



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2029 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

DEEPESH SUBSHASCHANDRA MODI.....CLAIMANT

VERSUS

PAN AFRICA EXPRESS TRANSPORT

(Licensee of the Federal Express Corp).....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Claimant brought his claim vide a memorandum of claim dated 2nd October, 2017.

The respondent put in a response dated 29th November, 2017.

2. The Claimant states that in mid-2016 the Respondent's recruitment agents named Hallmark Recruitment through M/s Michelle Njeri approached Claimant for a possible recruitment in the Respondent's company as a Regional Financial Controller East Africa under their company Pan Africa Express Transport Limited.

He says he then was in full time employment with I. Messina (K) Limited Kenya agents of an International Shipping Company. He was promised prospects of better terms and conditions.

3. The Claimant avers that the Respondent engaged him in protracted negotiations in several forums and final letter of offer and contract was executed in 2017. He says this took about 8 months to recruit him and poach him.

4. He says he reported to work on 3rd July, 2017 and found himself using a boardroom as he was not allocated an office. He says the Human Resource Personal and other Managers had no directives from the Managing Director on where to house him or what his duties were.

He says the Managing Director who was the Head of Africa Operations did not meet the Claimant for a whole week.

5. He says he shared with Mr. Haron of the Dubai office of his predicament and finally on 10th July, 2017 he was introduced to the Finance team by the Finance Manager. It also took the Managing Director directives in order to be allocated an office.

6. The Claimant says according to the letter of offer he was expected to report to the Managing Director Kenya a Mr. Amjad Hussain Group CEO and Mr. Haron of Dubai.

His duties were to prepare Financial Management reports, review and approve management reports, prepare accounting policies, review major settlements, reconciliations and negotiations among others.

The Claimant was also meant to design, implement and maintain a system of internal controls and ensure accurate calculations, deductions and payment of taxes and other statutory dues. The Claimant was to also ensure compliance with other laws and regulations governing the company in respective countries which it was operating in East African Region.

7. The Claimant asserts he continued with his assignments and complied with the terms of his engagement and highlighted on company failures. He says after he made the report on 25th July, 2017 he noted breaches to his terms of employment like his car broke down and was not repaired, salary would delay, no Directors responded to his report. He says the July salary was delayed and was only paid after intense pressure.

8. He says he used hired transport and was not refunded the same from 21st August, 2017.

He says the Managing Director failed to respond to the issues raised in his report.

9. He says that on 22nd August, 2017 in a telephone conversation Mr. Haron EFO and the Director in East Africa confirmed there were no changes required in their organization and there was no place for Claimant and his position was not necessary. He says that Mr. Amjad had communicated that the Claimant's dealings would only be limited to dealing with Finance Department.

10. He says on 23rd August, 2017 the Claimant got an email from Mr. Haron of Dubai notifying him not to deal with the Kenyan Managing Director at all and not to copy any emails to him.

According to the Claimant this meant he could not carry out his duties and he communicated the same but the Directors did not respond.

11. The Claimant says on 24th August, 2017 he arrived in the office and found his office had been allocated to somebody else without any consultation with him. He had no office and the other officer still had another office. He was told by a junior officer to look for a free desk. He says his working life became impossible.

He says he would wait for two hours from 24th August to 29th August, 2017 before he could get a place to sit.

12. The Claimant says the working place became very hostile and on 31st August he decided not to go to work anymore.

He says the worst part was he left a good job to join the Respondent's team but was met with frustration, discrimination and hatred. He had moved from Mombasa to Nairobi and had also transferred his son to a school in Nairobi.

13. He says the above state was against the provisions of the Constitution of Kenya which guarantees fair human treatment under Section 41 of the Constitution of Kenya 2010 and fair procedure.

He says the above treatment amounted to constructive termination. He says there was no cause shown, due process was not shown and premeditation was clear.

14. The Claimant seeks for judgment against the Respondent and prays for 12 months gross salary @Kshs.885,836/= totaling Kshs.10,630,032/=.

15. He is also praying for declaration of attendant unfair and ill-treatment and loss arising from Claimant leaving his employment only to be mistreated and frustrated and moving his family to Nairobi and all attendant costs.

He prays for costs and interest.

RESPONDENT'S EVIDENCE

16. The Respondent states in his response that the Claimant was on a probation initially of six months and should have given a 7 days' notice to terminate the contract.

17. He further says they had offered the Claimant opportunity to work for them since 17th November, 2016 but Claimant only accepted the position on 27th July, 2017 when he signed the contract.

18. He also says Claimant was responsible to line Manager and was allocated a laptop and a car. He says Claimant rejected the car terming it a run down car and instead opted to use taxi.

19. The Respondent says the Management of the Respondent was co-operative to the Claimant and his insinuation that there was no co-operation is unfounded.

20. The Claimant was not given assignment to assess the internal controls of the Respondent and even if he was given such an assignment, it was confidential and was not to be disclosed to third parties.

21. The Respondent also avers that the claims by the Claimant in paragraph 11 of the memorandum of claim are denied and are just a figment of Claimant's fertile imagination. The Respondent further says Claimant was paid his July, 2017 salary on 3rd August and August Salary was paid on 24th August, 2017 and balance was paid on 30th August, 2017. He therefore demonstrates there was no delay to the Claimant's salary.

22. The Respondent says Claimant was free to occupy any space being the Senior most employee. The Respondent says after Claimant received his August salary he did not return to work until his advocates wrote a demand letter and his handing over email of 31st August, 2017.

23. Respondent says he gave the Claimant a great opportunity but he failed to deliver and left only two months after his engagement. Respondent therefore says the Claimant's right were not violated under the Constitution and Employment Act and so he can only be said to have absconded his employment.

24. The Respondent says the Claimant acted in a malicious way by leaving employment when the Managing Director was on compassionate leave and by complaining about the car and the office.

He did not give himself time to understand the operations of the organization.

25. The Respondent prays the Claimant's case be dismissed with costs.

26. The Respondent has also counter claimed for Kshs.206,695/= being payment in lieu of notice. It also prays for costs of counter claim and interest and any other relief that the court may deem fit and proper to grant.

DETERMINATION

27. The issues for determination are as follows:-

- (a) Did the Claimant abscond from duty or is this a case of constructive dismissal.
- (b) is he entitled to the reliefs sought.
- (c) Is the Respondent entitled to his counter claim as prayed in his response.

28. The Claimant started work at the Respondent's organization on 3rd July, 2017 at a gross salary of Kshs.885,836/=. He has very systematically and logically set out what transpired after he joined the Respondent's organization.

Furthermore he says he was head hunted from his comfortable former employment in Mombasa and had to relocate to Nairobi together with his family.

29. He says he was not inducted in the position and was not allocated a working space for over 10 days and was given a laptop after two weeks. He says the motor vehicle he was allocated was not roadworthy. He says he was barred from reporting to his line Manager in Kenya and abusive language was used in addressing him. He says the work space he was allocated was then taken away.

He says all the lack of cooperation by the management amounted to constructive dismissal.

30. The Respondent averment is that they did all expected and fulfilled their part of the deal and they actually accuse the Claimant of having acted maliciously. They say the claimant acted in a petty manner. He refused to be patient in order to learn the workings of the Respondent's company even before making a hasty decision.

31. It is correct the Claimant left his employment during the probationary period. At the same time I have painstakingly considered the evidence adduced by all the respective parties including the submissions by both the respective parties (and indeed I must point out I enjoyed reading the opening poem by the Respondent).

I want to interrogate the issue of whether the Claimant breached the contract by leaving his employment during the probationary period and without giving 7 days' notice to the Respondent as per his contract.

32. After considering the evidence on record both from pleadings and the evidence in chief by the respective witnesses, I find that it was the Respondent who had headhunted the Claimant through his consultant. When he got on board however he seems to have developed a different attitude towards him.

As I consider all the communication between the parties I find that the Respondent did not seem to have been prepared for the Claimant.

A person who is employed in such a high position whose interview was even conducted abroad should have been given a better orientation and preparation of his role and even resources.

33. From the inception it seems even the salary was never agreed from the beginning.

The documents on record from the Claimant's bundles of documents display over time different salary offers as well as different start dates of the contract.

When finally the Claimant signed the contract it seems the Respondent was not ready with basic provisions like even a laptop, office space

and even the organization's organigram.

34. All these discrepancies seems to have brought confusion and misgivings to the Claimant who had left according to his testimony a comfortable job in Mombasa to join the Respondent.

35. The Claimant therefore pleads he was forced to leave employment because of the Respondent's conduct.

This is what is referred as constructive dismissal where the employee must have been entitled to have the right to leave without notice because of employer's conduct.

