



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1577 OF 2014**

(Before Hon. Justice Hellen S. Wasilwa on 31<sup>st</sup> October, 2018)

SUSAN WAITHERERO RUKUNGU.....CLAIMANT

VERSUS

BONIFACE KAMAU & LOISE NDUTA KAMAU

T/A HIGHLAND FOODS.....RESPONDENT

**JUDGEMENT**

1. The Claimant, Susan Waitherero Rukungu, filed a Memorandum of Claim dated 4<sup>th</sup> September, 2014 on 10<sup>th</sup> September, 2014 seeking damages for her terminal dues from the Respondents as follows:-

***a) Certificate of Service***

***b) Kshs. 4,153.80 for 9 days worked in December, 2013 (12000/26x9)***

***c) Kshs. 37,153.80 being leave pay for 3.83 years that the client never went on leave. (12000/26 x21X3.83)***

***d) Kshs. 22,980.00 for Leave allowance (12000/2x3.83)***

***e) Kshs. 82,728.00 being house allowance for the forty six months she worked. (15% x12000x3.83x12)***

***f) Kshs. 26,515.40 being service pay at 15 days for every year worked. (12000/26 x3.83 x15)***

***g) Kshs 148,265.75 being claim for overtime for the 28 months and 19 days (2.35years) she was a waitress. She worked 14 hours over and above the normal 52 hours every week, at an hourly rate of Kshs 57.70 for 2.35 years (12000/26 /8 x14x52x 2.35 x1.5)***

***h) Kshs. 93,252.40 being claim for overtime for the 1.48 years she was made a Cashier. She still worked 14 hours over and above the normal 52 hours every week, at an hourly rate of Kshs 57.70 for 1.48 years ( 12000/26/8x14x52x1.48x1.5)***

***i) Kshs 17,677.00 for all public holidays in 6 years at double rate. (3.83x10x12000/26)***

***j) Kshs 200.00 for unpaid NSSF (3.83x12x200)***

***k) Kshs 18,384.00 for unpaid NHIF. (3.83\*12\*400)***

***l) Such other dues as may be found due to our clients***

***m) Costs and interest.***

2. The Claimant avers that she was first appointed as Waitress by the Respondents 10<sup>th</sup> February 2010 and rose to become a Cashier on 29<sup>th</sup> June 2012. That she worked for 3 years and 10 months and left employment on 9<sup>th</sup> December 2013 after serving part of her notice due to

mistreatment and being overworked. That she then demanded for her terminal dues but the Respondents have refused/ neglected to settle the same.

3. The Respondents filed a response averring that the Claimant absconded employment without giving notice of quitting her employment and they deny mistreating or overworking her and denying her claims in total.

#### **Claimant's Submissions**

4. The Claimant submits that she was called for an oral interview and later reported to work the following day without a letter of appointment. That she began her job on the 10<sup>th</sup> February, 2010 as a waitress in the Respondents' hotel and all their communications during her employment were verbal. That she worked 66 hours a week over and above the normal 52 hours. That the first 3 months she worked as a cashier she was being paid Kshs. 9000 which is the amount she was being paid as a waitress and the amount was only increased after 3 months to Kshs 12000 while other cashiers were earning Kshs 12,000 at the same period. That she was overworked without any off days after other cashiers quit and due to unfavourable working conditions, she was forced to stop working.

5. Further, that during her employment with the Respondents, she never went for leave and did not receive any leave allowance. That she did not receive any house allowance and neither was she given a certificate of service. She also states that her NHIF and NSSF deductions were not being forwarded by the Respondents.

6. She submits that due to the foregoing, she was constructively dismissed from employment by the Respondents and cites the case of MARIA KAGAI LIGAGA -VS- COCA COLA EAST AND CENTRAL AFRICA LIMITED, Cause No. 611 (N) of 2009 and further quoted with authority in the case of MARETE VS ATTORNEY GENERAL [1987] KLR 690 as cited in MAX MASOUD ROSHANKAR & ANOTHER -VS- SKY AERO LIMITED [2015] eKLR where the court held:-

“... While under section 43 and 45 of the Employment Act 2007 the duty in showing that termination was fair is on the employer, constructive dismissal demands the employee demonstrates that his resignation was justified. Other collateral issues that must be shown by the employee are: that the employer made a fundamental change in the contract of employment, and that such change was unilateral; that the situation was so intolerable the employee was unable to continue working; that the employee would have continued working had the employer not created the intolerable work environment; and that the employee resigned because he did not believe the employer would abandon the pattern of creating unacceptable work environment. These are some of the rules governing a claim for constructive dismissal.”

7. On the question of the Respondent refusing or neglecting to pay the Claimant's terminal dues, she cites the case of ELIJAH KIPKOROS TONUI V NGARA OPTICIANS T/A BRIGHT EYES LIMITED [2014] EKLR where the Respondent was ordered to pay the Claimants his terminal dues which he was entitled to.

8. She also relies in the case of Alice Mbithe Mwanzia versus Xpress It Courier [2016] eKLR where the court dealing with similar issues stated as follows:-

“...Looking at the conduct of the employer and in light of definition of constructive dismissal, the court finds that the conduct of the Respondent was obviously geared towards making the employment environment intolerable for the Claimant by the substantial breach of the employment contract where the Respondent varied the terms of the contract unilaterally without due regard to the Claimant's rights..”

9. The Claimant further submits that the Respondents did not call any evidence to rebut her statement and her evidence was unchallenged. That she was not given her Certificate of Service and having been constructively dismissed from employment by the Respondents, she prays that the court grants her prayers.

#### **Respondent's Submissions**

10. The Respondents submit that the claim of constructive dismissal brought up in the Claimant's submissions should be ignored since that was not the Claimant's case and that she should be bound by her pleadings. That she has however not proved the same but brought it up in her submissions as an afterthought. That the basic ingredients that must be available for a claim for constructive dismissal to be successful were summarized in the case of Kenneth Kilimani Mburu & Another -Vs- Kibe Muigai Holdings Limited (2014) eKLR which was quoted with approval by this Court in Alice Mbithe Mwanzia Vs Xpress It Courier Limited (2016)eKLR that is:

- i) The employer must be in breach of the contract of employment;*
- ii) The breach must be fundamental as to be considered a repudiatory breach;*
- iii) The employee must resign after the breach has taken place, otherwise the court may find the breach waived;*
- iv) The employer must be in breach of the contract of employment.*

11. Further, that the several cases she relies on in support of her claim of constructive dismissal are distinguishable factually and materially from this case since they had direct evidence supporting the claim of constructive dismissal which had not been supported in evidence at all in this case and it should fail.

12. The Respondents submit that her claim for **Leave Allowance** is not based on any statute or contract and the same should fail since she did not justify her figures. That for the claim of **NHIF & NSSF** they remitted to the Claimant's pension (NSSF) and they were not obliged to deduct NHIF and therefore never deducted nor remitted for NHIF and they pray the same be dismissed.

13. On her claim for **House Allowance**, she was not entitled to the same because her wages were consolidated as stipulated in Section 31(2) (a) of the Employment Act. They rely on the case of *Collins Otieno Owino Vs Rift Valley Agencies Ltd [2016] eKLR* where the Court held that:-

**“..The Claimant's letter was clear that the remuneration was consolidated and therefore in terms of Section 31(2)(a) of the Employment Act, 2007, the claim for house allowance is therefore untenable.”**

14. On the claim for **Overtime** they submit that the Claimants was guaranteed one rest day together with breakfast and lunch breaks which lasted more than 1 hour. That she was aware of the working hours on appointment and cannot therefore claim overtime from the agreed working hours. They invite the court to dismiss this claim as was done in *Collins Otieno Owino Case (Supra)* where it was found:-

**“...However, the Claimant did not cite any Wages Order (the Employment Act, 2007 does not expressly provide for payment of overtime) prescribing the minimum working hours in the industry the Respondent was carrying on business, and the Court is therefore unable to determine whether he is entitled to payment of overtime.”**

15. On the claim for **Service Pay** they submit that it is only available to employees not registered with a pension or provident fund scheme under the Retirement Benefits Act; any other scheme established; gratuity or service pay scheme established under a collective agreement; and the National Social Security Fund, pursuant to **Section 35 (6) of the Employment Act**. That she is a registered NSSF member and the claim should thus fail.

16. On the claim for **Leave Pay** they submit that this claim is caught up with Section 28(4) of the Employment Act, 2007 and they rely in the case of *Collins Otieno Owino Vs Rift Valley Agencies Ltd [2016] eKLR*,

**“The Court would therefore have found for the claimant for the balance of the untaken leave, save that in the view of the court, claim for leave appear to be caught up by section 28 (4) of the Employment Act, 2007 that outstanding leave be taken within 18 months.”**

17. On her claim for 9 days worked in December 2013, they submit that the same should be dismissed since she ought to have given the Respondents one month salary in lieu of notice as provided in section 36 which amounts to Kshs. 12,000/= due to the respondents. Her claim for public holidays is also not substantiated. As for the **Certificate of Service** they submit that she left employment without notice but they undertake to provide the same as it is their obligation.

18. The respondents submit that the Claimant never discharged her burden as stipulated in section 107 and 108 of the Evidence Act Cap 80 and that she made mere allegations that were unsupported, unproven and at best speculative and therefore her claims should fail.

19. They finally submit that the other claims have been caught up with mandatory statutory provisions and they implore the court to uphold the same. They then pray that the court dismisses the claimant's claim in toto.

20. I have examined all the averments of the Parties plus submissions filed. The issues for determination by this Court are as follows:-

**1. Whether the Claimant was unfairly terminated or she resigned.**

**2. Whether the Claimant is entitled to remedies sought.**

21. The Claimant has submitted that she was constructively terminated due to the conduct of the Respondent in that she was never allowed to go on leave during the subsistence of her employment. She also avers that she was overworked without any off day and therefore she was forced to stop working.

22. The Claimant indeed left work citing the above issues. Can this qualify to be a question of constructive dismissal?

23. Constructive dismissal can be defined as the changing of an employee's job or working conditions with the aim of forcing their resignation. This arises when an employer creates a hostile work environment. Blacks Law Dictionary (9<sup>th</sup> Edition) defines constructive dismissal as follows:-

**“A termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave”.**

24. Whereas in cases of termination under Section 43 of the Employment Act, the employer has a duty to show the termination was fair, in cases of constructive dismissal, the burden of proof shifts to the employee to show that the situation was intolerable and that he had no choice but to leave.

25. The contention by the Claimant on poor working conditions by the Respondent must therefore be proved. The Claimant alleges she was not allowed to go on leave. There is no submission before this Court of any leave application, which was ever rejected. There is also

contention that she worked long hours and never went for off. There is also no submissions before this Court of any employment records indicating the hours worked.

26. The Claimant did not ask the Respondent to produce the documents if she needed to rely on them. My finding is that the Claimant has not proved that she was constructively dismissed.

27. In the case of **Alice Mbithe Mwanzia vs Xpress IT Courier Limited (eKLR 2016)** this Court made a finding that claimant had been constructively dismissed because there was tangible evidence placed before it of the conduct of Respondent as opined as follows:-

*“35. Looking at the conduct of the employer and in light of the definition of constructive dismissal, the Court finds that the conduct of the Respondent was obviously geared towards making the employment environment intolerable for the Claimant by the substantial breach of the employment contract where the Respondent varied the terms of the contract unilaterally without due regard to the Claimant’s rights. This breach is seen from the Respondents act of reducing the salary of the Claimant on different occasions and further by reducing the working period without regard to the law.*

*36. It is my finding that the Respondent by his conduct contractively dismissed the Claimant”.*

28. The situation does not arise in the current case and so I make a finding that the Claimant was not constructively dismissed but she resigned on her own volition.

29. Other than for the above reason, the claimant never pleaded constructive dismissal in her Memorandum of Claim and so cannot even make extensive submissions on the same as she is held by her pleadings.

30. On prayers sought, given that the Claimant resigned voluntarily, she is only entitled to her terminal dues. She has prayed for various remedies. Some remedies such as prayer (g) to (j) cannot be granted for lack of evidence. Prayer for unpaid NSSF and NHIF remittances, as per the documents “A is payable and that is  $200 \times 18 \text{ months} \times 3 = 3600$  of NSSF and NHIF =  $400 \times 18 \text{ months} = 7,200/=$ .

31. She is also entitled to house allowance at the rate of 15% of salary  $\times 12000 \times 4.2 \text{ months} = 75,600/=$

**TOTAL = 86,400/=**

32. Claim for service pay is not payable as Claimant was a member of NSSF.

33. Since Claimant resigned without giving the Respondent notice, the above money is less by 1 month’s notice of Kshs.12,000//=

**Total = 74,400/=.**

34. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

**Dated and delivered in open Court this 31<sup>st</sup> day of October, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

**Miss Nasanga holding brief for Kirimi for Claimant – Present**

**Claimant – Present**