



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO.30 OF 2019**

***(Before D.K.N.Marete)***

**PROTUS WANJALA MUTIKE.....CLAIMANT**

**VERSUS**

**ANGLO AFRICAN PROPERTIES**

**T/A JAMBO MUTARA LODGE LAIKIPIA.....RESPONDENT**

**JUDGMENT**

This matter came to court vide a Statement of Claim dated 16th July, 2019. It does not disclose an issue in dispute on its face.

The Respondent in a Respondent's Statement of Defence dated 25th November, 2020 denies the claim and prays that the same be dismissed with costs.

That Claimant's case is that he was employed by the Respondent as an Executive Chef on 27th January, 2014 and was posted to work in the same capacity at Jambo Mutara Lodge, Laikipia County. His pay was Kshs.100,000.00 which was later increased to Kshs.150,000.00 vide a letter dated 17th May, 2017 on confirmation of contract.

The Claimant's other case is that

*5. On 9<sup>th</sup> April 2018, the Respondent occasioned the arrest of the Claimant and arraigned at the Chief Magistrate's Court at Nanyuki in Criminal Case No.521 of 2018 Republic versus Protus Wanjala Mutike and 2 others where the Claimant was charged with two counts of offences of breaking into a tent with intention to commit a felony Contrary to Section 304(1) of the Penal Code and stealing contrary to Section 275 of the Penal Code respectively.*

*6. The unlawful arrest, detention and malicious prosecution of the Claimant was pursuant to an allegation and malicious report at Ngarengiro Police Station and the said report was baseless, unfounded, malicious and bad in faith.*

*7. From the time the Claimant was arraigned in court on 9<sup>th</sup> April 2018 until 26<sup>th</sup> February 2019, the Respondent and its witnesses deliberately failed and ignored to appear in court for the case to proceed, hence, causing the same to be withdrawn under Section 87(a) of the Criminal Procedure Code.*

The Claimant's further case is as follows;

*8. Upon arrest and arraignment in court, the Claimant was interdicted, suspended from his duties with no pay and to date, the Claimant has not been paid for the days worked and compensated for loss and damages he suffered by being subjected to financial embarrassment and breaching of his legitimate expectations that he would continue to work and to earn a salary until the end of contract.*

*9. The Claimant avers that he served the Respondent with distinction and at no time was he served with any warning, Show Cause Notice and or subjected to any disciplinary proceedings by the Respondent.*

It is his contention that the termination of his contract was unprocedural, unfair and unlawful as follows;

10. *The Claimant avers that his contract of service with the Respondent was unfairly and unlawfully terminated by the Respondent without following due process, without a good cause or jurisdiction and without being given a fair hearing, a right to be heard and to defend himself and to face his accusers as required by the Rules of Natural Justice, the provisions of Fair Administrative Actions Act, 2015 Employment Action 2007 and Provisions of the Constitution of Kenya.*

11. *The Claimant avers that he was condemned unheard and was unlawfully sacked without being subjected to disciplinary process as required by law and that his arrest was unjustified and actuated by malice and bad faith.*

It is his penultimate case that despite demand and notice of intention to sue, the respondent failed to make good his claim and therefore his resort to this court.

He prays thus,

- a) *A declaration that the termination of the Claimant's contract of service is unfair, unlawful, invalid and null and void.*
- b) *General damages for unfair and unlawful termination in the sum of Kshs.1,800,000/- being equivalent of 12 months salary at the rate of Kshs.150,000/- per month.*
- c) *Unpaid salaries from April 2018 to date.*
- d) *Salary in lieu of notice and compensation for pending leave days and off days not taken and paid for from April 2018 to date.*
- e) *An order directing the Respondent to issue a certificate of service to the claimant.*
- f) *Costs and interest on (b) to (d) above.*

The Respondent's case is an admission of the contents of paragraphs 7 only to the extent that the prosecution applied for the charges to be withdrawn under Section 87(a) of the Criminal Procedure Code but denies that the same was occasioned by the respondent's deliberate refusal to attend court.

Again, the witnesses who were former employees flatly refused to appear and tender testimony even after various attempts by the respondent to have them summoned in court. The respondent avers that it is possible that the said witnesses worked in cahoots with the claimant to frustrate and eventually stall his trial. This is as follows;

5. *Further the respondent emphasizes that the claimant was not acquitted of the charges facing him but instead the charges were temporary withdrawn by the prosecution under Section 87(a) which grants the police powers to re-arrest and charge the claimant afresh at a later date when the witnesses are ready to testify. With the foregoing, the Claimant is not yet off the hook.*

6. *In response to paragraph 8 of the statement of claim, the respondent restates that the claimant did not report back to work after being released on bail nor did he make any contact with the respondent and thus was not summarily dismissed as he claims.*

The Respondents further case is as follows;

*It is important to emphasize that the claimant was not interdicted, sacked, nor suspended. He was expected that once he posted bail to report back to duty. He did not attend to duty his time of arrest neither was he stopped by the respondent from doing so.*

*The record before this court is clear that the claimant has not adduced any evidence in court to proof his assertions that he was sacked, interdicted or put on suspension.*

*Further, he did not lead any evidence that he wrote to the respondent complaining of any malice, frustrations or constructive dismissal which would have warranted a letter of resignation from his end. The fact that the respondent reported loss of its property which action led to the arrests of persons including the claimant could not be termed as unfair termination of contract of employment.*

The Respondent also avers and submits that the claimant has not adduced any case of termination. She also rebuffs a case of constructive termination and holds the claimant wholly responsible for his misfortunes. This is as follows;

*It was the claimant's testimony on cross-examination that he considered himself terminated because while the criminal cause was ongoing, his belongings were delivered at his door step. He confirmed that he did not write to the respondent following up on the reason and or even tender a resignation at worst. He sat still and went mute only to file this suit, after the criminal charges were withdrawn.*

*It seems my lord though not clear cut that the claimant is basing his claim for unfair dismissal on the doctrine of constructive dismissal. It is our considered submissions that the facts of this case cannot warrant a claim for constructive dismissal. In the case of Lear Shighadi Sinoya v Atech Systems Limited (2017) eKLR the learned judge observed as follows while addressing the issue of absconding from duty on account of non-payment of salaries.*

*The claimant is also at fault. Despite noting that she had not been paid, for her to allege constructive dismissal, this was not to be*

resolved by failing to attend work without her letter of resignation. Failure to attend work is addressed under section 44 of the Employment Act as a matter subject to summary dismissal as it is classified as an act of gross misconduct. Where the claimant found her unable to attend work due to non-payment of her due salaries, she had every right to serve her letter of resignation citing the reasons for the same. To keep out of work and do nothing left the claimants claim for constructive dismissal exposed and compromised.

In Cause Number 611 (N) of 2009 between Maria Kagai Ligaga v Coca Cola East and Central Africa Limited (unreported), 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.

... in the totality of the evidence of this case and our above analysis we arrive at a considered conclusion that the claimant has not proved his case for unfair termination on a balance of probability. This is because he has failed to adduce evidence of his termination or his resignation if he considered himself to have been constructively dismissed.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of this cause?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in his written submissions dated 4th February, 2021 reiterates and submits a case of unlawful termination of employment.

It is his submission that the respondent in terminating his employment violated sections 41 and 43 of the Employment Act, 2007 in that he was never afforded an opportunity to be heard before dismissal. Again, the respondent has failed to prove that the reasons for his termination of employment are valid.

The claimant further wishes to rely on section 47 (5) of the Employment Act which provides as follows;

*(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.*

It is his case that the respondent has not discharged her burden of justifying termination and therefore a case of unlawful termination of employment ensues.

The Respondent in her written submissions dated 17th February, 2021 rebuffs the claim. It is her case and submission that the claim was not interdicted, sacked or suspended. It was expected that once he posted bail, he would return back to duty which he did not, or at all. The respondent had no role in this.

Again, the claimant has not adduced any evidence to prove his assertions of sacking, interdicted or suspension. She relies on the authority of **Kipkepe Limited v Peterson Ondieki Tai (2016) eKLR** where the court observed as follows;

“It is trite law in evidence that he who asserts must prove this case. No evidence was adduced by the plaintiff. In such cases the burden of proof lies with whoever would want the court to find in his favour in support of what he claims”

This is coupled by sections 107 and 108 of the Evidence Act, Chapter 80, Laws of Kenya which provides as follows;

*107 'whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist'*

*108 'The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side'*

The claim has therefore not been proved on a balance of probabilities and must fail.

Section 47 (5) of the Employment Act, 2007 provides thus;

*5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.*

It binds the claimants at the onset bring out the case of unlawful termination for employment to which the respondent shall adduce evidence in justification failure of which a claim is lost.

The respondent's case overwhelms that of the claimant. This is because the claimant has failed to satiate the burden of proof of unlawful termination of employment as provided under section 47 (5) of the Employment Act, 2007. He has not adduced evidence in support of termination, let alone unlawful termination on a balance of probability. I therefore find a case of no termination of employment and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is not. Having lost on a case of unlawful termination of employment he becomes disentitled to the reliefs sought.

I am therefore entitled to dismiss the claim with orders that parties bear their costs of the same.

**DATED AND DELIVERED AT NYERI THIS 26<sup>TH</sup> DAY OF JULY, 2021.**

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Abwour instructed by Abwour & Company Advocates for the claimants.
2. Mr. Orege instructed by Daniel Orege & company Advocates for the Respondent.