



**Katharua v Lords Healthcare Limited (Cause 532 of 2019)
[2024] KEELRC 13349 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13349 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 532 OF 2019
L NDOLO, J
DECEMBER 5, 2024**

BETWEEN

THOMAS MUNENE KATHARUA CLAIMANT

AND

LORDS HEALTHCARE LIMITED RESPONDENT

JUDGMENT

1. The Claimant’s claim against the Respondent, brought by a Memorandum of Claim dated 15th August 2019, is for compensation for wrongful dismissal and payment of terminal dues. In reply, the Respondent filed a Memorandum of Defence and Set-Off dated 11th September 2019.
2. At the trial, the Claimant testified on his own behalf and the Respondent called its Business Development Manager, Bernard Muriithi Njeru. Thereafter, the parties filed written submissions.

The Claimant’s Case

3. By a letter of appointment dated 25th February 2019, the Claimant was employed by the Respondent, in the position of Marketing Line Manager, earning a monthly salary of Kshs. 80,000.
4. In addition, the Claimant claims to have been entitled to a mileage allowance of Kshs. 1,400 per day, for use of his personal motor vehicle for official work. The Claimant states that he was only paid his mileage allowance for March and April 2019 and upon his inquiry on this lapse, the Respondent demanded that he proceeds to clear, upon which he would be released from his duties. The Claimant therefore gave a resignation notice dated 19th June 2019, which was to take effect on 27th June 2019.
5. The Claimant lays a claim of constructive dismissal against the Respondent and therefore claims the following:
 - a. 7 days’ salary in lieu of notice.....Kshs. 18,667



- b. 12 months' salary in compensation.....960,000
- c. Salary for June 2019.....72,000
- d. Mileage allowance for 1.5.2019-18.6.2019.....53,200
- e. unremitted NHIF dues for June 2019.....500
- f. Unremitted NSSF dues for June 2019.....400
- g. Certificate of service
- h. Costs plus interest

The Respondent's Case

6. In its Memorandum of Defence and Set-Off dated 11th September 2019, the Respondent states that the Claimant voluntarily resigned from employment, during probation.
7. The Respondent denies that the Claimant was entitled to mileage allowance and puts him to strict proof. The Respondent asserts that any compensation for use of the Claimant's personal motor vehicle would be subject to written agreement and GPRS records.
8. The Respondent admits owing the Claimant Kshs. 50,667 being salary for days worked in June 2019 plus Kshs. 18,667 in notice pay.
9. By way of set-off the Respondent claims Kshs. 9,477.50 being outstanding balance on cash sale number CSD50023523 plus Kshs. 2,000 being unpaid cheque charges, from the Claimant.
10. The Respondent also seeks to recover from the Claimant Kshs. 13,352 being Pharmacy and Poisons Board licence fees for the months June and July. In addition, the Respondent claims Kshs. 2,280 advanced to the Claimant as fuel allowance for the period between 19th June 2019 and 21st June 2019. The Respondent therefore states that only Kshs. 42,224.50 is due to the Claimant.

Findings and Determination

11. There are two (2) issues for determination in this case:
 - a. Whether the Claimant has proved a case of constructive dismissal;
 - b. Whether the Claimant is entitled to the remedies sought.

Constructive Dismissal?

12. On 19th June 2019 at 4.47 PM, the Claimant sent the following email to the Respondent:

“Dear Sir,

Re: Resignation From Work

I am giving a one week notice that I will be leaving the company effective 27th June 2019. I appreciate the short time we have interacted, and wish you the very best in your endeavours.

God bless you.

Regards

Thomas Munene”



13. According to the Claimant, he was forced to resign by the Respondent's conduct. In this regard, he complains that he was removed from a work WhatsApp group and that the Respondent failed to pay his mileage allowance. He therefore makes a claim of constructive dismissal.
14. Constructive dismissal occurs where an employer commits a fundamental breach of the employment contract, leaving the employee with no option but to leave. In *Western Excavating ECC Ltd v Sharp* [1978] 2 WLR 344, Lord Denning stated the following:

“If the employer is guilty of conduct which is a 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, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he has terminated the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains of, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”
15. Closer home, in *Nathan Ogada Atiagaga v David Engineering Limited (Cause No 419 of 2014)* constructive dismissal was defined thus:

“Constructive dismissal occurs when an employee resigns because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge.”
16. In his brief resignation notice sent by email on 19th June 2019 at 4.47 PM, the Claimant did not disclose the reason for his decision to resign. There is in fact no hint of any grievance between him and the Respondent.
17. However, in his claim and testimony before the Court, the Claimant states that his woes began after his inquiry about an accrued mileage allowance. He accuses the Respondent of not only failing to pay him this allowance but also removing him from a work WhatsApp group.
18. Regarding the claim for accrued mileage allowance, the Respondent states that the Claimant had failed to provide required supporting information in the nature of a GPRS report showing the use his personal motor vehicle for official duty. With respect to the complaint by the Claimant that he had been removed from a work WhatsApp group, the Respondent out-rightly denies any such action.
19. It seems to me that although there might have been some form of grievance between the Claimant and the Respondent, there was no proof of any action by the Respondent that could be construed as a fundamental breach of the employment contract.
20. I therefore find and hold that the Claimant has failed to establish a case of constructive dismissal. The claim for compensation is therefore without basis and is dismissed.



Other Claims

- 21. The Claimant did not adduce any evidence to support his claim for mileage allowance which therefore fails and is disallowed.
- 22. The Respondent admits the claims for salary for days worked plus 7 days’ notice pay but counterclaims Kshs. 9,477.50 being an unpaid balance on cash sale number CSD50023523 plus Kshs. 2,000 as unpaid cheque charges.
- 23. In addition, the Respondent claims Kshs. 2,280 said to have been advanced to the Claimant as fuel allowance for the period between 19th June 2019 and 21st June 2019. The Respondent did not however adduce any evidence to support these claims and the counterclaim therefore fails to this extent.
- 24. The Respondent also counterclaims Kshs. 13,352 being Pharmacy and Poisons Board licence fees paid on behalf of the Claimant, which the Claimant did not deny. This part of the counterclaim therefore succeeds and is allowed.
- 25. Regarding the claims for unremitted NHIF and NSSF dues, the only thing to say is that any such dues would be payable to the respective statutory body and not to the Claimant.
- 26. Finally, I enter judgment in favour of the Claimant as follows:
 - a. Salary for days worked in June 2019.....Kshs. 50,667
 - b. 7 days’ notice pay.....18,667
 - Total.....69,334
 - Less PPB licence fees.....(13,352)
 - Amount payable to the Claimant.....55,982
- 27. This amount will attract interest at court rates from the date of judgment until payment in full.
- 28. The Claimant is also entitled to a certificate of service.
- 29. As the claim succeeds only in part, each party will bear their own costs.
- 30. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF DECEMBER 2024

LINNET NDOLO

JUDGE

Appearance:

Mr. Baragu for the Claimant

Ms. Nini h/b for Mr. Maina for the Respondent

