



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 389 OF 2017

BETWEEN

ANDREW MUTISYA MWANZIA.....CLAIMANT

VERSUS

HILAL HARDWARE LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Munyithia, Mutugi, Umara & Muzna, Advocates for the Claimant

Khalid Salim & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 12th May 2017. He states, he was employed by the Respondent in 2012, as a Sales Manager, on a basic monthly salary of Kshs. 35,000. Around 2016, the Managing Director appointed a new management team solely on the ground that the business should have a Muslim face. The Director was himself of Islamic faith. The Claimant was subjected to continued harassment and unwarranted interference in his duties, which led him to resign, on or around 29th October 2016.

2. He states, resignation amounted to constructive dismissal. He gives details of constructive dismissal to include: his marginalization on account of his religion; being compelled alongside non-Muslims to operate from a backroom; prosecution of the Claimant over other Employees' lapses; suspension of the Claimant for defaults in stocktaking, a role reserved for the Stock Manager; being suspended without a hearing; being forced to resign; and terminating Claimant's contract on religious grounds. He was denied his terminal dues.

3. He prays for Judgment against the Respondent for:-

- a. Annual leave of 105 days, from 2012, at Kshs. 141,346.
- b. Overtime from 2014 at Kshs. 267,264.
- c. Gratuity at Kshs. 100,961.

Total...Kshs. 509,571.

- d. Compensation for unfair termination.
- e. Damages for discrimination.

f. Any other suitable relief.

g. Costs.

h. Interest.

4. The Respondent filed its Statement of Response on 30th October 2017. It is conceded that the Claimant was employed by the Respondent. He did not work overtime. He took his annual leave as and when it fell due. The Respondent did not appoint a new management team with the sole intention of giving the business a Muslim face as alleged by the Claimant. This allegation is wild and false. The changes did not have anything to do with Islam, or with the Claimant's role at work. Changes were made to streamline operations and improve efficiency. The Respondent did not harass, or discriminate against the Claimant. The Claimant resigned voluntarily, and does not merit the Judgment sought.

5. The Claimant and Respondent's Director Farah Kassim Haji, both gave evidence on 16th December 2019, when the hearing closed. The Cause was last mentioned on 27th February 2020.

6. The Claimant testified, he managed the business with the Director. Other Employees were mainly casual, without much experience in the business. He reported at 7.30 a.m. and would leave around 6.00 p.m. There was no clocking register until around 2016. He never went on annual leave.

7. A new Administrator was recruited by the Director. His name was Hamisi. Hamisi told the Claimant that the Respondent is a Muslim company. He changed Claimant's desk from the front office to inside the Director's office. Another Employee called Boniface was recruited at the expense of another Christian Employee who was moved to the backroom. The Claimant's orders were affected by the movement. The Claimant was blamed for shortfall in stocks. It was not his duty to take stocks. He was asked by the Director to leave for one week and come back with an explanation for the shortfall. Later, the Director told the Claimant he had to leave. The Claimant resigned on 29th October 2016, because the Administrator was giving him headaches. He was not paid his terminal dues.

8. Cross-examined, the Claimant told the Court he founded the business with the Director and 2 other Employees. He worked from 7.30 a.m. to 6.00 p.m. and beyond. He was not compelled to work excess hours. His duties entailed making purchase orders. There was a shortfall in stocks. The Claimant's role related to stocks. He never went on annual leave. He did not have evidence of leave application. He applied by word of mouth and was refused leave. The situation at work compelled him to resign. Redirected, he told the Court that Muslims were appointed in place of Christians. They were less experienced. The Administrative Manager was given the power to hire and fire Employees.

9. Farah Kassim Haji confirmed he employed the Claimant in 2012, through a mutual friend. The Claimant was a Salesman. He did not have specific qualifications. The Respondent made changes in management, to improve efficiency. The Respondent recruited Hamisi as an Administrator. He was not recruited based on his religion. 3 Employees were Christians. The Claimant failed to explain shortfall in stocks. It was not on one occasion. He ordered excess iron sheets in the absence of the Stock Manager. He was advised to take leave of one week as the Respondent investigated. He went, returned and resigned. He never complained about religious discrimination. He utilized annual leave and had off-duty days. He did not work overtime. He felt threatened and insecure when the Respondent brought in professionals to its workforce.

10. On cross-examination, Haji told the Court working hours were 7.30 a.m. to 5.00 p.m. The Respondent did not have a clocking machine. Hamisi was an Accountant. He was employed as the Administrator. He reported to Haji. He was not authorized to hire and fire. The Claimant's contract was not terminated over shortfall in stocktaking. The Respondent did not avail to the Court Claimant's annual leave records. Redirected, Haji told the Court, the Claimant was not compelled to work excess hours. He resigned before his suspension was over.

The Court Finds:-

11. The Claimant was employed by the Respondent in the year 2012. He resigned in the year 2016. He states that he was compelled to resign because of among other things, discrimination on the ground of his religious faith.

12. Evidence of this discrimination is lacking. The Claimant made sweeping statements about recruitment of Muslim Employees, and pushing of Christians into the backrooms. There was no hard evidence that the Respondent was driven by religion in its recruitment of new Employees, or in reorganization of its business operations as a whole. Haji explained and the Court believes him, that the Respondent recruited new Staff, driven purely by the need to professionalize the business. The Claimant did not have any specific professional credentials to his name. He was a general Salesman. It is evident that without professionalism the business was hampered in its operations as shown through the Claimant's own challenges in stocktaking. There were Christian and Muslim Employees, working in harmony.

13. There was no direct or circumstantial evidence of discrimination given to the Court by the Claimant. He did not call as a Witness; any of the Christian Employees he alleges were taken to the backroom alongside the Claimant. To prove discrimination, the Claimant needed to show that he was treated differently, because of his Christianity. He was not placed on suspension because of his Christianity, but rather, because of the shortfall in stocktaking. He claims he was harassed and that Hamisi told him the Respondent needed to have a Muslim face. Hamisi was a new Employee, with no decisional control at the Respondent's. The Claimant appears to have apprehended that his substandard professional acumen, would be overshadowed by the new professionals at the workplace, and went about fighting this, by playing the religious card. The particulars of constructive termination at paragraph 7 of the Statement of Claim, contains repeated claims of religious discrimination. Instead of details, the Claimant merely repeats generalized claims of religious discrimination. To prove discrimination, the Claimant must show he was treated differently because of his religion. There is no evidence of this nature here. The Court agrees with the Respondent that claims of religious discrimination are without foundation.

14. The prayer for damages for religious discrimination is declined.

15. Was the Claimant dismissed constructively? The leading decision on constructive dismissal in Kenya is in the CoA, *Coca Cola East and Central Africa Limited v. Maria Kagai Ligaga [2015] e-KLR*. It was held that the Employee must show that the Employer has fundamentally interfered with the terms of the contract; such change must be unilateral; the Employer has created an intolerable work situation; the Employee would have continued working, if the Employer did not create the intolerable work situation; and that the Employee resigned, believing the Employer was no longer willing to be bound by the terms of the contract.

16. In the present case, the Claimant was asked to step aside, as the Respondent investigated his failure in stock-keeping. He was asked to be away for a week. He returned and tendered resignation, even before the week was over. Investigation into his failure cannot have amounted to intolerable work environment, or unilateral and fundamental breach of the terms, by the Respondent. Disciplinary and investigation process, based on a genuine reason, [both Parties acknowledge there was a stock query], cannot amount to any of the factors critical in establishment of constructive dismissal. The Court has ruled out religious discrimination. The work environment does not point to circumstances that would justify resignation, based on Claimant's belief that the Respondent did not consider itself bound by the terms of the contract.

17. Was the Claimant unfairly dismissed, to warrant compensation? He resigned on his own volition, while on a 7 day suspension. The Respondent did not compel him to resign. He wrote a long letter of resignation. He does not in his letter, disclose compulsion. The Respondent asked the Claimant to take a break of 7 days. Before there was an outcome, within the 7 days, the Claimant resigned. He was not dismissed by the Respondent, and his prayer for compensation, is misplaced.

18. Does he merit gratuity? He was subscribed to the N.S.S.F. His N.S.S.F Statement indicates there was active subscription for a good number of years he worked for the Respondent, between 2012 and 2016. If the Respondent omitted to remit contributions for certain months, that is an omission which can be corrected by engaging the N.S.S.F. It does not call for payment of gratuity outside the N.S.S.F regime. The Claimant has not shown he is entitled to gratuity under any contract. His prayer for gratuity by whatever name called, is not founded on any statute, contract, or labour instrument. It is rejected.

19. Overtime? The Claimant was a Sales Manager as stated in his Statement of Claim, at paragraph 3. He was not covered under the Regulation of Wages [General Order]. The Wages Orders do not apply to management staff. They are geared towards protection of low income earners, those who are not in management. Management staffs negotiate their own terms and conditions of service, with the businesses that employ them. The Claimant should therefore have negotiated an overtime clause in his contract with the Respondent. He has not shown to the Court such a clause, to support the prayer for overtime pay.

20. Annual leave? The Claimant worked for 4 years. Haji told the Court that the Claimant went on annual leave, as and when it fell due. The Claimant states he did not, and was not paid in lieu of leave. The Respondent challenged the Claimant to show that he applied for annual leave, and was denied annual leave by the Respondent. The Court is of the view that as the custodian of employment records, the Respondent ought to have availed leave records, discounting Claimant's oral evidence, that he did not take leave. Annual leave is a statutory right, and accrues to the Employee, whether the Employee has applied to go on leave or not. There is in fact, no forfeiture provision in the Employment Act 2007, in event an Employee fails to apply. It is the responsibility of the Employer to pay in lieu of leave, or advise the Employee to take leave when it is due. The Claimant cannot be denied what accrued to him, on the ground advanced by the Respondent- that he failed to apply for leave. **He is granted annual leave pay, at the statutory minimum 21 days for 4 years, on a monthly salary of Kshs. 35,000 at Kshs. 113,076.**

21. No order on the costs.

22. **Interest allowed at 16% per annum from the date of Judgment, till payment is made in full.**

23. Lastly, the Court must record, it has been compelled to release this Judgment to the Parties from the confines of the Trial Judge's home at Chaka, Nyeri County, owing the covid-19 pandemic. The Hon. the Chief Justice has directed that pending Judgments be released to the Parties, by 30th May 2020. Rule 28 of the Court's Procedure Rules, which requires delivery of Court decisions in Open Court, cannot be enforced at the moment, without putting at risk, the lives of the participants and the general public. The place of trial, Mombasa City, has been identified by health authorities as an epicenter of covid-19. Other modes of delivery are neither failsafe, nor safe to the participants. Even online platforms require Staff of the Court to make some movement in and out of the Court premises. The wheels of justice must roll on, but protection of life is paramount. Rule 38 allows the Court to take control of its proceedings. The Judgment shall be accessible from the Court's Registry and as soon as practicable, through the Kenya Law Reports web portal.

IN SUM, IT IS ORDERED: -

a. The Respondent shall pay to the Claimant annual leave pay at Kshs. 113,076.

b. Interest allowed at 16% per annum from the date of Judgment till payment is made in full.

c. The Respondent is allowed stay of execution of 45 days.

d. No order on the costs.

Dated, signed and released at Chaka, Nyeri County, for dispersal to the Parties, this 29th day of May 2020.

James Rika

Judge