



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1374 OF 2016

(Before Hon. Justice Dr. Jacob Gakeri)

SUSAN NJERI WARUI.....CLAIMANT

VERSUS

POSTAL CORPORATION OF KENYA.....RESPONDENT

JUDGMENT

1. The Claimant instituted this claim by a statement of claim dated 14th July 2016 and filed in Court on the same day alleging discriminatory, arbitrary and unlawful suspension from employment.

Claimant's Case

2. The Claimant's case is pleaded as follows: That the Respondent employed the Claimant as a Postal Officer under a written contract dated 1st October 2007 at Kshs.35,415/- per month. That on 27th November 2015, the Respondent allowed the Claimant to be away from the office and on the same day Auditors reported to the Claimant's work station. That the Respondent opened the Claimant's safe and in the course of their auditing process found Kshs.138,300/- missing. That the Respondent forced the Claimant to admit that she had taken the cash or be reported to the police and was arrested by the police but released on a personal bail of Kshs.20,000/-.

3. It is contended that the Respondent did not serve the Claimant with a show cause letter as required by the Public Service Commission Policies and Procedures Manual (PSCP&P Manual). That the suspension letter stated that the Claimant was not entitled to any salary contrary to Section 10 of the PSCP&P Manual.

4. That the Respondent failed to issue a termination notice or any other communication the Claimant.

5. That the Claimant served the Respondent diligently and utmost loyalty until suspension by a letter dated 8th December 2015 allegedly for investigation. That the Claimant was not informed of the outcome of the investigation.

6. The Claimant prays for –

(a) Salary in lieu of notice Kshs.35,415.00

(b) Compensation for unfair termination

(35,415 x 12) Kshs.424,980.00

Total Kshs.460,395.00

(c) Declaration that termination of employment and/or dismissal was unfair.

(d) Costs of this claim.

Respondent's Case

7. The Respondent responded to the claim by filing its response on to the memorandum of claim on 9th September 2016.

8. The Respondent avers that on 27th November 2015 a team comprising Caroline Sheshe, JMK Kabira, Monica Mauti, Margaret Kiambi and Jacinta Musyoka visited the Loitokitok Post Office Branch unannounced and the Claimant was irregularly absent from the duty station without any paperwork and had deposited her keys to the safe with the Postmaster, Mr. Benard Kihima without a formal handover.

9. That efforts by the team and the Postmaster to reach the Claimant on her cell phone no. 0723 111 316 fell through. That the team accessed the Claimant's safe in the presence of the Postmaster and their initial investigation uncovered *prima facie* evidence of financial discrepancies and malpractices.

10. Subsequently, the Internal Investigation Officer, Mr. James Mwenze and Mr. Charles Sevu joined in the Inspection Team. The combined team of eight found instances of misrepresentation, misreporting, concealment, shortage/missing and lost funds amounting to Kshs.138,300.64.

11. That on 1st December 2015, Mr. Charles Sevu engaged the Claimant who requested for time to make good the deficit as she had admitted and signed the same as a shortage.

12. Relatedly, an Interim Inspection Report was prepared on 1st December 2015. That on 3rd December 2015, the Investigator, Mr. James Mwenze interviewed the Claimant and she recorded a statement where she confessed and acknowledged the loss of Kshs.138,000.64 and pledged to refund the same. That on the same day, the matter was reported to the Loitokitok Police Station, Vide OB No. 21/03/12/15.

13. That by a letter 8th December 2021, the Claimant was suspended from duty pending further investigations and disciplinary process for the loss of the employer's funds.

14. It is further averred that the final audit report dated 23rd March 2016 was availed in July 2016 showing financial impropriety by the Claimant.

15. That a notice to show cause was issued on 27th July 2016 but the Claimant declined to honour it since she had already filed the suit herein

16. That the said funds have not been repaid.

17. It is further averred that –

(i) The Claimant was not coerced to make the statement dated 1st December 2015 and 3rd December 2015.

(ii) Respondent merely reported the Claimant to the police for further action.

(iii) By refusing to accept and/or collect the notice to show cause, the Claimant declined to be

subjected to due process.

(iv) The Claimant filed a suit prematurely which frustrated the Respondent's disciplinary process against her.

(v) The Claimant continued to enjoy all other fringe benefits including medical cover, personal accident insurance cover, benevolent fund, etc.

18. The Respondent prays for dismissal for the Claimant's suit with costs.

19. The Claimant filed a reply to the Respondent's response to the claim on 27th January 2017. She averred that the date of employment was 1st October 2007 and that she had been granted permission by the controlling officer to be away on the material day as the internal audit report indicated.

20. It is also averred that the process to conduct the auditing was unprocedural. That her signature had been obtained by coercion and threats of arrest which eventually took place.

21. It is further averred that the suspension from duty was unprocedural. That the notice to show cause was prompted by the Claimant's suit and was thus unprocedural and had been overtaken by events.

22. That the Claimant filed the action to protect her labour rights since the Respondent did not appear interested in bringing the matter to its logical conclusion, yet the Claimant had children and no other source of income.

23. That, the Claimant avers that the suspension on 8th December 2016 was not meant to keep her out of employment but for investigations which took inordinately long to conclude.

24. The Claimant further testified that the inordinate suspension violated the Constitution of Kenya. Finally, it is averred that an employee on suspension remained an employee.

Evidence

25. The Claimant adopted her written statement and was cross examined. She confirmed that she received the suspension letter on 23rd January 2016 and the reason for suspension was indicated. That she was invited for a disciplinary hearing on 27th July 2016 after she had filed the case and did not attend. That she was suspended with no pay.

26. The Witness further confirmed that she did not contest the amount indicated as missing and she signed the shortage form on 1st December 2015 freely and admitted to a shortage of Kshs.138,300/-.

27. That she was arrested on 10th December 2015 and paid a cash bail of Kshs.20,000/- to await the audit report to be availed to the police for purposes of charging the Claimant. That the police had not been given the report by the date of the hearing on 26th October 2021 and the police have retained the Claimant's cash bail.

28. That the notice to show cause was unprocedural and was prompted by the Claimant's suit, seven months after the suspension without pay. That she had filed the suit to protect her labour rights after finding out that the Respondent was no longer interested in the issue of suspension yet she had no other source of income and had children and medical bills and depended on well-wishers.

29. **RW1, MR, JAMES NZAVI MWENZE** was cross examined on his written statement. He confirmed that he was unsure whether the Claimant was irregularly out of office on the material day. He testified that he was not in Human Resource but explained the handover procedure. He stated that the amount found as missing was Kshs.135,760.64 as per the Audit Report dated 23rd March 2016.

30. He told the Court that he reported the matter to the police on 3rd December 2015 and wrote to the DCIO Kajiado South on 4th December 2015 on the strength of the revelations made by the Inspection team from Nairobi that Kshs.138,300.64 was missing but the amount came down to Kshs.135,760.64 when audited by a professional. He confirmed that the Postmaster who had a shortage paid the sum but was later terminated.

31. He confirmed that he had interviewed the Claimant and recorded the statement which the Claimant signed voluntarily on 3rd December 2015. The Witness also confirmed that on 25th November 2015, the Claimant's Mpesa Line had a balance of Kshs.49,264.00 but her books had a float of Kshs.184,000/- signed by the Claimant on 1st December 2015. That the Claimant admitted the shortage when interviewed by the Witness.

32. That the inspection was carried out in the absence of the Claimant since she had handed over to Mr. Kihima on account of emergency leave.

33. **RW2, BEATRICE CHEMISU CHELIMO** adopted the written statement. On cross examination the witness testified that the suspension letter was effective 8th December 2015 although it was served on the Claimant on 22nd December 2015. The Witness also confirmed that the Claimant was suspended in accordance with the Human Resources Circular No. 7B of 2009 of the Respondent. The Witness further confirmed that an employee on suspension enjoyed medical cover only.

34. Finally, the Witness confirmed that the notice to show cause was dated 27th July 2016 and that the Claimant was procedurally dismissed on 9th January 2017.

35. Both parties did not file submissions.

Determination

36. After careful consideration of the pleadings, documents on record and evidence the issues for determination are: -

- a) Whether the Claimant was constructively dismissed;
- b) Whether the Claimant is entitled to the reliefs sought.

37. It is common ground that the Respondent suspended the Claimant on 8th December 2015 "*pending in depth investigation and finalization of your case*". The letter was explicit that "*while on suspension you will receive no salary until the suspension, is lifted ...*"

38. For unexplained reason, the Respondent did not revert to the Claimant in anyway until late July 2016 after the Claimant had filed the claim herein, when it purported to issue a notice to show cause. It is noteworthy that the audit report on fraud at Loitokitok Post Office was finalised on 23rd March 2016.

39. Intriguingly, the one and half page report took 3½ months to prepare and four months to be acted upon by the Respondent. It took the Respondent a total of 7 months and 19 days to notify the Claimant the next course of action, the notice to show cause.

40. On her part, the Claimant did not sit pretty for a notice to show cause or termination in January 2017. She instituted a suit against the Respondent for unlawful termination. Question is whether the Claimant was unfairly terminated.

41. Although the Employment Act has no provision on constructive dismissal, the principle is recognised by the common law and is anchored under Article 41(1) of the Constitution of Kenya, 2010 which provides that –

“Every person has the right to fair labour practices.”

42. The principle of constructive dismissal was defined by Lord Denning in **Western Excavating ECC Ltd v Sharp [1978] 2WLR 344** as follows –

*“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 he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. (See also **Nottinghamshire County Council v Meikle [2005] ICRI**)”*

43. The Court of Appeal elaborated the principles of constructive dismissal and laid down its key elements and tests in its seminal decision in **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR**. The Court expressed itself 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. The contractual test is narrower than the reasonable test.”

44. The Court adopted and affirmed the contractual test approach as explained in **Western Excavating (ECC) Ltd v Sharp (supra)**. The Court further observed that –

“This means that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment. Whether a particular breach of contract is repudiatory is one of mixed fact and law...” In constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of employee – unless waiver, estoppel or acquiescence is in issue...”

45. The principle of constructive dismissal has been applied in legions of decisions, one of which is **Joseph M. Kivilu v Kenya National Examination Council [2021] eKLR** where the Claimant had been sent on indefinite suspension without salary from 29th March 2016 and resigned on 24th March 2017. The Claimant had worked for six years. The Court awarded maximum compensation.

46. In the instant case, the Claimant was suspended on 8th December 2015 for purposes of investigation, was arrested on 10th December 2015 but was not charged and has not been charged since then. The Respondent relied on paragraph 1(ix) entitled “*Suspension from Duty*” of its antiquated Human Resource Circular No. 7“B” of 2009 as opposed to the more progressive **Public Service Commission Policies & Procedure Manual** available to all state bodies as a fallback position. The circular relied upon had no time frame when an employee was suspended from duty.

47. It took the Respondent three months and 15 days to finalise the internal audit report on the alleged fraud and/or misappropriation of funds and the report did not fundamentally change the findings of the Inspection Team and no communication was forthcoming until the Claimant filed the instant case.

48. The absence of communication by the Respondent from 8th December 2015 to 27th July 2015 is sufficient evidence that the Respondent did not consider itself bound by the contract of employment with the Claimant and the Claimant was entitled to treat herself as constructively dismissed. Keeping an

employee on suspension for more than six months would generally not qualify as fair labour practice as contemplated by Article 41 of the Constitution of Kenya, 2010.

49. For the foregoing reasons, it is the finding of the Court that the Claimant was constructively dismissed. The purported dismissal by the Respondent on 9th January 2017 was a face saving gimmick and is laughable.

50. On reliefs, the Claimant prays for –

(a) Declaration that the termination of the Claimant's employment and/or dismissal was unfair

51. Having found that the Claimant was constructively dismissed, a declaration hereby issues that the Claimant's termination of employment was unfair.

(b) Declaration that the Respondent fundamentally breached their statutory obligations under the Constitution of Kenya, 2010 and the Employment Act, 2007

52. Having found that the Claimant was constructively dismissed, it is declared that the Respondent was in breach of the Constitution of Kenya, 2010 and the Employment Act, 2007.

(c) An order directing and/or compelling the Respondent to pay the sum of Kshs.406,395/- comprising

i) Salary in lieu of notice Kshs.35,415.00

ii) Compensation for unfair termination (35,415 x 12) Kshs.424,980.00

53. Based on the findings, the Court has taken into account the following –

(i) The Claimant had served the Respondent for over 8 years, which is reasonably long and wished to continue

as evidenced by the prayer for reinstatement.

(ii) The Claimant had no previous warnings or suspension.

(iii) The Claimant was arrested before the Respondent had conducted investigations on the alleged improprieties and is yet to be charged

(iv) As the Claimant's reply to the Respondent's response avers, which was confirmed in Court on 30th September 2021, the Claimant is a single mother of two and has been out of employment since 2016.

(v) The Claimant contributed to the suspension and eventual dismissal.

54. In the circumstances, the equivalent of 8 months' salary is fair, **Kshs.283,230.00/-**.

(d) That the suspension of the Claimant be lifted and she be reinstated to her position of employment

55. This prayer is not available on account of Section 12(3)(vii) of the Employment and Labour Relations Court Act, 2011. It has been overtaken by events and is accordingly **dismissed**.

(e) That the allowances due to the Claimant are paid by the Respondent

56. The allowances contemplated are neither identified nor particularized and the Claimant adduced no evidence to that effect or the amounts due. The claim is **disallowed**.

(f) Costs

57. Notwithstanding the fact the prayers for costs is wrongly worded, the Claimant is not qualified for costs under the Advocates Remuneration Order. The claim is **disallowed**.

58. **Accordingly, judgment is entered for the Claimant for the sum of Kshs.318,735/-.**

59. Interest at Court rates from the date of judgment till payment in full.

60. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH DAY OF JANUARY 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE