



Wambu v Searite Holdings Limited (Employment and Labour Relations Cause 1614 of 2016) [2022] KEELRC 12950 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12950 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1614 OF 2016
JK GAKERI, J
OCTOBER 27, 2022**

BETWEEN

JOHNSON WAMBU CLAIMANT

AND

SEARITE HOLDINGS LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Memorandum of Claim filed on August 12, 2016 and amended on May 26, 2022.
2. The Claimant avers that he was employed by the Respondent as a guard in February 2013 at a gross monthly salary of Kshs 6,500/= and remained in employment until June 1, 2015 when he wrote a resignation letter alleging underpayment, lack of house allowance, overtime dues arrears and reduction of off days from 4 to 3.
3. The Claimant avers that he was grossly underpaid, not allowed to take leave and off days and not compensated for the same.
4. That his letter of resignation was acknowledged by letter dated July 15, 2015 but was not paid terminal dues. That his letter dated August 4, 2015 was not responded to by the Respondent so is a letter of even date to the Kiambu Labour Office.
5. That the withholding of dues was procedurally unfair.
6. It is the Claimant's case that the Respondent's actions amounted to unilaterally, unprocedurally and unfairly terminating the Claimant's contract of service contrary to the Constitution, labour laws and rules of natural justice.



7. The Claimant prays for:

- i. One month salary in lieu of notice Kshs 10,954
- ii. Leave pay Kshs 10,070.67
- iii. Public holidays Kshs 11,681.6
- iv. Service pay Kshs 13,000
- v. Overtime arrears Kshs 390,153.60
- vi. Salary underpayment Kshs 101,110.65
- vii. Housing allowance Kshs 40,891.60
- viii. Compensation for constructive dismissal Kshs 131,456.40
Total Kshs 722,137.22
- ix. Declaration that the resignation was involuntary hence it amounted wrongful/unfair termination of employment and/or constructive dismissal.
- x. A declaration that the withholding of terminal dues and benefits by the Respondent was unfair and unlawful.
- xi. General damages for loss of utility and earnings.
- xii. Off arrears owed Kshs 13,000
- xiii. Costs of this claim
- xiv. Certificate of service
- xv. General damages against the Respondent
- xvi. Interest of court rates

Respondent's case

8. The Respondent filed its response to the Memorandum of Claim on December 2, 2016.
9. The Respondent admits that the Claimant was its employee between February 2013 and June 2015 and resigned from employment voluntarily. It denies that the Claimant was denied leave days and off days or forced to work on public holidays and if he did, he was requested to do so in advance and was compensated.
10. That the Claimant was aware of and accepted the terms of employment and received the same for the entire duration of employment.
11. That communication before the suit herein was on a 'without prejudice basis.'
12. It is the Respondent's case that the Claimant is a vexatious litigant and has been using the court to enrich himself by litigation.
13. The Respondent avers that the Claimant was not a diligent employee as complaints against him had been made by colleagues and clients.
14. The Respondent prays for dismissal of the suit with costs.



Claimant's evidence

15. The Claimant's written statement is a replica of the memorandum of claim.
16. On cross-examination, the Claimant testified that he had no written contract with the Respondent and resigned in writing. That his monthly salary was Kshs 6,500/= and kept writing letters about it as he worked and was not paid any housing allowance and worked for 12 hours with no overtime pay and had worked in other companies.
17. On re-examination, the witness testified that he wrote a letter on August 4, 2015.
18. That he worked for 2 years 1 month and was on permanent terms of employment.
19. That he resigned because the terms were too poor from the time Mr Chege became the Manager.

Respondent's evidence

20. RWI testified that the Claimant was its employee from 2013 to 2015 and resigned voluntarily. That the terms of employment were agreed upon.
21. It was his evidence that employees did not work during public holidays and the Claimant was paid his dues.
22. That the Claimant had left another company to join the Respondent.
23. On cross-examination, RWI stated that he explained the terms of employment to the Claimant and his salary was Kshs 7,000/= per month but had not filed any documentary evidence. RWI further confirmed that the Claimant worked from 6.00 am to 6.00 pm and overtime was part of the salary.
24. The witness also confirmed that the letter dated February 29, 2016 was from the company and admitted owing the Claimant certain amounts. That he did the letter himself.

Claimant's submissions

25. The Claimant address three issues, on resignation, withholding of terminal dues and entitlement to the reliefs sought.
26. On resignation, it is submitted that the Claimant resigned on June 1, 2015 because of underpayment, no overtime dues, reduction of off days from 4 to 3 per month with no reason, could not take leave and was forced to work during public holidays and his letters were not responded to.
27. The Claimant submits that he was constructively dismissed and relies on the sentiments of Lord Denning in *Western Excavating ECC Ltd V Sharp (1978)1 WLR 344* for an explanation of the principle of constructive dismissal.
28. That the Respondent failed to pay the Claimant's dues and reduced the off days to 3.
29. That off and leave days had accumulated and refusal to increase the Claimants salary, housing allowance and overtime.
30. It is submitted that the Claimant's resignation was involuntary and amounted to constructive dismissal.
31. As regards the withholding of dues, it is contended that the Claimant resigned on June 1, 2015 but the Respondent did not settle his dues as by law required demands notwithstanding. That he wrote to the Respondent on August 4, 2015 and to the Labour Office Kiambu on August 14, 2015.



32. That a letter dated September 8, 2015 was also unresponded to.
33. That the withholding of terminal dues was unjustified.
34. On the reliefs sought, it is submitted that since the Claimant was constructively dismissed, he is entitled to the reliefs sought. For unexplained reasons, the amounts claimed in the submissions is different from what is pleaded.
35. Decisions such as [*Alphonse Maghanga Mwachanya V Operation 680 Ltd \(2013\) eKLR*](#), [*Patrick Njuguna Kariuki V Del Monte \(K\) Ltd Cause 953 of 2011*](#), [*Peter Mwaura Kamau and another V National Bank of Kenya Ltd \(2020\) eKLR*](#) as well as [*Joseph Mikae Ogenda V JRS Group Security Ltd \(2016\) eKLR*](#) and others are relied upon to urge that the Claimant is entitled to the reliefs sought.
36. In sum, the Claimant's counsel submitted that the Claimant resigned involuntarily owing to the Respondent's conduct and is thus entitled to terminal dues and benefits.

Respondent's submissions

37. The Respondent identifies three issues for determination touching on whether the Claimant was constructively dismissed, entitlement to reliefs and costs.
38. As regards the alleged constructive dismissal, the Respondent submits that the Claimant worked for the Respondent from February 2013 to June 2015 when he made a voluntary decision to resign from employment in pursuit of greener pastures.
39. The decision in [*Mwikali Nzuki V Food for the Hungry Kenya \(2015\) eKLR*](#) cited in [*Wilberforce Sifuna V Burbani Engineers Ltd \(2019\)*](#) is relied upon for an explanation of voluntary resignation.
40. Further, the decision in [*Milton M Isanya V Aga Khan Hospital Kisumu \(2017\) eKLR*](#) is relied upon to explain the doctrine of constructive dismissal.
41. The Respondent highlights one of the ingredients of constructive dismissal as

' The employee must not delay in resigning after the breach has taken place, otherwise the court may find the breach waived.'
42. Reliance is also made on the decision in [*Kenneth Mburu and another V Kibe Muigai Holdings Ltd \(2014\) eKLR*](#).
43. In sum, the Respondent submitted that the claim of constructive dismissal was an afterthought made 6 years after the claim was filed. In its view, the Claimant entered into an employment agreement where the terms and conditions were discussed and agreed upon and the same remained unchanged throughout the Claimant's employment and cannot be said to be intolerable having accepted them in the first place.
44. It is submitted that the Claimant has not established constructive dismissal. Section 47 (5) of the [*Employment Act*](#) is relied upon to urge that the burden of proving that an unfair termination or wrongful dismissal has taken place rests on the employee.

Analysis and Determination

45. The issues for determination are;
 - i. Whether the Claimant was constructively dismissed.



ii. Whether the Claimant is entitled to the reliefs sought.

46. As to whether the Claimant was constructively dismissed, the starting point is a delineation of the doctrine of constructive dismissal as enunciated by courts of law.

47. According to *Black's Law Dictionary, 10 Edition*, constructive dismissal means

' 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.'

48. According to Lord Denning in *Western Excavating ECC Ltd V Sharp (supra)*

' If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reasons of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once.

Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract'.

49. The Court of Appeal had the opportunity to explain and apply the doctrine of constructive dismissal in its decision in *Coca Cola East and Central Africa Ltd V Maria Kagai Ligaga (2015) eKLR* where the court expressed itself 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 give rise to the test to be applied. The first interpretation is that the employee could leave when the employers' 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 employers conduct is so grave that it constitutes a repudiatory breach of the contract of employment – this is the contractual test.'

50. The Court of Appeal laid down the guiding principles as follows;

- a. 'What are the fundamental or essential terms of the contract of employment.
- b. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer.
- c. The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of contract.
- d. An objective test is to be applied in evaluating the employer's conduct.



- e. There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e causation must be proved.
- f. An employee may leave with or without notice so long as the employers conduct is the effective reason for termination.
- g. An employee must not have accepted, waived acquiesced or conduct himself to be estopped from asserting repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
- h. The burden to prove repudiatory breach or constructive dismissal is on the employee.
 - i. Facts giving rise to repudiatory breach or constructive dismissal are varied.'

51. The court is bound and guided by these sentiments.

52. In the instant case, the Claimant submits that the Respondent made a fundamental change to the contract of employment unilaterally to the extent that its continuation was illogical in that off and leave days had not been paid, off days were reduced from 4 to 3.

53. Be that as it may, it is unclear as to when the alleged changes took place since the Claimant commenced his writing of letters on September 6, 2013 about underpayment. In this letter the Claimant stated

' I have now accepted to give up and will write resignation letter within a few days from now if my complain again ignored. I have off arrears, no house allowance, holidays not paid while salary is underpayment.'

54. The second letter is dated December 19, 2013 which addresses salary underpayment, house allowance, holiday and off days. A 3rd letter dated May 27, 2015 was on the same issues.

55. The letters dated August 4, 2015 and August 14, 2015 were written after resignation addressing the same issues.

56. The Claimant's termination letter read as follows;

Johnson Wambu

Searite security

Box 688 00900

Kiambu

June 1, 2015.

Searite Security

Box 68800900

Kiambu.

Dear Sir,

I am Johnson Wambu currently assigned to Catherine's home Kugeria Street near KIST. I am writing to inform you that I have decided to leave work as from July 1, 2015 factors to that decision amongst



them are- Salary underpayment, without house allowance and overtime. Also, salary reduction almost monthly unlawfully.

As that was not enough, the management have reduced my monthly 4 days off duty to three without any specific reason creating more arrears. I started work on February 20, 2013, never absent unless when given off officially.

I have served the Company for 2 years, 50 days off arrears, 22 leaves while 23 + 2 public holidays are also pending.

Would the process of replacement and payment be ready before the dates, to me will be quite better not forgetting to issue me with termination letter of service, NSSF contribution fully settled.

Yours truly

Johnson Wambu

Catherine Assignment

By July 1, 2015, my off arrears had reached 54 days unpaid. This is because.'

57. Needless to gainsay, the reasons for termination are the same reasons raised in the first letter on record dated September 6, 2013, 6 months after employment.
58. From the evidence on record and the 1st letter dated September 6, 2015, there was no fundamental change in the terms of the contract.
59. Intriguingly, the Claimant wrote no letter in 2014 and no complain appear to have been made.
60. It is not in dispute that the Claimant had serious issues with his employment and raised them with the Respondent and the Labour Office, Kiambu in June and December 2013 and did not raise them again until his resignation more than 17 month later.
61. Although the Claimant led no evidence to prove it, the only thing that appear to have changed mid-stream is the reduction of off days from 4 to 3 per month which is undoubtedly not a fundamental breach of the contract of employment between the parties.
62. In Maureen [Wanjiru Mwangi V Blue Sea Energy \(2020\) eKLR](#) and [Peter Kaburu Karanja V Kirinyaga Construction Kenya Ltd \(2020\) eKLR](#), it was held that failure to pay salary by the employer amounted to constructive dismissal. In the latter case, the Claimant had not been paid for nine (9) months by the time he resigned. Onyango Judge stated

' I find that the failure to pay the Claimant his salary amounted to constructive dismissal.'

63. The Respondent's failure to pay house allowance and overtime was a fundamental breach of the contract of employment but the evidence on record reveal that the Claimant accepted the state of affairs as his letter of September 6, 2013 confirm.
64. But more significantly, one of the requirements of constructive dismissal is that the employee must leave at the instant, otherwise 'he will be regarded as having elected to affirm the contract.'



65. This position finds support in Coca Cola East and Central Africa Ltd V Maria Kagai Ligaga (Supra) where the Court of Appeal stated that;

' An employee must not have accepted, waived acquiesced or conduct himself to be estopped from asserting repudiatory breach, the employee must within reasonable time terminate the employment relationship pursuant to the breach.'

66. Did the Claimant resign or leave within a reasonable time? The answer is in the negative. It took the Claimant more than 2 years to terminate the contract of employment and 18 months after the first letter dated September 6, 2013.

67. For the foregoing reasons, it is the finding of the court that the Claimant has on a balance of probability failed to demonstrate that he was constructively dismissed by the Respondent.

Reliefs

- a. Having found that the Claimant has failed to establish that he was constructively dismissed, the Claimant is not entitled to the declaration sought.
 - b. On the withholding of terminal dues, the Respondent's letter to the Claimant's advocate dated February 29, 2016 acknowledged that certain amounts were due to the Claimant in respect of off arrears, leave days and public holidays.
 - c. Respondent is directed to pay the Claimant the amounts promised in the letter, if outstanding as at the date of resignation.
 - d. Certificate of service to issue.
68. Having chosen to resign, the Claimant cannot claim any dues for unfair or unlawful termination of employment.
69. In the end, judgement is entered for the Claimant against the Respondent for;
- a. The amounts tabulated in the letter dated February 29, 2016 unless already paid.
 - b. Certificate of service to issue within 30 days.
70. For the avoidance of doubt, all other prayers are disallowed.
71. In light of the partial success, the Claimant is awarded 50% of the costs of this suit.
72. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF OCTOBER 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article



159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

