



**Maundu v Wine Company Limited (Cause E011 of 2022)
[2024] KEELRC 2866 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2866 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E011 OF 2022
DN NDERITU, J
NOVEMBER 14, 2024**

BETWEEN

SAMUEL MALITI MAUNDU CLAIMANT

AND

THE WINE COMPANY LIMITED RESPONDENT

JUDGMENT

I. Introduction

1. Through K. Kibiku & Co. Advocates the claimant commenced this cause by way of a statement of claim dated 18th April, 2022 filed in court on 27th April, 2022. As it is the procedure, the statement of claim is accompanied with a verifying affidavit sworn by the claimant, a list of witnesses, the claimant’s written statement, a list of documents and copies of the listed documents. On 11th May, 2023 claimant filed a supplementary witness statement dated 9th May, 2023.
2. The claimant is seeking the following reliefs –
 - a. Salary for the months of October 2021, November, 2021, December and 18th January, 2022..... Kshs 432,000
 - b. Allowance for December 2021 and January, 2022..... Kshs 24,200
 - c. One month’s salary in lieu of termination notice..... Kshs 120,000
 - d. 12 months salary for wrongful dismissal



- and unfair termination..... Kshs 1,440,000
- e. Payment for 30 leave days accrued until 18/01/2022 but not taken..... Kshs 120,000
 - f. Reimbursement of costs incurred on behalf of the respondent..... Kshs 44,215
 - g. Costs of the suit
 - h. Certificate of service
 - i. Interest on (a), (b), (c), (d), (e), (f) above at court rates until payment in full
 - j. Any other relief that this Honourable Court may deem just and fit to grant
3. The respondent entered appearance through Murimi, Ndumia, Mbago & Muchela Advocates on 26th May, 2022 and filed a memorandum of response on even date. In the said response, the respondent prays that the claimant's cause be dismissed with costs for want of merits.
4. The claimant filed a reply to the memorandum of response on 21st June, 2022 reiterating the contents of the statement of claim, seeking that the response be dismissed and judgment be entered in his favour as per the statement of claim.
5. On 31st May, 2023, with the leave of court, the respondent filed an amended response to the memorandum of claim and counterclaim seeking the following reliefs-
- a. General damages
 - b. Special damages of Kshs. 4,836,222.38.
 - c. Kshs. 120,000 being one month's pay in lieu of notice
 - d. Costs of this suit
 - e. Interests on all of the above at court rates
 - f. Any other order or relief that the court may deem fit and just to award.
6. The claimant filed an amended reply to the memorandum of response and defence to counterclaim on 19th June, 2023 seeking that the amended response be struck out, the counter-claim be dismissed, and that judgment be entered in his favour as per the statement of claim.
7. The cause came up for hearing on 9th October, 2023 when the claimant (CW1) testified and closed his case. The defence was heard on 15th November, 2023 when Peris Waithera Mbuthia (RW1) testified, and the respondent's case was closed.
8. Counsel for both parties, Mr. Kibiku for the claimant and Miss Kamau for the respondent, addressed the court by way of written submissions. Mr. Kibiku filed his submissions on 26th February, 2024 and Miss Kamau filed her submissions on 4th April, 2024.

