



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1644 OF 2015

TIMOTY NDERI.....CLAIMANT

VERSUS

SAFARICOM LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 23rd October, 2020)

JUDGMENT

The statement of claim was filed on 18.09.2015 through KTK Advocates. The claimant's case is as follows:

- a) He was appointed on 02.11.2004 as Principal Management Accountant.
- b) He was promoted and he resigned on 21.03.2015 as Head of Contact Support within customer care division. His last gross pay was Kshs.1, 123, 701.50.
- c) Around April 2009 and October 2010 he was seconded to Vodafone South Africa as Senior Manager Financial Reporting.
- d) He had a clean record for the 10 years of service.
- e) About 20.03.2015 the Director of Customer Management and General Manager Consumer Business were relieved of their duties through management changes.
- f) The claimant met the respondent's CEO Robert (Bob) Collymore in presence of the CEO's wife who was not the respondent's employee and the CEO insinuated of existence of a group of employees or cliques who were intimidating and harassing other staff and the group often spoke in unofficial vernacular language.
- g) The claimant had worked closely with the Director of Customer Management and he deputised him. A new Director of Customer Management was appointed without involving the claimant. It is his case that he had reasonable expectation to be promoted as head of department as Director of Customer Management. Someone with less experience and rank than the claimant was appointed to the position. He states he was discriminated on account of ethnicity.
- h) He was aggrieved and he handed in his resignation on 21.03.2015. The resignation was accepted on 23.03.2015 and he was not allowed to serve the 3 months' notice period – suggesting he was resigning to evade dismissal. He wrote on 30.03.2015 to the CEO about his concerns but no reply was received.
- i) The claimant alleges violation of the right to reasonable working conditions contrary to Article 41(b) of the Constitution; discrimination on ethnic grounds contrary to Article 27(5); and the right to express in a language of his choice contrary to Articles 7(3) (a), 11(2) (a) and 44 (1) and (2) of the Constitution.
- j) The respondent has failed to pay gratuity for 10 years at 2 months for each completed year of service; bonus for the year ended 31.03.2015; Employee Performance Share Award Plan (EPSAP); and salary for 12 months from termination of employment. Other employees who resigned were paid such dues.

The claimant prayed for:

- a) A declaration that the claimant's rights have been violated.

- b) A declaration the claimant was constructively dismissed.
- c) General damages for breach of the contract of employment.
- d) Punitive damages.
- e) Exemplary damages.
- f) Aggravated damages.
- g) In alternative, an award that the respondent compensates the claimant for dismissal being the maximum provided in section 49 of the Employment Act for 12 months' salaries Kshs. 14, 804, 415.00.
- h) Gratuity for 10 years at 2 months for each completed year of service Kshs. 24, 674, 025.00.
- i) Bonus for year ending 31.03.2015.
- j) Employee shares under the EPSAP 456, 136 shares vesting in September 2015; 265, 742 shares vesting in August 2016; and 131, 000 shares vesting in 2017.
- k) Costs of the suit.
- l) Interest on (c) and (j) above.
- m) Any other or additional reliefs that the Honourable Court deems fit to grant.

The statement of response was filed on 18.11.2015 through Havi & Company Advocates. The respondent's case is as follows:

- a) The respondent employed the claimant and the claimant resigned from employment as pleaded.
- b) There was no obligation for the respondent to consult the claimant in appointing the claimant's head of department.
- c) The respondent denies breach of contract as alleged for the claimant. It is denied that the claimant's rights were violated as alleged.
- d) The respondent admits it paid other officers final dues as alleged for claimant and states that the claimant was not entitled to similar pay.
- e) The claimant not entitled to gratuity because he was a member of the respondent's pension scheme and NSSF.
- f) Bonus is due on 1st September and he is not entitled because he terminated the contract prior to the due date. He was not also entitled to award under EPSAP because he resigned prior to the vesting date, 1st September.
- g) He was entitled to pay from 1st to 23rd March 2015, 3 months' salary in lieu of notice, and 11 days accrued leave less money owed to the respondent.
- h) The claim be dismissed with costs.

The parties filed their respective submissions. The Court has considered all material on record and the testimony by the witnesses. The Court makes findings as follows:

- 1) The Court finds that the parties were in a contract of service and there is no dispute in that regards.
- 2) The contract of service ended by agreement when the claimant wrote to resign and the respondent accepted the resignation. The Court finds that the claimant has failed to establish a case for unfair constructive termination because he voluntarily chose to resign. Further, the Court returns that the claim for compensation in that regard will collapse.
- 3) The Court also finds that the claimant resigned because his junior was appointed to head the department. As submitted for the respondent the claimant has not established that he was entitled to be consulted prior to the appointment and has not established that he was contractually entitled to be promoted to the position.
- 4) The Court has considered the material on record. Whereas there might have been an ongoing conversation and concerns by the CEO about the ethnicity concerns, the Court finds that that is all where the matter ends. In particular, the claimant has failed to show that his contract was impacted one way or the other upon consideration of his ethnicity. Allegations of violation of the freedom from discrimination in that regard will collapse.

- 5) In any event and as submitted for the respondent the claimant simply resigned as per the terms of his contract and never raised issues of discrimination or failure to be promoted to head of department and which issues the Court finds to be mere afterthoughts.
- 6) As urged for the respondent the claimant resigned prior to the vesting date of the bonus and shares and the claims and prayers in that regard will fail.
- 7) The claimant has not established the contractual basis for gratuity as prayed for and as submitted for the respondent he benefited under the respondent's pension scheme and the NSSF.
- 8) The Court finds that the claimant has failed to justify the award of any of the reliefs as prayed. They will all fail.
- 9) The respondent filed the submissions belatedly and each party shall bear own costs of the suit.

In conclusion the suit is hereby dismissed with orders each party to bear own costs of the suit.

Signed, dated and delivered by the court at Nairobi by video-link this Friday 23rd October, 2020.

BYRAM ONGAYA

JUDGE