer alleges desertion, it must prove the ingredients of desertion. A primary ingredient of desertion to be proved by the employer is that the employee has no intention of returning to work. The employer must also demonstrate that it accepted the repudiation (the same would apply to an employee who asserts an employer has repudiated a contract).

34. Whether desertion has been established will depend on the facts proved in each case.

35. The Appellant herein had not paid the Respondent wages for 2 months. It had not facilitated his movement to the new workplace. It thus failed to discharge the burden of proving that the Respondent had deserted and in this regard, this Court agrees with the conclusions of the Principal Magistrate on this issue.

### **Conclusion and Orders**

36. Having reviewed the Record, the Court makes the following orders:

- i. The Appeal succeeds only to the extent that the award of severance pay is set aside.
- ii. Each party to bear own costs of the Appeal.

**DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 14<sup>TH</sup> DAY OF FEBRUARY 2024.**



**RADIDO STEPHEN, MCI Arb**

**JUDGE**

Appearances

For Appellant Owiti, Otieno & Ragot Advocates

For Respondent Omondi, Abande & Co. Advocates

Court Assistant Chrispo Aura

