



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 92 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 14th January, 2020)

THOMAS OLUM MIYAGOCLAIMANT

VERSUS

S.C JOHNSON & SON KENYA LIMITEDRESPONDENT

CONSOLIDATED WITH

CAUSE NO. 91 OF 2015

SAMUEL MASAKA MLIWACLAIMANT

VERSUS

S.C JOHNSON & SON KENYA LIMITEDRESPONDENT

JUDGEMENT

1. The Claimants herein were initially employed by Kiwi Brands Limited, which was acquired by Sara Lee Corporation and subsequently employed by the Respondent after the Respondent's acquisition of Sara Lee Corporation.
2. They each filed a Memorandum of Claim on 29th January 2015 alleging their constructive dismissal as cause 91 and 92 of 2015.
3. On 19th June 2017 this Court ordered that the 2 files be consolidated and heard together under Cause 91 of 2015.

Cause 91 of 2015 – Samuel Masaka Mliwa

4. The Claimant avers that during his employment with the Respondent, and its predecessors, there was no issue with his performance. However, on 9th May, 2014 he received a letter citing an incident that arose in July 2013 involving the pricing of Ridsect Chalk and an error in the preparation of Corplan Bounc back in March 2014. He avers that this led to him being placed on a Performance Improvement Programme (PIP) with effect from 12th May, 2014 for 3 months.
5. He avers that subsequent to the PIP, the Respondent did not make a follow up with the purported appraisals and indicated that the Claimant's best option was to resign. He avers of the two mutual separation agreements presented to him, he accepted the offer of Kshs. 2,354,102 but indicated; *"I did not resign, this was management decision"*.
6. He avers that he tendered his resignation and was paid his terminal dues but the Respondent deducted amounts owed to creditors without his approval. He contends that the allegations of poor performance, the purported appraisals and the compulsion to resign and sign mutual separation agreement was the Respondent's scheme to terminate him without following due procedure.
7. He therefore seeks the following reliefs:-

1. A declaration that the Respondent's actions towards the Claimant amounted to constructive termination.

2. An order that the Claimant's supposed mutual separation agreement was not an agreed separation agreement but a coercion and intimidation on the part of the Respondent thereby being unlawful and unfair termination.

3. A declaration that the Claimant was not paid a house allowance in the entire duration of his service.

4. An award of Kshs. 22,426,295.00 made up as follows:-

a) 12 months compensation for

unfair termination Kshs. 3,962,172.00

b) 3 months' notice pay Kshs. 990,543.00

c) Compensation for work

in Zambia Kshs. 9,180,000.00

d) House allowance for 17 years Kshs. 6,214,860.00

e) Pending leave for 21 days Kshs. 163,495.00

f) Pay for off days (Saturdays and Sundays)

worked for 246 days Kshs. 1,915,225.00

Total Kshs. 22,426,295.00

5. Cost of the suit

6. Any other relief that the court may deem fit to grant

8. The Respondent filed a Memorandum of Defence on 9th July, 2015. It avers that the Claimant over priced the Ridsect chalk which resulted in the chalk being out priced and occasioned loss of sales to the Respondent. It avers that the pricing error on the product was discovered in December, 2013 thus it could not be addressed in the performance review of 18th August, 2013.

9. It avers that the entire process of performance appraisal and performance improvement relating to the Claimant was conducted according to the Code of Practice & Grievance Procedure Manual and was necessitated by the Claimant's poor performance.

10. It avers that the Claimant opted to resign as he anticipated that he was to be put through an enquiry into his poor performance. It avers that by virtue of the Claimant's voluntary resignation he is not entitled to any of the orders sought.

Cause 92 of 2015: Thomas Olum Miyago

11. The Claimant avers that there was never an issue with respect to his performance until 16th April, 2014 when he received 2 letters alleging that he had been performing unsatisfactorily. He avers that the letters made reference to a mid-year review conducted on February however the content in the two letters differed.

