



**Rashid & 9 others v Endmor Steel Millers Ltd (Employment and Labour Relations Appeal E011 of 2021) [2023] KEELRC 2603 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2603 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E011 OF 2021  
MA ONYANGO, J  
OCTOBER 19, 2023**

**BETWEEN**

**JOHNSON NDOMBI RASHID & 9 OTHERS ..... APPELLANT**

**AND**

**ENDMOR STEEL MILLERS LTD ..... RESPONDENT**

*(Being an appeal from the whole Judgment of the Honourable Chief Magistrate C.C Oluoch delivered on 29th October, 2021 in Mavoko CMEL No. 15 of 2018)*

**JUDGMENT**

1. The Appellants herein were the Claimants in Mavoko CMEL No. 15 of 2018 in which they had sued the Respondent vide a statement of claim dated 8<sup>th</sup> November 2021 seeking their terminal dues for the alleged unfair termination of their employment.
2. After hearing the parties, the trial court delivered its judgment on 29<sup>th</sup> October 2021 dismissing the claim against the Respondent.
3. The Appellants being dissatisfied with the said Judgement filed the instant appeal vide the Memorandum of Appeal dated 8<sup>th</sup> November 2021 filed in court on 12<sup>th</sup> November 2021. They raise the following grounds of appeal:
  - i. That the learned magistrate erred in law and in fact in finding that the Claimants were not constructively terminated from employment by the Respondent.
  - ii. The learned trial magistrate erred in law and in fact in not finding that, since the Appellants had been denied access to the work premises by the Respondent, they were unable to respond to the show cause letters or to defend themselves and were thus constructively terminated from employment.



- iii. The learned magistrate erred in law and fact in finding that the Appellants had not proved their case to get terminal dues, being Notice Pay, Leave days and House Allowance from the Respondent to the required standard.
  - iv. The learned magistrate erred in law and in fact in finding that the Appellants termination by the Respondent did not amount to unfair termination.
  - v. The learned magistrate erred in law and in fact in not considering the Claimants oral evidence and written submissions while considering the judgment.
  - vi. The learned magistrate erred in law and in fact in failing to take into account all the relevant factors and the law and thereby came to a wrong conclusion by dismissing the case.
4. The Appellants therefore prays for the following reliefs:
- a. That the appeal be allowed and the judgment of the lower court be set aside
  - b. That the judgment of the lower court be set aside and/ or varied to the extent that this Honourable court deems fit.
  - c. That the costs of this appeal be awarded to the Appellants.
5. The appeal was disposed of by way of written submissions. The Appellants filed their submissions on 25<sup>th</sup> February 2022 while the Respondent filed its submissions on 13<sup>th</sup> May 2022

#### **Analysis and determination**

6. This being a first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123.
7. Vide their Statement of Claim dated 31<sup>st</sup> October 2018, the Appellants herein sued the Respondent seeking for orders that;
- i. A declaration that the Respondent's letters dated 9<sup>th</sup> October 2018 and its actions thereafter amounted to unfair termination of the Claimants.
  - ii. Kshs 7,245,433 as particularized in the statement of claim
  - iii. Costs of the suit
  - iv. Interest on (ii) and (iii) above
  - v. Such further or other relief as this Honourable Court may deem fit
8. In that statement of claim, the Appellants averred that on various dates between the year 2010 and 2017, the Respondent employed them as scrap chargers and loaders at a rate of Kshs 7,300 per week being a basic salary of Ksh 31,616 a month.
9. They contended that they commenced employment and served the Respondent with loyalty and diligence until 9<sup>th</sup> October 2018, when the Respondents wrongfully and unlawfully constructively dismissed them from service without paying them their terminal dues.
10. The Respondent on its part filed an amended statement of response on 4<sup>th</sup> March 2020 and stated that the Claimants were employed as scrap metal suppliers at the furnace earning Kshs 622 per day.



11. The Respondent contended that the Claimants never served with diligence and loyalty and particularized the breach by the Claimants of the employment terms as: failure to supply scrap metals as the furnace, failure to meet deadline, failure to discharge roles assigned and the failure to report to work as directed.
12. The Respondent stated that as a result of the said breach, the Claimants were given a suspension notice of two weeks and were to resume duty thereafter. That they failed to report to work after the lapse of the two weeks. That none of them attempted to approach the Respondent for explanation which prompted the lawful termination of their services on 9<sup>th</sup> October 2018.
13. According to the Respondent, the Claimants chose to voluntarily resign and did not report to work at the lapse of the suspension notice as directed

### **The Evidence Adduced**

14. At trial the 1<sup>st</sup> Appellant, Johnson Ndambi Rashid testified as CW1 on his behalf and on behalf of the other Claimants. He adopted his witness statements his evidence in chief.
15. On being cross examined by Counsel Ivei, he stated that he was earning Kshs 31,616 per month and was paid via Mpesa. CW1 admitted to not responding to the show cause letter dated 9<sup>th</sup> October 2018 and stated that he was not allowed to go back to his place of work. He stated that they were terminated from employment without being given reasons.
16. In re-examination, CW1 reiterated that when they went back to work, they were sent away.
17. The Respondents called 2 witnesses in furtherance of its case. RW1, Laban Waigwa introduced himself as the Human Resource manager of the Respondent. He testified that the Appellants were employed by the Respondent and that they were earning a daily wage of Kshs 622. It was his testimony that the Appellants had a habit of delaying production which habit led to a lot of loss to the company and as a result, they were issued with a show cause letter which they never responded to. RW1 stated that the Claimants were suspended for 2 weeks and were to report back on 26<sup>th</sup> October 2018 which they did not.
18. RW1 explained the termination procedure at the Respondent's company. He stated that once an employee is given a show cause letter, they have to respond, after which they are suspended and given a hearing date. That further, the affected employee is supposed to have a witness at the hearing. That once a decision has been made to terminate employment wherein the dues of such an employee is calculated.
19. On cross examination, RW1 stated that the Respondent's human resource manual contains the procedure for termination. He stated that the Claimants were aware of the said procedures.
20. When referred to the show cause letters, he stated that the letters were dated 9<sup>th</sup> October 2018 while suspension was done on 12<sup>th</sup> October 2018. RW1 stated that the Claimants had been given 48 hours to respond to the show cause letters. That the 9<sup>th</sup> Claimant opted to resign on 16<sup>th</sup> October 2018.
21. Hillary Anyere Omollo testified as RW2 and stated that the Claimants were his workmates. It was his evidence that the Claimants and himself were suspended for two weeks due to delays in production caused by them. He stated that he went back to confirm the status of his employment and was informed that his employment had not been terminated. That he was told to go back to work and that he resumed on 25<sup>th</sup> October 2018.
22. On cross examination, RW2 maintained that he took himself to the company on 25<sup>th</sup> October 2018.



23. In re-examination, RW2 stated that he went back to the company on 19<sup>th</sup> October 2018 before expiry of 2 weeks.

## **The Appeal**

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

24. In their submissions dated 23<sup>rd</sup> February 2022 and filed in court on 25<sup>th</sup> February 2022, the Appellants have crystalized the issues for determination to the first three grounds in the Memorandum of appeal.
25. On the first ground that the learned trial magistrate erred in law and in fact in finding that the Claimants not constructively terminated from employment by the Respondent Counsel for the Appellants submitted that there is evidence that the Respondent terminated the employment of the Appellants unprocedurally without adhering to the provisions of Section 41 of the *Employment Act*. It was submitted that the Respondent's actions amounted to unfair termination as was established in the case *Walter Ogal Anuro vs Teachers Service Commission (2013) eKLR*.
26. On the second ground, it was submitted that when the Appellants were handed show cause letters dated 9<sup>th</sup> October 2018, they were not given a chance to defend themselves on the allegations levelled against them and that the Respondent did not investigate the said allegations before issuing the show cause letters to the Appellants.
27. It was further submitted that when the Appellants went back to work, they were not only denied access but they also found that they had been replaced by other workers, a clear indication that they had been constructively terminated unfairly.
28. According to the Appellants, the Learned Magistrate was wrong when she held that the Appellants could have asked for reinstatement in their demand letter dated 15<sup>th</sup> October 2018.
29. Lastly, on the ground that the Learned Magistrate erred in law and fact in finding that the Appellants had not proved their case to entitle them to be paid terminal dues, being Notice Pay, Leave days and House Allowance to the required standard the Appellants submitted that there is evidence that each appellant worked for the Respondent for more than the statutory minimum of three(3) and the maximum of (6) months which was an indication that their employment automatically converted to permanent contracts by conduct of the parties. That the Appellants worked 7 days a week including Saturdays and Sundays and that they were entitled to payment in lieu of the leave days as envisaged by Section 28 of the *Employment Act*.
30. It was also the Appellant's submission that from their evidence before the trial court, the amount paid as salary was never inclusive of house allowance which evidence the Respondents did not rebut.
31. The Appellants thus submitted that they had demonstrated that they were constructively dismissed and are entitled to the damages sought.
32. The court was urged to allow the appeal, set aside/vary the trial court's judgment to the extent it deems fit.

### **Respondent's Submissions**

33. The Respondent on its part identified the main issues for determination in this appeal to be; whether the Appellants made out a case for constructive termination of employment and if the trial court erred in its findings.



34. According to the Respondent, the Appellants were never terminated at any point. It was the Respondent's contention that the Appellants failed to reply to the notice to show cause letters served upon them and opted to desert work.
35. The Respondent submitted that the trial court properly evaluated and analysed the evidence to establish the validity of the Appellants' claims and that the issue of Sections 41 and 45 of the Employment Act does not arise as erroneously submitted by the Appellants.
36. It was further submitted that the appellate court is only tasked to review the evidence on record and not to sit as the trial court. That the Appellants submissions on ground 2 of appeal is an invitation to the court to sit as the trial court. The Respondent contended that the Appellants were attempting to introduce new evidence on the authenticity of the show cause letters which they did not challenge at the trial court.
37. It was the Respondent's further submission that there was no case of constructive dismissal as alleged by the Appellants. The Respondent contended that the court in the case of Coca Cola East & Central Africa Limited vs Maria Kagai Lugaga(2015) eKLR, expressly stated what constitutes constructive termination.
38. The Respondent thus submitted that the Appellants had failed to prove any constructive termination from employment. That as such the other grounds in the Memorandum of Appeal must fail since they are derived from the first two grounds of appeal.
39. It was further submitted that the trial court made findings based on evidence on record both oral and written and arrived at a just conclusion and that consequently, there is no reason to interfere with the trial court's judgment.
40. The Respondent prayed that the appeal be dismissed with costs.

### **Determination**

41. Upon analyzing the Memorandum of Appeal, the Record of Appeal and the rival submissions of the parties herein, the issues that fall for determination are whether the trial court erred in holding that the Appellants did not prove constructive dismissal and whether the trial court erred in dismissing their claim.
42. In ground 1 of the Appeal, the Appellants have raised the issue that the trial court failed to appreciate that the Appellants were constructively dismissed from employment.
43. The Black's Law Dictionary (Tenth Edition) defines constructive dismissal 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.”
44. The Court of Appeal in the case cited by the Respondent in Coca Cola East & Central Africa Limited v Maria Kagai Lugaga [2015] eKLR while addressing itself to the issue of constructive dismissal observed as follows;
 

“The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first



interpretation is that the employee could leave when the employer's behaviour towards him was so unreasonable that he could not be expected to stay- this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constitutes a repudiatory breach of the contract of employment- this is the contractual test."

45. Based on the above authority, the question that this court ought to answer is whether the circumstances under which the Appellants left employment would constitute constructive dismissal.

46. The letter addressed to the 1<sup>st</sup> Appellant read:

9<sup>th</sup> October 2018

Johnson Rashid Ndombi

Re: Show Cause Letter

It has been reported to Management that on 4<sup>th</sup> Oct. 2018, as a Scrap Charger, you failed to supply enough scrap on the platform. This action caused inefficiency and delay in production.

You knowingly acted contrary to the company policies and procedures.

You are hereby required to show cause in writing within 48 hours, why disciplinary action should not be taken against you, failure to which severe disciplinary action will be taken against you without further reference.

Yours faithfully,

For: Endmor Steel Millers Ltd

(Signed)

Loise Gichuki

HR Manager

CC: Director Operations

Deputy Managing Director

Operations Manager

47. From the above self-explanatory letter, it is evident that the Appellants were issued with the said letters after there was delay in production in the course of their employment. They were required to respond to the said show cause letters by giving reasons as to why disciplinary action should not be taken against them for their alleged inefficiency and delay in production.

48. The 1<sup>st</sup> Appellant who was PW1 at the trial in his witness statement dated 31<sup>st</sup> October 2018, stated that after they were issued with the show cause letters, they were denied access to the company premises by the security guards who told them that they were under instructions not to allow the Appellants into the premises. That as a result they were unable to respond to the show cause letters.

49. In the witness statement which PW1 adopted at the hearing, he did not state when they were denied access, whether it was before or after the time they were supposed to have responded to the show cause letter.

50. DW1 for the Respondent in his testimony testified that the Appellants were suspended for two weeks after they failed to respond to the show cause letters. That after the expiry of the two weeks' suspension, the Appellants deserted work. That their 2 colleagues.



51. Hillary Anyere Omollo and Paul Waithaka went back to work after the suspension and were allowed to continue working. Hillary testified for the Respondent as DW2 and stated that he had initially also been included in the demand letter but when he went to inquire from the Respondent he was told that his employment had not been terminated so he went back to work on 25<sup>th</sup> October 2018. He testified that he was not called back to work. That he took himself back to work.

52. The Appellants wrote a demand letter to the Respondent on 15<sup>th</sup> October 2018. This was before the period of suspension expired. In the demand letter they state that their employment was terminated on 9<sup>th</sup> October 2018 which was the date of the show cause letter. Paragraph 2 of the demand letter reads:

That based on oral contracts, you employed our above mentioned clients as scrap Chargers and loaders on various dates which are well known to you. On 9<sup>th</sup> October 2018, you purported to actually and/or constructively terminate our client's employment by issuing them with "Show Cause" letters under circumstances that were most unfair and unlawful. They were denied access to your offices and all their appeals fell on deaf ears. The above action amounts to Unfair Termination.

53. A show cause letter is not a termination letter as stated in the demand letter. I find that on the evidence on record, the trial court was right in holding that the Appellants did not prove that they were constructively dismissed.

54. The next issue is whether the trial court erred in not awarding the remedies sought in the Claim by the Appellants. The Appellants prayed for a declaration that the letters dated 9<sup>th</sup> October 2018 and its actions thereafter amounted to their unfair termination, one-month salary in lieu of notice, leave days, house allowance and 12 months' compensation for unfair dismissal.

55. I will consider each prayer under the specific head.

i. Declaration that letters of 9<sup>th</sup> October 2018 amounted to unfair termination

As already held above, the Appellants were not unfairly terminated. They are therefore not entitled to this prayer.

ii. One-month notice

Notice is provided for in both section 36 and 49(1)(a) of the *Employment Act*. In view of the fact that they were not terminated by the Respondent the Appellants are not entitled to notice.

iii. Leave days.

The Appellants in their evidence in the trial court contended that they never went on leave during the employment period. The Respondent witness RW1, did not refer to this issue in his evidence. However, going by the form at page 107 of the Record of Appeal and the fact that the payee Paul Wangai Wanjohi also issued with a notice to show cause together with the Appellants, it is evident that the Respondent paid leave to the workers. I will award them similar leave for 2018 at Kshs. 9796.

iv. House allowance

Under Section 31(1) of the *Employment Act*, 2007, an employer is required to provide an employee with reasonable housing accommodation or pay the employee sufficient housing allowance as rent in addition to the basic salary. The Respondent filed a copy of the gazetted Statutory Wages Order which shows that daily wages are inclusive of house allowance. In view



of the fact that the Appellants were paid daily wages, they are not entitled to house allowance as the same was included in their wages.

- v. 12 Months' salary as compensation for unfair termination

Having not been unfairly terminated, the Appellants are not entitled to compensation.

- vi. Certificate of service

56. Each of the Appellants having worked for more than 4 weeks, is entitled to certificate of service as provided in section 51 of the *Employment Act*.

57. In summary, the appeal succeeds only in terms of payment of leave and certificate of service. The rest of the Appeal is dismissed. Each party shall bear its costs of the appeal and in the lower court.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 19TH DAY OF OCTOBER, 2023**

**M. ONYANGO**

**JUDGE**

