



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

CAUSE NO.1255 OF 2017

WILBER OPIYO OGOL.....CLAIMANT

VERSUS

WELLS FARGO LIMITED.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Claimant filed a Memorandum of Claim dated 4th July 2017 suing the Respondent for unlawfully and unfairly terminating his employment and/or dismissing him from employment and withholding his wages. He avers that the Respondent employed him between 17.06.2008 up to 19.09.2014 on permanent basis and he was entitled to all other benefits under the law and his contract of service. He says his employment was subject to employment Act and all applicable legislation.

CLAIMANT'S CASE

2. The claimant claims that on 19.09.2014 at around 7.30pm the Directors of the Respondent forcefully made him resign from his employment under unclear circumstances and under duress. That prior to writing the said resignation letter there was already an email to all staff indicating that the Claimant was no longer the Respondent's Area Manager of Elgon and he had presented himself to a convened board meeting to be heard before being forced to resign. That he was also told to immediately hand over the company's car, laptop, and mobile phone together with his staff ID card. That despite the Respondent maintaining him on the payroll until 03.10.2014 basing on the fact that he had not yet taken his leave he was never paid for the months of September and October 2014.

3. It is the Claimant's averment that he was subsequently terminated contrary to his contract of employment and that he was not accorded an opportunity to respond to any allegations or accorded a hearing in respect of any alleged misconduct. That the Respondent has never made any effort to rescind its actions despite his protests against the forced resignation and subsequent unfair termination and has also never given him any opportunity to appeal. The Claimant thus seeks judgment against the Respondent for a declaration that he was unfairly and unlawfully constructively dismissed and for payment of one month's wages in lieu of notice, unpaid salaries, severance pay, untaken leave of 30 days, 12 months' gross wages as compensation, and damages for mental anguish and degradation.

RESPONDENT'S CASE

4. The Respondent filed a Memorandum of Response dated 28th June 2019 averring that the Claimant resigned from its employment of his own volition and that he has failed to identify the directors who purportedly forced him to resign. It avers that the Claimant was summoned to the head office as part of inquiry on allegations of misappropriation of funds in its Eldoret Branch since he was the Area Manager and that there was no allegation made against the Claimant as having been involved in the misappropriation.

5. That the said inquiry was thus not a disciplinary hearing but was a management meeting on operational matters and that it is in the course of that said meeting that the Claimant opted to resign even before the inquiry could be completed. The Respondent further avers that the email was only sent out to all critical staff after the Claimant had presented his resignation letter to the management and was sent on the same day due to the Claimant's sensitive and critical role.

6. That the Claimant's resignation letter makes no reference to any coercion as alleged, which claim is thus an afterthought and that contrary to the Claimant's assertions, it paid him his salary for September 2014. That the reliefs sought in the Claim cannot therefore be sustained in view of the Claimant's voluntary resignation and that he is particularly not entitled to severance pay since he was not declared redundant under Section 40 of the Employment Act. Further, the Claimant only had 12 leave days due as at the date of his resignation which were then offered to him as part of his notice period. It prays that the Claimant's claim be dismissed with costs to it.

CLAIMANT'S SUBMISSIONS

7. The Claimant submits that as per **Clause 8 of his contract of employment**, he was entitled to one month's written notice or payment in lieu and that his leave entitlement under **Clause 10** was 24 days.

He further submits that the chronology of events leading to his resignation, as pleaded, demonstrates that he was constructively terminated and that the Respondent has not produced any document to show that it gave him notice or that minutes were taken during the said mysterious meeting that led to his alleged voluntary resignation. That the **Black's Law Dictionary (9th Edition)** defines "constructive dismissal" as a termination of employment that occurs when the Respondent makes the employee's working conditions so intolerable that the employee feels compelled to leave employment.

8. That the concept of constructive dismissal was discussed in **KENNETH KIMANI MBURU & ANOTHER V KIBE MUIGAI HOLDINGS LIMITED [2014] ECLR** wherein the Court asserted that in constructive dismissal an employee may terminate the contract with or without notice by reason of the employer's conduct.

He also relies on the Court of Appeal case of **COCA COLA EAST AFRICA LIMITED V MARIA KAGAI LIGAGA [2015] ECLR** wherein the Court found that the Respondent was constructively dismissed as her letter of termination was not voluntary. Further, that the Court in **EDWIN BEITI KIPCHUMBA V NATIONAL BANK OF KENYA LIMITED [2018] ECLR** held that the court must be persuaded that the employee has reason to resign which in his case he has shown that he was on an upward trajectory at his place of work and thus had no reason to resign.

9. It is the Claimant's submission that constructive dismissal may be as a result of a series of acts or a unilateral act like it was in the instant case and that the Respondent has admitted in its pleadings and through evidence of Respondent witness (RW1) that the Claimant was never to blame for the mismanagement of funds.

10. The Claimant further submits that the Respondent has failed to prove that it duly paid him salary for the stated months and that the payslip the Respondent produced is an internally manufactured document which is further not signed by him. That the Court in **ALICE M'MBOGA OGOLLA VS NYAYO TEA ZONES DEVELOPMENT AUTHORITY [2017] ECLR** held that it is the responsibility of the employer to keep records of employment for all employees and to produce such records when required. That this Court should thus find that the Respondent has failed to discharge its burden of proof that he was paid. Further the court should find that the claimant was not paid salary for the months of September and October 2014.

11. He further submits that the Respondent's stated that they had no evidence to show how leave was taken and which thus entitles him to the claim for untaken leave. He pleads an award of Kshs.500,000/= as general damages for mental anguish and degradation and waives the claim for severance pay. That he has proved on a balance of probabilities that he was forced to resign by the Respondent.

RESPONDENT'S SUBMISSIONS

12. The Respondent submits that whereas the embezzlement of funds had been undertaken by one Nobert Nyongesa who was supervised by the Claimant, it was important for management to understand from the Claimant the gaps that could have led to the embezzlement. That the directors who questioned the Claimant were well within their prerogative rights as management to make inquiries on the embezzlement of funds and could not thus be faulted for calling the meeting.

13. It further submits that the most immediate piece of evidence demonstrating that the Claimant's resignation was voluntary and not coerced is the wording of his resignation letter in his own handwriting. It relies on the case of **EDWARD MACHUKA NYAMORA V KENYA ANIMAL GENETIC RESOURCE CENTRE FORMERLY CENTRAL ARTIFICIAL INSEMINATION STATION [2018] ECLR** wherein the Court noted that a reasonable employee in a senior position would tender resignation under protest and state that the resignation was forced and not voluntary and that the burden of proving forced resignation was squarely on the claimant who failed to prove on a balance of probabilities.

14. That similarly in the case of **JACKSON MURITHI KIURA VS FAMILY BANK LIMITED [2022] ECLR**, the Court noted that the claimant having occupied a senior position within the respondent's establishment had capacity to take issue with the conduct of his employer at the time of resignation but failed to do so and that the claim was evidently an afterthought. It is the Respondent's submission that in the instant case the Claimant was in senior management overseeing numerous Branch Managers and would thus have declined to sign any such resignation letter by coercion.

15. That the Claimant's claim for constructive dismissal was a clear afterthought since he only raised the same almost three years later vide these proceedings and also failed to indicate in his resignation letter or do a separate communication shortly thereafter stating that he had been coerced. That in any event the Claimant has failed to prove constructive dismissal because he did not prove that the Respondent's workplace was a hostile environment to work in as affirmed in **MILTON M ISANYA V AGA KHAN HOSPITAL KISUMU [2017] ECLR**.

16. The Respondent submits that the claim for an October salary has no basis as the Claimant did not remain as its employee up to the end of October and that it has evidenced payment of his September salary by producing payslip for the same at *page 6 of the Respondent's Bundle of Documents*. That the Claimant on his part did not produce evidence to prove the alleged unpaid salaries considering he was paid through his bank account and would have presented his account statement demonstrating he never received any monies. It further submits that even if the Court was to find that the Claimant was entitled to damages for unfair termination, he would not be entitled to compensation of 12 months' salary because of the length of his service and comparable opportunities for employment as provided in **Section 49(4) (e) and (g) of the Employment Act**. That the Claimant worked for it for 6 years and assessment for compensation should not be more than the equivalent of 2 months' salary.

17. In a rebuttal, the Claimant submits that the Respondent's sentiments that he should have refused to sign and that he should have

indicated he had been forced to resign are misconceived since he testified that at the time he was under coercion, duress and imminent danger. Further, the cases cited by the Respondent are distinguishable as they involved claimants who resigned to avoid summary dismissal whereas for him it is admitted that he had exemplary work record and was not blamed for the alleged mismanagement of funds.

18. He further submits that the grant of damages for unfair termination is assessed at the court's discretion based on the circumstances and facts of each case as affirmed in the case of **GITOBU IMANYARA & 2 OTHERS VS ATTORNEY GENERAL [2016] EKL.R.** That considering he had rendered selfless service to the Respondent, was coerced to resign and then stayed unemployed for extended periods of time he is entitled to damages of 12 months' salary. That the power to order costs is inherently with the court as reiterated in **CECILIA KARURU NGAYU VS BARCLAYS BANK OF KENYA & ANOTHER [2016] EKL.R.**

DETERMINATION

19. ISSUES FOR DETERMINATION

- 1) Was the claimant constructively dismissed or he resigned voluntarily
- 2) Is he entitled to any reliefs?

DECISION

20. The evidence adduced in court by the Claimant on 3rd November, 2021 and in his pleadings and submissions is to the effect that on 18th September, 2014 he was summoned to the Respondent's head office by the Human Resource Manager. On arrival to Nairobi he was taken to the office of Personnel Director.

