



**Albano v Factory Guards (MSA) Limited (Cause 365 of 2017)  
[2023] KEELRC 1729 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1729 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE 365 OF 2017**

**M MBARÚ, J**

**JUNE 29, 2023**

**BETWEEN**

**WYCLIFE MWANDAWIRO ALBANO ..... CLAIMANT**

**AND**

**FACTORY GUARDS (MSA) LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant was employed by the respondent as a security guard on 24 December 2008 to 14 April 2015 when his employment was terminated. The claim is that the respondent terminated employment without due process or payment of terminal dues. the claimant was last earning a basic wage of Kshs 8,000 per month; working from 6am to 6pm without a day off or being compensated and is claiming Kshs 23,535.
2. The claimant was not allowed to take annual leave or paid in lieu thereof and is claiming Kshs 948,729.60.
3. The claim is that in April 2015, the claimant reported to work but was not allocated work and at month end he was not paid without notice or being given any reasons. The claimant was forced to resign from his employment due to the intolerable conditions he was placed under.
4. The claim is also that the claimant was being underpaid in the year 2015 for 3 months, he was not compensated for working during public holidays and is claiming the followings;
5.
  - a. Work during public holidays Kshs 5,646;
  - b. Untaken annual leave days Kshs 948,729.60;
  - c. Salary for April 2015 Kshs 8,000;



- d. Overtime worked for 5 years and 3 months Kshs 23,535;
  - e. House allowance for 6 years and 3 months Kshs 375,000;
  - f. Transport allowance for 6 years and 3 months Kshs 300,000;
  - g. Underpayment for 3 months in the year 2015.
6. The claimant testified in support of his claim that he worked diligently for the respondent until April 2015 when he reported to work but was not allocated work the entire month and he was not paid. due to the distress and being placed under intolerable working conditions, he opted to resign and his claims should be awarded as pleaded.
  7. In response, the respondent's case is that the claimant resigned from his employment through letter dated 3 April 2015 to pursue further studies and as such the respondent accepted his decision through letter dated 16 April 2015 and requested him to clear to facilitate final payments of his dues, if any.
  8. The claimant was earning a basic age of Kshs 8,000 with benefits. For overtime, he was compensated with a day off and would be allowed annual leave or paid in lieu thereof.
  9. The claimant resigned and issued notice dated 3 April 2015 and the claims made have no merit and should be dismissed. the claim for overtime, transport allowances and underpayments are not justified and should be dismissed.

#### **Determination**

10. On 8 June 2022 parties had partial judgment herein and the claimant was paid Kshs 282,691 and the remaining issue in dispute is that of unfair termination of employment.
11. The claimant resigned from his employment through his letter dated 3 April 2015. His reasons were that he wanted to pursue further studies. The respondent accepted the resignation through letter dated 16 April 2015.
12. Under the law, an employer is allowed to terminate his employment upon notice in terms of Section 35 of the *Employment Act, 2007* (the Act). The employer too is allowed to terminate employment in terms of Section 35 but must give reasons to justify such action in terms of Section 43 and 45 of the *Act*.
13. In this case, the claimant terminated employment on the grounds that he wanted to pursue further studies. His resignation was accepted by the employer on 16 April 2015.

#### **Was there termination of employment due to intolerable working conditions?**

14. The concept of constructive dismissal has come to assist many employees who are placed under intolerable working conditions so that they can extricate themselves from such circumstances and claim unfairness under the law despite initiating termination of employment as held in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR that;

... The employer's behaviour in either case must be shown to be so heinous, so intolerable, that it made it considerably difficult for the employee to continue working. The employee initiates the termination, believing herself, to have been fired. The employee needs to show that the employer, without reasonable or proper cause conducted himself in a manner likely to destroy or seriously damage the employment relationship. Resignation is regarded as constructive dismissal if the employer's conduct is a significant breach of the contract of employment and that the conduct shows the employer is no longer interested in being



bound by the terms of the contract. There is no practical difference in terms of effect, between the statutory and the common law concept on constructive dismissal; it is unlikely that an employer is in fundamental breach of the contract of employment, but all the same is found to have acted fairly. ...

15. The employee claiming under constructive dismissal must demonstrate that;

... Other collateral issues that must be shown by the employee are; that the employer made a fundamental change in the contract of employment, and that such change was unilateral; that the situation was so intolerable the employee was unable to continue working; that the employee would have continued working had the employer not created the intolerable work environment; and, that the employee resigned because he did not believe the employer would abandon the pattern of creating unacceptable work environment. These are some of the rules governing a claim for constructive dismissal

16. The elements of a fundamental change to the employment relationship must exist. It must be unilateral and which places the employee under such conditions that can be described as intolerable making continuation of employment impractical. Essentially, the employer repudiates the employment contract.

17. In this case, the claimant under paragraph 7 of the Memorandum of Claim avers that;

The claimant aver that he went to work up to the month of April 2015 as usual but the respondent failed to assign him work and for the entire month that claimant faithfully reported to work but the respondent never deployed or gave him any duties.

The claimant tendered his letter of resignation on 3 April, 2015.

18. The respondent accepted the letter of resignation on 16 April 2016 and directed the claimant to clear so that his terminal dues could be paid, if any.

19. The claimant resigned and gave his reasons to be the need to go for further studies. These reasons ending employment was accepted by the respondent with directions to clear so as to be paid terminal dues.

20. The claimant cannot be found to state that in April 2015 he reported to work and was not assigned any duties which forced him to resign. From 3 April 2015 the claimant had already expressed his desire to terminate employment to pursue further studies. It cannot be on this date, 3 April 2015 he felt placed under intolerable conditions that he wanted to exit employment so as to pursue further studies. Far from it. his letter to the respondent, well understood on its basic meaning was clear to the extent of the reasons leading to termination of employment.

21. Having voluntarily terminated his employment, the claimant cannot claim that this was unfair and that he should be paid compensation.

22. Upon the partial judgment for payment of Kshs 282,691.01 on 8 June 2022 these being accepted terminal dues, the claim for unfair termination of employment is hereby found without basis and dismissed. Each party to bear own costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF JUNE, 2023.**

**M. MBARŪ**

**JUDGE**



In the presence of:

Court Assistant: Japhet

