



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 190 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

JOB ODHIAMBO NDURI..... CLAIMANT

VERSUS

SINAI HOSPITAL RONGAI LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed his claim vide a Memorandum of claim dated 27th March 2019 in which he prays for the following remedies.
 - (a) A declaration that the notice of resignation dated 3rd September 2018 was issued under duress and is therefore voidable;
 - (b) A declaration that the Claimant is still in the employee of the Respondent and in the alternative;
 - (c) The Respondent be compelled to pay to the Claimant the following benefits;
 - i) 12 months' salary on account of constructive dismissal which is unfair termination and/or unfair labour practice
 - ii) Leave days accrued for 9 years
 - iii) Service pay
 - iv) Salary in terms of notice
 - v) General damage for coercion, mistreatment and/or harassment
 - vi) Any other just and expeditious relief; and
 - vii) Costs and interest
2. The Respondent did not file a response to the claim herein nor participate in the proceedings although there is evidence that it was properly served. The facts as pleaded in the Memorandum of claim are thus uncontested.
3. The claim having been undefended, the court gave directions that it be disposed of by way of witness affidavit and written submissions.
4. The Claimant avers that he was an employee of the Respondent having been employed on the 1st of December 2001 as an Accountant/Administrator. That he rose up the ranks to be Head of Department with a salary of Kshs.91,995 at the time of termination of his employment. He states that during the pendency of his employment he never received any warning letter, was never reprimanded or questioned for any wrong doing by the Respondent.
5. The Claimant avers that from April 2018 he started experiencing very harsh working conditions as the Respondent's directors started being quarrelsome, failing to take any of his professional advice, subjecting him to humiliation and taking away some of his duties. He stated that on 24th August 2018 the Respondents directors served him with a notice to show cause letter which he responded to vide a letter dated 30th August 2018.
6. The Claimant states that when he was called to the disciplinary hearing the panel consisted of junior staff who questioned the content of

his response and demanded that he accepts liability in writing for all the allegations raised in the show cause letter.

7. The Claimant states that on proceeding for his annual leave his official email was blocked, bank agency mandate terminated, his salary for the month of August 2018 was not remitted and his position as the Office Administrator had already been taken by one of the directors.

8. The Claimant stated that above actions forced him out of employment constructively and he tendered his resignation on 3rd September 2018. He further stated that on demanding for his salary the Respondent caused him to be arrested but he was later released with no charges being preferred against him. The Claimant states that as a result of the foregoing his continued employment with the Respondents was untenable, the work environment was hostile forcing him to resign.

9. The Claimant states that the Respondent's actions were tainted with malice which is unlawful, illegal, unprocedural and contrary to Section 44 of the Employment Act 2007.

Claimant's Submissions

10. The Claimant submits that the Respondent created a situation in the work place which made continuation of his employment difficult. The Claimant submits the Respondent's conduct was a clear breach of law forcing him out of employment constructively through a resignation dated 3rd September 2018.

11. The Claimant relies in the case of **Peter Kaburu Karanja v Kirinyaga Construction (K) Limited [2020] eKLR**, where this Court held as follows;

"The Court of Appeal case of Coca Cola East and Central Africa Limited v Maria Kagai Ligaga [2015] eKLR at paragraph 30 of its judgment, outlined the principles relevant in determining constructive dismissal as follows-

- a. *What are the fundamental or essential terms of the contract through the conduct of the employer?*
- b. *Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?*
- c. *The conduct of the employer must be a fundamental breach or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more essential terms of the contract.*
- d. *An objective test is to be applied in evaluating the employer's conduct.*
- e. *There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e causation must be proved.*
- f. *An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.*
- g. *The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach; the employee must within a reasonable time terminate the employment relationship pursuant to the breach.*
- h. *The burden to prove repudiatory breach or constructive dismissal is on the employee.*
- i. *Facts giving rise to repudiatory breach or constructive dismissal are varied.*

12. The Claimant further submits that he is entitled to 12 months' salary on account of constructive dismissal. He relies in the case of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga (supra)**, where the Court of Appeal held inter alia as follows:

"... The employee's resignation is therefore treated as an actual dismissal by the employer and the employee may claim compensation for unfair termination"

13. Additionally, the Claimant submits that Section 49(1)(c) of the Employment Act provides for compensation as follows;

(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—

(a)

(b)

(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

14. The Claimant further submits that he is entitled to 21 leave days as per Section 28 of the Employment Act for the period of 9 years that he worked for the Respondent.

15. The Claimant further prays for general damages and reasonable reimbursements of money spent in the course of litigation.

