



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 172 OF 2018

BOB VINCENT MARU.....CLAIMANT

VERSUS

AMICA SAVINGS & CREDIT.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for his alleged wrongful, unlawful, unfair and constructive dismissal and the subsequent refusal to pay terminal benefits. The Claimant averred that he was employed by the Respondent on 1st December 2015 as the Human Resource Manager. He averred that he earned a salary of Kshs. 144,295/- a month and that he worked until June 2017 when he was terminated. He averred that he worked diligently and with a lot of dedication to his duties with little or no supervision and that he maintained good and cordial relations with the Respondent. The Claimant averred that his duties included reporting to the CEO and lawfully terminating people from employment under the directions of the CEO. The Claimant averred that sometime in May 2017 the CEO directed the Claimant to dismiss some staff from employment. The Claimant averred that he followed due process in terminating the said staff but the Respondent's Board Chairman got enraged that the Claimant had followed due process instead of abruptly sacking the said staff without terminal dues. The Claimant was orally suspended by the chairman of the Respondent followed by a letter dated 10th June 2017. He averred that he was recalled from suspension on 14th July 2017 and upon return to work his efforts to work were frustrated as he was not allocated any duties. The Claimant averred that he was forced to take a Voluntary Early Retirement or risk sacking. The Claimant averred that he declined to retire voluntarily and after that he came across an advertisement for his position that had been placed on the internet by the Respondent. The Claimant then bowed to the pressure and took up the retirement but he was not offered training as per the company policy like his colleagues who had voluntarily taken up this scheme. He averred that further, he was also not paid his lawful dues. The Claimant averred that he was therefore clearly constructively terminated which is wrongful and unlawful. The Claimant averred that he had been urged by the Respondent to acquire a car and was given a car allowance which was conditional to him to obtain a car and that the Respondent advanced monies to the Claimant to purchase the said motor vehicle but during the constructive termination, unknown to the Claimant, the Respondent unlawfully directed Kshs. 957,502.45 to itself to recover the said loan contrary to Section 19(3) of the Employment Act. The Claimant averred that at the time of the constructive dismissal gave a proposal as to how he intended to clear the outstanding loan arrears but the proposal never received a response from the Respondent. The Claimant averred that the termination was unlawful, unfair and in contravention to the provisions of the Constitution, the rules of natural justice, labour laws and fundamental International Labour Conventions and Declarations. The Claimant averred that the Respondent had no regard to the law and was bent to exploit the Claimant and urged the Court to take preventive and punitive steps to restore the ills meted to the Claimant. The Claimant thus sought three months notice in lieu of pay – Kshs. 432,885/-, unpaid leave days – Kshs. 153,914.73, gratuity – Kshs. 577,180/-, unlawful/unfair deductions – Kshs. 638,334.97, compensation for unlawful and unfair termination of employment – Kshs. 1,731,540/-, certificate of service, interest and costs of the suit.

2. In its defence, the Respondent averred that the Claimant willingly left employment on a Voluntary Early Retirement scheme. The Respondent denied that the Claimant was ever instructed by the CEO to terminate people from employment and contended that termination of employment was a reserve of the Board communicated to the Claimant through its CEO. The Respondent averred that the Claimant was directed by the Board of the Respondent through its CEO to summarily dismiss some employees but the Claimant chose not to adhere and instead terminated their employment contracts thus exposing the Respondent to unwarranted suits. The Respondent averred that the Claimant willingly and without undue influence wrote to the Respondent to be considered for a Voluntary Early Retirement program and the Respondent readily accepted the proposal. The Respondent denied ever urging the Claimant to acquire a car and asserted that the Claimant purchased the said car for his own convenience. The Respondent averred that the Claimant willingly entered into a Voluntary Early Retirement (VER) scheme with the Respondent and the latter was to pay half of the loan amount owned by the Claimant to the Respondent as part of bargain of the VER. The Respondent averred that it thus paid to the Claimant's account a sum of Kshs. 957,502.45 which was later transferred to the loan account of the Claimant to cater for the loan advanced to the Claimant by the Respondent. The Respondent averred that the Claimant never endeavored to clear the loan. The Respondent averred that the claim filed against it is malicious, ill intended and meant at casting aspersions into the credibility of the Respondent's financial institution and tarnish its employment reputation. The Respondent averred that the Claimant's memorandum of claim is bad in law, defective and ambiguous as it does not disclose any and/or sufficient or reasonable claim hence it should be struck out and or be dismissed with costs. The Respondent by way of counterclaim counterclaimed Kshs. 123,550.45 which is an outstanding staff loan balance due from the Claimant. The Respondent also counterclaimed Kshs. 1,057,560.73 which is an outstanding balance of a car loan that was awarded to the Claimant making a total of Kshs. 1,181,111.18.

