



Kimata v China Young Tai Engineering Company Limited (Employment and Labour Relations Cause E054 of 2023) [2024] KEELRC 2796 (KLR) (14 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2796 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E054 OF 2023**

**HS WASILWA, J
NOVEMBER 14, 2024**

BETWEEN

PETER NGANGIRA KIMATA CLAIMANT

AND

CHINA YOUNG TAI ENGINEERING COMPANY LIMITED RESPONDENT

JUDGMENT

1. The suit herein was instituted by the claimant vide a memorandum of claim dated 24th October, 2023, alleging to have been constructively dismissed and seeking for the following reliefs;-
 - a. A declaration that the claimant's dismissal was unlawful, unjust, unfair and discriminative and the same amounts to constructive dismissal.
 - b. Compensation for unfair termination/constructive dismissal to be determined by the Court.
 - c. An order compelling the Respondent to settle the claimant's outstanding benefits.
 - d. That the Respondent to pay the claimant herein accrued and unpaid annual leave days for 9 years from 2006-2014 of Kshs 900,000.
 - e. That the Respondent to pay the Claimant herein retirement benefits of Kshs 800,000.
 - f. That the Respondent herein to pay the Claimant unpaid service fee/pay for three years (2018,2020 & 2022) of Kshs 300,000.
 - g. That the Respondent herein to pay the claimant unpaid overtime dues for 9 years of Kshs. 898,560.
 - h. That the Respondent herein to pay the claimant unpaid salary for days worked of Kshs. 33,333.
 - i. General damages.



- j. Costs and interest of this Claim.
 - k. Certificate of service.
 - l. Any other relief which this Honourable court may deem fit to grant.
2. The claimant's case is that he was employed verbally by the Respondent as an Electrical Technician in the year 2006 earning Kshs 100,000. That he worked for the Respondent until 2022 when his working environment become hostile, untenable and generally unaccommodative as actuated by animosity, hostility and abuse from the Respondent's director, which forced him to resign.
 3. The claimant states that during the pendency of his employment, he discharged his duties diligently and meticulously without any disciplinary issues.
 4. Upon the said termination, the claimant avers that he was not paid his terminal dues in full causing him immense suffering, when he had worked for the Respondent for over 17 years.
 5. He states that he was optimistic that he would work with the Respondent till his retirement were it not for the constructive dismissal.
 6. The Respondent entered appearance through the firm of Musinga Advocates LLP on 26th January, 2024 and filed a defence to claim and Counter-Claim on 28th February, 2024.
 7. The Respondent admitted to engaging the claimant as an electrical technician in 2006 through an oral contract of service. However, that the claimant was never a full time employee, rather that he was an overseer who carried out duties as a consultant, hence he was not issued with any employment letter, neither were any statutory deduction ever deducted from his pay. Also that his reporting and leaving timeframe were flexible depending on what he was engaged on.
 8. It is stated that the claimant was paid a monthly emolument of Kshs 100,000 which was always paid through his bank account.
 9. It is averred that the claimant worked for the Respondent until 11th January, 2023 when he resigned after failing to show up for work from 1st January, 2023. That the claimant worked for the Respondent for over 16 years an indication of a good working relationship between the parties herein, therefore that the claim is without any basis.
 10. The Respondent maintained that the claimant was offered a conducive, amiable and professional work environment contrary to the allegations of animosity and abuse from any of the Respondent's directors.
 11. It is averred that the claimant after working for the Respondent for a long time became casual, insubordinate and entitled and when he was asked to rectify his ways, he choose to resign without even giving notice of the same.
 12. The Respondent states that since the claimant resigned without notice, he breached the service agreement between him and the Respondent as such, he owes the Respondent notice pay of one month.
 13. It is averred that the claimant at first used to report to work on need basis and not on regular basis and the main role initially was to ensure that the various regulatory documents that the Respondent needed were obtained as and when they are required. Later on when the Respondent got a contract that necessitated electrical works to be done, he began working from the site.