Analysis and Determination

16. Having considered the pleadings and the submissions the issues for determination are:

- (i) Whether the Claimant was constructively terminated from employment.
- (ii) Whether the Claimant is entitled to the reliefs sought.

17. Constructive dismissal is defined in **Black's Law Dictionary 10th Edition** as –

“An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”

18. Constructive dismissal is not expressly provided for in the Employment Act or in any other legislation in Kenya. It has however been the subject of numerous decisions and thus is an issue that is settled in our jurisprudence.

19. The Claimant avers that his resignation was not voluntary but influenced by the hostility of the working environment. He has relied on the Court of Appeal decision which elaborately addressed constructive dismissal and outlined the principles for determination of constructive dismissal. In **Coca Cola East & Central Africa Limited v Maria Kagai Lugaga [2015] eKLR**, the Court of Appeal set out the principles for determination of constructive dismissal as –

- a. *What are the fundamental or essential terms of the contract of employment"*
- b. *Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer"*
- c. *The conduct of the employer must be a fundamental or significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.*
- d. *An objective test is to be applied in evaluating the employer's conduct.*
- e. *There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e causation must be proved.*
- f. *An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.*
- g. *The employee must not have accepted, waived, acquiesced or conduct himself to be estopped from asserting repudiatory breach; the employee must-within a reasonable time terminate the employment relationship pursuant to the breach.*
- h. *The burden to prove repudiatory breach or constructive dismissal is on the employee.*
- i. *Facts giving rise to repudiatory breach or constructive dismissal are varied.”*

20. In the instant case, it is the Claimants case that he started experiencing hostile working conditions in April 2018 which persisted until 24th August 2018 when he was handed a Notice to show cause letter which he responded to and was summoned to disciplinary proceedings. The Claimant claims that he applied for annual leave on 3rd of September 2018 which was to end on the 4th October 2018. That upon commencement of his leave he realised that his official email had been blocked, the bank agency mandate had been terminated, the salary for the month of August 2018 was never remitted to his bank account and his administrative position was taken over which forced him to tender his one month notice to resign to run concurrently with the leave period.

21. The Claimant stated that on the 15th of August 2018 when he followed up on his Salary arrears the Directors caused him to record a statement at Ongata Rongai police station on missing documents from the office computer but no charges were preferred against him.

22. The Claimant never tendered any document in support of the hostility at his place of work that forced him to tender his resignation; therefore the allegations by the Claimant cannot be substantiated. The Claimant in his resignation letter dated 3rd September 2018 stated that he had to leave employment due to personal reasons. The letter does not refer to any frustrations at the time of resignation. The Claimant did not attach the outcome of the disciplinary process. He wrote his resignation on the date when he commenced leave. I thus find that his resignation was not in any way influenced by the locking of the email, the termination of the bank mandate, non-payment of the August salary nor his position being taken over by another person.

23. I therefore find that the resignation by the Claimant does not meet the threshold for constructive dismissal as outlined in the case of **Coca Cola East & Central Africa Limited v Maria Kagai Lugaga [2015] eKLR**.

Whether the Claimant is entitled to the reliefs sought;

a) A declaration that the notice of resignation dated 3rd September 2018 was issued under duress

As I have already found above, the resignation letter dated 3rd September 2018 states that the Claimant resigned from work due to personal reasons. No evidence has been adduced to demonstrate that the Claimant was unduly influenced to write the same. This prayer therefore fails.

b) A declaration that the Claimant is still an employee of the Respondent and in the alternative

- i) 12 months' salary on account of constructive dismissal which is unfair termination and or unfair labour practice
- ii) Leave days Accrued for 9 years
- iii) Service pay
- iv) Salary in terms of notice
- v) General damages for coercion, mistreatment and/or harassment
- vi) Any other just and expeditious relief
- vii) Costs and interest

24. Upon the Claimant tendering his resignation letter dated 3rd September 2018 his employment contract with the Respondent terminated upon the lapse of the notice. He cannot be declared to be an employee having terminated the employment of his own free will. Having failed to prove constructive dismissal, his resignation cannot be termed unfair or unlawful.

25. The Respondent in the acceptance letter of the resignation which was stamped on 21st September 2018 indicated that the Claimant was entitled to 21 days leave for every year worked. This amounted to Kshs.285,599/- which amount was offset against an outstanding loan advance to the Claimant. The said letter also enclosed a cheque for payment for the month of August 2018 less deduction of the outstanding balance. The Claimant did not challenge the said letter on the issue of leave days or the amount paid for the month of August.

26. I find that the Claimant is not entitled to the reliefs sought. The claim is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF SEPTEMBER 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