



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.85 OF 2016

KENNEDY MUTUA MWANGANGICLAIMANT

VERSUS

MADISON INSURANCE COMPANY (K) LIMITEDRESPONDENT

JUDGEMENT

The claimant was employed by the respondent on 1st March, 2013 as the Marketing Executive for General Insurance Business. In the course of the employment the respondent assigned the claimant more duties which required him to undertake debt collection.

The claim is that the claimant as the marketing executive was required to bring more business to the respondent by selling insurance policies to customers and earn commissions for premiums paid but the respondent never paid the claimant his override commissions despite the same being entrenched into his contract of employment.

The claimant was added more duties which entailed debt collection and entailed investigations on the colossal amounts of bad debts the claimant's predecessors had incurred. The claimant discovered mischief his predecessors had engaged in and embezzlement of premiums that was still being undertaken by the employees and upon notification of the respondent nothing was done. The respondent opted to recover the said debts from the claimant monthly salary effective February, 2014 thus constraining his employment and forcing him to tender his resignation.

Following salary deductions, the claimant was unable to raise fare to attend work, was unable to pay rent at Kisii taking into account his family was based in Nakuru. He was faced with both family and social problems and could not continue to discharge his duties under the contract of employment and was forced to resign from his employment with the respondent.

The claimant is seeking general damages for constructive dismissal; payment of accumulated override commissions and pension; the sum of ksh.20, 000 deducted from the February, 2014 salary; salary for 11 days worked in March, 2014; unpaid leave days; gratuity; certificate of service and costs of the suit.

The claimant testified that upon employment by the respondent he was based at Kisii agency office and was paid ksh.45, 000 which as increased to ksh.47, 500 from 1st January, 2014.

In the course of his employment the claimant discovered that his predecessors had issued cover policies on credit and or received premiums from insured's but failed to remit them to the respondent as a result of which the respondent suffered colossal debts. The claimant on reporting the same he was added more duties for debt collection and without his salary being reviewed.

The claimant also testified that he was forced to undertake investigations in a bid to recover the debts owing to the respondent and it transpired that some insured had paid their premiums but the employees had fraudulently stolen the same through fake insurance agencies with a good case being that of Nduru High School who had paid the full premium through a fraudster disguised as *Fatra Insurance Agency*.

It also emerged that the insured would pay in cash but such cash would be embezzled and fake receipts would be issued. To cover their tracks the employees would wait for insured that would pay with cheques and would fraudulently distribute the amounts to reflect part payments.

The claimant notified the management but no action was taken of the subject employees and to the contrary the respondent opted to recover these debts from his salary by deducting ksh.20, 000 from the month of February, 2014 without any justification or consent of the claimant.

The claimant also testified that as a result of the huge salary deduction done in February, 2014 he was unable to pay for his rent in Kisii, he had nowhere to sleep and take a shower before attending work and this placed him under such hardship to an extent that he could not attend work. This forced him to tender his resignation on 10th March, 2014 on the grounds that he could not sustain his stay in Kisii, pay rent, fare to work and support his family resident in Nakuru. His rented room in Kisii was locked and his goods sold

The claimant also resigned as his due override commissions earned in the course of duty had not been paid.

Defence

The defence is comprised of mere denials save that the claimant does not raise any cause of action and the suit should be dismissed and without prejudice the defence is that the claimant was an employee of the respondent and was assigned duties which required him to undertake debt collection besides his marketing duties for the same pay until he resigned from his employment on 10th March, 2014.

No witness was called.

No work records were filed.

At the close of the hearing both parties filed written submissions.

The court has analysed the pleadings, the evidence, the written submissions and the issues which emerge for determination can be summarised as follows;

Whether there was constructive dismissal of the claimant;

Whether general damages should be paid;

Whether the remedies sought should be issued.

Without the respondent filing any work records with regard to the claimant as required by the provisions of section 10(6) and (7) of the Employment Act, 2007 (the Act) the court is left with the claimant's evidence only. Such evidence is not challenged in any material way noting the defence comprise mere denials and no witness was called.

