



**Simotwo v Kenya Farmers Association Ltd (Cause 71 of 2018)
[2022] KEELRC 114 (KLR) (5 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 114 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE 71 OF 2018
ON MAKAU, J
MAY 5, 2022**

BETWEEN

SAMUEL A. K SIMOTWO CLAIMANT

AND

KENYA FARMERS ASSOCIATION LIMITED RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent in the year 1983 as a non-clerical staff and his salary was paid on monthly basis. During his employment the employer used to issue him with payslips for full salary but received less money. The balance was then normally given to him in bits through the petty cash. There are still salary arrears owing.
2. Sometimes in the year 1998, the Respondent's retirement benefits scheme was disbanded and the Claimant was to be paid gratuity which remain unpaid to date. It is alleged that the Claimant raised concerns on the part payment of his salary and the unpaid gratuity which was never acted upon and instead the Respondent adopted the style of transferring him from one branch to another whenever he raised the issue. He was transferred from Nakuru to Sotik, then to Kericho and finally to Bomet branch forcing him to seek an early retirement on the 12th September, 2017.
3. The Claimant contends that he took the early retirement due to frustrations occasioned by the various transfers, unfair-treatment, part payments and unpaid gratuity since the year 1998. He therefore alleged to have been forced to resign from the Respondent.
4. It is stated that, the Claimant's letter requesting for early retirement dated 12th September, 2017 was received and allowed by the Respondent on the 15th September, 2017. The Respondent in the acceptance letter granted the Claimant three (3) months special terminal leave which remain unpaid to date.



5. The Claimant stated that upon acceptance of the early retirement he expected the Respondent to pay his terminal dues together with all arrears which the Respondent has failed to pay. He therefore prays for the following reliefs; -
 - a. A declaration that the early retirement taken by the Claimant was constructively induced by the Respondent through unfair treatment and violation of his employment rights and statutory duties.
 - b. A declaration that the Claimant is entitled to payment of his retirement benefits/ gratuity from the year 1998, salary arrears, allowances and refund of shares contributed to the Respondent's Sacco plus interest at commercial rates.
 - c. An order that the Claimant is entitled to remuneration and gratuity from September, 2017 to July, 2018.
 - d. An order that the Respondent do remit all deducted and unremitted NSSF and NHIF contributions.
 - e. General damages.
 - f. Certificate of service.
 - g. Interest on award from the date of filing suit till payment in full.
 - h. Costs of this suit.
 - i. Any other relief as the court may deem fit and just to grant.
6. The Respondent entered appearance on the 5th September 2018 and filed a response to claim and counterclaim on even date. It admitted to employing the Claimant as pleaded but contended that all his payments were made through either cash or his bank account. Therefore, it denied that it paid the Claimant's salary by petty cash vouchers as alleged.
7. The Respondent avers that at the time of employment, it was implied that the Claimant, just like all its employees, could be transferred to work in any branch within Kenya and the allegation of unfair transfer is unfounded. Additionally, the Claimant used to seek for transfer from it and always allowed the same.
8. The Respondent then avers that the Claimant's reason for taking an early retirement was well captured in his letter of 12th September, 2017 being a persistent ache on his leg which allegedly made him unable to move for long distances. The Respondent then accepted his notice of retirement and allowed him to take immediate retirement without need of the three months' notice period he ought to have worked, which the Claimant misapprehended and now seeks to be paid for the three months.
9. With regard to the alleged deductions made on sick off, the Respondent avers that the Claimant on various occasions absented himself from duty without any permission and the Respondent was duty bound to deduct wages for the days not worked in accordance with Section 19(1)(c) of the Employment Act. Additionally, it was stated that the Claimant was always granted leave whenever he applied for one.
10. Upon accepting the early retirement, the Respondent avers that it entered into an agreement with the Claimant with regard to his terminal dues that the same was to be paid in installment, in any case the letter of acceptance indicated that the terminal dues were to be paid subject to availability of funds.
11. The Respondent then admitted owing the Claimant gratuity of Kshs 391,600 which it was willing to pay. On the subsistence allowance it was stated that the Claimant was paid Kshs 7,065 vide petty cash



- voucher on the 12.2.2013 leaving abalance of Kshs15,000. The Respondent then admitted to being in arrears for the year 2010 and 2013 as pleaded by the Claimant.
12. The Respondent stated that it paid the Claimant this September salary in full through two petty cash vouchers for Kshs 1,779 and Kshs 17,695, October, 2014 salary was paid in full vide petty cash vouchers numbers 22/5 and 9/7 for Kshs.8,000 and Kshs.4,271 respectively.
 13. It then admitted owing the Claimant Kshs. 38,945 being November and December 2014 salary. The Respondent also admitted to claim for salary arrears for the year 2015 from January to September and stated that the salary for October, 2015 of Kshs 19,044.80 was paid in full vide petty cash voucher no.14/2 of 12th November, 2015.
 14. On the deductions made on the Claimant salary, it was stated that the Claimant absented himself from duty without any lawful cause on 15.8.2016,29.8.2016,20.9.2016 and on 30.1.2017 occasioning the said deduction which were done in line with Section 19 of the *Employment Act*.
 15. The Respondent then averred that it remitted all statutory deductions and the NSSF for the Claimant and therefore he is barred under Section 35 and 36 of the *Employment Act* from seeking to be paid gratuity. It further averred that there was no agreement between the parties for payment of any gratuity to the Claimant.
 16. In the counterclaim, the Respondent averred that during the subsistence of this claim it paid the Claimant a cumulative of Kshs 327,800 and another Kshs 21,544 erroneously paid to the claim on the 30th April, 2016 adding up to Kshs 349,344 which it is counter claiming from the Claimant together with costs and interest.
 17. The suit went to full hearing and both parties tendered evidence and thereafter filed submissions.

Evidence

18. The Claimant testified as CW-1 and adopted his statement dated 1st August, 2018 as his evidence. He also produced seven documents in his list of document dated even date as exhibits. In brief, he contended that he was transferred far station without request and without being paid relocation allowances. His salary was also not paid in full making him fall in arrears in his financial obligations such as rent. Money deducted from his salary for sacco contribution was not being remitted by the employer. Therefore, he was forced to resign due to the foregoing frustrations.
19. He then prayed for the claim to be allowed as prayed including gratuity and salary for three months he was placed on special terminal leave after requesting for the early retirement.
20. On cross examination by Omae Advocate, the witness testified that his appointment by the respondent meant that could work in any of its station in Kenya.
21. He then denied receipt of Kshs 3000 shown in the Voucher dated 7th September, 2017 but he acknowledged the signature thereon to be his. He also denied receipt of the cheque number 006541 for Kshs. 30,000 dated 23rd February, 2016 referred to in the letter dated 18th February, 2016. He also denied receipt of Kshs.1,779 in the voucher dated 30th May 2015, Kshs. 8000 in the voucher dated 31th March 2015, Kshs 19,004 dated 13th April 2016, Kshs 21,544 dated 30th April 2016 and Kshs 5,000 in the voucher dated 4th December, 2017. He also never received the payments indicated at page 24 to 32 of the defence.



22. He admitted receipt of Kshs.17695.20 in the voucher dated 27th June 2015.He also admitted receipt of Kshs.100,000after retirement through his lawyer. Finally, he denied the counterclaim and stated that he had only one account at Family Bank.
23. On further cross examination, he testified that he sought for early retirementdue to the ache on his leg, the lack of money to take him to and from work and to pay for rent.He stated that he received Kshs 100,000 from his lawyers after the retirement. He also denied the claim for overpayment made in the counterclaim.
24. The Respondent’s Assistant Personnel Manager, one Josephine Wangeci testified as RW-1 and adopted her witness statement dated 25th November, 2021. She also produced the documents filed on 16th August, 2018 and the further list filed on 24th January, 2022 as Respondent’s exhibits.
25. The witness then testified that the Claimant was paid Kshs 327,800 as appearingat paragraph 37 of the counterclaim against the sum owing beingKshs 893,159.25 including 3 months’ salary in lieu of notice (Kshs.65, 788.80), service pay (Kshs.391,600), outstanding subsistence allowances (kshs.16,000), salary arrears (Kshs.351,258.55) and Sacco Shares contributions not remitted (Kshs.69,511.90)as appearing at paragraph 20 of his witnessstatement.
26. RW-1 contended that all the above Kshs. 893,159. 25 was paid during pendency of this suit.
27. On Cross examination byNgetich Advocate, the witness reiterated that the Claimantwas owed Kshs 893,159.25 as terminal dues. She admitted that the Claimant’s salary was deducted on account of absenteeism without being subjected to any disciplinary hearing. He testified that the Kshs 327,800 counterclaimed by the Respondent is the excess money paid to the Claimant.
28. The witness stated that all thecheques payment for the Claimant’s dues were cleared and paid as per the bank statement produced herein. He further admitted that the Claimantand all its other employees were from time to time paid part of their salary due to financialconstrains facing the Respondent.

Submissions

29. The gist of the Claimant’s submissions is that the he was forced to take an early retirement after the Respondent failed to pay his salary in full, causing him financial difficulties which made it impossible to move to and from work. The Claimantthen urged this Court to allow the claim on account of admission of liability by the Respondent in its defence and counterclaim.
30. With regard to the Respondent’s counterclaim, he submitted that he did not receive the said money.He further submitted that the money sought by the counterclaim is not recoverable by dint of section in17(9) of the *Employment Act*, because it is in excess of one-month salary. The Claimant, therefore urged this Court to disallow the counterclaim with costs.
31. The Respondent on the other hand, submitted on two issue including; whether the Claimantis entitled to the reliefs sought and whether the Respondent is entitled to the prayers in the counterclaim.
32. On the first issue, it was submitted that the basis of the claim herein was on the early retirement taken by the Claimant, which was alleged constructively caused by the Respondent. The Respondent submitted that the retirement undertaken by the Claimantwas based on his illness and not on the alleged frustration caused by the Respondent. Therefore,it maintained that the retirement was voluntarily taken and not forced on him.
33. In addition, it was submitted that the alleged breach occurred in the year 1998 but the Claimantdid not resign during that time and only did so in the year 2017 a few months before his normal retirement.



The Respondent then argued that the Claimant ought to be estopped from alleging constructive termination when the basis of his early retirement was an issue that occurred in the year 1998. For emphasis it cited the case of *Coca Cola East and Central Africa Limited Vs Marai Kagai Ligaga* [2015] eKLR.

34. With regard to payers sought, the Respondent submitted that it is willing to pay the admitted sum as appearing in its defence. However, it urged that the claim for payment of salary for the remainder of his term of employment is unreasonable and legally untenable. To support this argument, the Respondent relied on the case of *Linberata Njau Njioka V Magadi Soda Company Limited* [2011] eKLR.
35. As regards the claim for general damages, the Respondent submitted that the claim is not backed with any evidence or law and therefore it is not payable. For emphasis it cited the case of *George Onyango Akuti V G4S Security Services Kenya Limited* [2013] eKLR.
36. On the Counterclaim, it was submitted that the Claimant was paid in excess of his terminal dues. It was argued that the Claimant was owed Kshs 890,788.25 minus the Kshs 327,800 paid to the Claimant leaving a balance of Kshs 491,444.25. Further that the Respondent contended that it had already paid the Claimant Kshs 543, 815.25 during the pendency of this suit which money is in excess of the claim by Kshs 52, 372. Therefore, it urged the court to find that the Claimant's claim is fully settled during the pendency of the suit and since he was even over paid, the court should not saddle it with costs but rather direct each party bear own cost.

