



Geofrey v Principal Bomet University College & another (Cause 100 of 2018) [2022] KEELRC 150 (KLR) (22 April 2022) (Judgment)

Towett K. Geofrey v Principal Bomet University College & another [2022] eKLR

Neutral citation: [2022] KEELRC 150 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO**

CAUSE 100 OF 2018

ON MAKAU, J

APRIL 22, 2022

BETWEEN

TOWETT K GEOFREY CLAIMANT

AND

THE PRINCIPAL BOMET UNIVERSITY COLLEGE 1ST RESPONDENT

BOMET UNIVERSITY COLLEGE COUNCIL 2ND RESPONDENT

JUDGMENT

1. The background of this case is that the claimant was employed by Moi University on 12th August, 2011 as Grade III Clerk where he worked in the main Campus and his employment was confirmed on 31st January, 2012. Later on, he was deployed to Kericho Campus until 30th August, 2016 when he was again transferred to Bomet campus.
2. While working at the Bomet Campus, it was elevated to a University college (The 2nd Respondent herein) vide gazette Notice number 143 of 27th July, 2017 and became a constituent college of Moi university. As a result of the said developments, the existing employees including the claimant became employees of the said university college on secondment from Moi University. The claimant was then handed over officially to Bomet University College as a clerk in the Finance Department on the 29th March, 2018.
3. Sometime back on 28th April, 2017, the claimant was suspended for about 5 months and on reporting to work he was transferred to the academic department specifically Admissions and Examination section vide a memo dated 18th September, 2017. The deployment to academic department interfered with his part time studies because the Respondent did not allow personnel in the academic department to continue with their education on allegations that there was conflict of interest that might lead to examination irregularities.



4. Dissatisfied with the deployment to academic department, the claimant filed this suit on 27th September, 2018 seeking the following reliefs; -
 - a. A Declaration that the temporary discontinuation/ stoppage of work against the claimant by the respondent on account of unproven allegation of fraud and subsequent redeployment to another department was malicious, unlawful, unfair, unprocedural and a fundamental violation of the rights of the Claimant;
 - b. A Declaration that the subsequent discontinuance of part time education of the claimant by the respondent on account of conflict of interest and being a result of respondent malice was discriminative, malicious, unlawful, unfair, unprocedural and a fundamental violation of the rights of the Claimant,
 - c. A declaration that the actions of the 1st respondent and his quarters are an abuse of office as well that the same defamatory statements be held as exposing him to personal liability.
 - d. An Order to reinstate the rights of the claimants to the position/department which allows him to continue his part time education and enjoy conducive working environment.
 - e. General damages for psychological torture, trauma and defamation of name, destruction of the professional reputation and academic progress.
 - f. Costs and interest of this suit.
 - g. Any other award as the Honourable Court deems fit to grant in the circumstances of this case.
5. The Respondent entered appearance and filed a response to claim on the 17th December, 2018 admitting to receiving the claimant as a secondment employee from Moi University and contends that the claimant was Moi University employee who was governed by the terms of services indicated in the letter of appointment of 12th August, 2011. It is the Respondents' case that the claimant failed to adhere to code of conduct informing its decision to suspend him from work, however while the claimant was on suspension he received his salary in full together with all other emoluments.
6. The Respondent avers that, being the employer it was mandated to exercising disciplinary control over its employees and deploy them if need be, an act which did not augur well with the claimant leading to institution of this suit. The Respondent then denied the claims of defamation and discrimination pleaded by the claimant.
7. The Respondent also denied ever violating the claimant's right as stated in the claim and put him to strict proof thereof.
8. While this case was pending for determination in Court, the Respondent vide its letter dated 13th March, 2019 redeployed the claimant to Moi University for the reason that the wage Bill was so high that the Respondent was unable to manage. The claimant was instructed to report to Moi University on 18th March, 2019 for assignment of duties by the Vice Chancellor. At the time of redeployment of the claimant back to Moi University, the Respondents had not regularized any seconded staff from Moi University.
9. This redeployment informed the claimant application dated 27th March, 2019 seeking to stop the redeployment on the basis that the Respondent and Moi University were two separate legal entities and their Human Resource could only be governed separately and therefore the re-deployment was a nullity. It is not clear whether the claimant ever reported to Moi University as advised. As soon as the



