



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CASE NO. 33 OF 2018**

**BENJAMIN MURIUKI SELESTINO.....CLAIMANT**

**VERSUS**

**COBRA SECURITY COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent for constructive dismissal from employment. The was employed by the Respondent in November 2013 as a night guard earning a monthly salary of Kshs. 6,000/- until 21<sup>st</sup> February 2017 when he avers he was constructively dismissed. The Claimant averred that the Respondent engaged in unfair labour practices that led him to resign hence the averment that there was constructive dismissal. He asserted that the Respondent engaged in included unfair practices such as failing to provide him with necessary working equipment, failing to pay his requisite salary over the years of service, unlawful deduction of salary without his consent, subjecting him to harsh working conditions, lack of consistency in the amount paid and delays in paying the same and subjecting the Claimant to financial uncertainty and failing to discharge its common law duties as an employer. The Claimant seeks judgment against the Respondent for compensation for constructive termination - Kshs. 135,960/- , unpaid dues amounting to Kshs. 202,540/-, unpaid remittances to NHIF and NSSF, overtime of Kshs. 250,800/-, annual leave payment of Kshs 21,168/-, house allowance of Kshs. 64,569/-, refundable uniform fee, a certificate of service and costs of the suit.

2. In the response filed, the Respondent denied constructively dismissing the Claimant and stated that he was employed on a one-year contract and that he voluntarily resigned from employment citing family problems. The particulars of constructive dismissal were denied *in toto*. The Respondent further averred that the Claimant voluntarily resigned with a sole intention of employment with another company and averred that the circumstances of this claim do not warrant an award for the reliefs sought and as such the suit should be dismissed with costs.

3. At the hearing of the case the Claimant testified while the Respondent called one witness. The Claimant testified that he never went on leave for the three years that he worked for the Respondent and his absence from home made him face marital problems. He stated that he complained but the Respondent did not listen to him. He stated that his father fell ill and since he could not go home he resigned from work. He said that his salary was paid in bits and was not the same every month. He gave reason for dismissal as failure to be given leave and opined that he otherwise would not have resigned. He stated that at the time of employment, the Respondent had indicated that it would pay the Kshs. 200/- for NSSF and a sum of Kshs. 300/- for NHIF. He stated that he was employed in 2013 and was not given a contract. On cross-examination the Claimant confirmed that he wrote the letter of resignation but did not include poor pay and failure to be granted leave as his reasons for resigning. He also confirmed that after resignation he worked with Asset Security Systems Limited briefly but he denied having acquired a new job at the time he was resigning. He further testified that the statement from the bank did not have a reference to underpayment or payment in bits. He denied signing any contract of employment and maintained that there was no contract. He confirmed that there was a book they used to sign and confirmed signing the entries in the book. The Claimant contended that he was a night guard and that they did not have shifts, but upon being shown the records he confirmed his signature and stated that he was on day shift. He also confirmed that there were days he was off duty. He stated that after resignation he went home and was employed by Asset Systems on 26<sup>th</sup> February 2017 and he worked for it four days after resigning on 21<sup>st</sup> February 2017.

4. The Respondent called its branch manager a Mr. Peter Macharia Kamau who testified that the Claimant sought employment on 1<sup>st</sup> January 2016 and was issued with a contract which he signed. He confirmed that the contract was for one year though he did not have evidence of an extension of contract. He testified that the Claimant was paid his salary every month and that the Claimant used to go for off duty. He further testified in that the Claimant would receive a lower amount if there was loss or disciplinary issue.

5. The Claimant submitted that the Respondent failed to explain how the Claimant was at work in February 2017 while his contract was supposed to have ended on 31<sup>st</sup> December 2016. He submitted that he was employed in 2013 and that the Respondent was out to mislead the court to believe that the Claimant was employed for only one year and urged the court to disregard the assertion by the Respondent. On the issue of off days, urged the court to disregard the duty roster produced. The Claimant submitted that the copy of the duty roster produced by the Respondent should not be admitted in evidence since the Respondent failed to produce original version of the purported duty roster. The

Claimant urged the court to find that the Respondent had engaged in unfair labour practices pushing him to involuntary resign from employment and the same ought to be declared to be constructive dismissal amounting to unfair termination.

