



**Kimari v Standard Engineering Works (Cause E658, E657 & E660 of 2021 (Consolidated)) [2023] KEELRC 2641 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2641 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E658, E657 & E660 OF 2021 (CONSOLIDATED)**

**MN NDUMA, J  
OCTOBER 19, 2023**

**BETWEEN**

**PETER KIBICHO KIMARI ..... CLAIMANT**

**AND**

**STANDARD ENGINEERING WORKS ..... RESPONDENT**

**JUDGMENT**

1. The suit E658/2021 is consolidated with E657/2021 and E660/2021. E658/2021 is the lead file. The claimants have sued their former employer Standard Engineering Works. C.W.1 Peter Kibicho Kimani testified on behalf of all claimants and adopted his witness statement dated 19/7/2021 as part of his evidence in chief. C.W.1 also produced exhibits '1' to '7' in support of the Consolidated Claims. C.W.1 told the Court that the facts in support of their respective claims are the same, which may be summarised that C.W.1 was employed by the respondent by a written contract dated 2/6/2018 as a Mould Fitter at a monthly salary of Kshs.81,220 and a monthly housing allowance of Kshs.4,380 as per the union's agreement Maurice Oyiyo Karakacha was employed as a Turner by a written contract dated 8/1/1996 at a monthly salary of Kshs.102,935 and house allowance of Kshs.4,380 whereas Peter Ndung'u Mbeke was employed vide a written contract dated 1/9/1994 as a Mould Fitter at a monthly salary of Kshs.81,220 and housing allowance of Kshs.4,380.
2. That the claimants' worked diligently and continuously without any adverse record until 23<sup>rd</sup> February, 2021 when the three of them were painfully forced to resign from employment by the respondent. The respondent had started frustrating their contracts by paying their monthly salary in instalments and then stopped paying any salary for a period of six (6) months. That the claimants continued to report to work as usual during that period until they were unable to meet their daily financial needs including payment of transport to work and as a result the three individually decided to resign having been constructively dismissed from work due to non- payment of wages.



3. That the respondent has since failed and/or neglected despite demand to pay the terminal benefits to the claimants including the arrear salary not paid. That the respondent has proceeded to replace the claimants with other employees. That the constructive dismissal was unlawful and unfair it being in breach of the contract of employment.
4. Under cross-examination, C.W.1 insisted that the claimants' contracts of employment were fundamentally breached by failure to pay their wages, by the respondent. That this had started around the year 2019 and unpaid salary arrears had accumulated for period of up to six months at the time of their resignation. C.W.1 admitted that the delay in payment of salaries applied to all staff and when the claimants asked to be paid, they were told to leave employment. That the claimants were therefore forced to resign from employment against their will.
5. The respondent filed a Statement of Response and called R.W.1, Stanley Musembi Ky'engo in defence of the case. R.W.1 adopted a witness statement dated 10/9/2020. R.W.1 told the Court that he was employed by the respondent as Administration Manager. R.W.1 testified that the respondent had a Collective Agreement with the union which governed terms of employment of employees including the claimants. That terminal benefits were governed by the Collective Agreement. R.W.1 stated that employees were entitled to go on annual leave and were paid leave allowance. That the employees were also entitled to payment of terminal gratuity in terms of Clause 28 of the Collective Bargaining Agreement. R.W.1 said that the claimants resigned and so were not entitled to payment of gratuity. R.W.1 said that the Collective Bargaining Agreement did not, however, provide that the employees who resigned were not entitled to payment of gratuity.
6. R.W.1 admitted that they had not paid terminal benefits including arrear salaries to the claimants. R.W.1 admitted that other employees replaced the claimant upon their resignation. R.W.1 admitted that the claimants had pending leave days upon their resignation.
7. R.W.1 stated non-payment of salary was due to financial difficulties caused by COVID 19 and was not out of malice. R.W.1 said that the respondent had no issue with payment of arrear salaries.

### **Determination**

8. The parties filed final submissions which the Court has carefully considered together with the testimony by C.W.1 and R.W.1. The issues for determination are:-
  - (a) Whether the claimants were constructively dismissed from employment.
  - (b) Whether the claimants are entitled to the reliefs sought.
9. The Court received common evidence from C.W.1 and R.W.1 that the claimants resigned from work due to non-payment of salaries. R.W.1 admitted that the respondent was unable to pay salaries of all employees including the claimants at the material time due to financial difficulties occasioned by the COVID 19 Pandemic. R.W.1 admitted that the respondent replaced the claimants with other employees upon their resignation. R.W.1 said that non-payment of salaries to the claimants was not out of malice but was occasioned by events beyond their control, being the COVID-19 pandemic.
10. The Court finds that the respondent owes the claimants terminal benefits as set out in the respective statements of claim in respect of:-
  - (i) Six (6) months arrear salary including house allowance, Travelling allowance; In lieu of leave days not taken and terminal gratuity as provided under Clause 28 of the Collective Bargaining Agreement



11. The court therefore finds that the claimants have proved their respective claims on a balance of probabilities and the court awards them accordingly.
12. The court is however not satisfied that the respondent had deliberately and or maliciously breached the contract of employment between the respondent and the claimants. The court accepts the testimony by R.W.1 that the non-payment of wages during the material time between the year 2019 and 2021 was occasioned by financial difficulties arising from by diminished business due to the COVID 19 Pandemic. This was an event beyond the control of the respondent. The claimants testified that the respondent had continued to pay their salary in instalments until when it fell in arrears of six (6) months.
13. The claimants were well within their rights to resign from the employment due to the financial difficulties they faced including inability to pay for their transport to work. These circumstances considered as a whole did not constitute constructive dismissal by the respondent against the claimants.
14. This in the court's view was mutual separation by the parties occasioned by factors beyond the control of either of them.
15. Accordingly, the claim for compensation due to constructive dismissal has no merit and is dismissed for lack of merit.
16. In the final analysis, judgment is entered in favour of the claimants against the respondent for the payment of terminal benefits set out in their respective Statement of Claim as follows:-

(a) Peter Kibicho Kimau

- (i) Arrears salary for six months.....Kshs.523,290
  - (ii) Arrears house allowance for six (6) months .....Kshs.26,280
  - (iii) Arrears travelling allowance for Six(6) months .....Kshs8,200
  - (iv) Accrued 47 leave days not paid Kshs.....165,575.20
  - (v) Unpaid Gratuity at 21 days salary for each completed year of service being 33 years and 9 months .....Kshs.2,496,834
- Total: Kshs.3,220,179.2

(b) Maurice Oyiro Karakacha

- (i) Arrear salary for six months ..Kshs.643,892
  - (ii) Arrear travelling allowance .....Kshs.8,200
  - (iii) Gratuity at 21 days salary for each completed year of service for 25 years and 2 months .....Kshs.2,181,390
- Total: 2,833,482.00

(c) Peter Ndung'u Mbeke

- (i) Arrear salary for six months .....Kshs.487,320
- (ii) Arrear House Allowance .....Kshs.26,280
- (iii) Gratuity at 21 days salary for each completed year of service for 25 years and 2 months .....Kshs.1,787,595



Total: Kshs.2,301,195.00

- (d) Interest at Court rates for (a) (b) and (c) above from time of judgment till payment in full.
- (e) Costs of the consolidated suit.

17. For the avoidance of doubt, R.W.1 did not tender any tangible evidence with regard to the counterclaim. The requirement for the claimants to have given the respondent three (3) months' notice of termination in the circumstances of this case, where salaries were admittedly not paid for a period of six months was not proved by the respondent. The Counter-claim lacks merit and is dismissed as against the three claimants.

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 19<sup>H</sup> DAY OF OCTOBER, 2023.**

**MATHEWS N. NDUMA**

**JUDGE**

Appearance

M/s Abuga and M/s Mwangi for claimants

M/s. Kyalo for Respondent

Ekale – Court Assistant

