



REPUBLIC OF KENYA



KENYA LAW
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**Mutuku v Jocham Hospital (Cause E010 of 2022)
[2023] KEELRC 2304 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2304 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E010 OF 2022
M MBARÚ, J
SEPTEMBER 28, 2023**

BETWEEN

TITUS MUTUKU CLAIMANT

AND

JOCHAM HOSPITAL RESPONDENT

JUDGMENT

1. The respondent employed the claimant as the accounts clerk in the year 2007 earning a wage of Kshs. 10,000 per month. the claimant was promoted to the position of deputy chief accountant at a wage of Kshs. 46,000 per month and later he became the chief accountant at a salary of Kshs. 83,000 per month.
2. The claim is that in April 2019 the respondent constructively dismissed the claimant due to placings him under hostile work environment leading to his resignation. The claimant took his annual leave on 7 December 2019 until 7 January 2019 and upon return, the respondent asked him to explain the whereabouts of Kshs. 411,916 sales money that was not banked for the period the claimant was on annual leave. The claimant responded and noted that the irregularity occurred while he had handed over his duties to Ms Sarah Chamia while on leave but the respondent did not follow up the matter save to accuse him of theft.

The claimant was suspended from duty.

3. In February 2019 the claimant was asked to write a review of the final tender document for drugs tendering and laboratory reagents that was presented to the CEO. The claimant found some irregularities that did not tally with the tender documents presented to the CEO and he noted and made recommendations to address the discrepancies. This report was not taken well by some members of the board of directors and some told the claimant that his days at the respondent were numbered and his employment would be terminated.



4. The claim is that the claimant was demoted to a subordinate position without due process and later, he was issued with an ultimatum to either resign from his position or he would be issued with notice of summary dismissal and his case reported to the police for criminal charges and on this basis the claimant opted to resign. The claim is that the claimant was forced out of his employment by the respondent as he could not ensure the hostile working environment where he was labelled a thief without any due process or investigations and this violated his rights. His terminal dues were not properly calculated and is seeking the followings;
 - a. A declaration that there was constructive dismissal;
 - b. There was unfair termination;
 - c. Leave pay for 2017 Kshs. 83,000;
 - d. Notice pay Kshs. 83,000;
 - e. Compensation for constructive dismissal Kshs. 996,000;
 - f. Gratuity pay for 7 years Kshs. 290,500;
Balance of 5 days remaining for 4 years Kshs. 63,846.15
 - g. Costs of the suit.
5. The claimant testified that on 11 April 2019 he was forced to resign from his employment due to continued harassment by the respondent and being placed under hostile working environment. He had been suspended without a hearing and allegations made against him were not addressed and he opted to resign. In December to January he took his annual leave and as the chief accountants, he handed over his duties to Sarah Chamia his deputy. Upon resuming duty on 10 January 2019 his deputy did not hand over save to be faced with allegations that some money had not been banked which the claimant had reported to the CEO, Dr. Chamia that things were not being done properly. The claimant was asked to address the matter with his deputy and he filed a report and from it, the board created the position of financial controller and the claimant was to work under this officer from March 2019, meaning a demotion.
6. The claimant testified that in February 2019 the respondent was carrying out a tendering process for drugs supply. The CEO asked the claimant to review the documents and he noted that some documents were not as per the market prices, the quotations did not reflect market prices as they were very high and he handed over his report and recommendations to the CEO and some board members were not happy and the position of financial controller was therefore created and the claimant was to work under this office.
7. The claimant testified that the financial controller did a review of the financial records and noted that the claimant had not banked some cash leading to a shortfall of Kshs. 411,000 and he was asked to explain, there were unaccounted for funds at Kshs. 103,269 and while the claimant was on his annual leave, Kshs. 15,014 was not accounted for by his deputy together with another sum of Kshs. 88,241 and the respondent directed that these monies be recovered from his at Kshs. 5,000 per month. this difference arose from the handing over and under-banking. The claimant was not given a hearing before such decision was taken.
8. On 23 March 2019 the claimant was suspended for 14 days. On 8 April 2019 he resumed duty and was told to explain why there was under-banking and the claimant wrote his response and he found there was no good will and to protect his career, he opted to resign. The respondent accepted the resignation