The claimant filed his contract of employment with the respondent and employment was on the position of Marketing Executive for general insurance business based in Kisii agency office and his address is noted at Nakuru. The contract does not define the duties under the appointed position. There is no job description attached to the position. Without any work records, these details are denied of the court.

Under the contract of employment, the claimant was to be supervised by the *Sales Manager (Branches) – GIB*.

The claimant has filed various emails communication from different persons with regard to outstanding premiums. One such email is from Samuel G Chege, Chief Accountant to the effect that;

... I am therefore effecting your General Manager's instructions and hereby ask Susan to deduct ksh.20, 000 every month effectively ... 2014 until the matter is fully resolved.

There is also a communication to the claimant attached to the Memorandum of claim to the effect that;

Kennedy,

Please call me with answers to the issues raised.

We shall recover from your salary any outstanding premiums.

With copy of this letter, I am officially requesting Samuel Chege to agree with you the amount to deduct this month.

Kindly take this matter seriously.

You should have cancelled these policies immediately and I remember raising this issue with you last year and you decided ...

These are crucial details but they are left hanging without any tangible defence or witness to testify to these matters. The fact that the claimant produced these communication is to support his claims that his salary was deducted to pay for debts that had no relationship with his work and which was without his consent.

Section 19 of the Act allow an employer to make a salary deduction for a lawful cause, as permitted in an agreement, upon the consent of the employee and for loss incurred through the negligence of the employee. Section 19 (1) provides as follows;

(1) Notwithstanding section 17(1), an employer may deduct from the wages of his employee—

(a) any amount due from the employee as a contribution to any provident fund or superannuation scheme or any other scheme approved by the Commissioner for Labour to which the employee has agreed to contribute;

(b) a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the wilful default of the employee;

(c) an amount not exceeding one day's wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work;

(d) an amount equal to the amount of any shortage of money arising through the negligence or dishonesty of the employee whose contract of service provides specifically for his being entrusted with the receipt, custody and payment of money;

(e) any amount paid to the employee in error as wages in excess of the amount of wages due to him;

(f) any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award;

(g) any amount in which the employer has no direct or indirect beneficial interest, and which the employee has requested the employer in writing to deduct from his wages;

(h) an amount due and payable by the employee under and in accordance with the terms of an agreement in writing, by way of repayment or part repayment of a loan of money made to him by the employer, not exceeding fifty percent of the wages payable to that employee after the deduction of all such other amounts as may be due from him under this section; and

(i) such other amounts as the Minister may prescribe.

[emphasis added]

Was the respondent justified under the above provisions to effect a salary deduction from the claimant's salary?

Without any work records with regard to how and why the respondent made the decision to effect a salary deduction, there being no witness to support the defence filed, the court finds no good cause for the same. The deduction of ksh.20, 000 from the claimant's salary from February, 2014 was unlawful.

From the due salary of ksh.47, 500 with a deduction of ksh.20, 000 the claimant testified that he could not sustain himself and family, his rented premises were locked due to non-payment of rent and consequently the landlord sold off his goods. This effectively reduced the claimant to inhuman and degrading circumstances without a place to lay his head or take a rest after a long day at work with the respondent.

With regard to the first issue as to whether there was constructive dismissal, both parties in the written submissions have relied on the case of **Coca Cola East & Central Africa Limited versus Maria Kagai Ligaga Civil Appeal No.20 of 2012** and where the Court of Appeal analysed the concept of constructive dismissal and held that;

The authoritative meaning of constructive dismissal was articulated by Lord Denning MR in Western Excavating (ECC) Ltd. -v- Sharp [1978] ICR 222 or [1978] QB 761, as follows:

“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. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once (emphasis ours). (See also Nottingham County Council -v- Meikle (2005) ICR 1).”

The court above went on to analyse the key element and test to determine if constructive dismissal has taken place and summarised the legal principles relevant to determining constructive dismissal include the following:

- 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.