- claimant was served with the letter of redeployment to Moi University, his salary at the Respondent was stopped which the claimant also protested and filed another application on 7th May, 2019.
10. The claimant states that he was frustrated with the actions of the Respondent and tendered his resignation dated 8th November, 2019 with a notice of 21 days. He then filed an amended claim dated 4th February, 2020 seeking to be paid 12 months' unpaid salary withheld amounting to Kshs 446,880, unpaid expense of Kshs 44,880, terminal dues on resignation of Kshs 2,859,633, settlement of allowance on redeployment to and from Moi University of Kshs 137,400, damages for discrimination of Kshs 90,000, claimable compensation of Kshs 446,880 all adding up to Kshs 4,025,393.
 11. On 5th March, 2020 the matter was mentioned before this Court and the Court directed parties to explore out of Court settlement. This Court is then informed that an Ad-Hoc committee was formed by the Respondent who deliberated over the issue and made recommendation that the claimant be recalled back to Bomet University College and his employment regularized, that the resignation tendered by the claimant be considered as withdrawn by the claimant, that all employees seconded from Moi university and not redeployed back be regularized as employees of Bomet University College, the claimants claim of salary arrear from the period of redeployment to Moi University should not be paid since he was not the Respondent's employee. If the claimant was agreeable to the resolution of the ad-hoc committee then this suit be withdrawn since the issues would become settled.
 12. The claimant agreed to the said resolution save for the payment of arrears which he insisted that the Respondent ought to pay him. The claimant was then issued with a new employment letter dated 20th February, 2020 and he resumed his duties with the Respondent earning a gross salary of Kshs 59,193. The parties herein did not file a consent after the above agreement, neither did the claimant withdraw the suit as allegedly agreed.
 13. On 6th February, 2021, the claimant tendered another resignation letter calling it 'second notice to enforce the resignation dated 18.11.2019'. The reasons for resigning according to the letter was based on alleged frustrations, victimization and retrospective assassination of his career and Reputation by the Respondent. The resignation letter was accepted by the Respondent on the 22nd February, 2021 and he was duly served with certificate of service on 5.5.2021.
 14. After resigning the claimant sought to amend his claim to reflect the new emoluments, which application was allowed by the court on 28th October, 2021, however the Claimant did not file any further Amended claim.
 15. The matter therefore proceeded for hearing on the 7th and 8th December, 2021 when both parties gave evidence and thereafter filed written submissions.

Claimant's Case

16. The claimant testified as CW-1 and in brief stated that that he was employed by Moi University on 18.2.2010 as a clerk and on 5.9.2016 he was transferred on secondment to Bomet Campus in the same capacity where he worked till the campus became a constituent college of Moi university on 27.7.2017 thereby becoming semi-autonomous.
17. On 29.5.2018 Moi University officially handed him over together with other employees, assets and liabilities. In March 2019 the claimant was redeployed back to Moi university together with other employees, however upon reporting to Moi University he was informed that he was already an employee of Bomet University college and a letter dated 18.6.2019 was written to that effect.



18. The claimant further testified that his salary was stopped from March, 2019. Even after serving the Respondent with the letter from Moi University, he was not allowed back to work nor was he paid his salary.

PARA 19.

Prior to his redeployment to Moi University, the Respondent allegedly fabricated criminal charges against him and he was charged in Bomet Law Court in Criminal case number 148 of 2019, which issue was published in the daily nation of 17.2.2019. Another article titled 'Millions lost in a scam' was published with his name mentioned therein. Subsequently, a staff meeting was convened by the Joshua Kwonyike the Deputy Principal in charge of academic where he called him a fraudster.

20. He contended that, the act of stopping his salary was tantamount to being constructively dismissed and he resigned. After tendering his resignation the respondent called him and offered him the job afresh. The claimant accepted on condition that the Respondent would pay him all the arrears, withdraw the criminal charges and clear his name as published in the newspapers. However, the Respondent failed to perform its part of the agreement by failing to pay him allowances and salary arrears and also failed to withdraw the criminal charges. He was never the less discharged by the court on the 5.1.2021.

21. The claimant then served a resignation on the 6.2.2021 which was accepted by the Respondent on the 22.2.2021. Thereafter the claimant further amended his pleadings on 29.6.2021 to reflect the new developments.

22. On cross examination by Chepkirui Advocates, the claimant testified that he was paid from the time the Respondent was constituted and the salary was regularized in December, 2018. He admitted to having been away not working for the respondent from March, 2019 to March 2020.

23. He contended that the Respondent partially complied with the terms of the consent which informed his decision to accept the re-appointment by the Respondent and worked for the Respondent till his second resignation. Finally, he admitted that the Respondent paid him all his salary when he was working for it.

Respondent's Case.

24. The Respondent's, lecturer and former Assistant Academic registrar in the year 2018, Dr. Henry Cheruiyot, testified as RW-1. He adopted his witness statement dated 4.3.2020 but sought leave to expunge paragraph 10 and 11 of the said statement. He then adopted the list of documents which were marked as Exhibit D1-7 respectively.

25. On cross examination by the Claimant, RW-1 testified that he was not aware of the resignation by the claimant. He testified that he was a witness in the criminal charges against the claimant but denied being the complainant. He further testified that the claimant was redeployed to Moi University but he was returned to Bomet University College in March 2020.

26. He testified that by the time the claimant came back to the respondent he had left the Human resource office. He admitted that the Respondent accepted the resignation by the Claimant by a letter dated 22.2.2021 but denied being aware whether any disciplinary action was taken against the claimant.

27. On re-examination Rw1 testified that the claimant never worked from the time he was redeployed to Moi University and that the claim before the court is not in related to the said resignation.



Claimant's submissions.

28. The claimant submitted that he resigned from the Respondent on 6th February, 2021 and the resignation was accepted by the Respondent on 22nd February, 2021 without any objection to the terms of resignation. He clarified that the reliefs he is seeking are contained in the application of 29th June, 2021 which ought to guide this Court.
29. It is the claimant's submissions that the acceptance of the resignation by the Respondent was a clear indication of admission of liability on their part and therefore they ought to be compelled by this Court to pay the monies sought in the amended claim and subsequent applications.

DIVISION - Respondent's Submissions

30. The Respondent on the other hand submitted that the claimant failed to amend his pleadings when he was granted leave to do so by this Court and instead opted to rely on the prayers in the said application contrary to the law. It was further argued that the failure by the claimant to make the amendment and file the further amended claim reverted his claim to the previous claim filed on 5th February, 2020.
31. In support of their case the Respondent cited the case of Board of Governors, Changamwe Secondary School V Commissioner of Lands & 2 others [2018] eKLR where the Court held that;

“This Court was made aware of the decision in HCC No 485 of 2000 as I made reference to it in my ruling of 30.10.2015. In spite of that decision I still gave the plaintiff a chance to amend its pleadings to enable it bring its claim against the 3rd Defendant/Applicant who had just been joined. Once the amendment was done then the 3rd defendant would file its defence and the Court would have been in a position to be informed whether a different cause of action from that in HCC 485 of 2000 had arisen. The plaintiff has neglected and or failed to do so and should not be allowed to delay the prosecution of this matter merely because it is a School as justice must be served to both parties equally. The plaintiff did not even plead how long it required to effect the amendment. I am therefore in agreement with the 3rd Defendant/Applicant that in the absence of an amendment, there is no competent suit before the Court following the withdrawal of the substantive prayers made on 16th December 2014”.

32. On whether the claimant was the Respondent's employee before 20th February, 2020, it was submitted that the claimant together with other employees were seconded from Moi University and therefore they were Moi University employees who could be redeployed back to the parent institution any time. It was their submissions that the claimant together with all other seconded employees were never regularized at Bomet University College prior to the redeployment to Moi University. In support of their argument the Respondent cited the case Rev. John Mugania versus Kenya Methodist university & Prof. Mutuma Mugambi, Cause No.133 of 2013 where the court held that;

“secondment refers to temporary leave of absence from service of the principal employer to serve any other employer as the parties may agree or may grant permission for such temporary absence. During the secondment, the person proceeding on secondment must conclude a valid contract of employment with such other employer. The employer during secondment is responsible, within the terms of the contract of employment, to meet the salary and other benefits of the person so seconded. The person on secondment is obligated to work for such employer and pay loyalty to the employer, within the terms of the contract, throughout the secondment period. The secondment transaction does not, in absence of



an agreement to that effect, transfer to the employer, liabilities for pension of the person on secondment, unless this is expressly so stated prior to the secondment.”

33. On whether the resignation amounted to constructive dismissal, it was submitted that there is no evidence tendered by the claim to demonstrate that indeed it is the Respondents’ actions that forced him to resign from his employment. The respondent maintained that the claim of constructive dismissal was not proved to the required threshold as formulated in the case of Coca Cola East and Central Africa Limited v Maria Kagai Ligaga[2015] eKLR.
34. On the issue of defamation pleaded by the claimant, it was submitted for the Respondent that the claimant has also failed to prove the said tort to the required standard as was held in Nation Newspapers Limited V Lydia Chesire [1984] eKLR.
35. The Respondent then submitted that the claimant’ claim for a certificate of service can only be issue for the period worked for the Respondent and not from his date of employment at Moi University.
36. In conclusion, the Respondent submitted that the claimant is not deserving of the reliefs sought and urged this Court to dismiss the claim with costs.

Issues for determination and analysis

37. Having carefully considered the pleadings, evidence and submissions, the issues for determination are: -
 - a. Whether there is a valid amended statement of claim on record.
 - b. Whether the claimant’s resignation amounts to constructive dismissal.
 - c. Whether the Claimant is entitled to the reliefs sought.

Amended statement of claim

38. The claimant filed Statement of Claim on 27 the September, 2018 through Nyaata & company Advocates, complaining against unconducive working environment allegedly occasioned by the respondents. In the suit he sought declaratory orders, reinstatement to his position/department, and general damages for defamation and psychological trauma. The respondents filed defence on 17th December, 2018 through Sing’oei, Murkomen & Sigei Advocates, denying the alleged breaches and urged the court to dismiss the suit.
39. Thereafter the claimant decided to act in person and has since filed all manner of documents most of which are alien to the court’s rules of procedure and the law. The documents include amended Statements of Claim which were filed without the leave of the court. The only time he sought leave to amend the claim was on 1st July, 2021 when he filed the Notice of Motion dated 29th June 2021. The leave was granted by Wasilwa J on 28th October, 2021 but the claimant never filed any Amended Statement of Claim in accordance with the rules.
40. The provisions relating to amendment of pleadings in this court are contained in Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules, 2016 which requires that after filing of defence by the respondent, any amendment to the claim can only be done with the leave of the court. It follows that after seeking and obtaining the leave, the party concerned is obliged to file the intended amended pleading. Filing is only valid if the party pays the relevant court fees for the document.
41. In this case the claimant never filed an amended statement of claim after obtaining leave of the court vide the ruling delivered on 28th October, 2021 as alluded to by the respondents. Without any valid amendment to the claimant’s pleadings, this court will be limited to making its determination based



on the initial Claim filed on 27th September, 2018. All the other “pleadings” filed by the claimant between the initial pleading and 28th October, 2021 are therefore invalid and cannot be considered in this judgment.

Was the claimant constructively dismissed?

42. A lot has been said about constructive dismissal. It is now trite law that constructive dismissal occurs where the Employer’s behavior is so intolerable, that it makes it considerably difficult for the Employee to continue working. The Employee initiates termination, believing himself, to have been fired. The Employer is deemed to no longer be interested in honoring the terms of the contract of employment. The Employee must demonstrate that the Employer has engaged in repudiatory breach. The Court must be persuaded that the Employee has reason to resign. Employer’s actions need not be coercive, threatening or in the nature of duress.
43. This was affirmed by the Court of appeal in Court of Appeal Civil Appeal Number 20 of 2010, Coca Cola East & Central Africa Limited v. Maria Kagai Ligaga [2015] e-KLR when it held that:-
- “The key element in the definition of constructive dismissal is that the employee must have been entitled to or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer’s behaviour towards him was so unreasonable that he could not be expected to stay- this is the unreasonable test. The second interpretation is that the employer’s conduct is so grave that it constitutes a repudiatory breach of the contract of employment- this is the contractual test.”
44. The claimant indeed tendered his resignation letter dated 8th November, 2019 and before the same took effect, the parties, following the advice of this Court, explored an out of Court settlement. The Respondent formed an Ad-Hoc committee to deliberate over the issue of the claimant’s resignation and made recommendation. There is no dispute that the claimant was reinstated as a result of the negotiations between the parties. Consequently, I find and hold that the issue of constructive dismissal with respect to the resignation made on 8th November 2019 has since been compromised and is overtaken by events.
45. Further, the court considers that the second resignation, claim for salary arrears and terminal benefits to be a non-issue in this suit since they were not pleaded in the statement of claim filed by the claimant. In my view, they are new causes of action introduced after the close of pleadings without leave of the court.

Reliefs sought.

46. Having found that the claim for constructive dismissal with respect to the resignation done on 8th November 2019 has since been compromised by the parties I decline to grant the declaratory orders sought by the claimant. Likewise the prayer for reinstatement has also been overtaken by events following the said compromise.
47. The claim for general damages for defamation and psychological trauma is also declined because the claimant did not prove the said torts on a balance of probability. He did not establish the ingredients of defamation by evidence.
48. As regards the issue of costs of the suit, I award the same to the claimant because he was forced to come to court by the respondent.



49. As a parting shot, I wish to observe that the issue of the salary for the period between the date of redeployment to Moi University in March 2019 and February 2020 has not been resolved because it is not covered by the pleadings herein. The parties are therefore at liberty to resolve the matter to avoid coming back to court for more cases.

CONCLUSIONS

DATED, SIGNED AND DELIVERED AT NAKURU THIS 22ND DAY OF APRIL, 2022

ONESMUS N. MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

