



Burendwa Secondary School v Ashikhoba (Employment and Labour Relations Appeal 18 of 2023) [2023] KEELRC 1704 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1704 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
EMPLOYMENT AND LABOUR RELATIONS APPEAL 18 OF 2023**

JW KELI, J

JULY 7, 2023

**(FORMERLY BUNGOMA ELRC APPEAL NO. E014 OF
2022)**

BETWEEN

BURENDWA SECONDARY SCHOOL APPELLANT

AND

HENRY AMUSALA ASHIKHOBIA RESPONDENT

*(Appeal against the judgment of Hon. E. MALESI (PM) delivered
on the 8th July 2022 in Kakamega MELRC NO. 10 of 2020)*

JUDGMENT

1. The Appellant being dissatisfied with the Judgment of Hon. E.Malesi (PM) in Kakamega MELRC No. 10 of 2020 delivered on 8th July 2022 filed Memorandum of Appeal dated 3rd August 2022 against the entire decision of the learned Magistrate seeking for the judgment entered by the Learned Magistrate be set aside and substituted with the High Court Judgment dismissing the claimant's claim against the respondents.
2. That the appeal was premised on the following grounds:-
 - a. The Learned Trial Magistrate erred in law and in fact in finding that the respondent was being underpaid below the minimum statutory wages.
 - b. That the Learned Trial Magistrate erred in law and in fact in making a finding that the claimant had been constructively dismissed from employment of the claimant.
 - c. That the Learned Trial Magistrate erred in law and fact in failing to find that the respondent lacked academic qualifications to warrant him the job group he was claiming.



- d. That the Learned Trial Magistrate erred in law by relying on documents which were never produced during the hearing specifically the special Legal Notice No. 2 contained in the [Kenya Gazette Supplement No. 2](#) of 8/1/2019 and Legal Notice No. 112 contained in the [Kenya Gazette Supplement No. 107](#) of 14/7/ 2017.
- e. That the Learned Trial Magistrate erred in law failing to give justification for the award to the plaintiff of the maximum award of 12 months' salary as compensation for unlawful termination.
- f. That the Learned Trial Magistrate misdirected himself in totally disregarding the evidence tendered by the appellant.

Background to the Appeal

3. The Respondent/Claimant vide a plaint dated 30th January 2020 sought the following orders before the trial magistrate court:-
 - a. An order of permanent injunction restraining the respondent from filing Bursar and the position of accounts clerk on the basis of the advertisement dated 4th December 2019 and the interviews conducted on 23rd January 2020.
 - b. An order directing the respondent to pay the claimant the difference his current basic salary and the gazette statutory minimum wages from 5th April 2017 until repayment in full . The amount to attract interest at 14% per annum form 5th April 2017 until repayment in full.
 - c. General damages for breach of terms of employment
 - d. Costs of this suit.
 - e. Any other relief that the court may find fit and just to grant the claimant (page 3 of the supplementary record of appeal)

Written Submissions at Appeal

4. The court directed that the appeal be canvassed by way of written submissions. The Appellant's written submissions drawn by Gilbert Tarus, Senior State Counsel, instructed by Office of the Attorney General and Department of Justice were dated 14th February 2022 and received in court on the 16th February 2023. The Respondent's written submissions drawn by Emily and Associates were dated 17th February 2023 and received in court on the 20th February 2023.
5. A supplementary record of appeal was filed by the Appellant on the 28th April 2023 after which the judgment date was issued.

Determination

6. The principles which guide this court in an appeal from a trial court are now well settled. In *Selle and Another v Associated Motor Boat Company Ltd & Others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:-

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and



should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

Further in *David Kaburuka Gitau & Another v Nancy Ann Wathithi Gatutu & Another* Nyeri HCCA No. 43 of 2013 the court opined:-

"it is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on point of law and facts and come up with its findings and conclusions."

Issues for Determination

7. The Appellant in its submissions addressed the following issues for determination in the appeal:-
 - a. Whether the trial magistrate erred in law and fact in finding that the respondent was being underpaid below the minimum statutory wages and relying on legal notices that had not been filed or produced by the court.
 - b. Whether the trial magistrate erred in law and fact in making a finding that the respondent had been constructively dismissed from employment by the Appellant.
 - c. Whether the trial magistrate erred in law in failing to give justification for the award to the respondent of the maximum award of 12 months salary as compensation for unlawful termination.
8. The Respondent identified and addressed similar issues as the appellant. The court finds that the issues placed by the parties for determination in the appeal are as follows:-
 - a. Whether the trial magistrate erred in law and fact in finding that the respondent was being underpaid below the minimum statutory wages and relying on legal notices that had not been filed or produced.
 - b. Whether the trial magistrate erred in law and fact in making a finding that the respondent had been constructively dismissed from employment by the Appellant.
 - c. Whether the trial magistrate erred in law and fact by awarding the respondent the maximum of equivalent of 12 months' salary compensation for constructive dismissal

Whether the Trial Magistrate Erred in Law and Fact in Finding that the respondent was Being Underpaid Below the Minimum Statutory Wages and Relying on Legal Notices that had not been Filed or Produced.

The Respondent's/Claimant's Case at Trial Court

9. The respondent in his undated witness statement filed in court on the 31st June 2020 stated that he was employed to earn Kshs. 8000 contrary to statutory minimum basic salary of Kshs. 25,737.10 for position of cashier, that after raising concerns of underpayment he was served with letter dated 25th September 2018 by the Respondent on unfounded allegations of work conduct which he stated was meant to intimidate him (page 6 of the supplementary record). During cross-examination the claimant told the court he used to earn Kshs. 18000/-. That he had not filed the Gazette notice on his underpayment, that accounts clerk was the same as cashier, that he had not given the recommended



pay for accounts clerk. On re-exam the claimant stated his duties included managing cash, receiving cash and dispensing cash (page 112).

Appellant's Case at Trial Court

10. The appellant admitted that the claimant was employed as accounts Clerk/Bursar at starting salary of Kshs. 8000/- which was increased to Kshs. 15,600 though he did not have qualifications for the job. The appellant denied having underpaid the claimant (page 73-74).

Decision of the Trial Court on Claim for Underpayment

11. The learned magistrate relied on the payroll for January 2020 indicating the claimant had monthly of 27,023.95 ([Legal Notice of 2019](#)) and Kshs 25737.10 ([Legal Notice of 2017](#)) the court then found underpayment in legal notice for 2017 for period of 12 months total Kshs. 121,645.20 and the second Legal Notice of 2019 21 months total underpayment of Kshs. 239,902.95 making total of Kshs. 361,548.15. The appellant faulted the finding on the basis that there was no evidence as to the statutory wage the Respondent was supposed to earn for the position of Accounts Clerk so as to reach the conclusion on underpayment. That the gazette notices relied on were never produced in court and the appellant did not have opportunity to comment on them. That the gazette notice relied on by the learned magistrate did not have provision for Accounts Clerk to earn the minimum salary awarded by the magistrate court. That during cross examination the claimant indicated he has not given the recommended pay for accounts clerk nor did the advocate submit on the same.

12. The Respondent on the issue submitted that the Gazette Legal Notice ought not to be produced in court, that the specific Gazette notice were produced and even if not produced the court was right to rely on them under the principle of judicial notice. The Respondent relied on the definition of judicial notice under the [Black Law Dictionary](#) Tenth Edition page 975 as follows:-

" judicial notice :- a court acceptance for purposes of convenience and without requiring a party's proof , of a well-known and indisputable fact ; the court's power to accept such a fact, the trial court took judicial notice of the fact water freezes at 32 degrees."

13. That respondent further submits that under section 60 of the [Evidence Act](#) (Cap 80) Laws of Kenya it provides thus:-

" the courts shall take judicial notice of the following facts:-

- a. all matters of general or local notoriety (things that everyone knows)."

14. The court agreed with the respondent's submissions that the Gazette Notice being a published document by government, the respondent having pleaded underpayment, need not have been produced for the court to look into it. The court did find the Gazette Notice in the original file from the lower court. The court did not find the position of Accounts/ Clerk provided for under the said Legal Gazette Notices for 2017 and 2019. The respondent at lower court at cross examination did not indicate the recommended wages for his position. The courts finds that the lower court applied the statutory minimum wages for cashier. The respondent produced his confirmation letter to employment at the lower court (page 15). The letter indicated the position of employment to be Accounts Clerk /Bursar. The court on perusal of the said Gazette Notices did not find the position of the Accounts/ Clerk or Bursar. The learned magistrate appeared to have treated the respondent as a Cashier and awarded statutory minimum basic salary of Cashier. The court holds that the Learned Magistrate erred in fact and law for treating the respondent as a Cashier without any proof that the



accounts clerk position under his employment contract was equivalent to the position of Cashier. The court can never replace the employer and decide on the employment position of a claimant when there is a written contract of employment. The court cannot also rewrite the contract between the parties. For that reason the court finds the learned magistrate erred in law and fact by treating the respondent as a cashier and awarding on underpayment. The court on appeal having evaluated the evidence holds that the respondent did not prove on balance of probabilities the claim for underpayment and the said underpayment award is set aside in its entirety.

Whether the Trial Magistrate Erred in Law and Fact in Making a Finding that the Respondent had been Constructively Dismissed from Employment by the Appellant.

15. The Learned Magistrate found that during cross-examination the respondent left his place of work once his position was taken over by another person hence absconded work. The court applying the decision in *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga* (2015) eKLR found the circumstances of the case of the respondent having been employed as Accounts Clerk/ Bursar in 2016, his position having been split into two, Accounts Clerk and Bursar and advertised, claim by the employer he had no qualifications for the position held, the lack of indication whether the respondent was engaged on the issue of qualifications and his fate, the appellant's claim the respondent was deployed under same terms and a decision not communicated to the respondent. the lower court found these circumstances satisfied the definition and measure of constructive dismissal by the Court of Appeal in the *Coca Cola Case* as having occurred. The court then proceeded to award the equivalent of 12 months' salary based on the statutory minimum wage of Kshs 27,023.95 as at January 2020 total award of Kshs. 324,287.40.
16. The appellant relied on the same decision in *Coca Cola Case* and submitted that the circumstances under which the respondent left employment did not fit the definition of constructive dismissal as stated in the *Coca Cola Case* as the claimant absconded work. Further that there was no conduct for which the appellant that could be deemed to have contributed to the respondent leaving his employment since he continued to earn salary and continued to be paid even after he absconded duty.
17. The respondent on the other part submits there was no error in fact and law in the finding on constructive dismissal and relied on the Court of Appeal in *Coca Cola Case*. The respondent submits that relying on employment letter dated 26th May 2016 his employment was not controverted hence met the condition of essential terms of employment. The respondent submits that the appellant repudiated the contract for underpayment of wages by not applying the statutory minimum wages, that the awarded underpayment wages had not been paid, the appellant advertised the respondent's position and recruited other employees to take over his responsibilities without deploying him appropriately and the appellant denied the respondent access to his workplace without justification. That the appellant as employer failed the objective test. The causal link was established as the claimant stopping going to work at the hostile environment and was never served with desertion notice or termination notice.
18. The respondent further submits that he did not accept, acquiesce, waive or conduct himself in a manner to be estopped from asserting repudiatory breach. The respondent submits that he testified that after making efforts to access his workplace without success he stopped going to the premises, that the appellant defied court orders and he decided to walk away and filed suit immediately the appellant advertised his position.



Decision

19. The court finds that the Learned Magistrate, the appellant and the Respondent all relied on the doctrine of constructive dismissal as defined by the Court of Appeal in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR. The court took an excerpt from the decision at paragraph 30 which is reproduced below:-

“ 30. The legal principles relevant to determining constructive dismissal include the following: -

- 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.”

20. Applying the set-out principles above, an employee may without giving an employer notice, leave employment, if the conduct of the employer makes the working environment intolerable or difficult for the employee to continue working. The employee can either choose to give notice or not. In the instant case the respondent did not give any notice and continued to earn salary. The lower court held he absconded duty. This position is set out at Paragraph 28 of *Coca Cola Case* (*supra*), where the court quoted that:-

“ 28. In this appeal, we have considered the local and persuasive foreign authorities cited by counsel. The authoritative meaning of constructive dismissal was



articulated by Lord Denning Mr in *Western Excavating (ECC) Ltd. -v- Sharp* [1978] ICR 222 or [1978] QB 761, as follows:

“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 that 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 (emphasis ours). (See also *Nottingham County Council -v- Meikle* (2005) ICR 1).”

21. However, looking at the other principle under the said judgment:

“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”

An Employee is required after leaving his employment to terminate the employment through resignation to bring the employment relationship to an end, specifying his reasons for leaving employment to have been occasioned by the employer’s conduct. In *Coca Cola Case* at Paragraph 27;

“.....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. It is very unlikely that a common law breach occurs without amounting to a statutory wrong. The employee’s resignation is therefore treated as an actual dismissal by the employer and the employee may claim compensation for unfair termination..... The onus of proof in this form of employment termination, unlike in other termination, lies with the employee. While under Sections 43 and 45 of the *Employment Act* 2007 the duty in showing that termination was fair is on the employer, constructive dismissal demands the employee demonstrates that his resignation was justified.....”

22. It goes therefore without saying that, even after an employee leaves work without giving any notice, what is required of them is to terminate the contract through resigning within a reasonable time to prevent the assertion by an employer that the employee in fact breached the contract on their part. In the instant case the respondent never terminated his contract. The Respondent submits he filed a case in court. The learned magistrate found that the respondent absconded duty and continued to



earn salary. The court finds that the respondent never terminated his contract with the Appellant. The court in [Lear Shighadi Sinoya v Avtech Systems Limited](#) [2017] eKLR held that:-

“On the question of constructive dismissal, this is a case where an employee is placed by the employer under intolerable conditions forcing her to resign from employment. The duty is upon the employee to demonstrate such intolerable circumstances and conditions for the court to make a finding that indeed, placed under such conditions, the employee was justified in tendering resignation. Such a claim must be pleaded and evidence advanced to this effect.”

23. The court deduced from the above that an employee must prove they resigned from the employment for a claim on constructive dismissal to stand. Additionally, in [Lear Shighadi Sinoya](#) (*supra*) the court held that: -

“.....The claimant is also at fault. Despite noting that she had not been paid, for her to allege constructive dismissal, this was not to be resolved by failing to attend work without her letter of resignation. Failure to attend work is addressed under section 44 of the [Employment Act](#) as a matter subject to summary dismissal as it is classified as an act of gross misconduct. Where the claimant found her unable to attend work due to non-payment of her due salaries, she had every right to serve her letter of resignation citing the reasons for the same. To keep out of work and do nothing left the claimants claim for constructive dismissal exposed and compromised.”

Where an employee fails to issue a notice of resignation, they are considered to be in employment and their contract of employment in enforce. The contract of employment can only come to an end on termination or through resignation as the case is.

24. It is the opinion of this court that for an employee to fail to avail themselves at their duty station, and continue to receive their salary while not working, that conduct amounts to absconding duty and the employee becomes subject to summary dismissal by the employer. Section 44(4) of the [Employment Act](#), 2007 provides that:-

“Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—

- (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;.....”

25. At the risk of being repetitive I emphasize that for a claim of constructive dismissal to stand, an employee must ensure that they comply with their all obligations under their employment contract to leave no room for the employer to claim breach of contract on the employee’s part. For an employee to claim under constructive dismissal, the employee must tender their resignation without delay upon happening of the hostility terminating their employment owing to the Employer’s conduct, which resignation will in turn then be treated as an actual dismissal by the employer and the employee may claim compensation for unfair termination. The failure to resign and absenting themselves from work leaves an employee in breach of their contractual obligations as was the case in the instant case where the employee absconded duty and continued to earn salary. The acceptance of salary by an employee



denotes the continued existence of an employment contract, only that the employee receives the salary without having gone to work. Where the employee fails to resign but accepts the salary, they waive their ground to claim having being constructively dismissed, as they ought to have written their letter of resignation to the employer at the point of receipt of their salary to stop the employer from exercising their contractual obligation of paying an employee who alleges to have been constructively dismissed from work.

26. In the upshot the court holds that in the instant case constructive dismissal could not have occurred when the employee was enjoying the benefits of an employee from the employer of salary while absconding duty and failed to issue a resignation letter to end the employment relationship. Filing suit does not amount to termination of employment. The court holds the finding of constructive dismissal by the Learned Magistrate was erroneous and contrary to the relied on decision of Court of Appeal in *Coca Cola Case* (*supra*).

Whether the Trial Magistrate Erred in Law and Fact by Awarding the Respondent the Maximum of Equivalent of 12 Months' Salary Compensation for Constructive Dismissal

27. The court having held that the respondent's case did not meet the threshold for constructive dismissal and the employment relationship being was in force as at time the trial court decided the case the respondent was not entitled to a claim for unfair termination. There was no cause of action. Indeed in the instant case the employee was in breach of contract for absconding duty, as found by the lower court and could have been summarily dismissed upon due process. The compensation for unfair termination was premature for there was no termination of employment by either party and indeed the lower court noted the claimant was earning salary despite absconding duty. The courts that the award for unfair termination was erroneous and is set aside.

Conclusion and Disposition.

28. The court in determination of the appeal holds that the respondent did not satisfy the threshold of constructive dismissal for failure to resign immediately or at all when he felt the work environment had become hostile as stated and the act of absconding duty when still receiving salary meant he waived his claim for constructive dismissal and had acquiesced to the conduct of the employer. Consequently, the compensation of constructive dismissal was not justified and is set aside. The court further holds the underpayment award was illegal for it was based on position of cashier while the claimant held employment contract as accounts clerk/bursar.
29. The appeal then is held to be merited in its entirety and allowed. The judgment of the Hon. Eric Malesi delivered on 8th July 2022 in Kakamega MELRC Cause No. 10 of 2020 between Henry Amusala Ashikhoba v Burenda Secondary School is set aside and in place a judgment entered that the claim dated 30th January 2020 is dismissed.
30. No order as to costs in the lower court and in this appeal.
31. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 7TH DAY OF JULY 2023

JEMIMAH KELI

JUDGE

In the presence of



C/A -Lucy Macheso

For Appellant – Tarus, Senior State Counsel

For Respondent: Ms. Kadenyi Advocate

