



**Kisala v Securex Agencies (K) Limited (Cause 1174 of 2017)
[2022] KEELRC 1447 (KLR) (27 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1447 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1174 OF 2017
NZIOKI WA MAKAU, J
JUNE 27, 2022**

BETWEEN

NELSON MUSALAGANI KISALA CLAIMANT

AND

SECUREX AGENCIES (K) LIMITED RESPONDENT

JUDGMENT

1. The claimant instituted this claim against the respondent vide a Memorandum of Claim dated June 23, 2017. He avers that the respondent confirmed his employment as a guard by a letter dated July 31, 2011 and later appointed him to the position of rider by a letter dated July 18, 2014 and that his last gross salary is kshs 25,414/-. The claimant also filed a witness statement dated August 8, 2019. It is the claimant's averment that on December 26, 2016 he requested and the respondent allowed him to proceed to the village for a four-day Christmas break and he was expected to resume work on December 31, 2016. That however due to a transport crisis obtaining at that time, he was unable to get transport to Nairobi to get back to work on time and that upon reporting to work on December 31, 2016, he was given a letter dated January 14, 2016 inviting him for a disciplinary hearing on February 10, 2017 and was equally suspended without pay. He avers that the meeting held on February 10, 2017 found no wrongdoing on his part but the respondent still issued him with a warning letter dated February 16, 2017 and that when he reported to work on February 16, 2017, he was not assigned work. The claimant avers that on February 17, 2017 the respondent gave him a 'Guard Assignment Slip' informing him that work would start on March 10, 2017 and that through his then advocates, he then protested the respondent's refusal to assign work to him. That the respondent's response was that he had absented himself from work and again issued him with 'Guard Assignment Slip' on April 4, 2017 deploying him to the respondent's patrol department.
2. The claimant further avers that it is while on duty responding to an emergency alarm from the respondent's client that city council askaris impounded his motor bike on Mombasa road and that upon informing the respondent of the incident, he was advised to stay out of work until the same



was resolved. That there was however no communication from the respondent about his salary and it informed him on March 26, 2017 that kshs 10,000/- would be deducted from his payslip as a fine for the motorbike that had since been released. That on April 4, 2017 he was given a 'Guard Assignment Slip' and assigned respondent's back up team but he was not actively engaged in work by the respondent and he sought clarification on the status of his employment by a letter dated May 17,2017. That on May 26, 2017 the respondent called him for a meeting but did not inform him when it would assign duties to him and it is the claimant's averment that the respondent's acts are inhuman and against fair labour practice as the same: breached his right to earn a living; amounted to discrimination at the work place; was malicious and premeditated; and was in bad faith.

3. The claimant thus prays for judgment against the respondent for:
 - a. An order for immediate payment of kshs 152,484 being salary for December 2016 to May 2017.
 - b. Spent.
 - c. Such other orders as this honourable court may deem fit to grant.
 - d. Costs of the suit together with interest thereon.
4. The respondent did not file a response to the Memorandum of Claim. The claimant testified on his own behalf and restated his claim that the respondent did not accord him a fair hearing. The claimant stated that he was denied salary for December 2016 to May 2017 and the respondent also failed to allocate him work. The claimant prior to giving his testimony in court added a claim for compensation as well as notice for one month.
5. The claimant then filed his written submissions dated November 22, 2021 wherein he submits that the *Black's Law Dictionary* (9th Edition) defines constructive dismissal as "A termination of employment brought about by the respondent making the employee's working conditions so intolerable that the employee feels compelled to leave." He submits that constructive dismissal or discharge has been defined by the Court in the case of *Nathan Ogada Atiagaga v David Engineering Limited* [2015] eKLR as follows:

"Constructive dismissal occurs when an employee resigns because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge."
6. The claimant submits that the Court of Appeal in dismissing the appeal in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR, stated that:

"In constructive dismissal, it is not mandatory that the employee must leave immediately without notice, the employee may leave immediately or ay terminate the contract with notice or no notice. The departure must be within a reasonable time and the employer's conduct must be the effective cause of leaving or termination. Notice of termination is not necessarily a bar to a claim based on constructive dismissal."
7. It is the claimant's submission that from his testimony, he was denied salary for December 2016 to May 2017 and the respondent also failed to allocate him work and that his plea to the respondent for payment of his salary elicited no response. That the respondent had no basis to deny him a salary while



on suspension and that the question and rationale of a suspension was addressed by the court in *Paul Ngeno v Pyrethrum Board of Kenya Ltd* [2013] eKLR that the court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. The claimant further submits that it is apparent that the respondent did not require his services and made it difficult for him to work without a salary and that the guard assignment Slip issued to him were merely for cosmetic purposes. He urges the court to thus find that the claimant was constructively dismissed by the respondent and submits that the respondent having failed to call any evidence or attend the hearing, the claimant's case is uncontroverted. On this submission he relies on the case of *Elijah Kioko Kitavi v Allied Plumbers Limited* [2019] eKLR wherein the court while relying on the case of *CMC Aviation Limited v Cruisair Limited (no 1)* 1978) KLR 103, (1976-80) 1 KLR 835, found that the claimant's claim remained uncontroverted because the respondents had not rendered any evidence in court. He further urges this court to find that the claimant established the existence of an employment relationship with the respondent as evidenced in the documents in the List and Bundle of Documents. The claimant submits that the court should find that the burden placed on the respondent was not discharged and it did not tender any evidence or produce documents to counter the claimant's arguments. It is submitted by the claimant that since his claim stands uncontested, the court should find that he has proved his case on a balance of probability and was thus entitled to salary for the period worked and further, payment of one month's salary in lieu of notice based on the statutory Minimum Wages for 2012 as well as section 36 of the *Employment Act*.

8. The claimant proved constructive dismissal as he was repeatedly issued with standby instructions in the form of 'guard assignment slips' with no attendant tangible work. This is exhibited by the respondent's issuance of a letter indicating the claimant had absconded work despite the respondent placing the claimant on the aforesaid standby. This created a situation where the claimant resorted to legal assistance to assert his employment and subsequently his termination through non-payment of salary for a considerable period of time December 2016-May 2017. As such the claimant would be entitled to recover for the unpaid salary as well as compensation for the constructive dismissal.
9. In the final analysis I enter judgment for the claimant against the respondent for:-
 - a. kshs 152,484/- being unpaid salary for December 2016-May 2017
 - b. 3 month's salary as compensation – kshs 76,242/-
 - c. One month's salary as notice – kshs 25,414/-
 - d. Costs of the suit.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JUNE 2022

NZIOKI WA MAKAU

JUDGE

