



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 1262 OF 2013

FRED OBARE.....CLAIMANT

v

DEPUTY VICE CHANCELLOR (ADMINISTRATION)

KENYATTA UNIVERSITY.....1st RESPONDENT

KENYATTA UNIVERSITY.....2nd RESPONDENT

JUDGMENT

1. Fred Obare (Claimant) sued Kenyatta University (2nd Respondent) in Cause No. 240 of 2010, *Fred Obare v Kenyatta University & Ar*. The Claimant was contesting his suspension pending disciplinary action as being unlawful.
2. In a judgment delivered on 20 December 2012, the Court directed that the Claimant be reinstated to employment.
3. The Court at the same time held that the 2nd Respondent was at liberty to constitute a Disciplinary Board to look at the allegations against the Claimant.
4. The Respondents appealed against the judgment.
5. On 21 December 2012, the Claimant wrote to the 1st Respondent seeking to be reinstated in terms of the Court order.
6. The 1st Respondent replied to the Claimant on 2 January 2013 advising him that he had been reinstated and deployed to Kitui Campus as Clerk and that he should report to the Director of Kitui Campus.
7. The next day, 3 January 2013, the 1st Respondent wrote to the Claimant, inviting him to appear before the *Senior Board of Discipline* on 18 January 2013 to defend himself against allegations of gross misconduct (making irregular mileage claims).
8. On 4 January 2013, the Claimant met with the Registrar, Administration as a result of which he reported to Kitui Campus on 7 January 2013.
9. On the same day, the Claimant wrote to the 1st Respondent tendering his resignation, and the reasons given were that he had not been facilitated in terms of travel allowance (baggage and luggage allowances) as required by the *Terms and Conditions of Service*. The resignation was to take effect from 8 January 2013.
10. The 1st Respondent acknowledged the resignation letter on 9 January 2013, and further informed the Claimant that the resignation had not been accepted. Two reasons were given for rejecting the resignation (improper notice of resignation and a pending disciplinary case).
11. The Claimant did not appear before the *Disciplinary Board* and on 23 January 2013, the Respondents wrote to him, informing him that it had been decided to dismiss him from employment.
12. On 20 May 2013, the Claimant wrote to the Respondents demanding to be paid entitlements as provided for in the *Terms of Service* and *Collective Bargaining Agreement* in place.
13. Seeing no resolution to his demands, the Claimant instituted these proceedings against the Respondents on 12 August 2013 and he stated the Issues in Dispute as

Whether the involuntary resignation of the Claimant due to the Respondents' illegalities entitles the Claimant to be paid his entitlements, severance and other retirement benefits as stated by law and the terms of service.

14. The Claimant sought pay in lieu of notice, severance pay, lost income to retirement, damages for unlawful demotion and termination and reimbursement of medical expenses.
15. The Respondents filed a *Response* on 19 September 2013 but on 11 May 2015, they applied to be allowed to file an *Amended Response and Counterclaim*.
16. Leave was granted on 16 March 2017, and an *Amended Memorandum of Response and Counterclaim* was filed on 21 March 2017 and this prompted the Claimant to file a *Response to the Amended Memorandum of Response and Counterclaim* on 24 April 2017.
17. On 9 January 2018, the Claimant applied to be allowed to amend the Memorandum of Claim, and in a ruling delivered on 9 February 2018, the Court dismissed the application paving the way for hearing of the Cause.
18. The Claimant testified on 6 March 2018 while the Respondents' Human Resources Manager testified on 27 June 2018 and 28 November 2018.
19. The Claimant filed his submissions on 17 December 2018 while the Respondents filed their submissions on 25 January 2019.
20. The Court has keenly considered the pleadings, evidence and submissions and condensed the Issues for Determination as, *whether the Respondents' could reject the Claimant resignation, whether this was a case of constructive dismissal, whether there was breach of contract and appropriate remedies/orders.*

Whether the Respondents could decline the Claimant's resignation

21. The Claimant gave notice of resignation on 7 January 2013. On 23 January 2013, the Respondents purported to dismiss him.
22. Under the common law, an employer has no authority to reject a notice of resignation by an employee. If the appropriate notice is not given the option available to the employer is to sue for breach of contract.
23. A resignation is a unilateral act on the part of the employee and does not require the consent or acceptance of the employer.
24. The said position has been accepted in comparative jurisdictions (see *Taduggoronno v. Gotom* [2002] 4 NWLR (Pt. 757) 453 and *Yesufu v. Gov. Edo State* [2001] 13 NWLR (Pt. 731) 517).
25. Apart from setting out at section 35(1) the relevant notice periods for a party to notify the other of an intention to terminate the employment contract, the Employment Act, 2007 has not set out whether a notice of resignation by an employee can be rejected by an employer.
26. The Court therefore finds that it was not open to the Respondents to decline the Claimant's notice of resignation.
27. The Respondents' option was to sue for or assert a cause for breach of contract.

Constructive dismissal

28. Constructive dismissal has not yet been given statutory anchor in this country. It is widely recognised in comparative jurisdictions.
29. The general principles of constructive dismissal within the common law were set out by the English Court of Appeal in *Western Excavating (ECC) Ltd v Sharp* (1978) IRLR 27.
30. It would be in order to quote what the Court said

Whether an employee is "entitled" to terminate his contract of employment "without notice by reason of the employer's conduct" and claim constructive dismissal must be determined in accordance with the law of contract. The words "entitled" and "without notice" in the statute are the language of contract connoting that as a result of the employer's conduct the employee has a right to treat himself as discharged from any further performance of the contract

Per Lord Denning MR:

An employee is entitled to treat himself as constructively dismissed if 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. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

31. The primary reason given by the Claimant in the resignation notice was lack of facilitation by payment of *luggage and baggage allowances* to the new work station.

32. The Claimant also made reference to the fact that his children were at tender ages. He further alluded that the deployment would lead to separation with family who were in Nairobi.

33. The 2nd Respondent herein had the contractual authority pursuant to clause 4.20 of the *Administration Division Procedures and Policies* to transfer and deploy the Claimant and therefore in the view of the Court, the mere deployment of the Claimant to Kitui could not constitute conduct constituting significant breach going to the root of the contract or conduct evincing an intention not to be bound by the contract.

34. Similarly clause 4.9 of the *Procedures and Policies*, passage and baggage expenses were *reimbursable* and applicable only in cases of first appointment and on termination of service.

35. The Claimant's deployment to Kitui Campus was not a first appointment or a termination of service.

36. The collective bargaining agreement between *Kenyatta University Council and the Universities Non-Teaching Staff Union and the Inter Public University Councils Forum of the Federation of Kenya Employers and the Universities Non-Teaching Staff Union* had similar provisions, and do not assist the Claimant's case.

37. The Claimant further sought to rely on the *Code of Regulations* for the Public Service.

38. In the Court's considered view, the Code did not apply to the Claimant as he was not an employee of the Public Service Commission of Kenya.

39. It is therefore not clear to the Court why the Claimant expected to be paid the *allowances* before or so soon after the deployment to Kitui Campus.

40. It is not lost to the Court that the Claimant had just emerged out of a protracted dispute with his employer and that the Claimant had succeeded in convincing the Court that his suspension was *illegal* as a consequence of which the Court directed reinstatement.

41. Although not set out as a reason in the resignation letter, the Claimant attempted to present a narrative of discrimination and bad faith on the part of the Director of Kitui Campus by refusing him leave and that he had been demoted as the deployment letter indicated he was a Clerk while his substantive office was that of Senior Clerk (in charge of Records).

42. However, the Court finds that the Claimant did not provide sufficient evidence that the Director was actuated by bad faith when he purportedly declined to grant him leave.

43. With the conclusion on the question of constructive dismissal, the heads of claim for *pay in lieu of notice* and *damages for unlawful termination* does not arise.

Breach of contract

Severance pay

44. The Claimant did not disclose or draw the attention of the Court to the particular provision of contract or law entitling him payment of *severance pay*.

45. If the severance pay sought was anchored on the Employment Act, 2007, the same would not be available to the Claimant as his case was not one of redundancy.

Demotion

46. The Claimant alleged demotion on the ground that the letter deploying him to Kitui Campus indicated that he was deployed as a Clerk.

47. In the view of the Court, the mere reference in the deployment letter was not an indicator that the Claimant's substantive position had been altered or that the terms and conditions of service such as remuneration and other benefits were going to change.

48. During testimony the Claimant asserted that he was to report to a Clerk in Kitui who was in a lower grade. The details and job grade of the said clerk were not disclosed.

Medical benefits

49. The 2nd Respondent had a medical cover in place and it provided for it to bear liability for expenses incurred as a result of hospitalisation.

50. The Claimant asserted that he did not benefit from the cover during his suspension, but did not provide any evidence of medical expenses incurred during the suspension.

51. The Court is therefore of the view that there was no breach of this entitlement warranting relief.

Lost income to retirement

52. The question of lost income retirement keeps coming up regularly.

53. Without contractual agreement to the contrary, this Court can only echo and endorse the position by the Supreme Court of Uganda in *Bank of Uganda v Tinkamanyire* (2009) 2 EA 66 that the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.

Conclusion and Orders

54. The Claimant, a lay person without any legal training fought gallantly. Regrettably, the Court finds no merit in the Cause and orders the same dismissed with no order as to costs.

Delivered, dated and signed in Nairobi on this 8th day of February 2019.

Radido Stephen

Judge

Appearances

Claimant in person

For Respondent Mr. Mwangi/Mr. Angwenyi instructed by Mohammed Muigai Advocates

Court Assistant Lindsey