14. The Respondent states the Claimant's work dwindled between the year 2020 and 2022 when he became unresponsive to his seniors, management and also towards his peers.
15. It is stated that the claimant never raised any of these alleged issue of hostility, if any, by the directors for their action.
16. In the Counterclaim, the Respondent sought for the following reliefs;-
 - a. A declaration that the claimant was in breach of the contract by failing to issue notice of termination and /or payment in lieu of notice.
 - b. The sum of Kshs 100,000, being one-month's salary of the claimant and that the outstanding payment in lieu of notice due from the Claimant to the Respondent as of 15th February, 2024.
 - c. Interest on (a) above at the prevailing commercial bank interest rate until payment in full.
 - d. Costs of this suit and the counterclaim together with the interest thereon at Court rates.
 - e. Any other further or incidental relief that the Honourable Court may deem fit to grant.

Evidence

17. During hearing, the claimant testified as CW-1 and adopted his witness statement dated 24th October, 2023 and produced the list of documents in support of his case. He testified that he is now doing farming for a living and that prior to that, he used to work for the Respondent for over 16 years. He stated that he used to work full time for the Respondent and earned a monthly salary. That for the last 9 years he has not been granted leave. He also stated that he wants to be paid his retirement benefits.
18. He testified that while in the Respondent's employ, he used to earn monthly salary of Kshs 100,000 and a bonus pay of Kshs 100,000 per year, however that he was not paid the yearly pay for the years 2018, 2020 and 2022.
19. It is his case that he used to take people to the site by 7:30 am and pick them up at 5:30, thus he worked overtime which was never paid for.
20. He testified that the circumstances that led to his resignation is that the Respondent's director became abusive in the year 2022 and on 10th January, 2023, there was an issue with the generator that cause a blackout. That due to the generator issue, the director of the Respondent hauled insults on him saying he was useless. That he was so outraged by this abuses that he decided to resign but never told anybody about these insults. He maintained that he never absconded duty. He reiterated that he was an employee and not an independent contractor.
21. On cross-examination, he testified that he was employed by the Respondent on 2nd June, 2006 as a full time employee working from morning to evening every day. That he used to have an office at the Respondent's premises, which was located at riverside road but that at times they would work from the actual site.
22. He testified that he used to earn a monthly salary of Kshs 100,000 and a yearly allowance of Kshs 100,000. He testified that in his statement, on 28th and 29th December, he received Kshs 100,000, Kshs 200,000 and Kshs 100,000. He testified that he used to work full time save for Sundays and public holidays. He admitted that the reason for resignation were not indicated during resignation, neither have the same been tabled before court. He added that the issue of generator causing blackout and the director abusing him was the reason for his resignation.



23. He testified with regard to notice that since there was no agreement of employment, there was no agreement on notice to be given before resignation. He also stated that he was issued with a certificate of service after requesting for a copy of it. He admitted that there is nothing to show that he requested and was denied to go for leave at any given point.
24. Upon further cross examination, he testified that sometimes in 2014, he fell sick and was given off for a month to recover but that he was still paid his monthly salary. He admitted that he never had any missed payment for all the 17 years worked.
25. On re-examination, he testified that he used to report at 7:30 am and leave at 5:30 pm but that there was no signing sheet that can evidence the same. He testified that the Kshs. 100,000 paid yearly was his 13th salary, which they used to call service pay, but that he was not paid the said amount for the years 2018,2020 and 2022, which he now claims as service pay in the claim. He corrected that he worked till 10th January, 2023.
26. The Respondent called Fei Qian, as its RW-1. He testified that he speaks Chinese and English and that he has been in Kenya from 2002. He adopted his witness statement dated 30/2/2024 and produced the bundle of documents in support of the Respondent's case.
27. He testified that he is the Managing Director of the Respondent and has known the Claimant since when he was engaged by the Respondent. He stated that initially the claimant used to be paid Kshs 50,000 which was revised upward to Kshs 100,000. Further that he was paid bonus of Kshs 100,000 at the end of year. He stated that the Claimant worked on flexible hours at times reporting at 8 am and sometimes at 11 am. He told this Court that the Claimant's work was not intense as it was to coordinate with their Chinese lab. He stated that he used to work from Monday to Saturday save for Sunday and public holidays. He testified that the claimant resigned without any notice.
28. Upon cross examination, he testified that he is he managing director of the Respondent and that he has known the claimant since 2010 as an electrical engineer who used to coordinate between the client company and the Chinese side. He testified that the claimant was an electrician and a supervisor who served on full time.
29. He testified that the claimant took all his leave days. He testified that when the Claimant resigned claiming to have been abused by the director he reached out to him to come back to work but that the claimant was categorical that he did not want to work with the Respondent anymore.
30. On re-examination, he testified that the claimant resigned without being prompted by the Respondent to resign. He stated that he had a great working relationship with the claimant for the 17 years he worked for the Respondent. He clarified that though the claimant was a fulltime employee, he had flexible working hours. He also told this Court that the claimant could orally ask for leave and all the time he asked for leave, he was granted the same. He testified that in instances when the superior is displeased with an employee's work does not necessary amount to hostility.

Claimant's Submissions

31. The claimant submitted that it is not in dispute that he was employed by the Respondent as per documents by both parties. Secondly that he resigned as a result of unconducive working environment and that he was not paid his terminal dues.



32. It was submitted that in a claim of unfair termination of employment, the statutory burden placed upon a person complaining of unfair termination of employment or wrongful dismissal is anchored in section 47(5) of the *Employment Act*, which provides as follows:-

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer”.

33. Based on the above, the claimant submitted on three issues; -whether the claimant resigned or absconded duty, whether the claimant’s resignation amounts to constructive dismissal thus unfair and whether the claimant should be granted the reliefs sought.

34. On the first issue, it was submitted that the claimant worked for the Respondent until the year 2022 when his working environment became so hostile, untenable and generally unaccommodative as actuated by animosity, hostility and abuse from the respondent’s director a culmination of which the claimant had no option but to resign. That the claimant recounted the meeting of 15 November 2022, which was the genesis of the hostility and vituperation and which culminated his resignation. This testimony and account was fortified by the testimony and evidence of the respondent’s witness who indeed confirmed that there were issues and heated conflicts between the claimant and the respondent’s manager. He went ahead and confirmed that the same were never resolved until when he later was informed that the claimant had resigned.

35. The claimant submitted that as much as there existed no express terms of engagement, the respondent acknowledged having employed the claimant from 2006 up until 2022. However, that as a result of the untenable working environment, the claimant tendered his resignation which was to take effect immediately and as such, he did not report to work during the Christmas holiday.

36. It was argued that the Respondent alleged that the claimant deserted work, however that there are no efforts demonstrated showing that the Respondent reached out to the claimant on the alleged desertion. In this, he relied on the case of *Boniface Francis Mwangi V B.O.M. Iyego Secondary School* [2019] Eklr where Nzioki Wa Makau J observed as follows:-

“It is good practice for an employer to take the initiative of contacting the employee where an employee absconds work and find out the reason for the failure to present themselves for work.”

37. He also cited the case of *Simon Mbithi Mbane V Inter Security Services Ltd* [2018] Eklr where Abuodha J held that;

“An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.”

38. To buttress its argument, the claimant relied on the case of *Joseph Nzioka V Smart Coatings Limited* [2017] Eklr Nduma J. observed that:

“Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”



39. Accordingly, that the Respondent did not discharged its onus of establishing that the Claimant indeed absconded duty. Consequently, that the most plausible explanation is that the claimant was constructive dismissed and not deserted duty.

40. On the second issue on whether the claimant was constructively terminated, it was argued that constructive dismissal arises when the employee terminates the employment without notice by reason of the employer's intolerable or unreasonable conduct such as assault, sexual harassment or unsubstantiated allegations of theft or dishonesty. In support of this, he relied on the case of Gladys Mutanu Mutellah Vs. Bonface Kamau T/A Highland Annexe Restaurant Alias Highland Foods Industrial Cause No 271 of 2012 where the Court stated as follows:-

“A constructive dismissal is essentially unfair dismissal within Section 45 of the Employment Act. The basis are that constructive dismissal may be defined as a situation in the workplace, which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee to such an extent that the employee has no other option available but to resign.”

