



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 342 OF 2018

DANIEL NGURE MAGHANGA.....CLAIMANT

- VERSUS -

CONSOLBASE LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th June, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 22.05.2018 through G.A Okumu & Company Advocates. The Amended memorandum of claim was filed on 07.08.2018. The claimant pleads as follows. He was employed by the respondent on 01.06.2006 to 09.02.2018 as an Assistant Terminal Manager. His monthly pay was Kshs. 220, 000.00. In February 2018 he was demoted to Motor Vehicle Supervisor at Kshs. 83, 000.00 after a skewed disciplinary process. On 25.01.2018 he resigned from his job in light of the way he had been treated by the respondent and he claims unfair dismissal. The claimant states that he had resigned and on expiry of the notice the respondent paid part of the terminal dues. The claimant claims:

- a) Terminal benefits $\frac{1}{2}$ salary for 12 years Kshs. 1, 326, 000.00.
- b) Part salary for January 2018 Kshs. 138, 000.00.
- c) Total Kshs. 1, 464, 000.00.
- d) Less paid Kshs. 107, 900.00.
- e) Total claimed Kshs. 1, 356, 100.00.

The claimant prayed for judgment against the respondent for:

- a) Outstanding emoluments Kshs. 1, 356, 100.00.
- b) General damages for constructive dismissal.
- c) Costs of the suit.
- d) Interest until full payment.
- e) Any other or further relief as the Honourable Court may consider just.

The response to amended memorandum of claim was filed on 28.08.2018 through Akanga Alera & Associates Advocates. The respondent pleaded as follows. It employed the claimant as a motor vehicle supervisor by the letter dated 01.06.2006 on permanent and pensionable terms of service. The respondent performed its part of the contract and remitted statutory deductions including NHIF and NSSF. The claimant's performance was reviewed and the claimant promoted and given salary increment per records exhibited. However, the claimant severally breached some terms and conditions of service and he did not maintain a clean record of service. In October 2017 the claimant was implicated in unprocedural release of M/S Messina Shipping Line container LMCU913954-2 belonging to the respondent's client one Airmaritime Logistics Ltd. A disciplinary process followed and a notice of intention to demote the claimant issued on 15.12.2017 and respondent's management met, parties discussed previous disciplinary issues and he was found unsuitable to be retained in the prevailing post as per letters dated 05.01.2018 and 09.01.2018 conveying the respondent's decision on transfer and demotion with attendant salary diminution in line with his new job group. By the letter dated 24.01.2018 the claimant wrote rejecting the demotion and alleging the

disciplinary process had not been consultative, was illegal, and it amounted to constructive dismissal. The respondent denied the allegations by the letter dated 25.01.2018.

The respondent further pleads that by the letter dated 02.02.2018 the claimant wrote indicating that he wished to take early retirement and the respondent accepted the early retirement subject to signing of Retirement Finalisation Agreement but which the claimant refused to sign. The consequence was that his final dues would be full salary for February 2018 Kshs. 83, 000.00; 9 days worked in March 2018 Kshs. 24, 900.00 making a total of Kshs. 107, 000.00 and which has already been paid to the claimant and a certificate of service issued.

The respondent further pleaded that the claimant was a member of the of a contributory pension scheme and both parties contributed.

The respondent prayed that the suit be dismissed with costs.

The Court has considered the material on record including pleadings, evidence and final submissions filed for parties. The Court makes findings as follows:

