



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1766 OF 2017**

**JOHN KAHARA TIMANI NJIHIA.....CLAIMANT**

**-VERSUS-**

**XPLICO INSURANCE CO. LTD.....RESPONDENT**

**JUDGEMENT**

1. The Claimant brought this suit on 6.9.2017 seeking the following reliefs:-

(a) A declaration that the Claimants forced resignation amounted to constructive dismissal.

(b) A declaration that the dismissal was unfair and unlawful.

(c) An award of Kshs. 6,660,727/- made up as follows;

Unpaid salary .....Kshs. 1,728,000/-

Pension claim .....Kshs. 423,496/-

Stima Sacco .....Kshs. 50,000/-

Accrued leave for 60 days .....Kshs. 872,727/-

Balance on domestic package .....Kshs. 80,000/-

(d) 12 months salary for wrongful dismissal ... (320,000 x 12=Kshs. 3,840,000/-

(e) An order that the Respondent's vehicle KCA 472H be valued by a valuer to be agreed by the parties and the same be transferred to the claimant to offset claim amount to that extent

(f) Costs of the suit and interest

(g) Any other relief that the court may deem fit to grant.

2. The Claimant's case is founded on the facts set out in his Memorandum of claim, witness statement and the bundle of documents annexed thereto. In brief the claimant averred that he was employed by the respondent in various positions until 14.8.2017 when he resigned. He further averred that the resignation was not voluntary but forced by the conduct of the employer which made the conditions of employment impossible to continue with. He therefore averred that the resignation amounted to constructive dismissal. The claimant prayed for the above contending that some pension contributions were not remitted and that some allowances were withheld.

3. The Respondent filed defence and counterclaim on 9.11.2017 admitting she employed the claimant in various positions as pleaded in the claim. She however denied that the claimant had stellar performance and averred that she had subjected him to disciplinary proceedings on account of misconduct and disciplinary proceedings. She further averred that the claimant failed to discharge his duties leading to loss of

profitability and thus failure to pay salaries. She defended the reduction of claimant's salary contending that it was done in line with the industry regulations guidelines and in order to align the salary to his role and targets. She therefore denied the alleged constructive dismissal and averred that the resignation was voluntary and the suit should be dismissed save for the sum of Kshs. 720,040 being salary arrears for April 2017 to July 2017.

4. On the other hand the respondent counter claimed against the respondent one month salary in lieu of notice for resigning without a prior notice of one month. She further prays for return of motor vehicle KCA 472H which was assigned to the claimant during his employment but failed to handover after the termination. Finally she prayed for an order that the claimant should indemnify her for any claim that may arise under the law against her over the use of certificate of insurance issued to agents by the claimant through underwriting and financial malpractices.

5. Simultaneously with the suit, the claimant filed a Notice of Motion seeking for payment of his undisputed salary arrears and for an order that he hold KCA 472H Toyota Crown as security/lien until the settlement of his dues. After hearing both parties the court rendered a ruling on 23.10.2017 directing the respondent to pay the claimant all salary arrears for April, May, June and July 2017 plus costs of Kshs. 10000. The court directed further that the salary for August 2017 will be an issue for trial in the main suit, and the court further allowed the claimant to retain the car as lien so long as the claim was not going to occasion any loss or damage to the respondent through the car. On 4.12.2017, the respondent's Principal Officer Mr. Nelson Chege filed an affidavit annexing 4 cheques as proof that the claimant was paid Kshs. 720000/- towards salary arrears plus Kshs. 10000/- being costs of the interlocutory application.

6. The suit was heard on diverse dates between September 2018 and September 2019 when the claimant testified alone and the respondent called three witnesses. Thereafter both parties filed written submissions.

#### **CLAIMANTS CASE**

7. The Claimant testified that he was employed by the respondent on 21.5.2013 as a Branch Manager Mombasa and later rose to become the National Sales Manager in May 2017. His salary was Kshs. 320000/- per month. He was in charge of marketing for the company nationally and he had superb relationship with the respondent.

8. After his promotion and transfer to Nairobi, new Directors came on board and the company's operations were affected, because new changes were introduced in the terms and conditions of service that led to high turnover of senior managers.

9. In July 2017, he visited Coast with Mr. Saji ( a new director) for 2 weeks and although he was entitled Kshs. 15000/- per diem per day, he was only paid Kshs. 2000/- per day in Mpesa totaling to Kshs. 20000/- Before returning to Nairobi, he received a letter transferring him to Mombasa to serve as Regional Manager for a monthly salary of Kshs. 150000/- without 2 air tickets per month and medical allowance. He was also not paid transfer allowance of Kshs. 100000/- and the arrears of the said per diem for 10 days in Mombasa before the transfer.

