



**Mcrege v Riley Falcon Security Services Ltd (Cause E005 of 2022)  
[2023] KEELRC 1732 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1732 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E005 OF 2022  
CN BAARI, J  
JULY 13, 2023**

**BETWEEN**

**CHARLES G AMOLO MCREGE ..... CLAIMANT**

**AND**

**RILEY FALCON SECURITY SERVICES LTD ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. This suit was lodged vide a Memorandum of Claim dated 24<sup>th</sup> January, 2022, premised on allegations of constructive dismissal, unpaid terminal dues and compensation for unfair termination.
2. The Respondent entered appearance on 8<sup>th</sup> February, 2022, and subsequently filed a Response to the Memorandum of Claim on 23<sup>rd</sup> March, 2022.
3. The case was first heard on 1<sup>st</sup> November, 2022, when the Claimant testified in support of his case. He adopted his witness statement and produced a bundle of documents filed in support of his case.
4. The Respondent's case was heard on 6<sup>th</sup> February, 2023, when the Respondent presented a Mr. Tobias See, their Managing Director, to testify on its behalf. Mr. See adopted his statement, and produced a bundle of documents in support of the Respondent's case.
5. Submissions were filed for both parties.

**The Claimant's Case**

6. The Claimant states that he was employed by the Respondent in 2010, on a one (1) year renewable contract terms in the position of Staffing Officer. It is his case that his starting salary was Kshs.26,289.00, and which rose to Kshs.91,734.95.00 as at the time he left the employ of the Respondent.



7. That during his employment, he discharged his duties selflessly and with honesty which saw him rise steadily through the ranks to the position of Deputy Operations Manager.
8. It is his case that he received a letter from the Managing Director on 31<sup>st</sup> December, 2018, accusing him of gross misconduct on the basis that he had deployed 4 guards without official uniform at Tilapia Beach Hotel, sometimes between 12<sup>th</sup>, 13<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 22<sup>nd</sup>, and 24<sup>th</sup> November, 2018, in total disregard of the Respondent's Standard Operating Procedures and for personal gain.
9. The Claimant further states that he responded to the letter, and clarified that he was only giving a helping hand to the security guards who were on a one (1) week refresher training and who lacked accommodation during that period, since the training of officers and accommodation of the said guards fell on his docket.
10. That he again on 19<sup>th</sup> December, 2019, received a warning letter from the Director Operations and Administration which cited an accident that had occurred, involving the Respondent's vehicle and which he responded to, and explained what had happened to the Respondent's vehicle
11. That despite the clarification on the incident, the Respondent, surcharged him 40% of the total cost incurred in repairing the accident vehicle without considering that he was not the one in direct control of the vehicle at the time of the accident.
12. That another incident occurred on 24<sup>th</sup> July, 2020, at around 2300 hours when he received a call from the Respondent's Regional Manager, requiring him to facilitate admission of a Key Attendant Guard No. 53484, into the Aga Khan Hospital after he was involved in an accident. He states that he proceeded to the scene, and while there, he received a call from the Director of Operations reprimanding him and demanding that he returns to the station.
13. That the Regional Manager instructed the Operations Officer and the Senior Controller, who were officers of lower cadre to the Claimant, to write a report to the effect that he had hired the Key Attendant, yet he knew that he had an underlying medical condition.
14. The Claimant states that the report further falsely indicated that he had also hired a relative to enable the Respondent's Regional Manager mount a strong case of nepotism against him.
15. It is his case that on 1<sup>st</sup> October, 2020, his motor vehicle registration number KAL 939G that was parked at the Respondent's premises was impounded by the Directorate of Criminal Investigations, and on following up, he learnt that the Respondent employee had orchestrated the incident on the pretext that the vehicle was stolen.
16. That in a bid to frustrate him further, the Respondent's Regional Manager ordered him to remove his vehicle, registration number KYJ 572, which was parked on the premises, without considering that the vehicle had mechanical problems and could not be removed immediately as the Regional Manager had ordered.
17. The Claimant states that the reason he was given the short period to move his vehicle was so as to give the Regional Manager an opportunity to concoct a reason to terminate him.
18. It is the Claimant's case that he was suspended on 5<sup>th</sup> October, 2020, on account of parking vehicles at the Respondent's premises without authority, while the vehicle had been in the premises from 29<sup>th</sup> July, 2020, which made him wonder why he was being suspended 3 months later.
19. It is his case that the Respondent systematically and continuously frustrated him, forcing him to tender his resignation on 13<sup>th</sup> October, 2020.



20. The Claimant avers that after resigning, the Respondent, in a bid to reduce what would be left of his terminal dues, proceeded to concoct unfounded allegations of negligence and threatening to deduct Kshs.1,096,520.00 from his terminal dues.
21. The Claimant states that as at the time of filing this suit, and despite having cleared with the Respondent, the Respondent has maliciously withheld his terminal dues.
22. It is his further case that the actions of the Respondent were clearly malicious, as they did not conform to the basic tenets of fair labour practices entrenched under Article 41(1) of *the Constitution*.
23. It is his case that he involuntary resigned on 13<sup>th</sup> October, 2020, from the employment, and that the actions of the Respondent amount to constructive termination.

### **The Respondent's Case**

24. The Respondent's case is that it employed the Claimant, first as a Staffing Officer on a fixed term contract commencing 11<sup>th</sup> May, 2010, until 7<sup>th</sup> September, 2011, when he was assigned duties in the capacity of Operations Officer.
25. The Respondent avers that on 1<sup>st</sup> May, 2013, it appointed the Claimant to the position of Assistant Operations Manager, and that later in the year 2018, promoted him to the position of Deputy Operations Manager, which position the Claimant held until his resignation
26. The Respondent states that when he was assigned duties at the Operations Department, the Claimant fully acknowledged and confirmed the job purpose, duties and responsibilities as spelt out in the job descriptions.
27. The Respondent states that its Company Procedures require that once guards on refresher training are successful, the training officer clears them and forwards their respective files to the Human Resource Officer who then prepares contracts.
28. It is the Respondent's further case that upon signing their respective contracts, guards are kitted in company uniform and deployed to various available assignments.
29. The Respondent states that the refresher trainings are conducted at specific times in the day and the guards are expected to make their own arrangements on food and accommodation.
30. The Respondent states that the Claimant at one time assigned four guards duties at a client's premises based at Tilapia Beach Hotel, while dressed in civilian attire, and at a time when the guards were on refresher training, contrary to the Company's procedures and without prior authorization.
31. It is the Respondent's case that while on off duty, the Claimant engaged a driver who had been suspended pending disciplinary action, to run the affairs of the company, and who was later involved in an accident
32. The Respondent further avers that as a result of the negligent and unnecessary actions by the Claimant, the Respondent incurred costs for which it held the Claimant solely liable.
33. It is the Respondent's case that the Claimant without prior authorization parked his personal vehicles, one unregistered and the other of Registration Number KAL 939G, within the Company's premises, and that it was only after motor vehicle registration number KAL 939G was impounded by DCI that the company learnt that the two motor vehicles belonged to the Claimant.



34. That despite being given an opportunity to report to the Managing Director why his personal vehicles were parked at the company's premises, and why one of them was impounded by the police, the Claimant failed to do so, and instead, served the Respondent with a fairly rude response followed a day thereafter, with notice of his resignation
35. The Respondent states that the Claimant released a non-road worthy motor vehicle of registration number KBW 776J which ended up being apprehended by the police and a fine paid to secure its release. It is the Respondent's further case that the Claimant released motor vehicle registration number KCE 545H without prior authorization, and which ended up being involved in an accident and getting extensively damaged.
36. That the Claimant's aforesaid actions have over the years exposed the Respondent to financial risks and compromised service delivery to clients, thus negatively affecting the Respondent's income and the Respondent was bound to question and take action to mitigate such losses, hence the Respondent's letter dated 5<sup>th</sup> October, 2020.
37. The Respondent states that the circumstances under which the Claimant tendered his resignation, can only be construed to be an intention to circumvent any internal disciplinary action that was to follow.
38. That the reasons advanced by the Claimant for his resignation being citations of frustrations and intimidation on the part of the Respondent, are baseless and without any justification.
39. The Respondent states that the Claimant's leave entitlement over the years was duly accorded and salary for the days worked in the month of October, 2020, and final dues were duly settled.
40. The Respondent prays that the Claimant's claim be dismissed with costs.

#### **The Claimant's Submissions**

41. The Claimant submits that he resigned after he was increasingly frustrated by the Respondent. It is his further submission that the conduct of the employer under these circumstances are sufficient to infer that the Respondent did not have any further intention of engaging the services of the Claimant, and hence the Claimant was constructively dismissed. The Claimant had reliance in *Coca Cola East & Central Africa Limited V Maria Kagai Ligaga* [2015] eKLR to support this position.
42. It is the Claimant's Submission that the Respondent has produced final dues form which shows that in 2018, the Claimant had 17 outstanding leave days, in 2019 and 2020, he had a total of 20 outstanding leave days, which in the Claimant's view is illustration that he did not go for leave during the subsistence of his employment with the Respondent.
43. It is the Claimant's submission that the mistakes attributed to him and pointed out by the Respondent, were not so grave as to warrant the kind of treatment that the Claimant received towards the end of his service with the Respondent. It is his submission that the conduct of the Respondent continuing to have the Claimant in its service should be construed as a way of acquiescing the Claimant's "bad" conduct/ "lackluster" performance.
44. The Claimant submits that he was entitled to leave even without a resignation letter, hence he was not obliged to give any notice to the Respondent.
45. The Claimant submits that he has abandoned the 13 days salary for October claim, since they have been duly paid.



## **The Respondent's Submissions**

46. It is the Respondent's submission that there has been no fundamental or significant breach on their part which goes to the root of the contract and/or showed that the Respondent was no longer intending to be bound by the one or more of the essential terms of the contract of employment. Reliance was placed in the decision of this Court in Kisumu ELRC Cause No. E057 of 2021, Tobias Omenda Odhala Vs. Great Lakes University to support this position.
47. It is submitted that the Claimant admitted being pardoned by the Respondent in most of those instances of indiscipline, and even promoted the Claimant throughout the years of his employment. It is its submission that this cannot be the conduct of an employer who intends to frustrate an employee out of employment.
48. The Respondent further submits that the circumstances under which the Claimant tendered his resignation can only be associated with intention to circumvent any internal disciplinary action that was to follow.
49. The Respondent submits that having failed to prove constructive dismissal, the Claimant is not entitled to prayers (a) and (b), of his statement of claim.
50. It is submitted that the Claimant's prayer for gratuity is equally unmerited for reason that his contract of employment did not provide for the same. It submits that gratuity is only payable when the same is provided for in the employment contract and that the Claimant's contract did not provide for gratuity and therefore the same cannot be paid. The Respondent sought to rely on the findings of the Court of Appeal in National Bank Kenya Limited vs. Pipeplastic Samsolit (K) Limited and Another (2002) EA 503. and Bamburi Cement Ltd vs. Farid About Mohammed (2016) eKLR for the holding that there is no express provision for gratuity in the *Employment Act*, and that it is usually payable under the terms set out in a contract of service or collective bargaining agreement.
51. It is the Respondent's submission that the Claimant's pay slip is prove that he was a member of NSSF and deductions to the said body were made, and he is therefore not eligible to payment of gratuity by didn't of Section 35(6) of the *Employment Act*, 2007. It had reliance in Philip Mutinda vs. Lady Lori (Kenya) Limited [2020] eKLR to buttress this position.

## **Analysis and Determination**

52. I have considered the pleadings, the witnesses' testimonies and the Claimant's written submissions. The issues that fall for determination are:
  - i. Whether the Claimant was constructively terminated.
  - ii. Whether the Claimant is entitled to the reliefs sought

### **Whether the Claimant was Constructively Terminated.**

53. The Claimant herein resigned from the service of the Respondent on on 13<sup>th</sup> October, 2020. It is his contention that his decision to tender resignation was informed by what he termed as systematic and continuous frustration from the Respondent leaving him no option but to resign.
54. The Claimant was suspended from service vide a letter dated 5<sup>th</sup> October, 2020 on account of parking vehicles at the Respondent's premises without authority. His resignation from service followed seven days later.



55. The Respondent contends that the sole reason the Claimant resigned was to avoid facing imminent disciplinary action which was to ensue following his suspension.
56. The question for this Court is whether the circumstances under which the Claimant's exited the service of the Respondent, amounts to constructive termination.
57. The Black's Law Dictionary (Tenth Edition) defines constructive termination or discharge as:
- “An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”
58. The tribulations that the Claimant attributes to his decision to resign from his chronology of events, begun in December, 2018, when he was issued a show cause letter on allegations of deploying security guards on training to guard premises without authority, and for his own gain.
59. A warning letter was again issued in December, 2019, premised on the Claimant's failure to comply with instructions from his supervisor, and later on 5<sup>th</sup> October, 2020, yet another show cause letter was issued.
60. In the Claimant's responses to the letters referred to herein, he did not deny any of the allegations against him, other than that he had reasons for deploying the guards and that the motor vehicles stored at the Respondent's premises had been there for over three months prior to the show cause, and the subsequent suspension.
61. The Claimant did not thus in my view, sufficiently rebut the allegations against him and opted instead, to resign from his position at the employ of the Respondent.
62. In *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344, Lord Denning had this to say on constructive dismissal:
- “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 terminates 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: for, 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.”
63. Further, the Court of Appeal in *Coca Cola East & Central Africa Limited V Maria Kagai Ligaga* [2015] eKLR set out the legal principles relevant to determining constructive dismissal as follows: -
- “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 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.
- d. An 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 terminating the contract i.e. causation must be proved.
- f. An employee may leave with or without notice so 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 repudiatory breach or constructive dismissal is on the employee.
- i. Facts giving rise to repudiatory breach or constructive dismissal are varied.”

64. The Court record is a wash with show cause notices, warning letters and a surcharge letter issued to the Claimant for losses said to have been incurred by the Respondent from acts and omissions attributed to the him. The aforesaid letters speak volumes on the Claimant's record of service – it is anything but clean.
65. In my view, I do not see breach of contract on the part of the Respondent that would sufficiently constitute a repudiatory breach of the contract between itself and the Claimant, as to amount to constructive termination.
66. The Claimant admitted to wrong doing and which then goes to say, that the Respondent was within its rights as an employer to take disciplinary action against the Claimant for the acts of misconduct.
67. This Court would in my opinion, be setting a dangerous precedent to construe a resignation by an employee facing disciplinary action to amount to a repudiatory breach of the contract of employment.
68. The Claimant did not prove that his resignation was justified on account of intolerable conditions of service imposed by the Respondent/employer.
69. In the premise, I find and hold that the Claimant has not proved a case of constructive termination.

**Whether the Claimant is entitled to the reliefs sought.**

70. The Claimant sought the following reliefs:
- a. A declaration that the Respondent's actions against him amounts to constructive termination.
  - b. 12 months compensation amounting to Kshs. 1,100,820/- as general damages for unlawful and unfair termination.
  - c. Kshs. 91,937 being unpaid salary for the October, 2020.
  - d. Kshs. 45,867/- unpaid salary for 13 days worked in November, 2020.



- e. Gratuity.
  - f. Certificate of service.
  - g. Interests and costs.
71. Prayers (a) and (b) fail on the finding that the Claimant simply resigned, and which resignation did not amount to constructive termination.
72. On the claim for payment of unpaid salary for the month of October, 2020, a final dues form together with a cheque issued in favour of the Claimant, and an acknowledgment of payment of the final dues, satisfies this Court that the Claimant is not owed on this account.
73. In *Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited* [2015] eKLR the Court of Appeal had this to say on discharge vouchers:
- “...we agree with the Learned Judge that the execution of the discharge voucher, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged ... We therefore find that the execution of the discharge voucher by the appellant and the receipt of the sums therein stated, no more liability by way of any balance of the loss remained with the respondent.”
74. The Claimant in his submissions, abandoned the claim for payment of Kshs. 45,867/- being unpaid salary for 13 days worked in November, 2020, and it is thus left to rest.
75. Concerning the claim for payment of gratuity, the contracts of service between the Claimant and the Respondent, did not provide for payment of gratuity.
76. It has largely been settled that gratuity is only payable when it is provided for as a term of the contract of employment between the parties.
77. This relief is thus not available to the Claimant on the basis that it did not form part of his contract of service (See *National Bank of Kenya Limited v. Pipeplastic Samsolit (K) Limited & Another* (2002) eKLR). The claim for gratuity thus fails and is dismissed.
78. Consequently, the Claimant’s claim fails in its entirety and is dismissed with no orders on costs.
79. Judgment of the Court.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 13<sup>TH</sup> DAY OF JULY, 2023.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Mr. Brian Otieno present for the Claimant

N/A for the Respondent

Christine Omolo- C/A