41. He relied also on the Court of Appeal case of Coca Cola East & Central Africa Limited V Maria Kagai Ligaga [2015] Eklr the court held as follows:-

“Constructive dismissal occurs where, an employee terminates the contract under which he is employed, (with or without malice) in circumstances in which he is entitled to terminate it without notice, by reason of the employer's conduct... constructive dismissal as a repudiatory breach by the employer of the contract of employment. The employer's behaviour in either case must be shown to be so heinous, so intolerable, that it made it considerably difficult for the employee to continue working. The employee initiates the termination, believing herself, to have been fired. The employee needs to show that the employer, without reasonable or proper cause conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is regarded as constructive dismissal if the employer's conduct is a significant breach of the contract of employment and that the conduct shows the employer is no longer interested in being bound by the terms of the contract. The employee's resignation is therefore treated as an actual dismissal by the employer and the employee may claim compensation for unfair termination.... The onus of proof in this form of employment termination, unlike in other termination lies with the employee. While under Sections 43 and 45 of the Employment Act 2007 the duty in showing that termination was fair is on the employer, constructive dismissal demands the employee demonstrates that his resignation was justified. Other collateral issues that must be shown by the employee are; that the employer made a fundamental change in the contract of employment, and such change was unilateral; that the situation was so intolerable the employee was unable to continue working; that the employee would have continued working had the employer not created the intolerable work environment; and, that the employee resigned because he did not believe the employer would abandon the patters of creating unacceptable work environment. These are some of the rules governing a claim for constructive dismissal.”

42. Similarly, that in this case the Claimant contested his dismissal on the basis that his working conditions became intolerable or unreasonable necessitating his resignation. His sentiments were confirmed by the testimony of the respondent's witness who acknowledged existence of a serious dispute between the claimant and the respondent's manager. He argued that whereas the claimant was put to task



to elucidate on whether he reported any instance of harassment, vituperation or hostile working environment, it was pellucid that the issues complained by the claimant were perpetrated by the respondent's manager who in the greater circumspect of the work environment was the overall authority. Hence, it would sensibly defeat logic to report a complaint to a perpetrator of what is complained about. That there were absolutely no dispute resolutions mechanisms put forth and made available to the claimant to explore as a matter of local remedy. That in this circumstances, the continuous harassment without any notice to show cause as perpetrated by the respondent essentially made the claimant unable to perform his duties and impossible to continue working.

43. It was argued that even if the claimant had committed any of these offenses of insubordination, desertion, abscondment or absence from duty or place of work, these offenses are a grounds for gross misconduct under Section 44(4) punishable by summary dismissal, and even in such cases, the Claimant must still be given an opportunity under Section 41 of the *Employment Act* to explain what caused him to desert work. When an Employer fails to follow the mandatory procedures contemplated by section 41 of the *Employment Act*, 2007, the termination becomes substantively and procedurally unfair.
44. On the reliefs sought, it was submitted that, having found that the claimant was constructively and unfairly terminated, he is entitled to the reliefs sought.
45. On the claim for unpaid leave, it was submitted that the Claimant testified and informed the court that he did not go on annual leave for a period of 9 years from 2006 — 2014, a testimony that was uncontroverted.
46. On the claim of service pay, it was submitted that, it was the claimant's preposition that he used to be paid an additional sum of Ksh. 100,000/= every year as a stipend and/or service fee; which amount fell in arrears for three years being 2018, 2020 and 2022. That this amount was indeed acknowledged by the respondent's witness but he did not rebut the fact that the same remained unpaid and urged this court to allow the same as prayed.
47. On the claim for overtime and unpaid salary for days worked, it was submitted that it is trite that the respondent is clothed with a statutory obligation to keep and update employees' records. However, that in this case none was produced by the respondent to direct the court whether or not the claimant worked over and above the statutory working hours. That whereas it was the respondent's preposition that the claimant worked on a flexible schedule, the respondent did not adduce any evidence to elucidate the same or direct the court on the modalities of such flexible schedule as required under section 10(6) and (7) of the *Employment Act*, 2007 as read with section 74 of the *Employment Act*.
48. That in the event work records are not produced, any claim made by an employee with regard to terms and conditions of employment must be taken as the truth. In support of this, he relied on the case of Gilbert Kasumali Kithi Vs Nyali Beach Holiday Resort [2015] Eklr and in the case of Henry Ochido Versus Ngo Co-Ordination Board [2015] Eklr.
49. In conclusion, the claimant cited the case of Alice Mbithe Mwazia V Xpress IT, Courier Limited [2016] Eklr and the case of Raphael Wellington Okonji Vs Sunthesis Limited [2012] eklr where the court held as follows:-

“Where the Claimant sued the respondent his former employer seeking terminal dues for wrongful and unfair termination. It is observed that although the law does not give the criteria for assessing the quantum of damages for unfair termination, the court was of the view that the consequences of the dismissal, circumstances of the dismissal, the difficulty



with which to secure another job and the embarrassment suffered by the victim of unfair dismissal are the key factors for consideration.”

50. Accordingly, he urged the Court to condemn the Respondent to pay the costs of this claim.
51. The Respondent indicated to Court that they filed submission, however none was uploaded on the CTS system, neither was a copy availed to the Court.
52. I have examined all the evidence and submissions of the parties herein. The claimant has submitted that he was an employee of the respondent which the respondent denied alleging he was an independent contractor.
53. The respondent however admitted that he worked for them and was paid 100,000/- per month and 100,000/- yearly bonus. They also admitted that they had no written contract with the claimant but he served them from 2006 to 2023 when he resigned for no apparent reason and without notice.
54. As to whether the claimant was a contractor or an employee, the issue can only be resolved with reference to section 10(7) of the Employment Act 2007 which states as follows:
 - (7) If in any legal proceedings an employer fails to produce a written contract or the written particulars, prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.
55. Indeed an employer has an obligation to issue an employee with a contract of service stating the terms of engagement and when there is failure on employer’s part, the burden of proving the terms thereto lies on the employer.
56. The employer having failed to issue the claimant herein with an employment contract, it follows that the terms to be adopted by this Court are terms as stated by the claimant that indeed he was an employee a full time one at that and his salary was 100,000 per month and 100,000 yearly bonus.
57. On the issue of whether the claimant was unfairly terminated by the respondent, the claimant aver that he resigned because of a hostile working environment coupled by abuse from his superior. The claimant is however obligated as he alleges a hostile environment to prove that he raised these complaints to the employer and they were unattended to. The claimant though having alleged a hostile working environment has not submitted any evidence that he raised such complaint and they were unattended to.
58. The claimant agreed that he resigned from employment and I find that that, is the correct position and his allegation that he was constructively terminated cannot lie.
59. The respondent allege that the claimant absconded duty but also admit that he resigned without any notice. The issue of absconding duty cannot also therefore lie the respondent having agreed that he resigned from work.
60. As to the reliefs sought, the claimant sought various remedies including compensation for unfair termination. Having found that the claimant resigned, the claim for compensation therefore cannot stand.
61. As to claim for leave, the claimant stated that he did not go for leave for 9 years from 2006 to 2014. The claimant has however not exhibited any evidence that he requested to proceed for leave in the said period and this was denied. There being no such evidence, I find this claim is not only untenable but also time bared.
62. As for payment of service pay, section 35(5) 2(6) of the Employment Act 2007 provides that:



35(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

(6) This section shall not apply where an employee is a member of—

- (a) a registered pension or provident fund scheme under the *Retirement Benefits Act*;
- (b) a gratuity or service pay scheme established under a collective agreement;
- (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and
- (d) the National Social Security Fund

63. In case of claimant, though not being terminated, he is entitled to his terminal dues as provided above which I set at 15 days salary for each year worked= 15/30x17x100,000-850,000/-

64. Claim for overtime cannot stand given that there is no evidence of time sheet as worked by the claimant to prove he worked overtime.

65. The total awarded to the claimant is therefore kshs 850,000/- less statutory deductions.

66. The respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 14TH DAY OF NOVEMBER, 2024.

HELLEN WASILWA

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

HELLEN WASILWA

JUDGE