In this regard, in the case of **Antony Mkala Chitari versus Malindi Water and Sewerage Company Limited [2013]eKLR** defined the concept of constructive dismissal as flows;

'Constructive dismissal has been defined in Pretoria Society for the Care of the Retarded Versus Loots [1997] 6 BLLR 721 as a situation in the work place, which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee to such an extent that the employee has no other option available but to resign.

...

The doctrine of constructive dismissal has not been given statutory underpinning in Kenya. But the doctrine and principles developed in other comparative jurisdictions would be equally applicable here because of the entrenchment of a justiciable right to fair labour practices under Article 41 of the Constitution and the need to interpret the Constitution in a manner that advances human rights and fundamental freedoms in the Bill of rights and the doctrine that the Constitution is always speaking.

The above is reiterated in the case of **Joseph Aleper & another versus Lodwar Water and Sanitation Company Limited [2015] eKLR**, that;

The Claimants in their written submission ably make a rendition of the origins of the doctrine of constructive termination of employment and its application in our jurisdiction as hereunder;

Constructive dismissal has its roots in the law of contract under the doctrine of 'discharge by breach.' Under this doctrine, an employee was entitled to treat himself as discharged from further performance of his obligations where the employer's conduct was a significant breach going to the root of the contract. The termination would be due to the employer's conduct. Such conduct may include unilateral reduction in pay or failure to pay the employee.

Has the claimant's case met the above threshold?

The claimant tendered his resignation notice dated 10th March, 2014 and noting his reasons that;

... This is after consideration of my current circumstances whereby my February 2014 salary was deducted to pay for GIB insurance premiums without my consent. ...

As noted above, the Act does not allow the employer to effect a salary deduction from an employee without a lawful cause. The deduction of almost half the claimant's salary thus placed him under circumstances that were intolerable and could reasonably not be expected to undertake his duties as the respondent by its conduct had essentially repudiated the terms and conditions of employment and were in breach of the same through the unilateral act of a salary deduction. Such deduction of the claimant's salary being unlawful and comprising a substantial portion of his pay, the resignation from employment is hereby found justified.

In this regard the court is allowed to award compensation up to 12 months gross salary. The claimant thus forced to resign from his employment through the conduct of the employer is hereby awarded compensation at 10 months gross salary which is found sufficient in the circumstances and all at ksh.475, 000.

In this regard and on the award of compensation, general damages are addressed.

Further the deduction of Ksh.20, 000 in February, 2014 is due and is hereby awarded as this had no justification in law.

For the 11 days the claimant worked in March, 2014 this is time served and should be paid for in full. on the salary of Ksh.47, 500 the claimant is entitled to Ksh.17, 417.

On the claim for leave days due, without any work records to support the claimant having taken his annual leave, the contract of employment made provision for 25 days of annual leave under clause 4. The claimant worked from 26th February, 2013 to 10th march, 2014 being one year and pay for 25 days is due all at ksh.39, 583.

On the claim for gratuity, under clause 5, 6 and 7 the claimant had the benefit of being part of the provident fund, had a medical cover and was included in the respondent's group personal accident and group life cover. In the contract there is no benefit of a gratuity pay. The respondent was effectively compliant with the provisions of section 35 of the Act. No gratuity pay is due.

With regard to claims for override commissions due for premiums sold, there are no particulars of what went into these claims if any. The

claimant left this aspect bare. Despite there being no attendance by the respondent in this regard, on the claims for specific commissions due to the claimant, he had the burden of proof which was not discharged.

A certificate of service is due under the provisions of section 51 of the Act for the period of employment.

The claims made having succeeded to a large extent and having been necessitated by the conduct of the respondent and who received demand and failed to make good the claims, costs are hereby awarded.

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

(a) Compensation Ksh.475,000.00;

(b) Pay for 11 days worked in march, 2014 Ksh.17,417.00;

(c) Deduction of wage ksh.20,000.00;

(d) Annual leave pay ksh.39,583.00;

(e) A certificate of service shall be issued in accordance with section 51 of the Employment Act, 2007;

(f) Costs of the suit.

Delivered at Nakuru this 23rd day of January, 2020.

M. MBARU

JUDGE

In the presence of: