



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CASE NO. 390 OF 2017

MOHAMMED MAGAIRO RAMADHANI.....CLAIMANT

VERSUS

FSI CAPITAL LIMITED formerly known as

CONSUMER CREDIT LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed suit against the Respondent seeking to recover for his unfair termination of employment. He was a recovery officer from 28th March 2006. He averred that he diligently discharged his duties despite the long hours, gruelling work and difficult environment afforded him by the Respondent. His employment was terminated on 9th January 2017, allegedly without any prior notice or justifiable cause. He averred that the Respondent did not invite him for a disciplinary meeting or accorded an opportunity to defend himself against any allegations that formed the basis of termination from employment. He averred that the Respondent never allowed him to take his annual leave for the entire duration of his employment. He reported the matter to the Labour Office and through his advocates tried to resolve the matter amicably to no avail precipitating the suit herein. He sought the payment of one month's salary *in lieu* of notice – Kshs. 70,000/-, unremitted NSSF contributions – Kshs. 48,400/-, unremitted NHIF contributions – Kshs. 34,560/-, unremitted dues to Octagon Pension Services Limited – Kshs. 50,000/-, damages for unlawful termination of employment, payment *in lieu* of annual leave, severance pay, certificate of service, interest, costs and any other relief the court may deem just to grant.
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 counsel for the Respondent withdrew from acting for the Respondent due to lack of instructions on 4th May 2018. The Claimant's case was fixed for hearing and he was heard but the Respondent did not attend court despite service upon it. The Claimant testified that he was a debt collector for the Respondent, a micro-finance company. He stated that he was sent on indefinite unpaid compulsory leave. He referred to the letter dated 30th January 2017 which sent him on the unpaid compulsory leave. He stated that on enquiring he was advised that the Respondent was restructuring. He reported the matter to the Labour Office and when the Respondent was notified of the complaint it wrote back indicating that the Claimant had not been dismissed but was to return in April. He testified that he was not allowed back into the Respondent's premises when he went in April as the guard at the door advised him that he was not permitted to enter. He sought a refund of the sums deducted as pension but not remitted to Octagon, the NSSF dues deducted and not paid as well as the NHIF dues, leave pay, severance, certificate of service 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 its submissions out of time despite timely service upon it by the Claimant. The Respondent submitted that the Claimant had not shown there were deductions done and no remittances made. It asserts that in any event even if there were deductions made due to NHIF these cannot be subject of this suit. The Respondent submitted that the Claimant was sent on leave to cater for his accumulated leave days which were to run for a continuous period of 12 months as he had not gone for leave during his employment. The Respondent submitted that rather than let the leave run out, the Claimant took the matter to the labour office prematurely.

6. The Claimant was sent on compulsory leave on 31st January 2017. It was the Respondent's position in the submissions filed that the leave was to be for one year. This was not stated in the compulsory leave letter provided that the Claimant was to go on an indefinite leave. It was unpaid leave to boot. Rika J. held in the case of **Kenneth Kimani Mburu & Another v Kibe Muigai Holdings Ltd** (*supra*) the ingredients that place the dismissal in category of constructive dismissal are:-

- a. The employer must be in breach of the contract of employment;
- b. The breach must be fundamental as to be considered repudiatory breach;
- c. The employee must resign in response to that breach; and
- d. The employee must not delay in resigning after the breach has taken place, otherwise the court may find the breach waived.

7. The Respondent was in breach of the contract of employment as the Claimant was not paid for the leave he was forced to take for an indefinite period which the Respondent finally stated was for one year. Having failed to comply with Section 18 of the Employment Act, the Respondent had in effect dismissed the Claimant from its employ. The Claimant is entitled to recover leave dues for 3 years as the limitation period had set in for the previous unpaid leave beyond the 3 years from the date of filing suit. The Claimant did not prove entitlement to refund of unpaid pension dues as no documents were attached. The Respondent must however pay all NSSF dues deducted failing which the Claimant may report the Respondent to the NSSF inspectors for necessary action.

8. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- a. 3 months salary for the unpaid leave for 3 years – Kshs. 210,000/-
- b. One month's salary in lieu of notice – Kshs. 70,000/-
- c. 12 months salary for the unlawful dismissal – Kshs. 820,000/-
- d. Costs of the suit
- e. Certificate of service
- f. Payment of unpaid NSSF deductions within 30 days
- g. Interest on a), b) and c) above at court rates from the date of judgment until 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