- 1) There is no dispute that the parties were in a contract of service. The letter of appointment was dated 01.06.2006. Over time the claimant earned promotions, bonus, and salary increment.
- 2) The Court finds that the evidence is that the claimant did not maintain a clean record of service. He received warning letters and wrote apology such as on 31.08.2015 in respect of reported and established misconduct.
- 3) The evidence is that a disciplinary process took place culminating in transfer and demotion letter dated 05.01.2018. The claimant was transferred and demoted from Assistant Terminal Manager to Supervisor Motor Terminal effective 05.01.2018 at Kshs. 83, 000.00.
- 4) The Court finds that further evidence is that the respondent issued a notice to show cause dated 01.02.2018 against the claimant on account of absence from duty without notice and permission from 20.01.2018 to 01.02.2018 said to be by registered mail and fixing a disciplinary hearing for 05.02.2017 at 11.30am at the HR office. The claimant then wrote to the respondent's Director the letter dated 06.02.2018 expressing his gratitude for the happy and mutually beneficial time he had served with the respondent. The claimant further stated that his honest belief was that the recent events would not be unduly amplified. Further, he gave notice that he had opted to take early retirement with immediate effect since he had attained the age of 50 years. He concluded, "**Kindly therefore note that all issues pertaining to his employment with the company should be considered on this basis.**" The respondent replied by the letter dated 08.02.2018 stating that the management had accepted his request to voluntarily retire early and since records showed he was born on 24.12.1967 with the current year ending December 2018 denoting 50 years, qualifying the claimant for early retirement. The letter attached a retirement agreement for the claimant to consider for consultation and to attend a signing meeting on 17.02.2018. The human resource office would facilitate preparation of the claimant's pension savings, NSSF contributions withdrawal and payment of final dues. The claimant testified that after the demotion decision reducing his salary from Kshs. 220, 000.00 to Kshs. 83, 000.00 he was not happy. He testified that he rejected the demotion and instead decided to write a letter for early retirement. While the claimant was not happy with the demotion, the Court finds that the demotion is not questioned in the present proceedings and a remedy sought in that regard. The Court further finds that the claimant voluntarily opted to retire early with immediate effect. The Court therefore finds that the contract of service came to an end by reason of the claimant's letter of early retirement and as submitted for the respondent, the termination was not unfair or constructive. The evidence is that the respondent accepted the early retirement as was requested for by the respondent. Parties separated by agreement and the Court finds no basis for the alleged unfair and constructive termination. The only dispute the claimant appears to have had was that the base in computing his terminal dues was Kshs. 83, 000.00 as demoted and not the previous monthly pay of Kshs. 220, 000.00. Thus he testified, "**Terminal Manager was retiring. My colleagues were intent on seeing me out. I applied for early retirement. I was told it was acceptable. Tabulation of dues and contract of early retirement was done. The base salary was Kshs. 83, 000.00, not Kshs. 220, 000.00. I was paid Kshs. 107, 000.00 terminal dues. My pension was taken to the bank. I received a message saying it was Kshs. 2 Million...**" The Court finds accordingly and returns that general damages for the alleged constructive termination will not issue. The Court finds that in so far as the demotion decision is on record and by its existence alone, it cannot be found that the respondent made it unbearable for the claimant to continue in employment - especially that subsequent to the demotion the claimant opted to retire early in writing and without mentioning the offensiveness of the demotion that was prevailing. The Court further holds that the genuine exercise of the employer's power of disciplinary control like in the instant case where a demotion was imposed does not by itself amount to constructive termination – it does not amount to a fundamental breach of the contract of service by the employer. The Court further considers that it was open for the claimant to attack the demotion decision and the procedure leading to the demotion but he opted not to do so in the present case and as against the employer he opted to retire early with immediate effect. Thus, the Court reiterates that in the present case unfair and constructive termination has not been established.
- 5) The Court finds that the demotion decision being on record the claimant has not established a justification for award of part January 2018 salary as claimed and based upon the argument that his January 2018 salary ought to have been Kshs. 220, 000.00 and not Kshs. 83, 000.00 as demoted and payable in the lower post.
- 6) The Court has revisited the memorandum of claim as amended and the claim for half salary for 12 years as claimed has not been pleaded to be based on contract or other justification. It is submitted for the claimant that section 35(5) of Employment Act, 2007 provides for payment of service pay. However, the evidence is that the claimant belonged to a contributory pension scheme and NSSF. The Court returns that the claimant is precluded from an award of service pay as submitted in view of section 35(6) of the Act and which states that section 35 (5) of the Act does not apply in event an employee enjoys alternative pension benefits or is a member of NSSF. The claim and prayer will fail as unjustified.
- 7) The Court has considered the circumstances of the case including the belated filing and service of the respondent's final submissions and returns that each party shall bear own costs of the suit.

In conclusion the claimant's suit as initiated by the memorandum of claim as amended is hereby dismissed with orders each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 18TH JUNE, 2021.

BYRAM ONGAYA

JUDGE