10. In addition to the foregoing, his salary for April, July 2017 was not paid and his SACCO deductions were not remitted to Stima SACCO. Again, he sought permission to go to Nairobi to vote during the general elections but the permission was denied. As a result of the said matters he was forced to resign from employment.

11. He denied any wrong doing or poor performance of duty during his time of employment by the respondent but admitted that he reallocated insurance certificates to Rosi Insurance Agency and Breta Insurance Agency after other agents refused the same alleging that the company was collapsing. He further contended that it was permitted for a Branch Manager of the company to reallocate certificates to any agent country wide until 27.7.2017 when new directions were given to stop that.

12. He further testified that his performance was appraised in June 2017 and his good performance led to his promotion from Branch Manager to the National Sales Manager. His salary was also increased from Kshs. 300000/- to 320,000/-.

13. He contended that Mr. Raji the Director, was in charge of all the operations and he was introduced as such in the whatsapp Group for the Senior Managers. He further referred to paragraph 4 of the Replying Affidavit by Nelson Chege dated 20.9.2017 which confirmed that Mr. Raji was a Director. He further contended that before the reduction of his salary, the company was doing well financially but the Directors were diverting funds to other things.

14. He further testified that he handed over all the insurance certificates to the person he left at Mombasa office. He clarified that the certificates were not in personal custody but in the custody of the cashier and since his work was only to oversee. He contended that certificates were given to Breta Insurance Agency, with his approval because they were appointed by the Respondent. He clarified that the directive given in 27.7.2017 stopping allocation of certificates to the said agent was after the certificate were issued to her. He stated that if anything wrong happened after he left the company, he is not to blame because when he approved the allocation of the certificates he did so as part of his duty.

15. He maintained that he was coerced to resign and denied that he resigned voluntarily. He contended that the letter dated 31.7.2017 reduced salary by 60% changed contract of service from permanent and pensionable to contract term of three (3) months with a sales target of Kshs. 10,000,000/- per month, his salary was reduced from Kshs. 320000/- Kshs. 150000/- plus commission of 10% of the said target if the said sales target was met. Finally he reiterated that he was forced to exit due to frustrations.

#### **DEFENCE CASE**

16. Mr. Vincent Odhiambo Oyugi testified as RW1. He is the respondent's Mombasa Branch Manager who replaced the claimant. He stated that the claimant left before handing over to him insurance certificates and he was forced to look for the whereabouts of some certificates which he traced them to Kitengela where they had been allocated to blacklisted agents. The value of the certificates was Kshs. 2000,000/-

and he was not sure whether the premiums were paid to the respondent.

17. He contended that the certificates became the subject of fraud case which was reported to Mololongo Police station, after the agents failed to account for the same. He stated that the certificates were allocated to the agents by the claimant, but confirmed that the claimant never carried away any company records when he exited. He admitted that the records were used by Mr. Esssau when he reported to him where the certificates were allocated to.

18. He further admitted that the agents who were allocated the certificates had signed a Memorandum of Understanding with the respondent and further admitted that after allocating certificates, the agents must either present the premium or the unused certificate. However, he contended that in this case the agents presented nothing. He admitted that, as the Branch Manager, it was his duty to follow up the agents for the certificates. He admitted that the respondent never took any steps to invalidate the certificates and instead chose to pursue it as debt owed to the company because the agents admitted that the certificates were utilized and one led to a claim.

19. The Respondents CEO, Mr. Mike Gacheru Mureithi testified as Rw2. He stated that he joined the respondent on 3.4.2018 and as such his testimony was based on the company records he perused. In brief he testified that the claimant left the company on 10.8.2017 through resignation letter and the resignation was accepted the same day by Mr. Raji through Whatsup correspondence. He however contended that Mr. Raji was a shareholder without managerial role in the company.

20. RW2 further testified that the claimant left on 17.8.2017 after serving termination notice on 10.8.2017 and contended that he should pay the respondent one month salary in lieu of notice. He contended that the claimant resigned while serving as the National Sales Manager and earning Kshs. 320000/- per month. He further contended that before the resignation the company was experiencing financial problems which led to delay in payment of salaries to all employees but contended that the claimant has since his resignation been paid all his salary arrears. As regards the reduction of salary, Rw1 contended that all the Senior Managers were consulted and the claimant's consented to the same by signing a letter.

