



**Maina v Lavington Security Limited (Cause 1815 of 2017)
[2024] KEELRC 13516 (KLR) (13 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13516 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1815 OF 2017
K OCHARO, J
DECEMBER 13, 2024**

BETWEEN

HARRISON KIROMO MAINA CLAIMANT

AND

LAVINGTON SECURITY LIMITED RESPONDENT

JUDGMENT

Introduction

1. At all material times the Claimant was an employee of the Respondent as a Night Guard. Contending that he was prompted to resign from his employment as a result of the Respondent’s inaction and actions he sued the latter claiming for, a declaration that he was constructively dismissed from employment, compensation for unfair dismissal, compensation for salary underpayment, unpaid house allowance, compensation for earned but untaken leave days, service pay, costs and interest.
2. By its Answer to the Claimant’s Statement of Claim, the Respondent resisted the claim herein, denied the Claimant’s cause of action against it, and entitlement to the reliefs sought.
3. The Claimant’s case was heard on the 22nd February 2023, while the Respondents’ was on 16th May 2023. After hearing their respective cases, this Court ordered the parties to file their submissions. They obeyed the order, and their submissions are on record.

The Claimants’ case

4. At the hearing, the Claimant adopted his witness statement dated 6th September 2017 as his evidence in chief, and tendered as documentary evidence, the documents he filed under the list of documents of the even date.
5. It was the Claimant’s case that he first came into the employment of the Respondent in January 2009, as a Night Watchman at a net salary of kshs. 5,800 per month.



6. He contended that he was not issued with a written contract and that during his tenure of employment, the Respondent never issued him with an itemized pay slip.
7. He contended further that the Respondent never remitted NSSF and NHIF contributions to the relevant Authorities, notwithstanding, the deductions that it made on his monthly salary for remitting.
8. The Respondent did not allow him the chance to enjoy his annual leave. Additionally, he used to work from 6.00pm to 6.00a.m., therefore working overtime.
9. In June 2010, the Respondent increased his salary to kshs. 6,100 per a month salary which he continued earning up to May 2011. Thereafter at various times, the salary was increased variously as hereunder: -
 - a. June 2011 to August 2011.....kshs. 6,400.00
 - b. September 2011 – April 2012.....kshs. 7,800.00
 - c. May 2012 to September 2012.....kshs. 8,000.00
 - d. October 2012 to September 2013.....kshs. 9,050.00
 - e. October 2013 to December 2015.....kshs. 9,785.00
10. At all material times the salaries paid to him were below the relevant minimum wages.
11. The Respondent did not provide him with appropriate attire and as a result he was subjectable to cold, flu and other chest complications due to exposure to the cold conditions. His complaints regarding the underpayment and lack of appropriate attire for his work, were never acceded to by the Respondent.
12. On or about June 2015 while on duty at Bamuda Plaza, Nairobi, he and his colleagues were attacked by thugs. As the Respondent did not have a proper and functioning response system, there was no help that came from the Respondent. His colleagues and him were only rescued the following morning by the police. This experience traumatized him and he could no longer, therefore, work well.
13. The trauma, coupled with his worsening health condition due to exposure to the cold and the Respondent's failure to allow him to proceed for leave, forced him to resign on 30th November 2015. His resignation was therefore not voluntary. He was, therefore, constructively dismissed.
14. He asserted that considering the various Minimum Wage Orders during his tenure of employment, he was under paid as hereunder:-
 - a. January 2010 to May 2010
 Minimum wage per month.... kshs. 7,523.00
 Salary per month.....kshs. 5,800
 (kshs. 7,523-ksh. 5,800) = 1,723.00
 (kshs. 1723.00x5 months)kshs, 8,615.00
 - b. June 2010 to December 2010
 Minimum wage per month.... kshs. 7,523.00
 Salary per month.....kshs. 6,100
 (kshs. 7, 523.ksh. 6,100) = 1,423.00
 (kshs. 1,423x7 months)kshs. 9,961.00



- c. January 2011 to May 2011
 Minimum wage per month ...kshs. 8,462.00
 Salary per month = kshs. 6,100
 (kshs. 8,463-kssh. 6,100) = kshs. 2,363.00
 (kshs. 2,363.00X 5 months) kshs. 11,815.00
- d. June 2011 to August 2011
 Minimum wage per month = kshs. 8,463.00
 Salary per month = kshs. 6,400
 (ksh. 8,463.00-kshs. 6,400.00) = 2,063.00
 (kshs. 2,062.00x3 months)kshs. 6,189.00
- e. September 2011 to December 2011
 Minimum wage per month. = kshs. 8,463.00
 Salary per month = kshs. 7,800
 (kshs. 8,463.00-kshs. 7,800) = kshs. 663.00
 (kshs. 663.00x4 months) kshs. 2,652.00
- f. January 2012 to April 2012
 Minimum wage per month = kshs. 9,572.00
 Salary per month = kshs. 7,800
 (kshs. 9,572.00-kshs. 7,800) = kshs. 1,1772.00
 (kshs. 1,772.00X4 months)kshs. 7,088.00
- g. May 2012 to September 2012
 Minimum wage per month = kshs. 9,572.00
 Salary per month = kshs. 8,000
 (kshs. 9,572-kshs. 8,000) = 1,572.00
 (kshs. 1,572.00x5 months)kshs. 7,860.00
- h. October 012 to December 2012
 Minimum wage per month = kshs. 9,572.00
 Salary per month = ksh. 9,050.00
 (kshs. 9572-kshs. 9,050.00) = 522.00
 (kshs. 522.00x 3 months)kshs. 1,566.00
- i. January 2013 to September 2013
 Minimum wage per month = kshs. 10,911.70
 Salary per month = kshs. 9,050.00



(kshs. 10,911.70-ksh. 9,050=) 1,861.70
Kshs. 1,861.70X9 months)kshs. 16,755.30

- j. October 2013 to December 2013
Minimum wage per month = kshs. 10,911.70
Salary per month = kshs. 9,585
(kshs. 10,911.70-9,585) = ksh. 1,326.70
(kshs. 1326.70 x 3 months)kshs. 3,980.10
- k. January 2014 to December 2014
Minimum wage per month = kshs. 10,911.70
Salary per month = kshs. 9,585.00
(kshs. 10,911.70-ksh. 9,585.00) = ksh. 1,326.70
(kshs. 1,326.70x12 months) kshs. 15,290.40
- l. January 2015 to December 2015
Minimum wage per month = kssh. 12,221.10
Salary per month = kshs. 9,585.00
(kshs. 12,221.10- kshs. 9,585.00) = kshs. 2,636.10
Kshs. 2,636.10x12 months)kshs. 31,633.20.

15. Throughout his employment the Respondent did not pay him house allowance though he was legally entitled to. He was entitled to house allowance as hereunder: -

- a. January 2009 to December 2009
15% of kshs. 5,800= kssh. 870.00
(kshs. 870.00x12 months)ksh. 10,440.00
- b. January 2011 to December 2011
15% of kshs. 8,462.00 = kshs. 1,269.45
(kshs. 1,269.45 x 12 months)kshs. 13,541.40
- c. January 2012 to December 2012
15% of kshs. 9,572.00 = kshs. 1,435.80
(kshs. 1,435.80x12 months)kshs. 17,229.60
- d. January 2013 to December 2013
15% of kshs. 10,911.70 = ksh. 1,636.76
(kshs. 1,636.76x 12 months)kshs. 19,641.12
- e. January 2014 to December 2014
15% of kshs. 10,911.70 = kshs. 1,636.76
(kshs. 1,636.76x12 months)kshs. 19,641.12



- f. January 2015 to December 2015
 15% of kshs. 10,911.70= kshs. 1,626.76
 (kshs. 1,833.17x12 months)kshs. 21,998.04
16. Due to the failure by the Respondent to allow him proceed for his annual leave at the time of separation he had earned but unutilized leave days for which he was entitled to be compensated as follows:-
- a. Year 2009
 Salary per day = kshs. 193.33
 (kshs. 193.33x21 days)kshs. 4,059.93
- b. Year 2010
 Salary per day = kshs. 361.00
 (kshs. 361.00x21 days)kshs. 7,581.00
- c. Year 2011
 Salary per day = kshs. 406.10
 (kshs. 406.10x21 days)kshs. 8,428.10
- d. Year 2012
 Salary per day = kshs. 459.30
 (kshs. 459.30X 21 days)kshs. 9,645.30
- e. Year 2013
 Salary per day = kshs. 523.60
 (kshs. 523.60X21 days).....kshs. 10,995.60
- f. Year 2014
 Salary per day = kshs. 523.60
 (kshs. 523.60x21 days).....kshs.10,995.60
- g. Year 2015
 Salary per day = kshs. 586.40
 (586.40x 21 days) kshs. 12,314.40
17. At separation, the Respondent unjustifiably failed and or neglected to pay him the above stated benefits, and severance pay in the sum hereunder:
15. days salary for each year worked
- a. year 2009
 (kshs. 6,670x 1/2).....kshs. 3,335.00
- b. year 2010
 (kshs. 8,651.45x 1/2)kshs. 4,325.73



- c. year 2011
(kshs. 9,732.45x 1/2)kshs. 4,866.23
 - d. year 2012
(kshs. 11,007.80x 1/2) Kshs. 5,503.90
 - e. year 2013
(kshs. 12,548.46x1/2)kshs. 6,274.23
18. Cross-examined, he asserted that the only time he was given an itemized pay slip was when demanded for the one he tendered in Court as an exhibit. The pay slip for October 2013, shows his gross salary as kshs. 9,585.00
 19. Though he wrote his resignation letter on 30/11/2015, he worked in the month of December 2015, therefore. As such, he forfeited his salary for the month.
 20. After separation, he wrote a letter to the Kenya Human Rights Commission. In the letter he alleged that the Respondent was owing him kshs. 210,744.

The Respondents' case

21. The Respondent presented Pauline Kaki Nyamai, its Human Resource Manager to testify on its behalf in support of its defence against the Claimant's case.
22. The witness adopted the contents of her affidavit sworn on 14th March 2023 as her evidence in chief.
23. She stated that the Claimant resigned from his employment on 30th November 2015 out of his own volition giving a one months' notice. His services were not terminated, therefore.
24. She further stated that the Claimant did not at any time report to the Respondent any medical complication arising from the alleged attack by thugs in June 2015. Further, he never reported the attack.
25. He was paid his salary for December 2015. At all times, he was paid salary that was in accord with the minimum regulations for workers in the protective security services industry.
26. The Claimant was allowed to proceed for his leave as that was required.
27. Cross-examined by Counsel for the Claimant, the witness stated that the Claimant was first employed in January 2010 at a basic salary of kshs. 7,640. At separation, his monthly salary had risen to kshs. 10,500. The witness admitted that she knew the minimum wage Order applied to the Claimant and that he was being underpaid. As at 2015, his minimum wage ought to have been kshs. 12,221.
28. The witness contended that the Claimant's salary was a consolidated salary, therefore, inclusive of his house allowance. Further, he often proceeded for his annual. At separation, he did not have any earned but unutilized leave days.

Analysis and Determination

29. I have considered the pleadings, evidence and submissions by the parties, the following issues emerge for determination.
 - a. Whether the Claimant was constructively dismissed.



- b. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was constructively dismissed.

30. The Claimant pleaded, and her witness submitted that he was forced to resign and as such he was constructively dismissed. The Respondent on the other hand contended that the Claimant voluntarily resigned and cannot be heard to assert that he was constructively dismissed. The circumstances of this matter do not at all point to a constructive dismissal.
31. Constructive dismissal is a dismissal where the employee terminates the contract, either with or without notice in circumstances which he is entitled to terminate it without notice by reason of the employer's conduct. On general principles, it is not mandatory for the employee to inform the employer of his or her reason for leaving the employment, the test is simply one of causation, that is to say, was the employee's departure caused by the employer's conduct?
32. The Court of Appeal authoritatively put forth the principles considerable to determine a claim for constructive dismissal in the case of *Coca Cola East & Central Africa Ltd -vs- Maria Kagai Ligaga* [2015] eKLR, thus:-
 - 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 conduct of the employer?
 - c. The conduct of the employer must be a fundamental or significance 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. The 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 leaving the contract. I.e. allegation must be proved.
 - f. An employee may leave with or without notice for as 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 the repudiatory breach or constructive dismissal is on the employee.
 - i. Facts giving rise to repudiatory breach or constructive dismissal are varied.
33. Bearing in mind that in a claim for constructive dismissal the burden of proof lies on the employee. I have carefully considered the Claimant's pleadings and witness statement, and conclude that he did not establish that the resignation was as a result of the Respondents' repudiatory breach or that it had exhibited that it no longer intended to continue being bound by the contract of employment.
34. In my view the allegations that were made by the Claimant of the conduct of the Respondent were bare allegations which remained without evidential proof.
35. In the upshot, I am persuaded by the submissions by the Respondent's Counsel that the Claimant did not prove constructive dismissal. I find that he voluntarily resigned from his employment.



Whether the Claimant is entitled to the reliefs sought

36. Having found that the Claimant was not constructively dismissed, I cannot hesitate to conclude that in the circumstances the compensatory relief contemplated under Section 49(1)(c) of the Employment Act cannot be availed to him.

37. Section 48 of the Labour Institutions Act provides: -

“(1) Notwithstanding anything contained in the Act or any other written law: -

- a. The minimum rates of remuneration or conditions of employment established in a Wage Order constitutes a term of employment of any employee to whom the wage order applies and may not be varied by agreement.
- b. If the contract of an employee to whom the wage order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for conditions of employment prescribed in the wages regulation order or provides for less favourable condition of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.”

38. It is clear therefore that where a wage order stipulates a minimum wage and or condition of work such wage and or condition cannot be but contracted.

39. Sub-section 2 provides: -

“An employer who fails to

- a. Pay to the employee to whom a wage regulation order applies at least the statutory minimum remuneration or
 - b. Provide an employee with the condition of employment prescribed in the order, commits an offence.
- (3) if an employee is found guilty of an offence under subsection (2) the Court may in addition to any other penalty order the employer to pay the employee the difference between the amount which ought to have been paid in terms of the wage order and the amount which was actually paid.
- (5) the powers given by this section for the recovery of sums due from an employer to an employee shall be in addition to and not in derogation of any right to recover such sums by proceedings.”

40. Undeniably, the Regulations of Wages (Protective Security Services Order 1998) was applicable to the Claimant. I have carefully considered the basic minimum monthly wages [exclusive of allowances] for Night Guards that were gazetted at various times between 2010-2015 and I am persuaded that at all material times the Claimant was paid below the statutory minimum wages as elaborately brought out in his pleadings. His claim was properly anchored on the provisions of section 48(5) of the Labour Institution Act. He is entitled to be paid the cumulative sum, the difference between that what he ought



to have as a minimum wage and what he actually earned for the entire time he was in the employment at the Respondent's.

41. Section 31 of the Employment Act places a duty on the employer to provide accommodation for his or her employee(s) or an allowance in lieu, to enable them get reasonable accommodation. Therefore, under this provision a corresponding right to be accommodated or a house allowance in lieu is created.
42. Regulation 5 of the Regulation of Wages (Protective Security Services) order, 1998 provides: -

“An employee who is not provided with free housing, accommodation by his employer shall in addition to his basic minimum wage, be paid housing allowance of one thousand shilling per month or fifteen per cent of his basic minimum monthly wage, whichever is higher”.
43. In answer to the Claimant's claim for unpaid house allowance, the Respondent asserted that he was earning a consolidated salary. This cannot be held to be true for the reasons; first the Respondent did not place any material before this Court from which such can be discerned. Second, at all material times as I have found hereinabove, the Claimant was underpaid. His monthly earnings were all through less the minimum wages (exclusive of house allowance) that was provided for in the relevant wage orders. The amounts set out in his statement of claim under the head “house allowance” are well computed.
44. Though the Respondent's witness asserted that at all times, the Claimant was allowed to enjoy his statutory right of annual leave, the Respondent failed to tender as evident the leave application forms that the Claimant allegedly signed. As a result, I have no option but get persuaded by the Claimant's position that he neither enjoyed the right nor got compensated for the leave days earned but not utilized.
45. Section 35 of the Employment Act provides for the benefit of service pay. However, under Sub-section 6 excludes certain categories of employees from pursuing or asserting that they are entitled to the service pay. One of those categories are those employees who are members of the National Social Security Fund (NSSF). From the materials placed before me, I am convinced that the Claimant was a member of NSSF and therefore undeserving of the relief sought under the head “service pay”.
46. In the upshot, judgment is hereby entered for the Claimant in the following terms.
 - a. Compensation for the underpaid salary, pursuant to the provisions of Section 48(5) of the Labour Institutions Actkshs 124,024.30
 - b. Unpaid house allowance kshs. 114,724.28
 - c. Compensation for earned but unutilized leave days: -

Year	
i.	2009kshs. 4,130.00
ii.	2010.....kshs. 5,266.00
iii.	2011.....kshs. 5,924.00
iv.	2012kshs. 6,700.40
v.	2013.....kshs. 7,638.19



vi. 2014.....kshs. 7,638.19

vii. 2015.....kshs. 8,554.77
Kshs. 45,850.77

d. Costs of the suit.

e. Interest on the sum awarded above, from the date of this judgment till full payment.

f. The Respondent to issue the Claimant with a certificate of service within 30 days of today.

READ SIGNED AND DELIVERED THIS 13TH DAY OF DECEMBER 2024.

OCHARO KEBIRA

JUDGE.

In presence of

Ms. Sikuku for Cherono for the Claimant.

No appearance for the Respondent.

