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Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Judgment
Judge:	Maureen Atieno Onyango
Citation:	John Mulinge Mutuku v Kartasi Industries Limited [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Employment and Labour Relations
History Magistrates:	-
County:	Nairobi
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**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1434 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**JOHN MULINGE MUTUKU.....CLAIMANT**

***VERSUS***

**KARTASI INDUSTRIES LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant filed suit against the Respondent on 14<sup>th</sup> August 2015 seeking damages for wrongful termination of employment and failure or refusal by the respondent to pay terminal benefits.

He avers that he was engaged by the Respondent as a machine operator and worked continuously for a period of 2 years earning a monthly salary of Kshs.15,000 and house allowance of Kshs.3,450/=.

That on or about 21<sup>st</sup> August, 2014, the Claimant was forced to tender his resignation by the Respondent after failing to agree with the Respondent to increase his salary. The Claimant demanded to be given his terminal dues and the unpaid salary but the Respondent persisted in its refusal to pay the same.

In the Memorandum of Claim dated 14<sup>th</sup> August, 2014, the Claimant prays for judgment against the Respondent for:-

- a. Payment of August 2014 Kshs.15,500
- b. House allowance for 34 months at 3,450 per month Kshs.117,300
- c. Leave allowance for 2 years 10 months Kshs.43,916
- d. Service gratuity for 2 years Kshs.103,333
- e. Severance pay Kshs.12,916
- f. Overtime for 136 days Kshs.17,566.66
- g. Issuance of Certificate of Service
- h. NSSF funds deducted but not remitted Kshs.13,000
- i. Payment for unfair termination for 12 months
- j. Cost of this suit
- k. Interest in (a) to (h) above

I. Any other relief as the Court may deem just to grant.

The Respondent filed a Memorandum of Defence admitting the employment relationship but denies that the Claimant was wrongfully terminated or that his terminal benefits were not paid. It avers that on 22<sup>nd</sup> August, 2014, the Claimant resigned from employment on his own volition contrary to the averments made in his memorandum of claim. The Respondent accepted the resignation and the Claimant was paid for days worked up to 21<sup>st</sup> August 2014 and accrued leave days less one month's salary in lieu of notice. The respondent also issued the Claimant with a Certificate of service which the Claimant acknowledged receipt of.

The Respondent contends that the Claimant breached his contractual obligations by failing to issue the mandatory one month's notice provided for in his employment contract. It that for the Claimant's suit to be dismissed with costs.

### **Evidence**

At the hearing the Claimant testified that on 21<sup>st</sup> August, 2014, he reported to work and was assigned duties by his supervisor which he performed. That a production coordinator from another department came and told him to leave the work he was doing and go do some other work.

That he proceeded to the Human Resource Officer and told her that there was a clash of instructions from supervisors. The Human Resource Officer escalated the matter to the director Mr. Shabir. The claimant avers that the said Mr. Shabir referred the matter back to the Human Resource Officer who told the claimant that the matter was complicated and she could not solve it, that if he was not willing to work he should leave and come back after a week.

The claimant testified that after the said one week he went back and found that the Human Resource Officer had tabulated his final dues at Kshs.190/= which he refused to take. He further stated that he was coerced into signing against the said Kshs.190/= as his final dues otherwise they would issue to him his certificate of service.

He testified that he was not given any letter of termination. He prayed for notice pay, leave for 2014 and service pay for 2 years and 11 months. He also claimed for salary arrears based on General Order. He avers he was not paid during leave when he would be paid only Shs.7,000.

In cross examination he stated that he resigned because of being given conflicting instructions by his superiors. He admitted that he wrote a letter of resignation but did not indicate the issue of conflicting instructions therein and that he did not give notice in the resignation letter.

He also stated that he was claiming for house allowance for the month of August, 2014, only and not for 34 months as indicated in the memorandum of claim. He admitted signing that he had received a Certificate of service. He further admitted that he was a member of NSSF but stated that NSSF contributions for August, 2014, was deducted but was not remitted.

The Respondent did not call any evidence and relied on the documents on record and written submissions.

### **Submissions**

It is submitted on behalf of the Claimant that his employment was terminated unfairly once differences occurred between the Claimant and the Respondent's staff. That the Claimant reported to the director but nothing was done. That it was the work of the Respondent to ensure that there was order at the place of employment to ensure peace at the work place which the Respondent failed to do forcing the Claimant to resign.

He urges the Court to find that the termination was unlawful and allow the claim as drawn as no witness was called to controvert the Claimant's testimony.

On behalf of the Respondent it is submitted that this is not a case of constructive dismissal. That the fundamental terms of the contract do not make a provision for increase in salary at the Claimant's demand so there is no repudiatory breach of any contractual obligations by the Respondent. Further that declining a demand for increase in salary is not a fundamental breach going

to the root of the contract.

That during the hearing, the Claimant deviated from the cause of resignation as embodied in his pleadings and instead alleged that resignation was informed by conflicting instructions from 2 different superiors. That this reason cannot be attributed to the respondent so as to amount to constructive dismissal. It is submitted that there is no repudiatory breach of any contractual term and if anything, the Claimant was violating section 44(4) of the Employment Act that infers an obligation on the part of the employee to obey lawful commands from his superiors.

It is submitted that the Claimant has not demonstrated which fundamental term of the contract was breached to cause him to resign. That the Claimant is not entitled to compensation sought as he resigned voluntarily as seen from his resignation letter.

That the claim for overtime and house allowance appear in his payslip and the Claimant is just seeking unjust enrichment. That the Claim for leave pay is unjustified as the Claimant has attached pay slips for the entire working period which proves that he was paid contrary to what is alleged. The Respondent urges the Court to dismiss the Claim with costs.

### **Determination**

The issues for determination are the following –

1. Whether the Claimant was unfairly terminated
2. Whether the claimant is entitled to the reliefs sought

The Claimant pleaded that he was constructively dismissed after he failed to agree with the Respondent on salary increase whereas in evidence he stated that he resigned after he received conflicting instructions from his superiors and the Managing Director failed to do anything about it. The Respondent on the other hand is of the position that the claimant was not terminated but resigned on his own volition and he was paid all his terminal dues.

Appendix 3 in the memorandum of Defence is a resignation letter that was admitted by the Claimant. In the letter the claimant does not state the reason for resignation. The pleaded reason for termination and what was stated in evidence are different and the evidence in court seems to be an afterthought. The rules of pleadings are that one is estopped from raising an issue that was not pleaded.

In the case of *Phillip Osore Ogutu V Michael Onyura Aringo & 2 Others [2013] eKLR* it was held:

*“There can be no quarrel with the principle that any evidence that goes beyond pleadings must either be rejected outright or disregarded.”*

The Claimant has therefore not proved a case of constructive dismissal for failing to lead evidence as set out in his pleadings.

Furthermore, the evidence led does not make out a case of constructive dismissal as was set out in the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR* where the court set out the principles as follows –

*“The legal principles relevant to determining constructive dismissal include the following:*

1. *What are the fundamental or essential terms of the contract of employment”*
2. *Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer”*
3. *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.*

4. *An objective test is to be applied in evaluating the employer's conduct.*
5. *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.*
6. *An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.*
7. *The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.*
8. *The burden to prove repudiatory breach or constructive dismissal is on the employee.*
9. *Facts giving rise to repudiatory breach or constructive dismissal are varied."*

The claim for unfair termination therefore fails as there is no proof of constructive dismissal

As to the remedies sought, reference is made to the tabulation of final dues as contained in the letter dated 26<sup>th</sup> August, 2014, which the Claimant acknowledged receipt of. From the letter it is evident that he had been paid salary for days worked in August, 2014, house allowance and leave pay for 24 days. The employer deducted one month's pay in lieu of notice, statutory deductions and Advances leaving the Claimant with a negative balance of Kshs.190/=.

The Claim for house allowance fails for the reason that the pay slips attached to the Memorandum of Defence which were not disputed indicate that the Claimant was paid house allowance up to the month of August when he resigned.

Service gratuity is also not payable as the contract of employment does not provide for payment of gratuity and the Respondent deducted and remitted NSSF on behalf of the Claimant. No evidence of non-payment has been provided.

Severance pay is not payable as this is not a case of redundancy.

As for overtime, the payslips on record reflect that the Claimant was paid overtime and no specifics of what was not paid was provided by the Claimant. The Claim for overtime should be specific as it is a special damage claim. The Claimant has asked for overtime for 136 days which despite being provided with payslips to the contrary did not belabour to point out now the deficit arose. Without specifics on the same the claim fails.

The Claimant has provided an uncertified copy of an NSSF statement of account. The statement indicates some lapses in payments for the month of December, 2009, January 2010, June-December 2010, January-August 2011, February 2012 and December 2013. There is also an underpayment of Kshs.100 in September 2011.

This is an issue that the National Social Security Fund Board is capable of and well equipped to enforce upon a report being made by the claimant as NSSF has both the statutory and administrative structures to pursue the same through the National Social Security Fund Act.

In the end, I find that the claimant has not proved his case against the respondent. The same is accordingly dismissed. There shall be no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF FEBRUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**



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