II. The Claimant's Case



9. The claimant's case is predicated upon the statement of claim, the amended reply to the response and defence to counter-claim, the oral and documentary evidence by the claimant (CW1), and the written submissions by his counsel.
10. In the statement of claim, the claimant avers that he was employed by the respondent, a limited liability company in the business of selling and distributing alcoholic beverages, in its sales department on or about 11th November, 2015. Subsequently, it is pleaded that the claimant was promoted to head of sales on or about 19th July, 2021, earning a gross monthly salary of Kshs120,000/= along with other allowances and bonuses as provided for under revised terms of employment.
11. The claimant avers that he executed his duties diligently and with commitment but it is alleged that in October, 2021, the respondent without any reasonable cause or lawful justification, withheld his monthly salary and only paid a portion of his allowances. Further, it is pleaded that the respondent withheld the claimant's monthly salary for November and December, 2021, until 18th January, 2022.
12. It is pleaded that the respondent's refusal to pay the agreed monthly salary created a hostile working environment intended to frustrate and to constructively dismiss the claimant. Despite seeking an explanation from the respondent's directors, it is pleaded that the claimant received no explanation for the respondent's hostile and unlawful conduct. Due to a lack of income and hostility meted by the respondent, the claimant avers that he resigned from his job terming it constructive dismissal that was wrongful and unlawful. It is pleaded that by reason of the foregoing, the respondent violated Article 41 of *the Constitution* and Section 18(2)(c) of the *Employment Act* (the Act).
13. In his defence to the counter-claim, the claimant avers that the motor vehicle registration number KCL 270T, which was assigned to him during his employment with the respondent, was stolen from outside his residence on 16th February, 2019. It is further pleaded that the claimant's decision to resign was prompted by the respondent consistent withholding his salary rendering it impossible for him to sustain himself in the employment.
14. In his testimony in court, the claimant reiterated the contents of his pleadings and his written statement dated 18th April, 2022 together with his supplementary written statement dated 9th May, 2023 filed in court on 11th May, 2023, as his evidence-in-chief. He also relied on and produced copies of the documents in his filed list and bundle as exhibits 1 to 9.
15. In cross-examination, he stated that he resigned because he had not been paid his salary for the last three months of his employment although he did not indicate so in his letter of resignation. He stated that he did not collect debts from the respondent's clients as that was the responsibility of the accountant. He denied faking or forging any local purchase orders (LPOs).
16. He stated that according to his contract, he was required to give a two-month notice on termination which he did. He stated that the respondent was compensated by the insurance company for the stolen motor vehicle registration KCL 270T, Toyota Probox. He stated that he cooperated and he furnished the OB number to the respondent for the purposes of pursuing the said compensation with the insurer.
17. It is on the basis of the foregoing evidence and circumstances that the claimant is seeking that judgment be entered in his favour as prayed in the memorandum of claim.

III. The Respondent's Case

18. The respondent's case is contained and understood from the amended response to the memorandum of claim, the counter-claim, the oral and documentary evidence adduced through RW1, and the written submissions by its counsel.



19. In the amended response to the claim, the respondent denies in toto all the allegations set out in the statement of claim. It is pleaded that the claimant underperformed in his duties and allegedly stole from the respondent by collecting monies owed to the company and failing to remit or account for the same.
20. Further, the respondent avers that the claimant was paid all his dues and bonuses in addition to salary increments based on performance. The respondent denies that it allegedly constructively or otherwise dismissed the claimant as he voluntarily resigned at his own volition.
21. The respondent avers that the claimant attempted to evade inquiries about the stolen motor vehicle valued at Kshs. 1,000,000/= and breached his employment contract. It is pleaded that the claimant failed to respond to the respondent's attempt to contact them after his resignation.
22. In regard to the counter-claim, it is pleaded that the claimant was allocated motor registration number KCL 270T as his tool of work, valued at Kshs1,000,000/= but the same was stolen while in his custody and control in 2019. It is further pleaded the claimant forged and faked LPOs and delivery notes to steal goods worth Kshs. 3,836,222.36/= being monies that the claimant failed to remit and or account for. Further, the respondent is seeking Kshs120,000/= being one month's salary in lieu of notice since the claimant withdrew his services on 18th January, 2021 without notice.
23. The respondent is seeking for the reliefs in the counter-claim as alluded to in the introductory part of this judgment.
24. In her testimony in court, RW1, the respondent's human resource manager, relied on and adopted her filed written statement filed in court on 8th May, 2023 as her evidence-in-chief. She adopted and produced copies of the listed documents in the list dated 5th April, 2023 and filed on even date, as the respondent's exhibits 1 to 9.
25. She stated that the claimant voluntarily resigned vide a letter dated 18th January, 2022 and did not make any claims against the respondent in the self-explanatory letter of resignation. She stated that the claimant did not clear with the respondent. She further stated that the claimant's responsibilities as the head of sales included collecting and receiving monies from clients, supervising other sales representatives, and recovering all debts on goods supplied in accordance with his letter of appointment.
26. RW1 stated that by the time the claimant resigned, he had a debtor-book of Kshs3,800,000/=. She claimed that the claimant should not be paid salary in lieu of notice as he voluntarily resigned without notice.
27. In cross-examination, she stated that the respondent is required by law to keep employment records. She conceded that the claimant was not paid his salary and allowances for October, November and December, 2021 and for January, 2022.
28. She stated that the claimant was issued with a show cause letter before his salary was stopped. She further stated that she did not have a valuation report showing that the value of the motor vehicle was Kshs1,000,000/= but admitted that the purchase price of the car was Kshs800,900/=. She added that there is no evidence to show that the claimant participated in the theft of the respondent's motor vehicle. The motor vehicle was allegedly stolen on 16th February, 2019.
29. It is on the basis of the foregoing evidence and circumstances that the respondent is seeking for general damages, special damages of Kshs4,836,222.38, Kshs120,000/= being one month's pay in lieu of notice together with costs of the cause and counter-claim.



30. However, RW1 admitted that there was no evidence that the claimant collected debts and kept the monies, forged any LPOs, or participated in the theft of the company motor vehicle. She admitted that no reports were made to the police of the alleged criminal conduct by the claimant.

IV. Submissions By Counsel

31. In the written submissions, the claimant's counsel did not list down issues for determination but submitted as hereunder.
32. In regards to the dismissal counsel submitted that the claimant was constructively dismissed by the respondent as a result of which he resigned vide a letter dated 18th January, 2022. The court is urged to be persuaded by the reasoning in *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga* (2015) eKLR wherein the Court of Appeal laid out the principles of constructive dismissal. The court held that an employee pleading constructive dismissal must show that the employer's conduct was so grave that it constituted a repudiatory breach of the contract.
33. It is submitted that the claimant was employed on permanent basis and therefore he was entitled to payment of his monthly salary at Kshs120,000/= and the court is urged to apply Section 18(2)(c) of the Act in support of that proposition. It is submitted that the respondent's withholding of the claimant's salary was unjustified and discriminatory. It is submitted that the respondent did not have sufficient evidence to prove that the claimant forged LPOs and or that he collected money from clients and failed to remit or account for the same or at all.
34. It is submitted that the respondent failed to pay the claimant's salary and allowances forcing him to resign. Again the court is urged to be persuaded by the reasoning in *Agatha Bugosi Said V Vegpro Kenya Ltd* (2014) eKLR in support of the proposition.
35. On the reliefs sought, counsel urged the court to enter judgment in favour of the claimant and remedy him as per the reliefs accordingly.
36. On the other hand, counsel for the respondent submitted on seven issues for determination which in summary concerned the following three issues – Whether the claimant voluntarily resigned or was wrongfully dismissed by the respondent, and, Whether the claimant is entitled to the reliefs sought
37. On the first issue, it is submitted the claimant failed to prove that the respondent breached the terms of the contract of employment through its conduct, expressly or impliedly. Further, it is submitted that the claimant resigned voluntarily vide a letter of resignation dated 18th January, 2022. The court is urged to be persuaded by the decisions and holdings in *Alfonce Mua Kasimu V Electrical Card Services Ltd* (2014) eKLR and *Douglas Omunyin V Board of Trustees, Redeemed Christian Church of God* [2022] eKLR.
38. It is further submitted that the claimant failed to prove on a balance of probabilities that he was constructively dismissed or otherwise terminated. The court to be persuaded by the reasoning in *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga* (supra) and Section 109 of the [Evidence Act](#) in support of that regard.
39. On the second issue, counsel urged the court to be persuaded by the reasoning in *Alfonce Mua Kasimu V Electrical Card Services Ltd*(supra) wherein the court held that an employer was entitled to notice pay consequent to an employee's resignation without notice. It is submitted that the claimant voluntarily resigned without notice and the court should therefore award to the respondent one month's pay in lieu of notice as pleaded in the counter-claim.



40. It is submitted that the claimant is not entitled to the unpaid three months' salary as he was indebted to the respondent alongside the value of the motor vehicle which was stolen in his custody.
41. It is submitted that the certificate of service is ready and the claimant can collect it from the respondent's office upon clearing. On costs, counsel cited *Jasbir Singh Rai & 3 others V Tarlochan Singh Rai & 4 others* [2014] eKLR wherein the Supreme Court held that a court has the discretion in awarding costs based on the circumstances of the case.
42. In conclusion, counsel urged the court to dismiss the cause with costs for lack of merits and allow the counter-claim as prayed.

V. Issues for Determination

43. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and the written submissions by counsel for both parties. The following issues commend themselves to the court for determination –
 - a. Whether the claimant was wrongfully and unfairly dismissed or that he voluntarily resigned;
 - b. If the claimant was constructively dismissed is he entitled to the reliefs sought?
 - c. Has the respondent proved the counter-claim?
 - d. If (c) is in the affirmative, is the respondent entitled to the reliefs sought in the counter-claim?
 - e. What are the appropriate orders on costs in regard to the cause and the counter-claim?

VI. Dismissal or Resignation

44. It is not in dispute that the claimant was employee of the respondent, a seller and distributor of alcoholic beverages, as a sales representative was later promoted to head of sales earning a salary of Kshs120,000/= per month. The claimant was also allocated a motor vehicle registration number KCL 270T to facilitate his execution of duties.
45. The claimant alleges that the respondent withheld his salary from October, 2021 to January, 2022 thus creating a hostile environment which amounted to his constructive dismissal. It is the claimant's position that his resignation was not voluntarily but precipitated by failure by the respondent to pay his monthly salary rendering him completely unable to continue performing his duties.
46. The Court of Appeal in *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga* (supra) guided on the principles that a court should consider in determining whether constructive dismissal has occurred –
 - a. What are the fundamental or essential terms of the contract of employment?
 - b. Is there a repudiatory breach of the fundamental terms of the contract through the conduct of the employer?
 - c. The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.



- d. An objective test is to be applied in evaluating the employer's conduct.
- e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e. causation must be proved.
- f. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.
- g. The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
- h. The burden to prove repudiatory breach or constructive dismissal is on the employee.
 - i. Facts giving rise to repudiatory breach or constructive dismissal are varied.

47. In the above self-explanatory principles, the court held that employee must demonstrate that the employer's conduct was so grave that it constituted a repudiatory breach of the contract. One of the basic obligations of an employer is to allocate work to an employee and pay the agreed salary and allowances as and when the same falls due and payable – See Section 17 of the Act. Likewise, an employee is obligated to execute the allocated lawful instructions and to be terminated or dismissed only in accordance with the law – See Section 40, 41, 42, 43, 44, 45, 46 & 47 of the Act.

48. If and where an employer or an employee breaches any of the fundamental obligations provided in the land cited above the other party is entitled to bring the relationship to an end. It is no secret that an employer enjoys an upper hand in the relationship especially in an economy like ours where jobs are not easy to come by. It is from this reality that the principle of constructive dismissal developed. Simply put, if and where an employer creates an environment that is so toxic or uncondusive for an employee to continue executing his duties, going to the very root of the contract, an employee is free to leave the employment on the basis of the principles set out by the Court of Appeal in Coca Cola East & Central Africa Ltd. V Maria Kagai Ligaga (supra).

49. It is not denied that the respondent failed to pay to the claimant the agreed monthly salary from October, 2021 to January 18th 2022 when he resigned. It is the finding and holding of the court that non-payment of salary is a fundamental breach of a contract of employment.