- and offered to pay terminal dues within a week and when he went back for his terminal dues, the CEO cancelled the cheque. Later the respondent paid Kshs. 101,491.
9. According to the policy of the respondent, for 5 years of service, a service pay was due at 15 days' pay for each year. The claimant worked for 7 full years and service pay is due together with untaken leave days and compensation for constructive dismissal.
 10. Upon cross-examination, the claimant testified that he was suspended to allow for investigations and before attending disciplinary hearing, he was asked to respond to the allegations made against him. In his case, the financial controller did conduct investigations but filed a report dated 19 March 2019 and following recommendations, the claimant was suspended on 23 March 2019 and directed to file responses within 14 days. He filed response on 10 April 2019 after 17 days. On 11 April 2019 the claimant opted to resign from his employment because the financial controller had taken over his duties.
 11. The claimant testified that he took responsibility over missing and unaccounted for funds on 15 March 2019 as the officer in charge of accounts. He accepted liability for the loss and submitted to the CEO. An audit was conducted and as the overall responsible officer, he was held accountable.
 12. In response, the respondent's case is that the claimant was employed on 1st November 2007 as an audit clerk. On 1st May 2014 the claimant was appointed as deputy chief accountant at gross wage of Kshs. 46,000 and on 5 January 2015 he was appointed acting chief accountant and on 1st July 2015 he was appointed as chief accountant until he resigned on 11 April 2019 at a gross salary of Kshs. 80,000 per month.
 13. During routine audit of accounts, the respondent learnt that there were some irregularities and an auditor was engaged, Derrick Majani who did an investigation and submitted a reported dated 19 March 2019. The findings were that there were no documented procedures on handling of petty cash and definition of float management and cash count done on 10 December 2018 did not capture the difference as per the cashbook while imprest system was not managed property leading to misappropriation of funds. The auditor recommended that all sales should be banked daily to ensure quick marching of revenue and banking and finance and audit departments to develop an internal control policy to guide petty cash administration.
 14. The investigation revealed a variance between initial report submitted by the claimant and the auditor's report that there was under-banking between 7 December and 10 January 2019.
 15. There was no constructive dismissal of the claimant as alleged since the claimant voluntarily resigned on 11 April 2029 which was a surprise to the respondent.
 16. The claimant was not on leave as alleged and he remained on duty. Upon discovery of account irregularities, the respondent suspended the claimant for 14 days to allow for investigations. The claimant was invited to respond to the report and audit dated 19 March 2019 which he did on 10 April 2019 and then opted to resign on 11 April 2019 prior to any investigations coming to a conclusion. The ongoing investigations could therefore not have concluded or carry out any disciplinary process upon termination of employment by the employee. The resignation was meant to circumvent the disciplinary process.
 17. The claimant has since been paid his terminal dues including;
 - a. Certificate of service; and
 - b. Dues of Kshs. 101,480.90.



18. The terminal dues were paid less notice pay and there was no constructive dismissal as alleged and the claims made should be dismissed with costs.
19. In evidence, the respondent called Selpha Nanzala one of the auditors who testified that the claimant was working for the respondent as the chief accountant from 1st July 2015 to 11 April 2019 when he resigned.
20. Ms Nazala testified that On 2 January 2019 she conducted an audit on the respondent's accounts for the period of 7 December 2018 to 10 January 2019 and submitted a report dated 19 March 2019 with findings that there were no documented procedures for handling petty cash and definition of float management; cash account as at 10 December 2018 did not capture the difference as per the cashbook and imprest system was not managed properly leading to misappropriation of funds. During the investigations, the witness established that cash count report done did not reflect the ledger balance which varied from the physical cash counted. This led to non-banking of over Ksh.300000 as at 7 January 2019 and she thus recommended for documentation of petty cash and float management, cash count done as at 10 December 2018 which did not capture the difference as per the cash book and imprest system was not managed properly leading to misappropriation of funds.
21. The audit revealed variances from the report by the claimant over monies reported between 7 December 2018 to 10 January 2019. The claimant was informed of these findings and asked to submit a response which he did on 10 April 2019 and which necessitated an investigation to ascertain the truth but the claimant resigned from his employment before this could conclude. From the initial investigations there was a variance of Ksh. 411,916 between sales and banking and no reasons were given for such difference.
22. The respondent also called Jacqueline Kavuo Chamia one of the directors who testified that the claimant last worked as the chief accountant with duties to manage cash, approve payments, do reconciliations, prepare and manage reports and payroll, banking and drugs purchasing. During routine check of accounts, the internal auditor filed a report on 19 March 2019 and found variances in accounts and made recommendations which included the claimant being called to respond to petty cash differences from December 2018 to January 2019. The respondent had discovered account irregularities, the claimant was suspended to allow for investigation and he admitted to a shortfall of Kshs. 103,267 through letter dated 15 March 2019.
23. Ms Chamia testified that on 11 April 2019 the claimant tendered his resignation notice prior to investigations. His response to the allegations made was submitted a day later which did not allow the respondent to conduct proper investigations and deliver a verdict in the matter. No notice issued and the claims made should be dismissed with costs since the claimant has since been paid his terminal dues.
24. At the close of the hearing, both parties filed written submissions which are analysed and the issues which emerge for determination are whether there was constructive dismissal and whether the reliefs sought should issue.
25. Constructive dismissal is a concept allowed in law and occurs when an employee resigns because their employer's conduct has become so intolerable or made continued employment difficult that the employee has no choice but to resign. In the case of *Milton M Isanya v Aga Khan Hospital Kisumu* (2017) eKLR, the court held that;

In constructive dismissal, the desire to resign is from the employee as a result of a hostile working environment or treatment by the employer. A constructive dismissal occurs where



the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tender's resignation.

However, an employee who is faced with a disciplinary hearing cannot circumvent such process and claim in constructive dismissal. Such would negate the very essence of the concept.

