



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**CAUSE NO. 270 OF 2015**

**CHRISPINE ODUOR OPWONDO.....CLAIMANT**

**VERSUS**

**COMTRATE HULLIERS LTD.....RESPONDENT**

**JUDGEMENT**

1. The Claimant filed his Memorandum of Claim on 20<sup>th</sup> March, 2015 contending that he had been unfairly terminated by the Respondent. The Claimant prays for the following remedies: -

- 1) A declaration that the termination of the Claimant employment was unlawful.**
- 2) A declaration that the Claimant was entitled to one month leave after every year worked.**
- 3) An order directing the Respondent to pay the Claimant the following:-**
  - a) One month salary in lieu of notice, Kshs. 18,000**
  - b) Unpaid leave for 1 year Kshs. 18,000**
  - c) Compensation for unfair termination-Kshs.216000.**
- 4) Cost of this suit**
- 5) Any other relief that this Honourable Court may deem just and fit to grant.**

2. The Respondent entered appearance and filed a response to claim on the 13<sup>th</sup> July, 2015 contending that the Claimant was not dismissed from employment rather hat he left on his own volition after undergoing treatment occasioned by an accident.

**Claimant's Case**

3. The Claimant avers that he was employed by the Respondent on the 24<sup>th</sup> January, 2014 as a driver earning a monthly salary of Kshs.18,000 and a traveling allowance of Kshs 8,400 per month.

4. That he worked faithfully and diligently till 7<sup>th</sup> October, 2014 when he was driving from Uganda to Kenya along Malaba Road when he noticed the tyres he was transporting were missing forcing him to pack the vehicle and take a motor cycle to trace the missing tyres. While at the said motor cycle he noticed that a police van was transporting the said tyres and directed the rider to pursue the said police van. While chasing the said police van he was knocked by another motor cycle causing him serious injuries. He then informed the Respondent on the said incident who send an employee to his rescue. He was then taken to St Anthony hospital who referred him to CGH for further treatment and was later discharged on 14<sup>th</sup> October, 2014.

5. Upon discharge, the Claimant reported back to his employer only to be turned away by Mr. Bire and advised to remain at home until he recovered. Several weeks later there was no communication from the Respondent making him to believe that he had been dismissed from employment.

6. That there was no notice of termination or reason for the same given by the Respondent.

7. During hearing, the Claimant adopted his witness statement dated 19.3.2015 and in addition stated that the claim before the chief magistrates in Mombasa is with regard to injury sustained during the accident and not termination of employment.

8. He then testified that he was injured in the accident of 7<sup>th</sup> October, 2015 and was given 2 weeks leave to recuperate and upon reporting back to employment he was turned away. He testified also that when he boarded the motor cycle to trace the missing tyres his turn boy remained behind to guard the truck therefore the truck was not exposed to any risk. He then concluded that he was terminated for being injured and urged this Court to allow the claim.

9. Upon cross examination, the Claimant stated that he was employed in January, and worked till September before he was involved in the accident. That he reported to work after a week and was given Kshs 10,000 for treatment and turned back to recuperate since he fractured his leg, the Respondent manager then informed him not to call them again. That he fully healed after 1 year.

#### **Respondent's case**

10. The Respondent admitted that it employed the Claimant with effect from 2<sup>th</sup> January, 2014 however that the Claimant never performed his duties diligently as alleged rather that he performed his duties so carelessly in that he deserted his place of employment, failed to take measure to avert risk and causing the Respondent loss of its tyres and a computerized key of the truck entrusted to him.

11. That after the incident that occurred on the 7<sup>th</sup> October, 2015, the Claimant sustained injuries to the effect that he had an open fracture of the left limb forcing him to walk on crutches therefore he was not fit to continue working for the Respondent informing the Respondent's decision to have the Claimant take time off duty to heal.

12. After recuperating, the Claimant did not return back to the Respondent employment therefore that the Claimant deserted employment without cause and was never terminated at all. It was then contended that the claim herein is not warranted and should be dismissed with costs.

13. It was further stated that the Claimant had filed a similar suit in the Senior Resident magistrates Court in Mombasa therefore that the suit herein is sub-judice.