In the case of **COCA COLA EAST AND CENTRAL AFRICA VS MARIA KAGAI LIGAGA (2015) eKLR** the court held that in constructive dismissal what was relevant was the Appellant's conduct and not the Respondent's.

Further the court held that an employee engaged to work meant there was work to do. In this case it seemed the Respondent did not give the Claimant clear job description and kept even changing the reporting structures of the Claimant. Immediately he started work he was told he was not to report to the Managing Director in Kenya but would only report to Dubai.

36. Even his job was changed and was informed he was only to deal with Finance Department only.

37. The above scenarios all demonstrate that once the Claimant commenced employment, things seemed to have changed between him and his employer and at some point when he informed the Managing Director about the car which had broken down the Director told him via email he could not take any more "crap". In another email he was told if he did not want that vehicle that was now his problem. These were emails written by Mr. Amjad and copied to several other staff members (an email dated 21st August, 2017).

38. Under those circumstances it was not a conducive environment to continue working even if it was still during the probationary period.

In the case of **KENNETH KIMANI MBURU VS SAIDI EMMERICHU AND ANOTHER ELR 339/2011** the court held that if there is a fundamental breach of the contract the employee is left with no alternative but to abandon employment.

He further observed that for constructive dismissal to be proved the employment need not have been proved to be for long.

The Respondent case that the Claimant had not finished his probation was not upheld.

39. In this case the Respondent in his submission says Claimant did not prove or explain what action of the Respondent was a significant breach of employment.

He quotes **SIMON NGUGI KAMAU VS SILPACK INDUSTRIES LIMITED (2015) eKLR** where the court observed that a diligent and keen employee who is represented by a union should not have acted like the Claimant did. The court advised the Claimant should have engaged the employer in a meaningful manner in order to be redeployed from the Department where he was experiencing health difficulties".

41. In the present case the court looking at the numerous communication via emails by the Claimant finds he tried to get the management to engage but did not get useful response.

42. In the case of **JOAN MALIGA DALIA VS RUBYCUT GARDENS LIMITED CASE NO.1902 OF 2017** the Claimant complained of being subjected to insulting and demeaning words and it got worse when the Respondent Director one Ms Risper started insulting him. The Claimant considered the employment environment no longer tolerable and was forced to resign from employment.

The learned Judge found the Claimant had proved that he was unlawfully constructively dismissed from employment.

The court went further to hold that the situation for the Claimant was so toxic and intolerable for him to continue working as a result of conduct of Director of the employer.

The Claimant was justified to resign as he did.

43. In the present case the court looking at the numerous email communication by the claimant finds he tried to get the management to engage but did not get useful response.

44 He then resulted to the final decision of opting out. His advocates wrote to the Respondents a demand letter and the Respondent responded on 11th September, 2017 about 12 days later.

44. Being a senior employee the Respondent could have reached out to him for further engagement but that did not happen.

45. The Respondent claims that Claimant did not prove grounds of breach of contract but in my considered opinion failure to support, facilitate and respect an employee is sufficient to render the working place untenable. The Claimant from the day he reported to the Respondent's organization was not supported by the Respondent's management and I am well convinced the Claimant has proved a case of constructive dismissal. In the final analysis, I enter judgment for the Claimant against the Respondent.

REMEDIES

46. The Claimant prays for 12 months gross salary as compensation for loss of employment. Unlike the case of **COCA COLA VS MARIA KAGAI** where Claimant had worked for over 5 years and was awarded 9 months equivalent, in the present case 2 months' worth compensation is fair and reasonable having also worked for only two months.

Having awarded above compensation, I am persuaded is also sufficient to cover prayer 2 for damages of unfair and discriminatory treatment.

Costs are awarded to the Claimant and interest at court rates from date of this judgment until full payment.

COUNTER CLAIM

The court having conclusively found that the Claimant was constructively dismissed does not agree that the Claimant needed to give 7 days' termination notice.

The amount claimed by the Respondent in the counter claim being equivalent to 7 days counter claim is therefore declined.

CONCLUSION

The final award to the Claimant is Kshs.1,771,672/= plus interest from the date of this judgment till final payment and costs of the suit

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 10TH DAY OF FEBRUARY, 2022

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of court fees.

ANNA NGIBUINI MWAURE

JUDGE