



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.463 OF 2017

GEORGE OGOMA OCHIENG.....CLAIMANT

VERSUS

KENJAP MOTORS LIMITED.....RESPONDENT

JUDGEMENT

The claim is premised on the facts that the claimant was employed by the respondent as a machine operator in the year 2012 at a monthly wage of Ksh.17, 000 and where he worked until 8th May, 2014 when he was issued with a letter of appointment and his wages increased to Ksh.25, 000 per month.

The claim is that the claimant faced harassment and intimidation from the respondent's management and his efforts to have the same addressed did not bear fruits. He was hence unable to discharge his duties resulting in constructive termination of employment. This was unfair and unlawful for the reasons that the claimant was not allowed an opportunity to give his defence and there was no notice issued to the claimant to enable him defend himself.

The claim is that the claimant worked overtime, an extra hour every day and did not receive compensation. He worked during public holidays without compensation.

The claims are for the following dues;

- a) Damages for unlawful dismissal under section 49;
- b) Notice pay;
- c) Overtime pay at Ksh.187, 200;
- d) Work during public holidays at 32 days Ksh.26, 656;
- e) Compensation; and
- f) Costs.

The claimant testified that he was employed by the respondent to control the motor vehicle machine and was issued with letter of employment on 8th May, 2014 at a gross wage of Ksh.25, 000 per month. He then asked for a wage increase which created problems for him and he was changed from a supervisor to a general employee. A customer then lodged a complaint about his work and the respondent alleged that his work was poor but the claimant had been removed from the supervisor position and hence was not responsible to the customer.

The claimant resigned from his employment which was not voluntary. He was not able to work freely and whatever he did the respondent found a mistake. He would be at work from 6am to 7pm each day so as to finish his duties.

The claimant also testified that on 8th May, 2014 he wrote to the respondent seeking to terminate his employment. He had received several complaints from customers over his work. He did not give notice to the respondent upon terminating employment. There is no explanation given for the resignation.

The defence is that the claimant was employed in the year 2014 and accorded a peaceful work environment but he conducted his work poorly

leading to great loss to the company and which was brought to his attention and given a chance to defend his action and the cause of poor work performance. despite the misconduct the claimant was retained at work and his wages increased over time until he voluntarily left his employment without giving reasons or serving the notice period. He was paid all his owing dues.

The defence is also that despite the claimant being paid his total dues, he held company properties which he refused to hand over. The claims made are without merit and should be dismissed.

The respondent filed work records.

Hellen Kagiri the manager testified that upon the employment of the claimant his wages were increased lastly earning ksh.25, 000 from Ksh.17, 000 so as to motivate him but he continued to be of poor work performance a customer complained about his work and the claimant refused to cooperate and instead issued his resignation letter without giving reasons or serving notice period on 23rd October, 2017. The claimant terminated employment instantly without giving the respondent a chance to discuss the matter. As he refused to engage and cooperate, the resignation was accepted and owing dues paid in full.

The defence is also that at the time the claimant left his employment he was owing;

Ksh.14, 000 to the workshop owed to a client;

Ksh.6, 000 paid as advance

The claimant accepted being indebted to the respondent and he was paid ksh.6, 747 through his bank account.

Ms Kagiri also testified that another employee wrote to the respondent that the claimant was owing her Ksh.25, 000 and these had not been paid but the final dues owing to the claimant were not sufficient to clear this debt.

The claims made should be dismissed with costs.

The claimant has relied on the concept of constructive termination of employment on the basis that he resigned from his employment with the respondent following harassment and intimidation and failure to be allowed a conducive work environment. In an undated letter the respondent asserted was issue don 8th May, 2014 the claimant wrote in Swahili that *I have decided to terminate employment instantly. As such pay my dues we separate in peace.*

Constructive termination/dismissal from employment is not in our law books and can be deduced from decided cases. In the case of **Milton M Isanya versus Aga Khan Hospital Kisumu [2017] eKLR** constructive dismissal is defined that;

... Constructive dismissal has its roots in the law of contract under the doctrine of 'discharge by breach.' Under this doctrine, an employee was entitled to treat himself as discharged from further performance of his obligations where the employer's conduct was a significant breach going to the root of the contract. The termination would be due to the employer's conduct. Such conduct may include unilateral reduction in pay or failure to pay the employee....

If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct."

Therefore a distinction should be made of the two facets of the definition of constructive dismissal:

i. The employer making a unilateral alteration or breach of the employment contract to the detriment of the employee.

ii. The employer making or otherwise permitting working conditions of the employee to be intolerable for him to continue working.

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 termination of employment must be therefore at the instance of the employee due to being placed under intolerable work conditions. It is not sufficient that the employee has engaged in misconduct and to claim constructive dismissal hastily tenders a resignation notice to avoid the obvious.

In this case, the claimant was issued with notices that his work performance was poor. He had caused loss and damage to a client's property and was directed to make good the same.

The claimant followed this with his letter of resignation. He did not address the issue of his poor work performance and his defence was that he was demoted and thus not responsible to supervise work. Such attitude to work over a period where the claimant was still in the employment of the respondent and was required to be diligent in his duties is wrong. Instead of undertaking his duties properly as required,

he neglected his duties on the basis that he had been removed from the supervisor role which amounted to gross misconduct under the provisions of section 44(4) of the Employment Act, 2007.

The resignation from employment is hence found voluntary, it resulted from the claimant's efforts not to answer to noted gross misconduct and this was accepted despite him not serving the notice period as required under section 35 of the Employment Act, 2007.

On the claims made, part of the dues paid to the claimant by the respondent and records filed relates to overtime payments on 30th October, 2017. He was owing the respondent for failure to clear and submit tools and property issued to him and the deduction therefrom is in tandem with the provisions of section 17 of the Employment act, 2007.

On the claims for work during public holidays the evidence by Ms Kagiri that the respondent remained closed during public holidays was not challenged in any material way. To claim for payment of days when the claimant was not at work or required to be at work is to seek unjust enrichment.

Accordingly, the claims made are found without merit. Suit is hereby dismissed. The claimant shall pay costs to the respondent.

Dated and delivered electronically this 21st May, 2020 at 0900 hours

M. MBARU

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 15th March, 2020 the Order herein shall be delivered to the parties via emails.

this 21st May, 2020 at 0900 hours

M. MBARU

JUDGE