



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC. CAUSE NO. 1903 OF 2017

BENJAMIN BIKO MONGATTE.....CLAIMANT

- V E R S U S -

RUBYCUT ENTERPRISES LIMITED ALSO

TRADING AS RUBYCUT GARDENS.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent in March 2012 as a Waiter earning Kshs. 15,000 per month. He brought this suit alleging that he was constructively dismissed by the Respondent on 22.12.2015 by creating a hostile and unbearable environment at the workplace. He highlighted the said hostility as including verbal vulgar insults, false accusation, threats of dismissal for no reason and physical assaults with belt and slaps forcing him to lodge a complaint at the police and eventually to quit the job.

2. He further averred that he never went for any leave and he was working 13 hours a day including public holidays without any compensation for the extra time worked. He was also never paid any house allowance during the entire period of employment by the Respondent.

3. As a result of the foregoing matters, the Claimant filed this suit on 25.9.2017 seeking the following reliefs:

i. Accrued leave days

4 years (15000x4) = **Kshs. 60,000/-**

ii. Holiday Pay

$15000/26 = 576.9 * 24 \text{ days} + 13846 * 2 =$ **Kshs. 27,692.3/-**

iii. House Allowance

March 2012 – December 2012

$(15000 \times 15/100 \times 10 =$ **Kshs. 22,500/-**

January 2013 – December 2013

$(15000 \times 15/100 \times 12 =$ **Kshs. 27,000/-**

January 2014 – December 2014

$(15000 \times 15/100 \times 12 =$ **Kshs. 27,000/-**

January 2015 – December 2015

(15000 x 15/100 x 12 = **Kshs. 27,000/-**

iv. Damages/compensation for unfair termination

12 months (15000 x 12) = **Kshs. 180,000.**

v. Certificate of Service

4. The Respondent did not file any defence to deny the Claimants allegations and the claims and as such, the suit proceeded by way of formal proof on 21.1.2021 when the Claimant testified as CW1.

EVIDENCE

5. The Claimant reiterated the allegations in his pleadings that he was employed by the Respondent as a Waiter in 2012 and worked well until May when his relationship with the employer started to deteriorate; that the employer beat him with a belt in May 2015 and thereafter persisted in using abusive words and vulgar insults against him. Other times he falsely accused him of causing floods in the restaurant; finally, on 22.12.2015, the Respondent physically assaulted him by slapping him on his face causing his teeth to loosen, forcing him to report the matter to the police and quit the employment.

6. He contended that the work environment was rendered harsh and unbearable by the continuous insults, threats and physical assaults by the employer. As a result, he was forced by the circumstances to resign.

7. He reiterated that he worked for 13 hours a day including public holidays without any compensation for the extra hours worked. He never went on leave and he was not provided with housing or paid any house allowance. Therefore he prayed for the reliefs set out in his suit.

8. In his written submissions Claimant contended that he has established a case of constructive termination as defined by the **Court of Appeal in Coca Cola East and Central Africa Ltd v Maria Kagai Ligaga[2015]eKLR** namely, where an employee is forced to resign because the employer creates intolerable work environment.

9. He submitted that he has adduced evidence to substantiate that he was subjected to persistent instances of abuse and violent conduct from his employer's Director forcing him to report the matter to Kilimanjaro Police Station vide OB O. 10/22/12/2015.

10. He further submitted that the constructive dismissal was unfair contrary to section 45 of the Employment Act because there was no valid reason and the procedure followed was not fair.

11. As regards the reliefs sought, the Claimant maintained that he is entitled to the same and submitted that the Respondent did not adduce any evidence to the contrary.

ISSUES FOR DETERMINATION

12. Having carefully considered the pleadings, evidence and the written submissions presented by the Claimant, it is clear that the Claimant was employed by the Respondent as a Waiter from 2012 to 22.12.2015 when he resigned. The issues for determination are:

- a. Whether the Claimant was constructively dismissed by the Respondent.
- b. Whether the constructive dismissal amounts to unfair termination within the meaning of section 45 of the Employment Act.
- c. Whether the Claimant is entitled to the reliefs sought.

CONSTRUCTIVE DISMISSAL

13. The term constructive dismissal is not defined in our statutes. However the concept has been the subject of discussion by this Court and the Court of Appeal. In **Coca Cola East and Central Africa Limited v Maria Kagai Ligaga[2015]eKLR** the Court of Appeal held that:

“In constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of the employee – unless waiver, estoppel or acquiescence is in issue. Conduct by an immediate superior or supervisor maybe enough to justify constructive dismissal. . .

An employer is required not to behave in a way that amounts to repudiatory breach of contract”.

14. In this case the Claimant's un rebutted evidence is that the Respondent's director conducted herself in an abusive and violent manner against him that the working environment became harsh and intolerable forcing him to resign on 22.12.2015. Consequently, I am satisfied that the Claimant has proved on a balance of probability that he was constructively dismissed by the Respondent.

UNFAIR TERMINATION

15. Under section 45 of the Employment Act, termination of employment is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done in accordance with a fair procedure. In this case the Respondent has not entered appearance and as such it did not discharge its burden of proof under section 45 of the Act. Consequently, the court agrees with the Claimant that his constructive dismissal also amounted to unfair termination within the meaning of section 45 of the Act.

RELIEFS

16. Having found that the Claimant's employment was unfairly terminated by the Respondent, I hold that he is entitled to salary in lieu of notice plus compensation for unfair termination under section 49 of the Act. He will get one month salary in lieu of notice being Kshs. 15,000 plus four (4) months salary compensation being Kshs. 60,000 considering that he worked for the Respondent for about 3 ½ years without being served with any warning letter.

17. The Claim for accrued leave lacks particulars. However, in the hotel industry where the Claimant was working the Regulations entitles the employee to 24 leave days per year, which cannot be accumulated without the consent of the employer. Consequently I award the Claimant only one years leave being 24 days equalling to **Kshs. 15000 x 24/26 + Kshs. 13,846.125.**

18. The clam for public holidays worked is dismissed for lack of particulars and evidence.

19. The claim for house allowance is also dismissed because the salary vouchers produced by the Claimant indicated that the salary of Kshs. 15,000 he received was a gross pay.

20. Finally, the claim for Certificate of Service is granted because it is a right under section 51 of the Employment Act.

CONCLUSION AND DISPOSITION

21. I have found that the Claimant was constructively dismissed by the Respondent. I have further found that the dismissal was indeed unfair and the Claimant is entitled to the reliefs sought. Consequently, I enter judgment for the Claimant s follows:

NoticeKshs. 15,000.00

CompensationKshs. 60,000.00

LeaveKshs. 13,846.15

TotalKshs. 88,846.15

The award is subject to statutory deduction. The Claimant is also aware Certificate of Service plus costs and interest at court rate from the date hereof.

DATED AND DELIVERED IN NAIROBI THIS 8TH DAY OF APRIL, 2021

ONESMUS N. MAKAU

JUDGE

In the presence of:

Mr. Ondigi Advocate for the Claimant.

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