



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.286 OF 2017

ANTHONY KARANJA CHEGE.....CLAIMANT

VERSUS

THE ATTORNEY GENERAL, acting for

THE OFFICE OF THE PRESIDENT,

MINISTRY OF INTERIOR AND COORDINATION

OF NATIONAL GOVERNMENT.....RESPONDENT

JUDGEMENT

The claimant was employed by the government as an Assistant Chief Grade Two under Salary Structure for Civil servants Job Group F. the respondent is the office of the President, Ministry of Interior and Co-ordination of National Government and represented by the office of the Attorney General.

The claimant was employed by the respondent on 10th December, 2010 upon application and a successful interview for Nyakiambi Sub-Location, Sabugo Location, Sabugo Division, and Mirangine District as the Assistant Chief. The claimant was issued with letter of confirmation for the position dated 28th May, 2013.

Upon appointment the claimant was seconded to attend paralegal and AP matters Course as the Administration Police Training from 12th to 24th December, 2010.

The claimant worked diligently but on 7th July, 2015 was issued with a notice to show cause as to why disciplinary action should not be taken against him. prior to such notice being issued, the claimant was involved in the arrest and destruction of the second generation brew and alcohol drinks in the company of senior assistant County Commissioner, the OCPD and Member of Parliament OI Kalao together with members of the public on 4th July, 2015. The claimant was then accused of leaking information to sellers of the brews so as to hide their consignments which was false and lacked any factual basis.

The claimant responded to the show cause notice on 8th July, 2015 giving details of his involvement and activities in the company of his superiors. He was however issued with a further show cause notice dated 17th July, 2015 for alleged gross misconduct and given 14 days to reply thereto and on this notice he was also suspended from duty without pay with effect from 13th July, 2015.

The claimant replied to the second show cause notice and the Deputy Commissioner, Mirangine Sub-County also wrote to the County Commissioner about the good track record of the claimant by letter dated 20th August, 2015.

For 4 months the claimant received no communication from the respondent. he was left without a salary for the period. The claimant tendered his resignation letter on 2nd November, 2015 for constructive dismissal noting the hardships he had been placed.

At the time of his constructive dismissal the claimant was earning ksh.15,270.00 as basic pay, house allowance of ksh.2,100.00, commuter allowance of Ksh.3,000.00 all being Ksh.20,370.00 per month.

The respondent then issued letter dated 9th February, 2016 purporting to pardon and give severe warning to the claimant despite the claimant having served his resignation notice on 2nd November, 2015. The claimant however responded to the letter of warning noting his constructive dismissal and resignation and by letter dated 9th March, 2016 the respondent responded acknowledging receipt and acceptance of the resignation notice.

On 28th April, 2016 the claimant was issued with notice allegedly for failing to submit his declaration of income, assets and liabilities form for the period of 1st November, 2013 to 31st October, 2015 when the claimant had been placed on suspension and had complied with the same.

The false allegations made against the claimant were terminated by the respondents by letter dated 11th November, 2016.

The claimant is seeking for a finding that he was constructively dismissed following his resignation from employment on 2nd November, 2015 and is claiming;

- a) Salary due for July, 2015 to November, 2016 Ksh.448,868.00;
- b) One month notice pay ksh.26,404.00;
- c) Pro-rated leave ksh.54,849.60;
- d) Leave travelling allowance ksh.85,000.00;
- e) Compensation for unfair constructive resignation Ksh.316,848.00;
- f) General damages, emoluments, contingencies ksh.798,549.15; and
- g) Costs with interests on the due awards.
- h) Certificate of service be issued.

The claimant testified that upon suspension on 7th August, 2015 he was directed to be reporting to the respondent regularly while he had no salary which had been stopped. He was suspended following a crackdown on illicit brews in his location and was then accused of leaking information which was not true and he was not given a hearing. No reason was given for the stoppage of the due salary and this put him under a lot of strain for self and family and the villagers he was previously serving were mocking him causing him a lot of embarrassment and public ridicule. The claimant was unable to meet his daily upkeep and he fact that he went without a salary from July to November, 2015 put him under intolerable conditions forcing him to tender his resignation with the respondent.

The claimant also testified that by letter dated 2nd November, 2015 to the respondent he confirmed he had resigned and did not resume work and there was no revocation of the letter of termination but the respondent continued to write to him with various directions without payment of a salary.

The resignation notice was accepted by the respondent by letter dated 11th November, 2016. The claimant had however continued to report to the respondent as directed, filed the birth and deaths returns and was not paid the due travel allowances.

Defence

The respondents denied all the claims made by the claimant and that the claimant was never employed as an Assistant Chief and such claims are without evidence.

The claimant was not invited to attend Mashujaa Day as claimed and no honours or accolades were confirmed as alleged and he was only discharges his duties as an assistant chief.

The defence is also that where the claimant was issued with a notice to show cause letter it was done reasonably and lawfully and upon his resignation, the claimant cannot be forced to work for the respondent.

No evidence was called for the defence

The claimant has submitted his letter of appointment as Assistant Chief for Nyakiambi sub-location dated 10th December, 2010 issued by the Office of the President, District Commissioner, and Mirangine District and signed by Mwai Gicheru, District Commissioner. The appointment was confirmed by letter to the claimant dated 28th May, 2013 sent to him through Mr Anthony Chege, District Commissioner, and Migangine District and signed by C.A. Nyabwa for the Permanent Secretary, Provincial Administration & internal Security, the respondent.

The records filed confirm the claimant's employment with the respondent.

Both parties agree that there was a show cause letter issued to the claimant on 7th July, 2015 and the allegations made against him are set out therein. The respondent indicated that disciplinary action would be taken where cause was not shown. The claimant was given 7 days to respond to the notice.

By letter dated 8th July, 2015 the claimant replied to the allegations made against him and submitted the same with the County Commissioner

through the Deputy County Commissioner.

There is no response to the claimant.

However, on 17th July, 2015 the respondent issued the claimant with letter and notice of gross misconduct/suspension from duty on the grounds that;

... your supervisor indicate that your general conduct and work performance have been found wanting and fall below the expected service requirements by failing to control consumption and sale of illicit brews in you area of jurisdiction following a Presidential directive on the same.

In view of the foregoing, it is contemplated to dismiss you from the service on account of gross misconduct. however, before this is done, you are hereby called upon to show cause in writing why the contemplated action will not be taken without further reference to you.

Meanwhile, it has been decided that you be suspended from performing the duties of your office with effect from 13th July, 2015. During the period of suspension you will not be entitled to any salary.

The claimant replied to the show cause on 13th August, 2015.

On 20th August, 2015 the Deputy County Commissioner white to the County Commissioner with regard to the show cause notice issued to the claimant noting that he was an officer with a good track record in his area of operation. This letter supported the response by the claimant with regard to matters addressed in the show cause notices issued to him.

There is no response to the claimant.

By letter and notice dated 2nd November, 2015 the claimant resigned from his employment with the respondent on the grounds of personal circumstances and issues beyond his control. The resignation was stated to be with immediate effect. The respondent received the notice on 4th November, 2015. The notice was not accepted by the respondent until by letter dated 9th March, 2016.

Before the acceptance of the resignation notice, by letter dated 9th February, 2016 the claimant was issued with letter and notice of severe warning on the grounds that his responses of 13th August, 2015 on the show cause notice were found unsatisfactory and that his withheld salary would be paid upon return to duty.

The claimant replied and appreciated the pardon but noted that he had since resigned from his employment with effect from 2nd November, 2015.

A resignation from employment is a legitimate mode of terminating employment. Upon the employee serving such notice and receipt by the employer noting the date of effect, to keep the employee at work for any reasons would be servitude.

An employee can also tender resignation from employment following an act of the employer. Such acts may include being put in intolerable work environment in a manner that the employee finds himself unfavourably treated discriminated against, victimised, harassed, intimidated or by such other action(s) as to negate a conducive work environment.

In such circumstances, the employee must plead the circumstances leading to resignation from his employment as constructive dismissal.

In this case the claimant acting in person has pleaded that following his suspension, he was not paid his dues salary and this put him in distress and was unable to take care of self and family, he became a point of ridicule by members of his sub-location and for the non-payment of his salaries and the long period under suspension, he resigned under *constructive resignation*.

Constructive dismissal or constructive resignation well defined result into one and the same matter. The facts leading to the resignation well outlined is apparent from the pleadings, evidence and the various communications by the respondent that by letter dated 17th July, 2015 and reiterated in the letter of 9th February, 2016 that the claimant was not paid his salary during the period of suspension and this was to be processed from 9th February, 2016 when he was pardoned following the suspension.

As held in the case of **Maria Kagai Liganga versus Coca-Cola East Central Africa Limited V. Maria Kagai Ligaga (2013) eKLR** held that an employee is entitled to leave his employment when the employer's behaviour towards him is so unreasonable that the employee cannot be expected to stay. The employer's conduct must be so grave that it constitutes a repudiation of the contract of employment. The breach must go to the very root of the contract. In other words, the employer must have breached the terms of the employment contract in such a manner that it is no longer possible for the employee to continue working effectively. This decision went on appeal and the Court of Appeal in **Coca-Cola East Central Africa Limited versus Maria Kagai Ligaga (2015) eKLR** restated the position and findings of the court as above.

In this case, the action of the respondent issuing the claimant with a show cause notice on 7th July, 2015 to which he replied but there was no response of a hearing to determine the allegations made as to their truthfulness and then issued him with letter to show cause, suspension on

17th August, 2015 on matters to which he replied but was never called to a hearing but was kept without salary, such the court finds is a fundamental breach of the terms of employment contract which required the claimant to work and be paid monthly. The conditions visited upon the claimant with the non-payment of his salary by the respondent were not justified and by his resignation, there was constructive dismissal.

Such is unfair under the provisions of section 45 read together with section 41 and 43 of the Employment Act, 2007. There is no justification as to why the claimant was kept without being paid his due salary from July to November, 2015. Despite the respondent receiving the letter of resignation, such salary remains unpaid.

Such constructive dismissal from employment can be redressed with compensation. From the evidence, an award of ten (10) months gross salary is found appropriate compensation.

At the time of his resignation the claimant was earning a gross wage of ksh.26, 404.00 per month. Compensation is awarded at 264,040.00.

Notice pay on the findings that there was termination of employment due to the conduct of the employer. Such is awarded at ksh.26, 404.00.

The salaries due from July to November, 2015 are due to the date the claimant resigned from his employment. The claim for salaries up and until November, 2016 when the claimant by his own action resigned on 2nd November, 2015 is not due. even where the claimant may have undertaken work for the respondent after his resignation date, such is addressed above with the finding that there was constructive dismissal and has been redressed with compensation. The salary due is for four (4) months only all at ksh.105, 616.00.

On the claim for pro-rated annual leave, there is no challenge to this claim in any material way and the claimant is hereby awarded ksh.54, 849.60 in annual leave.

On the claim for leave travelling allowance at ksh.7, 500.00 the basis is not given.

This is declined.

On the claim for travelling allowances, the evidence was that the claimant was made to travel and file returns on births and deaths in his sub-location while he was not on a salary and his costs were not reimbursed. The claimant resigned on 2nd November, 2015 and stated the same was with immediate effect and after such period the letter of suspension was clear that he was not required to undertake any duty. To go out of his way to offer service upon resignation or when on suspension with clear directions was at own expense. Such claims are declined.

The claims for general damages, emoluments/contingencies at 15% is made on the evidence that the claimant had authority to incur expenses for the respondent and continued to work and perform his duties and his resignation was not accepted upon submissions. However, the letter of resignation was to take effect immediately and such is redressed by the court. there is no justification to claim outside such compensation with an award of general damages.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

- (a) The claimant was constructively dismissed by the respondent and this is declared unfair labour practice;**
- (b) Compensation for unfair termination of employment is ksh.264,040.00;**
- (c) Notice pay ksh.26,040.00;**
- (d) Leave pay due ksh.54,849.60; and**
- (e) Costs of the suit assessed at ksh.20,000.00**

Delivered at Nakuru this 7th day of March, 2019.

M. MBARU

JUDGE

In the presence of:

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