



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1902 OF 2017

JOAN MALIGA DALLA.....CLAIMANT

VERSUS

RUBYCUT GARDENS LIMITED.....RESPONDENT

JUDGMENT

1. The claimant filed the suit on 25/9/2017 seeking compensation for wrongful dismissal and payment of terminal benefits to wit: -
 - (a) **One-month salary in lieu of notice in the sum of Kshs. 20,000.**
 - (b) **Accrued leave pay for 5 years Kshs 100,000.**
 - (c) **Unpaid overtime Kshs 1,347,840.**
 - (d) **Unpaid public holidays worked – Kshs. 6,720.**
 - (e) **Unpaid gross allowance – Kshs. 180,000.**
 - (f) **Interest and costs.**
2. Despite service of summons to enter appearance and the Statement of Claim, the respondent did not enter appearance nor file a statement of defence. The suit proceeded to formal proof as undefended suit.
3. The claimant filed affidavit evidence sworn to on 10/2/2021 to which is attached supporting documents. The claimant deposed that he was employed by the respondent as a cashier in January, 2011. That he was not given a letter of employment. That he worked continuously for a period of 5 years until he resigned from employment on 9th December, 2015 following endless insults and discriminatory remarks directed at him by the Respondent's Director, One Ms. Risper. That she ridiculed him as overweight, and used insulting, and demeaning words every time she addressed him at the work place and this got worse whenever she was drunk.
4. That in the 1st week of December, 2015, the claimant experienced serious asthma attacks forcing him to request one-day sick off to seek medical attention on 7/12/2015.
5. On 8/12/2015 when he returned, Risper subjected him to insults including that he was suffering asthma attacks due to overeating at the work place.
6. The claimant considered the employment environment no longer tolerable and was forced to resign from employment. The claimant states that this was unlawful and unfair constructive dismissal and prays for compensation in addition to payment of terminal benefits.
7. The claimant wrote a letter of demand which was not heeded to hence the suit.
8. The Court finds that the claimant has proved that he was unlawfully and unfairly constructively dismissed from employment in violation of Sections 36, 43, and 45 of the Employment Act 2007 and the claimant is entitled to compensation in terms of section 49(1) (c) and (4) of the Act.
9. In this respect, the claimant had faithfully and diligently served the respondent for a period of 5 years under a very abusive environment. The claimant lost his job due to the continuous violation of his dignity by a Director of the respondent. The claimant suffered loss and damage since he was not paid overtime; nor compensated for the job loss and was not paid in lieu of leave days not taken. The claimant

lost prospects of career progression and became ill and lost self-worth as a result of the continuous abuse subjected to him by the respondent.

10. The Court has considered the case of **Edwin Beti Kipchumba –vs- National Bank of Kenya Limited [2018] eKLR** where the claimant was constructively dismissed.

11. The Court has also considered the Court of Appeal decision in **Cocacola, East and Central Africa Limited –vs- Mene Kagai Ligaga [2015] eKLR**.

12. The Court has come to the conclusion that the situation of the claimant was so toxic and intolerable for him to continue working as a result of the conduct of a Director of the employer. That the claimant was justified to resign as he did.

13. The Court awards the claimant the equivalent of six (6) month salary in compensation for the unlawful and unfair constructive dismissal in the sum of Kshs 120,000.

14. With regard to the terminal benefits, the claimant has established on a balance of probability that he was entitled to and was not paid, 60,000 in lieu of three years' untaken leave. The rest of the claim is time barred.

15. The claimant did not adduce sufficient evidence to prove that he was not

paid overtime; public holidays worked and house allowance sought in the statement of claim. These prayers are dismissed. The claimant having resigned is not entitled to payment in lieu of notice pay.

16. In the final analysis judgment is entered in favour of the claimant against the Respondents as follows: -

(a) Kshs. 120,000 in compensation for constructive dismissal.

(b) Kshs 60,000 in lieu of three years Annual leave not taken.

Total Award: Kshs. 180,000.

(c) Interest at Court rates from date of judgment till payment in full.

(d) Costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 23RD DAY OF SEPTEMBER, 2021.

MATHEWS N. NDUMA

JUDGE

Appearances:-

Mr. Ondegi for claimant

Ekale – Court Assistant