



**Sifuna v Secure Kenya Group (Appeal E161 of 2022)
[2024] KEELRC 13301 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13301 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E161 OF 2022
S RADIDO, J
NOVEMBER 21, 2024**

BETWEEN

ENOCK SIFUNA APPELLANT

AND

SECURE KENYA GROUP RESPONDENT

*(An Appeal from the Chief Magistrates Court delivered by Hon Selina N. Muchungi
relating to case Number MCELRC/E1142 of 2020 dated 9th September 2022)*

JUDGMENT

1. Enock Sifuna (the Appellant) sued Secure Kenya Group (the Respondent) before the Chief Magistrates Court alleging unfair termination of employment (constructive dismissal) and breach of contract.
2. The Cause was heard and in a judgment delivered on 9 September 2022, the Court dismissed the actions for unfair termination of employment and accrued leave.
3. The Court allowed the heads of claim for earned salary for January 2020 and a Certificate of Service.
4. The Appellant was aggrieved and he lodged a Memorandum of Appeal contending that:
 - i. The Learned Magistrate erred in law and fact by finding that the Appellant's employment was not constructively terminated and this not unlawfully terminated by the Respondent contrary to evidence tendered before him.
 - ii. The Learned Magistrate erred in law and in fact in finding that the actions of the Respondent of transferring the Appellant to another station in Isiolo where he was to report in 4 days as fair and reasonable and not amounting to constructive termination of the Appellant's employment a position contrary to principles of natural justice.



- iii. The Learned Magistrate erred in law and fact by finding that the Appellant's transfer was lawful and procedural without any evidence tendered by the Respondent that such a random transfer is acceptable and part of its employment policy.
 - iv. The Learned Magistrate erred in law and fact by not finding that the Respondent's decision to transfer the Appellant was malicious as no evidence was tendered by the Respondent to show that the Appellant was incompetent and that he was rejected by the Respondent's client as alleged.
 - v. The Learned Magistrate erred in law and in fact by dismissing the Appellant's application on the basis that the Respondent did not intend to terminate the Appellant's employment despite evidence tendered by the Appellant showing the Respondent's motive was to constructively terminate the Appellants employment and whose effect was to unfairly deny the Appellant the right of representation.
 - vi. The Learned Magistrate erred in law and in fact by reaching at the conclusion that the Appellant did not have unpaid leave days yet no evidence was tendered by the Respondent to show that the Appellant utilised his leave days and which effect was to deny the Appellant compensation for unpaid leave days.
 - vii. The Learned Magistrate erred in law and in fact by arriving at a decision completely unsupported by the evidence.
 - viii. The Learned Magistrate erred in law and fact by accepting the electronic evidence produced in Court by the Respondent as it did not meet the requirements as section 106b states in the [Evidence Act](#).
 - ix. The Learned Magistrate erred in law and in fact by arriving at a decision that completely contradicts the evidence tendered.
 - x. The Learned Magistrate erred in law and fact by arriving at a decision which contradicts the principles of natural justice and prejudices the Appellant.
5. The Record of Appeal was filed on 20 February 2024, and the Court gave directions on 15 October 2024.
 6. Pursuant to the directions, the Appellant filed his submissions on 31 October 2024.
 7. The Respondent's submissions were not on record (should have been filed and served on or before 15 November 2024).
 8. The Court has considered the Record of Appeal and submissions.

Role of the Court on a First Appeal

9. 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.



10. The Court will keep in mind the caution.

Unfair termination of employment: Constructive dismissal

11. The Appellant contended in the Memorandum of Claim filed before the Chief Magistrates Court at paragraph 2.5 that the constructive dismissal was occasioned by the conduct of the Respondent in transferring him on 21 January 2009 (the transfer was from Nairobi to Isiolo).
12. To support the assertion of constructive dismissal, the Appellant testified that the Respondent had called him to its offices and gave him a transfer letter with an ultimatum that he reports to Isiolo within 4 days.
13. According to the Appellant, no reasons were given for the transfer and the policies in place were not followed.
14. Prior to being summoned to the Respondent's offices, the Appellant testified that on 16 January 2020, he got a call from home and upon returning to his work station within Jacaranda Hotel, Westlands, a Security Manager accused him of having left his station to sleep, upon which the Respondent summoned him to its offices.
15. What constitutes constructive dismissal is now fairly well settled.
16. 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.....
17. In the instant case, the Appellant asserted that the transfer was contrary to the Respondent's policies and was thus wrong. A copy of the policies was not produced in Court.
18. Under the common law, an employer reserves the right to determine where an employee should provide his services. The Appellant did not demonstrate that the Respondent violated any of his common law rights or policies with the transfer.
19. Doctrinally, an employee alleging constructive dismissal should demonstrate that an employer made the work environment hostile warranting him or her to leave and assert constructive dismissal.
20. The Appellant did not show how the transfer created a hostile work environment or that he quit on account of the transfer. The evidence on record suggests that there was a disciplinary hearing before the separation.
21. The Court also notes that the Appellant did not file a complete Record of Appeal since copies of pleadings by the Respondent are not part of the Record. The exhibits which were produced before the Chief Magistrate are not on record.
22. On the basis of the record as is, the Court is satisfied that the Appellant did not prove constructive dismissal. The Chief Magistrate did not, therefore, fall into error in dismissing the head of claim for constructive dismissal.



23. The Appellant's action might have taken a different trajectory had the Appellant anchored the claim on unfair termination of employment and not constructive dismissal.

Accrued leave

24. The Appellant pleaded that he was owed the equivalent of 47 leave days and earned wages for 22 days as of January 2021.
25. The Appellant's witness statement, which was adopted as part of the evidence did not make any reference at all to these heads of claims. However, in the course of examination in chief, the Appellant stated he was seeking payment for the accrued leave.
26. The Appellant did not lay an evidential basis for the award of a relief in respect to accrued leave, and the Court so finds.

Orders

27. In light of the above, the Court finds the Appeal devoid of merit and it is dismissed with no order on costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 21ST DAY OF NOVEMBER 2024.

Radido Stephen, MCIArb

Judge

Appearances

For Appellant Bonaventure & Associates

For Respondent Litoro & Omwebu Advocates

Court Assistant Wangu