12. He avers that there were no previous set targets that were given to him before the alleged half year reviews. He avers that the Respondent was only fishing for a reason to prefer disciplinary measures against him so as to justify his termination.

13. He avers that he was served with two mutual separation agreements on 19th September, 2014 and informed that he was expected to resign. He avers that he tendered his resignation on 22nd October, 2014 and that the Respondent paid him his dues but deducted a loan a balance of Kshs. 1,138,500.00 owed to Champion Co-operative Society yet the Respondent was not a party to the loan agreement.

14. He therefore prays for the following reliefs:-

1. An order declaring that the Respondent's actions towards the Claimant amounted to constructive termination.

2. An order that the Respondent's conduct amounted to discrimination of the Claimant.

3. An order that the Claimant's supposed mutual separation agreement was not an agreed separation agreement but a coercion and intimidation on the part of the Respondent thereby being unlawful and unfair termination.

4. A declaration that the Claimant was not paid a house allowance in the entire duration of his service:

a) An award of Kshs. 26,495,280.00 made up as follows:-

b) 12 months compensation for

unfair termination

Kshs. 4,624,704.00

c) 3 months' notice pay

Kshs. 1,156,176.00

d) Compensation for work

in Zambia

Kshs. 11,340,000.00

e) House allowance for 21 years Kshs. 9,374,400.00

5. Costs of the suit.

6. Any other relief that the court may deem fit to grant.

15. The Respondent filed a Memorandum of Defence on 9th July, 2015. It avers that the Claimant was put under performance improvement plan due to the fact that his performance had fallen below the standards required for his position. It denies the Claimant's allegation that there were no previously set targets given to him before the half year review. It avers that the management of the Claimant's poor performance was fair and lawful and adhered to the laws of Kenya.

16. It avers that the Claimant voluntarily resigned instead of going through the disciplinary process. It avers that the Claimant's outstanding loan was set off against his final dues based on the contents of an authority document dated 14th August 2013. It avers that by virtue of the Claimant's voluntary resignation, he is not entitled to any of the orders sought.

Claimants' case

17. Samuel Masaka Muliro, CW1, testified that the cumulative years worked for all the Companies were 17 years with his last position at the Respondent being that of Cost Accountant. He testified that as a Cost Accountant he was in charge of stocks in Kenya valued at Ksh. 400 million and at Kshs. 100 million in Zambia.

18. He testified that on 1st August 2013 he was invited to the boardroom for a normal review and informed that he had delayed in the release of the price list for all commodities.

19. It was his testimony that the price list was effective 1st July 2014 thus he was not late in releasing it. He testified that the pricelist had been done by 1st June, 2013. According to him, that price list was not an individual issue and could be done with the input of other employees.

20. In respect of Zambia, he testified that he was informed that stock was being sold without proper authorisation. It was his testimony that authorisation was being done by the Zambian County Manager and Warehouse Manager. He testified that after the appraisal, he was not given any salary increment but was told to undergo a 6 months performance improvement plan.

21. He testified that he was informed that they would review his performance every month and at the end of the 6th month, he went to the boss to enquire on the next action. He testified that after that he was issued with a warning letter.

22. He testified that after the warning letter, he was told to undergo another 3 months performance improvement plan. He testified that from his improvement, some of the checks were not done weekly as was expected and he was also not appraised after the 3 months.

23. He testified that after the 2nd performance improvement plan on 9th September, 2014, he was invited to the Finance Manager's Office and told to sign the Mutual Separation Agreement but he declined. He testified that the Human Resource Manager tried to convince him to take up the resignation.

24. He testified that the Human Resource Manager further informed him that he was to go through the disciplinary process as he had refused to voluntarily resign. It was his testimony that he enquired whether he could get a fair hearing and he eventually decided to sign the resignation agreement to avoid being sacked.

25. He testified that his resignation was not voluntary and he resigned because management had already made a decision for him to go home. He contended that he therefore considered his resignation as constructive termination.

26. Upon cross-examination, he testified that the letter dated 17th October 2013 stated that there would be no salary review due to performance gaps.

27. He testified that there were no performance gaps before but there were some gaps in 2013.

28. He testified that his performance review rating was 2 which meant he had partially improved. He testified that in the review done in 2013 his rating was unsatisfactory.

29. He testified that he did not respond to the warning letter dated 9th May, 2014 as he requested for a meeting with the HR Manager. He testified that the warning letter stated that he did not perform but did not raise the issue of wrong pricing, which according to him was to be done by 5 people.

30. He testified that the performance improvement plan set out targets which he was expected to achieve but the standards were unachievable. He testified that he complained to Samuel Ampah, the Finance Manager who said that he would just achieve thus he should have signed it.

31. He contended that there was nothing to show that he was accused of being responsible for theft in Zambia but the theft was by employees in Zambia. He testified that he was not responsible for cashbooks and he never reviewed Zambia recommendations.

32. He testified that his outstanding loans were deducted from his terminal dues and as a result he was paid Kshs. 330,000. He testified that he was paid for his salary for the month of September 2014, 8 days in October but was not paid his leave days for the financial year 2013/2014.

33. In re-examination, he testified that he was not receiving his house allowance. He testified that should he have refused to accept the mutual separation he would have been subjected to disciplinary hearing, which would not have been fair as evidenced in his emails.

Cause No. 91/2015

34. Thomas Olum Miyago, CW2, testified that his position at the Respondent was Quality Controller and that he worked for the Respondent and the acquired companies for a total of 21 years. He testified that he never had any disciplinary issue over the years and his performance was okay.

35. He testified that he was issued with a letter dated 16th April, 2014 which referred to a discussion and his performance. He testified that the letter set objectives, which had been set in August 2013. It was his testimony that there was never any discussion on his performance and that it was his supervisor who completed his performance online which he received via email.

36. He testified that he was assessed on his performance management process on 13th May, 13th June and July and the outcome of this assessment was 70% achievement during the last assessment. He testified that in his own rating he had given himself a 3.6 and his boss had rated him at 2.2. He testified that it was only in his PIP that he got 70%.

37. He testified that he was not given an opportunity to go through a disciplinary process. He testified that he would have been sacked should he have refused to resign. He testified that according to his boss he was asked to resign due to poor performance. He testified that upon his resignation he was requested to follow up on a claim on distribution in Uganda and Ethiopia.

38. He testified that he was not paid house allowance but was paid his final dues though he did not know how the dues were calculated. He testified that his loan amount was deducted from his terminal dues. It was his testimony that there was no document authorising deductions as the Respondent only facilitated the check off deductions.

39. Upon cross-examination, he testified that he was the quality controller but he was not the lead quality controller. He testified that he did not agree with his supervisor's comment in the PMP document, which he, CW2, completed. He testified that he had not had a chance to discuss the matter. He contended that there were no reasons for putting him on a Performance Improvement Plan (PIP).

40. He contended that he refused to sign the mutual agreement, as he needed to consult. He contended that after he consulted he requested or communication on the issue but he was still told to initiate the resignation.

41. He contended that he was initially given a resignation letter on 19th October 2014 as he was being forced to resign. He testified that he complained of his loan deduction from his final dues. He stated that he had never withdrawn his signed authority document.

42. In re-examination, he testified that he got an implied directive in writing and verbally by Joseph Nyabuto and Ms. Regina. He testified that resignation was not voluntary and that he did not challenge it because the company had already made a decision for him to resign.

Respondent's Case

43. Joseph Nyabuto Nyamatao the Respondent's Plant Manager testified as RW1. He testified that he interacted with CW2 who was then a Quality Manager until his resignation. He testified that CW2's terms of employment never changed as ownership changed. He testified that the Claimant operated 80% locally but in terms of quality, he covered all countries within the region.

44. He testified that the Claimant received the letter dated 16th April, 2014 on his performance notification when his performance did not improve. He testified that it is not true that CW2 never had any problem with his performance. He testified that the Claimant was not a good performer and that CW2's ratings were given by him.

45. He testified that the ratings were to be reviewed by the supervisor and the supervisor's comments on the PMP form were that his performance was not good and he needed development.

46. He testified that the Claimant was put on a performance improvement plan but he did not meet the target. He testified that the 70% rating did not mean that the Claimant had met his expectation, as the required performance rating was 100%.

47. He testified that CW2 resigned voluntarily on 19th September, 2014. He contended that CW2 was issued with a document which he was expected to respond to but he did not respond in time despite giving him more time to respond.
48. He confirmed that CW2 was given a consultancy assignment but he was not sure if he was paid for the work done between 22nd October 2014 and 30th October 2014. He contended that the Claimant is not entitled to the prayers sought.
49. Upon cross-examination, he testified that CW2 was partly reporting to him. He testified that the second letter on CW2's performance notification, dated 16th April 2014, superseded the 1st letter as it raised the main issue which was his performance. He testified that there was lack of accuracy and cost of quality.
50. He testified that the entire staff was involved in achieving corporate quality audit and that during the evaluation there ought to have been a discussion between the employee and the supervisor but there was no discussion.
51. He contended that CW2's appraisal was initiated in July for reason that if an employee is not performing by mid year they were placed on a PIP as opposed to a PMP which is a full year review. He contended that the PIP did not clarify which area of leadership needed improvement but this area was communicated to CW2 in an email.
52. He testified that the mutual separation was discussed in an email, which was not produced in Court. He further testified that the letter asking him to resign was not a warning. He contended that the Claimant was to initiate his own resignation for the mutual separation.
53. In re-examination, he testified that he did not recall CW2 asking why he was issued with a 2nd letter on his performance notification as he never complained about the 2 letters. He maintained that CW2 was not directed to resign as they had had a meeting where the Claimant was given alternatives, which was to either resign or be subjected to an inquiry.
54. He testified that CW2 did not respond within 48 hours thus they sent him an email dated 26th September 2014 and later agreed on the process in a meeting held on 19th September 2014.
55. Samuel Ampah, the Finance Director of the Respondent testified as RW2. He testified that he had previously worked as a Finance Manager from 2012 to 2015.
56. He testified that CW1 worked under him as Lead Cost Accountant and that his employment ended in 2014 after a Performance Improvement Plan. He testified that salary reviews are dependent on PMP and each employee sets his objectives, which are reviewed by his/her supervisor. He testified that there would be final consultation between an employee and his/ her Manager.
57. He contended that in 2013 there were several performance measures that were agreed upon and that CW1's rating of 2 were given by him. He contended that upon his visit to Zambia he realised that there issues on CW1's performance as he did not price items despite visiting Zambia quarterly.
58. He stated that it took CW1 more than 2 months to accomplish the pricing and that he did not adhere to the reconciliation. He testified that CW1's result of the PMP led to the denial of salary review. He testified that he advised CW1 to go back to school and that he went back to school thus he did not put him on a PIP.
59. He testified that CW1 had been cautioned for not performing well due to his fatal mistakes. He contended that one of the mistakes which had been committed in July 2013 was realised in August and September 2013. He stated that CW1 failed to include procurement input which put it at a lower cost.
60. He testified that after CW1 was issued with a warning and he was put on a PIP. He contended that CW1 was expected to undertake certain tasks but it was impossible for him to do those tasks.
61. He testified that he had discussions and a final review with CW1 and it is then that he asked if the parties could mutually separate. He contended that CW1 took long to respond on the separation package even after he, RW1, asked Human Resource to award him KShs. 500,000 as he had a bank loan.
62. He contended that CW1 signed the separation agreement and indicated that he did not resign. He maintained that he did not force CW1 to resign. He testified that CW1 is not entitled to 3 months' notice as alleged because his appointment letter only provided for one month notice.
63. He testified that the CW1 was a management employee thus he was not entitled to overtime. He testified that the Claimant's claim is false as he was even paid leave days as provided in his September 2014 payslip.
64. In cross-examination, he testified that CW1 was never compelled to resign. He contended that they had had a conversation and told him of the two routes he had to take. He testified that he did not know if mutual separation is provided for in any company policy documents.
65. He testified that CW1 was not responsible for credit management or security in Zambia. He held that he could not hold CW1 responsible for the lost goods in Zambia but he ought to have reported the loss instead of indicating that the stock was obsolete.
66. He testified that he signed the warning letter, as it was CW1's responsibility to determine cost. He testified that there was no contradiction in the PMP by stating that CW1 had a problem with ownership and that he accepted his shortcomings. He contended that the relied on the

employee handbook to determine employee separation.

67. I have examined all the evidence and submissions from both Parties. The issues for this Court's consideration are as follows:-

1. *Whether the Claimants were constructively terminated or they resigned voluntarily.*
2. *If the claimants were constructively terminated, if the termination was fair and justified.*
3. *Whether the claimants are entitled to the remedies sought?.*

Constructive termination

68. From the documents supplied by the Claimant on 16/9/2014, the 1st Claimant Thomas was served with a letter indicating that he was being placed on a performance notification. The letter stated as follows:-

“Dear Thomas,

RE: PERFORMANCE NOTIFICATION

This letter serves as a written notification in accordance with the code of practice & grievance procedure manual clause 8 & 9 pertaining unsatisfactorily performing.

As discussed in February during the mid-year review, your performance has been below the standard. There complaints on the quality of reports you generate to EMEA. Your reports and gap analysis have not been accurate and reliable. The CoQ data and EMEA - Quality metrics report are examples of substandard reports. The company sponsored you for an ISO Quality Trainer course to close the gap on quality audits but no results as forthcoming yet.

There is also a gap on your speed and personal ownership in execution of projects relating to registration of company products. Please refer to the meetings we have had on this.

As agreed in your mid-year review, you were to provide an individual development plan on how to get back on track on your performance. This has not been fulfilled from your side. This again is a reflection on the gap on personal ownership and responsiveness.

The company has therefore decided to put you on a Performance Improvement Plan with effect from 16 April 2014 to assist you improve your performance. The program will run for 3 months and a review of the tasks/assignments thereafter.

Once again, the primary role of your position is to ensure that products conform to standard specifications and regulations as well as providing technical information to the manufacturing operations, commercial team on equipment, processes, procedures and compliance with local legislation.

Please note that failure to provide an immediate and sustained improvement in performance may result in disciplinary action up to and including termination of employment.

Yours sincerely,

SC JOHNSON & JOHNSON (K) LIMITED

Signed

JOSEPH NYAMATO

PLANT MANAGER”

69. After the Performance Improvement Plan, the Claimant was assessed on 15th July 2014 and found to have an average completion score of 70%.

70. In September 2014, however as per Appendix 13 and 14 there were some email exchanges between the 1st Claimant and one Joseph Nyamato and others and in one email of 26.9.2014 at 2.01 pm, the Claimant asked one Regina to give a written communication directing him to resign.

71. The same day at 1.58 pm, Regina wrote as follows:-

“Thanks for your email. Joseph will present you with a signed mutual agreement on Monday 29th September for you to sign – he has not signed the one in your possession. You will be required to present the agreement together with your resignation

letter. (Emphasis is mine)

72. The fact that the 1st Claimant was expected to present a resignation letter as he presented the agreement is proof that the resignation was being forced upon him and was not therefore voluntary.

73. The agreement referred to dated 19.9.2014 also included a resignation clause, which indicated that:-

“You will execute any and all necessary documents requested by SC Johnson Product Supply Department to reassign any positions that you hold related to the company that may be necessary to protect the Company’s business interests”.

74. This is also an indication that the issue of the 1st Claimant being asked to resign was part of the agreement which he finally executed on 22/10/2014.

75. Appendix 16 is also an email from Nyamato Joseph sent on 2/10/2014 at 12.11 pm, which also indicated that the agreement was to be conditional on the 1st Claimant issuing a resignation letter to the company.

76. In relation to the 2nd Claimant Samuel Mliwa there was similar communication between him and one Ampah Samuel. Appendix 7 is one such communication where the 2nd Claimant is being told as follows:-

“By implication you are supposed to resign before the benefit in the mutual agreement can apply. ...we have tried to council you in on any form to ensure that you do not end up as the ultimate loser but it appears you have other ideas which we respect

Accordingly, the next phase of the Performance Improvement Plan (PIP) process require Human Resource to set up a Board of Inquiry chaired by an independent arbitrator to hear on why we think that your performance does not measure up to the expectations and that we have to part company with you. Since this is the route you have taken, I can only wish you good luck...”

77. After this, the Claimant as per Appendix 6(a) shows the agreement send to the 2nd Claimant Samuel in advance had a similar resignation clause as was for the 1st Claimant.

78. The 2nd Claimant Samuel finally resigned and it is also clear that the resignation was triggered by the Respondent on its employees who actually issued a threat to him if he failed to write a resignation letter.

79. In **David Potter versus New Brunswick Legal Aid Services Commission, Supreme Court of Canada 2015 SCC 10**, Wegner J held as follows:-

“The test for constructive dismissal has two branches. The Court must first identify an express or implied contract term that has been breached and then determine whether that breach was sufficiently serious to constitute constructive dismissal ...first, the employer unilateral change must be found to constitute a breach of the employment contract and, second, if it constitutes such a breach, it must be found to substantively alter an essential term of contract.

Constructive dismissal can take two forms of a single unilateral act that breaches an essential term of the contract or that of a series of acts that takes together, show that the employer intended to no longer be bound by the contract. In all cases the primary burden is on the employee to establish constructive dismissal but where an administrative suspension is at issue the burden will necessarily shift to the employer”.

80. A constructive dismissal occurs therefore where the employer does not express the threat or desire to terminate employment but formulates the employee to the extent that the employee tenders resignation.

81. In the case at hand, the Respondent initiated a series of acts, which indeed put the Claimants on edge. The Claimants were 1st subjected to Performance Improvement Plan (PIP) and thereafter threatened with some disciplinary action leading to actual termination if they did not resign. They were forced to sign separation agreements, which also contained the resignation clause when infact the resignation had been forced upon them.

82. In this Court’s view the resignation of the Claimants was not voluntary at all but was a termination, which was disguised by the Respondents to appear as a resignation. I therefore find that the Respondent’s actions towards the Claimants amounted to a constructive termination.

Due process

83. Having found that the Respondents constructively terminated the Claimants herein, it follows that there was no due process that was subjected to the Claimants and I therefore find the Claimants termination was unfair and unjustified.

Remedies

84. In terms of remedies, I find that the Claimants are entitled to remedies sought which I find as follows:-

For Samuel Masaka Miliwa

1) 1 month salary in lieu of notice = 203,099/=

2) House allowance not paid for the last 3 years preceding the termination as other years are time barred = 15% of 203,099 x 36 months = 1,096,734.6

3) Unpaid leave for 21 days = 163,495/=

4) 10 months salary as compensation for the unfair and unlawful termination = 203,099 x 10 = 1,030,990/=

TOTAL = 3,494,318.6

Less statutory deductions

For Thomas Miyago

1) 1 month salary in lieu of notice = 215,248/=

2) House allowance not paid for the last 3 years preceding the termination as other years are time barred = 15% of 215,248 x 36 months = 1,116,339.2

3) 10 months' salary as compensation for the unfair and unlawful termination = 10 x 215,248 = 2,152,480/=

TOTAL = 3,530,067.2

Less statutory deductions

85. The Respondent will pay costs of this case plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 14th day of January, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Omondi for Respondent – Present

Claimants – Absent