



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 650 OF 2017

FRANCIS MAKORI.....CLAIMANT

VERSUS

BOB MORGAN SERVICES LIMITED.....RESPONDENT

JUDGEMENT

1. The genesis of the dispute herein is the claimant's letter of resignation dated 5th September, 2016, which he alleges authoring upon being forced to do so by the then Deputy Chief Human Resource Officer of the respondent. To this end, he has sought various reliefs including a declaration that his termination was induced hence unfair and unlawful; one month salary in lieu of notice, service pay for 14 years, salary for 9 days worked and full compensation for loss of employment.
2. The claim was contested vide the respondent's reply filed on 18th November, 2019 through which it averred that the claimant resigned voluntarily from employment, citing land boundary issues. It termed the suit by the claimant as an afterthought. The respondent prayed that the claim be dismissed with costs.
3. Essentially, the parties admit that they were in an employment relationship. What is in dispute is the manner in which the same was severed and the benefits payable thereunder, if any.
4. The matter proceeded for hearing of the claimant's case on 9th August 2021 and was later adjourned for defense hearing on 29th September, 2021.

Claimant's case

5. The claimant testified as CW1 and sought to rely on his witness statement, which he asked the court to adopt as part of his evidence in chief. He also produced the bundle of documents filed together with his claim as exhibits before court.
6. The claimant testified that he was employed by the respondent on a casual basis and that his terms of service were later converted to permanent. He told court that on 5th September, 2016, he went to see the respondent's Deputy Chief Human Resource officer by the name Mr. Ochuku as he had several issues to sort out. It was his testimony that the said Mr. Ochuku was very rude towards him and forced him to resign. That subsequently, he resigned in writing and the said letter of resignation was accepted immediately by the said Mr. Ochuku. It was his testimony that he felt harassed by Mr. Ochuku hence his resignation. He told court that during his employment with the respondent, he was never issued with any warning and as such, he had never seen the warning letter annexed to the respondent's defence. He summed up his testimony by stating that he was never paid terminal dues and was not adequately compensated for the unutilized leave and off days.
7. In cross examination, the claimant stated that he did not notify the management of the respondent in regard to the alleged harassment from Mr. Ochuku. He also stated that he was not aware of the normal notice period to issue in cases of resignation.

Respondent's case

8. The respondent presented its oral evidence through its Chief of Staff, Mr. Dennis Michieka who testified as RW1. He also sought to rely on his witness statement, which he asked the court to adopt as part of his evidence in chief. He also relied on the bundle of documents filed on behalf of the respondent and which he produced as exhibits before court.
9. RW1 stated that the claimant willfully resigned from employment and indeed, tendered insufficient notice. It was his testimony that the claimant never appealed nor approached the management of the respondent for any intervention following his resignation.
10. In cross examination, RW1 stated that Mr. Ochuku was his junior and was in charge of receiving resignations hence he is the one who attended to the claimant at the point of his resignation. In a quick rejoinder, he stated that the claimant never complained thereafter in regards

to the allegations touching on Mr. Ochuku.

Submissions

11. Both parties filed written submissions upon close of the hearing. On his part, the claimant submitted that his resignation was forced and induced hence termed his exit from the employment of the respondent as unlawful and unfair in terms of section 45 of the Employment Act (Act).

12. On its part, the respondent submitted that the claimant resigned out of his own will and had failed to prove termination as required of him by the law. The respondent further submitted that the claimant had not established a case of constructive dismissal. On this issue, it sought reliance on the case of **Coca Cola East & Central Africa vs Maria Kagai Ligaga (2015) eKLR** and **Milton M. Isanya vs Agakhan Hospital (2017) eKLR**.

Analysis and Determination

13. Upon considering the pleadings before Court, the rival submissions, as well as the documentary and oral evidence by both parties, this court is being called upon to determine the following issues?

i. Whether the claimant was terminated by the respondent

ii. Did the claimant's resignation constitute constructive dismissal?

iii. Is the claimant entitled to the reliefs sought?

Whether the claimant was terminated by the respondent

14. The claimant has alleged that his exit from the employment of the respondent amounted to unfair termination as he was forced to tender his resignation. This fact has been disputed by the respondent who has termed the instant suit as an afterthought.

15. In view of the contest presented before me, it is imperative to analyse the facts and circumstances leading to the exit of the claimant from employment, so as to determine whether he was indeed forced out of employment or whether he left on his own volition.

16. It is notable that the claimant has extensively submitted that he was terminated from employment contrary to section 45 of the Employment Act. It is noteworthy that **Section 47(5) of the Employment Act** places the burden of proving unfair termination of employment or wrongful dismissal on the employee. Once this burden is discharged, the employer then has the onus to justify the grounds for the termination of employment or wrongful dismissal. The said provision is in the following terms;

“(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 the employment or wrongful dismissal shall rest on the employer.”

17. The Court of Appeal addressed this issue in the case of **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR**, hence opined as follows;

“So that, the appellant(employee) in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "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.”

18. In accord with the provisions of **section 47(5)** as well as the finding in the foregoing precedent, the claimant was required at this instance to prove that he was terminated from employment and that the same was undertaken in an unfair and unlawful manner.

19. The claimant did not place a termination letter before court nor any letter for that fact, suggesting that his services had been terminated. On the converse, he told court that he was forced to resign.

20. In the circumstances, the claimant has failed to discharge the legal burden as required of him under the section 47(5) of the Act, by proving that his services were terminated by the respondent and no inference to that effect can be drawn.

Did the claimant's resignation constitute constructive dismissal?

21. The next issue I need to determine is whether the claimant's resignation was forced, hence constituted constructive dismissal. The claimant has denied that he voluntarily resigned from employment and has cited harassment from one Mr. Ochuku a former employee of the respondent.

10. The Black's Law Dictionary (10th Edition) defines the term constructive dismissal as follows:

“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.”

11. The Court of Appeal, in the case of **Coca Cola East & Central Africa Limited vs Maria Kagai Lugaga [2015] eKLR** extensively addressed the issue of constructive dismissal and laid down the following, as the guiding principles in that regard;

- 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.*

22. It is also instructive to note that the court found in the above case that **“The criterion to determine if constructive dismissal has taken place is repudiatory breach of contract through conduct of the employer. The burden of proof lies with the employee.”**

23. In this case, the claimant had the burden of proving that he was constructively dismissed. The circumstances of his resignation must also fall within the principles stipulated in the **Coca Cola case (supra)**.

24. The resignation letter by the claimant reads as follows;

“REF: RESIGNATION FROM THE COMPANY HAS (sic) A GUARD FROM 12-09-2016

I hereby kindly request the company to consider me for the above issue. I am a Kenyan man/company worker for more than ten years in service. Has (sic) per my request, I request accompany to offer me any/all benefits has (sic) per the above issue. I have stress of land issue with my uncle which I bought from her (sic). He uproots the boundary because I am away with my family. Also, I have domestic family issues which I need to solve &I have settled mind. If all goes swell, will communicate.

Thank you.

Yours faithfully

Signed

Francis Makori”

25. I have carefully perused the said resignation letter and note that the claimant does not make any reference to any frustrations from the respondent. On the contrary, he appears to be seeking time out to allow him settle personal problems. Simply put, the respondent had nothing to do with his decision. This is a fact he confirmed during his testimony. He clearly indicated that he had no issues with the respondent.

26. Coupled with the foregoing, the claimant did not adduce any evidence to suggest that there was repudiatory breach on the part of the respondent to satisfy the requirements of constructive dismissal.

27. As such, the court returns that the claimant has not proved that he was constructively dismissed from employment.

28. The claimant has also alleged that he tendered the letter of resignation upon being forced to do so by Mr. Ochuku. In addressing this issue, I wish to rely on the case of **Wenslaus Oduki Odinga V Kenyatta National Hospital Board [2013] eKLR**, where it was held as follows;

“Apart from the general claim of duress, the Claimant did not adduce any particulars. An employee alleging duress or inducement to sign a document in a non-custodial environment must provide details of such duress or inducement. It is not enough to say “I was forced or I was confused.” The Claimant failed to provide any such details and his claim that he was forced to sign the admission is therefore rejected. This in effect means that the Respondent had a substantive justification for terminating the Claimant’s employment.”

29. In the instant case, the claimant did not furnish any particulars constituting the alleged inducement. He merely alleged that the respondent's Mr. Ochuku forced him to resign. He stated during cross examination that he tendered the resignation out of fear since Mr. Ochuku was senior in rank at the respondent company. This reason is not plausible at all, given that he had nothing to lose by refusing to tender his resignation. What was the worst thing Mr. Ochuku could have subjected him to besides dismissing him from employment? After all, the resignation was the ultimate act of severing the employment relationship. How worse could it get?

30. Further, and as indicated by the respondent, the claimant never approached the management concerning his resignation nor sought any intervention in that regard. From evidence, it was apparent that Mr. Ochuku did not have the final say in the respondent company. This means that he still had a recourse in the event he felt mishandled by the said Mr. Ochuku, but he did not exercise that option.

31. In the circumstances, I find that the claimant's assertion that he was induced and /or forced to resign from employment, has not been substantiated.

32. It may be probable that the claimant tendered the resignation letter out of ignorance. Be that as it may and in as much as the court sympathizes with him, the law at this instance is not on his side and cannot cure what has been done.

33. Before I pen off, the claimant has prayed for the sum of Kshs 140, 575/= being service pay for the 14 years he worked for the respondent. Service pay is payable pursuant to section 35 (5) of the Act only in cases where termination is pursuant to a notice which was not the case herein. Besides, section 35(6) of the Act, excludes payment of service pay to employees who contribute towards the National Social Security Fund (NSSF). Since the claimant admitted contributing towards NSSF, he automatically falls out of the purview of the beneficiaries of service pay.

34. The employment relationship having been admitted, the claimant is entitled to a certificate of service pursuant to section 51(1) of the Employment Act.

Conclusion

35. The upshot of the foregoing is that the claim is dismissed in its entirety with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER 2021.

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STELLA RUTTO

JUDGE

Appearance:

FOR THE CLAIMANT MR. MAGETO

FOR THE RESPONDENT MR. NJUGUNA

COURT ASSISTANT BARILLE SORA

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 had 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.

STELLA RUTTO

JUDGE