



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 76 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

SIMON PAPA IMO

CLAIMANT

VERSUS

ATHI RIVER SHALOM COMMUNITY HOSPITAL

RESPONDENT

JUDGMENT

1. This suit was instituted by a memorandum of claim dated 9th December 2016 and filed on 18th January 2017. The Claimant alleges that he was unfairly terminated on 9th February 2015 after reporting to the work place after a few days' leave. The Claimant prays for –

(a) One month in lieu of notice (as per the Regulation of Wages Order 2013) Kshs.9,780.95

(b) Salary underpayment (9,780.95 – 8,000)

1,780.95 x 1½ years Kshs.32,057.00

(c) Unpaid/untaken public holidays

(x 9,780.95 x 1½ years x 2) Kshs.10,759.00

(d) Unpaid house allowance Kshs.26,406.00

(e) Compensation damages for wrongful dismissal

(9,780.95 x 12) Kshs.117,371.00

Total Kshs.196,374.00

(f) Costs of this suit and interest.

2. Although a Counsel by the name Omari appeared for the Respondent before the Deputy Registrar on 18th September 2018, when the date for pre-trial was taken, the Respondent did not enter appearance or file a memorandum of response or participate in the proceedings in anyway despite service. The suit was certified to proceed ex parte on 24th January 2019.

Claimant's Case

3. The Claimant avers that he was employed by the Respondent as a night guard on 4th July 2012 at a salary of Kshs.8,000 per month, which is below the minimum wage as per the Regulation of Wages Order 2013. That sometime in February 2015 he sought and was granted leave by the General Manager, one Mr. Alfred Onyango to attend to his sick father in Busia.

4. The Claimant further avers that he travelled to Busia on 5th February 2015 and was back in Nairobi on 8th February 2015, ready to report for work on 9th February 2015. He claims that when he reported to the workplace on 9th February 2015 at around 4.00 per month, to prepare

for the night duty he was informed by the new guard that the General Manager had issued instructions that the Claimant should not be allowed into the premises.

5. He avers that attempts to get in touch with the General Manager for the reasons for termination on phone bore no fruits as he did not pick the Claimant's calls. He avers that the conduct of the General Manager amounted to summary dismissal which was unlawful since he was innocent and had no record of misconduct or warning letter. That due process was not followed in the termination and his dues were not paid.

Evidence

6. The Claimant adopted his witness statement added 9th December 2016 which regurgitates the averments in the memorandum of claim.

7. Records show that the Claimant was employed by the Respondent on 4th July 2013 as a security guard at a monthly salary of Kshs.8,000. His Supervisor was the Head of Security. The contract provided for a 3 months' probation period and one (1) month's notice of termination or payment in lieu of notice by either party during probation and after confirmation. The Claimant was entitled to thirty (30) consecutive days of leave for every completed year of service and office hours were from 6.30 pm – 7.30 am. A copy of the pay slip for July 2014 was attached.

8. The Claimant testified that on 5th February 2015, he applied and was granted three (3) days' leave to visit a sick parent and returned to Nairobi on 8th February 2015 and reported to the work place on 9th February 2015. He told the Court that the security guard at the gate informed him that he had instructions from the Manager not to allow him into the premises. That his attempts to get in touch with the Manager by phone failed. He testified that the Manager would call back but did not. He testified that he had no record of wrong doing. That he used to work every day including Sundays and public holidays.

Submissions

9. According to the Claimant the issues for determination are whether the Claimant's termination was fair and whether the Claimant is entitled to the prayers sought.

10. On termination procedure, the Claimant relied on the decision in **Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Ltd, Cause No. 74 of 2013** on the essence of Section 41 of the Employment Act. It is submitted that the Claimant was not accorded a hearing as required by Section 41.

11. Reliance was also made on Sections 43 and 45 of Employment Act on the requirement of substantive and procedural fairness. It is contended that the Claimant was given neither the reason for termination nor taken through a disciplinary hearing. The decision in **International Planned Parenthood Federation v Pamela Ebot Arrey Effiom [2016] eKLR** and **Kenfreight (EA) Ltd v Benson K. Nguti [2016] eKLR** as well as **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** on procedural and substantive fairness if a termination is to pass the fairness test.

12. The Claimant submits that his termination did not attain the threshold for substance and procedural fairness.

13. On reliefs, it is submitted that the Claimant is entitled to payment in lieu of notice under Section 36 of the Employment Act underpaid salary as per the Regulation of Wages Order 2013, public holidays as held in **Edwin Odhiambo Sindala v Samba Enterprises Limited & Another (2015) eKLR**, house allowance payable under Section 31 of the Employment Act and 12 months' salary as compensation. The Claimant relied on the decision in **Peter Karenju Mwangi v Home Afrika Limited [2015] eKLR**.

Analysis and Determination

14. The issues for determination are: -

(a) Whether the Claimant was constructively dismissed.

(b) Whether the Claimant is entitled to the reliefs sought.

15. On termination, it is the Claimant's uncontroverted evidence that he was denied access to the workplace on 9th February 2015 through instructions given by the General Manager, Mr. Affoco Onyango and an attempt to contact him fell through because he did not pick call and did not call back. The fact that the Claimant could not access this work place on instructions of the General Manager and for no reason written or otherwise went to the root of the contract of employment and show that the Respondent had breached a fundamental obligation of the contract of employment dated 4th July 2013 for the simple reason that the Claimant could only perform his contractual duties at the Respondent's work place. Access to the work place went to the root of the contract of employment and the denial amounted to a constructive dismissal.

16. According to **Black Law Dictionary (10th Edition)**, constructive dismissal is defined 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 causing the working conditions or terms of employment; an employee's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”

17. The principle of constructive dismissal was explained by Lord Denning in **Western Excavating ECC Ltd v Sharp [1978] 2 WLR 344**.
18. The tests and guiding principles for constructive dismissal were explained by the Court of Appeal in **Coca Cola East and Central Africa v Maria Kagai Ligaga [2015] eKLR** as follows: -

“The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer’s behaviour towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer’s conduct is so grave that it constituted a repudiatory breach of the contract of employment - this is the contractual test.”

19. In addition, the Court of Appeal formulated additional principles in cases germane to constructive dismissal:

- (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 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.*

20. As observed by Lord Denning in **Western Excavating ECC Ltd v Sharp (supra)**

“If the employer is guilty of conduct which is a 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, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed ...”

21. In the instant case, the denial of access to the work place by the Respondent without any justification was a significant breach of the contract of employment which entitled the Claimant to treat himself as discharged from further performance.

22. The Court finds that in the circumstances of this case, the Claimant was constructively dismissed. Accordingly, the Claimant’s dismissal by the Respondent on 9th February 2015 was unfair and unlawful.

Reliefs

23. Having found that the Claimant was constructively dismissed, I now turn to the reliefs sought –

(a) One month’s salary in lieu of notice Kshs.9,780.95 (as per the Regulations of Wages (General) (Amendment) Order, 2013. The Claimant was not given a termination notice and is thus entitled to one month’s salary in lieu of notice as provided by the contract of employment dated 4th July 2013. The Court awards **Kshs.9,780.95**.

(b) Salary underpayment for the entire duration of service $Kshs.(9,780.95 - 8,000) = 1,780.95$

Since the Claimant worked for the Respondent for 18 months and the Respondent did not adhere to the Regulation of Wages (General) (Amendment) Order 2013, effective 1st May, 2013, which fixed the minimum wage for watchman at Kshs.9,780.95, the Claimant is entitled to the balance for the entire period of employment. The Court awards **Kshs.32,057**.

(c) Unpaid/untaken public holidays for the entire period

Although the Claimant testified that he worked every day including public holidays, particulars of the specific holidays were not provided. The claim is declined.

(d) Unpaid house allowance – $(15\% \times 9,780.95) \times 12 \times 1\frac{1}{2}$ years = Kshs.26,406

This is a statutory right of the employee as ordained by Section 31 of the Employment Act. The July 2013 payslip on record shows that the Respondent was not paying the Claimant house allowance and the same is awarded for the entire employment period that is 4th July 2013 to 9th February 2015 – **Kshs.26,406.**

(e) Compensatory damage for unfair dismissal

Having found that the Claimant was constructively dismissed by the Respondent, which is unfair, the Claimant is entitled to the reliefs provided by Section 49(1) of the Employment Act.

Taking into consideration the fact that the Claimant worked for the Respondent for one and half years only, wished to continue and was blameless, the equivalent of two (2) months' salary is fair in the circumstances. The Court awards the equivalent of two (2) months' salary as compensation for the unfair termination of **Kshs.19,561.90.**

24. In conclusion, judgment is entered in favour of the Claimant for Kshs.87,805.85 with costs and interest at Court rates from the date of judgment till payment in full.

25. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 26TH DAY OF OCTOBER 2021

DR. JACOB GAKERI

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.

DR. JACOB GAKERI

JUDGE