



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 736 OF 2019

DUNCAN MURUNYU MUNGAL.....CLAIMANT

VERSUS

SLOPES MEDIA HOUSE LIMITED.....RESPONDENT

J U D G M E N T

1. The claim before me was instituted by the Claimant vide a Memorandum of Claim dated 31st October 2019 and filed in Court on 1st November 2019. The Claimant pleaded, *inter-alia*;

- a) that on 11th September 2018, the Claimant was engaged by the Respondent as a TV host for a show dubbed “Kinya Wenge” which aired on Mt. Kenya TV owned by the Respondent at a monthly salary of ksh.100,000.
- b) that following commencement of his duties, the Claimant sought to improve the quality of the show and to increase its media outreach, and consequently came up with a different show dubbed “kuriria Live” with a different structure, name and content.
- c) that satisfied with the Claimant’s expertise and services, the Respondent requested the Claimant to host another show dubbed “Mururi wa Mt. Kenya” and re-negotiated the Claimant’s contract and reviewed his salary upwards to ksh.120,000 effective 1st October 2018.
- d) that during the month ending October 2018, the Respondent paid the Claimant ksh.50,000 and during the subsequent months of November, December January and February, the Respondent paid the Claimant his salary exclusive of statutory deductions.
- e) that in March 2019, the Respondent purported to arbitrarily reduce the claimant’s salary to ksh 68,452 and proceeded to pay that amount in March and April.
- f) that in May 2019, the Respondent failed to pay the Claimant absolutely, and yet expected the Claimant to get to work and deliver on his duties on air; thus subjecting the Claimant to extreme financial embarrassment and difficulty, resulting to Claimant’s inability to get to work on 7th June 2019, which was communicated to the Respondent’s producer.
- g) that the Respondent made a cash pay of Ksh.34,000 being part- payment of May 2019 salary.
- h) that the Respondent was in breach of the contract of employment, as a result of which the Claimant continues to suffer financial loss.
- i) that the Claimant continued to report to work for preproduction and preparation of the show and that on 15th June 2019, after final preparations for the show, the Respondent’s Head of Production stated that the Claimant would not be going on air.
- j) that the Respondent continued to frustrate the Claimant until 29th July 2019 when the Respondent’s Managing Director and Human Resource Manager informed the Claimant of the Respondent’s intention to terminate his employment, and that a formal letter would follow.
- k) that despite the employment contract not being formally terminated as evidenced by continued airing of the program

“Kururia Live” and the Respondent’s use of the Claimant’s social media accounts on the show, the Respondent has neither paid the Claimant nor put him on air.

l) that the Claimant assumed constructive termination of his employment and on 27th August 2019 send the Respondent a demand letter (dated 27th August 2019), demanding for his terminal dues, salary arrears, damages for unlawful termination and loss of opportunity.

2. The Claimant prays for ksh.619,096 being salary arrears for October 2018, march, April, May, June, July and August 2019, Ksh.120,000 being one month salary in lieu of notice, ksh.1,440,000 being twelve months salary as damages for unfair and unlawful termination, ksh.1,440,000 being twelve months salary as damages for loss of opportunity, an order that the Respondent provides the Claimant with a Certificate of Service, and an order that the Respondent remits the already deducted statutory deductions to KRA, NSSF and NHIF, costs and interest.

3. The Claimant also filed, along with the Memorandum of Claim, a detailed witness Statement dated 31st October 2019 and a List of Documents dated 31st October 2019, on which seven documents are listed. These include the contracts of employment dated 11th September 2018 and 22nd November 2019 respectively, and the demand letter dated 27th August 2019.

4. Though duly served by the Court on 8th January 2020 with Summons and all the pleadings filed herein, the Respondent did not enter appearance, and did not file any defence. On 10th November 2020, the Court directed that hearing proceeds by way of formal proof.

5. When the matter came up for formal proof on 10th August 2021, the Claimant adopted his detailed filed witness statement as part of his evidence. The said witness statement states in detail matters pleaded in the Memorandum of Claim, which I have substantially reproduced in paragraphs 1 and 2 of this judgment. The Claimant further produced the documents listed on his list of documents as exhibits.

6. The Claimant buttressed his evidence by telling the Court:-

a) that the media industry is quite fluid and that what matters is one’s last appearance.

b) that a TV host’s image leaves people’s minds the minute they stop seeing him on screen, as one is judged by his last appearance; depending on what they see him doing on screen on day to day basis.

c) that one becomes obsolete as soon as people stop seeing him on screen.

d) that the Claimant has been out of job for quite sometime and has suffered quite a lot and especially with the onset of Covid-19.

The Claimant urged the Court to consider these facts in deciding his case.

7. At the close of the hearing/formal proof on 10th August 2021, the Claimant’s counsel was directed to file written submissions, which the counsel finally did on or about 31st August 2021, ahead of the date that I had set for mention of the matter before the Court’s Deputy Registrar (23rd September 2021) to confirm filing of the written submissions.

8. The Court file was subsequently forwarded to me for writing of this judgment.

9. As already stated in paragraph 4 and 5 of this judgment, hearing proceeded by way of formal proof. The Claimant’s evidence therefore stands uncontroverted and un rebutted.

10. While appreciating the Claimant’s list of issues dated 18th February 2020 listing five issues for determination, issues for determination appear to me to be as follows:-

a) whether the Respondent was in breach of the Claimant’s contract of employment by failing to pay the claimant’s salary as per the contract of employment.

b) whether the Respondent’s conduct of barring the claimant from going on air and failure and/or refusal to pay the Claimant’s salary in accordance with the Claimant’s contract of employment amounted to constructive dismissal of the Claimant.

c) whether the dismissal was fair and lawful.

d) whether the Claimant is entitled to the reliefs sought.

11. On the first issue, section 9(2) of the Employment Act 2007 obligates an employer who is a party to a written contract of service to cause the contract to be drawn up stating the particulars of employment and to have the same consented to by the employee by signing his name thereon or imprinting thereon an impression of his thumb or one of his fingers thereon. This brings into contracts of employment the principle of offer and acceptance. Once signed, none of the parties thereto can run away of even attempt to run away from the terms and conditions thereto.

12. The contract of employment dated 11th September 2018 and signed by both the Claimant and the Respondent put the Claimant's salary at ksh.100,000 (Ksh.25,000 per episode, one episode every week). This contract was renegotiated and the Claimant's salary was reviewed upwards to ksh 120,000 per month, leading to the signing of the contract of employment dated 22nd November 2018.

13. Failure and or refusal by the Respondent to pay the Claimant's salary as set out in the contract of employment and/or purporting to unilaterally reduce the same, amounted to breach of the contract of employment by the Respondent.

14. On the second and third issues, the Claimant, who is a TV host, testified that the Respondent not only refused to pay the claimant's salary in accordance with the contract of employment, putting the claimant to great financial difficulties, but also refused to let the Claimant go on air, despite the fact that his TV show continued to be aired and his social media accounts on the show continued to be used by the Respondent.

15. Indeed, the Claimant pleaded and testified that on 15th June 2019, he was barred by the Respondent from going on air after he had fully prepared for the TV show. The Respondent never terminated the Claimant's contract formally despite informing him on 29th July 2019 that they would do so.

16. From the Claimant's pleadings and evidence, it is clear that the Respondent deliberately created a situation at work place which rendered the Claimant's continuation of employment difficult, if not impossible.

17. In determining what amounts to constructive dismissal in the case of Edwin Beiti Kipchumba -vs- National Bank of Kenya limited [2018] eKLR, the Court of Appeal cited with approval the Industrial Court's decision in Cause Number 611(N) of 2009 between Maria Kagai Ligaga -vs- Coca Cola East and Central Africa Limited where it was held:-

“constructive dismissal occurs where the Employer's behavior is so intolerable that it makes is considerably difficult for the Employee to continue working.

The Employee initiates termination believing himself to have been fired. The Employer is deemed to no longer be interested in honouring the terms of the contract of employment. The Employee must demonstrate that the Employer has engaged in repudiatory breach. The Court must be persuaded that the employee has reason to resign. Employer's actions need not be coercive, threatening or in the nature of duress.”

18. The employee in the Maria Kagai Ligaga case (supra), who had been serially transferred, was found to have been constructively dismissed, and was awarded damages for unlawful dismissal. The decision was upheld by the Court of Appeal in Civil Appeal No. 20 of 2010, Coca Cola East and Central Africa Limited -vs- Maria Kagai Ligaga [2015] eKLR.

19. In the present case, I find and hold that from the Claimant's pleadings and evidence adduced in proof thereof, the Respondent engaged in repudiatory breach and was not interested in honouring the terms of the Claimant's employment. The Claimant was constructively dismissed by the Respondent, and the dismissal was unlawful for failing to meet both the procedural and substantive fairness threshold as set out in Sections 41 and 45 of the Employment Act 2007.

20. On the fourth issue, it is my finding that the Claimant has proved his claim against the Respondent, save for the claim for damages for loss of opportunity. Consequently, judgment is hereby entered in favour of the Claimant against the Respondent as follows:-

- a) Salary arrears for October 2018, March, April, May, June, July and August 2019.....Ksh.619,096
- b) One month salary in lieu of notice.....ksh.120,000
- c) Eight months salary being compensation for unfair and unlawful termination.....ksh.960,000
- Total.....Ksh.1,699,096**

21. The Claim for damages for twelve months salary being damages for loss of opportunity was not proved, and the same is declined.

22. The prayer for an order that the Respondent remits the already deducted statutory deductions to KRA, NSSF and NHIF is allowed and the Respondent is ordered to remit any such deductions within thirty days of this judgment.

23. The Respondent is also ordered to issue the Claimant with a Certificate of Service pursuant to Section 51(1) of the Employment Act 2007 within thirty days of this judgment.

24. The Claimant is awarded costs of this claim and interest at court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2ND DAY OF DECEMBER 2021

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Gichuhi for Claimant

No appearance Respondent