



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO 711 OF 2012**

**MICHAEL NTHENGE.....CLAIMANT**

**VS**

**KENYA AUROTECH LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's claim brought by Memorandum of Claim dated 24<sup>th</sup> April and filed in Court on 27<sup>th</sup> April 2012 is for unlawful dismissal and failure to pay terminal dues. The Respondent did not enter appearance nor did it file a defence. The Claimant's case therefore proceeded *ex parte*. The Claimant elected not to give sworn testimony.

**The Claimant's Case**

2. The Claimant was employed by the Respondent on 1<sup>st</sup> February 2005. In December 2007, upon the Respondent's complaint, the Claimant was arrested and charged with the offence of stealing by servant contrary to Section 281 of the Penal Code. The Claimant was eventually acquitted on 30<sup>th</sup> January 2012. It is the Claimant's case that the Respondent's complaint and the subsequent charges preferred against the Claimant amounted to constructive dismissal.

3. The Claimant therefore claims the following:

- a. A declaration that he was constructively dismissed
- b. Unpaid salaries for November 2007 to March 2012.....Kshs. 1,166,000
- c. Unpaid leave.....Kshs. 17,400
- d. One month's salary in lieu of notice.....Kshs. 22,000
- e. 12 months' salary in compensation for unfair termination.....Kshs. 264,000
- f. Certificate of service
- g. Costs

**Findings and Determination**

4. The main issue for determination in this case is whether the Claimant has made out a case for unfair termination. Section 47(5) of the Employment Act, 2007 provides that :

**(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.***

5. In my view, the burden of proof placed on the Claimant does not shift or diminish by the mere fact that the claim is not defended. When Counsel for the Claimant appeared before me on 5<sup>th</sup> March 2014, he told the Court that the Claimant wished to rely on his pleadings filed in Court. In his Memorandum of Claim, the Claimant states that the complaint made by the Respondent which led to charges being preferred against him amounted to constructive dismissal.

6. In the case of ***Emmanuel Mutisya Solomon Vs Agility Logistics (Industrial Court Cause No 1448 of 2011) Mbaru J*** defined constructive dismissal as:

***“a situation in the workplace which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee to such an extent that the employee has no other option available but to resign.”***

7. A complaint made to the police by an employer against an employee does not in my opinion, constitute circumstances leading to constructive dismissal. Apart from a general statement in the Claimant's submissions filed on 19<sup>th</sup> March 2014, there was no evidence that the Claimant sought to go back to work and was locked out by the Respondent.

8. I therefore find that the Claimant has not proved his claim for wrongful and unfair termination of employment. The claim therefore fails in its entirety and is dismissed with no order for costs.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 21<sup>ST</sup> DAY OF MAY 2014**

**LINNET NDOLO**

**JUDGE**

***In the Presence of:***

.....***Claimant***

.....***Respondent***