

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 278 OF 2017

VERONICA WANJIRU RWINJI.....CLAIMANT

VERSUS

BENSON NJIRU KIAMBO

t/a BENSER FINANCIAL CONSULTANCY.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for her alleged unfair and unlawful dismissal from employment. The Claimant averred that she was employed in March 2009 as a receptionist by the Respondent earning a sum of Kshs. 4,500/- a month which sum was raised over the years to stand at Kshs. 12,000/- in 2017. She averred that she worked diligently for the Respondent till 6th May 2017 when the Respondent without any just cause told her “You can take all the time you need Vero. I do need such characters as you are portraying in my office. Period”. The Claimant averred that subsequent to the statement aforesaid he variously prompted, allowed and incited his spouse to confront the Claimant and overtly represented that the Claimant was unwanted at the workplace. The Claimant averred that she sought explanations from the Respondent on the reasons for the said actions by himself and his spouse but no reason was offered to date. She averred that the conduct by the Respondent caused considerable anguish, discomfort and negative apprehension that the Claimant opted to resign on 10th June 2017. The Claimant averred that the conduct of the Respondent constituted a fundamental breach of the contract of employment amounting to constructive unfair termination of the employment contract. The Claimant sought underpayments for between June 2009-May 2010 – Kshs. 35,628/-, between June 2010 and May 2011 – Kshs. 71,940/-, between June 2011 and May 2012 – Kshs. 86,184/-, between June 2012 and May 2013 – Kshs. 96,972/-, between June 2013 and May 2014 – Kshs. 93,264/-, between June 2014 and May 2015 – Kshs. 69,264/-, between June 2015 and May 2016 – Kshs. 65,104.80 and between June 2016 and May 2017 – Kshs. 65,104.80. She averred that she invariably worked every day of the year including weekends and holidays for which she claimed Kshs. 579,452/- for the years between 2010 and 2017. The Claimant averred that she was not granted the requisite annual leave throughout her employment thus accumulating 1.75 days per month leaving unpaid leave of Kshs. 98,133/-. She claimed she was not paid house allowance throughout the period of her employment amounting to Kshs. 174,818.60. She also sought service pay for the years of service amounting to Kshs. 72,808/-. She thus sought a declaration that the termination of the Claimant’s employment was constructive unfair dismissal and she thus sought compensation for unfair dismissal – Kshs. 218,424/-, terminal benefits of Kshs. 1,508,673.30, costs of the suit and interest.

2. The Respondent filed a defence in which he averred that the claims were bare and unsubstantiated in particular the interpretation that the Claimant was not wanted at the workplace and the allegations that the Respondent incited his spouse. The Respondent averred that the Claimant’s claim for constructive dismissal was an afterthought based on a third party who is not a party to this suit. The Respondent averred that the Claimant’s employment was voluntarily terminated by the Claimant underpayment vide her letter of 10th June 2017. The Respondent averred that the Claimant’s claim for constructive dismissal should be declined as she had approached the fountain of justice with unclean hands. The Respondent averred that he owed no dues to the Claimant and that despite demand and notice of intention to sue he averred that he had no obligation to pay reasons wherefore he sought the dismissal of the Claimant’s claim with costs.

3. The Claimant testified as did the Respondent. She testified that she was presently a banker and that the situation at the workplace is what led to the termination of employment. She said that the boss told her he did not want her character at the office and then the Respondent called her father to inform him that the Claimant had insulted him and his wife. She stated that the Respondent’s wife was not an employee and that the Respondent’s wife did not talk to her and that the wife called her dad and told them she had insulted the couple. She testified that she resigned due to the condition at the workplace because of what was said and the allegations of abuse plus the wife’s frequent insinuation that if the Claimant left the office she would definitely die. She said that the wife would just come to the office and start telling her these things while in the office. In cross-examination she stated that she wrote the letter of resignation and that her father was told she was abusing the employer. She said that the spouse to the Respondent took her dad to Nyama Choma Village and told him that she had been abusing her and her husband. She stated that she was not there at the meeting with between her father and her employer’s wife. She stated that she was confronted and the wife even called her and talked about the issue. She conceded she had not included the Respondent’s wife in the suit. She testified that she had thanked the employer in her resignation letter and did not refer to the issues she had adverted to in her letter. She stated that she received a text message from the Respondent through Safaricom but she had not indicated the cellphone number. She testified that she was unwell during December 2016 to February 2017. She said that she was paid by cheque from 2015-2017 and the previous years it was by cash. She stated that she did not voluntarily leave work but was forced and the main reason that caused her to leave was the text he sent through her phone indicating he did not want such a character in his office.

4. The Respondent testified that the Claimant left when the relationship was very good and that there was no issue between him and her. He stated that she was unwell and was hospitalized and he gave her sick leave for 2 months – January and February 2017. He stated that he paid her hospital charges as an employer and friend and was demanding Kshs. 253,370/-. He stated that he did not issue a demand notice and that he did not threaten her. He testified that their relationship was good and that there was no threat just that the letter from the advocate stated they would seek recovery of that money. He stated that the father proposed to pay and he conceded that the father was not his employee. He testified that she did not resign because of the money and that she resigned later after the demand had been made. He said that his wife does not come to the office and that unless at a personal level he did not know whether the two had met. He stated that his wife does not interfere

with his office or visit his office. In re-exam he stated that the Claimant did not leave because of the demand letter. He stated that she worked till 30th June 2017 and she was not dismissed. He testified that they had a good relation and she was working save for 2 months when she was sick and was not able to come to work. He stated that his wife had never been part of his office at any one time. He said there was no reference to his wife in the demand letter and that the Claimant had left employment willingly and was paid all her dues.

5. The Claimant submitted that the issues in contention related to whether there was a dispute between the parties over the involvement of the Respondent's wife in the employment contract which affected the Claimant's performance of that contract. The Claimant submitted that the issues for determination were whether the Claimant's resignation was in response to the Respondent's breach or breaches of the employment contract; whether the Claimant's resignation attracts a finding for unfair termination of the employment contract; whether the Claimant is entitled to the prayers in the claim. She submitted that her resignation was triggered by the Respondent's way of performing the employment contract. The Claimant submitted that the Respondent claimed what he had spent on her treatment from both the Claimant and her father, threatening to take legal action in default of a refund. The Claimant submitted that she resigned in reaction to the Respondent's conduct which made her stay at the workplace unbearable. She submitted that the disclosure to and the involvement of her father in her health status and treatment by the Respondent breached the fundamental implied term of trust and confidence in the employment contract as espoused in the case of **Malik v BCCI [1997] 3 All ER 1**. She submitted that such conduct was held in the case of **Fifth Accountants Ltd v Law UKEAT/0460/13/SM** to amount to such a breach where an employer raised concerns about an employee's health with her son, not with her. The Claimant submitted that her reaction to the said breach was a lawful response which amounts to unfair constructive dismissal as observed in **Western Excavating (ECC) Ltd v Sharp [1978] 1 All ER 713**. The Claimant submitted that the aforesaid case represents the proper response to a breach of trust and confidence term in an employment contract by way of resignation and that she duly acted accordingly. She submitted that she was entitled to treat the breach as a repudiation of the contract of employment. She cited the case of **Kingston Upon Hull City Council v Dunnachie UKEAT Appeal No. 0706/02RN** and submitted that she had established a proper case for declaration that the termination of her employment amounts to unfair constructive dismissal thus attracting the appropriate compensation. She urged the court to find that the termination was unfair and award her the claim as prayed for and as provided for in the relevant wages order.

6. The Respondent submitted that the issues for determination were whether the Claimant voluntarily resigned from employment or was the Claimant's employment constructively terminated and secondly us the Claimant entitled to the remedies sought? The Respondent submitted that the provisions of Section 47(5) of the Employment Act were to the effect that for any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest upon the employee. The Respondent cited the case of **Milton Misanya v Aga Khan Hospital Kisumu [2017] eKLR** in which the court held that the resignation letter did not disclose constructive dismissal as the employee thanked the employer which was not the tone of an employee forced out of employment from frustration. The Respondent submitted that the court defined constructive dismissal as defined in **Black's Law Dictionary 9th Edition** as a termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave. The Respondent also cited the cases of **Kenneth Kimani Mburu & Another v Kibe Mungai Holdings Limited [2014] eKLR** and **John Mulinge Mutuku v Kartasi Industries Limited [2019] eKLR**. The Respondent submitted that the Claimant had failed to prove a case of constructive dismissal as was set out in the case of **Coca Cola East Africa & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR**. The Respondent submitted that the case for unfair termination thus fails as there is no proof of constructive dismissal. The Respondent cited the cases of **Reuben Lucheleli Shikuri v Eldoret Packers Ltd [2015] eKLR**, **Moses Mulupi Wamalwa v Bake N Bite [2016] eKLR** and **Cheruiyot Kipkemoi v Tirgaga Tea Factory [2017] eKLR** on the issue of voluntary resignation. The Respondent submitted that the alleged breaches of the employment contract were unsubstantiated to warrant a finding of constructive dismissal and urged the court dismiss the Claimant's case with costs.

7. The Claimant resigned from employment. She pleaded constructive dismissal ostensibly as a result of interference from the Respondent's spouse. There seems to have been undertones unrevealed in the suit as during the hearing it emerged that there was even a meeting between the Respondent's wife and the Claimant's father where it was alleged that the Claimant had insulted the Respondent and his wife. The Claimant seeks underpayments, house allowance and overtime for the 8 years of work as well as service. Constructive dismissal would arise where the employer creates such a hostile environment at the workplace that the employee has no option but to resign. **Black's Law Dictionary 9th Edition** defines constructive dismissal *as a termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave*. The ingredients for constructive dismissal are asserted in pleadings including advertence to an offending SMS stated to have been sent to the Claimant by the Respondent. However, the Claimant in her resignation letter conveyed her gratitude to the Respondent for creating an environment where she was able to thrive both in her personal growth and career wise. In my considered view, this is apposite what a frustrated employee would convey. The Claimant did not also avail the evidence of the SMS which would have proved the hostile environment or a statement and affidavit from her father indicating the conversations he had with the Respondent's wife to bolster her assertions. The foregoing analysis is clearly an indication the claim was unproved. Suit is dismissed but each party to bear their own costs.

8. 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.

It is so ordered.

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

Nzioki wa Makau

JUDGE