



**Bob Morgan Services Ltd v Ochieng (Appeal E10 of 2022)  
[2022] KEELRC 12937 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12937 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E10 OF 2022  
S RADIDO, J  
OCTOBER 19, 2022**

**BETWEEN**

**BOB MORGAN SERVICES LTD ..... APPELLANT**

**AND**

**OMOLLO VICTOR OCHIENG ..... RESPONDENT**

*(Being an Appeal against the judgment of the Chief Magistrates Court (Hon. W. Onkunya, SRM delivered on 18th February 2022 in Kisumu CM ELR E14 of 2020, Omollo Victor Ochieng v Bob Morgan Security Services Ltd)*

**JUDGMENT**

1. Omollo Victor Ochieng (the respondent) sued Bob Morgan Services Ltd (the appellant) before the Magistrates Court, alleging unlawful termination of employment and non-payment of terminal dues.
2. The cause went to trial, and a judgment was delivered on 18 February 2022. Judgment was entered in favour of the respondent, and he was awarded the equivalent of 1 month's salary in lieu of notice, 9 months of gross wages as compensation together with costs and interest.
3. The appellant was aggrieved, and it filed a memorandum of appeal on 16 March 2022 contending:
  - (1) That the honourable magistrate erred in law and fact in holding that the respondent was constructively dismissed by the appellant, yet the said issue of constructive dismissal had neither been pleaded nor proved by the respondent.
  - (2) That the honourable magistrate erred in law and fact in failing to appreciate that the respondent had not filed any reply to the appellant's response to the claim and, therefore, the appellant's defence to the claim had not been disputed by the respondent.



- (3) That the honourable magistrate erred in law and fact by disregarding and/or failing to consider the appellant's evidence and testimony and laying undue weight on the respondent's unfounded allegations and therefore arriving at a wrong conclusion.
  - (4) That the honourable magistrate erred in law and fact in failing to appreciate the fact that the appellant had made out a clear defence that the respondent's services had not been terminated and that the respondent had been sent on unpaid leave.
  - (5) That the honourable magistrate erred in law and fact by disregarding the appellant's submissions and authorities, overlying on the respondent's submissions, and therefore arriving at a wrong decision.
  - (6) That the honourable magistrate erred in law and fact in making excessive awards to the respondent and failing to give reasons for the said excessive awards.
4. The appellant filed a record of appeal on 24 May 2022, and the court gave directions on 14 June 2022. The directions included an order of stay of execution on the condition that the appellant deposited the decretal sum in court.
  5. The court has considered the record of appeal and the submissions.

#### **Role of the Court on a First Appeal**

6. The role of a first appellate court was discussed in *Kamau v Mungai* (2006) 1 KLR 150, where it was held that:

"This being the first appeal, it was the duty of the court.... To re-evaluate the evidence, assess it and reach its own conclusions, remembering that it had neither seen nor heard the witnesses, hence making due allowance for that."
7. The court will keep in mind the edict on its role.

#### **Respondent's Failure to Join Issue with the Response**

8. Amongst the grounds raised by the appellant was that since the respondent did not file a reply to the response, its defence that the respondent's employment had not been terminated should have been determinative, and reliance was placed on *Denmus Oigoro Oonge v Njuca Consolidated Ltd* (2012) eKLR.
9. The authority relied on by the appellant was made within the context of the *Civil Procedure Rules* and a cause of action grounded on negligence.
10. The statutory burden parties should meet in the context of employment disputes has been set out expressly in sections 35(1), 41, 43, 45 and 47(5) of the *Employment Act*, 2007, and the court is of the view that the failure to file a reply to response in the circumstances of this appeal was not fatal.

#### **Failure to Consider the Appellant's Evidence and Submissions**

11. The appellant challenged the judgment of the trial court in paragraphs 3 and 5 on the basis that its evidence and submissions were not considered.
12. It did not isolate in the submissions before this court the evidence and submissions which were not considered and how the failure affected the final orders of the trial court.



## Constructive Dismissal

13. The appellant contended that the trial magistrate erred in law and fact by concluding that the instant case was one of constructive dismissal, yet the same was not pleaded nor proved.
14. The gravamen of the respondent's case was pleaded in paragraphs 5, 6, 7 and 9 of the memorandum of claim, and constructive dismissal was not mentioned.
15. The witness statement, which was filed and adopted as part of the evidence, did also not allude to constructive dismissal.
16. In reaching a conclusion that the respondent's claim was one of constructive dismissal, the trial magistrate considered the fact that the respondent had been sent on indefinite leave because of the COVID-19 public health pandemic, and an interpretation and application of the law as set out in the case of *Kimaru Mburu & Ar v Kibe Muigai Holdings Ltd* (2014) eKLR where the court had stated:

"Constructive dismissal occurs when an employee is forced to leave employment against his will because of his employer's conduct."
17. Constructive dismissal is not provided for in a statute in Kenya, but it has been accepted by the courts in the jurisdiction.
18. The English Court of Appeal set the tempo for what constitutes constructive dismissal in *Western Excavating (CC) Ltd v Sharp* (1978) ICR 221, where it stated:

"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."
19. Locally, the Court of Appeal addressed the question of constructive dismissal in *Coca-Cola East & Central Africa Limited v Maria Kagai Lugaga* (2015) eKLR, wherein it stated:

"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....."
20. The COVID-19 public health pandemic was a situation beyond the control of the appellant and respondent herein. It frustrated the performance of many contracts and not only the one under examination (the court is alive to situations where sending an employee on indefinite unpaid leave may amount to constructive dismissal).
21. This court is, therefore, of the view that the separation herein was not because the appellant breached a significant term going to the root of the contract or created a hostile work environment warranting the respondent to leave and invoke constructive dismissal.
22. The trial magistrate fell into an error of law by reaching such a conclusion.



### **Unfair Termination of Employment**

23. It was not in dispute that the appellant sent the respondent on unpaid leave from 1 April 2020.
24. The letter giving the respondent the notification was dated 10 September 2020. The respondent, in effect, had been out of work some 5 months before formal communication.
25. The letter indicated that the contract the appellant had to offer guarding services to the Rural Electrification Authority had been terminated. The authority had informed the appellant through a letter dated 14 February 2020 that it would not grant it a tender to offer guarding services contract (the previous tender had been extended up to 30 March 2020). The reason why the tender failed was because the appellant had failed the financial evaluation stage.
26. The claimant was sent on unpaid leave immediately after the appellant's contract with the Rural Electrification Authority lapsed. The appellant had failed financial evaluation.
27. It is, therefore, more probable that the real reason why the appellant sent the respondent on unpaid indefinite leave was not the COVID-19 public health pandemic but the failure to secure a renewal of the contract with the Rural Electrification Authority.
28. In the court's view, this was a case of redundancy.
29. The respondent made alternative submissions asserting redundancy. The appellant did not demonstrate that it made any attempt to reach out to the respondent before the letter of 10 September 2020. This particular letter talked of the termination of assignment at Rural Electrification Authority and that, for the time being, there were no placement opportunities.
30. The appellant did not comply with the protections assured employees in cases of redundancy by section 40 of the [Employment Act](#), 2007.

### **Excessive Compensation**

31. The trial court awarded the respondent the equivalent of 9 months' wages as compensation.
32. The court considered the fact that the respondent had served from November 2011 to April 2020, about 9 years, and that he had no previous disciplinary cases.
33. The court finds that the trial court exercised its discretion within the parameters outlined in section 49(4) of the [Employment Act](#), 2007.

### **Conclusion and Orders**

34. Save for the findings on constructive dismissal, the court finds no merit in the appeal, and it is dismissed with costs to the respondent, both before the Magistrates Court and this court.

**DELIVERED VIRTUALLY FROM KWALE, DATED AND SIGNED ON THIS 19TH DAY OF OCTOBER 2022.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

### **Appearances**

For Appellant J.L. Cheruiyot Advocates

For Respondent Odhiambo Ouma & Co. Advocates



Court Assistant Chrispo Aura

