



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO.1352 OF 2016**

***(Before Hon. Lady Justice Anna Ngibuini Mwaure)***

**WILLIAM NJOROGÉ.....CLAIMANT**

**VERSUS**

**KENOL KOBIL LIMITED.....RESPONDENT**

**JUDGEMENT**

**INTRODUCTION**

1. The claim was dated 11<sup>th</sup> July, 2016 was filed by the Claimant on 13<sup>th</sup> July, 2016.

The Respondent put his response on 27<sup>th</sup> September, 2016.

**CLAIMANT'S CASE**

2. Claimant was employed by the Respondent as a Sales Representative at a salary of Kshs.15,000/= per month from 3<sup>rd</sup> April, 1995.

On 13<sup>th</sup> October, 2014 he was appointed as a Marketing Manager in Respondent's subsidiary company known as Kobil Rwanda. This was to be for a contract of 6 months and the same would be evaluated. The effective date was 23<sup>rd</sup> October, 2014. The terms of the contract are as per his letter of appointment dated 23<sup>rd</sup> October, 2014.

3. On 23<sup>rd</sup> October, 2014 he got another appointment letter appointing him as Marketing Manager Rwanda for a period of 3 years.

4. The Claimant says he relocated with his family to Rwanda and then the Respondent did not refund his travelling expenses contrary to his contract.

5. Claimant says he worked diligently with the Respondent for twenty years and the last 10 months in the contract with the subsidiary company.

6. He says on 22<sup>nd</sup> August, 2015 he got an email from the Respondent's group Manager and acquisition support supervisor directing him to hand over office responsibilities by 24<sup>th</sup> August, 2015 and report back to head office in Nairobi.

7. He was also directed to hand office operations to Joseph Mwangi and Public Relations and Human Resource docket to Jolly Kalisa. Jolly Kalisa was also asked to cancel his work permit and other ex-parte benefits with immediate effect.

8. He says he got a letter dated 24<sup>th</sup> August, 2015 confirming the contents of the email referred thereto. He says he could not hand over immediately due to the documentation process and finally finished on 25<sup>th</sup> August, 2015.

9. He says he was invited to a meeting on 15<sup>th</sup> September, 2015 by Group Managing Director and Group managers in Nairobi and in that meeting he was ordered to write a resignation letter.

10. He says under pressure he finally handed his resignation letter on 18<sup>th</sup> September, 2015 giving two months' notice as provided in Respondent's policy.
11. The Respondent accepted the resignation by the Claimant but exempted him from serving the two months' notice.
12. The Claimant says the Respondent was to pay costs of Claimant's transportation by air back home as well as the Claimant's family expenses. He says the same was not paid for him.
13. The Claimant says the unlawful acts of the Respondent have caused him financial and mental anguish and he has incurred costs of telephone, travel and accommodation and relocating back to Kenya as well as time.
14. The Claimants now prays the Respondent pays him the following:-
  - (a) 28 months contract Kshs.9,490,000/= residue.
  - (b) 27 days unpaid leave Kshs.324,000/=.
  - (c) Expenses/losses incurred following termination Kshs.50,000/=.
  - (d) Education costs for Claimant's children \$3000 per year.
  - (e) Compensation for unlawful termination.
  - (f) Costs of the suit.
  - (g) And any other remedy the court may deem just to grant.

#### **RESPONDENT'S CASE/PLEADINGS AND EVIDENCE**

15. The Respondent admits the Claimant had a 3 years contract effective 23<sup>rd</sup> October, 2014 with a 6 months' probation period and was to be evaluated and reviewed based on Claimant's performance.
16. He further states the probation period was extended for another 6 months effective 25<sup>th</sup> April, 2015 and was informed he would be evaluated thereafter. He says when the Respondent resigned on 15<sup>th</sup> September, 2015 he was still on probation.
17. The Respondent denies he failed to pay for Claimant's children school fees and travel expenses.  
He says the above benefits were to apply upon confirmation of his position.
18. Respondent says the Claimant voluntarily resigned when the Respondent recalled him back to Nairobi.
19. The Respondent avers they had a right to evaluate the Claimant's duties and to post him to any part of the region and also to evaluate his performance. They admit they directed the Claimant to report back to Nairobi for re-assignment and his expatriate benefits ceased thereafter. They say that instead of reporting to Nairobi Claimant went on unauthorized and unearned leave.
20. The Respondent says Claimant was absent from duty between 26<sup>th</sup> August, 2015 to 14<sup>th</sup> September, 2015. He says Claimant went on leave and when he resumed work on 15<sup>th</sup> September, 2015 he handed his resignation letter.
21. They say they accepted his resignation and waived off his two months' notice period.  
They say they tabulated his dues and set off his car loan and then paid his balance being Kshs.368,553/=.
22. They say Claimant signed off a discharge voucher confirming the payment he received was in full and final payment of his entitlement.  
He confirmed by signing the discharge voucher he would not make any further claim from the Respondent.
23. The Respondent state the transportation of Claimant's luggage of 100 kgs and his family was subject to confirmation of his employment.
24. The Respondent say the Claimant never presented receipts for telephone or travel and accommodation for refund.
25. They also deny the Claimant had 28 leave days having only worked for 10 months for Kobil Rwanda.  
They say it is preposterous for Claimant to claim 28 months residue contract having resigned voluntarily.