6. The Respondent submitted that the Claimant did not produce any evidence to confirm that he used to work since the year 2013 and that he only produced bank statements for year 2016 to January 2017. It was submitted that the Claimant never raised any complaint with the employer in regard to salary deductions and maintained that it used to pay him the whole amount for all days worked. It was submitted that the Claimant confirmed that he used to go on leave and that he used to work during the day. The Respondent submitted that the Claimant did not prove any hostility by the employer but rather cited family problems as a reason for resignation. The Respondent therefore prayed that this claim be dismissed with costs. The case of **Alfred Wekesa Katami v Registered Trustees of Catholic Diocese of Kitale & 3 others [2016] eKLR** in support of its argument.

7. I have considered the pleadings of parties, the testimony adduced and the submissions of parties in arriving at this decision. From the foregoing, the issues for determination that are distilled are

a. whether the Claimant resigned voluntarily from the employment of the Respondent or was constructively dismissed by the Respondent and

b. whether the Claimant is entitled to the reliefs sought.

It is now trite that constructive termination of an employee's employment occurs where by conduct the employer commits a repudiatory breach of the employment contract, or creates a hostile working environment that makes it impossible for the employee to continue working which forces the employee to resign. In the case of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR**, the Court of Appeal, cited with approval the definition of constructive dismissal by **Lord Denning MR** in **Western Excavating (ECC)Ltd v Sharp [1978] ICR 222 or [1978] QB 761** where he held 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.....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.”*

8. The onus of proving on a balance of probabilities the constructive acts lies with the Claimant. This is the case whether or not the matter was heard *ex parte* and in the absence of the Respondent. **In the case Eastern Produce (K) Ltd v John Lumumba Mukosero [2008] eKLR** it was held:

*“The fact that one party has filed a suit or made a claim, by itself is not proof that there is a prima facie case which defendant must rebut. It is for the Plaintiff to prove liability and this onus of proof does not shift whatsoever.”*

Upon careful consideration of the evidence tendered by parties, the Claimant has not proved on a balance of probability that he was forced to resign by the wrongful conduct on the part of the Respondent as the particulars of the case before me do not fall within the description of repudiatory breach of the employment contract or creation of intolerable working environment that would precipitate constructive dismissal. The Claimant additionally did not prove any of the particulars of constructive dismissal as outlined in his statement of claim.

9. From the evidence tendered it is clear that the Claimant lied to court as he denied having knowledge of the contract and yet he issued a seven days notice as provided for by the same contract at the time he resigned. The claimant also stated that he never used to go on leave citing it as the main reason for resigning but on cross-examination and after being shown the record he confirmed to have gone for off days but stated that he did so after a Mr. Muriuki insisted that he should go. That clearly shows that it is the Claimant who never wanted to go on leave prompting the management to force him to go on leave, a fact he deliberately lied to court about. Similarly the Claimant indicated in his testimony that he was not working on shift, however upon cross-examination he retracted his earlier testimony and indicated that he was working during the day after maintaining that he used to work at night. It is clear from the records tendered by the Respondent that the Claimant never used to work overtime. He confirmed to have signed the duty roster which indicated the time that he used to start work and the time that he used to leave. From the records there was no indication that the Claimant ever worked past the stipulated time. Having asserted that it is the employer's conduct that led to his resignation, the Claimant had the onus of proving the same. He confirmed from his testimony that he never indicated any of the particulars of constructive termination as a reason for termination in his resignation letter; rather he indicated that he resigned because of family problems. In the resignation letter he stated that due to family problems he was forced to resign. This therefore means that the Claimant resigned for different reasons as opposed to what he is claiming to be the reason for termination and it is clear that his resignation was voluntary. The Claimant has failed to discharge the onus placed on him in this respect and the claim for unlawful constructive dismissal thus fails and with that the claim for general damages as well. Flowing from the finding that it is the Claimant who resigned voluntarily, the issue of compensation for unfair termination does not arise. The final outcome of the matter is that the suit be dismissed with costs to the Respondent.

It is so ordered.

**Dated and delivered at Nyeri this 16<sup>th</sup> day of May 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a

true copy of the Original

**Deputy Registrar**