



REPUBLIC OF KENYA



KENYA LAW
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**Tanui v Carzan Flowers (K) Ltd (Cause 382 of 2017)
[2023] KEELRC 469 (KLR) (23 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 469 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 382 OF 2017
DN NDERITU, J
FEBRUARY 23, 2023**

BETWEEN

WESLEY K. TANUI CLAIMANT

AND

CARZAN FLOWERS (K) LTD RESPONDENT

JUDGMENT

I. Introduction

1. In a Statement of Claim dated August 21, 2017 and filed in court on August 25, 2017 through Munene Chege & Co Advocates the Claimant prays for: -
 - a. A declaration that the claimant's dismissal was unlawful, unjust and discriminative and the same amounts to unfair dismissal.
 - b. Payment in lieu of notice
 - c. Compensation for unfair termination
 - d. An order compelling the Respondent to settle the outstanding benefits as enumeration at paragraph 20 of the claim.
 - e. General damages.
 - f. Any other relief that this court may deem fit to grant.
2. Together with the statement of claim was filed a witness statement by the Claimant and a bundle of documents in support of the claim.
3. On December 7, 2017 the Respondent through Agricultural Employers' Association entered appearance and filed a memorandum of response to the claim on 22nd December, 2017. In their



memorandum of response, the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.

4. This cause came up in court for hearing on February 7, 2022 when the Claimant (CW1) testified and closed his case.
5. The defence was heard on March 22, 2022 when Danson Maina (RW1) testified and the Respondent's case was closed.
6. Counsel for the parties addressed and summed up their respective client's case by way of written submissions. Counsel for the claimant filed written submissions on May 24, 2022 while Counsel for the respondent filed on July 25, 2022.

II. Claimant's Case

7. The claimant's case is expressed in the statement of claim, the oral and documentary evidence of the claimant (CW1), and the written submissions by his Counsel, Miss Daye, and the same is summed up as hereunder.
8. In his memorandum of claim, the claimant pleaded that he was engaged as a security guard by the respondent in May, 2010.
9. The claimant stated that on April 6, 2016 he was wrongfully, unprocedurally, and unlawfully dismissed from the said employment by the Respondent.
10. In his testimony in court the claimant stated that he was dismissed after sustaining injuries at work. He alleged that he had permission to ride a motorbike from the Respondent in his patrols in the farm and that during one such patrol he was injured in a motorbike accident. He alleged that after the accident the Respondent, and more so his supervisor, became very hard and hostile towards him with a view to dismissing or terminating him to avoid payment of the hospital bills by the Respondent.
11. The claimant denied that he deserted and or absented himself from duty. He admitted that he received a show cause letter dated April 5, 2016 and that he responded thereto vide his letter of even date. He alleged that he was not given a hearing in view of his response but instead he was dismissed.
12. Upon further probing by Counsel for the Respondent the Claimant stated that while he authored and submitted the resignation letter dated April 7, 2016 that he allegedly did so under duress and coercion from the respondent claiming he was threatened that if he did not write and sign the letter of resignation he would be dismissed without any benefits.
13. He admitted that he was not licenced to ride a motor cycle and that he had no records to prove that he was indeed involved in an accident as he alleged. He also admitted that he had no documents to confirm that he was injured in the alleged accident and that he sought and obtained sick leave following the alleged accident.
14. It is on the basis of the foregoing that the claimant has prayed for reliefs as per his claim.

III. Respondent's Case

15. The Respondent's case is contained in the response to the claim, the oral and documentary evidence adduced through RW1, and the written submissions by its Counsel, Mr. Okoth, as summarized hereunder.
16. The evidence by RW1, the human resource manager of the respondent at the material time, is that the claimant absented himself from work without notice or permission as a result of which he was issued



with a show-cause letter dated April 5, 2016. The said letter was produced as an exhibit and it indicates that the claimant was served with the same on even date.

17. The claimant responded to the show-cause letter on the same date above and he delivered the said response on even date. RW1 testified that upon deliberation on the reply from the claimant and the explanation offered for the lateness and absenteeism the respondent resolved to issue the claimant with a warning letter. The warning letter dated April 6, 2016 was produced as an exhibit. It is indicated on the face of the said letter that the said warning letter was delivered to the claimant on April 7, 2016.
18. On April 7, 2016 the claimant authored and delivered a resignation letter which was received by the respondent on the same day.
19. The evidence by the respondent is that after the claimant left employment a certificate of service was prepared in his name and the same is dated May 11, 2016. All the letters and documents mentioned above were produced as exhibits by the Respondent through RW1.
20. RW1 testified that the claimant was not involved in a motorbike accident as he alleged and that no such accident was ever reported to the respondent and none was documented. He testified that the claimant resigned voluntarily and of free will and no pressure, threats, duress, or coercion was applied to him whatsoever. In any event, the Respondent did not intend to dismiss the Claimant as alleged and only issued him with a warning at the end of the short disciplinary process.
21. RW1 stated that he is not aware of any proceedings filed in court against the Respondent in regard to the alleged motorbike accident involving the Claimant.
22. It is on the basis of the foregoing that the Respondent prayed that the Claimant's cause be dismissed with costs for want of merit.

IV. Issues for Determination

23. This court has carefully gone through the pleadings filed, the oral and documentary evidence tendered from both sides, and submissions by counsel for both parties and the court identifies the following issues for determination –
 - a. Was the claimant dismissed by the respondent as alleged or did he voluntarily and willingly resign from employment?
 - b. If (a) above is in the affirmative, is the claimant entitled to the reliefs sought in the claim?
 - c. Who meets the costs in this cause?

V. Dismissal or Voluntary Resignation?

24. The terms and conditions of employment of the claimant by the Respondent are not really in dispute. As at the time of dismissal or resignation, as the case may be, on or about April 7, 2016, the claimant was in employment of the Respondent as a security guard at a monthly salary of Kshs.7,350/=.
25. It is also not in dispute that no notice of termination or dismissal was issued to or by the Claimant. However, the parties agree that the Claimant authored and delivered a resignation letter dated 7th April, 2016. The reason cited in the letter by the Claimant for resignation is alleged bad health but no further details are given. The evidence on record is that the Respondent accepted the resignation by the Claimant and that the employment was terminated in that manner.



26. However, and this is the parting point between the parties, the Claimant alleges that he authored and tendered the letter of resignation under duress and coercion from the Respondent. He alleged that he was told that if he did not resign he was to be dismissed and hence lose all his terminal dues.
27. However, while the Claimant stated in his letter of resignation that he was resigning on account of ill health he did not state what his illness was about. He did not mention that he had been involved in a motorbike accident while at work. He admitted that he did not report the said accident to the union or labour office but he alleged that he orally reported to the Respondent through the human resource department. He did not avail evidence of his said reporting or any other evidence whatsoever that the Respondent was made aware of the alleged accident.
28. Further, except for allegations made by his counsel in his submissions, which allegations cannot amount to evidence, the Claimant did not avail any evidence of any proceedings pending before any court on his claim for compensation in regard to the alleged accident. The Claimant alleged that the accident was witnessed by his colleagues at work (Paul and Abdi) yet he did not call any of such witnesses to confirm that indeed he was involved in such accident. In any event, the Claimant confirmed that he was not licenced to ride a motorbike and any such adventure would have been unlawful and volenti on the part of the Claimant.
29. From all the foregoing, this court holds that the Claimant has not adduced evidence, in these proceedings, to establish that indeed he was injured at work and that he was as a result coerced or pressured to resign by the Respondent. This court takes the view that for whatever reason, either for fear of the then pending disciplinary proceedings for absenteeism or for bad health, from whatever illness, the Claimant voluntarily and willingly resigned from the employment of the Respondent.
30. In other words, the Claimant has failed to prove that he was indeed dismissed by the Respondent. Under sections 43 and 47 of the *Employment Act* (the Act) it is upon an employee to prove that he was indeed terminated or dismissed and it is only then that the burden shifts to the employer to justify the reason for dismissal or termination. The Claimant having failed to prove that he was indeed dismissed in the first place, the Respondent had nothing to justify as there was no established or proved dismissal.
31. This court is absolutely not in agreement with Claimant's Counsel submissions on the foregoing issues. Counsel has not submitted on how duress, threats, or coercion was applied on the Claimant leading to his resignation. This case was to be won or lost on that single issue as the Claimant has not denied that he authored and delivered the letter of resignation.
32. The disciplinary proceedings that were commenced following the absenteeism and or lateness of the Claimant culminated in a warning letter and as such it is not on the basis of those disciplinary proceedings that the Claimant left the employment. The Claimant left employment on the basis of the letter of resignation alluded to above and that is the issue and the line of argument that his Counsel ought to have pursued.
33. On the other hand, Counsel for the Respondent has argued that in the entire circumstances of this cause the Claimant voluntarily and willingly resigned from employment and hence this cause was filed as an afterthought. Counsel submitted that the Claimant failed to discharge his burden under sections 43 and 47 of the Act and hence the Respondent has nothing to justify in regard to the resignation as it could not have rejected a voluntary resignation from the Claimant. This court agrees with Counsel for the Respondent on this issue.
34. It is hence held that the Claimant knowingly, voluntarily, and willingly resigned from the employment of the Respondent.



VI. Reliefs

35. Having held that the Claimant voluntarily and willingly resigned from the employment of the Respondent and hence terminated his own services, this court shall now consider each of the reliefs sought as set out at the introductory part of this judgment.
36. Prayer (a) is for this court to declare that the dismissal of the Claimant was unlawful, unjust, and discriminative, and hence unfair and unlawful. This court has found and held above that the Claimant was neither dismissed nor terminated by the Respondent but that he voluntarily and willingly resigned from employment. This prayer is outrightly denied for all the reasons stated in the preceding part of this judgment.
37. Prayer (b) for payment in lieu of notice is denied as well. In fact, it is the Claimant who was obligated to issue a notice before or upon his resignation, which he did not.
38. No unfair termination occurred as illustrated in the foregoing part of this judgment and hence there cannot be any compensation for unfair termination or dismissal. For this reason, prayer (c) must fail.
39. Prayer (d) is for an order compelling the Respondent to settle unpaid salary in lieu of notice, public holiday pay, and compensation for unfair dismissal. The court has already found and held above that there was no dismissal and, in any event, it is the Claimant who was supposed to issue a notice on or upon his resignation. Likewise, no compensation is payable as the Claimant resigned voluntarily and willingly.
40. On the issue of pay for public holiday days worked, the Respondent failed to avail employment records and work attendance roster to confirm if indeed the Claimant worked on public holidays as alleged or not. Sections 10 and 74 of the Act obligate the Respondent to keep employment records and hence avail the same whenever need arises. The Respondent failed and or neglected to avail such records in this cause and hence the allegation by the Claimant that he worked on public holidays stand unchallenged. For the foregoing reason the Claimant is awarded the claimed sum of Kshs.46,153.85.
41. Prayer (e) is for general damages. There is no evidence adduced in support of this prayer and the Claimant's Counsel has not submitted on this issue. This court is unable, even remotely, to establish what such damages would entail. The loss or damage that is occasioned to an employee who has been unlawfully terminated or dismissed is the compensation provided for under Section 49 of the Act. A claim for special or general damages should have to be pleaded and proved and not merely stated or alleged as the same goes beyond what is intended to be compensated under Section 49 of the Act. For the foregoing reasons, this claim must fail.

VII. Costs

42. The Claimant has failed to prove his cause to a large extent. The Respondent has succeeded to a large extent in defending this claim. For the foregoing reason each party shall meet own costs in this cause.

VIII. Disposal

40. In final disposal of this cause, this court issues the following orders: -
 - a) A declaration be and is hereby issued that the Claimant knowingly, willingly, and voluntarily resigned culminating in termination of his employment relationship with the Respondent.
 - b) However, the Claimant is awarded a total of Kshs. 46,153.85 for working on public holidays together with interest thereon from the date of this judgment.



- c) All the other claims are denied.
- d) Each party shall meet own costs of this cause.

DATED, DELIVERED VIRTUALLY, AND SIGNED AT NAKURU

THIS 23RD DAY OF FEBRUARY, 2023.

DAVID NDERITU

JUDGE

