



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 110 OF 2016

MICAH KANGOGO CHELANGA.....CLAIMANT

VERSUS

KENYA FARMERS ASSOCIATION LTD.....RESPONDENT

JUDGEMENT

1. The Claimant through the firm of Gordon Ogola, Kipkoech and Company Advocates lodged his memorandum of claim dated 2nd March, 2016 seeking for the following reliefs;

a) A declaration that the Claimant was constructively and unfairly dismissed hence entitled to 12 months salary of Kshs 236,076.

b) A declaration that the Claimant is entitled to payment of unpaid salaries, unremitted provident fund, collective bargaining agreement arrears, one month salary in lieu of Notice and terminal dues amounting to Kshs. 740,684 as pleaded under paragraph 20 of the claim

c) Costs and interest of this Suit at court rates

d) Any other relief that this Honourable Court may deem fit to grant.

2. The summary of the Claimant case is that the Claimant was employed by the Respondent in November, 1989 in the position of a clerk earning a salary of Kshs 19,673, which position he held until 30th August, 2014 when he tendered his resignation.

3. The Claimant avers that he resigned from the Respondent employ since his salary had been withheld for about 2 years from July, 2012 making it impossible for him to commute from his residence to work. He thus contends that the withholding of his salary forced him to resign as such he was constructively dismissed by the Respondent.

4. The Claimant resignation was accepted by the Respondent on the 2nd September, 2014 and in the said letter of acceptance the Respondent promised to pay the Claimant his salary from July, 2012, unremitted providence fund and collective bargaining Agreement arrears, however that none was paid at the time of filling this suit.

5. The Respondent entered appearance and filed a response to claim on the 3rd May, 2016. The Respondent admitted that it owes the Claimant salary areas, unremitted provident fund and CBA arrears only which sum amount to Kshs 410,009 less deductions.

6. The Respondent avers that it was willing to pay the Claimant in installments however that the Claimant refused to accept payment in installments.

7. The Respondent then denied the particulars of illegality leveled against it. It was contended that the Claimant has not suffered any damages and the loss and inconveniences complained of by the Claimant are self-inflicting.

8. The Respondent then denied all the other claims as pleaded in the claim and put the Claimant to strict prove therefore. Further that the Claimant chose to resign and was not terminated at all.

9. On 22nd March, 2017 the parties herein recorded consent with regard to the admitted sum of Kshs. 410,009 where the Claimant was paid Kshs 200,000 and the balance of Kshs, 210,009 which was to be paid. The suit therefore proceeded with regard to the disputed issue.

10. The claim herein proceeded for hearing on the 19th January, 2021 where the Claimant testified at CW-1 and adopted his witness statement dated 2.3.2016 and produced the documents filed on 15.3.2016 and a further list on 31.3.2017 and in summary testified that he resigned from the Respondent since his salary was not paid from July 2012 till the time of his resignation. He averred that he never sought or received any salary advance from the Respondent as alleged. He then testified that he was entitled to pay rise as per the CBA which was never implemented therefore he urged this Court to compel the Respondent to pay the said arrears as per the CBA.

11. Upon cross examination, CW-1 testified that he was never informed the reason for delay in payment of his salary or whether the company was experiencing any financial problems. He admitted that after the consent recorded in this Court on 22nd March, 2017 he received Kshs 410,000 as salary arrears. He also stated that he was not forced to resign rather that he resigned due to the circumstances at the Respondent's and the withheld salary which made it impossible for him to meet his financial obligations.

12. On 16th November, 2021 the Respondent's case was heard where the Respondent called one witness, Josephine Wangechi, the Assistance Personnel Manager at the Respondent's employ as RW-1. The witness adopted her witness statement date 5.10.202.

13. On cross examination, RW-1 testified that the Claimant had worked for it for over 25 years earning a salary of Kshs 19, 673. She then admitted that the Claimant had not been paid salary for over 12 months together with the CBA arrears which salary was paid to him after filing of this suit of Kshs 410,000. She testified that they issued the Claimant with a certificate of service upon his resignation and the terminal dues were to be paid subject on availability of funds.

Claimants Submissions.

14. The Claimant submitted that he was constructively dismissed from employment for the basic reason that his salary was not paid by the Respondent for a period of 2 years. It was argued that as much as the Claimant resigned from employment, the resignation was motivated by the Respondent act of failing to pay him his salary. It was further argued that for constructive dismissal to stand the Claimant has to demonstrate that the employer breached the contract of employment, which terms is fundamental that has the effect of forcing the employee to resign and the employee must not delay in resigning. The Claimant then supported its arguments by citing the case of **Kenneth Kimani Mburu & Another V Kibe Muigai Holdings Limited [2014] eklr** where the Court gave the ingredients to be demonstrated in constructive dismissal.

15. Accordingly it was argued that the Claimant has satisfied all the requirements therein and thus the Claimant was constructively dismissed from employment.

Respondent's Submissions

16. The Respondent on the other hand submitted that the ingredients forming the basis of constructive dismissal as was held in **Coca Cola East and Central Africa Limited V Maria Kagai Ligaya [2015] eklr** was interalia that the employer must not have waived or acquiesced the repudiatory breach. The Respondent then argued that the Claimant alleged breached of non-payment of salary was with effect from July, 2017 about two years before the Claimant took an action at all. Further that the Claimant did not at any point raise any concern on the delay in payment of the said salary and accepted the salary advance paid to him without question. Accordingly, it was argued that the actions of the Claimant waived the repudiation of the said contract therefore the Claimant must be estopped from claiming constructive dismissal.

17. On whether the Claimant is entitled to the claim first of one month notice in lieu, it was submitted that under the CBA between the Claimant's Union and the Respondent, the employer is to be given 3 months Notice before resignation which was not the fact in this case as the Claimant resigned a day after tendering in his resignation therefore the Respondent in this case is entitled to 3 month pay in lieu of Notice as per the CBA. It was further argued that the issue of Notice and salary arrears was addressed in the consent ordered signed by the parties therefore the claim is no longer tenable.

18. On whether the Claimant was unfairly terminated from employment to deserved compensation, It was submitted that the Respondent was experiencing cash flow challenges and it gave the Claimant salary advance to sustain himself as the cash flow issue was sorted out. It was argued then that the Claimant was paid all his terminal dues during the pendency of this suit also that the Respondent had not denied owing the Claimant neither had it refused to pay the Claimant therefore that the Claimant for compensation ought to be disregarded in light of the fact that the Respondent has already paid the Claimant all his terminal dues. The Respondent then urged this Court in the interest of justice to award the Claimant one month salary as compensation on the basis that the salary delay was not authored by the Respondents doing but was due to unforeseeable circumstances. They then cited the case of **United states International University V Eric Rading Outa [2016] eklr** and the case of **Samsung Electronics East Africa Limited V K.M [2017] eklr**.

19. On whether the Claimant should be awarded provident fund arrears, it was submitted that the said arrears have already been paid to the Claimant as per the consent order of the Court earlier alluded to therefore the claim is not warranted. The Respondent then buttressed its argument by citing the case of **Legal Brains Trust (LBT) Limited V Attorney General of the Republic of Uganda [2012] eklr**.

20. In conclusion the Respondent concluded that the claim has been fully settled therefore costs should not be awarded and cited the case of **Samsung Electronics East Africa Limited V K.M (Supra)**.

21. I have examined all evidence and submissions of the parties herein. From the original claim, the Claimant sought various remedies. Vide a consent of the parties dated 22/3/2017, part of the claim was resolved and this court was left to resolve issues of whether the Claimant had been constructively dismissed and whether the Claimant was entitled to payment of compensation for unlawful dismissal and lastly whether the Respondent had failed to make remittances for monthly statutory deductions and provident fund.

22. On issue of whether the Claimant was unfairly constructively dismissed. The Claimant in effect resigned from work sue to non-payment of his salary which stood to the tune of over 400,000/= in arrears. This was a fact the Respondent acknowledged and promised to pay me

subject to availability of funds.

23. Constructive dismissal has been defined by Blacks Law Dictionary 10th Edition as:-

“An employer’s creation of working condition that leave a particular employee or group of employees little or no chance but to resign, as by fundamentally changing the working conditions or terms of employment; an employee’s cause of action that being detrimental of an employee leaves the employee almost no option but to quit.”

24. In regard to this issue, the learned J. Radido in Antony Mkala Khitavi Vs Malindi Water & Sewerage Company Limited (2013) eKLR alluded to this issue and stated as follows:-

“Constructive dismissal has been defined in Pretoria Society for the Care of the Retarded V Loots f19971 6 BLLR 721 as a situation in the workplace, which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee – to such an extent that the employee has no other option available but to resign.

Constructive dismissal has its roots in the law of contract under the doctrine of ‘discharge by breach’. Under this doctrine, an employee was entitled to treat himself as discharged from further performance of his obligations where the employers conduct was a significant breach going to the root of the contract. The termination would be due to the employers conduct. Such conduct may include unilateral reduction in pay or failure to pay the employee.”

25. This position was also reinforced by Rika J in Kenneth Kimani Mburu & Another Vs. Kibe Muigai Holdings Ltd (2014) eKLR where he stated as follows:-

“Constructive dismissal is not defined in our Employment Act 2007. The concept was the subject of this Court’s Award in Cause Number 611 (N) of 2009 between Maria Kagai Ligaga v. Coca Cola East and Central Africa Limited (Unreported). The court found that constructive dismissal occurs where an employee is forced to leave his job against his will, because of his employer’s conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed. The basic ingredients in constructive dismissal are:-

The employer must be in breach of the contract of employment;

The breach must be fundamental as to be considered a repudiatory breach;

The employee must resign in response to that breach; and

The employee must not delay in resigning after the breach has taken place, otherwise the court may find the breach waived.

..... The conduct by the employer must be shown to be so intolerable that it made it considerably difficult for the employee to continue working. At the heart of constructive dismissal is breach of the duty of trust and confidence. The employer’s behavior must be shown to have destroyed or seriously undermined trust and confidence. In the English Employment Rights Act 1996 and the South African Labour Relations Act Number 66 of 1995, constructive dismissal occurs when an employee terminates the contract under which he is employed, with or without notice, in circumstances which he is entitled to terminate it without notice, by reason of the employer’s conduct. Although the court is not bound by this definition, the two statutes conform to the definition of the term given by most labour and employment law publicists.”

26. The above case law sets out parameters to be considered in deciding whether an employee has been constructively dismissed or not.

27. In the current case, the Respondent failed to pay the Claimant his salary for over 2 years. The reason was for non-payment as alluded to by the Respondents was financial troubles.

28. That notwithstanding, the Respondent and Claimant had an employment relationship. The terms of the contract was that Respondent was obligated to pay the Claimant his salary which they failed to pay leading to the resignation of the Claimant. The non-payment of the Claimant’s salary in my view was an act by the Respondent which derogated from the term of the contract and was definitely a constructive dismissal.

29. I therefore agree with the Claimant that he was constructively dismissed by the Respondent.

30. Given that the Claimant was constructively dismissed, he is entitled to payment of compensation for the unlawful and unfair termination which I award at 10 month’s salary

$= 10 \times 19,673 = 196,730/=$

31. I also find that the Claimant is entitled to notice pay which as per CBA was 3 months pay and which I award as follows;

$3 \times 19,673 = 59,019/=$

32. The total payable to the Claimant is therefore kshs.255,749/= less statutory deductions.

33. The Respondent will pay cost of this suit plus interest at court rates with effect from the date

DATED AND DELIVERED IN OPEN COURT THIS 8TH DAY OF MARCH, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ouma for the Claimant – present

Omae for the Respondent – present

Court Assistant - Fred