In this case, following an audit conducted by the respondent in the claimant's office and dated 19 March 2019, the claimant was suspended through letter dated 23 March 2019 for 14 days on the grounds that;

There have been clarifications sought by management from your office regarding the accountability of funds under your custody as the Chief Accountant. Your feedback on this has not been forthcoming in an acceptable manner despite the several meetings and reminders.

This is to inform you that the hospital management has decided to suspend you from duty from today the 23rd March 2019 for 14 days to allow time for comprehensive investigations without any interference to conclude the matter.

The outcome of the investigations shall inform the next course of action as per by law required and also determine your resumption of duty. ...

26. On 8 April 2019 the respondent directed the claimant to respond to the audit report and explain why there was under-banking for funds, unaccounted funds of Kshs. 369,111, director's float of Kshs. 100,000 and various cash drawn from the bank and NHIF expenditure of Kshs. 200,000 not utilized.
27. Through his responses dated 10 April 2019 the claimant gave details of various matters put to him and admitted that with regard to cash differences, his deputy Sarah Chamia could not account for Kshs. 88,276 and he took responsibility for total loss of Kshs. 15,046 and offered to do a refund through checkoff at a monthly rate of Kshs. 5,000 with effect from 19 March 2019.
28. In evidence, the claimant testified that he took responsibility over such difference and offered to repay the sum of Kshs. 15,046 since he was the officer responsible for the accounts department. There was no loss but he took responsibility and liability to repay back this amount.
29. The next day, 11 April 2019 the claimant resigned from his employment.
30. The claimant gave his reasons as being due to unavoidable circumstances.
31. In evidence, the claimant testified that he was forced to resign from his employment due to the harassment he received from the respondent and when the CEO called him and demanded that he should resign or criminal sanctions be taken against him. That the board of directors were not happy with him following his assessment of the tender documents for supply of drugs to the respondent.
32. However, the claimant had been suspended to allow for investigations in his department. Various matters and irregularities were noted and the claimant directed to respond. He responded and noted various lapses and also admitted to a loss of Kshs. 15,046 and offered to pay through monthly deductions of Kshs. 5,000 from 19 March 2019 the date of the April audit report.
33. The respondent had therefore set in motion a process of investigations to address irregularities. The claimant was suspended to allow for investigations and to allow him give a response. No disciplinary matter requiring him to be issued with a show cause notice had been issued as at 1 April 2019 when he resigned from his employment. Investigations were still ongoing he had not been found culpable or called to show any cause of guilt.



34. Resignation by an Employee from employment, is basically termination of employment at the instance of the Employee as held in *Edwin Beiti Kipchumba v National Bank of Kenya Limited* [2018] eKLR. The claimant resigned before investigations could conclude. He had just submitted his responses to the audit report and noted irregularities. No show cause notice had issued.
35. In the case of *Kennedy Obala Oaga v Kenya Ports Authority* [2018] eKLR the court in addressing a similar matter held that an employee who resigned before a disciplinary process could take effect, effectively ended the employment relationship. Even where a verdict of the disciplinary process had not issued, the resignation circumvented such process and the employer had no mandate to require the employee to attend upon resignation and cessation of employment.
36. In the case of *Stephen Michuki v East African Safari Air Express Limited & another* [2022] eKLR the court held that an employee who resigns to circumvent the disciplinary process cannot claim there was unfair termination of employment.
37. It is apparent that each case must be looked at on its own merits and circumstances.
38. In this regard, the claimant was aware of the audit process and was suspended for 14 days to allow for investigations. He responded in details about his role and admitted to part of the shortfall in unaccounted for funds of Ksh. 15,046 and offered to repay. Before any further action could be taken against him, he opted to tender his resignation on 11 April 2019.
39. The court finds the claimant lawfully resigned from his employment voluntarily and cannot justify a claim of constructive dismissal. The facts of his case do not speak to such a matter. He had his right under Section 35 and 36 to tender his resignation and terminate his employment with the respondent. Notice pay and compensation claimed is not available.
40. Termination of employment being lawful and available to the claimant, the claim for payment of gratuity is on the basis that this was due for 7 full years worked at Ksh. 290,500 and balance of 5 days remaining for 4 years at Ksh. 63,864.15.
41. Gratuity pay is a gratuitous and should be through a term of the employment contract or through a policy or private treaty between the parties in the employment relationship. Save to claim for gratuity pay for 7 years and a balance of 5 days remaining for 4 years, the claimant in the pleadings has not attached any contract, policy or agreement on this claim for payment of Gratuity. In the written submissions, the claimant only reiterated his claim without giving details as to how this arose.
42. With regard to claim for leave pay due for the year 2017, in tabulating terminal dues, the respondent paid the claimant the following;
43.
 - a. Salary for days worked Ksh. 33,876;
 - b. 12 days leave earned Ksh. 36,923; and
 - c. Other terminal benefits Kshs. 123,076.
44. The claimant admitted that he was paid Ksh. 101,000 and has since cleared and his Certificate of Service issued.
45. The respondent as the employer is the custodian of work records. The leave days owed at end of employment were 12 and these were cashed and paid.



46. Accordingly, the claims made are found without merit and are hereby dismissed with costs to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA THIS 21ST DAY OF SEPTEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