21. Rw1 further testified that in September 2017, the respondent raised complaint against the claimant for failure to do handing over of his official car and also for allocating insurance certificates to blacklisted agents who used the certificates to commit fraud. He therefore prayed for the counterclaim to be allowed as prayed. He blamed the salary delays to the claimant's fraud in the sales of insurance certificates.

22. As regards the reliefs sought by the claimant, he admitted that the claimant had 42 leave days outstanding and a total of Kshs. 358,585 dues payable to him as against a counterclaim of Kshs. 2,500,000/- for insurance certificate not accounted for.

23. He contended that on 26.7.2017, the respondents Principal Officer issued a circular to all Branch Managers barring them from issuing insurance certificates to blacklisted agents. He however admitted that the memorandum of understanding with agents is not terminated immediately as the agent is usually given grace period. He further admitted that the serial numbers of the certificates issued to the blacklisted agents set out in the statement by RW1 do not correspond with the numbers indicated in the letter to Mulolongo Police Station dated 9.1.2018 and which started with B83. He further admitted that investigations into the fraud have not yet been completed and his counterclaim for Kshs.. 2,000,000/- is based on the value of the purchase of the certificates.

24. He maintained that the certificates were allocated by the claimant to blacklisted agents. He contended that the two (2) agents were blacklisted vide the memo dated 28.6.2017 and the decision to bank allocation of certificates to them was made by the management on 29.7.2017. He contended further that the claimant's email that allocated the said certificates to the blacklisted agents was not copied to the management.

### **CLAIMANT'S SUBMISSIONS**

25. The Claimant submitted that he did not resign voluntarily but he was forced to do so by the respondents behavior including failure to pay salary and eventually reducing the salary by more than half and taking away all allowances contrary to section 10(5) 17(1) and 18 (2) (c) of the Employment Act. He urged that such treatment was in violation of 41 of the Constitution which entitles him to fair labour practices. He therefore contended that his involuntary resignation amounted to unfair termination by the employer and prayed for compensation of eight (8) months compensation plus one month salary in lieu of notice. For emphasis he relied on **Coca Cola Africa Ltd vs Maria Kagal Ligaga [2015]eKLR** where the Court of Appeal blamed the employer for the resignation of the employee and held that in constructive dismissal, the issue is primarily the conduct of the employer.

26. As regards the counterclaim, the claimant submitted that the respondent did not plead the sum of Kshs. 2,000,000/- and also did not prove that he was liable to compensate the company the said sum. He contended that the company did not take any steps to invalidate the alleged fraudulently allocated certificates or make any effort to recover the premium if the certificates were used. He further contended that certificate numbers forming the subject of policy investigations were materially different from the ones listed in the respondent's pleadings as confirmed by RW2.

### **RESPONDENT'S SUBMISSIONS**

27. The Respondent submitted that the claimant resigned on 10.8.2017 via whatsapp communication and the same was accepted by letter dated 10.8.2017. Thereafter the claimant confirmed his resignation by the letter dated 14.8.2017 which he described as the official resignation. She further submitted that after the resignation, she computed his terminal dues totaling to Ksh. 358,585.69 which she is ready to pay to him. The sum is made up of the following:-

- a) 7 days salary for August 2017 .....Kshs. 35000
- b) 42 leave days .....Kshs. 610909

- c) I leave day after salary reduction .....Kshs. 6818.18
  - d) less one month salary in lieu of notice .....Kshs. 150000
  - e) less PAYE .....Kshs.144141.58
  - f) less debt to the company.....Kshs. 0
- Net due .....Kshs. 358585.69

28. As regards the reduction of claimant's salary, the respondent submitted that it was not arbitrary and discriminatory. She contended that the claimant and other senior managers were consulted before the change of their terms of service due to financial problems. She contended that the claimant accepted the changes via whatsapp communication where by he appreciated that the new terms were similar to those offered by Direct Line Insurance Company in the insurance industry. She further urged that the delay in payment of salary and the eventual reduction of salary did not affect the claimant's financial obligations. He requested for advances which he used to service his loan. She further urged that the new salary plus commission was to place his total earnings at Kshs. 250000/-which corresponded to his role in the company. Finally she blamed the claimant for the mess in salary delays because as the National Sales Manager he failed to drive the sales docket effectively and thereby led to loss and low income.