The Respondent thus prayed for judgment against the Claimant for the aforesaid amount plus costs of the counter-claim.

3. The Claimant filed a response to the Respondent's counter-claim and averred that the Respondent sanctioned auctioneers to recover the loan arrears and/or commenced recovery proceedings and is therefore abusing the court process by trying to recover the same loan through the court process. The Claimant further averred that the dispute in the counter-claim does not fall under the purview of disputes which this court is mandated to determine and the Respondent should seek recourse in the Subordinate Courts with jurisdiction to hear civil matters. He thus prayed that the Respondent's counterclaim be dismissed with costs.

4. The Claimant testified and adopted his statement and the list of documents and stated that he was forcefully asked to take a Voluntary Early Retirement by the Respondent. He confirmed in cross-examination that he was called by one Mr. Mbui who asked him to apply for the Voluntary Early Retirement and he was only paid pension money after retirement. He stated that the suspension was because he failed to advise the Board appropriately yet the decision to dismiss the four employees who were involved in fraud was after he had advised the CEO. He testified that he had discussed with the CEO who went to the Board to suspend the employees. The decision was revoked by Board and a decision was made to dismiss. He confirmed that he was not the one making decisions. He maintained his was a constructive dismissal.

5. The Respondent's first witness was James Kimani Mbui the CEO of the Respondent. He testified that the Claimant voluntarily applied for Voluntary Early Retirement through an email that was sent to him and the Respondent processed and accepted it. He stated that the Claimant indicated in the email that after soul searching he wished to apply for VER. He confirmed that the Claimant had a loan with them and had written to them committing to repay and that the VER then sorted the issue of the loan out. The Respondent's second witness was Pius M. Hiira the credit manager who adopted his statement as his evidence in chief and testified that the Claimant had a car loan and a short term loan. He stated that they did not recover the loan from the VER.

6. The Claimant submitted that the Respondent violated Article 41 of the Constitution when it coerced him into taking up the Voluntary Early Retirement and by advertising his position while he was still in employment and having expressed his desire to continue with the employment contract. He submitted that the Respondent's actions amounted to unfair labour practices. The Claimant submitted that he never executed any decisions without the go ahead from the Respondent's CEO, therefore to terminate his employment on account of taking a decision authorized by the CEO clearly qualifies as unfair termination. Guided by the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR**, the Claimant submitted that the reason leading to the coercion into taking up early VER and/or for his constructive termination failed to meet the fairness test. The Claimant further submitted that the Respondent failed to issue him with a certificate upon termination of his employment only to offer the same after a demand to sue for unfair termination which was in violation of Section 51 of the Employment Act thus amounting to unfair and unlawful termination. The Claimant submitted that the Respondent directed his wages and dues elsewhere without his written authority contrary to Section 17(d) of the Employment Act. Additionally, the fact that the Claimant's full wages were deducted to pay his loan arrears proves that the Respondent contravened Section 19(1) of the Employment Act which provides that not more than 50% of the employee's wages should be directed to loan repayment by the employer. He submitted that this also violated Section 19(3) which provides that the total amount of deductions made by an employer from an employee's wages should not exceed two thirds of such wages. The Claimant submitted that during cross-examination the Respondent's first witness testified that the SACCO was registered and that he did not have a written authorization filed before court to testify on behalf of the Respondent nor were there any board meeting minutes or a resolution passed authorizing him to testify on behalf of the Respondent. The Claimant thus submitted that the testimony of the first witness cannot be considered. He submitted that in the event the court admits the testimony, the testimony was to the effect that the Claimant had loans with the Respondent which loans were offset from all the VER proceeds, this was a clear admission that the claimant was never paid a single cent of his benefits and the offset of loans was done without his authorization contrary to the law. The Claimant submitted that the witness confirmed he was his direct supervisor and that he scrutinized and approved all decisions made by the Claimant before they were executed. The Claimant submitted that this therefore was a clear admission that the procedure taken by the Claimant to terminate the 5 employees was approved by him. The Claimant submitted that it follows therefore that the constructive termination from employment on account of the above reason was unfair. The Claimant submitted that the Respondent's second witness also confirmed that he had two loans but the witness could not confirm without a shadow of doubt whether the loan payment had been recovered from VER program. The Claimant submitted that the witness however confirmed that a substantial amount of the loan had been recovered which confirmed the fact that the Claimant was never paid his terminal dues and all his dues were diverted towards the loan repayment without his written authorization which is unfair and unlawful. The Claimant submitted that the counter-claim goes beyond the dispute of employer-employee relationship and hence the court should direct that the Respondent seeks relevant reliefs in the normal courts. The Claimant submitted that however, in the event that the court finds otherwise, he submitted that the Respondent did not prove its counter-claim as the Respondent's second witness was not even aware of the details appurtenant to the loan recovery. The Claimant submitted that no evidence was supplied as to how much was due and owing and it would be unfair for the court to make a blanket order where majority and/or all of the loan may have been recovered. The Claimant cited the case of **Jemmah Akoth Nyadera Onyosi & 6 Others v Kenya National Trading Corporation [2014] eKLR** and submitted that the VER terms were less favorable than the terms under the Employment Act hence the court should make the awards in favor of the Claimant as prayed in the memorandum of claim.

7. The Respondent submitted that its first witness was duly authorized to plead and act on behalf of the Respondent by conduct because all the documents in the Respondent's list of documents were either directed or originated from the Chief Executive Officer who was the Respondent's first witness herein. The Respondent submitted that the Claimant never contested all those documents and never disputed the fact that the CEO was his instructing officer. The Respondent submitted that the evidence of its first witness should be admissible as what the Claimant is introducing is a procedural technicality that has already been overruled by Article 159(2)(d) of the Constitution. The Respondent submitted that the Claimant via a letter dated 18th June 2017 wrote to it requesting to be considered out of employment through Voluntary Early Retirement and in the same breath wrote an email requesting for the VER. The Respondent submitted that the Claimant acknowledged that these documents were authentic and were from him which leads to a conclusion that he voluntarily initiated the process of opting out of employment and thus cannot claim coercion. The Respondent supported its argument with the case of **William Mureka Okinda v Southern Shipping Services Ltd [2016] eKLR**. The Respondent submitted that VER circular dated 16th June 2017 was on the face of it a contract and anyone who accepted its terms was fully bound by it. The Respondent submitted that there was no special form of the circular that had been reserved for special cases or special people as the Claimant wished. The Respondent submitted that the program was a take or leave it form of an agreement. The Respondent submitted that the Claimant never demonstrated how the VER was favoring the employer more than the employees and submitted that the Claimant was fully bound by the VER as contained in the circular dated 16th June 2017 and that he indeed requested for the VER voluntarily. The Respondent relied on the case of **Godfrey Kangashi Aludah v Metal Crowns Limited [2019] eKLR** where the court held "...I have found that the claimant retired from employment voluntarily and he was paid all his rightful dues plus

more. Consequently, I dismiss the suit...' The Respondent submitted that the Claimant failed to prove his case on a balance of probabilities as required by Sections 107 and 108 of the Evidence Act. The Respondent submitted that the Claimant did not present any evidence before court to prove that the acts of the Respondent were wrongful, unlawful and unfair. The Respondent maintained that the Claimant's claim is unmerited as he voluntarily requested to be considered in VER program and his case should therefore be dismissed with costs to the Respondent. The Respondent sought the award of the counterclaim as well as costs of the counter-claim.

8. The Claimant was an employee of the Respondent. That was not controverted. He sought voluntary early retirement (VER) despite having indicated in his letter of 14th July 2017 unwilling to take the offer. It seems his hand was forced by the advertisement on July 18th 2017 where the Respondent advertised online its wish to recruit a human resource and administration manager. The VER taken by the Claimant was anything but voluntary and fits in the classic case of constructive dismissal. This came hot on the heels of a suspension which was prompted by the Claimant's dismissal of some employees at the Respondent's Thika office. Apparently the Claimant was to summarily dismiss the employees but he followed due process and terminated their services. Contrary to assertions by the Respondent, a summary dismissal has higher chances of attracting a lawsuit as opposed to a dismissal after due process. Upon dismissal, it is not denied that the Claimant was not paid any terminal dues. It was asserted by the Respondent's first witness that the sum was directed to clearing the debt owed by the Claimant. No statements were presented by the Respondent to prove indebtedness by the Claimant. It was conceded by the Claimant that he owed some money on loans and since none of the parties presented the documents in respect of the loans it will be a matter of letting the loses lie wherever they may be. The counterclaim by the Respondent thus fails and is dismissed. Since the dismissal was unfair within the meaning of the law by being a constructive dismissal, the Claimant will be entitled to recover:-

- a. One month's salary as notice – Kshs. 130,000/-
- b. 6 month's salary as compensation for unlawful termination – Kshs. 780,000/-
- c. Costs of the suit
- d. Interest on the sums in a) and b) above at court rates from date of judgment till payment in full.

9. This decision was rendered online with the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16th March 2020 and the Kenya Gazette Notice 2357 of 20th March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the statement he made in the NCAJ address to the Nation of Kenya when the Judiciary and the other stakeholders in the administration of justice agreed to scale down operations to mitigate the effects of COVID-19, execution of the judgment is automatically stayed for 14 days.

It is so ordered.

Dated and delivered at Nyeri this 24th day of April 2020

Nzioki wa Makau

JUDGE