



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO.281 OF 2016

NELSON NYOIKE WAINANINA.....CLAIMANT

VERSUS

HAPPY COW LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed a Memorandum of Claim dated 25th July, 2016, on the 26th July, 2016 through the firm of Munene Chege and company advocates claiming unfair termination and to be compensated for the unfair termination.

2. The summary of the claimant's case is that he was employed by the Respondent on the 24th January, 2006 via an appointment letter of even date to the position of receivable accountant at a salary of Kshs 14,375 inclusive of House allowance which money rose over the years and in May, 2014 his salary rose to Kshs.72,864 which salary he received till his termination.

3. Circumstances leading to the termination is that sometimes in January, 2016, the claimant was relieved of some of his responsibilities and the same handed over to another accountant by the name Josephine. The actions of the said Respondent's director did not augur well with the Claimant, and the claimant confronted the director about the said action and a squabble ensued therefrom. To cool down, the claimant sought for 3 days leave from his supervisor which was granted.

4. Upon returning back from the three days off, she was given 28 compulsory leave days commencing on 9th February, 2016, which the claimant in hesitation signed for. The claimant avers that he went back to his office only to find the Respondent had confiscated his work desktop computer forcing him to seek permission to be proceed on his leave early. On the same day on 8th February, 2016 the claimant was issued with show cause letter on the basis of deserting work on 8th February, 2016, which Notice he responded to while on leave.

5. On returning to work on 12th March, 2016 after serving the compulsory leave, the claimant was informed by the Human Resource manager, of the Respondent's intentions to change his position. The Claimant in retaliation tendered his resignation letter dated same day 12th March, 2016 which was to take effect immediately and left the Respondent's premises.

6. The claimant avers that despite resigning from the Respondent's employ, the Respondent has failed to pay him his terminal dues to date. He therefore sought for the following reliefs;

- a) Compensation for the unfair termination**
- b) An order compelling the Respondent to settle the outstanding benefits**
- c) General damages**
- d) Costs of suit and interest thereof at Court rates.**

7. The Respondent responded to the claim on the 27th October, 2016 through the firm of Ikua, Mwangi and Company Advocates.

8. The Respondent stated that indeed the claimant sought 3 days leave which was granted and while away the Respondent noted that the claimant had accumulated 28 days' worth of leave which the Respondent directed the claimant to take the 28 days leave and the claimant accepted to proceed on the compulsory leave and his leave days were exhausted.

9. The Respondent also admitted receiving the letter of resignation from the Respondent but contended that it did not in any way contribute

to the claimant's resigning from its employment therefore that the claimant left employment on his own volition and thus not entitled to the reliefs sought.

Hearing

10. During hearing the claimant testified as CW-1 and adopted his witness statement dated 25.7.2016 which reiterated the claim and in addition stated that he sought permission from his immediate supervisor on 8th February, 2016 which was granted and then took the day off before commencing his leave the next day on 9th February, 2016. He testified that he never absconded work as alleged. He also stated that he resigned after the compulsory leave for the reason that the Respondent had shortchanged him and was to be given another position. He contended that the resignation was not voluntary.

11. Upon cross examination, he confirmed that he never gave the Respondent notice of resignation, also that in his application he had applied to work at any department in the Respondent.

12. The Respondent called one witness, Peter Wachira as RW-1 who is the Respondent's Accountant and the claimant's immediate supervisor. RW-1 adopted his statement of 16.3.2017 and in addition stated that the claimant was employed as an Accountant receivable and was to be deployed in any part of Kenya. He testified that, the claimant proceeded for his annual leave on 8th February, 2016 instead of 9th February, 2016. That the claimant was a NSSF and NHIF paid up member therefore is not entitled to gratuity. Further that the claimant had exhausted his leave days at the time of resignation.

13. On cross examination, RW-1 testified that the claimant did not ask him for permission on the 8th February, 2016. That he was then issued with a show cause letter which he responded via email.

14. On further cross-examination, the witness admitted that the claimant was not subjected to any disciplinary hearing following the Notice to show cause. He also admitted that the claimant was due to be transferred to another department after taking up his leave. However that the claimant resigned before being re-deployed. Additionally, that the claimant had 21 leave days remaining and that he was not entitled to gratuity.

Claimant's submissions.

15. The claimant submitted that his resignation from the Respondent was not voluntary rather that it was informed by the hostile work environment which began when his duties had been reassigned to another accountant, then followed by the compulsory leave and finally the deployment to other department. He argued that his separation from the respondent was as a result of constructive dismissal. It was argued that the circumstances at the Respondent employment were no longer conducive forcing him to resign which resignation is tantamount to constructive dismissal. To support his argument the claimant cited the court of Appeal case of **Coca Cola East and Central Africa Limited V Maria Kagai Lugaga [2015] eklr.**

16. On whether the claimant is entitled to the reliefs sought, it was submitted that the resignation was not voluntary as per the elements in the case of **Edwin Beiti Kipchumba V National Bank of Kenya Limited [2018] eklr.** It was argued that the resignation was informed by the frustration at the Respondent, which is tantamount to constructive dismissal. It follows therefore that the Respondent ought to have followed due procedure in terminating the claimant's services. In this the claimant cited the case of **Walter Ogal Anuro V Teacher Service Commission [2013] eklr.**

17. Accordingly, the claimant submitted that the termination was unfair and urged this Court to allow his claim as prayed.

Respondent's Submissions

18. The Respondent on the other hand submitted that the claimant's resignation did not amount to constructive dismissal for the reason that the resignation did not meet the conditions enumerated in the Court of case of **Coca Cola East and Central Africa Limited V Maria Kagai Lugaga (Supra).** It was the Respondent's argument that there were no conditions that could have forced the claimant to resign and if there were any, then they were not as a result of the Respondent's conduct.

19. The claimant then urged this Court to be guided by the decision in **Catherine Kinyany Vs MCL Saatchi & Saatchi [2013] eklr** and dismiss the claimant's cases on the basis that the resignation was voluntary and not forced as alleged.

20. I have examined all evidence and submissions of the parties herein.

21. The issues for this court's determination are as follows;

1. Whether the claimant resigned voluntarily or was constructively dismissed.

2. If dismissed, if the claimant is entitled to the remedies sought.

ISSUE NO. 1

22. From the evidence on record, the claimant was asked to proceed on leave for 28 days with effect from 9/2/2016 and was to resume duties on 12/3/2016.

23. On the day the claimant resumed duty on 12/3/2016, he tendered his resignation. In the resignation letter, the claimant didn't indicate the reason for the resignation but indicated he was grateful for the opportunity given by the respondent to serve.
24. The resignation letter was to take effect immediately and it was received by the respondent. In my view the moment the claimant resigned on 12/3/2016, he ceased to be an employee of the respondent.
25. I have been treated to other communication on Emails exchanged between the claimant and respondent on the issue of desertion of duty by the respondent which I find is irrelevant the claimant having already resigned from duty.
26. The claimant has averred that he resigned from duty because of being frustrated by the respondent.
27. It has not however been demonstrated by the claimant that he was unfairly treated and pushed to the wall into resigning.
28. The assertion of constructive dismissal by the respondent in my view is not proved and I reject that argument.

ISSUE NO. 2

29. Having found that the claimant resigned voluntarily, I find he is not entitled to any other remedies which I also find not proved. I therefore find the claim by the claimant unmerited and I dismiss it accordingly.
30. There will be no order of costs.

DATED AND DELIVERED IN OPEN COURT THIS 22ND DAY OF MARCH, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Daye for Claimant - present

Ikua for Respondent – present

Court Assistant - Fred