26. The Respondent says Claimant went on 15 days leave.

They also state his certificate of service has always been ready for collection.

27. The Respondent says the Claimant's demands are therefore unwarranted and prays his claims be dismissed with costs.

### **ISSUES FOR DETERMINATION**

28. (i) issues for determination are whether at the time of termination of the Claimant was he on probation or was his term confirmed.

(ii) Was Claimant constructively dismissed?

(iii) Was this a case of unlawful termination.

(iv) Is Claimant entitled to the prayers sought?

### **DECISION**

29. The Claimant had worked for the Respondent for over 20 years from 1995 and 23<sup>rd</sup> October, 2014 when he was appointed as Marketing Manager in Kobil Rwanda. This was a contract for 3 years.

30. However, he was placed on acting capacity for 6 months. He was advised after that period he will be entitled to a car loan and cost of travel by air for himself, his spouse and Children and baggage maximum 100 kgs. He was advised he could be joined by his spouse and children after his confirmation. Confirmation was to be in writing.

31. Even school fees of his children was to be paid after confirmation of his employment.

He was also to have the house allowance at maximum USD 1500 per month plus utilities.

32. He was further informed his return home expenses would be catered by the company including his family and baggage maximum at a 100 kgs.

33. It was a term of his employment that should he return back to Kenya he will revert to the policies and terms and conditions applicable to the job group assigned at the time.

34. The Claimant was now working from Rwanda and had shipped his family there and settled them there.

The six month acting period ended on 23<sup>rd</sup> April, 2015. He continued working without any communication from the Respondent.

35. On 23<sup>rd</sup> June, 2015 he was informed his acting period had been extended for another six months as the initial six months was inadequate to evaluate his performance.

He was promised to be evaluated after that period and would then be advised on new assignment.

36. Then on 22<sup>nd</sup> August, 2015 Claimant was advised to report back to Kenya and was advised to finish hand over by 24<sup>th</sup> August, 2015.

37. The court would wish first to address the issue of failure by the Respondent to communicate to the Claimant about his confirmation after the 6 months acting period stipulated in his letter of appointment. Yet the Respondent was aware a lot the benefits due to the Claimant depended on his confirmation. It took two months after the expiry of the six months to advise him they had extended his acting period with another six months.

38. Probationary period is defined on Section 2 of Employment Act 2007 as a contract of employment which is not more than twelve months duration or part thereof and is in writing and expressly states that it is a probationary period.

Section 42 of the same Employment Act provide that probationary period shall not be more than six months, but it may be extended for a further period of not more than six months with the agreement of the employee.

39. There is no evidence adduced that the Claimant was consulted before his probationary period was extended.

Furthermore there was a delay of two months before the said extension which again was against fair labour practices. Actually the law provide that on expiry of the probation the employment is confirmed right away.

40. As for the process where Claimant was recalled from Rwanda the Respondent did not disclose the reason for the abrupt recall of the Claimant back to Kenya. He received an email on 22<sup>nd</sup> August, 2015 and was told to hand over his responsibilities by 24<sup>th</sup> August, 2015.

Furthermore his expatriate benefits were recalled immediately and his work permit was withdrawn.

41. The Claimant must have been in great dilemma and especially since he was stuck in Rwanda with his family. His house rent was apparently withdrawn and he had to look for alternative accommodation even as he was to organize how to move back to Kenya with his family.

He was not given the air ticket and he says he had to move the family by road.

42. I would not want to try to fathom what the Claimant was going through at this period.

One psychologist compared the loss of a job, second only to loss of a loved one through death. As to why he decided to resign we cannot know what exactly made him make such a drastic decision but as said considering all what was going on, it may not be a great wonder. He claims he was ordered to resign by the Respondents.

43. Looking at the pleadings evidence and submissions and all the exhibits and authorities, I would like to deal with tenets of constructive dismissal.

44. The Claimant over the years as per the documents of evaluation produced in court had good performance rating as late as July, 2015. He was then recalled from his probably dream job and this without any explanation and this must have caused him great distress and anxiety.

45. The issue of failure to address the acting position of the Claimant for two months and then only to extend it without his consent or at least his consultation was a ground for breach of the contract of employment as well as a case of unfair labour practice. The law provides clearly the procedure to extend the probation which I read interchangeably with acting position described in Claimant's letter of appointment.

In the case of **COCA COLA EAST AND CENTRAL AFRICA LTD VS MARIA KAGAI LIGANA CIVIL APPEAL NO.20 OF 2012** the court held that in constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of the employees unless there is waiver, estoppel or acquiescence is in issue. Conduct by an immediate superior or supervisors may be enough to justify constructive dismissal.

In the case of **HILTON INDUSTRIAL HOTELS (UK) LIMITED VS PROTOPAPA (1990) ILR 316** it was held that an employer is required not to behave in a way that amounts to a repudiatory breach of a contract.

46. The employer as already observed failed to adhere to the law concerning the confirmation of the Claimant's employment. He then asked him in unreasonable circumstances to report back to Nairobi. He was immediately given no sufficient time to hand over and to organize his family to relocate back home. He was not facilitated to move back to Kenya.

47. Even if his family was not entitled to air travel before confirmation but at least the Respondent could have facilitated the transition and deduct it from his dues. It was like the Claimant had offended the Respondent and was under punishment.

48. In the above referenced case of **MARIA LIGAGA VS COCA COLA (SUPRA)** the court held that the employer must make it impossible for the contract of service to be performed under cloud of suspicion and hostility.

In the **CASE OF JOHN KIMINGI VS DAMCO LOGISTICS (K) LIMITED CASE NO.1546 OF 2018** the Judge held that the Claimant's resignation is precipitated by the circumstances created by the Respondent's Management. There was lack of support from the Human Resource Manager and the case was declared a classic case of constructive dismissal.

49. In this case as well of **KOBIL**, I find as well it is a case of constructive dismissal. Claimant had relocated to Rwanda with his whole family to pursue his career. He would not just have woken up one morning and resigned without a reason.

I am convinced he was forced to resign because of the circumstances and the hostile environment from his employer of over 20 years.

50. The Respondent in his submissions avers that the Claimant signed the discharge voucher and confirmed he was not going to make any other claims against the Respondent.

One part of the discharge voucher states;

“The above settlement has been made to me and I Understand that no other claim or claims will be made by me to the Company.”

51. Generally discharge voucher is accepted in law as a binding contract as in the case of **WILLIAM WAMBEU VS THIKA COFFEE MILLS LIMITED CAUSE NO.936 OF 2014** where court observed that even if discharge voucher is generally accepted as a binding contract however the court must consider each case according to its circumstances.

However in the case of **THOMAS DE LA RUE K. LIMITED VS DAVID OPONDO (2013) eKLR** the court of appeal agreed with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and it cannot preclude the court from inquiring into the fairness of a termination.”

52. In the present case we are looking into the circumstances around how the Claimant was moved from Rwanda to Nairobi and his terminal

dues were held for several months. It is clear as he says he was under a lot of pressure for funds. The discharge voucher was signed on 8<sup>th</sup> April, 2016 and his resignation letter was on 15<sup>th</sup> September, 2015. So he got his terminal dues around April, 2016.

53. I am persuaded considering the circumstances of this case the court can consider this is a case the Claimant was between a rock and a hard place and had no chance but to sign the discharge voucher. He had abruptly lost his job and he had not been paid his dues. He had a life to live and a family to take care of. That is a case I am willing to rule did not absolve the Respondent from statutory obligations despite the claimant signing the discharge voucher. I find the Respondent did not practice fair labour practices under Article 41 of the Kenya Constitution 2010.

54. I am convinced the resignation by the Claimant on 15<sup>th</sup> September, 2015 and the discharge voucher he signed on 8<sup>th</sup> April, 2016 were not voluntarily signed and was caused by the repudiatory breach of the contract of employment by the respondent.

I therefore enter judgment in his favor for unlawful and wrongful termination of his employment due to constructive dismissal.

### **REMEDIES**

55. (a) The Claimant claims for 28 months contract residue.

I find his contract had not been confirmed and he was still on probation. I am hesitant to award this prayer and is not supported by the provisions of section 49 of the employment act. The same is declined.

(b) 27 unpaid leave days are not proved as there is no clear evidence of what he is entitled but the Respondent says he was entitled to 22 days leave. I will concede to 22 days amounting to Kshs 248,016/=.

(c) Education costs not refundable as the Claimant's contract had not yet been confirmed as provided in his contract.

(d) The costs of the travel by air from Rwanda to Nairobi to be calculated to cover ONLY the costs of the Claimant. It was clear from the contract that the Claimant was only entitled to the shipment of his family after confirmation of his contract.

I am afraid he was in too great a hurry to move his family to Rwanda before his contract was confirmed. This prayer is declined but his personal travel costs are to be refunded to him by the Respondent as will be worked out by the respective parties within 30 days from today's date.

(e) Having worked for Kobil groups of Company in Kenya and in Rwanda for about 20 years, it is only fair and prudent to award him compensation for unlawful termination under Section 49 (1)(c) Employment Act equivalent to 8 months amounting to 338,204 x 8 =

Kshs.2,705,632/=.

(f) He is awarded costs.

(g) And interest at court rates from date of Judgement until final payment.

The total award will be Kshs.2,953,648/=.

Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 8TH DAY OF MARCH, 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**