



**Masinde v G4S Security Services Kenya Limited (Cause 480 of 2017)
[2024] KEELRC 1109 (KLR) (3 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1109 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 480 OF 2017
MA ONYANGO, J
MAY 3, 2024**

BETWEEN

PIUS SIMIYU MASINDE CLAIMANT

AND

G4S SECURITY SERVICES KENYA LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this suit against the Respondent alleging wrongful or unlawful dismissal from employment. He averred that he was employed by the Respondent on 30th October 2006 as a Security Guard on permanent terms of service and that he attended to his duties as instructed by agents and or employees of the Respondent.
2. The Claimant averred that on or about 17th June 2015, while on annual leave, he was involved in a road accident and informed the Respondent through its agent, Mr. Nicholas. He averred that when he resumed work in January 2016, his immediate supervisor asked him to produce medical reports to prove that he was actually involved in a road accident. That he subsequently handed in medical treatment notes and the receipts but was told to go home and wait until the company gets in contact with him. That after waiting for some time, he returned to the Respondent's offices but the Respondent refused to assign him duties and turned him away.
3. The Claimant's stance was that the Respondent's silence for over two years amounted to summary dismissal and unfair termination of his employment since the Respondent was aware and in fact paid him for the two months he was away for treatment. He thus prayed for: a declaration that the termination of his employment by the Respondent was unfair and unlawful; general damages for unfair and unlawful termination of employment; any other appropriate relief as the Court may deem fit to grant; and costs of this suit.



4. In reply, the Respondent admitted in its Statement of Response that the Claimant's Line Manager received a report of his having been involved in a road accident in which he fractured his leg. It averred that when the Claimant resumed reported back to work in early 2016, he could not be deployed as he had not recovered. He was instructed to return home until he was fit to resume duty. According to the Respondent, the Claimant was numerous times requested to avail medical documents on his treatment and save for those produced in his Bundle before Court, there was no evidence of any further treatment that he undertook for the entire period he was away from work.
5. The Respondent denied having terminated the Claimant's employment and asserted that it was waiting for him to resume duty once he was fit. It averred that the Claimant is thus not entitled to any of the reliefs set out in his Claim and that the suit should be dismissed with costs to the Respondent.
6. The Claimant's rejoinder through his Reply to Defence dated 10th October 2017 was that when he reported back to work after the accident, his wound had totally healed and he was fit to work. He affirmed that all the medical documents related to the accident were delivered to the Respondent and asserted that he was not in employment with the Respondent since his salary had not been paid from September 2015. That he was thus constructively dismissed and was entitled to the reliefs sought in the claim.

Evidence

7. At the hearing of the case the Claimant testified on his behalf as CW1 and the Respondent called Victor Tabu Oanda, its Customer Service Manager who testified as RW1.
8. The Claimant adopted his witness statement and bundle of documents filed with the Claim. He testified that he was employed by the Respondent in 2015 as a security guard. Under cross examination the Claimant stated that he was involved in a road traffic accident along Eldoret Nakuru road on 17th June 2015 while on annual leave. He sustained a fracture on his left leg. He was admitted at Moi Teaching and Referral Hospital, Eldoret. He informed the Respondent about the accident and submitted treatment records. His leave started on 25th May 2015 and he was supposed to report back to work on 24th June 2015.
9. The Claimant testified that he was paid salary for June, July, August and September, 2015. He reported back to work in January 2016 and was informed by RW1 Victor to get a letter from a doctor confirming he was well enough to report for duty. He went to Damiano Hospital, Bungoma and obtained a letter which he brought to RW1 on 5th February 2016 but did not retain a copy. RW1 sent him to Mr. Kyule, the Branch Manager. Mr. Kyule sent him to Agneta of Human Resource. Agneta sent him back to Mr. Kyule with instructions that Mr. Kyule should send an email to Agneta so that she could put him back on payroll. He reported back the following day but RW1 was not available. He went to Mr. Kyule who accused him of having gone to a medicine man instead of going to hospital.
10. When he reported back to Agneta on 6th February 2015 she told him to go and wait at home until he was called to report back to work. That he waited for the call which never came.
11. He stated that he did not clear with the Respondent and still had his job card. He did not have uniforms as they were surrendered by guards when proceeding on annual leave.
12. RW1 adopted his witness statement dated 25th July 2018 together with the bundle of documents filed by the Respondent. He also adopted the documents in the Supplementary bundle dated 24th May 2022.



13. RW1 denied seeing the Claimant in January 2016 or receiving documents from St. Damiano Hospital, Bungoma. He testified that when the Claimant reported back to work he still had a wound on his leg and RW1 could not assign him duties as he was not able to wear company safety boots. RW1 stated that this was the reason he sent the Claimant to Agneta, the Human Resource Officer as in his opinion it was not proper to assign the Claimant work in that status. He testified that the Respondent advised the Claimant to continue with his treatment until the doctor advised the Respondent that he was well enough to resume duty. RW1 testified that the Claimant left and never reported back to work.
14. Under cross examination RW1 stated that he was the Claimant's supervisor and received the report when the Claimant was involved in the road accident. He testified that the Claimant reported back to work in January 2016 and wanted to be deployed but still had an uncovered wound. That he told the Claimant to go back to the doctor and report back with a sick sheet which the Claimant never submitted to the Respondent. According to RW1 the Claimant's employment had not been terminated and he was still considered an employee on sick leave.
15. RW1 stated that the Respondent did not write to the Claimant to report back to work after January 2016 or to inquire why he absconded duty. According to RW1 the Claimant did not abscond duty as according to the Respondent he was still on sick leave.
16. RW1 testified that an employee on sick leave was paid salary for 90 days after which the salary was stopped until the employee resumed duty.
17. RW1 stated that he was not aware if the Claimant went to Mr. Kyule to assign him duties. He testified that Kyule was not responsible for assigning the Claimant duties. That it was RW1 who was responsible for assigning duties to the Claimant.
18. On re-examination RW1 stated that employees were paid full salary for the first 50 days of sick leave and thereafter paid half salary until 90 days. After 90 there was no pay until the employee resumed duty.

Claimant's Submissions

19. The Claimant submitted that the evidence before Court including his testimony and the admissions by RW1 are to the effect that his employment was constructively terminated by the Respondent. That the Respondent had not adduced any documentary evidence to confirm that the Claimant was still their employee as per their records or that it tried to reach out to the Claimant to return to work. In support of his submission on constructive dismissal, the Claimant referred the Court to the case of Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR where the Court of Appeal 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. 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 constituted a repudiatory breach of the contract of employment - this is the contractual test...”

20. It was the Claimant's submission that the conduct of the employer must be shown to be so intolerable that it made it considerably difficult for the employee to continue working. That at the heart of the constructive dismissal is breach of the trust and confidence through the employer's conduct (see Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited [2014] eKLR). That in the



instant case, the conduct of the Respondent of not assigning the Claimant duties was so unreasonable that one would not have expected the Claimant to keep on going to the Respondent's offices seeking to be assigned duties. He submitted that he got frustrated, lost trust and confidence in the Respondent and opted to go back to his village. That since his demand letter was not replied to, it was clear that the Respondent constructively dismissed him.

21. The Claimant submitted that he had proved his case to the required legal standard – on a balance of probability- and was thus entitled to be awarded the reliefs sought.

Respondent's Submissions

22. The Respondent submitted that the Claimant's employment was not terminated and he was thus not entitled to the remedies he sought from the Court. That under section 107 and 108 of the Evidence Act, the burden of proof lies on the person who would fail if no evidence at all were given on either side. That there was no proof that the Claimant visited the Respondent's offices or got treatment from St. Damiano Hospital that cleared him for duty yet the Claimant had the responsibility of maintaining medical records of his treatment. The Respondent relied on the case of Ayub Kombe Ziro v Umoja Rubber Products Limited [2022] eKLR, in which this court sitting on appeal found that in asking the appellant to go back home for not providing a clean bill of health the Respondent could not be construed as having terminated the contract of employment as this was a condition for resumption of duty.
23. It further submitted that as set out in section 47(5) of the Employment Act, the Claimant had not discharged the burden of proving that an unfair termination had occurred and therefore had no cause of action against the Respondent.
24. it was further submitted that this Court should note that the Claimant had introduced the argument that he was constructively dismissed in his submissions which he did not plead in his Statement of Claim. That the court has previously found held in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR that submissions cannot take the place of evidence. That if the Claimant was minded to present a case for constructive dismissal, he should have adduced evidence in support of that claim. The Respondent argued that in any event, none of the ingredients of constructive dismissal set out in the Coca Cola case (supra) relied on by the Claimant had been proved in the instant case. That the Claimant was neither entitled to repudiatory breach nor did he resign from employment and cannot thus claim that he was constructively dismissed.
25. The Respondent concluded that since the Claimant had failed to prove unfair termination, none of the remedies sought was available to him. That this Court should dismiss the suit with costs to the Respondent.

Determination

26. Having considered the pleadings, evidence and submissions filed by the parties, it is my considered opinion that the issues arising for determination are the following:
 - i. Whether the Claimant's employment was terminated by the Respondent, and if so,
 - ii. Whether the termination was unfair,
 - iii. If the Claimant is entitled to the reliefs sought.
27. It is not contested that the Claimant was employed by the Respondent or that while he was on leave on 17th June 2015 he was involved in a road traffic accident and sustained a fracture on his left leg. It is



further common ground that the Claimant reported the accident to the Respondent and was deemed to be on sick leave until he reported back to work on 5th January 2016.

28. According to the Claimant the Respondent refused to allow him to resume duty when he reported back even after he submitted medical records to prove that he was away on sick leave. The Respondent on the other hand avers that when the Claimant reported back for duty on 5th January, 2016 he still had a wound on his leg and was requested to continue with treatment and report back with a medical certificate confirming that he was well enough to resume duty.
29. The Claimant avers that he submitted the medical certificate from St. Domiano Hospital in Bungoma while the Respondent denies that such a certificate was ever adduced by the Claimant. It is the Respondent's position that as far as it is concerned the Claimant was still on sick off.
30. The Employment Act provides as follows in respect of sick leave:
 30. Sick leave
 - (1) After two consecutive months of service with his employer, an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of seven days with half pay, in each period of twelve consecutive months of service, subject to production by the employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre.
 - (2) For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.
 - (3) For the purposes of subsections (1) and (2) "full pay" includes wages at the basic rate excluding deductions from the wages allowable under section 19.
 - (4) For purposes of subsection (1), the twelve continuous months of service shall be deemed to commence on the date of the employment of the employee and on such subsequent anniversary dates of employment.
 - (5) An employer shall have the right to place all his employees on an annual cycle of an anniversary date falling on a day to be determined by the employer.
31. In the instant case the Claimant reported to the Respondent that he was involved in a road traffic accident and indeed was paid salary for 90 in accordance with his terms of service. There is however no evidence that the Claimant submitted a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre covering the entire period that he was away from work.
32. The Claimant having not absconded duty, there was no responsibility on the part of the Respondent to write to him to inquire his whereabouts as the Respondent was aware that he was on sick off. According to RW1 the Claimant was free to report back to work provided he had the certificate from a medical practitioner that he was fit to resume duty.
33. For the foregoing reasons I find that the Claimant has failed to prove that his employment was unfairly terminated by the Respondent.



34. The orders that recommend themselves in the instant circumstances is an order dismissing the suit.
Each party shall bear its costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON

THIS 3RD DAY OF MAY, 2024

MAUREEN ONYANGO

JUDGE

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