50. However, in his letter of resignation the claimant stated as follows –

To

The Director

The Wine Company Ltd

Mr. Tajvir Bedi Tuesday 18th January 2022.

RE: Letter of Resignation

I am regretfully sending this letter to inform you of my resignation from my position at TWC. It has been a difficult decision for me to make, as I have enjoyed my 5 years service there and gained valuable experience that will serve me in the rest of the career.

However, I believe that taking this step will help me get closer to achieving my career goals.



Therefore, I would like to offer a notice of resignation with immediate effect. My 2020/2021 pending leave days will serve as notice of my resignation.

My last day of engagement with TWC will be today 18th January 2022.

I appreciate the professional development and growth from TWC for the last 5 years, and in particular, from you. Your mentoring support has encouraged me, and I hope that we will continue bridging our relationship as I move forward in my career. If there is anything I can do, please don't hesitate to ask me. I can be reached on my cell phone or email.

My dues computation should be as per my salary scale of 120,000 gross and allowance of 5,500 per week.

Also my pending Coast Market Visit claims which have been pending since July 2021 of 44,215/-.

Lastly, I want to state officially that my resignation is in no way to be perceived as me being unhappy or dissatisfied with the job, its responsibilities, or the leadership of TWC but due to the challenges I have faced last year.

I wish you and the rest of the administrative team continued success, and I want to take this opportunity again to thank you for permitting me to be part of the team.

Thank you.

Sincerely,

Samuel Maundu

Sales Manager/KAM.

18th January 2022.

51. The wording of the letter clearly shows and demonstrates that the claimant voluntarily resigned from his job. The reason(s) given by the claimant is that he wanted to proceed to another chapter in his career. There is no mention of delayed or unpaid salary or any other blame upon the respondent for the resignation. The tone of the letter is friendly and genuinely so. If the reason for the resignation was the salary arrears, or any other toxic working environment, nothing should have been easier than for the claimant to expressly state so.
52. One of the cardinal principles in considering constructive dismissal is that the toxic or unconducive environment created by an employer must be the fundamental reason for an employee leaving the employment. From the letter of resignation which was voluntarily authored and delivered by the claimant it is evidently clear that the reason for the resignation is that the claimant wished to grow and develop his career elsewhere.
53. Flowing from the foregoing, the court finds and holds that the claimant was neither constructively dismissed nor otherwise terminated but he voluntarily and wilfully resigned.

VII. Reliefs

54. Having held that the claimant willingly and voluntarily resigned from employment, the court shall now consider each of the reliefs sought by the claimant as set out in the introductory part of this judgment.
55. Prayer (a) is for salary arrears for October, November and December, 2021 up to 18th January, 2021. The respondent as the custodian of employment records did not avail evidence that it had paid to the claimant the claimed salary arrears and the same is granted as prayed in the sum of Kshs432,000/=.



56. Prayer (b) is allowance for December 2021 and January, 2022 amounting to Kshs. 24,200/=. Counsel for the claimant argued that the respondent did not rebut the evidence by the claimant that he was entitled to this allowance and the counsel for the respondent did not address this issue in his submissions. The same is granted as prayed in the sum of Kshs24,200/=.
57. Prayer (c) is for one month's salary in lieu of notice amounting to Kshs120,000/=. According to Section 35(1)(c) of the Act either party terminating a contract of employment shall give a 28 days notice in writing. In the resignation letter the claimant stated that his leave days should act as his notice period. The respondent did not avail any documentation to show how many leave days were due to claimant and as such the court takes the view that the claimant may have been entitled to those leave days. His resignation was voluntary and did not amount to dismissal or termination. In fact, it is the claimant who ought to have issued a one-month notice prior to resignation or forfeit one month's salary in lieu of the notice.
58. Prayer (d) is for 12 months' salary in compensation for wrongful dismissal and unfair termination amounting to Kshs1,440,000/=. As held above, the claimant voluntarily and wilfully resigned from his job and the court shall decline this prayer.
59. Prayer (e) is payment for 30 leave days accrued until 18/01/2022 amounting to Kshs120, 000/=. Although no records were availed by the respondent to confirm whether the claimant had accrued leave days at the time of resignation, the court declines to award this claim as the claimant indicated in the letter of resignation that he was trading the leave days for notice.
60. Prayer (f) is for reimbursement of costs incurred by the claimant on behalf of the respondent amounting to Kshs44,215/=. In his bundle of documents, the claimant availed a breakdown of the amount used and receipts in support thereof. This prayer is granted as prayed in the sum of Kshs44,215/=.
61. Prayer (h) is for a certificate of service. Section 51 of the Act requires that an employer issues an employee with a certificate of service. The respondent shall issue and deliver a certificate of service within 30 days of this judgment.

VIII. Costs

62. Costs follow the event and the claimant is awarded costs of his cause.

IX. Counter-claim

63. In the counter-claim it is pleaded that in the course of his employment the claimant collected debts for and on behalf of the respondent but failed to remit and or account for the monies recovered. It is further pleaded that motor vehicle registration No. KCL 270 T Toyota Probox belonging to the respondent was stolen while in custody and that the claimant forged LPOs in the name of the respondent.
64. Theft of a motor vehicle, and obtaining by false pretences or false accounting, forgery are all criminal offences over which this court has no jurisdiction to hear and determine. However, no iota of evidence was availed by the respondent to demonstrate yet alone prove that the claimant was involved in the alleged criminal conduct.
65. The pleaded general damages and special damages and fraud damages were not proved and hence prayer (a) and (b) of the counter-claim are hereby dismissed.



66. Prayer (c) is for Kshs120,000/= being one months pay in lieu of notice. The respondent failed to avail the claimant's records of employment during the trial and his evidence that he was owed 30 leave days stands unchallenged. The claimant traded the 30 days leave for notice and hence the court denied him notice pay in the dealing with the reliefs that he sought. Equally, the respondent is not entitled to notice pay as it owed the claimant the 30 days leave. This prayer is denied and dismissed.
67. The net effect of the above is that the counter-claim is hereby dismissed with costs.
68. Curiously, neither counsel submitted on the counter-claim.
69. This court (ELRC) is established under Article 162 of *the Constitution* and the jurisdiction of the court is set out under Section 12(1) of the Employment and *Labour Relations Act* as follows –
- (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including –
 - (a) disputes relating to or arising out of employment between an employer and an employee;
 - (b) disputes between an employer and a trade union;
 - (c) disputes between an employers' organisation and a trade union's organisation;
 - (d) disputes between trade unions;
 - (e) disputes between employer organisations;
 - (f) disputes between an employers' organisation and a trade union;
 - (g) disputes between a trade union and a member thereof;
 - (h) disputes between an employer's organisation or a federation and a member thereof;
 - (i) disputes concerning the registration and election of trade union officials; and
 - (j) disputes relating to the registration and enforcement of collective agreements.

70. The above provisions of the law confirm that this court's (ELRC) jurisdiction is limited to dealing with employment and labour relations disputes only. The issues raised by the respondent in the counter-claim are clearly and evidently outside the jurisdiction of this court.

X. Orders

71. In disposal of the cause and the counter-claim, the court issues the following orders –
- a. A declaration be and is hereby issued that the Claimant willfully and voluntarily resigned from his employment



b. The claimant is awarded Kshs500,415= made up as follows –

i. Salary for October, November,

December, 2021 and 18th January, 2022..... Kshs432,000

ii. Allowance for December 2021 and

January, 2022..... Kshs24,200

iii. Reimbursement of costs incurred

on behalf of the respondent.....Kshs44,215/=

Total Kshs500,215/=

c. The respondent is ordered to issue and deliver a certificate of service to the Claimant within 30 days of this judgment.

d. The claimant is awarded costs of the cause.

e. The counter-claim by the respondent is hereby dismissed in its entirety with costs to the claimant.

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

.....

DAVID NDERITU

JUDGE

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