



**Kenya National Private Security Workers Union v Patriotic Group of Companies
(Cause E006 of 2023) [2024] KEELRC 997 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 997 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
CAUSE E006 OF 2023
ON MAKAU, J
APRIL 12, 2024**

**BETWEEN
KENYA NATIONAL PRIVATE SECURITY WORKERS UNION CLAIMANT
AND
PATRIOTIC GROUP OF COMPANIES RESPONDENT**

JUDGMENT

1. The Claimant is a registered trade union and has brought this suit on behalf of its member Mr. Paul Mwenda Kugeria, who was formerly employed by the Respondent. The Claimant and the respondent have a Recognition Agreement but no Collective Bargaining Agreement.
2. The facts of the case are that the grievant was employed by the respondent on 20th April 2021, as a night guard in Nanyuki, at a basic salary of Kshs. 10,000/= per month, less allowances. He allegedly worked from 6.00pm to 6.00am daily without any compensation for overtime. He was also not compensated for his annual leave or rest days. His salary was reduced to Kshs. 8,000 in January 2022 without any reason, forcing him to write a protest letter to the Respondent. Due to frustrations, the grievant resigned on 10th November 2022.
3. The claimant then reported a trade dispute to the Ministry of Labour on 14th November 2022, and a conciliator was appointed on 25th January 2023. However, the dispute was not resolved and the conciliator referred the dispute to this court under section 69 of the *Labour Relations Act* 2007. Consequently, the Claimant seeks judgement against the Respondent as follows:
 - a. The grievant to be paid the monthly salaries he could have earned since the date of his resignation up to the date of judgement.
 - b. An order directing the Respondent to issue the grievant with a certificate of service as provided under section 51 of the *Employment Act* 2007.



- c. Maximum compensation for constructive dismissal.
 - d. Underpayment of basic monthly salary.
 - e. Payment of standard overtime for the entire period worked.
 - f. Compensation for off/rest days for the entire period worked.
 - g. Payment of earned annual leave plus travelling allowance.
 - h. Payment of house allowance for the entire period worked.
 - i. Payment of public holidays for the entire period worked.
 - j. Interest in a, b, c, d, e, f, g of the above of 15% with effect from the day of judgement to the day of full payment.
 - k. The costs of the suit plus interest.
 - l. Any other or further relief the court deems fit to grant in the circumstances to meet justice.
4. The Claim is accompanied by the grievant's statement, and a list and bundle of 24 docs dated 28th March 2023. The Claim was undefended and therefore proceeded by formal proof.
 5. The Claimant called the grievant as CW1 who adopted his witness statement dated 28th March 2023 and produced a bundle of documents as his evidence. He then stated that he wrote a letter to his supervisor, Mr. Japheth Kipruto on 27th September 2021 seeking for an off, but he was advised not to ask for offs and to continue with work. He testified how he worked during his off days and public holidays but he was not compensated. He also worked overtime and he was also not compensated. He never took annual leave and he was not compensated for the same.
 6. He was first posted to Nanyuki where he worked until January 2022 when his salary was reduced from Kshs 10000 to Kshs 8000 and then he was transferred to Meru. He protested to his supervisor against the salary reduction vide the letter dated 16th February 2022 but the salary was never restored. He continued to work until 10th November 2022 when he resigned due to financial constraint.

Submissions

7. The Claimant submitted that the grievant was verbally employed on 20th April 2021 as a night security guard which was in contravention of section 10 of the [Employment Act](#). It argued that the grievant was the Respondent's employee because it paid his salary and remitted NHIF to his account.
8. It further submitted that the grievant's salary of Kshs. 10000 while posted at Nanyuki Total Petrol Station was below the gazetted minimum basic salary of Kshs. 14,038 for night security guards. It contended that the said minimum pay was increased on 1st May 2022 to Kshs. 15,722. It was also contended that the reduction of the grievant's salary to kshs 8000 was without his consent and therefore contrary to section 19 (2) of the [Employment Act](#). It also amount to unfair labour practices.
9. It further submitted that the reduction of the grievant's salary by the Respondent created a hostile environment that caused the grievant anguish and mental torture forcing him to resign. To buttress the above assertion, the claimant placed reliance on the case of Kenya Union of Commercial, Food and Allied Workers v Generation Electric Allied Limited [2019] eKLR, where the court held that resignation due to hostile work environment amounted to constructive dismissal.



10. The claimant also submitted that the grievant was entitled to House allowance under section 31 of the Act and paragraph 5 of the protective security services order of 1998 (the order) that provide for housing or payment in lieu of accommodation. It urged the Court to grant house allowance at 15% of the basic pay as it was higher than the Kshs. 750 per month provided for by the regulations.
11. It submitted that under paragraph 9 (2) of the order, an employee is entitled to double pay for public holidays which was never paid to the grievant for all the holidays he worked. He further submitted that the grievant was entitled to standard overtime since he worked in a 12 hour shift each day for the entire period instead of the normal shift of 8 hours. It was argued that the 8 hours shift was set under the ILO Convention No. 1 of 1919 and paragraph 7 of the Protective security services (order) of 1998. It was further submitted that the grievant's letter dated 7th September 2021 was proof that he was never granted or compensated for off/rest days contrary to section 27 (2) of the Act.
12. As regards underpayment of basic wages, the claimant argued that the grievant was paid Kshs. 10,000/= which was reduced to Kshs. 8,000/= whereas the legal notice No. 2 of 2019 stipulated that a night security guard wages ought to be Kshs. 14,038/=. It further submitted that the minimum wage was increased to Kshs. 15,722/= by Legal Notice No. 125 of 2022 but the respondent did not effect it in favour of the grievant. It relied on section 48 (1) (a) of the Labour Institutions Act, 2007 to fortify the claim for the unpaid salary arrears which amounted to unfair labour practices.
13. The claimant further submitted that the resignation was not voluntary and as such it amounted to constructive dismissal. It submitted that the grievant resigned due to the reduction in wages without his consent and the failure to reinstate the same 8 months after his protest letter. It was argued that the grievant's rights as enshrined in the Constitution 2010, International Labour standards and Employment Act were violated and therefore he is entitled to damages.

Issues for determination and analysis

14. Having considered the pleadings, the evidence and submissions, the issues falling for determination are as follows:
 - a. Whether the grievant was constructively dismissed.
 - b. Whether the reliefs sought by claimant are merited.

Constructively dismissed

15. The claimant resigned by the letter dated 10th November 2022 which I have copied below:

“To the Human Resource Manager

Patriotic Security Group

O Box 10645-00100

NAIROBI

10TH November 2022

Dear Sir/Madam

ATTN H.R

RE: Termination Of My Services With Immediate Effect



I hereby terminate my services with immediate effect starting from the date of this letter. My reasons for termination of my services with you are as follows: -

1. Downsizing of my monthly salaries.
2. Failure to pay House allowances.
3. Failure to pay standard overtime.
4. Failure to pay public holidays

Sometimes in October I asked my Union official in Meru where I am a member to ask you to reinstate back my monthly salaries at the end of the month of October but in vain. I have written many letters to your area supervisor so as to reinstate back in my monthly salaries, pay me house allowances, standard overtime and public holidays but it was fallen into deaf ears. I was left with no option other than to request my Union to write to you in order to effect the same but also in vain. All I have received are threats and intimidation from your offices on the ground.

I have decided to make this painful decision to terminate my services with you because it will be untenable to continue working under the environment which to me is toxic. Its my humble request that you will calculate all my dues as per the letter written to you by the Union.

I wish you success in all your future endeavours.

Hoping to hear from you very soon.

Thank you

Yours faithfully,

Paul Mwenda Kugeria”

16. The claimant maintained that the resignation was not voluntary since it was prompted by the breaches committed by the respondent and which made the work environment hostile. In common parlance, voluntary resignation from employment refers to the instance where an employee decides to terminate his contract of service in his or her volition.
17. However, according to the Concise Oxford English Dictionary 12th Edition, to “resign” is to “voluntarily leave a job or position of office.” On the other hand, the Black’s Law Dictionary 10th Edition defines resignation as: -

“ A formal notification of relinquishing an office or position, an official announcement that one has decided to leave one’s job or organization, often in the form of a written statement.”
18. Resignation by an employee is a right that is provided for under the Section 35 and 36 of [Employment Act](#) and is normally found in most of the written contracts of employment including collective Agreement and employer’s HR Manuals. The said right is fundamental because without it an employee could be forced into employment against his/her wish and therefore lead to slavery.



19. On the other hand, constructive dismissal is not provided for in statutory laws of Kenya but it is a creature of a case law. According to Concise Oxford English Dictionary 12th Edition, constructive dismissal refers to

“the changing of an employees’ job or working conditions with the aim of forcing their resignation.”

20. The Black’s Law Dictionary 10th Edition defines constructive dismissal or constructive discharge as: -

“An employer’s creation of working conditions that leave a particular employee or group of employees with 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.”

21. In the case of Coca Cola East and Central Africa (2015) eKLR, the Court of Appeal held that: -

“The criterion to determine if constructive dismissal has taken place is repudiatory breach of contract through conduct of the employer. The employer’s conduct must be such as when viewed objectively, it amounts to a repudiatory and fundamental breach of the contractual obligations...there must be a causal link between the employers’ conduct and the reason for employee terminating the contract.”

22. From the above precedent and meaning given by the dictionaries, it is clear that in a claim for constructive dismissal, the Claimant must prove that: -

- a. He was forced to resign by the employer’s conduct;
- b. that the conduct was intolerable or that the employer fundamentally breached the contract of employment that he treated it as a repudiation of the contract.
- c. The employee must show that he did not condone the said conduct but he resigned without much delay.

23. In this case the respondent filed a response denying the alleged constructive termination but it tendered no evidence to rebut the claimant’s evidence. The resignation letter produced by the claimant as an exhibit is sufficient proof that the resignation was not voluntary. The letter highlights the reasons why the grievant resigned which point to the employer’s breaches and conduct towards him. Consequently, I find and hold that the grievant’s resignation amounted to constructive dismissal by the respondent.

Reliefs sought

24. Constructive dismissal is by its very nature unlawful and unfair because it is not grounded on a valid reason and the employee is not exposed to a fair procedure. Section 45 of the [Employment Act](#) provides that:

- (1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove:
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - i. related to the employee’s conduct, capacity or compatibility; or



- (ii) based on the operational requirements of the employer; and
- (c) that the employment was terminated in accordance with fair procedure.”

25. Section 41 of the *Employment Act* provides as follows:

1. “Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

26. In view of the foregoing matters, I am satisfied that the claimant is entitled to compensation for unfair termination. He served without any disciplinary issues. However, the period of service was less than two years. Consequently, I award him two months gross salary as compensation for the unfair termination. The award is based on Kshs 15,722 being the minimum salary set on 1st May 2022 by the General Wage Order of 2022 plus house allowance.

27. The claimant further prayed for withheld salary caused by underpayment. The grievant was first posted to Nanyuki and thereafter moved to Meru. His salary was first Kshs. 10000 and later it was reduced to Kshs. 8000. Having considered the General Wage Order for 2019 and 2022, I agree with the claimant that the respondent underpaid the grievant. Under the 2019 Order, the minimum basic salary for a night watchman was Kshs. 14,038 while under the 2022 Order it was Kshs 15,722. Consequently, guided by section 48 of the *Labour Institutions Act*, I grant the prayer for salary underpayment as assessed by the claimant being Kshs. 99,420.

28. The claimant prayed for house allowance at the rate of 15% of the gazetted monthly minimum basic salary for the months served and I allow it because the respondent did not provide housing to the grievant. Section 31 of the *Employment Act* entitles every employee to reasonable housing at the employer’s expense. Hence from April 2021, his house allowance was 15% of Kshs.14,038 equalling to Kshs. 2,105 while from May 2022 it rose to Kshs2358 per month.

29. The claimant stated that he worked 12 hours daily for eighteen (18) months without off days, holidays and without going for his annual leave. The reason for the separation was due to salary underpayment, denial of rest days and leave. The grievant had written a letter dated 7th September 2021 requesting for the same but it was never granted as confirmed by the resignation letter. The respondent never tendered any evidence to rebut the claimant’s evidence or at least to show that the grievant was paid double for the off days worked.

30. Consequently, I allow the claim for over time and the off days worked at the rate of one day per week for the 18 months worked between April 2021 and November 2022. The formula for assessing overtime is provided by the Circular by the Ministry of Labour dated 20th December 2018 and I have confirmed that the claimant has complied with the same in computing the claim for overtime worked. Consequently, I award the claim for kshs. 157,092 as prayed.



31. I also find that the claim for off days worked is properly computed as per the said government Circular. However, the sum of Kshs. 73,776 does not take into consideration the fact that the grievant was paid the normal rates when he worked during off days. Consequently, I find that he is only entitled to half of the sum computed to top up the unpaid arrears of the double pay as prescribed by the said Circular, being Kshs. 36,888.
32. The claim for public holidays lack particulars and it is declined since the court cannot fill the gaps left by a party in its pleadings.
33. In conclusion, I enter judgment for the claimant in the following terms:
Compensation Kshs. 36,160.00
Salary underpayment Kshs. 99,420.00
House allowance Kshs. 38,908.00
Overtime worked Kshs.157,092.00
Rest/off days worked Kshs. 36,888.00
Total Ksh 368,468.00
34. The award is subject to statutory deductions but in addition to costs of the suit plus interest at court rates from the date of this judgment.

DATED, SIGNED AND DELIVERED AT NYERI THIS 12TH DAY OF APRIL, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

