



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**

**NAIROBI**

**CAUSE 1677 OF 2012**

**JULIUS MICHAEL OOKO.....CLAIMANT**

**-VERSUS-**

**TATA CHEMICALS MAGADI LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. By the Amended Statement of Claim filed on 14th September, 2018 the claimant alleges that he was wrongfully and unfairly dismissed from employment by the respondent through involuntary resignation and his benefits withheld. He therefore seeks the following remedies:

- a) Kshs.3,856,000/- as itemised in paragraph 5 of the Amended Statement of Claim.
- b) Interest on (a) above from the 23rd November, 2011 until payment in full
- c) Costs of the Suit
- d) Certificate of Service
- e) Any other suitable relief that this Honourable Court may grant

2. The Respondent filed Amended Statement of defence on the 14th September, 2018 denying the alleged unfair termination of the

Claimant's employment and averred that the termination was done by the claimant through voluntary resignation on 22.11.2011. She further averred that the claimant is not entitled to the reliefs sought and prayed for the suit to be dismissed with costs.

3. The suit was heard on 22.11.2018 when the claimant testified as Cw1 and the respondent called her HR manager, Mr John Kabera who testified as Rw1. Thereafter both parties filed written submissions.

**Claimant's Case**

4. CW1 adopted his statement dated 23rd October, 2018 as his evidence in chief. In his statement CW1 stated that he was employed by the Respondent herein on 29th August 1995 as an Accounts Clerk and rose through the ranks to position of Financial Accountant earning a monthly salary of Kshs.192,800. He contended that he had a good career at the respondent until he was forced to resign by the respondent.

5. He testified that on 17th November 2011, he found his car had been block by that of Ken Njenga in a manner that he could not leave the car park. That his effort to reach him by phone failed because he refused to pick the calls. Shortly thereafter, the two were involved in an argument over the parking space, which ended with Mr. Ken claiming that he (Cw1) had assaulted him. That on the same day he was served with a show cause letter requiring him to respond to the same within 24 hours, which he did denying any wrong doing and thereafter he was via phone call invited to appear for a disciplinary hearing on 22.11.2011.

6. Cw1 further testified that he was not allowed to call his witness and just when he started explaining what had transpired on the material day, he was handed a dismissal letter. He then requested the Respondent to withdraw the dismissal letter and allow him put in a resignation letter instead of the dismissal and it was agreed. That he handed in the resignation letter dated 22.11.2011 and it accepted by the Respondent on 23rd November, 2011 with direction that he exits immediately.

7. He however testified that his forced removal and/or unfair termination was instigated by his discovery of fraudulent activities within the Respondent Company. He further stated that his resignation was not voluntary as he was threatened with possible arrest and prosecution for allegedly assaulting his colleague, Ken Njenga. He therefore urged the Court to find allow his claim as drawn.

8. On Cross examination CW1 admitted there being an altercation with a colleague over a parking within the work premises. CW1 further stated that he was not allocated parking space despite being entitled to one and after having requested for the same. It was his evidence that he parked at one of the available parking slots but Ken blocked his car. He stated that he had raised the issue of parking space verbally with the Human Resource Department.

9. On further cross examination he confirmed that he was served with a notice to show cause letter dated 17/11/2011 requiring him to show cause why he should not be punished for the altercation that occurred that morning and he responded. He further confirmed that his response was rejected by the Respondent and thereafter he was invited for a disciplinary hearing by phone. He further contended that he was issued with a letter of dismissal but requested to be allowed resign instead, which request was accepted by the Respondent and the dismissal letter withdrawn. He however maintained that his resignation was not voluntary.

10. CW1 admitted that he was a member of NSSF and that the requisite deductions were made on the payslip for NSSF as required by law.

11. He maintained that he was invited for disciplinary hearing verbally and that he was issued a dismissal letter during the said hearing the letter was withdrawn at his request before taking a copy of the same. He however, admitted that he no copy of the letter he wrote in response to the show cause letter. Finally, he admitted that he received his Pension refund.

### **The Respondent's Case**

12. RW1 also adopted his witness statement dated 19/10/2018 as evidence in chief whereby he confirmed that the Claimant was employed by the Respondent on 29th August, 1995 in the position of Accounts Clerk and was promoted to the position of Branch Accountant-Mombasa earning Kshs.192,800. He further testified that during the subsistence of his employment contract, the Claimant failed to conduct himself in a manner be fitting his position as required by the employment contract (Clause 13). That specifically, on 17th November, 2011, the claimant used abusive or insulting language towards his colleague and physically assaulted him during working hours and within the Respondent's premises prompting the Respondent to issue the Claimant with a notice to show cause on the same date.

13. RW1 states that the Claimant failed to respond to the notice to show cause and on 22nd November, 2011 he voluntarily resigned from his position with the Respondent. That the Respondent duly accepted the Claimant's resignation on 23rd November, 2011 and paid him all his rightful dues under his employment contract. He contended that the Claimant never raised, with his office, the issue of parking space at the work premises.

14. RW1 denied that the Claimant was unlawfully and/or unfairly terminated from his employment as alleged and maintained that he voluntarily and without undue influence resigned to avoid the pending disciplinary process. He further denied that the Claimant was served with a dismissal letter as alleged. He urged the Court to dismiss the suit because the Claimant is not entitled to the reliefs sought.

15. On cross examination RW1 confirmed that the Claimant was indeed served with the notice to show cause letter and thereafter the Claimant responded by serving the Respondent with his resignation letter. He maintained at the time of separation, the claimant was duly paid all his rightful dues plus 3 months in lieu of notice so as his resignation to take effect immediately. He stated that the Claimant is not entitled to service pay since he was a beneficiary of NSSF. In conclusion, he reiterating that, he never issued the Claimant with the letter of termination as he alleged but admitted that the Claimant had no previous disciplinary issues.

### **Claimant's submissions**

16. The Claimant submitted that his dismissal was unfair and contrary to Sections 41, 42 and 45 of the Employment Act. That the Respondent terminated the Claimant's services vide a letter dated 23rd November, 2011, without any justification and/or valid reason and/or given a fair hearing or opportunity to be heard. The Claimant avers that the Respondent did not accord him fair hearing as envisaged under Article 50 of the Constitution of Kenya, 2010 as read together with Section 45 of the Employment Act.

17. To fortify the foregoing submission, he relied on the Authority of *Alphonse Maghanga Mwachanya vs Operation 680 Limited (2013) eKLR* where the Court held that:

***“Section 41 of the Employment Act, 2007 has now created a statutory obligation on an employer before terminating the services of an employee on the grounds of misconduct, poor performance or physical incapacity to explain to the employee the reasons for the termination and to listen to any explanations by the employee. The employee is also entitled to have a representative present. This is what is now referred to in employment law and practice as procedural fairness.”***

18. The Claimant further submitted that he is entitled to the reliefs as sought in his Statement of Claim because his services were terminated without any notice being issued to him and that he was never given any terminal dues at the point of separation with the Respondent. He relied on *Ezekiel Mburu Kangethe & Others vs Mugoiri Five Farmers' Co-operative Society Limited, Nyeri Cause No. 146 of 2015* where the Court granted compensation to the Claimants for dismissal without valid reasons. He further relied on the case of *Martin Wekesa Wamalwa Vs Barrow & Grundy (Ukunda) Limited (2013) eKLR* where compensation was awarded dismissal without following a fair procedure as set out in Section 41 of the Employment Act, 2007.

19. He concluded by urging the Court to grant the damages plus certificate of service sought by his amended claim because he is entitled to the same under the Employment Act, 2007.

## Respondent's submissions

20. The Respondent submitted that she never dismissed the Claimant and contended that he voluntarily resigned from his employment by a 3 months' written notice to her. That she received the said resignation positively but she opted to waive the notice by the Claimant and instead paid him salary for the notice period. She further submitted that the Claimant did not avail evidence to support his assertion that she threatened and/or coerce him to tender his resignation.

21. The Respondent further submitted that the Claimant's assertions seems to infer that his services were constructively dismissed by her. However, she urged that the claimant did not prove that her actions of commencing disciplinary process against him amounted to constructive dismissal. She relied on *Mariana Onica & Another vs Sky Aero Limited Cause No. 1815 of 2014* as cited in *Nathan*

*Ogada Atiagaga vs David Engineering Limited (2015) eKLR* where it was held:

***"...it is for the employee to prove that the employer was responsible for introducing the intolerable condition and for the employee to prove that there was no other way of resolving the issue except for resignation. In other words, it is not for the employer or the Respondent in this case to show that he did not introduce any intolerable condition it is for the employee to show that he did."***

22. The Respondent further submitted that the Claimant never indicated in the resignation letter, reason for his resignation as the intolerable conduct by her and instead expressed gratitude for the opportunity availed to him during the subsistence of his employment contract. She relied on *Edward Machuka Nyamora vs Kenya Animal Genetic Resource Centre Formerly (Central Artificial Insemination Station [2018] eKLR* where it was held that:

***"If the resignation was not voluntary as claimed by the Respondent, a reasonable employee in a senior position as was held by the Claimant would tender his resignation under protest and state that the resignation was not voluntary but was forced."***

23. Finally, the Respondent submitted that the Claimant is not entitled to the reliefs sought having not discharge the burden of proof as indicated in Section 47(5) of the Employment Act, 2007. For emphasis the Respondent relied on the case of *Kennedy Maina Mirera vs Barclays Bank of Kenya Limited (2018) eKLR* where it was held that:

***"...Sections 43(1) and 47(5) of the Employment Act, must be construed so as not to nullify the conventional and accepted law on the burden of proof. Therefore, the Plaintiff must adduce prima facie evidence that tends to show that his employment was not terminated for a valid reason and that the employer did not follow a fair procedure in terminating his employment..."***

24. Regarding the claim for service pay, the respondent submitted that the Claimant was disqualified from claiming that benefit because the claimant admitted in evidence that he was a member of NSSF and that she remitted his NSSF contribution to Fund. That RW1 testified that the Claimant was a member of the Respondent's provident fund and the claimant admitted in evidence that he was paid his pension dues after the separation. She relied on *Michael Obudho Amondi vs United Millers Limited (2016) eKLR* where it was stated that:

***"What Section 35(6) of the Employment Act provides is that where an employee is already benefiting from a registered pension or provident fund; or gratuity or service pay scheme established by the employer or under a collective bargaining agreement or is a member of NSSF, then he shall not be entitled to service pay"***.

25. She therefore concluded by urging the Court to dismiss the instant claim with costs to the Respondent.

## Analysis and determination

26. After careful consideration of the pleadings, evidence and submissions presented to the court by both parties, there is no dispute that the claimant was employed by the respondent from 29.8.1995 to 23.11.2011. The issues for determination are:

- a) Whether the Claimant voluntarily resigned from his employment or he was constructively dismissed by the Respondent.
- b) Whether the Claimant entitled to the orders sought.

## Voluntarily resignation or constructively dismissal

27. The Claimant contended that his resignation from the Respondent's employment was not voluntary. In other words, he claims to have been coerced into tendering his resignation after his discovery of fraudulent activities within the Respondent Company. However, I find that the said contention by the claimant has not been proved on a balance of probability.

28. He admitted in evidence that he was involved in an altercation with one of his colleague over parking space on 17th November, 2011 for which he was issued with a suspension and notice to show cause letter requiring him to put a response within 24 hours, explaining why disciplinary action should not be taken against him. That he never responded as required but he wrote a resignation letter dated 22.11.2011, obviously to avoid disciplinary action. Had he responded to the show cause letter he would have proved the same by producing a copy as an exhibit.

29. The question that arises is whether the Respondent's action of commencing disciplinary proceedings against the claimant amounted to

constructive dismissal? The Black's Law Dictionary (9th Edition) defines constructive dismissal as

***“A termination of employment brought about by the Respondent making the employee's working conditions so intolerable that the employee feels compelled to leave.”***

30. In the case of **Nathan Ogada Atiagaga Vs David Engineering Limited Cause No. 419 of 2014** the court held that:

***“Constructive dismissal occurs when an employee resigns because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge.”***

31. In **Coca Cola East and Central Africa Limited vs Maria Ka-gai Ligaga[2015]e KLR** the Court of Appeal had the following to say about the burden of proof and the criterion for constructive dismissal of an employee:

***“The criterion to determine if constructive dismissal has taken place is repudiatory breach of contract through conduct of the employer. The burden of proof lies with the employee. The employer's conduct must be such as when viewed objectively, it amounts to repudiatory and fundamental breach of the contract obligations.”***

32. After considering all the material placed before me, I return that on a preponderance of the evidence, the Claimant has not proved that his resignation was not voluntary and therefore amounting to constructive dismissal. He did not prove the link between his resignation to any conduct by the employer that rendered his continuation with the employment intolerable. The resignation letter never blamed the employer for any such conduct and from the tone of the letter; the Claimant was under no duress from the Respondent.

33. The letter read as follows:

*“From: JULIUS M. OOKO*

*WORKS NO. 84640*

*Date 22.11.2011*

*TO: DIRECTOR OF HUMAN RESOURCES*

***Subject: RESIGNATION FROM EMPLOYMENT AS FI-***

***NANCIAL ACCOUNTING MANAGER***

*I would like to humbly submit my letter of resignation from the employment of Tata Chemicals Magadi Ltd. I would like to give a notice of 3 months, starting today the 22nd Nov, 2011 to 21st Feb 2012.*

*I would once more take this opportunity to thank the management to have let me serve in various capacities.*

*Yours faithfully*

*Julius M. Ooko*

*22/11/2011*

34. Going through the said resignation letter, and considering the time when it was written, less than a week after service of a show cause letter, it is clear that the Claimant resigned to avoid the disciplinary action. The resignation was not due to intolerable conduct by the employer otherwise he would not have been ready to endure the same for the 3 months' notice period. He is therefore estopped from turning round to allege that he was forced to resign. Consequently I return that the claimant was not constructively dismissed but he voluntarily resigned from his employment.

**Whether the Claimant is entitled to the reliefs sought Service pay**

35. The Claimant prayed for service pay at the rate of fifteen (15) days' pay for every year worked. He worked for 16 years from 1995 to 2011 totaling to Kshs.1,542,400.00. During cross examination he admitted that he was a member of NSSF and that the Respondent made the requisite contributions. He further admitted that he received his pension refund after the separation. I agree with the Respondent's contention that by dint of Section 35(6) of the Employment Act, 2007, the Claimant is not entitled to service pay because he was a member of NSSF and the Respondent remitted the requisite contribution to the National Social Security Fund as provided for by the law.

36. In **Michael Obudho Amondi vs United Millers Limited (2016) eKLR** it was held that:

***“What Section 35(6) of the Employment Act provides is that where an employee is already benefiting from a registered pension or provident fund; or gratuity or service pay scheme established by the employer or under a collective bargaining agreement or is a member of NSSF, then he shall not be entitled to service pay”.***

**Compensation for unfair dismissal**

37. The claimant prayed for equivalent of one year’s salary for unfair constructive dismissal as provided under Section 49(1) (c) of the Employment Act, 2007. However, in view of the finding herein above that he was not constructively dismissed but rather resigned voluntarily, the claim for compensation is without merits and stands rejected.

**Certificate of Service**

38. The Claim for certificate of service is granted because it is a right of every employee under section 51 of the Employment Act.

**Conclusion and disposition**

39. I have found that the claimant was not dismissed by the respondent but he resigned voluntarily to avoid lawful disciplinary action. I have further found that he is not entitle to the reliefs sought save for a certificate of service. Consequently the suit is dismissed save for the claim for Certificate of service. Each party shall bear his/her own costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 22nd day of March, 2019**

**ONESMUS N. MAKAU**

**JUDGE**