



**Omwancha v Chandaria Industries Limited (Cause 194 of 2019)  
[2023] KEELRC 2624 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2624 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 194 OF 2019  
MN NDUMA, J  
OCTOBER 19, 2023**

**BETWEEN**

**ABRAM MOCHACHE OMWANCHA ..... CLAIMANT**

**AND**

**CHANDARIA INDUSTRIES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimant filed suit on 28/3/2019 seeking for maximum compensation for alleged constructive dismissal from employment by the respondent.
2. The claimant further seeks payment of terminal dues set out in the Statement of Claim including:-
  - (i) One month salary in lieu of notice – Kshs.123,976 and
  - (ii) Overtime from May, 2015 to May, 2018 in the sum of Kshs.1,115,784.
  - (iii) Costs and interest.
3. The claimant, C.W.1 testified that he was employed by the respondent as a casual labourer in January, 1997 and was later confirmed on 1/2/2020 as a Salesman. That his last salary was Kshs.123,976. That his duties included drawing invoices, collect money from sales representatives and walk in clients and issue receipts accordingly.
4. That he reported to work at about 7.30 a.m. and would normally leave at around 5.30 p.m. That he was not paid any overtime despite raising the issue with his employer.
5. That on or about 26<sup>th</sup> April, 2018, C.W.1 testified that he reported to work as usual and continued working. That at about 11.00 am, the production manager called him concerning an issue of a client having more goods loaded in his vehicle than the actual goods paid for.



6. C.W.1 stated that he explained to the production manager that he had issued the client with a receipt which covered the goods bought and had directed him to proceed to the loading section to collect the goods. That at no point was he required to confirm the goods being loaded as there was a supervisor tasked to handle that part of business.
7. The claimant continued working as usual until 5/5/2018 when he was given a notice to show cause by the Human Resource manager M/s Catherine Mwangi. That he responded to the Notice To Show Cause on 7/5/2018.
8. That on 8/5/2018, he was given a letter of suspension pending further investigation into the theft incidence in question.
9. That to-date, C.W.1 said he was never called back to work. That he has been constructively dismissed without any due process. That the dismissal was unlawful and unfair and claimants to be awarded as prayed.
10. The respondent filed a memorandum of response dated 17/6/2019 in which the claimant denied the particulars of claim in toto. The respondent pleaded that the claimant tendered letter of resignation upon being suspended pending investigations in respect of a theft incidence.
11. R.W.1 Bhavin Shah stated that he was the head of finance of the respondent. He adopted a witness statement dated 15/5/2019 as his evidence in Chief. R.W.1 added that the claimant resigned by a letter dated 9/5/2018 which he produced before Court. That the claimant did not give any notice of resignation. That the claimant was paid all his benefits and the respondent does not owe him any more money.
12. Under cross-examination by Mr. Wathome for the claimant, R.W.1 said the letter of resignation was sent to the Sales department and was left at the reception. That the letter is signed by the claimant though it bears no receipt stamp. That this followed issuance of a Notice to Show cause to him which he had responded to followed by a letter of suspension to allow further investigation into the matter.
13. R.W.1 said that the disciplinary process was not concluded since the claimant resigned.
14. The claimant under cross-examination by counsel for the respondent denied that he had tendered any letter of resignation. That the letter produced before Court was not signed nor presented to the respondent by him. That he was awaiting to be called back after conclusion of investigations in vain. That he had then filed the suit. That he was not at all involved in the alleged theft of goods as he had explained in his response to the Notice to Show Cause.

### **Determination**

15. The parties filed written 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 claimant was constructively dismissed by the respondent or he had resigned from employment.
  - (b) Whether the claimant is entitled to the reliefs sought.
16. In terms of section 107 and 108 of the *Evidence Act*,
  107. Burden of proof
    - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

17. The claimant has the onus of proving on a balance of probability that his employment was constructively terminated by the respondent. The respondent has denied that it terminated the employment of the claimant and the respondent presented a letter of resignation which they said was presented to the respondent by the claimant.
18. The claimant stated that upon being given a letter of suspension on 8/5/2018, awaiting further investigations of a theft incidence in respect of which he already had responded to a notice to show cause, the respondent never called him back until he came to Court.
19. The claimant did not adduce any evidence indicating any effort by himself to enquire from the respondent why the respondent failed to call him back or how far the investigations had gone.
20. The claimant produced a letter of demand dated 10/1/2019 written to the respondent by his advocates Mukunga, Wathome & Company advocates. It is important to note that this letter was written about eight (8) months from the date of his suspension.
21. The advocates of the claimant indicated in their demand letter that the claimant had returned to the respondent's office, after a week to inquire about the result of the investigation when he was informed that he was dismissed.
22. The Court finds it difficult to believe that the claimant did not follow up this matter in writing immediately thereafter until eight (8) months later when the demand letter was written. There is no evidence that the claimant also demanded to be paid his terminal benefits including salary for days worked in writing until the demand letter was written.
23. The Court has considered the letter of resignation allegedly written to the manager sales and marketing department by the respondent and dated 9/5/2018 and finds no reason to doubt that it was indeed written by the claimant and delivered to the respondent. The claimant did not contest that the handwriting in which the letter is authored belongs to him. The claimant casually said that he had not signed or presented the letter to the reception of the sales department.
24. Accordingly, the claimant has failed to prove that he was constructively dismissed from work by the respondent. The letter was written a day upon the claimant's suspension on 8/5/2018 and the letter narrates the claimant's lack of morale due to what he considered unjustified allegations made against him after an excellent service to the respondent for a period of over twenty years.
25. The Court finds that the claimant severed his relationship with the respondent voluntarily upon being placed on suspension on 8/5/2018. The claim for compensation for unlawful dismissal is without merit and is dismissed.
26. The claimant having resigned from employment without giving notice is not entitled to an award of one month's salary in lieu of notice. The claim is dismissed.
27. The respondent also failed to sufficiently prove that he was owed by the respondent payment in respect of any overtime worked. The claimant did not produce any documented claim of overtime he had made to the respondent during his 20 years' service to the respondent.



28. The said claim has no merit and is also dismissed.
29. In the final analysis, the suit by the claimant against the respondent is found to lack merit and is dismissed.
30. Considering the 20 years' service the claimant had given the respondent and equity of arms between the contractual parties who had mutually separated, each party to bear their own costs of the suit.

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

**MATHEWS N. NDUMA**

**JUDGE**

**Appearance**

Mr. Wathome for claimant

M/s Ayego for Respondent

Ekale: Court Assistant

