



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ayonga v Falcon Signs Limited (Cause 878 of 2017)  
[2023] KEELRC 300 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 300 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 878 OF 2017  
BOM MANANI, J  
FEBRUARY 9, 2023**

**BETWEEN**

**JOSEPHAT OTONGO AYONGA ..... CLAIMANT**

**AND**

**FALCON SIGNS LIMITED ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant was an employee of the respondent until October 5, 2015 when he tendered his resignation. He asserts that he was forced into resigning from employment. In his view, he was a victim of constructive dismissal. The claimant has thus filed these proceedings seeking, among others, compensation for wrongful termination.
2. The respondent does not admit liability. It is the respondent's position that the claimant voluntarily resigned from employment. Therefore, the issue of unlawful termination of his contract does not arise.

**Claimant's Case**

3. According to the claimant, he was first employed by the respondent in January 2010. He was to serve as a heavy commercial vehicle driver.
4. Around July 2015, the claimant alleges that he developed eye complication. That he sought permission from the respondent to go for treatment but this was declined. As a result, he was forced to resign from employment. He tendered a notice in this regard on October 5, 2015 and the same was to take effect on November 8, 2015.
5. The claimant avers that the resignation was not voluntary but forced by the fact that the respondent declined to grant him permission to proceed on leave in order to seek medication. Consequently, it is the claimant's case that he was constructively dismissed.



## Respondent's Case

6. On its part, the respondent avers that the claimant was not unfairly relieved of his employment. On the contrary, he voluntarily tendered his resignation from employment. The respondent avers that it accepted the claimant's resignation with the consequence that the contract of service between the parties came to a close.
7. The respondent denies that this is a case of constructive dismissal as the claimant's decision to resign was not forced. Accordingly, the respondent prays that the suit be dismissed with costs to the respondent.

## Issues for Determination

8. After analyzing the pleadings and evidence on record, I consider the following to be the issues for determination:-
  - a. Whether the claimant's contract of service was unfairly terminated.
  - b. Whether the parties are entitled to the reliefs sought in their pleadings.

## Analysis

9. The dispute between the parties revolves around the mode of termination of their employer-employee relation and the legal consequences thereof. It is without doubt that the termination was occasioned by the claimant's decision to resign from employment. The question for determination is whether the said resignation was voluntary or forced.
10. Resignation is one of the modes of terminating the employer-employee relationship. It is a tool that is available to an employee to trigger his separation from the employer.
11. Being a unilateral act, the employee who wishes to sever the employer-employee relation can elect to serve the employer with a resignation. The resignation may be expressed to take effect either immediately or at a later date as indicated by the employee.
12. Once the employee communicates the decision to resign from employment, the contract of employment is effectively terminated. The validity of the resignation is not dependent on the employer accepting it (see *Herbert Wafula Waswa v Kenya Wildlife Services* [2020] eKLR).
13. At the same time, an employee is under no obligation to justify the decision to resign from employment. All that he is required to do is provide the requisite notice to terminate the contract or make payments *in lieu* of such notice.
14. However, for a resignation to be deemed as lawfully terminating a contract of employment, it must be voluntary. Where the resignation is involuntary, the termination that flows from it is construed as unlawful as against the employer.
15. A forced or involuntary resignation by an employee is usually deemed as constructive termination of employment by the employer. In the eyes of the law, an employee who is forced into resigning is considered as having been unfairly terminated.
16. Constructive termination is a creature of common law. It has yet to be legislated upon in Kenya. Consequently, its foundation and boundaries are usually determined from precedent.



17. Constructive termination often arises when the employer makes it impossible for the employee to deliver on his mandate thus forcing the employee to take the decision to resign from work. Whether the employer has rendered the work environment so hostile as to force the employee into resigning is a matter of fact to be determined on a case by case basis. The primary consideration is that the employer's conduct must have fundamentally breached the employment contract as to result in an implied repudiation of the contract (see *Herbert Wafula Waswa v Kenya Wildlife Services* [2020] eKLR).
18. The circumstances that may force an employee to resign from employment are varied. They include: unilaterally demoting the employee from his current position at the workplace; persistently failing to allocate the employee work; and unilaterally varying the terms and conditions of the employee's contract.
19. In terms of the burden of proof, the legal position is that the burden of proving that the employer forced the employee into taking the decision to resign from employment lies with the employee. This position has been reiterated in a number of decisions (see for instance *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR and *Herbert Wafula Waswa v Kenya Wildlife Services* [2020] eKLR).
20. In the case before me, it is clear that the claimant tendered his resignation on October 5, 2015. He indicated that the resignation was to take effect on November 8, 2015, approximately one month from the date of the notice.
21. In the letter, the claimant indicated that he was resigning in order to create time to take care of his eyes and himself. He did not mention that he had been denied an opportunity by his employer to seek medication. Neither did he mention that he was acting on expert medical advice that he should refrain from working until his eye problem had been fixed. There is no evidence showing that the claimant presented to the employer medical evidence confirming that the eye ailment was of the magnitude that required him to stay away from work and that the employer ignored the medical opinion.
22. There is no evidence that in the days immediately preceding the decision to resign the claimant had applied for leave to go for medication and that the same had been denied by the respondent. It is to be noted that from his own pleadings, the claimant states that the eye problem was first noticed by him on July 1, 2015. Therefore, evidence relating to whether or not leave had been applied for before this date is of no relevance to the dispute.
23. In effect, I do not think that this case satisfies the threshold for a declaration that the claimant's employment was constructively terminated. The claimant has failed to provide evidence to demonstrate that the respondent's conduct forced him into taking the decision to resign from employment.
24. In their submissions, the claimant's lawyers make a rather curious observation. It is their case that the claimant's resignation was meant to have been temporary. That he resigned on October 5, 2015 but was to resume work on November 8, 2015. I think that this observation is inaccurate. A plain reading of the letter of resignation shows that the claimant indicated he was to remain on duty up to November 8, 2015 where-after he was to be considered out of employment. In any event, the law does not recognize temporary resignation.



**Determination**

25. In the premises, I find that the claimant voluntarily resigned from employment thereby validly ending the employer-employee relation between the parties. Consequently, this claim is dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED ON THE 9<sup>TH</sup> DAY OF FEBRUARY 2023**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimant

.....for the Respondent

**ORDER**

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

