



THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 256 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

KUDOYI MICHAEL.....CLAIMANT

VERSUS

LEO INVESTMENTS LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant was employed by the Respondent as an IT Executive in the Respondent's business, Concord Hotel & Suites effective 2nd December, 2016. He remained in the employment of the Respondent until he was summarily dismissed by the Respondent vide a letter dated 5th April, 2019.

2. Aggrieved by his dismissal, the Claimant filed the present suit by way of a Statement of Claim dated 15th April 2019 and filed on 18th April 2019 wherein he alleges that his dismissal was unlawful and unfair and seeks Judgment against the Respondent as follows:

- i. Annual accrued leave days 43 x 4,459. The total accrued leave dues are Kshs.191,737/=.
- ii. 16 days worked in the month of April at 98,103 divided by 16 x 4,459= Kshs.71,344/=.
- iii. Salary in lieu of notice Kshs.98,103/=.
- iv. 12 months' salary for summary dismissal/termination = Kshs.1,177,236/=.
- v. Certificate of Service.
- vi. General Damages.
- vii. Costs of this suit.
- viii. Interest on (a), (b), (c), (d) above at Court rates.

3. The Respondent filed a Memorandum of Response dated 14th November, 2019 and filed on 15th November, 2019. The Respondent alleged that the Claimant was insubordinate and was dismissed on grounds enumerated in his termination letter. The Respondent thus seeks the dismissal of the suit with costs.

4. The Claimant's case was heard on 27th November, 2019 where the Claimant testified in support of his case. The Respondent's case was heard on 16th February, 2021 when the Respondent's Witness Martin Maina Mwangi testified.

The Claimant's Case

5. The Claimant adopted his witness statement dated 15th April, 2019 as his testimony.

6. The Claimant's testimony was that he was employed in the Respondent's establishment, the Concord Hotels, Beach Villas & Game

Lodges as an IT Executive effective 2nd December 2016 earning a gross salary was KES 98,103.

7. In or around 25th March, 2019, he met a stranger accompanied by the Respondent's Chief Financial Controller who informed him that the stranger would be assisting in the day to day operations of the Respondent.

8. That on 26th March, 2019 the Respondent's Sales Director and two others summoned the Claimant to his office and verbally demanded that he hand over the information technology system and credentials. The Claimant declined to do so as he required approval from the Respondent's top management.

9. It was the Claimant's testimony, that upon declining to do so, he was presented with a transfer letter and told that he ought to provide the credentials, or he would be transferred. The Claimant was issued with the transfer letter and was informed that he would be going on forced leave immediately.

10. The Claimant testified that he requested for the evening to consult his family with respect to the transfer. On the same day, the Claimant reached out to one of the Respondent's Directors who was out of the Country, Mr. Rahim Chatur, who approved the handover of the credentials and indicated that he would have a meeting with the Claimant once he was back in Kenya. He proceeded to hand over the entire system to the new IT Executive on the same day in the presence of 3 security personnel.

11. The Claimant stated that when he reported to work on 27th March, 2019 to meet with the Respondent's Human Resources Manager (HRM), he was informed that the HRM was unavailable. On the evening of the same day, he was invited to the Financial Controller's Office who informed the Claimant in the presence of security officers that he would not be allowed entry into the office premises the following day. The reason was that the hand over meant that the Respondent no longer required the services of the Claimant.

12. It was the Claimant's testimony that he reported to the work premises every day between 28th March, 2019 and 6th April, 2019 but was denied access into the premises. That, on 1st April, 2019 he met with the Respondent's Sales Director, Martin Mwangi and the Operations Director, Ms. Zara Chatur. At the said meeting, the Respondent's Sales Director gave the Claimant two options: to either be terminated summarily on grounds of insubordination or write a resignation letter to enable him secure the final dues and save his career.

13. The Claimant testified that he demanded for written reasons for his termination to make an informed decision, but the reasons were not supplied to him. His follow up request on 3rd April, 2019 for written reasons for his termination was never replied to either.

14. The Claimant testified that earlier, in or around 19th February 2019, he was summoned to the work premises on account of an electrical power shortage that had affected the entire Hotel including the IT systems. He was requested to carry an overnight bag and personal items and informed that he would be provided with a room to spend the night as he would be required to stay at the hotel overnight.

