



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL NO. 55 OF 2015

BETWEEN

THE BOARD OF GOVERNORS, CARDINAL

OTUNGA HIGH SCHOOL, MOSOCHO 1ST APPELLANT

NYARIKI ZACHARY 2ND APPELLANT

JEREMIAH NYAKUNDI 3RD APPELLANT

AND

ELIZABETH KWAMBOKA KHAEMBA RESPONDENT

(Being an appeal from the judgment and order of the Industrial Court of Kenya at Kisumu (Hellen Wasilwa, J.) dated 28th February, 2014

in

Industrial Cause No. 190 of 2013)

JUDGMENT OF THE COURT

1. The respondent was employed by the appellants as a cateress on 30th August, 2004 at a monthly salary of Kshs.6,750/=. At the time of termination of her employment on 1st June, 2013 her salary was Kshs.10,560/=.
2. On 28th February, 2013 the respondent was given the three months' compulsory leave. No reason was given for that action. Upon completion of the compulsory leave, the respondent reported back to work on 1st June, 2013. She was immediately served with a letter directing her to take up a supervisory role in the cleanliness of the school boarding area.
3. According to the respondent, the letter substantially altered her terms of employment by assigning her duties that were outside her professional competence and which she had not applied for. She treated that as termination of her employment as the school cateress, and through her advocate, wrote to her

employer demanding her terminal benefits and entitlements.

4. The appellants admitted that the respondent had been sent on compulsory leave, allegedly for receiving unauthorized stock, a job reserved for the storekeeper, that it was necessary to facilitate investigations, which revealed impropriety on her part. They however denied having terminated the respondent's services as a school cateress, though they admitted that the respondent's duties had been changed. According to the appellants, the respondent had absconded duty.

5. The appellants further contended that the respondent was always expected to do other duties assigned by the head teacher and the supervisory role of cleanliness in the boarding area was part of such duties.

6. The trial court held that the respondent was recruited and appointed as a cateress and her duties had been enumerated under Appendix 5 to her letter of appointment. Her duties were confined to the kitchen and the kitchen area, but did not include cleanliness in the boarding area, which was a house keeper's duty.

7. The trial court further held that the unilateral change of the appellant's duties also offended the provisions of **section 10 (5)** of the **Employment Act** which states that:

“10 (5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.”

That was tantamount to terminating the existing contract and therefore amounted to an unfair and unjustified termination of employment.

8. The court awarded the respondent Kshs.10,500/= being one (1) month's salary in lieu of notice, Kshs.126,000/- being twelve (12) months' salary as damages for unlawful termination of employment and Kshs.31,500/= being fifteen (15) days' salary as terminal benefits for each year served. The appellants were also ordered to pay the costs of the suit.

9. The appellants were dissatisfied with the said judgment and preferred an appeal to this Court.

10. Although the appellants' memorandum of appeal contains 14 grounds of appeal, **Mr. Ojuro**, learned counsel who held brief for Mr. Nyang'au for the appellant, compressed his submissions into three (3) main grounds as follows:

a. ***That the learned judge erred in law in holding that the letter dated 1st June, 2013 requiring the respondent to take up a supervisory role in the cleanliness of the boarding area amounted to termination of her original employment and was contrary to section 10(5) of the Employment Act,***

b. ***That the learned judge erred in law in failing to find that the respondent had absconded from duty after she was issued with the letter dated 1st June, 2013.***

(c) That the learned judge erred in granting the respondent the reliefs as contained in the judgment.

Mr. Ojuro submitted that the new responsibilities that were assigned to the respondent were in line with her duties as a cateress and therefore **section 10(5)** of the **Employment Act** had not been breached at all. Further, there was no constructive termination of the respondent's employment, instead, it was the respondent who had absconded duty, counsel added. The learned judge thus erred in law in finding for the respondent, Mr. Ojuro added.

11. **Mr. Wasuna**, learned counsel for the respondent, opposed the appeal. He submitted that the

respondent's letter of appointment ought to be read together with the appellants' letter of 12th May, 2009 which set out the responsibilities and duties of a cateress, which are all related to food in the students' Dining Hall and the kitchen. He contended that although the last duty and responsibility stipulated in the said letter was "*Doing other duties assigned by the head teacher*", such duties had to be in line with duties related to food in the Dining Hall and kitchen. Counsel applauded the trial judge's application of the *ejusdem generis* rule in interpreting the above quoted last duty and responsibility, which the appellants had relied upon in re-assigning the respondent supervisory role in cleanliness of the boarding area.

12. Mr. Wasuna further submitted that learned judge was right in finding that there was constructive termination of the respondent's employment, that she had not absconded duty and in awarding the reliefs as contained in the judgment. Further, since the appellants had not contested the quantum of benefits awarded, if this Court were to find that there was constructive termination of the respondent's services, it should not interfere with the quantum of damages as awarded.

13. The main issues for determination in this appeal are whether the appellants' action of assigning the respondent new roles amounted to termination of her contract of employment and if so, the consequences thereof, or whether the respondent absconded duty and thereby unlawfully terminated her employment with the appellants.

14. The respondent was employed as a cateress at a boys' boarding school. Her responsibilities and duties were specified as follows:

“Preparation of budget estimates for foodstuffs and other kitchen requirements, preparation of menu for students, supervision and guidance of kitchen staff, preparing and serving of meals during school functions e.g. Board and PTA meetings, visitors etc, checking the quantity and quality of goods supplied to the kitchen, control of food stores, proper storage of foodstuffs, keeping of proper and up to date records of foodstuffs received/consumed, preserving food for students taking part in activities out of school, maintenance of high standards of cleanliness in the Dining Hall/kitchen, reporting any breakages/damages to /kitchen/Dining Hall/kitchen, preparation of duty roster for kitchen staff, Doing other duties assigned by the head teacher.”

15. After completion of her unexplained compulsory leave on 1st June, 2003, the respondent was assigned duties that were completely outside the scope of her employment, that is "*supervisory role in the cleanliness of the boarding area*". Although in his letter dated 1st June, 2003, **Mr. Nyariki Zachary**, the Secretary to the Board of Governors, Cardinal Otunga High School, stated that the new role was in line with the respondent's duties as a school cateress, we do not think so. The new duty she was asked to take up required her to "*ensure that high standards of cleanliness in line with the Public Health and Sanitization needs are kept.*" The trial judge held, and in our view rightly so, that maintenance of cleanliness in boarding areas is more of a house keeper's duty than a cateress'.

16. It cannot therefore be true that the role of supervising cleanliness in boys' dormitories was in line with "*doing any other duties assigned by the head teacher*" as contended by the appellants. The respondent stated in her evidence that she could not supervise cleanliness in boys' dormitories and besides, that was a violation of her terms and conditions of service.

17. The respondent was not consulted before assignment of the new duties. We agree with the trial judge that this omission amounted to a violation of **section 10(5)** of the **Employment Act** which requires an employer to consult with an employee before revision of a contract of employment.

18. What was the effect of the unilateral decision by the appellants to change the contract of employment between themselves and the respondent? The trial court held that it was "*tantamount to terminating the existing contract and therefore amounts to an unfair and unjustified termination*" of the contract of employment and proceeded to award damages to the respondent.

19. The appellants did not formally terminate the contract of employment with the respondent as a cateress. It is the respondent who construed the unilateral variation of her duties as a repudiation of the contract and refused to take up the new assignment. The respondent's advocate submitted that the appellants' conduct amounted to constructive dismissal of the respondent.

20. Although the doctrine of constructive dismissal is not defined by the **Employment Act, 2007**, this Court, in a recent decision, had opportunity to pronounce itself on the doctrine where it upheld a decision by the Employment and Labour Relations Court. That was in **COCA COLA EAST & CENTRALAFRICA LIMITED v MARIA KAGAI LIGAGA [2015] eKLR**. The court cited with approval several authorities, among them, **WESTERN EXCAVATING (ECC) LTD v SHARP [1978] 1 CR 222** where Lord Denning held:

“If the employer is guilty of conduct which is a 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, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice.”

21. In the circumstances that gave rise to the case before the trial court, we find and hold that the appellants' action of unilaterally assigning the respondent new duties amounted to significant breach that went to the root of the employment contract. The respondent was right in treating herself as discharged from any further performance of her duties as a cateress. She cannot be said to have absconded duty. This was a classic case of constructive dismissal of the respondent by the appellants. The respondent was rightly entitled to damages for unfair termination of her employment under **section 49** of the **Employment Act, 2007**.

22. As the appellants did not appeal against the quantum of the awards that were made by the trial court, we have no basis of interfering with the same. Consequently, this appeal is dismissed with costs to the respondent.

DATED and DELIVERED at KISUMU this 2nd day of June, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR