



**Anyasi v El-Casa Suite Nyali (Appeal E086 of 2022)
[2023] KEELRC 2854 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2854 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E086 OF 2022
AK NZEI, J
NOVEMBER 9, 2023**

BETWEEN

AMOS ANYASI APPELLANT

AND

EL-CASA SUITE NYALI RESPONDENT

*(being an appeal from the judgment of the Hon. M.L. Nabibya – SPM
delivered on 17th November 2022 in Msa CM-ELRC E157 of 2021)*

JUDGMENT

1. The Appellant herein was the Claimant in Mombasa CM ELR Cause No. E157 of 2021 whereby he had sued the Respondent herein vide a memorandum of claim dated 10/3/2021 seeking the following reliefs:-
 - a. A declaration that termination of the claimant’s employment amounted to a constructive dismissal and was unfair.
 - b. One month salary in lieu of notice ksh. 70,000
 - c. Two (2) days’ pro-rata leave for 4 months worked ksh. 5,384,62
 - d. Four (4) public holidays worked in December 2019 to January 2020 i.e 12th, 25th, 26th, December & 1st January 2020 ksh. 10,769.23
 - e. Compensation for wrongful/unfair/constructive dismissal at twelve months salary (70,000x12) ksh. 840,000
 - f. House allowance for four(4) months @ ksh. 10,500 ksh. 42,000
 - g. Issuance of a certificate of service



- h. Costs and interest at Court rates.
2. The Appellant had pleaded:-
- a. that he had been employed by the Respondent as a Hotel Manager effective 1/11/2019, earning a monthly salary of ksh. 70,000 and communication allowance of ksh. 2,500; on terms and conditions contained in his employment letter dated 8/10/2019. That no position agreement was attached to the letter of employment, and none was ever given to the Appellant.
 - b. that two months into the Appellant's employment, the Respondent's director/proprietor, one Ahmed Maalim, became hostile, intimidating, rebellious and cruel towards the Appellant and created constrained working relationship between the two.
 - c. that the said director expected the Appellant to provide instant success, growth and expansion of the Respondent's business, notwithstanding lack of proper and structured marketing strategies for the business.
 - d. that in early February 2020, the Respondent's said director asked the Respondent's accountant by the name Esther to tell the Appellant to leave employment, and that the Appellant was not issued with any letter in that regard.
 - e. that being unable to withstand, persevere or tolerate working under such hostile and harsh conditions, the Appellant left employment without notice.
 - f. that the Appellant was neither paid house allowance nor availed reasonable housing at or near his place of work for the four months that he worked.
 - g. that the Appellant was never provided with any payslips, and was thus unable to establish whether NSSF, NHIF or PAYE deductions from his salary were made and remitted.
3. Other documents filed by the Appellant together with his statement of claim included his written witness statement dated 10/3/2021, replicating the averments made in the memorandum of claim, and an evenly dated list of documents listing some eight documents, which included the Appellant's job offer for the position of Resort Manager, dated 8/10/2019.
4. The Respondent is shown to have entered appearance through the firm of Ameli Inyangu & Partners Advocates on 24/2/2022, but is not shown to have filed any response to the Appellant's memorandum of claim, as none is contained in the record of appeal filed herein.
5. Hearing is shown to have proceeded on 8/6/2022 before Hon. M. Nabibya (Principal Magistrate) whereby the Appellant adopted his filed witness statement dated 10/3/2021 as his testimony in chief, and produced in evidence the documents listed on his filed list of documents.
6. Cross-examined, the Appellant testified that he started working for the Respondent on 1/11/2019 and left in March 2020, having worked for four (4) months. That the contract provided for a probationary period subject to satisfactory performance, and that the Appellant did not leave employment on his own, but the Respondent sent its representative to tell him that it could not work with the Appellant, but no letter was issued in that regard. That the Respondent sent two people to tell the Appellant to leave. That the Appellant left on 2/3/2020.
7. The Appellant admitted, under cross examination, that he signed for an all-inclusive salary of ksh. 70,000, and that the claim for house allowance was unfounded.



8. Re-examined, the Appellant testified that he worked for 4 months, and had completed probation as at the time of his departure, and that he never received any communication. The Appellant then closed his case, and the Respondent closed its case without calling any evidence; and indicated that it would not file any submissions. The Appellant filed written submissions.
9. The trial Court delivered its judgment on 17/11/2022, rendering itself thus:-

“... To me, the claimant has demonstrated that he deserted duty and the only relief available to his case is that of issuance of certificate of service for the period worked, and I so order that the same be supplied to him.

The rest of the claim is dismissed.

Costs to the Respondent.”
10. Aggrieved by the said judgment, the Appellant preferred the present appeal and set forth the following grounds of appeal:-
 - a. that the learned Magistrate’s judgment was contrary to matters raised in the Appellant’s memorandum of claim, evidence and submissions on matters of both law and fact.
 - b. that the learned Magistrate erred in law and in fact in dismissing the Appellant’s claim and failing to appreciate that based on the memorandum of claim, evidence adduced and submissions presented, and the law, the Appellant was entitled to the reliefs sought. That dismissal of the claimant’s claim was unreasonable, mischievous and erroneous.
 - c. that the learned Magistrate erred in law and in fact in ignoring and/or failing to consider and to appreciate the key elements in the definition of constructive dismissal, which were elaborated in the Appellant’s submissions whereby she wrongly found that the Appellant had deserted duty and failed to issue notice or request for a certificate of service. That the Magistrate misapprehended and misunderstood the principles of constructive dismissal.
 - d. that the learned Magistrate erred in law and in fact in admitting that the Respondent had closed its case without calling single witness and failing to take into account that the claimant’s claim was undefended and his evidence unchallenged; thus she wrongfully, unjustifiably and unreasonably assumed that the Respondent had discharged its burden of proof to the required standard.
11. The Appellant sought the following reliefs on appeal:-
 - a. that the appeal be allowed.
 - b. that the Chief Magistrate’s Judgment delivered on 17th November 2022 be set aside and/or varied.
 - c. that in the alternative, this Court takes up the Appellant’s submissions and or reassess the evidence and issue a judgment thereon.
 - d. such further or other orders this Honourable Court may deem just to grant.
12. I have severally stated, and I do repeat it here, that Courts determine cases, or are supposed to determined cases before them based on the pleadings filed by the parties, evidence presented in Court and the law. Submissions by legal Counsel, whether oral or written, cannot be a substitute for pleadings and evidence. Submissions are presentations and/or arguments on an already presented case by parties thereto and/or their Counsel as they try to convince the Court that their respective cases carry more



weight, and that the scales of justice should tilt in their favour. Any issue pleaded by a party must be proved by evidence, not by submissions.

13. This is a first appeal, and the Appellant's case as presented in the trial Court is open for fresh consideration. It is to be noted that the Appellant's case was not defended and that the evidence adduced by him was not rebutted. A first appellate Court is empowered to subject the whole of the evidence adduced in the trial Court to a fresh and exhaustive scrutiny and to make conclusions about it; bearing in mind that it did not have the opportunity of seeing and hearing the witness first hand. This duty was stated in *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123.
14. Having considered the pleadings filed by the Appellant in the trial Court and evidence thereon adduced, issues that fall for determination, in my view, are as follows:-
 - a. whether the Appellant was entitled to plead unfair termination, and if so, whether his employment was unfairly terminated.
 - b. whether the Appellant is entitled to the reliefs sought in the trial Court.
15. On the first issue, the Appellant pleaded and testified that he was employed by the Respondent effective from 1/11/2019, and that he left employment on 2/3/2020, having worked for four(4) months; and that he left employment after the Respondent's director asked the Respondent's accountant to tell the Appellant to leave employment as the Respondent could not work with him. He asked the trial Court to declare that he (the Appellant) had been constructively terminated, which amounted to unfair termination. Section 45(3) of the *Employment Act* provides as follows:-

“(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.”
16. Without belaboring the point, I find and hold that the Appellant, having worked for his employer (the Respondent) for only four (4) months, had no right to complain and/or to plead that he had been unfairly terminated. The Court cannot, therefore make a finding of unfair termination, whether constructive or otherwise.
17. On the second issue, and having made a finding that the Court cannot make a finding of unfair termination in favour of the Appellant, the claim for compensation for unfair termination of employment cannot succeed, and is hereby disallowed.
18. On the claim for one month salary in lieu of notice, the Respondent did not deny or rebut the Appellant's pleading and evidence that its director send the Respondent's accountant to tell the Appellant to leave employment. The trial Court fell into error by finding that the Appellant deserted employment. The Appellant produced in evidence his letter of employment dated 8/10/2019. Clause 3 of the said letter states that the claimant's basic salary was ksh. 70,000 per month. It was not shown that the Appellant was issued with termination notice pursuant to Section 35(1)(c) of the *Employment Act*. He is entitled to one month salary in lieu of notice. Clause 8 of his employment letter/contract states as much. I allow the claim for ksh. 70,000 in that regard as prayed.
19. The claim for two (2) days pro-rata leave for the 4 months worked was never denied, and is allowed. I award the Appellant ksh. 5,384.62 in that regard as prayed. Section 74(f) of the *Employment Act* obligates an employer to keep records on each employee's leave entitlement, on days taken and days due. In the absence of evidence by the Respondent demonstrating that leave days due were taken, the claim must succeed.



20. The claim based on alleged public holidays worked by the Appellant during the four months that he worked for the Respondent was not proved, and is disallowed. An employee making such a claim must present evidence to show that he or she was, indeed, on duty on the public holidays in issue, and that he or she was not compensated by the employer for the same. Such claims must always be proved to the required standard. That is, on a balance of probability.
21. I would have allowed the claim for house allowance were it not for the Appellant's evidence under cross examination that the claim for house allowance was unfounded. I say this because I have noted from Clause 3 of the Claimant's contract of employment dated 8/10/2019 that the contractual monthly salary of ksh. 70,000 was basic, but not consolidated pursuant to Section 31(2) (a) of the Employment Act 2007.
22. I uphold the trial Court's finding on issuance of a certificate of service by dint of Section 51(1) of the Employment Act. An employer is obligated to issue a certificate of service to an employee upon termination of the employee's employment. The appeal thus partly succeeds.
23. Consequently, the trial Court's judgment delivered on 17/11/2022 is hereby set aside, and is substituted with a judgment in favour of the Appellant against the Respondent as follows:-
 - a. one month salary in lieu of notice ksh. 70,000
 - b. two (2) days pro-rata leave for the four months worked ksh. 5,384.62Total ksh.75,384.62
24. The Respondent shall issue the Appellant with a Certificate of Service pursuant to Section 51(1) of the Employment Act 2007 within thirty days of this judgment.
25. The Appellant is awarded costs of this appeal and costs of proceedings in the Court below. Costs shall be assessed on the lower scale, both in this Court and in the Court below.
26. The Appellant is also awarded interest on the awarded sum, to be calculated at Court rates from the date of this judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9th NOVEMBER 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for the Appellant

..... for the Respondent