15. It was the Claimant's testimony that upon arriving at the work premises, he had a disagreement with a student trainee, one Lucy Ote and the security personnel. That, this arose since there was no competent engineering personnel to effectively handle the electrical incident.

16. The Claimant testified that the Hotel receptionist informed him that the Hotel was half full and they discussed which rooms he could utilize for his overnight stay. In the course of the night, he was woken up by a huge blast of power outage by the generator which affected the Hotel IT system. He responded to the same by assisting the front office to carry out an end of the night system report.

17. It was the Claimant's testimony that the disagreement was resolved the following day when the HRM sent out an email directing the Engineering Manager to ensure the night shift was well covered by a competent and able person.

18. During cross-examination, the Claimant testified that the stranger he met on 25th March, 2019, turned out to be his replacement – Amos. He testified that he was only informed that Amos would be assisting him with his duties.

19. As regards the incident with the room allocation, it was the Claimant's testimony during cross-examination that he was requested to select a room by the Receptionist who activated his key card. He stated that he was not aware that the room had been allocated to a guest.

20. He testified that his transfer letter only came after the request for the handover of the credentials and passwords for IT system. He testified that he was only authorised to handover and give the credentials and passwords to the Respondent's Directors. That once he received the written authorisation via WhatsApp message, he proceeded to hand over. He testified that even his immediate supervisor would only be able to access the credentials and passwords with approval from the Directors.

21. The Claimant testified that the letter of transfer was issued immediately after he handed over the credentials on 26th March, 2019. The letter required him to immediately proceed on leave before reporting to his transfer station at the Mara. He requested for time to discuss the letter with his family and sought to discuss the same with the HRM the following day who declined to give him audience.

22. The Claimant testified that after repeatedly being denied access to the work premises he was issued with the termination letter dated 15th April 2019.

23. The Claimant thus filed the present suit where he prays for judgment against the Respondent for his unlawful and unfair termination.

The Respondent's Case

24. The Respondent's witness, Martin Mwangi (RW1) adopted his witness statement dated 7th January 2021. He testified that on 20th March, 2019, while the Claimant was on duty, the power stabilizer failed due to a power outage. The Group Engineer directed one Lucy Ote to switch the power supply to the generator power supply. RW1 stated that Lucy Ote advised the Claimant to perform the switch as directed by the Group Engineer which he declined to do without any reason.

25. It was RW1's testimony that the Claimant having refused to work with the Engineering team went on to conduct himself in an unprofessional manner and threatened his colleagues by saying ... "*leo mtajua ni nani ako na nguvu kwa hii nyumba*". Further, that the Claimant stopped Lucy Ote from performing her duties by unplugging the phone and blocked her passage out of the accounts office until the security officer came to resolve the issue.

26. RW1 testified that on the night of 20th February, 2019 at about 0332 hours, the Claimant had sneaked into one of the guest rooms without informing the receptionist knowing that he needed to inform them beforehand.

27. RW1 testified that when the guest who had booked the room that the Claimant had occupied arrived, the Receptionist was shocked to learn that the same was occupied by the Claimant.

28. It was RW1's testimony that following the incident, the Claimant was issued with a Notice to Show Cause Letter dated 25th February, 2019 requiring him to give reasons for his behaviour which tainted the Hotel's reputation.

29. RW1 testified that the Claimant declined to acknowledge receipt of the said letter and did not give reasons for his behaviour. The Claimant further declined to hand over the IT system credentials and passwords on 26th February, 2019 without reasons. As such, due to his acts of insubordination and difficulties in getting along with his colleagues in the present station, the Respondent issued him with the transfer to the Mara.

30. It was RW1's testimony that the Claimant was allowed a day to consult with his family with respect to the transfer based on his request but he did not provide feedback thereafter.

31. He stated that they required the Claimant to immediately go on leave as no employee in the station was willing to work with him due to his poor attitude and lack of respect to his fellow employees.

32. It was RW1's testimony that while the Claimant handed over the passwords, he did not hand over all of them and the Respondent thus incurred extra costs to have the system passwords reset. That the Respondent decided to terminate the Claimant's service due to the poor working relationship from the time he was employed.

33. During cross-examination by the Claimant, RW1 admitted that he was employed after the Claimant and was aware that the Claimant was answerable to the Head of Finance. He admitted that there was no formal communication requiring the Claimant to handover the credentials and passwords to the IT system. He stated that he had authority to request for the handover as the acting General Manager at the time. Further, that the Claimant was not directly answerable to the Director, Mr. Rahim.

34. RW1 testified that he was not aware whether the Claimant had received a warning letter but that he had a bad attitude at the workplace.

35. With respect to the incident of the hotel room stay, RW1 clarified during cross examination that the date was 19th February, 2019 and not 29th March, 2019 as indicated in his witness statement. He stated that he summoned the Claimant to report to work on account of the emergency and informed him that he would be provided with a room in the Hotel for the overnight stay.

36. It was RW1's testimony that the Claimant adhered to the summons and performed his duties but declined other extra duties that he did not agree with. He stated that the Respondent did not summon an engineer that night to rectify the problem but that there was someone qualified on duty that night.

37. RW1 testified that the Claimant used his master key to access the room that had been pre-booked for a guest.

38. With respect to the Claimant's termination, RW1 admitted in his testimony that the termination letter was dated 5th April, 2019 and that a meeting with the Claimant was scheduled for 9th April, 2019 which the Claimant did not attend. He testified that the purpose of the meeting was for the Claimant to explain his insubordination and collect his letter. He further testified that an email was sent on 10th April, 2019 enclosing the termination letter which the Claimant had refused to collect. He admitted that he was not aware whether the security desk informed the Claimant that he was required to appear on 9th April, 2019.

39. RW1 testified that the Claimant was not paid while on leave. That the Respondent did not pay because the Claimant did not accept to go on leave.

Submissions

40. This Court directed parties to file written submissions on 16th February, 2021. The Claimant filed his written submissions dated 12th March, 2021. The Respondent did not file submissions.

41. The Claimant submitted that the Respondent summarily and unfairly terminated the Claimant from employment without notice or affording him an opportunity to be heard. The Claimant in his submissions invoked the provisions of **Section 41** of the Employment Act,

2007 and relied on the case of **David Gichana Omuya v Mombasa Maize Millers Limited [2014] eKLR** and **Liz Ayany v Leisure Lodges Limited [2018] eKLR**.

42. The Claimant also submitted that he was never given a reason for his termination contrary to **Section 42(1)** of the Employment Act. He submitted therefore that his termination was faulty, irregular, and unlawful. He further relied on the cases of **Nicholas Otinyu Muruka v Equity Bank Limited [2013] eKLR** and **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**.

43. It was also the Claimant's submission that the Respondent's acts amounted to a constructive dismissal by: -

- i. Locking the Claimant out of the work premises
- ii. Verbally informing him that he had been transferred to the Mara and given one month to prepare for the transfer
- iii. Terminating his services prior to the end of the one month.

44. He relied on the decisions in **Western Excavating (ECC) v Sharp [1978] ICR 221**, **Anthony Makala Chitavi v Malindi Water & Sewerage Company Ltd Cause No. 64 of 2012**. He also relied on the cases of **Mutisya Solomon v Agility Logistics Cause No. 1418 of 2011** and **Buenel Mariera v Awand Enterprises Limited Msa Cause No. 191 of 2013** to support his submission on the acts constituting his constructive dismissal by the Respondent.

45. He further submitted that he was entitled to a certificate of service pursuant to **Section 51** of the Employment Act and that the Respondent was committing an offence by withholding the same. He relied on the case of **Angela Wokabi Muoki V Tribe Hotel Limited [2016] eKLR** in support of his submission.

Determination

46. The pertinent issues for my determination from the pleadings, the testimony and evidence adduced at the hearing and the submissions are:

- i. Whether the termination of the Claimant's employment was fair; and
- ii. Whether the Claimant is entitled to the reliefs sought.

47. I will begin by stating that I do not find that there was constructive dismissal of the Claimant as submitted in the Claimant's submissions. This is because the Claimant was issued with a letter of termination. Further, the contention was raised at the point of submissions and cannot be admitted before this Court for determination. It is trite law that parties are bound by their pleadings and the allegations of constructive dismissal were not raised in the Statement of Claim or raised at the hearing by the Claimant. I will say nothing further on the same.

48. **Section 41** of the Employment Act provides for the procedure for termination of employment as follows: -

41. Notification and hearing before termination on grounds of misconduct

1. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

49. Further **Section 43** provides for proof of reasons as follows: -

43. Proof of reason for termination

1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

50. The Claimant contends that he was not given an opportunity to be heard prior to his dismissal while the Respondent's contention is that the Claimant was given an opportunity to be heard on 1st April, 2019. While Section 44 of the Employment Act gives an employer the liberty to terminate the employment of an employee without notice or with less notice than that to which the employee is entitled to by any statutory

provision or contractual term, the summary dismissal is only fair if the Claimant is provided with an opportunity to be heard before the dismissal.

51. Further, **Section 45(2)** provides that termination of employment is unfair if the employer fails to prove that the termination of employment was for valid reasons and that the employer complied with the requirements for fair procedure.

52. There was no evidence placed before me that the Claimant was afforded an opportunity to respond to the allegations of insubordination as raised by the Respondent. There is no evidence that the Claimant was informed in advance of a disciplinary hearing or supplied with the charges laid against him or that the Respondent informed him about his right to be accompanied by a union official or colleague.

53. The Claimant was thus not afforded a fair hearing or opportunity to prepare and present his defence as envisioned in **Section 41** of the Employment Act.

54. I find that Radido J. aptly captured the principles in Section 41 in the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Limited [2013] eKLR** when he stated as follows: -

“And what does section 41 of the Act require? The first observation is that the responsibility established is upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity, it is the employer to demonstrate to the Court that it has observed the dictates of procedural fairness.

The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

55. I therefore find that the summary dismissal of the Claimant was unfair and now proceed to consider the reliefs sought in the Statement of Claim under the respective heads of claim.

i. Accrued Leave Days

56. The Claimant's prayer for accrued leave of 43 days has not been controverted by the Respondent in its evidence. In any event, pursuant to Section 10 as read with Section 74 of the Employment Act, it is the burden of the employer to keep and to produce employment records in the absence of which the burden to disprove the averments by the employee shifts to the employer.

57. The Claimant did not explain the basis of his prayer for KES 4,459 per day for each day earned. The appropriate formula for the calculation of leave days is the salary divided by days worked in a month. A working month is 26 days, taking into account 4 rest days in a month thus $98,103 \div 26 \times 43$.

58. I accordingly award the Claimant the sum of **KES 162,247.60** in lieu of leave earned but not taken.

ii. Days Worked in the Month of April 2019

59. The Claimant prays for payment of 16 days worked from the month of April 2019. The letter of termination issued by the Respondent is dated 5th April, 2019. However, from the evidence adduced at the hearing the same was only supplied to the Claimant vide an email on 10th April, 2019.

60. I do not find any basis for the 16 days claimed by the Claimant. From the pleadings and the evidence adduced at the hearing, the Claimant was denied access to the work premises as at 28th March, 2019.

61. I therefore award the Claimant the sum of **KES 37,731.92** being the salary accrued up to 10th April, 2019 which was the date he received the termination letter.

iii. Payment in lieu of notice

62. Empowered by Section 49(1) (a) of the Employment Act, I award the Claimant one month's salary in lieu of notice being the sum of **KES 98,103**.

iv. Compensation

63. Having found that the Claimant was unfairly terminated, he is entitled to compensation. I have taken into account the circumstance under which the Claimant's employment was terminated and the factors set out in **Section 49(4)** of the Act. I have considered that the Claimant

worked for a period of almost three years and the unfair manner in which his summary dismissal was undertaken. In my opinion, compensation equivalent to 4 months' salary amounting to **KES 392,412** would be reasonable in the circumstance. I accordingly award him the same.

v. General Damages

64. I find that the Claimant's prayer for general damages fails as he has not justified the grounds for award of the same.

Conclusion

65. In conclusion judgment is entered in favour of the Claimant against the Respondent as follows: -

- i. Payment in lieu of leave KES 162,247.60
- ii. Payment of accrued salaryKES 37,731.92
- iii. Payment in lieu of notice.....KES 98,103.00
- iv. 4 months' salary as compensation..... KES 392,412.00

Total Award KES 690,494.52

- v. The Respondent shall issue the Claimant with a Certificate of Service forthwith.
- vi. The Respondent shall pay the Claimant's costs of this suit.
- vii. The decretal sum shall attract interest at court rates from date of judgment until payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF JULY 2021

MAUREEN ONYANGO

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE