



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CASE NO. 391 OF 2017

DOMINIC MUSYOKA KATISO.....CLAIMANT

VERSUS

FSI CAPITAL LIMITED formerly known as

CONSUMER CREDIT LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed suit against the Respondent claiming unfair termination of employment. He was an office assistant from 1st May 2003 initially earning Kshs. 7,000/- which was later increased to Kshs. 12,000/- a month and at the time of separation he was earning Kshs. 40,000/-. He never went on leave and vide the Respondent's letter dated 17th August 2017 was sent on indefinite compulsory unpaid leave as the Respondent was allegedly restructuring. He sought unpaid NHIF and NSSF dues. He averred that the Respondent failed to render his contributions to his personal pension scheme despite making deductions from his salary.
2. The Respondent filed a defence in which it denied the averments made by the Claimant in his claim. It was averred that the Claimant's services were not terminated and that the Claimant had only been sent for pending leave which had accumulated over time and upon expiry thereof was to be requested to resume duty. The Respondent averred that the suit was premature and thus an abuse of the court process.
3. The Claimant testified while the Respondent duly served failed to avail any witness. The counsel for the Respondent had applied and successfully been able to cease acting for the Respondent. The Claimant testified that he was sent on some indefinite compulsory leave and he was not paid for the said leave. He stated that his statutory deductions were not remitted despite being deducted by the Respondent. He thus sought the relief sought in his claim including compensation for the unlawful dismissal. Severance pay, unpaid leave dues and costs of the suit.
4. The Claimant and Respondent filed submissions. The Claimant submitted that the actions of the Respondent amounted to constructive dismissal. The Claimant argued that the indefinite nature of the leave he was given and the refusal of the Respondent to admit him back was proof of the dismissal. He relied on the case of **Kenneth Kimani Mburu & Another v Kibe Muigai Holdings Ltd [2014] eKLR** where Rika J. held that constructive dismissal occurs when an employee is forced to leave his employment against his will because of his employer's conduct. He submitted that the dismissal did not accord with Section 41 of the Employment Act and was therefore unfair within the meaning of 45 of the Employment Act. He submitted that on the strength of the case of **Evalyn Mumbi v Zetu Kenya Limited [2015] eKLR** he was entitled to service pay as his pension dues were never remitted and that his NSSF dues were unpaid. He asserted that he was entitled to the dues sought in the claim.
5. The Respondent filed submissions out of time despite being served on time by the Claimant. It submitted that the claim was premature as the Claimant had merely been sent on compulsory leave for one year. The Respondent urged the dismissal of the suit.
6. The Claimant was not paid when he was sent on the compulsory leave. When an employer declines to pay salary for a long period of time, the employee may be able to assume the contract is terminated as Section 18 provides that an employer shall pay an employee at the end of the period prescribed for the nature of work done. Leave is a term of the contract and there must be payment during leave. In the event that the leave is compulsory as was in this case, there must be full pay as well. The Claimant herein was thus unlawfully dismissed from service by the conduct of the Respondent who has the cheek to state that the Claimant is still employed yet there is no payment made to date. The Claimant did not prove entitlement to severance pay. The Respondent must however pay all NSSF dues deducted failing which the Claimant may report the Respondent to the NSSF inspectors for necessary action.
7. In the final analysis I enter judgment for the Claimant against the Respondent for:-
 - a. 3 months salary for unpaid leave for 3 years – Kshs. 36,000/-

- b. One month salary in lieu of notice – Kshs. 12,000/-
- c. 12 months salary as compensation for the unlawful dismissal Kshs. 144,000/-
- d. Certificate of service
- e. Costs of the suit
- f. Payment of unpaid NSSF deductions within 30 days
- g. Interest on a) and b) above at court rates from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 25th day of February 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar