



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU
CAUSE NO.379 OF 2017

FRANCIS KIMANI KINUTHIA.....CLAIMANT

VERSUS

FLAMINGO HILL CAMP LIMITED.....RESPONDENT

JUDGEMENT

On 22nd August, 2017 the claimant filed his Statement of Claim and defence was filed on 18th September, 2017.

Hearing directions were issued on 18th July, 2018 where the respondent had been served but remained absent. Hearing date was allocated for 11th December, 2012 and the respondent was dully served on 20th August, 2018 and returns filed to confirm the same. There was no attendance at the hearing.

The claimant was heard on his case in the absence of the respondent.

The claimant was employed by the respondent as a Pool Attendant and issued with letter of appointment dated 1st February, 2011 at a monthly wage of Ksh.8, 000.00 and which pay did not include a house allowance. After 6 months of diligent service the claimant's wage was increased to Ksh.20, 211.00 per month.

The claim is that the claimant remained at work for 7 days a week without taking a rest day or payment in lieu thereof. The claimant worked 3 hours overtime without compensation. During public holidays the claimant was required to be at work.

The claimant was allocated extra duties in addition to his position upon employment.

He was to be a waiter and a life guard contrary to the terms of his employment.

In April, 2016 the claimant was sent on forced leave which was unpaid for 3 months until June, 2016.

On 31st January, 2017 the respondent forced the claimant to take leave which was unpaid save for an allowance of Ksh.3, 000.00 due to what the respondent claimed was low economic status of the business.

Following such prolonged non-payment of the wages due the claimant decided to resign from his employment despite his willingness to work but was not paid. Such resignation resulted from constructive dismissal. The failure to pay due wages was not justified, was unlawful and in breach of the employment terms.

The claimant is seeking for payment of his dues as follows;

- a) Notice pay Ksh.20,211.00;
- b) Salary arrears April to June, 2016 Ksh.60,633.00;
- c) Salary arrears February, to May, 2017 Ksh.80,844.00;
- d) House allowance Ksh.166,740.00;
- e) Overtime hours Ksh.495,864.00;

- f) Unpaid holidays ksh.18,648.00;
- g) Unpaid leave of 45 days Ksh.34,965.00;
- h) Unpaid rest days Ksh.261,072.00;
- i) Service pay Ksh.81,621.00;
- j) Compensation; and
- k) Costs.

The claimant is also seeking for orders that he was constructively dismissed and that he should be paid compensation as such was unfair and resulted from work frustrations by the respondent after failing to pay his wages and sending him on long and unpaid forced leave days.

The claimant testified in support of his claims.

The defence is that the claimant was employed as a pool attendance at a wage which was inclusive of a house allowance. He worked for 6 days a week and was not required to work overtime or on public holidays as alleged. Where the claimant worked overtime or on public holidays he was compensated for such work monthly.

The defence is also that the claimant was never employed or worked as a waiter.

There was no breach to the claimant's rights and the respondent observed the law at all times. All dues owing to the claimant were paid.

The claimant had the right to tender his resignation which was purely voluntary and which ended his employment with the respondent. The respondent was at all-time ready and willing to pay the claimant his dues as provided for by the law but despite several requests, the claimant has failed to clear for the same to be made.

No evidence was called to support the defence as the respondent remained absent during the hearing. No work records were filed save for letter of service, pay statement for July, 2017 and a letter in response to the demand made.

The claims made shall be assessed on the merits noting the pleadings, the evidence and the applicable law.

The basis of the claim is that the claimant was constructively dismissed from his employment by the respondent following his resignation which he testified was necessitated following several months of forced leave and non-payment of his wages.

A claim for constructive dismissal from employment may arise based on different circumstances facing an employee. Fundamentally what an employee is called to demonstrate is that the employer made the work environment so hostile that the employee could not continue working under such deplorable conditions. Such lead to resignation not because the claimant is unable to work but is forced to take such action following the unjustified conduct of the employer.

In the case of **Lear Shighadi Sinoya versus Avtech Systems Limited [2017] eKLR** the court held as follows;

On the question of constructive dismissal, this is a case where an employee is placed by the employer under intolerable conditions forcing her to resign from employment. The duty is upon the employee to demonstrate such intolerable circumstances and conditions for the court to make a finding that indeed, placed under such conditions, the employee was justified in tendering resignation. Such a claim must be pleaded and evidence advanced to this effect.

The above findings affirmed that constructive dismissal is caused by the intolerable work conditions an employee is placed forcing him to resign from his employment. The court relied on the case of **Osman Eggae Egaal versus John Philip Tilley & Others, Petition No.90 of 2012** and **David Potter versus New Brunswick Legal Aid Services Commission, Supreme Court of Canada, 2015 SCC 10**, and where **Wagner J** held that;

The test for constructive dismissal has two branches. The court must first identify an express or implied contract term that has been breached and then determine whether that breach was sufficiently serious to constitute constructive dismissal. ... first, the employer's unilateral change must be found to constitute a breach of the employment contract and, second, if it constitutes such a breach, it must be found to substantively alter an essential term of the contract. ...

Constructive dismissal can take two forms: that of a single unilateral act that breaches an essential term of the contract, or that of a series of act that, taken together, show that the employer intended to no longer be bound by the contract. In all cases the primary burden is on the employee to establish constructive dismissal, but where an administrative suspension is at issue, the burden will necessarily shift to the employer

In this regard, the claimant was under an employment contract with the respondent for the payment of a wage at month end. Such wage was not paid and or there is no proof of payment submitted to confirm that the wage was paid as and when it became due in April to June, 2016 and again from February to May, 2017 when the claimant was forced to tender his resignation.

In the letter dated 13th June, 2017 in the respondent's response to the demand made by the claimant, the respondent has on a without prejudice basis noted that they were ready to pay the claimant was due and owing. However no amount is computed and no payment was done. Payment of a wage was an agreed term of employment. such is a requirement under sections 18 read together with section 20 of the Employment Act, 2007. The respondent did not oblige. Such resulted in a fundamental breach of the employment contract. This was the primary reasons leading to the claimant's decision to resign from his employment. Such was to put the claimant into circumstances that can only be termed as unfair and unwarranted.

Where the respondent had financial problems, such is addressed in law but such is not sufficient reason to warrant the breach of contract with regard to the claimant's employment.

The evidence of the claimant remained unchallenged. No defence was called to controvert it.

The court finds there was constructive dismissal of the claimant, such resulted from the unfair conduct of the respondent as the employer and such amounted to unfair termination of employment. Compensation is due.

Compensation is hereby assessed at 10 months gross wage all at Ksh.202, 110.00. Notice pay is due in a case of constructive dismissal which is assessed at one month gross pay at ksh.20, 211.00.

The salaries unpaid when the claimant was sent on compulsory/forced leave is due as such time was within his employment. The wages owing from April to June, 2016 and from February to may, 2017 are payable all at ksh.141, 477.00.

The claimant testified that he was cumulatively sent on forced/compulsory leave for 6 months. Such period covered April to June, 2016 and February to May, 2017. Within such leave period, the court has redressed the same with payment of the wages due for the period. Such puts the claimant in good stead.

On this basis, the 6 months of leave covers the annual leave days due and owing to the claimant for the period under employment. He was entitled to 21 days of leave each year under the provisions of section 28 of the Employment Act, 2007.

With such allocation, there are 4 months and well factored covers days worked during public holidays, rests days due and overtime hours computed into days. The balance is negligible save that such does not redress the unfair termination of employment which is dealt above.

On the claims for house allowance, under the contract dated 1st august, 2015 the claimant was allocated the benefit of a house allowance. The contract under which the allowance was not factored is not produced. From the payment statement, such benefit is secured.

On the claim for service pay is claimed on the basis that the respondent failed to pay statutory dues in the year 2017. Such can well be redressed with a report to the labour officer to initiate sanction and due penalties against the respondent and ensure such payments are effected as they relate to a period under one (1) year.

Accordingly, the court declares the claimant was constructively dismissed from his employment by the respondent and is awarded compensation at Ksh.202, 110.00; notice pay at ksh.20, 211.00; unpaid wages Ksh.141, 477.00; and costs of the suit.

Delivered at Nakuru and dated this 21st day of January, 2019.

M. MBARU JUDGE.

In the presence of