



REPUBLIC OF KENYA



KENYA LAW
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**Atianyi v Aga Khan Education Service (Appeal E041 of 2021)
[2023] KEELRC 586 (KLR) (3 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 586 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E041 OF 2021**

**J RIKA, J
MARCH 3, 2023**

BETWEEN

WILBERFORCE MIIDO ATIANYI APPELLANT

AND

AGA KHAN EDUCATION SERVICE RESPONDENT

(An Appeal from the Judgment delivered by the Hon. G.A. Mmasi [Mrs.] Senior Principal Magistrate on 15th March 2021, in C.M.E.L No. 822 of 2019 at Nairobi)

JUDGMENT

1. The Appellant was employed by the Respondent as a Laboratory Technician on February 12, 2001. He was stationed at Aga Khan High School, Nairobi. He worked for 17 ½ years until July 26, 2018, when he notified the Respondent that he would be resigning, with effect from August 24, 2018.
2. He thanked the Respondent for the opportunity to work, stating that he enjoyed and appreciated the professional development sessions, which would last him for the rest of his career. He wished the Respondent continued success, and hoped to stay in touch with the Respondent in the future.
3. The Respondent accepted resignation, through a letter dated August 2, 2018.
4. The Appellant filed Claim at the Trial Court against the Respondent, claiming that he was constructively dismissed, and seeking: gratuity; outstanding house allowance; safety attire allowance; long-service award; August 2018 salary; 12 months' salary in compensation for unfavourable work conditions; costs; interest; and any other suitable relief.
5. The Respondent filed a Statement of Response and Counterclaim on August 22, 2019. It denied the averments made by the Appellant, and counterclaimed the amount of Kshs 27,663 in notice pay due from the Appellant.



6. The Trial Court entered Judgment for the Claimant for the sum of Kshs 102,422, and also allowed the Counterclaim, in the sum of Kshs 52,692, which upon setoff, resulted in a decretal sum of Kshs 46,730 in favour of the Appellant. There was no order on the costs.
7. The Appellant filed a Memorandum of Appeal on April 12, 2021, raising 9 Grounds of Appeal, which are: -
 - I. The Trial Court erred in finding there was no constructive dismissal.
 - II. The Trial Court erred in finding that dismissal was not unfair.
 - III. The Trial Court erred in finding that the Appellant was paid Kshs 70,000 in house allowance.
 - Iv The Trial Court erred in denying the claim for house allowance.
 - v The Trial Court erred in finding that termination notice violated the contract.
 - VI. The Trial Court erred in finding that notice of 1 month issued by the Appellant was insufficient.
 - VII. The Trial Court erred in denying the Appellant August 2018 salary.
 - VIII. The Trial Court erred in granting the Respondent's counterclaim of 2 months' salary in lieu of notice.
 - IX. The Trial Court erred in granting the counterclaim of Kshs 52,692 which was not pleaded.
8. It is proposed that: -
 - a. Appeal is allowed and outstanding house allowance of Kshs 165,000 be paid to the Appellant.
 - b. August salary at Kshs 27,663 is paid to the Appellant.
 - c. 12 months' salary at Kshs 331,956 being compensation for unfavourable working conditions is paid to the Appellant.
 - d. Costs of the Appeal and the Trial be borne by the Respondent.
9. Parties agreed on July 5, 2022 to have the Appeal considered and determined on the strength of the Record of Appeal. They confirmed filing and exchange of Closing Submissions at the last appearance in Court, on November 3, 2022.
10. The Closing Submissions restate the Grounds of Appeal, and rehash the arguments proffered at the Trial Court by the Parties.
11. The issues raised on Appeal are whether: -
 - a. The Appellant was constructively dismissed.
 - b. The Appellant was unfairly dismissed.
 - c. The Trial Court made the wrong findings on house allowance, August 2018 salary, and the Counterclaim.

The Court Finds: -

12. Constructive Dismissal: The letter of resignation dated July 26, 2018 does not portray a situation, where the Appellant was subjected to a hostile working environment by the Respondent. It does



not mention any act of hostility. There was no evidence before the Trial Court, to suggest that the Respondent had repudiated the Appellant's contract, or evidence to lead the Appellant to resign, believing himself to have been fired. The Trial Court interpreted and applied the principles of constructive dismissal correctly, guided by the Court of Appeal decision, *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR*.

13. The Appellant listed in his Statement of Claim at paragraph 15(1) to 15 (9) grievances which he characterized as 'unfavourable work conditions.' None of these was shown to constitute 'hostile working environment.' How would failure by the Respondent to give the Appellant "more time to re-organize himself to relocate," an event coming after resignation, amount to hostile working environment? The Court does not think that the Appellant being thrown out by the Guards from the Respondent's residential premises, or his daughter being locked out upon her arrival from the School in the evening, are acts that could be by any stretch of the imagination, amount to hostile working environment. The Appellant had already resigned when the events complained of, took place. The Appellant even pleaded underpayment of salary as an aspect of the hostile working environment, while his Claim did not have a prayer for redress on underpayment of salary. Events occurring after resignation were not in the contemplation of the Appellant, when he resigned, and could not amount to a hostile working environment, or what the Appellant terms to be 'unfavourable working conditions.'
14. The Trial Court did not err, in finding that there was no constructive dismissal.
15. Unfair termination: Unfair termination presupposes that there is termination at the instance of the Employer. This is statutory concept, governed by Sections 41, 43, 45, and 47 (5) of the *Employment Act*, 2007. The remedies on unfair termination are provided for under Section 49 of *Employment Act* and Section 12 of the *Employment & Labour Relations Court Act*.
16. To establish unfair termination, there are specific requirements under these provisions of the law. The Appellant resigned, which would not place any obligation on the Respondent, to show that termination was based of valid reason or reasons, and that it was executed fairly. The Trial Court correctly concluded that the Appellant resigned of his own volition. He could not claim compensation for unfair termination, having instigated termination of his contract.
17. There was no basis for the prayer for equivalent of 12 months' salary in compensation for unfair termination, or damages for constructive dismissal, pleaded at Kshs 331,956.
18. The prayer for house allowance in arrears at Kshs 165,000 was declined based on evidence available to the Trial Court. Specifically, there was a letter dated May 31, 2017 to the Appellant from the Human Resource Manager, where the Respondent undertook to pay Kshs 70,000, being arrears of house allowance of Kshs 5,000 for 14 months. The Appellant discharged the Respondent from further claims on house allowance, appending his signature to the discharge, on June 5, 2017. The Trial Court found that he was housed by the Respondent from the year 2010. He confirmed he was housed by the Respondent at paragraphs 15 (2) and 15 (7) of the Statement of Claim.
19. There was an understanding between the Parties concerning notice and August 2018 salary. This was shown in the letter by the Respondent accepting the Appellant's resignation, dated August 2, 2018. The Appellant gave a notice of resignation of 1-month to the Respondent. The contract executed by the Parties provided for a notice period of 3 months, or 3 months' salary in lieu thereof. It was agreed in the letter of August 2, 2018, which the Appellant signed, that the Respondent would recover notice pay of 1 month from the Appellant's August 2018 salary. The Appellant was therefore not entitled to August 2018 salary.



20. The last Ground of Appeal is similarly resolved in the letter accepting resignation. The Appellant had issued 1- month notice. Notice pay recovered by the Respondent from the Appellant's August 2018 salary, covered another 1 month notice. The contract provided for 3 months' notice. There remained 1-month notice due to the Respondent. There was an error in the Judgment of the Trial Court, by awarding the Respondent 2 months' salary in lieu of notice in the Counterclaim, instead of 1 month salary. The error is conceded by the Respondent at paragraph 49 of its Closing Submissions.
21. In the end, the Appeal succeeds on 1 Ground- that the Respondent ought to have received 1-month salary in lieu of notice by way of the Counterclaim at Kshs 27,663, and not 2 months' salary.

It Is Ordered: -

- a. The Appeal is partly allowed.
- b. The grant of 2 months' salary to the Respondent in notice pay, is corrected to 1- month salary in lieu of notice at Kshs 27, 663.
- c. The total sum due to the Appellant after set off is adjusted to Kshs 102, 422 – 27,663 = Kshs 74,759.
- d. No order on the costs of the Appeal.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 3RD DAY OF MARCH 2023.

JAMES RIKA

JUDGE

