



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 866 OF 2015**

***(Before Hon. Lady Justice Maureen Onyango)***

**CHARLES MUNYUA.....CLAIMANT**

**VERSUS**

**MARIE STOPES KENYA.....RESPONDENT**

**JUDGMENT**

The Claimant filed this suit against the Respondent alleging unfair termination. In his Memorandum of Claim filed in Court on 21<sup>st</sup> May, 2015, the Claimant avers that he was employed by the Respondent pursuant to a contract on 1<sup>st</sup> March 1990 and was subsequently confirmed in employment on 27<sup>th</sup> December, 1990 following successful completion of his probationary period.

He further avers that during the subsistence of his employment contract he performed his duties diligently and to the Respondent's satisfaction and rose through the ranks to the position of Clinic Manager.

Early in the year 2014 the Claimant requested for early retirement.

He maintained that he did not receive any communication from the Respondent on his request prompting him to engage its Human Resource Department on payment of his terminal dues which were admitted at Kshs.892,948.72.

The Claimant further averred that on 14<sup>th</sup> August, 2014 he received an undated letter from the respondent declining his request for early retirement.

The Claimant maintained that the Respondent in a malicious and unprecedented move purported to transfer him to Malindi on 15<sup>th</sup> December, 2014. The Claimant did appeal the decision to transfer his services but the appeal was dismissed.

The Claimant contended that this acts by the Respondent grossly frustrated him and he was eventually forced to tender his resignation from employment effective 31<sup>st</sup> January, 2015.

In his Memorandum of Claim the Claimant seeks the following reliefs:-

- a) Kshs.892,948.72 being an admitted amount of terminal dues.
- b) Damages for unfair termination
- c) Such other dues as may be found due to the Claimant.
- d) Such other relief(s) as the Court may deem fit to grant.
- e) Costs and interest

The Respondent in its Memorandum of Defence dated 23<sup>rd</sup> May, 2018 and filed in Court on 24<sup>th</sup> May, 2018 admits having engaged the Claimant from 1<sup>st</sup> March, 1990 until 31<sup>st</sup> January, 2015.

The Respondent states that it received a letter dated 3<sup>rd</sup> April, 2014 from the Claimant applying for early retirement to which it sent him a

response declining his application on 14<sup>th</sup> August, 2014 on two grounds:

- i. Having invested in the Claimant's capacity, the Respondent wanted to continue to benefit from the Claimant's skill and knowledge.
- ii. The Respondent wanted to maintain its policy on retirement at the age of 65 years.

The Respondent further states that on 15<sup>th</sup> December, 2014 it did communicate its decision to transfer the Claimant from its Nanyuki Centre to its Malindi Centre.

The Respondent states that the Claimant declined the transfer and instead opted to tender his resignation from service effective 31<sup>st</sup> January 2015. The Respondent accepted the Claimant's resignation on 6<sup>th</sup> January 2015 and informed him that it would pay his salary for the notice period and his pending leave days less statutory deductions as well as facilitate the refund of his pension benefits.

The Respondent however denied having accepted to pay the Claimant terminal benefits of Kshs.892,984.72 as alleged by the Claimant herein and maintained that the Claimant's dues were in fact Kshs.75,000 which amount was used to offset an outstanding loan facility owed by the Claimant.

The Respondent further averred that it did facilitate and ensure the release of the Claimant's benefits from CITI Bank and Jubilee Insurance which amounts were paid directly to the Claimant.

It is on this basis that the Respondent maintains that the instant suit is void of merit and urged this Court to dismiss the same with costs to the Respondent.

### **Evidence**

The matter was heard on 30<sup>th</sup> July, 2019 with the Claimant testifying on his behalf. The Respondent on the other hand closed its case without calling any witnesses.

### **Claimant's Case**

In his evidence the Claimant reiterates the averment made in his Memorandum of Claim. He further testified that after his retirement request was declined he continued working for the Respondent and in fact applied for the position of Community Liaison Manager that was internally advertised.

The claimant testified that at the time of separation he was paid salary for days worked, salary in lieu of notice as well as pension dues. He further testified that what he now seeks is payment of Kshs.892,948.72 admitted by the Respondent as terminal dues.

The claimant stated that he did not resign but was forced to proceed on early retirement. He therefore maintained that he is entitled to the reliefs sought in his Memorandum of Claim and urged the Court to allow the same as prayed.

On cross examination, the claimant stated that his transfer from Nanyuki to Malindi was precipitated by his request for early retirement. He admitted that he was paid his terminal dues at the time of separation save for the tabulation as received on 30<sup>th</sup> April 2014.

The Claimant further testified that his claim is for payment of service/severance pay and therefore urged the Court to allow his Claim as prayed.

### **Respondent's Case**

The Respondent's case was scheduled for hearing on 4<sup>th</sup> November 2019 when the Respondent closed its case without calling any witness having failed to procure the attendance of its witness.

The Parties were thereafter directed to file and exchange their written submissions to the Claim filed herein.

### **Submissions by the Claimant**

In the written submissions the Claimant reiterated the contents of his Memorandum of Claim and his oral evidence in Court.

The Claimant further submitted that his forced early retirement by the Respondent in essence amounted to unfair termination of his employment.

The Claimant maintained that his alleged transfer to Malindi was meant to frustrate him and force him to retire as it made the working conditions intolerable and in the circumstances the Claimant was forced to retire early. That this was tantamount to constructive dismissal. The Claimant relied on the case of **Nathan Ogada Atiagaga v David Engineering Limited (2015) eKLR** where the Court defined the circumstances that lead to a claim for constructive dismissal to include behaviour that is so intolerable or made life so difficult that the employee has no choice but to resign.

