



**Tahmeed Transporters Limited v Mwero (Appeal E099 of 2023)  
[2024] KEELRC 1474 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1474 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E099 OF 2023**

**M MBARÚ, J  
MAY 23, 2024**

**BETWEEN**

**TAHMEED TRANSPORTERS LIMITED ..... APPELLANT**

**AND**

**HAMISI MLAKO MWERO ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. T. A Sitati delivered  
on 21st August 2023 in Mombasa CMELRC No.538 of 2021)*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 21<sup>st</sup> August 2023 in Mombasa CMELRC No.538 of 2021. The appellant is seeking that the judgment be set aside and the claim dismissed. The counterclaim be allowed with costs.
2. Before the lower court, the respondent filed his Memorandum of Appeal on the grounds that in August 2018 he was employed by the appellant as a welder at a wage of Ksh.20,000 per month. He worked until 22 March 2021 when his employment was terminated on the grounds that there was no work but he had been injured while at work and had reported the matter to the Labour Officer. He claimed that the termination of his employment was unlawful and unfair and claimed the following dues;
3.
  - a. Leave pay for 2 years and 7 months Ksh.36,166;
  - b. Service pay for 2 years Ksh.25,833;
  - c. House allowance for 31 months Ksh.93,000;
  - d. 12 months compensation Ksh.240,000;



- e. Certificate of service;
  - f. Costs.
4. In response, the appellant admitted that the respondent was paid ksh.35, 050 in terminal dues upon resigning from his employment through a letter dated 19 April 2021 and after refusing to submit himself to the disciplinary process. He is not owed leave pay after taking his statutory leave days and service pay is not due upon resignation he was registered with NSSF and the appellant is compliant with Section 35(5) (d) of the *Employment Act*. The wages paid were inclusive of house allowance while compensation is not due upon resignation.
  5. In the counterclaim, the appellant's case was that the respondent resigned without notice or serving notice and hence owes the appellant Ksh.20, 000 in notice paid with interest from 19 April 2021 until paid in full and costs of the counterclaim.
  6. The learned magistrate heard the parties and in the judgment made a finding that there was constructive dismissal of the respondent leading to resignation and made the following awards;
    - a. House allowance of Ksh.84,000;
    - b. Annual leave Ksh.14,00;
    - c. Annual leave allowance Ksh.14,000;
    - d. Unpaid salary for 3 months Ksh.66,000;
    - e. 6 months compensation Ksh.120,000;
    - f. Certificate of service;
    - g. Costs;
    - h. Interests at 14% from the date of filing suit until payment in full.
  7. The counterclaim was dismissed with costs.
  8. Aggrieved, the appellant filed the appeal on the grounds that;
    - a. The learned trial magistrate erred in law and in fact by holding that the respondent herein be paid house allowance at the rate of 15% of the basic salary per month multiplied by the 28 months that he ought to have received from August 2018 to April 2021.
    - b. The learned trial magistrate erred in law and in fact by failing to consider relevant issues and evidence in finding the appellant is solely to blame for the termination of employment hence erred in holding that from December 2020 to the end of May 2021 the appellant had acted unfairly towards the employee thus awarding 6 months compensation for unlawful termination.
    - c. The learned magistrate erred in law by failing to take into account the basic principles of evidence and failed to consider that the respondent failed to discharge his burden of proof and hence erred in holding that the respondent was constructively dismissed from work which necessitated his resignation.



- d. The learned magistrate erred in law and in fact and misdirected herself by holding that the respondent be awarded an annual leave allowance for the period between August 2018 to December 2021.
  - e. The learned magistrate erred in law and in fact in taking into account consideration extraneous factors and issues in arriving at the decision thus occasioning a miscarriage of justice.
  - f. The learned magistrate erred in dismissing the counterclaim with costs.
9. Both parties attended and agreed to address the appeal by way of written submissions.
  10. The appellant submitted that the respondent failed to discharge his burden of proof under Section 47(5) of the *Employment Act*, 2007 (The Act) as held in the case of Peter Otabong Ekisa v County Government of Busia [2017] eKLR. Without establishing a prima facie case, the appellant had no basis to prove or justify reasons leading to termination of employment. The respondent alleged that he was placed under intolerable working conditions leading to resignation and thus claimed leave allowance, service pay, house allowance and compensation for alleged unfair termination of employment. However, in his evidence, the respondent admitted that he was sacked due to misconduct. He got injured and was treated and allowed to resume work. He alleged that he was forced to tender his resignation. He admitted to being paid ksh.35, 000 in terminal dues. He has admitted he submitted a resignation letter dated 19 April 2021.
  11. The appellant submitted that the respondent had been issued with a disciplinary warning on 27 April 2020 for tardiness, absenteeism and failure to report to work. Several warnings had been issued. This conduct justified summary dismissal under Section 44(4) (a) and (c) of the Act.
  12. On 24 December 2020, he was issued another warning for failure to complete allocated work. Through notice dated 22 March 2021, another notice was issued for insubordination and failure to complete assignments. These were acts of gross misconduct and justified summary dismissal.
  13. Through notice dated 30 March 2021, the respondent was called to show cause why disciplinary action should not be taken against him.
  14. Despite the trial court finding that the respondent had been absent from work, contrary to Section 44(4) (a) of the Act, he was awarded compensation. This is even though, the respondent, to avoid disciplinary action opted to tender his resignation. The respondent was of gross misconduct and summary dismissal was justified and he cannot be allowed to change the resignation to constructive dismissal.
  15. The alleged work injury suffered was on 28 December 2020 and was not related to his work. The respondent instituted legal proceedings at the Ministry of Labor and the Director for work injury and these are unrelated matters herein. The respondent reported his claim to the Labour Office on 26 May 2021 while he resigned on 19 April 2021 and he cannot claim his employment was terminated following his report.
  16. The payment of Ksh.35, 050 was made following agreement with the respondent for January to March 2021. This cannot be the basis for constructive dismissal as held in Musonye v Minolta Limited [2023] eKLR.
  17. The awards for house allowance, leave, unpaid salary and alleged unfair termination of employment are not justified. The award of costs plus interests at 14% is not justified and should be set aside and the appeal allowed with costs.



18. The respondent submitted that for 3 months his salary had not been paid by the appellant. This forced him to tender the resignation letter dated 19 April 2021 and he told the appellant that;

This is to inform you that I do not want to work for the company from today. I want to be paid for the months I have not been paid and we can part ways. Thank you.

19. Before the resignation, the respondent had an accident from a work injury which forced him to take 21 leave days from 28 December 2020 to 21 January 2021. He was not paid his wages until April 2021. The learned magistrate analyzed the evidence that this was not justified and the failure to pay wages for 3 months placed the respondent under intolerable working conditions. In the case of *Milton M. Isanya v Aga Khan Hospital Kisumu* [2017] eKLR the court held that in constructive dismissal, the desire to resign is from the employee as a result of a hostile work environment or treatment by the employer, in the case of *Nathan Ogada Atiagaga v David Engineering Limited* [2015] eKLR the court held that constructive dismissal occurs when an employee resigns because their employer's behaviour has become intolerable or made life so difficult that the employee has no choice but to resign. The non-payment of salary for 3 months in this case was cruel and justified the resignation as a matter of constructive dismissal.
20. The reliefs sought and awarded in annual leave, compensation and costs were justified and the appeal should be dismissed with costs.

The counterclaim was found to be without basis and hence dismissed.

### **Determination**

21. As a first appellate court, the court is not bound by the findings of the trial court as the duty is to reassess, review and reevaluate the entire record and arrive at a conclusion. However, take into account that the trial court had the opportunity to hear the witnesses as held in *Peter's v Sunday Post Limited* [1958] EA.
22. I have scanned the Memorandum of Claim dated 24 August 2021 and the respondent does not plead constructive dismissal.
23. His case is that on 22 March 2021, he reported to work and his supervisor told him that there was no work. He knew that was a result of the work injury claim he had reported to the Labour Officer. His report to the Labour Office was on 26 May 2021 and he filed this letter to support his case.
24. The concept of constructive dismissal is not addressed under Kenyan law. It is a concept that has been adopted over time and largely arises when the employee is placed under intolerable working conditions leading to a resignation as held in the case of *Coca-Cola East & Central Africa Limited v Maria Kagai Lugaga*(2015) eKLR.
25. In the case of *Lear Shighadi Sinoya v Avtech Systems Limited* [2017] eKLR the court held that;

On the question of constructive dismissal, this is a case where an employee is placed by the employer under intolerable conditions forcing her to resign from employment. The duty is upon the employee to demonstrate such intolerable circumstances and conditions for the court to make a finding that indeed, placed under such conditions, the employee was justified in tendering resignation. Such a claim must be pleaded and evidence advanced to this effect. [Underline added].



26. The purpose of such pleadings is to bring such matters to the attention of the respondent to allow a specific response or an admission. Without pleading the same, it cannot be inferred or applied in place and instead of other matters.
27. To proceed and make findings that there was constructive dismissal was in error in the absence of the respondent pleading the same without any particulars thereof.
28. The respondent tendered his resignation on 19 April 2021 to be paid his terminal dues. His demands were specific and I want to be paid for the months I have not been paid and we can part ways.
29. The failure to pay an employee his wages when due and upon the same accruing is not justified. This offends the mandatory requirements under Section 17(1) and 18(2) of the Act upon month end and as agreed under the contract of service. Failure to pay an employee within the allowable legal threshold creates anxiety and renders the employee unable to meet his basic needs as held in *Mokaya v Christ the King Parish & another (Cause 386 of 2015)* [2024] KEELRC that the employer subjected the employee to unfair working conditions and practices and failed to meet their legal obligations as employers by failing to pay wages when due. This resulted in unfair labour practices.
30. Upon non-payment of wages, this is a breach of contract and allows the employee to terminate the contract of employment for good cause. Such justifies a claim for damages for unfair labour practices.
31. The award of 6 months compensation is discretionary and this cannot be faulted.
32. The learned magistrate conflated issues and instead of allowing the claim for compensation for unfair termination of employment changed this to constructive termination. On the analysis herein, the non-payment of wages is hereby found not justified. Whatever misconduct the respondent was alleged to have committed, the appellant as the employer held the disciplinary mechanisms at its hands.
33. Warnings, notices and notices to show cause had been issued. There was no conclusion. Pending such matters, the wages due should and ought to have been paid up until the day of resignation on 19 April 2021. The failure to conclude any disciplinary matters against the respondent was hence overtaken by his resignation. He cannot be punished after his employment ended.
34. On the claims made for terminal dues, leave allowance for the period between August 2018 to March 2021 (2 years and 7 Months) is claimed at Ksh.36, 166. There is no contract of employment filed by either party.
35. The learned magistrate awarded the leave allowance without any form of analysis. A leave allowance must be premised under the contract of employment. Leave allowance is not similar to payment in lieu of taking annual leave which is specifically regulated under Section 28 of the Act.
36. In his evidence, the respondent testified that I was forced to sign a leave form – leave without pay. After I received cash Ksh.35, 000 I was dissatisfied.  
The gist of it is that leave pay and leave allowance are different.
37. House allowance is claimed for 31 months. As outlined above, there is no contract of employment. The respondent's case is that he was a welder. Without any written terms and conditions, his wages became regulated under the Minimum General Orders.
38. A general worker in Mombasa from August 2018 was earning Ksh.13, 572.90 minimum. With an additional 15% house allowance, the wage of Ksh.20, 000 was generous. To award a house allowance over and above the wages paid is unjust enrichment.



39. The unpaid wages for 3 months from January to March 2021 led to the termination of employment. The respondent admitted to payment of Ksh.35, 000 in terminal dues. What is owed is Ksh.66, 000 out of which the amount paid should be taken into account hence a balance of Ksh.31, 000.

A certificate of service should be issued at the end of employment.

40. The award of costs in employment claims do not follow the cause and is regulated under Section 12(4) of the *Employment and Labour Relations Court Act*, 2011. The award of costs must be justified and with reasons. To proceed and allocate interests from the date of filing suit until paid in full is to apply the law and known judicial principles in error. Without a justification for the costs awarded, each party bears its costs for the appeal and lower court proceedings.

41. On the Counterclaim, the findings above necessitated the respondent to terminate employment for breach of employment contract and this court satisfied that this was an unfair labour practice, counterclaim is not justified. The learned magistrate should have made a finding on such a matter to support the final order of dismissal.

42. Accordingly, the appeal is partially successful and the following orders are hereby issued;

- a. A declaration there was unfair termination of employment;
- b. Compensation awarded Ksh.120,000;
- c. Certificate of service.
- d. Each party bears its costs.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 23 DAY OF MAY 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant:

..... and .....

