



**Riley Falcon Security Services v Okoth (Appeal E023 of 2022)  
[2023] KEELRC 2236 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2236 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E023 OF 2022  
CN BAARI, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**RILEY FALCON SECURITY SERVICES ..... APPELLANT**

**AND**

**JAMES ODUOR OKOTH ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. W. K. Onkunya  
(SRM) delivered on 24th June, 2022 in Kisumu CMELRC NO. 142 OF 2020)*

**JUDGMENT**

1. Before Court is an appeal against a judgment rendered on 24<sup>th</sup> June, 2022, where the Trial Court found in favour of the Respondent, and ordered payment of terminal dues to wit, one month salary in lieu of termination notice and damages for loss of employment all amounting to Kshs. 208,000/-.
2. The Appellant being aggrieved by the decision of the Trial Court, lodged this appeal on 20<sup>th</sup> July, 2022.
3. The appeal is premised on the grounds that:
  - i. The Learned Magistrate erred in law and fact in finding that the Claimant had been unlawfully dismissed from employment when there was no evidence to support the said termination.
  - ii. The Learned Magistrate erred in law and in fact by holding that the Respondent was constructively dismissed, despite the fact that the Respondent did not plead constructive dismissal in his pleadings and the same was only brought to the attention of the court through written submissions.
  - iii. The Learned Magistrate erred in law and in fact by holding that the Respondent was constructively dismissed despite evidence on record showing that the Respondent willingly resigned from employment. There was no evidence on record showing that the Appellant coerced the Respondent into signing his resignation letter.



- iv. The Learned Magistrate erred in law and in awarding the Claimant the sum of Kshs.16,000.00 being one-month salary in lieu of notice whereas there was no basis to make the award in view of the evidence presented before court.
  - v. The Learned Magistrate erred in law and fact by awarding the exorbitant sum of Kshs192,000.00 as twelve (12) months compensation for damages for loss of employment whereas there was no basis to make the award in view of the evidence presented before the court.
  - vi. The Learned Magistrate erred in fact and law by failing to appreciate the evidence tendered by both the Appellant and the Respondent and analyze and apply the correct law thereby arriving at erroneous conclusion that is not premised on evidence and the law.
  - vii. The Learned Magistrate erred in law and in fact in awarding the Respondent costs of the suit yet the suit had been filed without the Respondent first serving upon the Appellant a demand and a notice of intention to sue.
  - viii. The Learned Magistrate erred in law and in fact in disregarding the submissions made and filed by the Appellant in arriving at judgment in the case.
4. The Appellant prays that this appeal be allowed and the Judgment of the subordinate court be set aside and be substituted with a Judgment dismissing the Respondent's suit in the subordinate court.
  5. The Appellant further prays that it be awarded the costs of this appeal as well as those of the suit in the subordinate court.
  6. Submissions on the appeal were filed for both parties.

### **The Appellant's Submissions**

7. It is the Appellant's submission that the trial court erred in considering the new and unpleaded issue of constructive dismissal on the basis that parties are bound by their pleadings and cannot be allowed to raise a different or a fresh case without any amendments properly made with the consequence that, any evidence led by any party which does not support the averments in the pleadings or put in any other way which variances with the averment of pleadings goes to no issue and must be disregarded. It had reliance in the Court of Appeal decision in *Independent Electoral & Boundaries Commission & Another Versus Stephen Mutinda Mule & 3 others* (2014) to buttress this point.
8. The Appellant submits that no particulars of constructive dismissal were pleaded. It is its further submission that there was simply no factual and/or legal basis upon which the trial court would consider that the Respondent was constructively dismissed, and that the Respondent could not rely on the issue of constructive dismissal without expressly setting out the issue in his Statement of Claim.
9. The Appellant submits that the Trial Court overstepped its mandate by dealing with a new issue of fact and basing it to reach the finding that the Respondent had not resigned voluntarily, but that his resignation was occasioned by frustrations by the Appellant.
10. It is its further submission that it's not the duty of the court to enter upon any inquiry into the case before it, rather than to adjudicate upon the specific matter in dispute which parties themselves have raised in their pleadings.
11. It is the Appellant's submission that the Respondent did not establish that the Appellant breached the employment contract by creating a hostile environment that made it completely impossible for him to continue being employed so as to raise the issue of constructive dismissal. It is its further submission



that the Respondent was employed as a security guard and by the nature of his work, the Appellant could appoint him to secure various establishments on different date, and the trial court reliance on the Respondent's narration on how he went from one establishment to the next to offer security does not prove frustration.

