



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 370 OF 2018

HUMPHREY SITATI.....CLAIMANT

VERSUS

BOARD OF MANAGEMENT LENANA SCHOOL.....RESPONDENT

JUDGMENT

1. The Claimant filed this suit on 20.3.2018 contending that he was employed by the respondent as a Laboratory Technician from 2.7.2012 earning Kshs. 24,692 per month. He further averred that he worked until 4.3. 2017 when he was suspended indefinitely on account of failure to seek rehabilitation services and desertion. He contended that the suspension was unlawful and it amounted to constructive dismissal from employment. He therefore seeks the following reliefs: -

a) A declaration that the indefinite suspension was unfair, unlawful and it amounted to constructive termination.

b) Terminal dues plus compensation for unfair termination totalling to kshs. 1,001,722.

c) Certificate of service.

d) Costs and interest.

2. The Respondent never entered appearance after service of summons and such the suit proceeded by formal proof on 20.11.2019 when the claimant adopted his pleadings and written statement and urged the court to enter judgment as set out above.

3. There is no dispute from the pleadings and evidence that the claimant was employed by the respondent. The issues for determination are:

a) Whether the claimant was suspended from work indefinitely by the respondent on 4.3.2017.

b) If the answer to (a) above is yes, whether it the indefinite suspension amounted to constructive dismissal.

c) If the answer to (b) above is yes, whether it the indefinite suspension amounted to an unfair and unlawful termination.

d) Whether the claimant is entitled to the reliefs sought.

Whether the claimant was suspended from work indefinitely by the respondent on 4.3.2017.

4. I have carefully considered the evidence presented including the written statement and the supporting documents filed in support of the claimant's case. He alleged that the suspension was done verbally by the respondent's principal on 4.3.2017 for an indefinite period. The alleged suspension has not been denied by pleadings or rebutted by evidence. I therefore find that the claimant was suspended by the respondent on 4.3.2017 for an indefinite period. The suspension came after the claimant responded to the show cause letter that accused him of desertion from 19.1.2017 when he was supposed to report back from rehabilitation leave.

Whether it the indefinite suspension amounted to constructive dismissal.

5. The claimant contended that the indefinite suspension was without pay contrary to the terms and conditions of service and as such it amounted to constructive termination. In **Coca cola East & Central Africa Limited v Maria Kagai Ligaga [2015] e KLR**, the Court of Appeal cited with approval the English case of **Western Executive (ECC) Limited v Sharp [1978] 1 CR 222** where Lord Denning held that: -

“If the employer is guilty of conduct which is a significant breach that goes to the root of the contract of employment or which shows that the employer no longer intends to be bound by the 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.”

6. The alleged indefinite suspension without pay was indeed not backed by the contract of service or any law. It showed that the employer was no longer interested in continuing to employ the claimant because he had a condition that required rehabilitation. The foregoing view is fortified by the respondent’s letter dated 27.1.2018 which demanded that he vacates the staff house by 29.1.2018. The letter stated as follows:

“This is to remind you to vacate the School House as it had been communicated to you verbally before. You are now supposed to leave the said house by 29.1.2018 without further delay.”

7. The said letter is clear that the claimant was no longer wanted in the school again. If he was, the employer would not throw him out into the cold. The said suspension of the claimant without pay amounted breach of a repudiatory term of the contract of service and the claimant was entitled to treat the contract as terminated by the respondent. That conduct by the employer amounted to constructive dismissal and I so hold.

whether it the indefinite suspension amounted to an unfair and unlawful termination.

8. Under section 47(5) of the Employment Act, the burden of proving unfair termination rests on the employee. I have already found herein above that the claimant has proved that he was constructively dismissed by the respondent. The respondent did not enter appearance and as such he did not adduce any evidence to prove that the dismissal of the claimant was grounded on a valid and fair reasons and that a fair procedure was followed as required by section 45 of the Employment Act. consequently, I find and hold that the constructive dismissal of the claimant was unfair within the meaning of section 45 of the Act.

Reliefs

9. In view of the finding, that the indefinite suspension of th claimant without pay was a breach that went to the root of the contract of service, I make declaration that the said suspension was unfair and unlawful and it amounted to constructive termination. Under section 49 of the said Act, the claimant is entitled to one month’s salary in lieu of notice plus 3 months’ salary compensation for the unfair dismissal.

10. The claim for leave is declined because the claimant enjoyed leave during the school holidays like other staff. Likewise, the claim for house allowance is declined because the claimant was housed by the employer.

Finally, the claim for arrears of salary and commuter allowance is dismissed because the claimant made a blanket assessment of the alleged underpayments as if there were no gradual or annual increments. It is my view that the said generalised quantum is exaggerated. Finally, the prayer for certificate of service is granted as prayed.

11. In conclusion, I enter judgment for the claimant against the respondent as follows:-

Notice	Kshs. 24,600
Compensation	<u>Kshs. 73800</u>
TOTAL	<u>Kshs. 98,400</u>

The said award is less statutory deductions but in addition to costs and interest at court rates from today.

Dated, signed and delivered in open court at Nairobi this 29th day of April, 2020.

ONESMUS N. MAKAU

JUDGE