



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 697 OF 2012

JAMES MUCHENE MBUGUA CLAIMANT

v

QUORANDUM LIMITED RESPONDENT

JUDGMENT

1. James Muchene Mbugua (Claimant) was offered employment as a driver by Quorandum Ltd (Respondent) on 28 March 2008.
2. On 28 December 2010, the Claimant gave notice of resignation, effective 31 December 2010, and on 6 February 2012, he caused demand to be sent to the Respondent seeking payment of accrued salaries and leave.
3. The Respondent replied on 23 February 2012 indicating that due to an economic downturn it required two weeks to come up with proposals to clear any outstanding dues.
4. On 25 April 2012, the Claimant commenced legal action against the Respondent alleging *constructive dismissal* and breach of contract.
5. The Respondent filed a *Response* on 25 June 2012 and on 5 March 2014, the Claimant was granted leave to file an *Amended Memorandum of Claim*. The Claimant was directed to file and serve an *Amended Memorandum of Claim* before end of 6 March 2014.
6. There is nothing on record to show that the Claimant filed and served an *Amended Memorandum of Claim*. What is on file is a *draft amended Memorandum of Claim* which was attached to the application seeking leave.
7. In the circumstances, the Court will only consider the initial Memorandum of Claim.
8. The record shows that on 19 April 2018, the parties caused the Court to mark the Cause as settled.
9. However, the Claimant caused the suit to be scheduled for hearing on 17 December 2019 and when the Court drew the attention of the parties to the settlement order, Mr. Ogada informed the Court that the settlement was in erroneous as there had been a mix-up. The Respondent did not deny that there was a mix-up and the Court vacated the settlement order, paving way for the hearing to proceed.
10. The Cause was heard on 17 December 2019 and on 21 January 2020. The Claimant and the Respondent's Managing Director testified and judgment was scheduled for 17 March 2020. Due to the current COVID19 pandemic, it could not be delivered. The Deputy Registrar notified the parties that this judgment would be delivered on 24 April 2020. None of the parties responded. A fresh notice was issued for today.
11. Both parties filed their submissions on 14 February 2020.
12. The Court has considered the pleadings, evidence and the submissions and will adopt the Issues for determination as raised in the Respondent's submissions.

Constructive dismissal

13. The doctrine of *constructive dismissal* was discussed in detail in the case of *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344. The Court discussed the rival tests and ended up endorsing the contract test.
14. The test, essentially as to what amounts to constructive dismissal as endorsed in the authority is that 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. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must, in either case, be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

15. From this test, the duty the Court is called upon to do is to look at the conduct of the employer which might have led to the employee leaving.

16. In the instant case, the Claimant penned a resignation letter to the Respondent on 28 December 2010.

17. The Claimant did not give any reason for his action in the aforesaid letter but instructed the Respondent to recover the pay in lieu of notice from unpaid October 2010 salary.

18. While giving evidence, the Claimant stated that the Respondent had failed to pay his salary for 3 months and further that the payment of salaries had been intermittent.

19. According to the Claimant, the failure to receive the salary made it difficult for him to provide for his children and family.

20. The Respondent's witness admitted that the Claimant was owed salaries by the time of resignation and that at the time, the Respondent was restructuring as it could not maintain all its employees.

21. The witness did not disclose whether any discussions or consultations were held with the Claimant (or other employees) on the delay to pay salaries.

22. The Respondent, relying on *Nyali Academic Services Ltd t/a the Mombasa Academy v Caroline Opondo* (2019) eKLR submitted that the resignation of the Claimant was voluntary and therefore the Court should find there was no *constructive dismissal*.

23. The payment of salary when it falls due is one of the *essentials* of an employment contract. Under the common law, it is a fundamental consideration.

24. The obligation to pay salary on time has now been given statutory imprimatur by sections 17 and 18 of the Employment Act, 2007.

25. Without any evidence that the Respondent discussed with the Claimant the failure to pay his salary on time, the Court is of the view and finds that the Respondent was in fundamental breach of its contractual obligations thus creating a hostile work environment, warranting the Claimant to leave and assert *constructive dismissal*.

26. The Claimant was constructively dismissed.

Compensation and salary in lieu of notice

27. The Claimant served the Respondent for about 3 years and on account of the length of service, the Court is minded to award the equivalent of 3-months' gross salary as compensation (gross salary in November 2009 was Kshs 28,528/-).

28. The Claimant left because of the Respondent's conduct in failing to fulfil its obligations and the Court finds that the Claimant is entitled to the equivalent of 1-month salary in lieu of notice (basic salary was Kshs 28,528/-).

Unpaid salaries for October to December 2010

29. The Claimant was entitled as of right to salaries up to 31 December 2010 and the Court will allow the head of the claim in the sum of Kshs 75,000/- as sought.

Service pay

30. The Claimant was a contributor towards the National Social Security Fund and is not eligible for *service pay* pursuant to the provisions of section 35(5) & (6) of the Employment Act, 2007.

Certificate of Service

31. The Respondent issued a recommendation letter to the Claimant with the particulars prescribed for a certificate of service.

Outstanding leave days

32. Annual leave on full pay is a statutory right of every employee.

33. The Claimant prayed for Kshs 25,000/- on account of accrued leave days.

34. The Respondent produced the Claimant's leave records showing that he had a balance of 7 days as of 27 January 2009. No records for 2010 were produced

35. The Court in the circumstances finds that the Claimant did not take leave for 2010 and he is entitled to the equivalent of a months' salary in lieu of the accrued leave.

Conclusion and Orders

36. The Court finds and declares that the Claimant was *constructively dismissed* and also that the Respondent was in breach of contract.

37. The Claimant is awarded

(i) Compensation	Kshs 85,584/-
(ii) Salary in lieu of notice	Kshs 28,528/-
(iii) Unpaid salaries	Kshs 75,000/-
(iv) Outstanding leave	Kshs 25,000/-
TOTAL	Kshs 214,112/-

38. Claimant to have costs.

Delivered through Microsoft teams/email, dated and signed in Nairobi on this 5th day of June 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Ogada instructed by Prof Tom Ojienda & Associates Advocates

For Respondent Mr. Angwenyi instructed by Mohammed Muigai LLP Advocates

Court Assistant Judy Maina