



**Simecheri v Trattoria Limited (Cause 1675 of 2017)
[2022] KEELRC 12738 (KLR) (3 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12738 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1675 OF 2017
MA ONYANGO, J
OCTOBER 3, 2022**

BETWEEN

DONALD JUMA SIMECHERI CLAIMANT

AND

TRATTORIA LIMITED RESPONDENT

JUDGMENT

1. *Vide* his memorandum of claim dated June 12, 2017 and filed in court on August 25, 2017, the claimant avers that his employment was wrongfully and unlawfully terminated by the respondent herein.
2. The claimant avers that he was employed by the respondent on or about February 1, 2016 in the position of a waiter. He was earning a monthly salary of Kshs 13,605/-. He further averred that he worked diligently and to the respondent's satisfaction until March 5, 2017, which notice was however declined by the respondent.
3. The claimant further avers that he then continued working for the respondent up to March 6, 2015 when the respondent unfairly, wrongfully and unlawfully terminated his employment in gross violation of the provisions of the *Employment Act, 2007*.
4. Aggrieved by the respondent's decision to unlawfully, wrongfully and unfairly terminate his employment, the claimant filed the instant claim seeking the following reliefs: -
 - a. A declaration that the claimant was wrongfully and unfairly terminated from his employment
 - b. Outstanding dues totalling to Kshs 178,161.63/- comprising of the following: -
 - i. One month salary in lieu of notice Kshs 13,605



$\frac{\text{Kshs. } 13,605}{30 \text{ days}}$

- ii. Unpaid salary (March) $= 453.50 \times 6 \text{ days Kshs } 2,721$
 - iii. Unpaid leave Kshs 13,605
 - iv. Deductions (2015 – 2017) Kshs 64,900
 - v. Unpaid overtime $13,605 \times 56 \text{ hours} \times \text{Kshs } 5,101.88 \times 19 \text{ months Kshs. } 96,935.63$
Total Kshs 191,766.63
- c. 12 months' salary as compensation for wrongful and unfair termination Kshs 13,605 x 12 Kshs 163,260
 - d. Punitive and aggravated damages for breach of the claimant's constitutional rights
 - e. Costs incidental to the suit.
5. The respondent in its memorandum of response dated October 23, 2017 and filed in court on October 30, 2017 admits having engaged the claimant as stated in his letter of appointment dated February 1, 2016. It however denies unlawfully, wrongfully and unfairly terminating the claimant's employment as alleged.
 6. It further confirms having received the claimant's letter of resignation dated March 5, 2017, which was duly accepted as communicated *vide* the respondent's letter dated April 5, 2017.
 7. The respondent avers that the claimant was paid all his dues totalling to Kshs 11,624.40/- at the time of separation and therefore has no claim against the respondent herein.
 8. The respondent urged this court to find the claim without merit and to dismiss it with costs.

Evidence

9. This matter proceeded for hearing on November 4, 2021 with the claimant testifying as CW1 and the respondent calling one witness, Irene Wambui Kariuki, its Human Resource Manager, to testify on behalf of the respondent herein.

Claimant's Case

10. In support of his case the claimant, CW1 relied on his Witness statement filed in court on August 25, 2017 as his evidence in chief. He further relied on a total of 4 documents attached to his List of documents filed in court on June 12, 2017 as exhibits in this matter.
11. In his statement the claimant reiterated the averments made in his memorandum of claim and urged this court to find merit in his claim and allow it in terms of the reliefs sought therein.
12. On cross examination CW1 admitted that he tendered his resignation to the respondent on March 5, 2017 citing personal reasons for his resignation. He further admitted receiving a letter of acceptance of his resignation by the respondent on April 5, 2017 which clearly indicated his entitlements.
13. CW1 testified that he could not recall if his last day of service was March 11, 2017 as indicated in his resignation letter.
14. On further cross examination CW1 admitted that he reported this dispute to the labour officer and thereafter he was issued with a certificate of payment by the respondent dated April 27, 2017 together with a cheque for payment for Kshs 11,624.40.



Respondent's case

15. RW1, Irene Wambui Kariuki, the respondent's Human Resource Manager adopted her witness statement dated November 3, 2021 as her evidence in chief. She further relied on the list and bundle of documents dated October 23, 2017 as exhibits in this matter.
16. She urged this court to find the instant claim without merit and to dismiss it with costs to the respondent.
17. On cross examination RW1 admitted that there were deductions made to the claimant's salary and were indicated as shortages in his payslip. He testified that waiters were surcharged for any shortages arising from unpaid bills while on duty as well as breakages that are not accidental.
18. RW1 confirmed that each of the waiters were required to contribute Kshs 200/- from the tips earned to be shared with cooks and cleaners. She testified that the waiters were at liberty to receive tips from the tables they served and that the shortages deducted were not from tips received.
19. RW1 denied the allegation that the claimant resigned out of frustration as his resignation letter does not indicate the same as his reason for resignation.
20. RW1 testified that the claimant did not work overtime and that all members of the respondent's staff worked with clean schedules.
21. On re-examination RW1 stated that the respondent did not receive any complaint on the salary deductions on account of bill shortage.

Claimant's Submissions

22. In his submissions the claimant maintained that his employment was unlawfully and unfairly verbally terminated by the respondent after he served his resignation letter.
23. He further submitted that his resignation was precipitated by the continued and unfair deductions made by the respondent to his salary without basis and that the deductions were admitted by the respondent's witness during cross examination. He argues that this was tantamount to constructive dismissal. For emphasis the claimant relied on the decision in the case of *Coca Cola East & Central Africa v Maria Kagai Lugaga* (2015) eKLR on constructive dismissal.
24. The claimant further submitted that he had proved his case for unlawful and unfair termination and urged this court to allow his claim in terms of the reliefs sought therein. To fortify this argument the claimant relied on the provisions of sections 19, 35 and 49 of the *Employment Act, 2007* and the cases of *Pamela K Butalanyi v University Council for the Kenya Polytechnic University Collage* (2015) eKLR, *John Mwanzia Mbitbuka v Mukesh Maide (Managing Director & Another)* (2014) eKLR and *Rose Mwikali Nzuki v Food for the Hungry Kenya* (2015) eKLR all on compensation for unlawful termination.

Respondent's Submissions

25. The respondent in its submissions denied terminating the claimant's employment as alleged maintaining that the claimant tendered his resignation from employment, which resignation was duly accepted. To buttress this argument the respondent relied on the provisions of section 36 of the *Employment Act, 2007* and the case of *Edwin Beiti Kipchumba v National Bank of Kenya* (2018) eKLR on resignation.



26. The respondent submitted that the claimant had failed to prove his claim for unfair and unlawful termination on March 6, 2017 as contended in his pleadings and therefore his claim had no basis. To fortify this argument the respondent relied on the court findings in the case of *Shadrack Kabungani Mukwana v Wines of the World Limited* (2014) eKLR where the court held that it was the duty of a party to state their case in pleadings and also prove the same in evidence.
27. The respondent further submitted that the claimant's resignation was duly accepted by it on April 5, 2017. It maintained that there is no legal requirement that an employer must accept a resignation for it to take effect.
28. The respondent maintained that the claimant's resignation was intentional, voluntary and he was paid all his terminal dues at the time of separation. The Respondent maintained that the claimant is bound by his decision.
29. The respondent submits that there was no proof of constructive dismissal as alleged by the claimant and that in absence of any such proof this court was invited to disregard the allegation.
30. On the reliefs sought, the respondent submitted that the claimant is not entitled to any of the reliefs sought having failed to prove his case for unlawful and unfair dismissal.
31. The respondent further submitted that the claimant having resigned from his position he was not entitled to any of the reliefs sought in his memorandum of claim.
32. The respondent further submitted that the claim for 12 months' salary as compensation for the unlawful and unfair termination is also not available to the claimant following his resignation.
33. The respondent further submitted that the claimant had discharged it from any further claims and is therefore estopped from seeking any claim from the respondent. To buttress this argument the respondent relied on the findings in the cases of *Coastal Bottles Limited v Kimathi Mitbika* (2018) eKLR and *Gilbert Mugambi v Michimikuru Tea Factory Limited* (2018) eKLR where the courts held that where a party has accepted compensation from an employer with a disclaimer that they have no other claim against the employer. This was a waiver on the part of the employee and can therefore not bring any other claim against such an employer.
34. In conclusion the respondent urged this court to find the instant claim without merit and to dismiss it with costs.

Analysis and Determination

35. Having considered the facts of this cause, evidence, submissions and authorities cited by the parties hereto there is no dispute that the claimant was employed by the respondent herein from February 1, 2016. It is further not in dispute that the claimant resigned from the respondent's employment *vide* his letter dated March 5, 2017. That the issues for determination are therefore the following:-
 1. Whether the claimant was unfairly terminated or be resigned voluntarily;
 2. Whether the claimant is entitled to the reliefs sought
36. The claimant maintained that he was unfairly and unlawfully verbally terminated by the respondent on March 6, 2017. He maintained that he had tendered his resignation from the respondent's employment, which he insists was not accepted by the respondent herein and continued with his normal duties.



37. The claimant maintained that he was forced to tender his resignation following continued disagreement with the respondent where his salary was deducted without just cause.
38. The respondent on the other hand confirmed having been issued with a notice of resignation by the claimant, which notice it maintained was duly accepted as communicated vide its letter dated April 5, 2017.
39. The respondent maintained that the claimant's resignation was voluntarily and intentional and was in fact not bound to express its acceptance to the same despite notifying its acceptance officially vide its letter of April 5, 2017.
40. It is further the respondent's contention that claimant was not coerced in any way to tender his resignation from its employment. With regards to the salary deductions, the respondent maintained that the same was done in instances where there were bill shortfalls. RW1 confirmed that this was the practice and that there were no complaints from the waiters for the surcharge.
41. I have perused the claimant's resignation letter and note that the same does not depict any form of coercion to resignation.
42. The letter is a clear indication of the claimant's intent to terminate the employer- employee relationship between him and the respondent herein.
43. Once served with such an intent the same takes legal effect its acceptance notwithstanding. I refer to the case of *Edwin Beiti Kipchumba v National Bank of Kenya Limited* (supra) where it was held: -

“A notice of resignation by an employee from employment, is basically a termination of employment at the instance of the employee. It is a unilateral act. The *Employment Act* does not require the employer to accept a notice of termination issued by the employee, for that notice to take effect.”

[Emphasis mine]
44. The claimant has not adduced any evidence on the alleged forced resignation on the part of the claimant as alleged. I thus find that the claimant voluntarily and intentionally tendered his resignation from employment.
45. There was further no evidence was availed to this court to prove the alleged refusal by the respondent to accept the resignation or the claimant's continued service up to March 6, 2017 when the claimant alleges that his services were verbally terminated.
46. In the circumstances, I find that the claimant was not terminated from employment but rather resigned from his employment with the respondent.

Whether the Claimant is entitled to reliefs sought

47. It is clear from the pleadings, evidence and submissions that the claimant was paid all his terminal dues at the time of separation, a fact that was not denied by the claimant.
48. Having found that the claimant voluntarily resigned from employment and that he was paid his dues at the time of separation from the respondent, I find that the claim herein is without basis. The same is accordingly dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 3RD DAY OF OCTOBER, 2022.



MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE

