



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 5 OF 2016

BETWEEN

KEVIN LIKHANGA MUSITIACLAIMANT

VERSUS

SEIFEE GLASS MART LTDRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Cootow & Associates, Advocates for the Claimant

Mwakireti Ndumia & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 12th January 2016. He avers he was initially employed by the Respondent Company as a Casual Employee, for a period of 2 years. On or around January 2015, he was employed on a contract of 2 years. He worked up to 5th August 2015, when the Respondent, without notice and just cause, terminated the Claimant's contract. The Claimant had been cut on his hand while loading glass, under instruction from the Respondent. He asked the Respondent to assign him light work upon return to work. The Respondent refused to do so, branding the Claimant as a 'lazy woman.' The Claimant considered himself to have been constructively dismissed. The Respondent prepared the Claimant a letter of resignation, which the Claimant refused to sign. He did not leave work voluntarily but was constructively dismissed. The Respondent declined to pay Claimant's terminal dues. His last salary was Kshs. 14,300 monthly. Against this backdrop the Claimant prays for Judgment against the Respondent in the following terms: -

- a. Declaration that the Claimant was constructively dismissed, and dismissal therefore unfair and unjust.
- b. A sum of Kshs. 100,100 comprising salary for the remainder of contract period [5] months at Kshs. 71,500; annual leave pay for 2015 at Kshs. 14,300; and 1 month salary in lieu of notice at Kshs. 14,300.
- c. Damages for breach of contract.
- d. Costs.
- e. Interest.
- f. Any other suitable relief.

2. The Respondent filed its Statement of Response and Counterclaim, on 9th April 2016. It is admitted that the Respondent employed the Claimant on contract, on a monthly salary of Kshs. 14,300. He was a poor performer. He had been reprimanded for poor performance. The

Claimant did not request for light work from the Respondent. He was not branded a 'lazy woman' by the Respondent as alleged. He was not constructively dismissed. The Respondent did not prepare a letter of resignation for the Claimant. The Claimant declared on 5th August 2015 that he would no longer work for the Respondent. He demanded to be released. He requested the Respondent to prepare a letter of resignation for him. The Respondent did so. The Claimant immediately left, promising to return later, which he never did. He voluntarily left employment. He took annual leave from 11th May 2015 to 18th May 2015. He is not entitled to any prayer. The Respondent urges the Court to dismiss the Claim. He owes the Respondent notice pay, which the Respondent counterclaims at Kshs. 14,300. The Respondent prays for costs and any other suitable relief.

3. The Claimant gave evidence, and rested his case on 20th March 2017. The Respondent called as its Witnesses, Window Fabricator Jacob Odhiambo Ng'ela and Business Partner Nurdin Murtaza Haji, who both gave evidence on 6th March 2018, concluding the hearing. The Cause was last mentioned on 21st March 2019 when Parties confirmed filing of their Closing Submissions.

4. The Claimant confirmed details of his employment with the Respondent, in his evidence. He was introduced to the Respondent by his friend Jacob Odhiambo. Initially the 2 Employees worked on casual terms. The Claimant earned Kshs. 3,000 weekly. He visited construction sites, and fixed glass windows.

5. He had requested the Respondent to avail a generator at a site in Bamburi. There was no electricity at the site. He was instructed to report back at the workshop. Upon reporting, he was asked to remove his overall and leave. There was no more work for him. This was in August 2013.

6. He was recalled in January 2014. In 2015, he was advised he would be on contract. This was effective January 2015. In August 2015, the Respondent terminated his contract.

7. He was injured in April 2015. He resumed after 2 weeks. The Respondent met his hospital bill of about Kshs. 50,000. It is not true that he fought at work persistently. He did not perform poorly. He was not warned about poor performance and fighting. He did not leave employment voluntarily.

8. The Fitter had measured windows in excess of the required size. The Claimant was compelled to adjust the size of the glass to fit. He worked excess hours. When he asked for overtime pay, the Respondent was not happy. The Respondent alleged a lot of money was spent in treating the Claimant after he was injured at work. The Respondent drafted a letter of resignation, and asked the Claimant to sign. The Claimant did not sign the letter.

9. Cross-examined, the Claimant testified that he had a contract, beginning January 2015. His salary was Kshs. 14,300 monthly. He had worked for the Respondent before 2015. The Respondent had made complaints about the Claimant's slow pace, in performance of his role. The Respondent had work at 2 sites. Another Employee had taken window measurements. The windows could not fit. The Claimant asked the Respondent to pay him his terminal benefits, and release him. The Respondent in turn asked the Claimant to tender resignation. He asked the Respondent to pay his dues. He would go his way upon payment. It is not true that he was forced out.

10. His main grievance was about overtime. The Respondent paid his hospital bills. His salary was paid during the period of hospitalization. He took annual leave in 2015. The Respondent did not receive a notice of termination from the Claimant.

11. Redirected, the Claimant told the Court he asked to be paid for overtime work. The Respondent did not look at work records before determining no overtime work had been carried out by the Claimant. He was asked to remove his overall and leave. The problem of unfitting windows involved both sites. It compelled the Claimant to leave. He would not have wished to leave, if the environment was right. He was away in May 2015. He had a bout of malaria. He was not paid terminal dues.

12. Jacob Odhiambo Ng'ela told the Court he worked with the Claimant. It is not true that the Claimant was dismissed by the Respondent on 5th August 2015. Ng'ela served as the Foreman. He assigned the Claimant work at Bamburi. The Claimant declined, saying he wished to talk to the boss, Nurdin Haji.

13. Ng'ela took him to the boss. The Claimant told the boss he wished to cease working. He was asked to write a letter of resignation. The Claimant complained that the work he was being asked to do had measurements which had been taken by another Employee. He insisted he would only continue working if he took the measurements himself. He asked the Respondent to draft the letter of resignation. Nurdin drafted the letter. The Claimant did not sign. He left and Ng'ela did not see him again at the workplace. The Claimant was a difficult Employee to work with. He did not meet targets. The Respondent did not insult him.

14. On cross-examination, Ng'ela testified that he was Claimant's Supervisor. The Claimant worked from 2013. Ng'ela did not work in the Human Resource Department. The Claimant was employed through Ng'ela. The Claimant was initially in casual employment, and later contracted. His role did not change.

15. The Respondent fabricates windows and fixes them at Clients' construction sites. The Claimant was not dismissed for being troublesome. There was no evidence from other Employees confirming that the Claimant was a difficult Employee.

16. Ng'ela accompanied the Claimant to see Nurdin. The Claimant wanted to leave. He had been injured at work. He had a cut on the shoulder. The Respondent paid his hospital bill. He was assigned lighter work. He was not forced to continue performing the role he was performing prior to the injury. The Claimant stated he wished to resign. He did not insist on alternative work. Redirected, Ng'ela told the Court that the Claimant returned to work after hospitalization. He was assigned cleaning work at the workshop. He had healed sufficiently at the time he resumed normal duty.

17. Nurdin confirmed that the Claimant was Respondent's Employee. The Claimant was on contract. He asked to leave before end of the contract. The Respondent did not terminate his contract. He left on his own volition. He went to see Nurdin, accompanied by the Foreman. He said he wished to leave. Nurdin asked the Claimant to put it in writing. The Claimant asked Nurdin to draft for him the letter of resignation. The draft was done. The Claimant left without signing. The Respondent was surprised to receive a demand letter from the Claimant's Advocates, alleging that the Claimant's contract was terminated by the Respondent. He was slow-paced, fixing 2 windows in a day, while another Employee fixed 21 windows in a day. There were several warnings issued upon the Claimant for poor performance. He went on leave from 11th May 2015 to 18th May 2015. His Claim has no foundation. He left without giving notice to the Respondent. The Respondent merits notice pay. He was away while injured for 21 days.

18. Cross-examined, Nurdin told the Court he is a Managing Partner. The Claimant worked for the Respondent, even before 2015. Nurdin did not have warning letters issued to the Claimant in 2015. Other Employees and Clients complained to Nurdin that the Claimant was temperamental. Nurdin was a bit angry because the Claimant failed to fix glasses on time. He gave verbal warnings to the Claimant. The Claimant did not ask the Respondent to let him write the resignation letter himself. Nurdin did not contact the Claimant after the Claimant left employment. The Claimant's role was assigned to other Employees within the workplace. Ng'ela recruited the Claimant. The Respondent did not choose to believe Ng'ela over the Claimant. The Respondent did not pay terminal dues because the Claimant terminated his own contract.

The Court Finds:-

19. The Claimant worked for the Respondent as a Window Fabricator. He initially was employed on casual terms, prior to January 2015.

20. In January 2015, the Parties entered into a contract for a period of 1 year, ending 31st December 2015.

21. Unfortunately, the contract did not mature. It was terminated prematurely, on 5th August 2015, some 4 months before the contracted date of termination.

22. Parties do not agree on who between them, initiated termination. The Claimant alleges he was constructively dismissed. He gives various factors which made him think he was constructively dismissed.

23. He alleges there were window measurements taken by other Employees, which made him unable to fabricate fitting windows. He was compelled to work overtime, because he would have to adjust his measurements to meet what other Employees had measured. When he asked for overtime pay, the Respondent was unhappy, pointing out to the Claimant, that a lot of money had been spent in medical expenses for the Claimant, after the Claimant had suffered injury at the workplace. The Claimant felt this work environment was not conducive to continued service.

24. According to the Respondent, the Claimant expressed his desire to leave. He went to Nurdin's office accompanied by Ng'ela, and made his intention known. He was asked to put this intention in writing. On his request Nurdin drafted a letter of resignation. The Claimant did not sign. He walked out and came to Court.

25. Cross-examined, the Claimant told the Court: -

§ I asked the Respondent to pay my dues, I go my way.

§ It is not true that I was forced out.

§ My main grievance was overtime.

26. These concessions do not support the position that the Claimant's contract was constructively or otherwise terminated by the Respondent. The Claimant left employment on his own volition.

27. There is no link between his injury, hospitalization and termination. The Claimant's main grievance as stated in his evidence was that he was compelled to work overtime, which he was not compensated for on demand.

28. There are no circumstances establishing the principle of constructive dismissal as enunciated, in **Kenya Court Appeal** decision, **Coca Cola East & Central Africa Limited v. Maria Kagai Ligaga [2015] e-KLR**: the Employer is not shown to have made the work environment intolerable for the Employee to continue working; the Claimant was offered light duty of cleaning the workshop while recuperating from his shoulder cut; the Respondent was not shown to have acted in a manner indicating it was no longer interested in meeting the fundamental terms of the contract; the Claimant did not resign, having concluded that the contract was unworkable; he wished to resign, asked Nurdin to draft resignation letter and bolted; and finally, he states at paragraph 6 of his Statement of Claim, that the Respondent terminated his contract by word of mouth. It cannot have been constructive dismissal, if the Claimant was told by word of mouth that his contract had been terminated. Dismissal is constructive when it is not explicit, when it is derived by inference. If it is verbal, it is explicit and there is nothing to infer. The Claimant has not shown that he was constructively dismissed, and or otherwise unfairly dismissed by the Respondent.

29. The Claimant appears to the Court to have been an incompatible Employee. The Respondent would have been justified to terminate the contract for incompatibility under Section 45 [2] [b] of the Employment Act, but nonetheless did not initiate termination. In fact the Claimant had in the past, prior to 2015 left employment, and been recalled by the Respondent. His friend Ng'ela recruited him, and accompanied him at the meeting with Nurdin, where the Claimant expressed his wish to leave. The Court does not see any reason to disbelieve Ng'ela. He discounted every significant averment made by the Claimant. He affirmed that the Claimant left employment on his own volition.

30. The Parties were free under the contract, to disengage. The only fault with termination was that the Party who terminated the contract 4 months before expiry, failed to issue notice.

31. Nurdin testified however that the Respondent did not pay the Claimant his salary for the last month. This should satisfy the demand for salary in lieu of notice made in the Counterclaim.

32. The Claimant told the Court on cross-examination that he took annual leave for 2015. His prayer for annual leave has no basis. He had not completed 12 continuous months' in service as required under Section 28 of the Employment Act to demand a month salary as annual leave. He admittedly went on annual leave notwithstanding this legal provision. He was away from work in the 8 months worked, on other occasions. He was injured and away for 21 days. The Court was told also that the Claimant was sick with malaria on other occasion. His prayer for annual leave is not reasonable or sustainable.

IN SUM, IT IS ORDERED: -

a. Both Claim and Counterclaim are rejected.

b. No order on the costs.

Dated and delivered at Mombasa this 13th day of June 2019.

James Rika

Judge