



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1248 OF 2014

MARTIN KABANGA GATHATWA.....CLAIMANT

-VERSUS-

ASSOCIATED BATTERY MANUFACTURERS (EA) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 6th March, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 28.07.2014 through Kinoti Kibe & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the respondent coerced the claimant to tender the resignation letter dated 10.06.2014.
- b. A declaration that the claimant's resignation letter dated 10.06.2014 is null and void ab initio.
- c. A declaration that the decisions, actions and omissions of the respondent culminating in the purported resignation of the claimant on 10.06.2014 constitute unfair labour practices under section 41 of the Constitution.
- d. A declaration that the respondent has engaged in discrimination in employment in contravention of section 5 of the Employment Act, 2007.
- d. A declaration that the respondent's decisions, actions and omissions were actuated by Anti-Kikuyuism on the part of its Managing Director, Guy Jack and Deputy Managing Director Polycarp Mukwana.
- f. A declaration that the respondent's decisions, actions and omissions have violated the claimant's right to protection of law and freedom from discrimination guaranteed by Article 27 of the Constitution.
- g. A declaration that the respondent violated the claimant's rights to human dignity enshrined in Article 28 of the Constitution.
- h. A declaration that under sections 45 and 46 of the Employment Act, 2007 the decisions, actions and omissions of the respondent culminating in the purported resignation letter dated 10.06.2014 constitute unfair termination of the claimant.
- i. An order of certiorari to issue to bring into the Honourable Court and quash the claimant's purported resignation letter dated 10.06.2014 purporting to accept the said resignation for violation of the claimant's rights under Articles 27, 28, and 41 of the Constitution and for being in contravention of section 5, 45 and 46 of the Employment Act, 2007.
- j. The Honourable Court be pleased to find that the respondent is guilty of the offence of discrimination in employment within the meaning of section 5(5) of the employment Act, 2007.
- k. The Honourable Court be pleased to find that prima facie the decisions, actions and omission of the respondent culminating in the coerced resignation of the claimant constitute the offence of defeating the course of justice under section 121 of the Penal Code, Cap.63.
- l. That pursuant to section 5(1) of the Employment Act, 2007 the Honourable Court be pleased to recommend to the Director of Public Prosecution that the respondent's Managing Director Guy Jack and Deputy Managing Director Polycarp Mukwana be

investigated and or prosecuted for violation of sections 5 of the Employment Act, 2007 and Section 121 of the Penal Code, Cap 63.

- m. The respondent to be ordered to pay compensatory damages to the claimant for violation of his fundamental rights and freedoms guaranteed by Articles 27, 28 and 41 of the Constitution.
- n. That the respondent be ordered to pay the claimant general damages for violation of section 5 of the Employment Act, 2007.
- o. Compensation of Kshs.5, 220, 000.00 for unfair termination of employment pursuant to section 49 of the Employment Act, 2007.
- p. Costs of the suit.
- q. Interest on m, n, o, and p above at court rates until payment in full.
- r. Any other or further relief that the Honourable Court may deem just and fit to grant.

The respondent filed a reply to the memorandum of claim on 28.08.2014 through Swanya & Swanya Advocates. The respondent urged and prayed for the Court:

- a. To dismiss the claimant's claim with costs.
- b. To award general costs to the respondent for mental injury and anxiety for being taken through litigation based on false statements.
- c. To make a declaration that the respondent is at liberty to seek appropriate legal redress, for the defamatory, malicious falsehoods, libel and slander of title and goods of the respondent.
- d. To grant interest on (a) and (b) above at Court rates until payment in full.
- e. Any other or further relief that the Honourable Court may deem just and fit to grant.

The claimant testified to support his case and the respondent called one witness (RW) one Florence Kihara, the respondent's Group Human Resource Manager. The Court has considered the pleadings, the evidence including the documents exhibited for parties, and the comprehensive written and oral submissions made for the parties. The Court makes findings as follows.

To answer the **1st issue** for determination the Court returns that there is no dispute that the parties were in a contract of service at all material times. The respondent initially employed the claimant as a cleaner before he was deployed and appointed as a Recycling Assistant on 19.12.2006 on a monthly salary of Kshs.11,018.00. In that capacity the claimant's duties included collection and purchase of scrap batteries for the respondent's enterprise of recycling such used batteries. The claimant's monthly salary varied over the tenure of his service.

The **2nd issue** for determination is whether the claimant earned Kshs.435, 000.00 per month or Kshs.35,000.00 per month as at the time of separation. The claimant has pleaded that as at the time prior to the separation his duties were managing stores for collection of raw materials in Nyeri, Meru, Sagana and Ruiru; mobilisation and coordination of commissioned agents to obtain and supply raw materials in the Central Kenya Region including Nairobi, Nyeri, Meru, Sagana and Ruiru; and acting as an agent of the respondent in co-ordination of mobilisation of raw materials. The claimant further pleaded that in discharge of his functions he was paid a monthly basic salary of Kshs.35,000.00 and a monthly allowance of approximately Kshs.400,000.00 based on Kshs.2.00 Commission per kilogramme. The claimant therefore pleaded that his monthly salary be fixed at Kshs.435,000.00 per month. For the respondent it was pleaded that it was a lie that the claimant's monthly salary was Kshs.435,000.00. The respondent pleaded that by the letter dated 22.04.2014 the respondent conveyed to the claimant that his salary had been reviewed upwards to Kshs.35,722.00 and an end year bonus had been approved at Kshs.33,700.00. Thus the respondent urged that the due monthly salary was Kshs.35,722.00.

The Court has considered the evidence on the point. The claimant testified that within his area of operation the claimant had stores and each store required a clerk and a watchman. The clerk and the watchman were not the respondent's employees but the respondent opened a bank account at which money was deposited and the claimant would pay the clerks and watchmen and loaders. The claimant also paid the purchase price of each used battery delivered at the stores out of the cash the respondent deposited for that purpose at the same bank account the respondent had opened at the Barclays Bank of Kenya for that purpose. The claimant testified that for each Kg of used batteries purchased, he had a verbal agreement with the respondent that he pays himself Kshs.2.00 out of the money at the Barclays Bank of Kenya (BBK) account being some kind of commission. The claimant was the sole signatory to that account and once the funds were depleted he accounted the usage to the respondent. On a monthly basis the amount deposited in the BBK account would not be less than Kshs.400,000.00 and the claimant testified that out of that money he paid the clerks, the watchmen, the drivers for the trucks that delivered the batteries to the respondent's factory from the field stores.

In cross-examination the claimant testified thus, **"My salary was Kshs.35,000.00 per month. I say it was Kshs.435,000.00. There was no payslip for Kshs.435,000.00. I was never paid Kshs.435,000.00 for salary. It was per month. It was fluctuating, sometimes higher than Kshs.435,000.00 . Sometimes it got to Kshs.450,000.00 per month. It was based on my performance. The Kshs.400,000.00 was put on account for purchasing batteries. I was given more than Kshs.10,000,000.00 then out of which I paid batteries and commission. Each Kg of battery was Kshs,50.00 and I was given extra Kshs.2.00(making Kshs.52.00). The Kshs.2.00 was my commission and pay workers I engaged. The money was on BBK account. The Kshs.2.00 commission was payable only if I bought the 1Kg battery. Every 1Kg I got Kshs.2.00 for expenses and commission. It was agreed Kshs.2.00 I pay the driver, loaders, storekeepers and the balance was mine."**

The court has carefully considered the claimant's evidence and which has not been rebutted. The evidence is clear that the respondent opened the BBK account in the claimant's name for the sole purpose of facilitating the claimant to meet the respondent's expenses of purchasing the old or used batteries. Out of that account the claimant was allowed to purchase a Kg of used battery at Kshs. 50.00 and to pay the workforce involved Kshs.2.00 making the expense per unit Kg of battery at Kshs. 52.00. It is the evidence that in paying the workforce the claimant might have bargained and had a freehand to make some "income" by way of savings in a good bargain. The Court finds that such was a fringe benefit the claimant enjoyed from the respondent and did not amount to a commission or remuneration as was urged for the claimant. Indeed there was no evidence of agreed commissions and in which event, the commissions would have been part of the claimant's remuneration but which the Court finds was not the case.

To answer the 2nd issue for determination the Court returns that the claimant's monthly pay as at separation was Kshs.35,722.00 as urged for the respondent and as per the respondent's letter dated 22.04.2014.

The 3rd issue is whether the claimant voluntarily resigned from employment or he was coerced to resign as pleaded in the memorandum of claim. The respondent's case is that the claimant resigned.

The claimant pleaded that on 27.05.2014 he was away on official duty in Meru and he was informed by fellow employees of an attempt to steal lead ingots by the driver and conductor of motor vehicle KBP 749E. The claimant testified that on 27.05.2014 it was the respondent's Human Resource Manager (HRM) one Bernard Njoroge who telephoned him to convey about the attempted theft. The claimant advised the HRM that he was out of Nairobi and the person in-charge was therefore one Wanjala. The claimant further testified that after 20 minutes the HRM called again and conveyed that the respondent's Managing Director had said that the motor vehicle involved belonged to the claimant and the claimant should therefore get dismissed. The claimant pleaded in his memorandum of claim and testified that motor vehicle KBP 749E belonged to his partnership with one Mbiria, also an employee of the respondent and who wrote to the respondent apologising about the attempted theft. The claimant also testified that Wanjala wrote to the Managing Director apologising and they promised to take action against the driver and conductor that had been involved. The claimant then testified thus, "HRM summoned me to resign or get dismissed. I opted to resign to get some terminal dues. I saw it was computed at Kshs.35,000.00. My actual monthly pay used to be Kshs.435,000.00 per month at minimum....HRM explained to me the dues. I objected. Gathoni wrote the resignation letter. He told me Samuel Kariuki had signed similar resignation. It was 2 weeks after Kariuki had been fired. I accepted to resign because I was told by HRM to be dismissed or I resign. I opted to resign. I was told terminal dues would be per amounts in salary of Kshs.35,000.00. If I had been paid Kshs.435, 000.00 I would not have sued." The claimant further testified that he did not type the resignation letter but he simply signed it and since he did not know how to use the computer it was not voluntary.

The letter of resignation dated 10.06.2014 and signed by the claimant and addressed to Bernard B. Njoroge, the HRM stated as follows:

"Dear Sir,

REF: RESIGNATION

I would like to inform you I am resigning from my position as Recycling Assistant from ABM thereby giving two months' notice effective today.

Thank you for the opportunities for professional and personal development that you have provided me during the last 7 years. I have enjoyed working for the company and appreciate the support provided to me during my tenure with the company.

Yours faithfully

Signed

Martin Kabanga"

The respondent immediately replied by the letter dated 10.06.2014 addressed to the claimant thus,

"Dear Martin,

Re: Resignation

I refer to your letter dated 10th June 2014 of equal subject and wish to inform you that your resignation as a Recycling Assistant has been accepted with regret.

Your notice to cease employment in a month's period has been duly noted but you shall be relieved off your duties on 11/06/2014 and be paid an equivalent of two months' pay in lieu of notice.

May I take this opportunity to express the company's gratitude for your service and wish you the best in your future endeavours.

Upon resignation you shall be paid final dues as follows:

- 1. Salary up to and including 10.06.2014.**

2. Equivalent of 2 months' salary in lieu of notice.
3. Accrued leave days if any.
4. Service gratuity at 24 days' pay for every completed year of service (i.e 7 years, 8months).
5. X-Mas fund contribution.
6. Provident fund contributions in accordance with the existing rules and regulations.
7. Any other earnings as at 10.06.2014.

NB: The above dues are subject to PAYE tax where applicable and will be net of any amounts owed to the company/third parties.

Please make immediate arrangements to hand over any company property in your possession in accordance with the final clearance procedures.

Please acknowledge receipt of this letter by signing in the space provided here below.

Yours faithfully,

Signed

Bernard B.Njoroge

HR & Admin Manager"

The claimant signed the letter on 10.06.2014 acknowledging receipt.

It was submitted for the claimant that the resignation was not voluntary because the letter was typed for the claimant with a two months' termination notice. Further upon being advised by his legal counsel the claimant did not take the cash but he filed the present suit. The Court has considered the evidence and submissions. As submitted for the respondent, the evidence is that the claimant voluntarily resigned. The claimant has not provided evidence of force or coercion as was alleged. **Black's Law Dictionary 9TH Edition at page 294** defines coercion as compulsion by physical force or threat of physical force. The claimant does not deny signing the resignation letter and the Court finds that the fact that he may not have typed the letter by himself does not amount to coercion. It is not the claimant's case that he did not understand the contents of the letter and it was his evidence that he knew he was signing a resignation letter. His further evidence was that he filed suit when he realised that the final dues would be computed at a monthly salary of Kshs.35,000.00 and not Kshs.435,000.00. The Court returns that such base for computing the final dues had no effect of invalidating the claimant's express and voluntary will to resign as was stated in the letter of resignation that he signed. The Court therefore returns that upon the claimant's own evidence he voluntarily signed the resignation letter. By that finding allegations of unfair termination will therefore collapse and the contract of employment came to an end by reason of that resignation and not any other reason.

It was urged and submitted for the claimant that the termination was constructive and unfair. The Court finds that in the instant case there was no established breach of the fundamental terms and conditions of the contract of service on the part of the respondent and which the claimant promptly refused to condone in an ensuing separation. In that view, clearly it was not a case for constructive termination and the Court finds accordingly.

The **4th issue** for determination is whether the claimant was discriminated on account of tribe. The claimant pleaded that the respondent terminated his employment and in doing so the respondent was actuated by the claimant's ethnicity. It was alleged that the respondent's Managing Director Guy Jack and his Deputy one Polycarp Mukwana dismissed the claimant and other employees of Kikuyu ethnicity upon unjustified reasons. The claimant listed in the memorandum of claim names of six alleged individuals who allegedly were of Kikuyu ethnicity and who had been coerced to resign.

As submitted for the respondent the claimant while alleging discrimination on account of ethnicity has completely failed to prove the same. First, the Court finds that while the claimant alleged to be a Kikuyu as well as the 6 alleged individuals listed in the memorandum of claim, no evidence was provided to establish the claimant's ethnic background or simply ethnicity. Second, the Court has already found that the claimant voluntarily resigned and he was never dismissed by the respondent on account of his ethnicity. Third, the 6 listed individuals were never shown to have been the respondent's employees and if they were, the circumstances of their separation with the respondent were never established by way of necessary evidence. The Court finds that the allegations of discrimination will collapse as not established at all.

To answer the **5th issue** for determination and in view of the findings on the earlier issues for determination in the case, the Court returns that the claimant has failed to establish the prayers in the memorandum of claim and the same will fail as unjustified.

The Court has considered the prayers made for the respondent in the reply to the memorandum of claim. The respondent appears to have abandoned all the prayers except the one for dismissal of the claimant's suit with costs. In that consideration the Court has considered the parties margins of success and all circumstances of the case and returns that each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimant for:

1. Dismissal of the claimant's suit.

2. Each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday, 6th March, 2020**.

BYRAM ONGAYA

JUDGE