



**Ngoge v Straight Security Services Limited (Cause 1140 of 2018)
[2022] KEELRC 12924 (KLR) (24 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12924 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1140 OF 2018
JK GAKERI, J
OCTOBER 24, 2022**

BETWEEN

WILLIAM PETERSON MAUTI NGOGE CLAIMANT

AND

STRAIGHT SECURITY SERVICES LIMITED RESPONDENT

JUDGMENT

1. The Claimant initiated this suit by a Memorandum of Claim filed on 5th July, 2018 alleging unfair termination of employment, constructive dismissal and non-payment of other dues.
2. The Claimant avers that he was employed by the Respondent on 11th as well as 15th August, 2012 as a security guard at a monthly salary of Kshs.4,500/= and performed his duties diligently and faithfully.
3. That as at the date of dismissal, his salary was Kshs.5,500/= per month which was below the minimum wage.
4. It is the Claimant's case that the Respondent deducted but did not remit NHIF and NSSF contributions. The Claimant further avers that he was not paid housing allowance, overtime, did not proceed on leave and was not paid for public holidays and had no rest day and was transferred from place to place, his residence notwithstanding.
5. That owing to the hostile environment and a non-responsive management, he had no option but to resign on 9th December, 2017.
6. The Claimant pray for;
 - i. House allowance Kshs. 93,871.92
 - ii. Overtime pay Kshs. 525,507
 - iii. Holiday pay Kshs. 38,199.3



- iv. Annual leave Kshs. 70,156.77
 - v. Restday Kshs. 118,474.2
 - vi. Notice pay Kshs. 17,000
 - vii. Damages for unlawful termination Kshs. 210,000
 - viii. Certificate of service
 - ix. Costs of this suit
7. In its response filed on 19th September, 2018, the Respondent avers that it employed the Claimant as a guard on 20th August, 2012 under a written contract terminable by one (1) month's notice.
 8. The Respondent further avers that on 31st October, 2017, the Claimant applied for 8 days leave but he was granted 21 days, his full annual leave entitlement effective 3rd November, 2017 to resume duty on 4th December, 2017 but did not.
 9. The Respondent issued a notice to show cause dated 9th December, 2017 but the Claimant neither acknowledged the letter nor responded.
 10. The letter invited him for a disciplinary hearing on 20th December, 2017 on which day he brought a resignation letter having been away for two weeks. The resignation letter was received on 20th December, 2017 date of the disciplinary hearing.
 11. That the Respondent gave a letter of rejection of the resignation which the Claimant received and disappeared until he filed the suit herein.
 12. It is the Respondent's case that the Claimant was not constructively dismissed as alleged.
 13. The Respondent further avers that the Claimant resigned without notice, proceeded on weekly offs and annual leave and was compensated for public holidays and his salary was consolidated.
 14. The Respondent further states that the Claimant worked from 8.00 am – 5.00 pm guarding an open field along Mombasa Road to keep of hawkers and trespassers and did not work overtime or Sundays as he was a Pastor at his church at Mukuru Kwa Njega.
 15. That the Claimant had taken annual leave before he deserted duty and NSSF and NHIF contributions were made during his employment.
 16. The Respondent prays for dismissal of the suit with costs.

Claimant's evidence

17. On cross-examination, the Claimant confirmed that he had not pleaded or claimed for underpayment. That he took an advance once. It was his evidence that the Respondent was deducting but not remitting NSSF contributions yet his own evidence shows that NSSF contributions were paid up to September, 2017.
18. It was the Claimant's testimony that he applied for employment on 20th October, 2017 and was employed on the same day. He confirmed that he was not allowed to proceed on leave but admitted having applied for 8 days on 31st October, 2017, when confronted with evidence that he had indeed proceeded on leave.



19. The witness confirmed having written the resignation letter dated 19th December, 2017 received by the Respondent's response on 20th December, 2017.
20. That he returned to the work place after his leave and was unaware of the disciplinary proceedings. That he did not receive the letter dated 9th December, 2017 on disciplinary.
21. The Claimant further testified that he worked for 12 hours, 7 days a week without rest for 5 years and was a Pastor as his application letter indicated and used to attend church services on Sunday and attend to his flock.
22. He testified that he had communicated his tribulations to the supervisor but was not assisted but had no evidence to show.
23. On re-examination, the Claimant testified that he was a night guard for the entire duration he worked. That the challenges he was facing at the work place started in 2012.

Respondent's evidence

24. RWI, Mr. Francis Munene testified that the Claimant worked as a day guard in the company of 6 other guards, in an open field on Mombasa Road that did not require security at night and worked from 8 – 4 pm up to Saturday with offs on Sunday.
25. On cross-examination, the witness stated that the Claimant had an immediate supervisor and a day guard though he sought employment as a night guard and worked at Embakasi from 8.00 – 8.30 am, but the witness had no attendance records.
26. The witness confirmed that the Claimant did not report to the office after leave. That he reported on 9th December, 2017 and refused to sign the notice to show cause letter and brought the resignation letter on 20th December, 2017.
27. The witness testified that he had not filed minutes of the disciplinary hearing.
28. The witness maintained that the Claimant's employment was not terminated unlawfully.
29. It was his testimony that public holidays worked were compensated and leave granted on application and the Claimant's salary was inclusive.