29. As regards the counterclaim, the respondent submitted that the claimant was guilty of underwriting and financial malpractices that led to the loss or unaccountability of insurance certificates valued at Kshs. 2000000/- She contended that the claimant did not dispute that he received various categories of certificates via memo dated 24.7.2017 and authorised the reallocation of the same from Abson Motors and Precise Insurance Agencies to ROS and Better Insurance Agencies which were operating outside his jurisdiction. The respondent contended that the memo dated 29.7.2017 by the Principal Officer barred allocation of certificates issued to branches outside their jurisdiction or subletting the same to any agent. She contended that the claimant did not take any remedial measures after receiving the memo dated 29.7.2017.

30. She concluded by reiterating that the claimant was not constructively dismissed and urged that he voluntarily resigned. He contended that the burden of proof that resignation was not voluntary rests with the claimant. He relied on various precedents and the Blacks Law Dictionary to define constructive dismissal all of which were unanimous that constructive dismissal occurs when an employee resigns because of the employer's behavior which becomes intolerable for the employee to continue working there.

**ISSUES FOR DETERMINATION**

31. There is no dispute that the claimant was employed by the respondent in various capacities until August 2017 when he resigned. The issues for determination are:

- (a) Whether the claimant resigned on 10.8.2017 or 14.8.2017.
- (b) Whether the resignation amounted to constructive to dismissal.
- (c) Whether he is entitled to the relief's sought herein.
- (d) Whether the respondent is entitled to the reliefs sought in the counterclaim herein.

**DATE OF RESIGNATION**

32. The Respondent contended that the claimant resigned via whatsapp message on 10.8.2017 and produced screen shots to support the same. However, the claimant contended that he officially resigned via the letter dated 14.8.2017. I have carefully considered the screenshots dated 7.8.2017 marked Exhibit NC2 annexed to the Replying Affidavit by Nelson Chege sworn on 20.8.2017. It stated as follows:

**“ . . .That said retainer of Kshs. 150 g is based on production of 10 m in Mombasa can only be achieved if doing PSV business. And since we have not addressed PSV in Mombasa am sorry these terms are not acceptable to me. I will be delivering my resignation letter as soon as I travel to Nairobi.”**

33. The foregoing excerpt from the screen shot does not amount to a resignation but a declaration of an intention to serve a resignation letter when the claimant traveled to Nairobi. It follows therefore that the letter by the CEO Mr. Eric Chege dated 10.8.2017 purporting to accept claimant's resignation was premature and without any basis. I say so because Mr. Eric Chege was not privy to the whatsapp correspondent between the claimant and Mr. Raji on 7.8.2017. It follows therefore as admitted by RW2, the only official communication of claimant's resignation was contained in his letter dated 14.8.2017 which was received the same date and thereby brought to an end his services to the respondent.

**Whether the resignation amounted to constructive dismissal.**

34. The claimant contended that his resignation was not voluntarily but forced by the respondent's behaviour of delaying salary and then unilaterally reducing salary and converting his permanent and pensionable employment to three (3) months contract. The Respondent maintained that the resignation was voluntary and averred that the change of the terms of service was preceded by consulting all the senior

managers in line with the practice in the insurance industry and the claimant consented.

35. I have carefully considered the evidence presented by both sides. The burden of proving that the employee was consulted before change of the terms and conditions of service lies within the employer. The respondent contended that the claimant consented to the new terms of service by whatsapp communication and acknowledge that the same terms were similar to those offered by Direct line Insurance Company Limited.

36. As clearly indicated in the excerpt of the screenshot of what sup message by the claimant to Mr. Raji on 7.8.2017, the claimant declined the said terms and promised to serve a resignation letter. The resignation letter dated 14.8.2014 indicated that the letter reducing his salary and varying his terms of service were not acceptable to him. The letter stated:-

**“Dear Sir/Madam**

**RE: OFFICIAL RESIGNATION LETTER**

**Reference is made to your letter reducing my salary and varying my terms of employment that is in my possession. The contents herein and the terms as specified thereon are not acceptable to me.**

**Consequently, I tender my resignation . . .**

**Please advise how you want me hand over, here in Nairobi or Mombasa. . .**

**Yours faithfully**

**. . .”**

37. Considering the said evidence, I am satisfied that the claimant has proved on a balance of probability that his resignation was not voluntary but due to unilateral reduction of his salary and variation of the terms of his service by the employer. **The Blacks Law Dictionary (9<sup>th</sup> Edition) defined constructive dismissal as:**

**“A termination of employment brought about by the respondent making the employee's working conditions so intolerable that the employee feels compelled to leave.**

38. In **Coca Cola East and Central Africa Ltd v Maria Kagi Ligaga [2015]Eklr** the Court of Appeal held that:-

**“The criterion to determine if constructive dismissal has taken place is repudiatory breach of contract through conduct of the employer. The burden of proof lies with the employee. The employer's conduct must be such as when viewed objectively, it amounts to repudiatory and fundamental breach of the contract obligations.”**

39. In this case, the claimant has demonstrated that the employer failed in his obligation to pay his salary from April to July 2017. That was a fundamental breach of the respondent's contractual obligation. Secondly the employer unilaterally and fundamentally changed the terms of service for the claimant by converting his contract from permanent and pensionable to seasonal contradict of 3 months and reduced salary from Kshs. 320,000/- to Kshs. 150,000/- without allowances but in addition to commission of 10% subject to meeting a monthly target of Kshs. 1,000,000.

40. The Claimant further felt frustrated by the respondent failure to pay him per diem for the 10 days he worked at Mombasa before his transfer from Nairobi and also because his salary was withheld for over 4 months. Consequently I return that the involuntary resignation amounted to constructive dismissal of the claim by the respondent.

### **RELIEFS TO THE CLAIMANT**

41. Under section 45 (2) of the Employment Act, termination of employment is unfair if the employer fails to prove that the termination was grounded on a valid and a fair reason and that a fair procedure was followed. In this case, the respondent never made any effort to discharge the said burden of proof and I, therefore, find in favour of the claimant that the termination was unfair within the meaning of section 45 of the Act.

42. Under section 49 of the Act, the claimant is entitled and I award him one month salary in lieu of notice plus six(6) months salary as compensation for the unfair termination. In forwarding the said compensation I have considered the fact that he worked for the respondent for over four (4) years and he did not contribute to the dismissal through misconduct. Although the respondent alleged that the claimant committed underwriting and financial malpractices, she never used the said reasons to dismiss the claimant and instead frustrated him in relation to the terms of employment until he resigned from employment. The said award is based on the salary of Kshs. 320,000/- per month.

43. The salary for August 2017 was not settled and the parties left it to the court to determine. I award him salary upto the date of resignation on 14.8.2017 being Kshs. 320,000 x 14/26 + 172307.69.45.

44. The Claimant contended that he never went for his annual leave for 2 ½ years. He did not give particulars of the leave days outstanding. I therefore award what the respondent admitted being 43 leave days x Kshs. 320000 divide by 26 = 529,230.76.

45. However the claim for leave allowance and transfer allowance are dismissed for lack of evidence to support the same. There is no provision of such entitlements in the appointment letter produced by the claimant. Likewise the claim for Kshs. 80000/- for domestic package is dismissed for lack of particulars and supporting evidence

#### **COUNTER CLAIM**

46. In views of the finding herein that the resignation of the claimant amounted to constructive dismissal, I dismiss the claim for salary in lieu of notice by the respondent.

47. The claim for Kshs. 2,000,000/- or 2,500,000/- being the value of the unaccounted certificates issued with the authority of the claimant to blacklisted agents lacks particulars and evidence and must fail. It is trite that special damages must not only be pleaded specifically but must also be proved. I agree with the claimant that the said value was only mentioned by the witnesses in the evidence and they contradicted in the actual value of the certificates. Even if the same was pleaded and proved, there is no evidence to prove that as at the time the claimant authorized the reallocation of the certificates, he had no authority to do so. In my view the memo being relied upon by the defence was published after he certificates were issued.

48. Finally as regards the claim for the motor vehicle KCA 472H, I reiterate the orders by Nzioka wa Makau J that the same will be released to the respondent upon payment of all his terminal dues awarded herein above.

#### **CONCLUSION AND DISPOSITION**

I have found that the resignation by the claimant was done on 14.8.2017 and it amounted to constructive dismissal. I have further found that the dismissal was unfair within the meaning of section 45 of the Employment Act and dismissed the respondents counterclaim save for the claim for motor vehicle KCA 472H. Consequently, I enter judgment for the claimant as follows:-

**a. Notice.....Kshs. 320.000**

**b. Compensation.....Kshs. 1920.00**

**c. Leave.....Kshs. 529,230.76**

**TOTAL                      Kshs. 2,769,230.76**

Award is less statutory deductions but in addition to costs and interest on rates from the date hereof.

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

**ONESMUS N. MAKAU**

**JUDGE**