14. During hearing the Respondent called one witness, Balbir Singh Kandola, one of the Respondent's directors as RW-1 who adopted his witness statement dated 21.11.2018 and in addition testified that the Claimant was involved in an accident that caused a fracture on his foot rendering him unfit to continue with his duties therefore that he advised the Claimant to recuperate then report back. That at the time the Respondent was served with the Claimant's demand and memorandum of claim, the Claimant had not yet healed and could not perform his duties of a driver. He then stated that he was willing to accommodate the Claimant after he was fully healed and fit to drive again.

15. Upon cross examination, he testified that all his trucks have a driver and a turn boy and that he never dismissed the Claimant rather that the Claimant took sick leave and never returned back after recuperating.

#### **Claimant's Submissions.**

16. The Claimant submitted that he was constructively dismissed by the Respondent when he took sick leave and on contacting the Respondent he was warned not to call the said Director again. The Claimant then supported his case by citing the case of **Joseph Aleper & another V Lodwar water and sanitation company limited [2015] eklr.**

17. The Claimant also cited the case of **Kenneth imani Mburu and anoher V Kibe muigai Holdings Limited[ 2014] eklr** and argued that the Claimant dismissed him from employment and urged this Court to allow the claim as prayed.

#### **Respondent's Submissions.**

18. The Respondent on the other hand submitted that the Claimant absconded duty and was not constructively dismissed as urged by the Claimant. It was argued that the Claimant was given sick leave to recuperate and it was upon the Claimant to inform the Respondent that he had healed and report back to work, however that the Claimant before recuperating issued the Respondent with a demand letter and filed his suit alleging unfair termination when the sick leave was valid till he became fit again to operate a motor vehicle as a driver.

19. The Respondent then argued that the Claimant was never dismissed from employment rather that he absconded duty and therefore the claim ought to be dismissed. In this the Respondent cited the case of **Ann Njoroge V Topez Petroleum Limited cause number 1248 of 2012.**

20. I have examined the evidence and submissions of the parties herein. The Claimant has averred that he was terminated from employment after being involved in an accident when the Respondent's director warned him not to call the office again. The Claimant avers that this was constructive dismissal.

21. The Respondent on their part aver that the Claimant absconded duty after he was injured as he never reported back to them after he got well to resume duty.

22. From the evidence on record, the Claimant was indeed involved in an accident on 7/10/2014. He sent a demand notice to the

Respondents on 17<sup>th</sup> January, 2015. The Respondents didn't deny receiving the demand notice sent to them. In their evidence, the Respondents contended that the Claimant refused and neglected to report to duty.

23. In cross-examination the Respondent admitted that the Claimant had been on sick leave and they didn't pay him during that period.

24. The admission by the Respondent that they didn't pay the Claimant when he was on sick leave is an admission that they constructively dismissed him when he was injured by failing to pay him his salary.

25. This position gets credence from Blacks Law Dictionary 9<sup>th</sup> Edition which defines constructive dismissal as "termination of employment brought about by the employer making the employees working conditions so intolerable that the employee feels compelled to leave"

26. In the instant case, the Respondent having breached their contract by failing to pay the Claimants salary for 6 weeks when he was sick having been involved in an accident dealt the Claimant double trouble by ignoring his plight while sick. In my view this act by the Respondent amounts to constructive dismissal and I return the verdict that the Claimant was indeed constructively terminated.

27. In terms of remedies, having found that the Claimant was constructively dismissed, I find for him and award him as follows;

**1. 1 months salary in lieu of notice = 18,000/=**

**2. Unpaid leave for 8 months prorated =  $8/12 \times 18,000 = 12,000/=$**

**3. 10 months leave as compensation for the unfair and unjustified termination**

**=  $10 \times 18,000 = 180,000/=$**

**TOTAL = 210,000/=**

**Less statutory deductions**

**4. The Respondent will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.**

Dated and delivered in open Court this 8<sup>TH</sup> day of MARCH, 2022.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ms. Karanja holding brief for Ms. Daye for the Claimant - present

No appearance for the Respondent

Court Assistant - Fred