Claimant's submissions

30. As to whether the Claimant was constructively dismissed, it is urged that the Claimant worked in various places despite complaints occasioning his resignation on 20th December, 2017 citing hostile environment. That his resignation was involuntary.
31. Reliance is made on the decision in *Coca Cola East and Central Africa Ltd v Maria Kagai Ligaga* (2015) eKLR and *Kenneth Kimani Mburu & another v Kibe Muigai Holdings Ltd* (2014) eKLR that the employer's behaviour must have been the cause of the resignation.
32. That he was routinely transferred as was the case in the Coca Cola East & Central Africa Ltd case (Supra).
33. Reliance is also made on the sentiments of Lord Denning in *Western Excavating (ECC) Ltd v Sharp* (1978) Q.B. 761.
34. It is urged that the Claimant resigned because the situation was intolerable and was thus constructively dismissed.



35. As to whether the constructive dismissal amounted to unfair termination of employment, it urged that it was since the provisions of section 45 and 41 of the *Employment Act* were not complied with. Reliance is made on the decision in *Mary Chemweno Kiptui v Kenya Pipeline Co. Ltd* (2014) eKLR.
36. On entitlement to the reliefs sought, it is urged that the Respondent did not comply with the provisions of section 20 of the Act on payslip and is entitled to all the reliefs prayed for.

Respondent's submissions

37. The Respondent's submissions are for the most part a rehashing of the evidence adduced by the parties and isolates no specific issue(s) for determination and no judicial authority is relied upon. In a nutshell, it is the Respondent's case that the Claimant opted to resign as opposed to face disciplinary action which the Respondent had already initiated following his desertion of the workplace.

Analysis and determination

38. The issues for determination are;
- i. Whether the Claimant was constructively dismissed by the Respondent.
 - ii. Whether the Claimant is entitled to the reliefs sought.
39. As to whether the Claimant was constructively dismissed, the starting point is the doctrine of constructive dismissal as enunciated by courts of law.
40. Although the provisions of the *Employment Act* do not expressly recognize constructive dismissal, the doctrine has been domesticated by courts and is now part of our jurisprudence in employment law.
41. The classical articulation of constructive dismissal remains the often quoted sentiments of Lord Denning in *Western Excavating (ECC) Ltd V Sharp* (1978) 2 WLR 344 as follows;
- “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 reason 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 be in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind 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.”
42. In *Coca Cola East and Central Africa Ltd v Maria Kagai Ligaga* (supra), the Court of Appeal explained the doctrine of constructive notice as follows;

“The key element in the definition of constructive dismissal is that the employee must have been entitled 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 constituted



a repudiatory breach of the contract of employment – this is the contractual test. The contractual test is narrower than the unreasonable test. The dicta in *Western Excavating (ECC) Ltd V Sharp* adopts the contractual approach test and we are persuaded that the test is narrow, precise and appropriate to prevent manipulation or overstretching the concept of constructive dismissal. For this reason, we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment. Whether a particular breach of contract is repudiatory is one of mixed fact and law . . .”

43. The Court of Appeal proceeded to catalogue the legal principles relevant to determining constructive dismissal to include the following;
- 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 the contract.
 - d. An objective test is to be applied in evaluating the employer’s conduct.
 - e. There must be a casual link between the employer’s conduct and the reason for employee terminating the contract is causation must be proved.
 - f. An employee may leave with or without notice so long as the employer’s conduct is the effective reason for termination.
 - g. The employee must not have accepted, waived acquiesced or conducted himself to be estopped from asserting the 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.”

44. In the instant case, the Claimant alleges that he resigned because of the hostile environment.

45. The resignation letter states in part

I was employed by you in August 2012 as a security guard. I was never given an appointment letter or written contract of employment. Although I started working in 15th August 2012, you paid me my first salary in October 2012.

In the course of my employment, you have grossly underpaid me and frustrated my employment. The salaries of between Kshs.4,500/= and Kshs.5,500/= were grossly below the minimum wage orders. You did not pay me House Allowance or remit NSSF and NHIF deductions.

Although I worked for 12 hours daily for 7 days a week, all year round and without rest days, you have never paid me overtime/public holidays pay.

You have routinely transferred me to various places of deployment without taking into consideration where I live. I have been forced to spend a lot of money to commute to work, leaving me poor.



Since 2012, I have never gone for annual leave. In November 2017 when I asked for leave, you only gave me 8 days off and when I returned 3 days late, you deducted 3 days wages.

I can no longer work in this hostile environment and I resign forthwith. This resignation is a direct result of your hostile work environment which I can longer work in.

I claim the following . . .

Kindly respond within 10 days so as to avoid legal action.

Yours faithfully,

William Peterson Mauti Ngoge

Signed 9-12-2017.

46. There is no dispute that this letter was served upon the Respondent on 20th December 2017, the effective date of resignation.
47. Coincidentally, this was the date of the scheduled disciplinary hearing of the Claimant. A coincidence perhaps?
48. Relatedly, the Claimant had been served with a notice to show cause on 9th December, 2017 which required a response and the hearing on 20th December, 2017 which the Claimant forestalled by his resignation.
49. The essence of constructive dismissal is that the resignation must be linked to the employer's conduct, i.e the causal link. The conduct complained of must constitute a repudiatory breach of contract.
50. In the Claimant's resignation letter, the litany of infractions by the Respondent, the alleged reason for resignation are traceable to 2012, 5 years before the resignation. The Claimant joined the Respondent on 20th August 2012 and his terms of employment remained practically the same for over 5 years.
51. The conduct of the Respondent did not change over this span of time to trigger a resignation in December 2017.
52. Worthy of note, some of the allegations cited by the Claimant are not entirely untrue, such as NSSF contributions. The NSSF statement provided by the Claimant paints a different picture. Contributions were remitted from November 2012 to September 2017.
53. Similarly, on the leave application for November 2017, the Claimant applied for eight (8) days leave but was infact given 21 days to resume duty on 4th December, 2017 and one, Mr. Amos Gwako was the replacement. The claim that he was given 8 days is untrue.
54. Finally, this case turns on, whether the Claimant satisfies the guidelines of determining constructive dismissal as formulated by courts. One of the salient guidelines is that the employee must act with rapidity once the conduct complained of manifests itself or action is taken by the employer or risk loosing the right to treat himself as discharged. Put differently, the employee must not accept acquiesce, waive or affirm the conduct complained of otherwise he loses the right to assert repudiatory breach. This requirement was explained by Lord Denning in *Western Excavating (ECC) Ltd V Sharp* (Supra) and elaborated by the Court of Appeal in *Coca Cola East & Central Africa Ltd V Maria Kagai Ligaga* (Supra). The court was explicit that the employee must terminate the employment within a reasonable time. What is reasonable time varies from case to case.



55. In the instant case, even assuming that the catalogue of complaints by the Claimant amounted to a repudiatory breach of the contract of employment, all are historical and as confirmed by the Claimant on re-examination, all started happening in 2012.
56. None of the complaints is alleged to have taken place in early 2017 or late 2016. All were experienced from early years of employment and continued.
57. Significantly, the Claimant adduced no evidence that he brought these concerns to the attention of the Respondent's management and no action was taken.
58. The resignation letter makes no reference to any complaint to the Respondent on these undeniably serious issues.
59. It behoves the employee to raise all employment related issues he/she is unhappy with or do so through the union, if any, and depending on the employer's response, take the next course of action.
60. In the courts view, the Claimant would have had a more cogent case if he had resigned earlier on. The more than 5 years wait would appear to suggest that the Claimant not only acquiesced but affirmed the employer's conduct complained of hook, line and sinker and is estopped from alleging otherwise.
61. To find or hold that resignation after 5 years allegedly for non-payment of house allowance, overtime, leave pay, rest day and public holiday pay due to the Claimant since 2012, was acting within reasonable time would be to overstretch imagination.
62. (See *Geoffrey Muriithi Muthee v XPLICO Insurance Co. Ltd* (2022) eKLR on reasonable time in cases on constructive dismissal).
63. The facts in this case are similar to those in ELRC 1614 of 2016 Johnson Wambo V Searite Holdings Ltd, where the Claimant sued the Respondent for underpayment, leave, public holidays and reduction of off days more than 2 years after employment. The court held that the more than 2 years wait was not reasonable time to invoke the principle of constructive dismissal.
64. In the instant case, it is also evident that the Claimant resigned on 20th December, 2017 after he had been issued with a notice to show cause and invited for a disciplinary hearing scheduled for 20th December, 2017. The disciplinary process may have been the causa causan for the resignation.
65. For the foregoing reasons, it is the finding and holding of the court that the Claimant has failed to prove that his resignation on 20th December, 2017 was actuated by the Respondent's repudiatory breach of the contract of employment.

Reliefs

66. Having found that the Claimant has not established that he was constructively dismissed by the Respondent, it follows that he separated from the Respondent by resignation and is thus not entitled to any reliefs for unfair termination save for the certificate of service by dint of section 51 of the *Employment Act*.
67. In conclusion, the suit is without merit and is dismissed.
68. Certificate of service to issue within 30 days.
69. Parties to bear own costs.
70. Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24TH 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