21. He says he found Group Operation Manager Mr. Gullen and Operational Director as well as Personal Director.

He says that as he was being escorted to the Personal Director's boardroom the Human Resource Manager informed him that should he be asked to resign he should just accept.

22. He says that in that meeting he was told that there was misappropriation of funds by his branch manager Nobert Nyongesa and that he should take responsibility. He says he was asked to resign but he said he would not resign.

He says he was not allowed to even get for fresh air.

He says at 6.00p.m he saw an email from his phone by Mr. Cullen informing the employees that he was no longer their employee. He says he finally wrote a resignation letter by 8.30p.m.

He says his car and phone and laptop were taken away that same day. He says the Human Resource Manager promised to pay his salary but was not paid the salary for that month of September. His resignation letter is dated 19th September, 2014.

23. The Claimant prays the court to find he was constructively dismissed because he was put under pressure by the Respondent's management to resign as a result of alleged misappropriation of funds by one of his manager's one Nobert Nyongesa.

24. Indeed the sequence of events of that material day the 19th September, 2014 are quite interesting.

First Claimant was called from Eldoret to come to Nairobi to their Head Office. He was in a senior position overseeing four regions. There is no evidence presented in the court that the Claimant had any disciplinary issues with his employer.

25 Claimant says he was then taken through a meeting with the Director of Operation and Human Resource Manager and Personal Director.

He says he was asked to take responsibility for the misappropriation of funds by Mr. Nyongesa and that he should resign.

26. The court finds the Claimant's evidence and pleadings are believable and sees no reasonable explanation why he should have come for a normal meeting to explain about loss of money and then abruptly opt to resign with no premeditation or provocation.

Respondent witness as well admits the inquiry was not implicating the Claimant but was a normal management meeting. It is not believable that a Senior Manager would be invited for a normal management meeting and then with no force or threats opt to resign immediately.

Yet the Claimant states categorically he was pressured to resign.

27. He says that even before he could resign Mr. Cullen the Executive Director circulated an email to the other employees to the effect that the Claimant was no longer an employee of the Respondent.

He says immediately he wrote the letter his car and laptop and phone were taken away and he was escorted out of the premises by an armed escort.

28. In the case of **COCA COLA EAST AFRICA VS MARIE KAGAI LIGAGA (2015) eKLR** the court held that the criteria for determining if constructive dismissal has taken place is repudiatory breach of contract through conduct of the employer. The burden of proof is on the employee. The employer's conduct has to be such as when viewed objectively it amounted to repudiatory and fundamental breach of contractual obligations".

29. Also in the case of **KENNETH KIMANI MBURU & ANOTHER VS KIBE MUIGAI HOLDINGS LIMITED (2014) EKLR** the judge expressed himself on the concept of constructive dismissal as follows. "The conduct of the employee must be shown to be so intolerable that it made it considerably difficult for the employee to continue working. At the heart of the constructive dismissal is breach of the duty and trust and confidence.

The behaviour of the employer must be shown to have destroyed or seriously undermined trust and confidence.

30. Indeed I find no reason why the Claimant who had a high level job with the Respondent would just have resigned because of an investigation that did not even involve him. The Claimant had no reason to resign abruptly and considering the events just before then where he had a good working relationship with the Respondent. I find his evidence believable.

For some reason it would appear some of the management of the Respondent pushed him to resign for reasons best known to them.

31. It is noteworthy that Mr. Cullen even circulated the email either before he had resigned or just after he resigned informing other staff members that the Claimant was no longer an employee of the Respondent. Somebody was in a hurry to get rid of the Claimant. Immediately they took over his laptop and his vehicle and company phone.

32. The court has critically considered the evidence adduced by the respective parties and their submissions and is convinced the Claimant was forced to resign and he never resigned voluntarily. The Claimant having been an employee of the Respondent for over five years he was constructively dismissed and so he was unlawfully, unfairly and wrongfully terminated.

REMEDIES

Having found that the Claimant was unlawfully, wrongfully and unfairly terminated, I award him the following reliefs:-

1. One month salary in lieu of notice Kshs.105,000/=.
2. Salary for September and 3 days in October, 2014 Kshs.115,000/= as the Respondent did not prove they paid him rather than producing a payslip. A bank statement would have been more convincing evidence.
3. Severance pay is not applicable since this is a case of unlawful termination not termination due to redundancy.
4. Leave pay is not applicable as the Claimant admitted he went on 12 days leave after the forced resignation and so is declined.
5. Payment of compensation for wrongful termination for 5 months amounting to
Kshs.105,000 x 6= Kshs.525,000.

The above compensation is enough compensation for mental anguish and degradation and unlawful termination.

6. The effect of my award is Kshs.745,000/=.
7. Costs are awarded also to the Claimant.
8. Orders accordingly.

Delivered, dated and signed in Nairobi this 13th day of April, 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 15th March 2020 and subsequent directions of 21st 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 **Civil 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