



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CIVIL APPEAL NO 14 (A) OF 2020

HERBERT WAFULA WASWA.....APPELLANT

VS

KENYA WILDLIFE SERVICES.....RESPONDENT

(Appeal from the judgment and decree of Hon. D. Wangeci,

PM delivered in on 26th May 2020 in Voi CMEL No 2 of 2019)

JUDGMENT

1. The Appellant, Herbert Wafula Waswa, worked for Kenya Wildlife Services in the position of Customer Care Assistant, from 6th March 2009 until 6th March 2017, when he resigned, allegedly out of frustrations by the Respondent.
2. On 22nd May 2019, the Appellant filed an employment claim at the Magistrate's Court in Voi, seeking compensation for constructive dismissal, in addition to terminal dues.
3. In a judgment delivered on 23rd March 2020, **Hon D. Wangeci, PM** dismissed the claim for constructive dismissal and proceeded to make an award for terminal dues as follows:
 - a) Salary for 5 days worked in March 2017;
 - b) Unutilised leave days;
 - c) Withdrawal benefits under the KWS Staff Superannuation Scheme Rules.
4. The Appellant was dissatisfied with the terms of the award by the trial court and therefore preferred the present appeal.
5. In his Memorandum of Appeal dated 18th June 2020, the Appellant raises the following grounds of appeal:
 - a) The learned Magistrate erred in law and in fact by holding that the Appellant was not constructively dismissed, despite evidence on record showing that it was the Respondent's frustrations that led to the Appellant's unwilling resignation from employment. The evidence on record showed that the Respondent clearly frustrated the Appellant without any justifiable reason;
 - b) The learned Magistrate erred in law and in fact by failing to award damages for unlawful dismissal despite the Appellant's evidence being uncontroverted by the Respondent;
 - c) The learned Magistrate misdirected herself and erred in law and fact by shifting the burden of proof from a balance of probability to proof beyond reasonable doubt, knowing that it is settled law and practice that the burden of proof in civil cases is on a balance of probability and hence disregarding the law and fact that the Appellant had proved his case and it was the Respondent's duty to cast doubt on the Appellant's evidence;
 - d) The learned Magistrate erred in law and in fact by wrongly exercising her judicial discretion against the Appellant and against reason in the circumstances of the matter by failing to award costs of the claim to the Appellant;
 - e) The learned Magistrate erred in law and in fact by failing to consider the Appellant's written submissions and authorities in support of the claim for constructive dismissal, causing her to arrive at an erroneous decision.

6. This is a first appeal and the drill is well set; I am required to re-evaluate and reconsider the evidence on record and allowing room for the lack of an opportunity to see and hear the witnesses first hand, draw my own conclusions and inferences.

7. The duty of a first appellate court was established by the Court of Appeal in *Selle v Associated Motor Boat Company Ltd [1968] E.A 123* in the following terms:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

8. The Appellant lists five (5) grounds of appeal which, in my view, fall under two (2) broad categories:

- a) Whether the Appellant made out a case of constructive dismissal;
- b) Whether the trial court erred in failing to award the Appellant costs of the trial.

9. In her judgment dated 23rd March 2020 and delivered on 26th May 2020, the learned trial Magistrate states thus:

“.....for constructive dismissal to be construed, it is incumbent that the claimant proof (sic) that employer is guilty of conduct which is a significant breach going to the root of the contract of employment; The breach must be fundamental as to be considered a repudiatory breach; The employee must resign in response to that breach; The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.”

10. Based on the above test, the learned Magistrate concluded the following regarding the Appellant’s case:

“In his letter, the claimant does not give an outline on the conduct of the respondent, his employer to have been so intolerable that it made it considerably difficult for him to continue working. He actually thanks the respondent for according him an opportunity to work for it thus advancing his professional dream. He even pledged to continue collaborating with the respondent. This is not the tone of an employee who was left with no option but to leave due to the employer’s frustration. The letter does not prove that the respondent was in breach of the contract of employment; that the breach if any, the same was fundamental as to be considered a repudiatory breach; and that the claimant herein resigned in response to that breach. The tone used by the claimant is that of a satisfied employee ready to venture into a different world altogether.”

11. This appeal turns on the question whether the circumstances and tenor of the Appellant’s resignation from the Respondent’s employment constituted constructive dismissal. The law on constructive dismissal is fairly well settled.

12. Black’s Law Dictionary (Tenth Edition) defines constructive dismissal or discharge as:

“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.”

13. In his written submissions filed in this Court, the Appellant made reference to the decision in *Western Excavating ECC Ltd v Sharp (1978) 2 WLR 344*, where Lord Denning 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. 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.”

14. In addressing itself to the issue of constructive dismissal, Court of Appeal, in its decision in *Coca Cola East & Central Africa Limited v Maria Kagai Lugaga [2015] eKLR* stated the following:

“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.”

15. The Court of Appeal went further to set out the following as guiding principles in determining the issue of constructive dismissal:

- 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 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 employer's conduct is the effective reason for termination.*
- g. *The 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.*

16. I do not need to say anything more regarding what constitutes constructive dismissal. The question to ask now is whether the facts and circumstances surrounding the Appellant's case fall within the foregoing definition of constructive dismissal.

17. On 6th March 2017, the Appellant wrote to the Respondent as follows:

"Dear Sir,

RE: RESIGNATION

I hereby tender in (sic) my resignation from Kenya Wildlife Service with a notice of two months as from 6th March 2017. I am the above named person, having joined Kenya wildlife service in April 2009. I worked in Amboseli National Park for six years, two years at Tsavo East National Park; out of which I have achieved a lot including writing and publishing Amboseli and Tsavo East guidebooks. In the course I have learned much about conservation in relation to tourism. Kenya Wildlife Service has offered me a great opportunity where I have advanced my professional dream and trained well on dealing with customers and handling their related issues. It has come a time to explore other fields to advance my dreams.

Thank you so much for each and every assistance you have accorded me in my career at Kenya Wildlife Service. I look forward to collaborate with you while on (sic) the outside world to advance the organisations (sic) goals. Once again thank you.

Yours faithfully,

(signed)

Herbert Waswa.

KWS/9404"

18. By his letter, the Appellant told the Respondent that he wished to be released to pursue other interests. He gave an impressive account of his work and achievements while working with the Respondent.

19. The Appellant did not cite frustration by his employer as a reason for his desire to leave. He however told the trial court that because he had been put on suspension, he could not stay on.

20. By itself, suspension is not an unlawful action (see *Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR*). Of significance in this case is that, by the time the Appellant wrote his letter of resignation, he had been on suspension for barely ten days, which by all standards could not be considered to be unduly long.

21. Additionally, the Appellant's determination to leave the Respondent's employment was not in doubt. I say so because when his letter of 6th March 2017 did not elicit an immediate response from the Respondent, he wrote the following reminder on 2nd October 2017:

"DEAR SIR,

RE: RESIGNATION REMINDER

Refer to the letter dated 6th March 2017 through the senior warden of Tsavo East National, I hereby request for an acceptance on your part. Since I stopped rendering my services to the organization as from 6th March 2017, I did hand over of the uniforms to the customer service officer Tsavo East National park; Mr. Waweru. I hope to hear from you soon.

Thank you

Yours faithfully

(signed)

Herbert Waswa

KWS/944”

22. Taken cumulatively, the Appellant’s actions after his suspension did not suggest the plight of an employee being forced out of employment; rather, the portrait is of an employee sabotaging a disciplinary process, by clambering out of jurisdiction.

23. Whatever his motivation, on 6th March 2017, the Appellant effectively resigned from the Respondent’s employment.

24. Black’s Law Dictionary (Tenth Edition) defines resignation as:

“The act or an instance of surrendering or relinquishing an office, right or claim. A formal notification of relinquishing an office or position; an official announcement that one has decided to leave one’s job or organization, often in the form of a written statement.”

25. As held in **Edwin Beiti Kipchumba v National Bank of Kenya Limited [2018] eKLR** resignation is a unilateral act on the part of the employee. There is no provision in the Employment Act suggesting that its efficacy is dependent upon any action by the employer.

26. It follows therefore that once an employee hands in a resignation letter, the employment relationship comes to an end. The subject of any ensuing obligations to the employer is a separate one, to be pursued a such.

27. In effect therefore, after 6th March 2017, the Appellant ceased being an employee of the Respondent and any subsequent attempt to subject him to an internal disciplinary process had no legal basis and was null and void. In the result, neither the Appellant nor the Respondent could rely on such a process to pursue their claims. That settles the question as to the effective date of the Appellant’s exit from the Respondent’s establishment.

28. The Appellant made a big issue of and even sought to benefit from the Respondent’s failure to call *viva voce* evidence. Section 47(5) of the Employment Act is however clear that in a claim of unfair termination or wrongful dismissal, the burden of proving the ingredients of unfairness and wrongfulness lies with the employee.

29. Section 47(5) states:

(5) For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

30. Having failed to prove his claim of constructive dismissal, the Appellant could not benefit from the Respondent’s failure to call witnesses.

31. On the issue of costs, I will say this; while ordinarily, costs follow the event, the court is allowed to exercise discretion in making an award one way or the other. The Appellant, having failed in his major claim for damages for constructive dismissal, although succeeding in the other claims, did not attain an automatic entitlement to costs. It was therefore proper for the learned trial Magistrate to direct each party to bear their own costs.

32. Ultimately, I find no reason to cause me to overturn the decision by the learned trial Magistrate.

33. This appeal therefore fails and is dismissed.

34. Each party will bear their own costs.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY DECEMBER 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Mwasaru h/b for Mr. Musundi for the Appellant

Miss Lelu for the Respondent