



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1762 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

AFRICA NAZARENE UNIVERSITY.....CLAIMANT

VERSUS

DR. HENRY KINYA.....RESPONDENT

JUDGMENT

The Claimant herein filed its Memorandum of Claim on 9th October 2014. It avers that it employed the Respondent as a Librarian vide an employment contract dated 21st August 2006. The claimant thereafter promoted to the position of Senior Librarian on the 6th June 2011 which position he held until his resignation. It avers that it granted the respondent study leave after bonding him to work for the claimant for at least 3 years after completing his studies. It avers that the Respondent tendered his resignation on 21st January 2014 before the lapse of the 3 year bonding period which was to lapse on 10th March 2014, after reporting to work from pursuing his studies. The Claimant prays for the following reliefs:

- (i) Kshs.1,405,433.00 being a refund of the expenses incurred by the Claimant for the period the Respondent was on study leave.
- (ii) Kshs.480,554.38 being a refund of the salary paid for the period of 69 days the Respondent absented himself from duty without consent from the Claimant.
- (iii) Interest on (i) and (ii) above.
- (iv) Costs of the suit.

The Respondent filed his Memorandum of Response on 19th February 2015 denying the averments in the Claim. He avers that he was forced to tender his resignation due to his failing health and the Claimant's refusal to grant his unpaid leave. The Respondent further raised a Counterclaim in which he seeks the following reliefs:

1. That the Claimant's claim be dismissed with costs
2. Judgment be entered for the Respondent for general damages for unlawful an constructive termination
3. Costs of the counterclaim

The Claimant in its reply to the counterclaim avers that the Claimant had ulterior motives in tendering his resignation as he had already taken up employment at Rongo University as from December 2013.

By consent of the parties, the matter was heard by way of pleadings, documents and written submissions with each party filing its respective submissions.

Claimant's Case

The Claimant avers that the Respondent requested for study leave to pursue a PHD in Library and Information Science at Marathwada University in India for the period between 12th May 2008 to May 2011. It avers that the study leave was granted as stated in its letter dated

10th April 2008 on condition that after the completion of the studies the Respondent would serve the Claimant for a period of not less than 3 years. The Claimant avers that the Respondent reported back to work on 11th March 2011 and started serving his bond term which would have ended on 10th March 2014.

However, on 24th September 2013, the Respondent requested for leave of absence for a period of 6 months for time to rest but the Claimant did not approve the leave since the Claimant was serving the 3 year bond term. The Claimant avers that the Respondent appealed the decision declining his application for leave on grounds that a doctors' report had recommended that he needed time to rest. The Claimant requested him to see one of the doctors in the Claimant's medical scheme and arranged for the same but the respondent failed to do so. The Claimant further avers that the Respondent absented himself from duty between 18th October 2013 to 19th January 2014 during which period it paid him his full salary.

It is the Claimant's case that the Respondent was bound by the terms of the bond which he executed and his resignation on 20th January 2014 was a breach of the bond terms. The Claimant therefore contends that in accordance with the bond terms, the Respondent ought to reimburse the expenses it incurred during the Respondent's study period.

The Claimant submitted that by signing the acceptance of the conditions in the letter dated 10th April 2008, the Respondent created a binding bonding agreement between him and his employer. The Claimant therefore argued that the Respondent breached the bonding agreement when he resigned in January 2014 before the completion of the agreed bonding period. As a result, the Claimant is liable to pay back the money expended on him in the 3 years he was studying being a sum of Kshs.1,405,443.00. The Claimant relied on the decision in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR** where the Court held:

"...parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved."

The Claimant further submitted that the Respondent ought to refund the sum of Kshs.480,554.38 which was paid to him before he officially resigned as he was paid for days he did not work.

In respect of the Counterclaim the Claimant submitted that the Respondent cannot claim constructive dismissal yet the Claimant did all it could to assist him including paying him when he absconded duty.

Respondent's Case

The Respondent avers that after working for a period of almost 2½ years he got a burn out and requested for unpaid leave for a period of 6 months. He denied having taken 87 days of his annual leave within the period he resumed duties and further denied that he was absent from work between 18th October 2013 and 9th January 2018. The Respondent avers that he was forced to tender his resignation due to his failing health.

With respect to his counterclaim the respondent avers that the Claimant declined to grant him leave of absence and continued subjecting the Respondent to work despite the burn out, stress and pressure from family issues that had arisen during his period of absence. Further, that the Claimant failed to positively respond to his appeal against the decision declining his leave application. He avers that he worked under harsh inconsiderate working terms which the Claimant had imposed upon him effectively constructively terminating his employment.

He avers that the main reason tendered in his resignation was his ill health and that of his parents. He further avers that the Claimant in the letter dated 10th February 2014 asked him to see one of their doctors in the panel and at this time it had been 20 days after his resignation.

The Respondent submitted that he was not in breach of the bonding agreement and that he continued working under inconsiderable working terms contrary to his rights under the Employment Act and his employment contract. He argued that the Claimant unlawfully denied him leave of absence as a discriminatory measure which was contrary to the provision of Article 27(4) of the Constitution, section 43 and 45 of the Employment Act. The claimant relied on the decision in **Raol Investments [pty] Limited t/a Thekwinin Toyota v Mandela [2008] LJ 267 [SCA]**. The Respondent submitted that he suffered mental and physical anguish as a result of the Claimant's denial of leave.

Determination

The issues for determination are:

1. Whether there was breach of the Bonding Agreement.
2. Whether the Respondent is entitled to reimburse the Claimant the amount sought in the Claim.
3. Whether the Respondent's counterclaim on constructive dismissal should succeed.

Whether there was breach of the Bonding Agreement

The parties hereto admit that there existed a binding bonding agreement between themselves. The agreement was pursuant to the Respondent's letter dated 10th April 2008 granting the Respondent study leave to pursue a PhD in Library and Information Science at Marathwada University, India. The letter stated thus:

“The conditions attached to this offer are as follows:

The study leave will be for a duration of three years with effect from 12th May 2008 to May 2011;

That during the course of your study, you will be expected to keep the University updated on your academic progress;

That while on study leave, you will be paid at the rate of 80% of your basic salary;

That after the completion of your degree course, you undertake to work for Africa Nazarene University for a period of not less than three years, failure to do which you undertake to indemnify the University for the entire expenses incurred in the course of your study.”

The Respondent consented to these terms and reported to work on 11th March 2011. On 24th September 2013 he requested for 6 months unpaid leave of absence to rest and attend to a career structure and family pressing issues. The Claimant in its response in the letter dated 27th September 2013 informed the Respondent that he had taken 63 annual leave days from the date of his return and further reminded him that he was still serving a bonding period of 3 years.

The terms of the bonding agreement were clear that the Respondent was to work for a period of not less than 3 years. The Respondent might have experienced personal issues. In his letter dated 24th September 2013 he not only wanted 6 months to rest but to also attend a career structure and family pressing issues. Despite seeking to proceed on leave to attend to these issues the Respondent was fully aware that he had bonding terms which he was bound to adhere to. The Claimant was justified to inform the Respondent that his leave application was declined for the fact that he had a 3 year bonding period which he had to complete.

The Respondent on his part seems to have been determined to not complete the 3 year period. Consequently, the Respondent tendered his resignation citing his trying moments during his illness and that of his parents. The Respondent resigned on 20th January 2014 while the terms of his bonding agreement would lapse on 11th March 2014 being 3 years from his reporting date 11th March 2011. This is despite the fact that the Respondent was informed to seek medical attention from one of doctors on the Claimant’s medical scheme but refused to do so.

The Claimant was therefore justified to seek the fulfilment of the bonding terms at the time the Respondent tendered his resignation. Further, the respondent did not deny that the curriculum vitae attached to the claimant’s Memorandum of Claim was his. According to the CV, he started working in Rongo University College as a Senior Lecturer from December 2013, the time when he was asking for leave of absence from the claimant allegedly because he was suffering from burnout.

The Court finds that the Claimant not only breached the terms of the bonding agreement for terminating it before the lapse of the 3 year period but also the employment contract which provided that a one month notice or one month salary in lieu of notice was to be given.

Whether the Respondent is entitled to reimburse the Claimant the amount sought in the Claim.

The Claimant seeks that the Respondent does reimburse it the entire expenses incurred in the course of his study. It was a condition of the bonding agreement that should the Respondent fail to undertake work for a period of not less than 3 years he would indemnify the University for the entire expenses incurred in the course of his study. The Respondent terminated the contract of employment before the lapse of the period. He therefore breached the conditions set in the agreement. The Claimant is thus entitled a reimbursement of the expenses it incurred on the Respondent during his study leave.

The Claimant also sought a refund of the salary for the 69 days being the period between 18 October 2013 to 19th January 2014 the Respondent absented himself from duty. The Respondent denied having absented himself from duty. The Claimant in its response to the resignation letter informed him that he had absented himself from duty for the 69 days but the Respondent did not respond to this letter.

The Claimant avers that during his absence the Respondent took up employment at Rongo University as from December 2013 and produced a Curriculum Vitae indicating that the Respondent acknowledged that he worked at Rongo University. The Respondent did not prove that he neither absented himself nor was working at the Rongo University. He did not demonstrate what he was doing during for the 69 days he absented himself. He further did not respond to the issue of his absenteeism as stated by the Claimant in its letter dated 11th March 2014 in response to his resignation letter. He further refused to present himself to the claimant’s doctor for an independent medical opinion.

The Court therefore finds that the Respondent did not prove that he did not absent himself from duty despite receiving salary for that period. The Claimant is therefore entitled to receive the sum of Kshs.480,554.38 which it paid the Respondent as prayed as per the payslips presented in court.

Whether the Respondent’s counterclaim on constructive dismissal should succeed.

The Respondent in his counterclaim contends that he worked under harsh inconsiderate terms imposed by the Respondent therefore resulting to his constructive dismissal. The Respondent did not state what these harsh conditions were. The Respondent further avers that he tendered his resignation giving the main reason being his ill health and that of his parents. However, this reason was not stated in his resignation letter. He further failed to be assessed by a Medical Practitioner in the claimant’s medical scheme for purposes of an independent medical report.

The Respondent avers that the Claimant informed him 20 days after his termination to see one of their doctors in their medical scheme. This

is not the correct position as the Respondent resigned on 20th January 2014 while the Respondent requested him to see one of its doctors in its memo addressed to the Respondent on 22nd October 2013.

The applicable test in determining constructive dismissal was set out in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR* where the Court of Appeal held:

*“What is the key element and test to determine if constructive dismissal has taken place? The factual circumstances giving rise to constructive dismissal are varied. The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer’s conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer’s behaviour towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer’s conduct is so grave that it constituted a repudiatory breach of the contract of employment - this is the contractual test. The contractual test is narrower than the reasonable test. The dicta in **Western Excavating (ECC) Ltd. -v- Sharp [1978] ICR 222** adopts the contractual approach test and we are persuaded that the test is narrow, precise and appropriate to prevent manipulation or overstretching the concept of constructive dismissal. For this reason, we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment.”*

From the test expounded by the Court of Appeal in the above case, the Respondent has not demonstrated that there was a valid reason for him to terminate the employment contract or that he was dismissed constructively. The Respondent’s counterclaim therefore fails.

Conclusion

For these reasons, the claimant’s claim succeeds and the court awards the claimant the total sum of Kshs.1,885,997.38/=.

The counterclaim is dismissed.

The respondent shall pay the claimant’s costs for both the claim and the counterclaim. Interest on the decretal sum shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE