



**Momanyi v Menengai Oil Refineries Limited (Cause 254 of 2017)
[2022] KEELRC 1701 (KLR) (17 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1701 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 254 OF 2017
HS WASILWA, J
MAY 17, 2022**

BETWEEN

JOSHUA OGAMBA MOMANYI CLAIMANT

AND

MENENGAI OIL REFINERIES LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this claim on June 9, 2017 vide a memorandum of claim dated June 8, 2017 alleging to have been constructively terminated from employment without any payment of his terminal dues.
2. The summary of the Claimant case is that he was employed by the Respondent sometimes in April, 2012 in the position of a general worker earning a daily wage of Kshs 320.
3. The circumstances leading to his termination was that there was an incident at the work place where corrosive chemicals burnt the Claimant's face and hands occasioning serious injuries. The Claimant then sought for medical treatment where he was treated and advised by his doctor not to work in the said place. However, on seeking to be transferred to another department within the Respondent's employment, the Respondent refused to transfer him leading to his resignation vide its letter dated July 1, 2015 which took effect from August 1, 2015.
4. The Claimant alleged that he worked in the department where he was exposed to hazardous chemicals without being given the appropriate protective gear.
5. It is also alleged that prior to resigning the Claimant had sought for 2 weeks' sick leave to recuperate from the burns which the Respondent granted but failed to pay him during the sick off days.
6. The Claimant alleged to have been underpaid and claimed Kshs 124,194 as underpayment. He also prayed for overtime alleging that he reported to work at 6am and clocked out at 7 pm clocking



10 hours a day therefore praying for Kshs 86,009.94 for overtime. He also claimed to have worked during all public holidays during the period and prayed for Kshs 31,098.77 as compensation therefore. Additionally, he prayed for gratuity, one-month salary pays in lieu of notice and compensation for the unfair termination of Kshs 21,793.50, Kshs 10,107.10 and Kshs 174,348, respectively.

7. The Claimant sought for the following Orders;-
 - a) A declaration that the Claimant's dismissal was unlawful, unjust and discriminative and the same amounts to constructive dismissal.
 - b) Compensation for the unfair termination/constructive dismissal.
 - c) An order compelling the Respondent to settle the outstanding benefits as enumerated at paragraph 22 of the claim.
 - d) Costs of the suit and interest thereof at Court rates.
 - e) Any other relief that this Court may deem fit to grant.
8. The Respondent entered appearance on January 25, 2019 and filed a response to claim on February 6, 2019. The Respondent admitted employing the Claimant within the stated terms albeit on need basis. The Respondent denies dismissing the Claimant as alleged rather that the Claimant resigned from duty for undisclosed reason.
9. The Respondent avers that the Claimant was employed and worked in the packing department where he was tasked with packing oil, therefore he was not exposed to any hazardous chemicals as pleaded. It was further stated that the Respondent does not deal or have any corrosive substance at its factory as alleged.
10. The Respondent states that the Claimant worked with it in the packing department intermittently till July 1, 2015 when he tendered his resignation letter which letter was accepted by the Respondent and the last date of service was on July 31, 2015. The Claimant was then paid his salary and leave pay and their employment relationship came to an end. It is then stated that at the time of termination the Claimant was paid Kshs 587.00 per day as such was never underpaid as alleged.
11. The Respondent denied the allegation of injury pleaded by the Claimant and stated that the Claimant never sustained any injuries while working for it, neither did it seek two weeks leave as alleged therefore that the allegation of constructive termination is not justified.
12. The Respondent also avers that the Claimant was working within the normal time limits and never worked overtime as alleged neither was he engaged during public holidays.
13. On the gratuity sought, the Respondent avers that it remitted Claimant's NSSF to the statutory body as such the Claimant is not entitled to any gratuity, in any case the same was not payable to their employees.
14. The Respondent urged this Court to disallow the Claimant with costs.

Hearing.

15. During hearing the Claimant testified as CW-1 and stated that he sustained injuries as captioned by the treatment notes and the report by Doctor Obed Omuyoma captured in the list of document dated February 28, 2019. He further testified that the doctor advised him to seek for transfer to another department which the Respondent refused to transfer him to. He stated further that upon his termination he was paid his July salary only and nothing was paid for his terminal dues including



- the leave days admitted by the Respondent. He then maintained that he worked for about 12 to 13 hours and during the Holidays without any compensation in terms of overtime and extra pay during the Holidays.
16. Upon cross-examination by Chepngetich Advocate, the witness testified that the pays lip is not correct as it indicates that he worked in stores which was not true. He also testified that when he was injured he was given sick off leave which his employer was aware of and on reporting he furnished his employment with the medical treatment notes. He then stated that upon resignation the Respondent did not inform him of acceptance of the same and that he never received the letter of July 8, 2015. He stated that he was paid July salary only.
 17. Upon further cross examination, CW-1 admitted that his pay slip shows he was a member of NSSF. He indicated that he reported to work mostly between 6am and 7am and left at 8pm or 9pm depending on work load.
 18. The Respondent did not call any witness and their case was closed on January 20, 2022.

Claimant's Submissions.

19. It was submitted for the Claimant that the Claimant was forced to resign from the Respondent's employment when he was denied transfer to another department after recuperating from exposure to hazardous chemicals that caused him burns on his face and hands. It was then argued that the failure to transfer the Claimant to another department forced him to resign therefore that the termination was constructively caused by the Respondent. In support of this argument the Claimant relied on the case of *Coca Cola East and Central Africa Limited V Maria Kagai Lugaga* [2015] eKLR.
20. The Claimant then submitted that the Respondent failed to provide it with safety gear as provided for under section 3 of the *Occupational safety and Health Act*, Chapter 514 of the laws of Kenya, causing him to sustained the injuries complained against therefore that the Respondent ought to take responsibility for the injuries incurred at work place. The Claimant then relied on the case of *Purity Wambui Muriithi V Highlands Mineral Water Co Limited* [2015] eKLR.
21. Finally, it was submitted that the Claimant has proved his case to the required standard and he therefore prayed for the claim to be allowed as prayed.

Respondent's Submissions.

22. The Respondent on the other hand submitted that the Claimant resigned from employment vide his letter of July 1, 2015 which resignation was accepted on July 8, 2015 therefore that the termination was initiated by the Claimant and not caused by the Respondent as alleged and cannot be termed as constructive termination.
23. It was further submitted that the Claimant has failed to show how the Respondent forced him to resign from work as provided for under the case of *Coca Cola East and Central Africa Limited V Maria Kagai Lugaga (Supra)*.
24. With regard to the reliefs sought, it was submitted that no justification has been given for payment of 12 months salary as compensation for termination. The Respondent then relied on the case of *Elizabeth Wakanyi Kibe V Telkom Kenya Limited* [2014] eKLR and argued that to grant the clamant such prayer would amount to unjust enrichment as the Claimant would be paid for duration which he did not work for the Respondent. The Respondent then prayed for the suit to be dismissed with costs.



25. I have examined the evidence and submissions presented before this Court. From the exhibits produced by the Claimant, the Claimant was attended to at Mother Kevin Catholic Medical Centre on June 2, 2015 while unwell and the doctor advised him to stop irritating his body. The medical report by Dr. Omuyoma dated August 3, 2015 also show that the Claimant was injured while on duty on June 2, 2015 and sustained burns on the face and hands. From the payslip produced by the Claimant, his gross pay was 7,200/= as at April, 2013.
26. The Claimant indeed resigned vide a letter dated July 1, 2015. He indicated he was resigning because he had been multi treated by his employer.
27. The Respondents didn't call any evidence and so the documents filed by them remained unproduced and could not be relied upon.
28. From the documents by the Claimant therefore, and per his evidence, he resigned due to the mistreatment by the Respondent. The Claimant indicated that he was not paid his salary at the time he was on sick leave recuperating from the burns. He also indicated that he sought to be transferred to another department but the Respondents rejected his request.
29. The Claimant has however not submitted any documents for the transfer request. From his payslip however, I note that 4,800/= was deducted in April 2015 as absent amount which is the period when he had been injured at work. It was indeed callous for the Respondent to proceed to deduct his salary when they were aware of the injury he sustained.
30. This in my view was a good reason for the Claimant to resign citing mistreatment by his employer. This also falls within the preview of contractive dismissal. From the claim, the Claimant seeks to be paid salary underpaid as per the legal notices.
31. I find indeed the Claimant was underpaid as submitted and I find for him and award him the underpayment of kshs 124,194/=.
32. As for the claim of overtime, the Claimant didn't adduce any evidence of the times worked to prove the same. There is no indication that he sought to have the Respondents produce the master roll and they failed. I therefore find the overtime pay not proved and is dismissed.
33. This is also true of gratuity claim as the Claimant was a member of NSSF and was therefore not entitled to gratuity payment.
34. I therefore find for Claimant as follows;-
 1. Underpayment claim of kshs 124,194/=.
 2. Compensation equivalent to 6 months pay for being unfairly constructively dismissed
 $= 6 \times 7,200 = 43,200/=$
 GRAND TOTAL = 169,394/=
 Less statutory deductions
 3. Issuance of a certificate of service.
 4. The Respondents will pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 17TH DAY OF MAY, 2022.

HON LADY JUSTICE HELLEN WASILWA



JUDGE

In the presence of:

Ms Odhiambo holding brief Ms Daye for Claimant – present

Muli & Co Advocates for Respondents – Absent

Court Assistant - Fred

