



Sitati v SGA Security Limited (Employment and Labour Relations Appeal E218 of 2022) [2024] KEELRC 2819 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2819 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E218 OF 2022
AN MWAURE, J
NOVEMBER 8, 2024**

BETWEEN

MARY SITATI APPELLANT

AND

SGA SECURITY LIMITED RESPONDENT

(Being an Appeal from the Judgment of the Honourable (SRM) Mrs. M.W Murage delivered on 18th November 2022 in Nairobi MCELRC No. E004 of 2021)

JUDGMENT

1. The Appellant being dissatisfied by the entire judgment and decree of the Senior Resident Magistrate Hon. M.W Murage (Mrs) delivered on 18th November 2022 filed this appeal vide a memorandum of appeal dated 7th December 2022 on the grounds that: -
 1. The Honourable Magistrate erred in law and fact by failing to find that the Claimant had proven her case for constructive dismissal.
 2. The Honourable Magistrate totally erred in fact and law by failing to find that the Claimant was entitled to damage for unlawful dismissal.
 3. The Honourable Magistrate totally erred in fact and law by failing to find the Claimant was entitled to compensation for the overtime hours worked during her employment.
 4. The Honourable Magistrate totally erred in fact and law by failing to find that the Claimant was entitled to compensation for unpaid leave for 6 years, 6 months and for unpaid salary for the days worked in June, 2019.
 5. The Honourable Magistrate totally erred in fact and law by finding that the Claimant was paid a consolidated salary which contained house allowance.



6. The Honourable Magistrate erred in fact and law by totaling ignoring the Claimant's prayer for compensation for working during public holidays.
 7. The Honourable Magistrate totally erred in fact and law by totally ignoring the Claimant's prayer for settlement of unpaid NHIF & NSSF deductions.
 8. The court erred in law and fact by dismissing the Claimant's statement of claim dated 21st December 2020
2. The Appeal prays that:
 - a. The appeal be allowed and the Judgment of Hon. M.W Murage(Mrs) SRM delivered on 18th November, 2022 be set aside.
 - b. Costs of the appeal be awarded to the appellant
 3. The Appeal is canvassed by written submissions.

Appellant's submissions

4. The appellant submitted that she was not assigned any work duties from 13th June, 2024 to the date of resignation and the respondent did not provide any justification as her salary was based on the number of days worked. The appellant further submitted that since she was not assigned any duties, it amounted to constructive dismissal which essentially denied her salary without any explanation or reason. The appellant cited the case of Coca Cola East & Central Africa Limited V Maria Ligaga [2015] eKLR where the court dealt with the concept of constructive dismissal in Kenya.
5. The appellant cited the case of Western Excavating (ECC) Ltd V Sharp [1978] QB 761 and the court stated that if an employer engages in conduct that significantly breaches the employment contract or demonstrates an intention to abandon essential terms of the contract, the employee is entitled to consider themselves their obligations meaning the employee can terminate the contract without notice and claim constructive dismissal.
6. The appellant submitted that the trial court found that she was not terminate as she chose to resign and the trial court ignore the substance of the claim for constructive dismissal thus denying her damages for constructive dismissal. The appellant cited Section 49(1)(c) of the Employment Act which allows awarding compensation up to 12 months' salary totalling Kshs. 204,408/=.
7. The appellant submitted that the trial court declined to award for overtime and it was not in dispute that the appellant worked from 6:00 am to 6 pm and thus used to work 4 overtime hours a day totalling Kshs.744,549/= citing Section 27 of the Employment Act and Evans Kaitezo Aligulah V Eldomatt Wholesale and Supermarket Ltd [2016] eKLR in support of that proposition.
8. The appellant submitted that she did not proceed for her annual leave of six and half years when she worked for the respondent and therefore was entitled to Kshs. 102,024/= citing Section 28 of the Employment Act and Fancy Jeruto Cherop & Another V Hotel Cathay Limited [2018] eKLR in support of that proposition.
9. The appellant argued that she is entitled to accrued house allowances for six years of work, calculated based on her basic pay. According to the General Wages Order, the housing component should make up at least 15% of the basic wage, which amounts to Kshs.198,900/=.
10. The appellant submitted that the trial court declined to award for working during public holidays, despite working some days during public holidays thus the evidence was uncontested during the trial.



The appellant cited Section 10(3)(a) of the *Employment Act* which stipulates that the employer is required to pay the employee for work done on public holidays. As a result, the appellant is entitled to Kshs. 68,016.20/=.

11. The appellant submitted that the claim for constructive dismissal was well proven and the Appeal has merit urging the court to set aside the Judgment of the trial court.

Respondent's submissions

12. The Respondent defined constructive dismissal according to the Black's Law Dictionary (9th Edition) as "termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave"
13. In *Sophie Muthoni Njagi V Rift Valley Railways (Kenya) Limited* [2020] eKLR the court cited cause number 611 of 2009 *Maria Kagai Ligaga V Coca Cola East and Central Africa Limited*[unreported] the court held that constructive dismissal occurs when an employee is forced to quit their job due to the employer's conduct even without being formally dismissed. It occurs if the employer breaches the employment contract in a fundamental way, and the employee resigns promptly as a direct result of the breach.
14. In *Kenneth Kimani Mburu & another V Kibe Muigai Holdings Limited* [2014] eKLR the court stated that constructive dismissal occurs when an employee terminates the contract under which he is employed with or without notice, in circumstances, which is entitled to terminate it without notice, by reason of the employer's conduct.
15. The Respondent submitted that the appellant resigned on her own volition, so she was not constructively dismissed. This did not breach the contract of employment in any fundamental way, nor did the employer's conduct make it intolerable for the appellant to continue working. The Respondent further submitted that the trial court found that the resignation was voluntary and not the result of constructive dismissal.
16. The Respondent submitted that the appellant is not entitled to damages under Section 49 of the *Employment Act* as she did not prove her case and the respondent relied on the case of *Sophie Muthoni Njagi V Rift Valley Railways* (Supra) where the court found that the claimant had voluntarily resigned from her employment as the prayer for constructive dismissal could not be granted.
17. The Respondent submitted that the appellant is not entitled to compensation for overtime as her working hours were consistent with her contract and did not exceed the terms agreed upon. The Respondent relied on *Charles Nguma Maina V Riley Services Limited* [2018] eKLR and *Evans Katiezo Alligulah V Eldomatt Wholesale and Supermarket Ltd* [2016] eKLR in support of that proposition.
18. The Respondent submitted that the appellant is not entitled to compensation for public holidays as she did not avail any evidence to support such as duty roster or payroll record showing that she worked on public holidays without being compensated. The Respondent relied on the case of *Ngunda V Ready Consultancy Limited* [2022] KECA 557 and *Kudheih Workers V Charles Waithaka Goka t/a Apple Bees Pub and Restaurant* [2013] eKLR.
19. The Respondent submitted that the appellant also did not provide that she was denied to take her leave. The Respondent also submitted that the appellant is not entitled to a claim for untaken leave for a period beyond eighteen months and relied on *Togom V Radar Limited* (*Employment and Labour Relations Appeal E003 of 2023*) [2024] KEELRC 112 (KLR) in support of that proposition.



20. The Respondent submitted that the appellant's salary was in accordance with the Regulation of Wages (General) (Amendment) Order 2018 which provides that the minimum daily and hourly rates are inclusive of house allowance. The appellant being a security guard earning a daily wage of Kshs. 654 was remitted and was a slightly higher wage of Kshs. 653.10 prescribed under the Schedule which includes house allowance.
21. In *Patrick Nambila Mikuzi V Ashton Court Apartments Limited* [2020] eKLR the court found that the salary was consolidated and inclusive of house allowance and the claim for house allowance was dismissed. The Respondent submitted that the appellant was adequately compensated including housing as the payment made was in compliance with the statutory rates.
22. In conclusion, the Respondent submitted that the appellant failed to prove her claim and urged the court to dismiss the appellant's appeal and uphold the decision of the trial court.

Determination

23. Arising from the grounds of appeal the main issue of determination is whether the appeal is merited.
24. It is not in dispute that the appellant was employed by the respondent as the security guard who was deployed in various places.
25. The Appellant submitted that she was constructively dismissed as the respondent failed to assign her any duty and the trial court failed to analyze the circumstances that led to her resignation as she was forced due to the frustration but did not resign voluntarily.
26. Upon perusing the record of appeal, it is clear that the appellant's letter dated 22nd June 2020, does not constitute a resignation. Instead, it expresses frustration over the failure of the respondent to issue her with an employment letter. Additionally, the title of the letter does not suggest that it is a resignation. Furthermore, the appellant did not provide a one-month notice as required.
27. In the Court of Appeal case of *Coca Cola East & Central Africa Limited V Maria Ligaga* (Supra) the court held that "the employer's conduct should be so grave that it constituted a repudiatory breach of contract of employment – this is the contractual test. The contractual test is narrower than the reasonable test... we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of contract of employment... the employer's conduct does not have to be intentional or in bad faith before it can be repudiatory... The employee must be able to show that he left in response to the employer's conduct..."
28. The appellant in her letter of 'resignation' wrote in part-

"In the recent past my employment has been frustrated. I have not received any posting and I have not been paid my dues."
29. Obviously, one is employed to perform the tasks they are employed to undertake and are paid for the same. If this does not take place then a case of constructive dismissal is eminent. Furthermore where the employee is not paid their dues as in this case.

The appellant had not apparently even been availed an employment letter. This was despite having worked for the respondent for over six (6) years.
30. Persuaded by the holding in the often cited cases of *Coca Cola East And Central Africa Limited - vs- Maria Ligaga* (Supra) and the one of *Western Excavating (ECC) Ltd -vs- Shapr* (1978) QB 78 the



court finds the appellant did not resign voluntarily but was forced to resign due to the environment pertaining at the place of work. In the case of Western Excavating Ltd the court stated that if an employer engages in a conduct that significantly breaches the employment contract to demonstrate an intention to abandon essential terms of the contract, the employee is entitled to consider their dues and can terminate their contract without notice and claim constructive dismissal.

No wonder in this case the appellant just asked to be released from her employment and gave seven (7) days' notice.

31. In view of the foregoing, this Honourable Court hereby finds a case of constructive dismissal has been established. The judgment of the trial court delivered on 18th November 2022 is therefore set aside and will give the listed awards: -

- (a) The court will award the appellant compensation for ten (10) months' salary amounting to Kshs.172,040/= which is calculated as follows: Kshs.17,204 X 10= Kshs.172,040/=
- (b) Unpaid days in June 2020 – Kshs.8,502/=
- (c) The court has declined to award overtime, unpaid leave, house allowance, and public holidays as the same was not proven and in this case the court is in concurrence with the trial court.
- (d) The total award is Kshs.180,542/= plus interest at court rates at 14% per annum from date of judgment till full payment.

The appellant is awarded costs of the appeal as well as costs of the lower court trial.

Order accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8TH DAY OF NOVEMBER, 2024.

ANNA NGIBUINI MWAURE

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.