12. The Appellant submits that the Respondent's termination of employment was not constructive and/or unfair but rather, the Respondent voluntarily resigned from work and the Trial Court erred in abandoning the clear and voluntary resignation letter dated 20th April 2020 and imposed constructive dismissal.
13. The Appellant prays that the appeal be allowed and the decision of trial court delivered on 24th June 2022, be set aside and the suit in the lower court be dismissed with cost to the Appellant.

### **The Respondent's Submissions**

14. The Respondent submits that he tendered sufficient evidence that demonstrated his claim against the Appellant as spelt out in the Memorandum of Claim, and which is evidenced by the proceedings that form part of the record of appeal herein.
15. The Respondent submits that the Appellant unlawfully terminated his employment without any justification cause and without adhering to the lawful procedure, and which therefore fully entitles him to the full extent of the reliefs sought in memorandum of claim filed.
16. It is the Respondent's submission that adequate material was placed before the Trial Magistrate that properly persuaded her to make a finding that the termination was both substantively and procedurally wrong.
17. The Respondent submits that Section 18(4) provides that where an employee is summarily dismissed for lawful cause, the employee shall, on dismissal be paid all his moneys, allowances and benefits due to him up to the date of his dismissal.
18. It is his further submission that the Appellant did not dismiss him for a lawful cause and did not pay him his terminal dues, hence the Appellant breached fundamental provisions of the *Employment Act*.
19. It is the Respondent's submissions that on the provisions of the Act, and the evidence placed before the Trial Magistrate, the termination of the Respondent was outrightly unfair and wrongful.
20. It is his submissions that he established his claim against the Appellant as pleaded, and was therefore entitled to the remedies ought.
21. He finally submits that the appeal herein has no merit and should accordingly be dismissed with costs.

### **Analysis and Determination**

22. I have considered the Appellant's Record of Appeal, and the submissions by both parties. The eight grounds of appeal are summarized into the following three grounds -
  - i. The Learned Magistrate erred in law and in fact by holding that the Respondent was constructively dismissed, despite the fact that the Respondent did not plead constructive dismissal in his pleadings and the same was only brought to the attention of the court through written submissions.
  - ii. The Learned Magistrate erred in law and in fact by holding that the Respondent was constructively dismissed despite evidence on record showing that the Respondent willingly



resigned from employment. There was no evidence on record showing that the Appellant coerced the Respondent into signing his resignation letter.

- iii. The Learned Magistrate erred in law in awarding the Claimant the sum of Kshs.16,000.00 being one-month salary in lieu of notice whereas there was no basis to make the award in view of the evidence presented before court.
23. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, while handling a first appeal from the High Court, the Court of Appeal held that:

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned Trial Judge are to stand or not and give reasons either way”
24. The role of this Court therefore as a first Appellate Court in this matter, is to re-evaluate, re-assess and re-analyse the evidence on record and determine whether the conclusions reached by the learned Trial Court are to stand or not. (See *Selle & Ano. Vs. Associated Motor Boat Co. Ltd* (1968) EA 123)
25. While doing this, this Court will be guided by the decision of Madan J in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A, where he had this to say on appeals:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law: secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”
26. The Trial Court held that the Respondent did not voluntarily resign from his position, but was instead forced to do so by the frustrations occasioned by the employer/Appellant, and hence constructive dismissal.
27. Constructive dismissal has its roots in the law of contract premised on the doctrine of discharge by breach. Constructive dismissal occurs when an employee resigns, and not by a formal decision of dismissal reached by an employer. The employer instead, constructs circumstances that result in a dismissal.
28. The question then, is whether the Appellant constructed circumstances that repudiated the contract between itself and the Respondent herein, and which entitled the Respondent to treat himself as having been discharged.
29. The Respondent attributed his decision to resign on the frequent transfers by the Appellant, where he at times reported to work and was not assigned duties in his new stations. Lord Denning defined constructive dismissal in the case of *Western Escavation (ECC) Ltd v. Sharp* 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 instantly without 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 way be sufficiently serious to entitle him to leave at once."

30. The Respondent in his memorandum of claim stated that he was dismissed from service on 20-4-2020. Paragraph 4 of the claim states thus:

"The Claimant avers that on or about the 20-4-2020, he was unlawfully and unprocedurally dismissed from employment by the defendant without any justifiable cause or reason at all."

31. Paragraph 6 of the memorandum of claim goes on to state thus:

"It is the Claimant's position that the Respondent's action to dismiss him was unfair, wrongful and contrary to the express provisions of the *constitution*, the *Employment Act*, the principles of Natural justice and the basic tenets of good labour practice in that:

- a. No prior notice was issued to the Claimant on the issue of the alleged offence,
- b. Due process was not adhered to in the process leading to the Claimant's dismissal, which dismissal was therefore capricious and malicious."

32. At no point did the Respondent herein, in his memorandum of claim mention that he resigned from the service of the Appellant and therefore attributing his resignation to the frustration occasioned by the Appellant/employer so as to construe the resignation to amount to constructive dismissal/termination.

33. The issue of the Respondent's resignation is a matter that only came up during the Respondent's oral testimony before the trial Court, but which is not supported by his pleadings.

34. As correctly submitted by the Appellant, it is a settled principle of law that parties are bound by their pleadings, and the Respondent's pleadings are not an accurate representation of his case or the position he now wants the court to believe. The Court of Appeal fortified this position in *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others* [2014] eKLR also cited by the Appellant, where it cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries* PLC SC 91 /2002 where it was held that:

"It is trite principle in law that parties are bound by their pleadings and that any evidence led by the parties which does not support the averments in the pleadings goes to no issue and must be disregarded..."(emphasis own)

In the absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration... Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings. "

35. I have no doubt in my mind that where an employer embarks on countless transfers of an employee without justifiable reason or denies an employee access to the work place, an employee may consider himself constructively terminated. (See *Simon Papa Imo v. Athi River Shalom Community Hospital*



(2021) eKLR). This however was not the Respondent's case at least not per the pleadings he filed before this Court.

36. The Respondent's averments both under his submissions and oral testimony before the trial court, are not supported by his pleadings and to admit this position would amount to allowing the Respondent to travel beyond his pleadings.
37. In the premise, I find and hold that the finding of constructive dismissal of the Respondent by the Trial Court is without basis and the decision is hereby set aside.
38. The Respondent's case according to his pleadings, is that of an unfair termination based on failure by the Appellant to accord him appropriate notice and due process prior to the termination.
39. The Respondent having changed his case midstream, then means that he did not lead any evidence in support of the case he lodged before Court. He also did not seek to amend his claim to reflect his changed mind on how and why he left the service of the Appellant.
40. I conclude by holding that the Respondent did not prove his case and the finding of the trial court, including the award of damages is without basis and is set aside in its entirety.
41. The Respondent issued resignation notice and continued to serve in the service of the Appellant to the end of the notice period. For this reason, the Respondent was not entitled to the award of one month salary in lieu of termination notice.
42. In the premise, the award by the trial court of one month salary in lieu of notice, is devoid of merit and is hereby set aside.
43. In whole, the appeal herein is allowed, and the Judgment of the subordinate court is set aside in its entirety, and substituted with a Judgment dismissing the Respondent's suit with costs.
44. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Ms. Anuro h/b for Ms. Oduor for the Appellant

N/A for the Respondent

MS. Christine Omolo - Court Assistant.

