



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.109 OF 2020

NICK MUSILI MUSYOKA.....CLAIMANT

VERSUS

DAC AVITION (E.A) LIMITED.....RESPONDENT

JUDGEMENT

The claimant is a male adult and the respondent a limited liability company, an aviation company.

The claimant was employed by the respondent as a First Officer vide contract dated 31st October 2014 earning ksh.115, 560 per month. The salary was reviewed vide letter dated 2nd October, 2015 to ksh.176, 103 per month.

In the year 2018 the claimant was promoted to the position of Captain vide letter dated 10th July, 2018 and salary reviewed to Ksh.247, 480 per month and a monthly allowance of \$2420 based on the new obligations.

In the year 2019 the salary was reviewed too Ksh.277, 177.60 per month and in September, 2019 the allowance was increased to \$2920 following an approval by the Kenya Civil Aviation Authority (KCAA) to the claimant to become a training instructor. The claimant also became entitled to 6 weeks leave per years and a medical allowance.

The claim is that the claimant worked diligently leading to increase in salaries and promotions and added responsibilities. He was also required to travel locally and abroad to Mali, Democratic Republic of Congo, Somalia, Chad, South Sudan, among others.

The approval of KCAA for the claimant to become a Training Instructor was an additional responsibility which included the training of the respondent's First Officers to become Captains within the country and outside the country but he was never paid his allowances for his trips outside the country. the due allowances were communicated by the respondent in letters and notices to the claimant.

The respondent was in breach of the employment contract by failing to pay the due allowances to the claimant from May, 2019 to December, 2019 a total of 8 months. The claimant was denied his annual leave for the years 2018 and 2019 and denied medical allowances for the year 2019 and forcing him to secure an alternative medical insurance at own costs.

In the year 2018 the claimant was denied his annual leave and allegedly compensated in the sum of \$4240 but later in the year 2019 he was informed that such compensation would be applied to his cash allowances for march and April, 2019 leading to no leave compensation.

The claim is also that the claimant was never provided with housing or an allowance.

The claim is that the claimant has suffered loss and damage due to the actions of the respondent leading to threats to terminate employment vide letter dated 6th January, 2020. The claimant had to involuntarily resign from his employment due to acts of coercion and threats by the respondent. his terminal dues have not been paid despite demand and father no Certificate of Service has been issued.

The claimant is seeking the following dues;

- i. Unpaid basic salary from November to December, 2019 Ksh.459,431.36;
- ii. Unpaid cash allowances from May to December, 2019 \$21,360;
- iii. Leave days not taken 84 days \$7476 + Ksh.734,520.64;

- iv. Unpaid house allowances from 2014 to 2019 Ksh.2,103,347.88;
- v. Refund of medical allowance expenses for the year 2019 Ksh.18,845;
- vi. 12 months compensation for unfair constructive dismissal \$35,040 and Ksh.3,326,131.20;
- vii. Notice pay Ksh.\$2920 + Ksh.277,177.60;
- viii. An order compelling the respondent to issue a certificate of service;
- ix. An order directing the respondent to pay the USD (\$) amounts in Kenya Shillings;
- x. Costs of the suit;
- xi. Interests on the awards; and
- xii. Any other order the court may deem just.

The claimant testified in support of his case that despite working diligently for the respondent he was constructively dismissed from his employment after threats and coercion when he made demand for his unpaid dues and was forced to tender his resignation. The claims made should be awarded.

The respondent entered appearance on 3rd March, 2020.

No defence was filed.

On 19th November, 2020 both parties attended court and the respondent's advocate applied for more time and 14 days to file a response. The court granted orders that the respondent had 14 days to comply with Rule 13 of the Employment and Labour Relations Court (Procedure) Rules, 2016; to serve the claimant with the response and pleadings to close within 30 days.

The allocated time lapsed and no response was filed.

On 23rd March, 2021 the claimant invited the respondent at the registry for allocation of a hearing date but there was no attendance. A Hearing Notice was served on for 27th September, 2021 and in attendee was a new advocate Mr Litoro and who applied to be allowed to come on record and that he needed two weeks to do so and the court directed that the respondent was well represented in this matter and there was no Notice of Change of advocates. A new hearing date was allocated for 15th November, 2021 to allow the respondent a fair chance to attend the hearing or change his advocates.

On the due date there was no attendance or response filed.

Determination.

In a letter dated 6th January, 2020 the respondent notified the claimant that he was on *unauthorised absence* and that when your supervisor contacted you, you advised him that you were unavailable for duty until pending payments were made. Please refer to the several memos issued giving dates the company expects to make payments.

On 22nd January, 2020 the claimant through his advocates issued notice to the respondent that there was constructive and wrongful dismissal due to non-payment of due salaries and allowances owing from May, 2019 and that following notice dated 6th January, 2020 which contained threats, the non-payment of salaries, the respondent was in breach of the contract of employment and had caused the claimant to deem it as constructive wrongful dismissal from his employment.

The employment relationship between the parties herein was regulated under written terms and conditions. All changes and reviews thereof were put into writing. These are records attached to the Memorandum of Claim.

Clause 5 of the Employment Contract, parties agreed to the payment of a monthly salary.

Such terms for the payment of a salary on a monthly basis is the foundation of section 18 of the Employment Act, 2007 (the Act). subsection 18(2) thereof provides that;

2. Subject to subsection (1), wages or salaries shall be deemed to be due—

a. in the case of a casual employee, at the end of the day;

b. in the case of an employee employed for a period of more than a day but not exceeding one month, at the end of that period;

c. in the case of an employee employed for a period exceeding one month, at the end of each month or part thereof;

d. in the case of an employee employed for an indefinite period or on a journey, at the expiration of each month or of such period, whichever date is the earlier, and on the completion of the journey, respectively.

Even where parties have not agreed, an employee employed for a period exceeding month should be paid at each month end and an employee employed for an indefinite period should be paid his salaries and benefits therefrom at the end of each month.

Where then an employer subjects the employee to long periods of non-payment of his salaries and benefits therefrom, the employee becomes agitated, is preoccupied by his next course of action and particularly where to get the next meal, how to support his family and such results in anguish and agony leading to begging from relatives and friends which eventually stripes off the employee of any dignity. Such is inhuman, degrading and punishment for no good cause. This is so since the employee reduced to begging has offered his labours and there is no pay.

Where an employer is unable to pay an employee due to circumstances that the business is not able to afford the due salary and benefits, recourse is under the law as otherwise, too subject the employee to prolonged periods of non-payment of the salary is to engage in unfair labour practices. Such is specifically prohibited under Article 41 of the Constitution, 2010.

In the case of **Kusow Billow Issack v Ministry of Interior and Coordination of National Government & 3 others [2021] eKLR** the court held that where employees continued working but was never paid any salary, despite persistent demand, and as such his ability to provide for his family was curtailed and consequently he was subjected to undignified living, degrading treatment and mental anguish. This was found to be in violation of Article 23(3) of the Universal Declaration of Human Rights which provides for right to just and favourable remuneration which ensures the employee and his family have existence worthy of human dignity.

In the case of Jonathan **Spangler v Centre for African Family Studies (CAFS) [2017] eKLR** the Court held that the failure to pay salary to employees after rendering their services is subjecting them to degrading, inhuman and torturous conditions.

In this case, the claimant has submitted a litany of demand letters, messages and responses by the respondent admitting to non-payment of his salaries;

In a memo dated 20th January, 2020 the respondent notified employees that the payroll would be delayed;

In a letter dated 19th December, 2019 the respondent acknowledged there was non-payment of salary;

On 18th November, 2019 the respondent has proposed a payment plan for owing salaries from September to December, January to May.

Cumulatively, the claimant was not able to attend to his duties due to non-payment of his salaries.

the claimant through his notice and demand through his advocates he noted breach of contract and that where there was non-payment he would file suit, which he did and the same is not challenged as no response is filed despite the respondent having entered appearance and thus aware of these proceedings.

On the claimed dues, the salary from November to December, 2019 is not contested and for time worked the claimant is entitled to Ksh.459, 431.36.

The cash allowances from May to December, 2019 are equally due and part of employment and awarded at \$21,360.

Leave is due under the contract of employment and as a requirement under section 28 of the Act. the tabulation of 84 days of owed leave days is not contested and the claim for \$7476 + Ksh.734, 520.64 is found justified.

The claim for unpaid house allowances from 2014 to 2019 is claimed at Ksh.2, 103,347.88. housing was not a term of contract. Clause 5.4 of the contract provide for housing and payment of an allowance thereof whenever the claimant was travelling on assignment. Since the claimant was not a protected employee or earning a minimum wage regulated under the Wage Orders, such claim is found without merit.

On the claim for refund of medical allowance expenses for the year 2019 at Ksh.18, 845 such benefits was under clause 6 of the contract. The claims that whereas the claimant had such benefits he was not paid and was forced to secure alternative insurance medical cover.

The medical insurance under the contract was non-monetary. Where this was not provided, the claimant had a right to secure such right through the allowed dispute resolution mechanism, this court. he took the option to take an alternative insurance cover. Though a prudent thing to do, the non-monetary nature of the medical benefit, such shall not be refunded.

Further to the above, the claimant does not state that he required the use and application of medical cover and was forced to use personal funds in this regard. He only acted as a diligent person would do and applied personal monies to get an alternative insurance cover.

The claimant is seeking for notice pay and compensation on the basis that there was constructive wrongful dismissal of his employment by the respondent. that due to threats and acts of coercion, he was forced to resign from his employment.

Constructive wrongful dismissal from employment exists where the employer is guilty of conduct which is a significant breach going to the

root of the contract of employment such breach must be fundamental as to be considered a repudiatory breach of the contract of employment.

The employee is forced to resign from his employment in response to that breach of contract of employment.

The Court of Appeal in addressing such matter in the case of **Coca Cola East & Central Africa Limited v Maria Kagai Lugaga [2015] eKLR** held that;

The key element in the definition of constructive dismissal is that the employee must have been entitled to 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 constitutes a repudiatory breach of the contract of employment- this is the contractual test.

...

The Court went on to outline the key elements of a constructive dismissal to be that;

- a. Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer?**
- b. 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.**
- c. An objective test is to be applied in evaluating the employer's conduct.**
- d. 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.**
- e. An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.**
- f. 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.**
- g. The burden to prove repudiatory breach or constructive dismissal is on the employee.**

The breach of the employment contract by the employer must hence be followed by the employee tendering his resignation. Failure to take such action and abandon employment, such is conduct defined as gross misconduct and without good cause in law. even in a case where the claimant was not paid his salaries for long period, such being good cause to infer breach of the employment contract on the part of the respondent as the employer, good cause for the claimant to claim in constructive dismissal lay In his letter of resignation, this was not filed.

The letter of demand from his advocates is not commensurate to the letter of resignation. See the case of **Herbert Wafula Waswa v Kenya Wildlife Services [2020] eKLR**. the court finds the claimant has failed to prove a case of constructive dismissal. He abandoned his employment. he cannot claim notice pay or compensation.

A Certificate of Service should issue for the duration of employment pursuant to section 51 of the Act.

The order seeking for payment of terminal due in Kenya Shillings is lawful and justified pursuant to section 17 of the Act.

The award of costs before this court is discretionary and the claim not contested the court finds it fair and just to award costs. On the owed dues, such shall be paid within 30 days and after such period, he same shall be paid with interests at court rates from the date due and until paid in full.

Accordingly, judgement is entered for the claimant against the respondent in the following terms;

- a. Unpaid basic salary from November to December, 2019 Ksh.459,431.36;**
- b. Unpaid cash allowances from May to December, 2019 \$21,360;**
- c. 84 Leave days not \$7476 + Ksh.734,520.64;**
- d. The dues in United States Dollars shall be converted and paid in Kenya Shillings;**
- e. Certificate of service shall be issued pursuant to section 51 of the Employment Act, 2007;**
- f. Dues at (a), (b) and (c) above shall be paid within 30 days after which period these shall be paid with interests at court rates from the date due and until paid in full;**

g. Costs of the suit.

DELIVERED IN COURT AT NAIROBI THIS 16TH DAY OF DECEMBER, 2021

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and