The Claimant further submitted that there was no evidence to justify his transfer to Malindi. He therefore maintained that this transfer was done for the sole reason to push him to retire early.

He further submitted that no evidence has also been availed by the Respondent as to its reasons for declining his request for early retirement yet it accepted similar requests from other members of staff and proceeded to pay their terminal dues.

It is on this basis that the Claimant submitted that he is entitled to the reliefs sought in his Memorandum of Claim and urged the Court to allow the same as prayed. The Claimant relied on the provisions of Section 49 of the Employment Act, 2007 and the cases of **George Odiyo Minyika v Chemilil Sugar Company Limited (2015) eKLR** and **Abisalom Ajusa Magomere v Kenya Nut Company Limited (2014) eKLR** where the Courts found the Claimants termination was unfair and proceeded to award 12 months' salary as compensation for unfair termination.

There are no submissions on record filed on behalf of the respondent.

### **Analysis and Determination**

Having considered the facts of this cause, evidence, submissions and authorities cited by the Claimant hereto, the issues for determination are:

1. Whether the Claimant voluntarily retired or was constructively dismissed by the Respondent.
2. Whether he is entitled to remedies sought in his Claim

### **Whether the Claimant was forced to resign or she voluntarily resigned.**

The Claimant in his pleadings, evidence and submissions contends that his early retirement from the Respondent's employment was not voluntary and was precipitated by the fact that the Respondent made his working environment unbearable after it declined his request for early retirement. The Claimant further contends that his alleged transfer from Nanyuki to Malindi was only meant to frustrate him into forced retirement.

This court appreciates that an employer has the prerogative to transfer/deploy its employees. However, that prerogative should be exercised reasonably and not arbitrarily. In **Henry Ochido v NGO Co-ordination Board [2015] eKLR** the Court held:

*“In this regard therefore, a transfer of an employee is one such prerogative of an employer subject to sufficient and reasonable notice to enable the subject employee report to the new station of transfer with the requisite facilitation. It is therefore not in the choice of an employee to dictate where they wish to work, once work has been created, and in the view of the employer they find that a particular employee is best placed in a certain location or work station, the duty on the employer is to inform the employee and the employee's role is to ensure their work performance in the allocated station...For the employer to thus enjoy this prerogative, there is the duty not to act arbitrarily and ensure the employee is duly notified of the transfer and where the employee seeks a variation, such must be put into account in a manner that entails hearing what the employee has to say with regard to the transfer. This could be extension of time; facilitation; review of job requirement and any other reasonable terms that may arise...”*

The Claimant's transfer letter reads as follows:

*15<sup>th</sup> December, 2014*

*Charles Munyua*

*C/O Marie Stopes Kenya – Nanyuki*

*NANYUKI*

*Dear Charles,*

**RE: TRANSFER**

*This letter is to advise you that you have been transferred from Nanyuki Centre to Malindi Centre based in Malindi effective 12<sup>th</sup> January 2015. Your designation is Centre Manager.*

*Please note that you will be paid transfer allowance as per the Organization's policy.*

*Any other change in terms of employment will be communicated in due time.*

*I wish you the best as you go about your daily duties in your new work station.*

*Yours faithfully,*

Signed

Rhoda Odhiambo

Deputy Director CS – People and Development”

From the wording of the aforementioned letter the Respondent exercised its prerogative and the Claimant was given adequate notice to facilitate his relocation to the new work station.

Can the Claimant aver that the said transfer was malicious and only meant to force him to resignation and in fact amounted to constructive dismissal?

### **What is Constructive Dismissal**

Black’s Law Dictionary (9<sup>th</sup> Edition) defines 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.**

Constructive dismissal or discharge has been defined by the Court in **Nathan Ogada Atiagaga v David Engineering Limited Cause No. 419 of 2014** as follows:

*“Constructive dismissal occurs when an employee resigns because their employer’s behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge.”*

Further, in **Cause Number 611 [N] of 2009 between Maria Kagai Ligaga v Coca Cola East and Central Africa Limited [unreported]**, the Court held that: -

*“Constructive dismissal occurs where an employee is forced to leave his job against his will, because of his employer’s conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed.*

*The basic ingredients in constructive dismissal are:-*

- a. The employer must be in breach of the contract of employment;*
- b. The breach must be fundamental as to be considered a repudiatory breach;*
- c. The employee must resign in response to that breach; and*
- d. The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.”*

Were any of the above ingredients present in the Claimant’s case for him to successfully plead constructive dismissal? From the facts at hand the Respondent had the prerogative to transfer the claimant.

In his letter for early retirement the Claimant goes on to thank the Respondent and its management team for a rewarding and fulfilling career with it. There is no evidence of frustration. Further from the tone of the letter the Claimant was under no duress from the Respondent.

In the case of **Milton M Isanya v Aga Khan Hospital (2017)**

**eKLR** the Court in dismissing a claim for constructive dismissal stated that:

*“In constructive dismissal the desire to resign is from the employee as a result of hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tenders resignation. I find no evidence of constructive dismissal in the Claimant’s case.”*

As in the case of Milton M. Isanya, I find that the claimant resigned voluntarily. He is therefore not entitled to the remedies sought. **The claim is accordingly dismissed with no orders as to costs.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF MAY 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**