Issues for Determination and Analysis

37. Having carefully considered the pleadings, evidence and submissions. It is clear that the Claimant was employed by the Respondent until 12th September, 2017 when requested for an early retirement and was granted. The issues for determination are: -
 - a. Whether the Claimant voluntarily retired or he was constructively dismissed by the Respondent.
 - b. Whether the Claimant is entitled to the orders sought.
 - c. Whether the respondent's Counterclaim should be allowed.

Voluntarily early retirement versus constructively dismissal

38. The letter requesting for the early retirement read as follows; -

“Samwel Simotwo,
BOX 105,
Litein,
12/09/2019.
Cell No.0728040617.
The Human Resource Manager
Kenya Farmers Association,
Box 35,
Nakuru.
Dear Sir,



Ref: Application For Early Retirement

Owing to the persistent ache in my leg that has almost rendered me immobile, I would like to humbly request your office to grant me an early retirement. I have severally visited various physicians and all of them have advised that I should reduce long distant movements.

I have worked with the company since 1983 up to date totaling almost 35 years in the service. With your tender heart, I implore you to kindly accept my humble requisition.

I look forward to your favorable reply at your most convenient opportunity.

Yours in service.

Samwel Simotwo.

39. The above letter does not blame the employer for the early retirement as alleged by the Claimant. It cited sickness as the reason for the retirement.
40. *Black's Law Dictionary* (9th Edition) defines constructive dismissal as; -
- “A termination of employment brought about by the Respondent making the employee's working conditions so intolerable that the employee feels compelled to leave.”
41. The Court has defined Constructive dismissal in *Nathan Ogada Atiagaga v David Engineering Limited* Cause No. 419 of 2014 as follows:
- “Constructive dismissal occurs when an employee resigns because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge.”
42. The ingredients that form constructive dismissal were laid out in the case of *Maria Kagai Ligaga v Coca Cola East and Central Africa Limited* where the Court held 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:-
- a. The employer must be in breach of the contract of employment;
 - b. The breach must be fundamental as to be considered a repudiatory breach;
 - c. The employee must resign in response to that breach; and
 - d. The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.”
43. In this case, the Claimant alleged in his pleadings, evidence and submissions that his early retirement from the Respondent's employment was not voluntary but it was forced on him by the Respondent by making his work environment unbearable by arbitrarily transferring him to far flunk stations without relocation allowance, making part payments of his salary and failing to remit Sacco Shares deducted from his salary.



44. The Claimant then demonstrated how he was paid his salary in bits, which fact was admitted by the Respondent. The Respondent also admitted to having transferred the Claimant to four branches without paying transfer allowances. However, it contended that the same was done in line with circumstances and need for employees in the other branches. It also contended that some of the transfers were at the request of the Claimant.
45. Having considered the evidence and submissions by the parties I find that the stations where the Claimant was transferred to do not fit within the description of “far flunk” geographically as alluded to by the Claimant. In addition, the Claimant wrote letter in 2008 requesting transfers from Sotik to Kipkelion, then in 2010 from Narok back to Sotik and in 2014 from Kericho to either Molo or Nakuru. His transfers cannot be solely to blame on the respondent because he also requested for the same. The transfer allowances may have delayed but that never forced him to resign immediately. He acquiesced the employer’s lapses for years.
46. The other issue that the Claimant claimed to have motivated him to take early retirement was the part payment of his salary. This issue was not disputed by the employer but it attributed the arrears to financial constraints. In fact, RW-1 admitted in his testimony that the employer owed the Claimant salary in arrears. The delayed salaries affected all the employees of the company and the Claimant did not resign but condoned the default for years just as he did with respect to the unremitted Sacco Shares deducted from his salary.
47. From the facts at hand, I find that the Claimant resigned voluntarily. He was not compelled by the unbearable working environment or repudiatory breach of the contract of service by the employer. He stayed on until just a few months before his normal retirement to resign. As already observed above, the letter requesting for the early retirement did not blame the employer for the premature retirement but rather cited a medical condition.

What remedies are payable to the Claimant.

48. With regard to the first claim on gratuity, the Claimant prayed for pay, from the year 1998 when the respondent pension scheme was abolished, at a rate of one-month salary for each year worked from 1998. The Respondent did not put so much resistance on the prayer and even offered to pay the Claimant Kshs 391,600 as gratuity. RW-1 confirmed that the Claimant was entitled to gratuity at the rate of one-month salary for each year of service.
49. The Claimant did not compute his gratuity to rebut the offer by the employer. I will therefore award him what the employer has admitted being Kshs 391,600.
50. With regard to the travel allowance sought of Kshs 20,000, the Claimant did not tender any evidence in support of this claim. However, Respondent admitted Kshs.15,000 and alleged it had paid part of the claim on the 12th February, 2013 vide petty cash voucher. Therefore, I allow the sum of Kshs.15,000 as travel allowance.
51. The Claimant then prayed for salary arrear running from the year 2010 to 2015 amounting to Kshs. 412,054.35. The Respondent on the other hand admitted that it was in arrears of the said sum but contended that it paid the Claimant salary for November and December, 2014, and October, 2015 salary leaving a balance of Kshs. 350,951.75 which it is willing to pay. I have considered the documents filed by the respondent there is evidence before Court that the Claimant was paid for the said months. With regard to 2014, it’s also clear from the evidence before Court that October salary of Kshs. 19,044 was paid. Therefore, I award the claim for Kshs.350,951.75.



52. On the alleged unlawful deduction due to absenteeism, the Claimant alleged that he tried seeking leave to no avail. The Respondent on the other hand maintain that it deducted the Claimant's salary for being absent from work without any lawful excuse. The Claimant did not tender any evidence to prove that he sought leave to no avail. Even if leave was denied, he had no right to absent himself without leave. Therefore, I decline to grant the prayer for refund of the deductions.
53. The terminal dues sought and the Three months' terminal leave together with the Sacco deduction not submitted were never challenged by the Respondent, I will therefore grant the Claimant Kshs. 65,788.80 as prayed in paragraph 14 (h) of the claim and the KFA Sacco contribution of Kshs. 69,511.90 deducted and not remitted as prayed in paragraph 14(i).
54. With regard to the prayer of the unremitted NSSF and NHIF, the Claimant did not tender any evidence, like statements from the relevant Agencies to affirm the said claim. Therefore, I decline to grant that claim for lack of evidence.
55. The claim for payment for unexpired term is decline because the Claimant retired voluntarily.
56. The claim for General damages is also decline for lack basis and supporting evidence.
57. The Claimant will be issued with his certificate of service.

Whether the Counter Claim should be allowed

58. On the counterclaim, The Respondent alleged to have advance the Claimant a sum of Kshs 327,800 and erroneously paid the Claimant Kshs 21,544 on 30th April, 2016 adding up to Kshs 349, 344 which was not factored in the Claimant's dues. The Respondent then prayed to set off the said sum from the Claimant's dues. In addition, the Respondent in the further list of document dated 24th January, 2022 produced a list of cheques showing that the Claimant had received a cumulative figure of Kshs. 853,815 from the time of filing this case in August, 2018 towards payment of the arrears owed.
59. As already stated above the Claimant cumulative sum owed is Kshs 892,852.45. The Respondent has already paid a sum of Kshs 853,815 as per the bank statement before Court, leaving a balance of Kshs. 39, 037.45. Consequently, I dismiss the counterclaim by the respondent.
60. In conclusion, I enter judgment for the Claimant against the respondent in the sum of Kshs. 39,037.45 plus costs and interest at court rates from the date of filing the suit. The award is however, subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 5TH DAY OF MAY, 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

