



**Mburu v Gillys Security Investigations Services Ltd (Cause
779 of 2018) [2024] KEELRC 1348 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1348 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 779 OF 2018
NZIOKI WA MAKAU, J
JUNE 6, 2024**

BETWEEN

ANDREW MUNGAI MBURU CLAIMANT

AND

GILLYS SECURITY INVESTIGATIONS SERVICES LTD RESPONDENT

JUDGMENT

1. In his Memorandum of Claim and Witness Statement both dated 21st May 2018, the Claimant averred that the Respondent employed him as a Security Guard on 29th December 2009 on permanent and pensionable basis, earning a basic monthly salary of Kshs. 5,800/-. He noted that while in the Respondent's employ, the Respondent deducted NHIF and NSSF contributions from his salary but failed to remit the same as required by law. That he also was never paid any house allowance or given accommodation in the alternative during the period of his employment at the Respondent Company. He asserted that the Kshs. 5,800/- he received as monthly salary was way below the minimum wage orders of the diverse years and that the Respondent subjected him to work overtime for 12 hours a day without compensation. That the Respondent neither allowed him to proceed for public holidays nor compensated him for the same and that he worked for seven (7) days a week without resting. The Claimant's case is that due to the hostile work environment and his numerous complaints ignored by the Respondent, he had no choice but to resign from its employ on 30th March 2016. That the Respondent's conduct and how he was treated amounts to constructive termination of his employment. He therefore prays that the Court do order and award him notice pay, house allowance, underpayments, overtime, rest day pay, public holidays, NSSF, NHIF, compensation for unfair termination, cost of the suit, interest on the foregoing, certificate of service and any other relief the Court may deem just and fit to award.
2. The Respondent filed its Response to Claim on 8th October 2018 and in it averred that the Claimant is not entitled to any claims. It averred that further, the Claimant absconded duty sometime in February



2016 and caused it serious losses and damage. It averred that the Claim is time barred under section 90 of the [Employment Act](#). That the Claimant used to earn less than Kshs. 80,000/- and as such, the present suit should be heard by the Chief Magistrates Court. It prays that the instant claim be dismissed with costs to the Respondent.

3. Evidence

The Claimant testified that he did not abscond and instead, he resigned due to the problems at work involving delay in payment of salary. He noted that nowhere in the payslips on record is house allowance indicated and that he worked as a night guard from 6.00pm to 6.00am. The Claimant asserted under cross-examination that he was never given a Contract and that he had bank statements that showed he started working for the Respondent in 2009. That the Respondent refused to give him the handwritten resignation letter he had handed over to Alphonse at the Respondent's office. He confirmed that the said Alphonse had declined the resignation.

4. The Respondent's witness, Mr. Japheth Kaunda (RW1), testified that they never received any resignation letter from the Claimant. He stated that the night guards went for offs four (4) days in a month and that some worked on holidays if the off-day does not fall on a holiday. RW1 confirmed under cross-examination that both the basic and gross figures of the Claimant's salary were at Kshs. 7,500/- and that the payslip had no item for house allowance.

5. Claimant's Submissions

According to the Claimant, the following are the issues for determination by this Court:

- a. Whether the Claimant's claim is time barred
- b. Whether the Claimant was unfairly and constructively dismissed from employment.
- c. Whether Claimant is entitled to the reliefs sought.
- d. Who bears the cost of this suit?

6. The Claimant submitted that the Respondent's Preliminary Objection on the suit being time-barred, is not merited as it was lodged after both parties were heard and their respective cases closed. Secondly, that section 90 of the [Employment Act](#) provides for limitation in matters arising out of the Act or service of contract and that such matters must be filed within three (3) years of accrual of the cause of action. The Claimant argued that a cause of action arises with end of employment and having resigned on 30th March 2016, the same is deemed as the date of termination of his employment. That consequently, his Claim is not time-barred because he filed the instant suit in May 2018 within the three-year limitation. He further submitted that the said preliminary objection cannot stand as it is based on contested issues of facts, including the date of the termination as held in the case of *John Musakali v Speaker County Assembly of Bungoma & 4 others* [2015] eKLR quoted with approval in *Okoiti v Parliamentary Service Commission & 2 others; Speaker of the National Assembly & another (Interested Parties) (Petition E166 of 2022)* [2023] KEELRC 252 (KLR) (7 February 2023) (Ruling). It was the Claimant's submission that this Court should consider the foregoing submissions and dismiss the said preliminary objection on the basis that parties are not in agreement on whether there was constructive dismissal or termination on account of desertion.

7. As regards the constructive termination, the Claimant submitted that he was unfairly and constructively dismissed due to the frustrations he faced at his employment with the Respondent. He cited the decision in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR wherein the Court of Appeal set out the legal principles for determining constructive dismissal and stated that the employee must have been entitled to or have the right to leave without notice because



of the employer's conduct. According to the Claimant, his testimony was that he started complaining about the conduct of the Respondent a year after employment but the Respondent ignored him completely and he persevered the said conduct for seven (7) years despite the poor pay. That however, the Respondent's conduct became so detrimental that he had no option but to quit and that he had thus demonstrated that he was constructively dismissed. It was the Claimant's stance that whereas the Respondent's case is that he deserted work, it did not provide evidence on the action it took on the purported desertion narrative. That it is trite law that an employer alleging desertion against an employee must demonstrate efforts made towards reaching out to the employee and notifying them that termination of employment on such ground is under consideration. He cited the case of Ronald Nyambu Daudi v Tornado Carriers Limited [2019] eKLR in aid. He submitted that the decision of this Court in Boniface Nkubi Karagania v Protective Custody Limited [2019] eKLR is also appropriate to the instant dispute because the Respondent herein did not prove that the Claimant intended not to return to work. The Claimant asked this Court to thus find that the Respondent's account of the termination is untrue.

8. It was the Claimant's submission that having found that the constructive dismissal of his employment was unfair for want of reason and procedure, this Court ought to award him maximum compensation and consider the period of service (7 years) and the cruelty of the dismissal through the abuses suffered. Furthermore, that since the dismissal was done without any prior written notice, the Court should award him payment in lieu of notice in accordance with the dictates of section 36 of the [Employment Act](#). The Claimant further submitted that he had demonstrated through his payslips on record that he was never paid house allowance and that his salary was not consolidated with the same. Consequently, he asks for the claim of house allowance to be allowed at 15% for the entire period he worked for the Respondent. He reiterated that he is also entitled to underpayments of his salary as computed in the Memorandum of Claim and to overtime pay as he worked for more than the stipulated eight (8) hours. The Claimant posited that he is entitled to Rest Day pay pursuant to section 27(2) of the [Employment Act](#) and to Public Holidays pay pursuant to section 10(3)(a)(i) of the Act. It was the Claimant's further submission that the Respondent's failure to remit his NSSF on the months he fell sick was unlawful as NSSF deductions are remitted as long as one is an employee and that he should thus be awarded the claim as prayed. He urged the Court to compel the Respondent to issue him with the certificate of service as required under section 51(1) of the Act and to award costs to the Claimant for having proven his claim.

9. Respondent's Submissions

The Respondent submitted that the issue of jurisdiction can be raised at any stage of a case as was affirmed by the Court in Kennedy John Achoki v Secretary General Jubilee Party & 7 others [2017] eKLR. That similarly, a preliminary objection can be raised at any stage in the proceedings as held in the case of Jackson Koome v M'limongi M'ikuamba & 2 others [2018] eKLR and that the Court in the case of [Gencel v Goga \(Civil Suit E015 of 2022\)](#) [2023] KEHC 18429 (KLR) (31 May 2023) (Judgment) found that notwithstanding the fact that the objection was raised towards the very end of the trial, the defendant is still entitled to have his preliminary objection determined. It was the Respondent's submission that considering the provisions of section 90 of the [Employment Act](#) and having shown that there was a period of more than one year from the time the Claimant stopped working for it, his Claim being of a continuous nature cannot succeed save for damages for unlawful termination of employment. On this submission, the Respondent relied on the findings of the Court in Ben Nandasaba Muiyundo v Ideal Security Services Limited [2018] eKLR and John Kiiru Njiiri v University of Nairobi [2021] eKLR.



10. As to whether the Claimant was constructively dismissed or he absconded duty, the Respondent submitted that since the Claimant did not mention in the Memorandum of Claim that he resigned via a handwritten letter, this Court cannot rely on the said evidence. That it settled law that parties are bound by their pleadings and evidence which tends to be at variance with the pleadings is for rejection. It asserted that the inconsistencies between the Claimant's pleadings and testimony at trial show that he is insincere and his testimony cannot as such be taken to be credible and should be disregarded as held in *Maawiya Ali Abdala t/a South-Coast Paint & Hardware v Bongo Mwamwero Ngome* [2022] eKLR. The Respondent further submitted that since the Claimant cited in the Demand Letter that the reason for his resignation was 'family issues', his allegation that he was frustrated into resignation cannot be true as he would have expressly stated so in the letter of resignation. It cited the case of *Achieng' v Africa Diatomite Industries Limited & another (ELRC Cause 13 of 2020)* [2023] KEELRC 293 (KLR) (2 February 2023) (Judgment). The Respondent argued that the Claimant had not proved his claim for constructive dismissal, in which the resignation must happen immediately. That in his case, the Claimant admitted that he chose to stay and continued his employment with the Respondent for seven (7) years and that as such, the claim for constructive dismissal must fail. It relied on the case of *Herbert Wafula Waswa v Kenya Wildlife Services* [2020] eKLR in which the Court held that for constructive dismissal to be construed, the employee must not delay in resigning after the breach has taken place.
11. It was the Respondent's submission that the Claimant having failed to prove constructive dismissal, the only explanation as to what happened is he absconded duty. That the aspect that the Claimant abandoned work is clearly shown by his NSSF Statement attached to the Claimant's List of Documents and produced as an exhibit, indicating that as at 22nd March 2018 when the said Statement was printed, the Claimant was working for Protective Custody Limited and not the Respondent. That this shows that the Claimant abandoned work, quit employment with the Respondent and went to work with the Company the contract was given to i.e. Protective Custody Limited. The Respondent posited that on a balance of probability, it has been established that the Claimant absconded duty.
12. The Respondent submitted that the Court does not have jurisdiction to grant the orders sought by the Claimant save for the Claim relating to damages for unlawful termination. It nevertheless posited that the claim on house allowance having been based on the Minimum Wage Order that provides for a consolidated amount, the Claimant cannot seek underpayment and housing allowance as the same amounts to double compensation. That in essence, the Claimant did not prove why he should be awarded house allowance as per the calculations in his pleadings and that the same should thus be set aside. That that the Claimant had also failed to prove the claims for overtime, rest day and public holiday and that he is not entitled to notice pay and damages for unlawful termination because he absconded duty. On salary underpayments, the Respondent submitted that the same is in nature a special damage or liquidated damage, which particulars need to be pleaded and strictly proved but which the Claimant had failed to prove. It further submitted that NHIF and NSSF are remitted to a statutory body and not an individual and that the claims as sought herein cannot stand. The Respondent submitted that since costs follow events, and awarded to the successful party, costs and interests should be awarded to it in this matter.
13. The Claimant asserts that his resignation on 16th February 2016 was constructive dismissal. In the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* (supra) the Court of Appeal held that:-

In constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of employee... [Emphasis supplied]



14. Other than asserting and averring that the Respondent created a hostile working environment, no evidence was led to demonstrate the conduct of the employer was so egregious that the only option for the employee was to resign. There were no cited incidences, no corroborative evidence to show the conduct of the employer led to the Claimant having no option but to resign. The Claimant did not qualify to claim constructive dismissal and the claim in that regard fails. He asserted that he was underpaid. He also indicated that NHIF and NSSF dues were deducted and not remitted. The Claimant produced a statement from NSSF indicating the employer as Protective Custody. No statement for the relevant period when the Respondent was employer was tendered. Be that as it may, the Court notes there are gaps in the remittances for some months and it would be important for the Respondent to follow up with the NSSF and confirm the remittances it made for the Claimant were properly reconciled and credited to the Claimant. The Respondent is directed to file an original copy of the statement in respect of the period the Respondent was the Claimant's employer within 21 days of the judgment and the Deputy Registrar will ascertain if the statement is accurate in form and substance. Should any gaps be discerned after the reconciliation then the matter be referred to the Court for additional orders on sanctions against the employer.
15. In the claim, an allegation was made on underpayment. Underpayment of wages is a continuing wrong and should be redressed within the shortest period possible and in terms of section 90, these claims become stale within 12 months. In respect of the Claimant, the only valid claims he could press were for the year 2015 to 2016. The going wage in 2015 was Kshs. 12,597.91 a month. The Claimant earned Kshs. 5,800/- in the period. This means he was underpaid by a sum of Kshs. 6,797.91 each month. The Claimant resigned in February 2016 and as such can only claim underpayment for 10 months in which case he is entitled to Kshs. 67,979.10 for the year in question. The underpayment for the 2 months in March and April 2015 are Kshs. 10,896.20 meaning the Claimant will recover Kshs. 78,875.30 only in respect to underpayment. The Claimant is not entitled to housing allowance as the pay was consolidated meaning he is entitled to only the wage provided since the wage is bundled. The Claimant did not prove any element of overtime as he never presented worksheets, check in registers or even sought the production of the same from the employer. In any event, why would he work overtime for years and never claim it only to do so in court almost a decade later? It makes no sense and as such the claim is disallowed. Further, the claims on public holidays, rest days and notice pay are disallowed. He resigned and from all accounts it was on his own volition therefore no notice is due. In addition, the claims for rest days and public holidays fall in the same class as overtime. No record is availed, no tabulation is made, no explanation is made as to why the Claimant let the days accumulate without any protest. It is inconceivable that the Claimant worked 7 days a week meaning he worked 365 days in a year. Since the abolition of slavery, it is not conceivable that a person can be at work every day without a break year after year without any protest. As such the claim is found to be fallacious and disallowed.
16. In the final analysis, I enter judgment for the Claimant against the Respondent as follows:-
- a. The Respondent is directed to file an original copy of the statement in respect of the period the Respondent was the Claimant's employer within 21 days of the judgment and the Deputy Registrar will ascertain if the statement is accurate in form and substance. Should any gaps be discerned after the reconciliation then the matter be referred to the Court for additional orders on sanctions against the employer.
 - b. Underpayment - Kshs. 67,979.10 + Kshs. 10,896.20 = Kshs. 78,875.30
 - c. Costs limited to the sum in (b) above.
 - d. Interest at court rates on the sum in (b) above from date of judgment till payment in full.



e. Certificate of service.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JUNE 2024

NZIOKI WA MAKAU

JUDGE

