



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.267 OF 2015

JOSEPH NYAGA.....CLAIMANT

VERSUS

UNITED MILLERS LIMITEDRESPONDENT

JUDGEMENT

The claimant is seeking the following;

- a. A declaration that the claimant was constructively dismissed;
- b. Unpaid salary arrears to the tune of ksh.5,100,000/=
- c. Expenses as per tax refund ksh.1,386,400/=
- d. Unpaid earnings for the month of October, 2010 to the tune of Ksh.26,795.72
- e. Gratuity for years of service $85,000/26 \times 12 \text{ years of service} = 588,461.54$
- f. Damages for unlawful and unfair termination of employment equivalent to 12 months' salary.
- g. Withheld earnings for April and May, 2011 to the tune of Ksh.178, 419.94.
- h. Damages against malicious allegations of stealing by servant for cash collected from kanini haraka to the tune of ksh.500,000/=
- i. Costs of this suit.
- j. Interest on (b), (c), (d), (e) and (g) above.

claim

The claimant was employed by the respondent on 5th May, 2003 as a Sales Executive at Nairobi on a probationary period of 3 months and was retained thereafter in the same capacity. The claimant remuneration was ksh.60, 000.00 which was increased to Ksh.85, 000.00 basic pay and a house allowance of ksh.38, 000.00 per month.

The claimant was relocated to Nakuru in the year 2010 in an effort to break into the market and supply the products manufactured by the respondent and so as to have a larger customer base. With the move the claimant was removed from the respondent's pay roll and his earning were on commission basis following sales achieved on monthly basis and which was to cater for all expense inclusive of fuel, personal insurance, assistants' salaries, accommodation, client entertainment, parking fees and court fines and as set out in letter dated 18th October, 2010.

The claimant shared his performance results for June to August, 2010 noting the challenges he was facing in the new business environment but the respondent failed to address the noted challenges. From 1st August, 2010 the claimant was pulled out of his assignment, he was required to forfeit earning of bounced cheque transactions and there was arbitrary exercise of power to debit the claimant's account on failure of debt collection.

The claimant was provided with a company car Registration KBL 586K as a tool of trade and following performance improvements and the incentives he recruited assistants to help boost sales but the respondent later poached them and engaged in unfair competition by allowing these sales assistants to offer the same clients lower prices all meant to frustrate the claimant. This resulted in reduced sales and low commission.

The respondent had put the claimant under pressure to employ the sales assistants to be paid from his earnings irrespective of the sales made; the respondent devised methods to reduce the claimant's earnings by directly dealing with his clients and denying him sales earnings, changing customer identity and cutting off accessibility and giving price discounts to other customers to the exclusion of the claimant's customers and therefore reduced demand.

The claim is also that the respondent insinuated that the claimant was involved in fraudulent transactions relating to a customer *Kanini Haraka* in respect of cheques issued by the customer whereas the cheques were issued in the company's name and the claimant only picked them and banked. The slips were submitted to Kisumu office for accounting purposes.

The respondent created an intolerable work environment for the claimant, though keen to work, the unwarranted deduction on commission left him with meagre earnings;

- i. Taxation at 30% on gross income contrary to KRA guidelines;
- ii. Payments made to ghost workers;
- iii. Imposed ksh.500.00 charge to any invoice cancellation;
- iv. Ambiguous formula on deciding earnings

The effect of these actions reduced the claimant's earnings from ksh.218, 000.00 to ksh.3, and 000.00 per month.

The respondent caused a fundamental change to the employment contract which was unilateral. Such changes had a bearing on the claimant's employment. The allocated motor vehicle was recalled making the claimant unable to discharge his duties. The respondent has conducted itself in a manner calculated to destroy and damage the employment relationship and has retained the sales assistants on a salary of ksh.20,000.00 per month all in preparation of taking over the claimant's duties in the event the frustrations lead to his resignation. This has rendered the claimant's life difficult and the claimant would have continued in the employment of the respondent had the intolerable work conditions not been created.

The claimant is seeking the payment of damages for unlawful and unfair termination of employment and costs of the suit.

The claimant testified that upon employment by the respondent on 3rd May, 2003 he worked diligently until the year 2010 when on 11th April, 2010 he was called to a board meeting and was given new terms of contract. His employment code changes, pace of work changed from Nairobi to Nakuru and he was removed from the payroll. He would be paid on commission from sales done monthly. No salary would be paid. The engagement came with restrictions. There were no negotiations over these new developments.

The claimant testified that he asked for the payment of his terminal dues but was directed to start working and he would be paid. These communications were verbal. The claimant made demand and there was no payment.

Under the new arrangement, the claimant was required to finance all his operations including fuelling the allocated motor vehicle, pay the sales assistants and finance customer relations. There was a tax remittance of 30%.

The respondent started using unorthodox means to frustrate the claimant in his duties by paying the sales assistants from his commissions and then retained in his area to offer similar goods to the customers at reduced prices than what the claimant was offering and this reduced his commissions. By the year 2015 the claimant felt so frustrated as his earnings had reduced from ksh.297, 000.0 per month to ksh.8, 000.00 and his operational costs were consuming his commissions.

The claimant also testified that the motor vehicle allocated to him was recalled alleged on the reasons that it had been sold to a third party. The net effect of these actions made the work environment not conducive and intolerable.

The claimant complained in the high commissions charged at 30% forcing him to consult with KRA on the validity of the same and was advised that such taxations should not be above 16 to 20%. The KRA has since made a refund on the over taxation.

Upon cross-examination, the claimant testified that following his meeting with the respondent's board he wrote a letter dated 18th October, 2010 noting the change of employment terms and requested the respondent to pay the terminal dues for years worked.

Upon the changes effected following the meeting, the claimant was removed from the payroll and his NSSF and statutory dues were no longer being paid save to a commission of 30%. Despite being paid on commissions he was forced to pay for his own operational costs.

There was constructive dismissal from employment. There was no letter of resignation. The dues claimed including the payment of gratuity are owing.

Defence

The defence is that in April, 2010 the claimant and the respondent mutually agreed to change the terms of employment from monthly salaried employee to commission basis and in May, 2010 the claimant moved to Nakuru in the same understanding and was put on commission basis as per agreement. Commission was to be earned on sales.

The claimant was allocated motor vehicle KBL 586L belonging to the respondent to assist in meeting his targets in line with the business objectives. The claimant was still working on commission basis. There was no agreement on the recruitment of sales assistants as alleged. The respondent had its own sales assistants and the claimant used them to achieve his sales targets.

The issue of cheques and fraud is a matter under investigations and once addressed the claimant will have a chance to give his defence.

The respondent has worked on commissions payable to the claimant where he was making more money than when he was salaried. The changes made were not unilateral and no complaint was made in this regard. The calculations wrongly remitted to KRA can be reimbursed and this has since been resolved by KRA.

On 3rd June, 2015 the respondent warned the claimant against the practice of allowing customers to use credit facilities for extended period as it was affecting the cash flow and the issue of *Kanini Haraka* was brought to his attention whereby he was to collect the money. The work environment was always supportive, there were commissions paid based on sales and the allocated motor vehicle was filed by the respondent.

The defence is also that the claim is frivolous and in abuse of court process and no cause of action has been established against the respondent. The employment relationship ceased when the claimant accepted to work on commission basis from May, 2010 and since the claimant was new in the region of Nakuru he was put on the payroll and paid a commission on monthly basis from October, 2010 until December, 2011. This was to operate as an incentive.

On 21st August, 2015 the respondent informed the claimant that the allocated motor vehicle had been sold and he should return it to the factory workshop. He refused to attend and remained absent from duty. He rushed to court and filed suit on 24th September, 2015 claiming constructive dismissal whereas there is no resignation and his was meant to pre-empt any investigations the respondent wanted to undertake against the claimant.

The claimant was paid his dues salary up and until December, 2011 and earned commissions paid until the year 2015. KRA has since done a tax refund and there is no gratuity payable to the claimant or damages as claimed.

In evidence Philipps Dawo the Human Resource officer for the respondent testified that he is based at the Kisumu office and worked with the claimant while he was the sales executive in Nairobi. The claimant moved to Nakuru and was on permanent employment until May, 2011 when terms changed to payment on commission basis.

The claims that there is harassment, frustrations and work environment made intolerable is not correct as the claimant disappeared from work with the respondent's property and noting the allocated motor vehicle had been sold to a third party and he was required to return it and get new directions, he opted to desert duty. The claims made are without justification, the tax claims have since been refunded and the claims made should be dismissed.

At the close of the hearing, both parties filed written submissions.

The claimant submits that his contract of service was fundamentally breached by the respondent when there was a unilateral change which is contrary to section 97 of the Evidence Act and there is no proof of the claimant giving consent.

The respondent illegally withheld the salary due to the claimant.

The claimant was constructively dismissed when he was put under intolerable work conditions as defined in the case of **Joseph Aleper & another versus Lodwar Water and Sanitation Company Limited [2015] eKLR**. The change to the employment contract, the over taxation at 30% instead of 5%, the huge reduction in earnings and payment of sales assistants from the due commissions and withdrawal of motor vehicle used as a tool of trade all culminated in intolerable work environment as held in the case of **Cola Cola East Africa Limited versus Maria Kagai Ligaga [2015] eKLR**. This resulted in unfair termination of employment and the claims made are due.

The respondent filed the submissions out of time. As the claimant has not had the benefit of these submissions, the court will not go into them.

From the pleadings, the evidence and submissions, the issues which emerge for determination can be summarised as follows;

Whether there was constructive dismissal;

The nature of relations between the parties;

Whether there was unlawful and unfair termination of employment; and

Whether there are remedies.

On the issue of the nature of relations between the parties, it is common cause that the claimant was employed as a Sales Executive by the respondent by letter and contract dated 5th May, 2003.

The claimant testified that on 11th April, 2010 he was called to a board meeting and informed that he would be issued with new terms of engagement. He was given a new work code, removed from the payroll and paid on commission based on sales. His engagement came with restrictions.

The defence was that from May, 2010 the relations between the parties changed and the claimant was no longer a salaried employee but paid a commission. He was moved a new location at Nakuru and to give him support in the new market from October, 2010 to December, 2011 he was retained on a salary and since he was paid commission based on sales until the year 2015 when he deserted duty.

Fundamentally in this case, from May, 2010 the claimant was removed from the payroll and was deducted 30% tax which was remitted to KRA. He was paid a commission unlike before. The schedules of commissions paid have been filed by the respondent.

Though not defined under the Employment Act, 2007 there is a difference between an independent contractor, consultant and service provider as against an employee.

The test to apply as to whether an employee is under a *contract of service* or under a *contract for service(s)* has been addressed by the court in **Christine Adot**

Lopeyio versus Wycliffe Pere, Cause No.1688 of 2012 and the tests and principles to apply in such a case is that control test; integration test, economic and business reality test; and mutuality of obligation.

This differentiation relate to very fundamental issues noting that under a contract of service it customarily relates to an employee who is **subordinate** or under the guidance and dependent on another for their employment whereas under a contract for service an employee can be said to be independent or free on his or her own terms for purposes of undertaking a task in an autonomous manner. Thus there is a constant thin line that is drawn between self-employed or independent contractors in a contract for service, and, employees in a contract of service.

In addressing a similar matter in the case of **Fredrick Byakika versus Mutiso Menezes International Unlimited [2016] eKLR** the court held as follows;

The use of the terms such as salary, employment terms and conditions, summary dismissal - *such though referred do not confer an employment relationship*. In the employment contract there were deliverable, terms and conditions, but the Claimant was largely left on his own to undertake his duties and the element of control was his contract of employment and I find no provisions inconsistent with the contract of service as held in **Ready Mixed**

Concrete (South East) Ltd versus Ministry of Pensions and National Insurance [1968] 2 QB 497.

The defining features of an 'independent' service provider as against an 'employee' is that the independent service provider is; paid upon submitting an invoice;

The dues payable were subject to withholding tax at 5%; No direct control in service provision though supervised to deliver quality service; Hours of work were based on the job demands; and No salary or wage is paid but a commission based on sales, completion of service, end of term or lapse of task; and

There is no payment of statutory dues.

In the case of **Paul Ochieng' Agola versus Gateway Marine Services Limited [2018] eKLR** the court held that an Independent Contractor is: a registered taxpayer; will work his own hours; runs his own business; is free to carry out work for more than 1 Employer at the same time; invoices Employer each month; and is not subject to usual "employment" matters such as deduction of PAYE, annual leave, and sick leave.

These defining features were addressed in the case of **George Kamau Ndiritu versus Intercontinental Hotel, Cause No.2347 of 2012** where the Claimant was under a contract for works and the relationship was not covered by the Employment Act.

In this case, upon the removal of the claimant from the payroll and his payment of a withholding tax to the KRA, he ceased being an employee covered under the Employment Act, 2007. Any claim(s) emanating from any breach of his service terms is not a matter for this court to address as upon ceasing being an employee, his relationship with the respondent was purely that of an independent contractor for a commercial court.

With the end of employment relationship as at May, 2010 any claims for due salaries, unpaid earning, gratuity, damages for unfair termination ought to have been lodged under the Employment relationship subsisting and ending as at such date. To file claim in the 2015 is a period way out of the limitation period stipulated under section 90 of the Employment Act, 2007.

The claim for constructive dismissal is thus addressed as above. Without there being an employment relationship between the parties and the claims with regard to employment ending May, 2010 being time barred, the concept of constructive dismissal is lost.

Even in an appropriate case for constructive dismissal to hold, the employee must demonstrate the intolerable work conditions he is subjected to by the employment and which conditions led him to resign from his employment. As correctly cited by the claimant in the case of **Cola East Africa Limited versus Maria Kagai Ligaga**, above cited, there must be resignation from employment forced by the employer due to the intolerable work conditions. Constructive dismissal is a novel remedy for harassed employees.

The duty is upon the employee to demonstrate such intolerable circumstances and conditions for the court to make a finding that indeed, placed under such conditions, the employee was justified in tendering resignation. Such a claim must be pleaded and evidence advanced to this effect. See **Lear Shighadi Sinoya versus Avtech Systems Limited [2017] eKLR**.

In this case, there is no resignation from employment as at the time the suit was filed in 24th September, 2015. This can only be explained by the fact that there was no subsisting employment between the parties as such had ceased in May, 2010 and the claimant was not required to resign from any employment as none existed as at 24th September, 2015.

The remedies sought are not available to the claimant.

The court is not the right forum to urge the alleged breaches.

Accordingly, the claim is hereby struck out. No orders to costs.

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

M. MBARU JUDGE

In the presence of: