



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 2456 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 8th July, 2019)

PETER MUTARURA MWAURA.....CLAIMANT

VERSUS

CIC INSURANCE GROUP LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant, Peter Mutarura Mwaura, filed a Memorandum of Claim dated 25/11/2016 against the Respondent, CIC Insurance Group Ltd. He avers that he was first employed by the Respondent as an Assistant Accountant by a letter of appointment dated 12/02/1985 with effect from 03/03/1985.
2. That he rose in rank and responsibilities to the level of Managing Director/Principal Officer – CIC Asset Management Ltd earning a monthly salary of Kshs. 1,972,002/= at the time he was forced to leave. That his rise in ranks is exhibited by various letters from the Respondent for the years he worked for it in **Appendix A - P** annexed to his Claim. That by a Certificate of Recognition dated 11/12/2015, he was recognised for having been loyal and dedicated in service to the Respondent.
3. That following the closure/placing of Imperial Bank under the management of the Kenya Deposit Insurance Bank on 13/10/2015, the Respondent's Group Chief Executive Officer and board sought to know from him the exposure level. That he timely sought the said information from the Respondent's Investment Manager in his email of 13/10/2015 but who misled him that the exposure level was Kshs. 334,160,821.91/=.
4. He contends that while relying on this information, he unintentionally and excusably misled the board and the Respondent's Group Chief Executive Officer during their retreat of 25th – 27th October at the Great Rift Valley Lodge.
5. That in December 2015 while he was on leave, the Capital Market Authority requested the Respondent to confirm the deposit amounts held at Imperial Bank which was obtained from the company's systems and which established the amount as Kshs. 605 Million and not the figure he had been led to believe.
6. That he sought an explanation of the variance from the Investment Manager in his email of 21/12/2015 given the said manager had omitted two other deposits of Kshs. 200 Million and Kshs. 83 Million since his report had not been fully reconciled.
7. He avers that he was summoned by the Respondent through a letter dated 05/02/2016 to show cause on 12/02/2016 why he should not be dismissed and/or other disciplinary action taken as against him for the abovementioned misleading information and was to submit his written explanation by 08/02/2016 at 5pm.
8. That despite responding and giving his explanation, the Respondent's Group Chief Executive Officer came into his office asking for his car keys before giving him 10 minutes to write a resignation letter and leave the Respondent's premises.
9. That owing to the pressure, coercion, intimidation and threat, he succumbed by handing in a two line resignation letter and left the premises for fear of being removed forcefully and that this scenario was in disregard of the rules of natural justice.
10. That in a letter dated 16/02/2016, the Respondent's Group Chief Executive Officer sarcastically accepted his forced resignation and that under the terms of service, he was to retire at the age of 60 and was entitled to annual salary increments and promotions among other benefits.

11. That having worked for the Respondent for over 30 years and despite it promising to pay him his final dues, it has since negated on the same and that being forced to resign was unlawful and unjustified. He claims as hereunder:-

a) 1 years pay for loss of employment (1,972,002 x 12) Kshs. 23,124,024/=

b) 3 months' notice (1,972,002 x 3) Kshs. 5,781,006/=

c) Unpaid salary for February 2016 (1,972,002 x 12/30) Kshs. 770,800/=

d) General damages for threats, intimidation and coercion

12. The Claimant prays for a declaration that his resignation letter was procured by force, threat and intimidation; that he wrongly and forcefully lost his employment; that he is entitled to the claim of **Kshs. 29,687,830/=** as well as judgment and assessment of general damages; that in the alternative, he should be reinstated to his previous position without any loss of benefits and payment of salary arrears for the entire period he has been out of employment; and costs of the claim and interest.

13. He also filed his Witness Statement dated 25/11/2016 stating that he issued the Respondent with a demand letter dated 15/11/2016 but it has failed and/or neglected to make good his claim. He prays that his claim is allowed as prayed and damages to be assessed for threat, intimidation and coercion.

14. The Respondent filed its Statement of Response dated 30/01/2017 denying that it terminated the Claimant's employment and averring that his job description included directly managing and/or supervising the Investment Manager and Unit Trust Manager. That the Claimant was enjoined to take all investment risks; solve complex issues and make strategic decisions within the subsidiary; make investment decisions in conjunction with the investment committee; and was also responsible for all subsidiary data.

15. That apart from the retreat, the Claimant also presented the wrong figures of the deposits held at Imperial Bank to the Finance and Investment Committee and the Board on 17/11/2015. That when it carried out a computation from its system, it established that the said deposits held by its Fund stood at Kshs. 605,482,191.78 and that this was confirmed on or about 21/12/2015 by its custodian – the Co-operative Bank of Kenya Limited.

16. It avers that the Claimant failed or neglected to scrutinize the summary furnished to him resulting to an omission of two deposits and that one of his duties was ensuring monthly reconciliations for deposits placed in banks by the Respondent's Funds. That the Claimant performed his duties carelessly and/or negligently by authorizing deposits to be made in Imperial Bank in the sum of Kshs. 600 Million without approval of the board and which was in excess of the agreed limit of Kshs. 485 Million.

17. That he also did not ensure that the Investment Committee met regularly and that even though the board had recommended terminating his services following a disciplinary hearing held on 12/02/2016, he was still granted a chance to resign. That the Claimant voluntarily resigned with immediate effect which resignation it accepted and that it waived the requirement for 3 months' notice under clause 7 of the amended contract as at 25/11/2013.

18. That the Claimant has not justified the award of an order of reinstatement through demonstrating any exceptional circumstances and that without prejudice, it was entitled to terminate or summarily dismiss him under **Sections 35 and 44 of the Employment Act** respectively. It prays that the claim is dismissed with costs to the Respondent.

19. The Respondent filed a Witness Statement dated 21/07/2017 by its Chief Executive Officer, Tom Gitogo, who states that at one time the Claimant failed to turn up on time for his performance appraisal on 11/02/2014 and was accordingly given a show cause letter to explain his conduct.

20. That the Respondent considered his explanation of being delayed by traffic and pardoned him but gave him a warning and that it also declined to give him merit salary increment. That during his disciplinary hearing on 12/02/2016, the Claimant confirmed that the reconciliations were being done quarterly and not monthly and apologised for the error on the reconciliations while pleading for leniency.

21. He confirms that the aforementioned Investment Manager was also taken through a disciplinary process and he voluntarily resigned on 26/02/2016.

22. The Claimant filed a Further Statement dated 13/09/2017 averring that he disagreed with the Respondent's alleged Minutes of his disciplinary meeting which he contends are misleading and that the Investment Committee was to make decisions independently without influence from him. That the then Unit Trust Manager who was in charge of all the investments was not questioned or investigated on the alleged over exposure and was to the contrary promoted and that he concluded he was forced to leave his post to create room for the said manager.

23. He states that if investigations were properly done, he would have been cleared of all wrongs and that the investment committee should have been further investigated for being directly responsible.

Evidence

24. The Claimant, CW1 testified in Court that he wished to rely on his filed Statements and documents in furtherance of his case. That while working for the Respondent, he surpassed his Kshs. 1Billion budget in 2016 by Kshs. 0.4 Billion and that under his stewardship, the Respondent was awarded the Best Performing Money Market Fund and he referred the Court to *Appendix f* of his list of documents dated

25/11/2016.

25. He stated that contrary to the Respondent's averments, the investment limit with Imperial Bank was not Kshs. 485 Million but Kshs. 687 Million being 6.7% of the investment portfolio and that the sum of Kshs. 605 Million was well within the limit as per *page 33 of the Respondent's bundle of documents*. That he had taken loans with the Respondent bank which balance was at Kshs. 5.8 Million at that time and that in his view he was forced to write a resignation letter.

26. RW1, Tom Gitogo stated in Court that he wished to have his filed Statement adopted as his evidence in chief and that he also wished to rely on the Respondent's bundle of documents which substantiate their claim as his evidence.

Claimant's Submissions

27. The Claimant submits that the minutes of the disciplinary hearing were signed 9 months later and were not signed by 2 of the 10 people present in the said meeting and that no subsequent minutes were recorded to confirm the correctness of those minutes.

28. That he has made out his case on a balance of probability in that he had been an exemplary employee of the Respondent for more than 30 years and that he was constructively dismissed through the board's decision. He relies on the case of **Rose Mwikali Nzuki –v- Food for the Hungry Kenya [2015] eKLR** where this Court in holding that the claimant did not voluntarily resign but was constructively dismissed stated at paragraph 15 and 16 that:-

“A resignation is voluntary if the employer does not influence or prompt the employee to so resign. This is irrespective of whether the employee has committed some acts or omission which would otherwise warrant his dismissal. Where the employer prompts the employee to resign promising some carrot to wade off some stick then the resignation is not voluntary.

In this case, the resignation of the Claimant was prompted or discussed with the Respondent and this in itself is not a voluntary resignation but a constructive dismissal...”

29. That whether the Respondent's conduct also amounted to constructive dismissal was articulated by Lord Denning in **Western Excavating Ltd –v- Sharp [1978] Q.B 761** that the employer's conduct must amount to a breach of contract showing that the employer no longer intends to be bound by one or more of the essentials of the terms of contract.

30. He avers that the conduct of the Respondent's Chief Executive Officer towards him amounted to fundamental breach of the terms of employment and that he would have found it difficult to continue working with him and was thus constructively dismissed. That failure by the board to officially inform him of its decision violated his right to fair labour practices.

31. It is submitted by the Claimant that having proved he was constructively dismissed, he is entitled to the reliefs as particularised in his claim and that the Court in the **Rose Nzuki case** above awarded the claimant found to have been unfairly and unjustly terminated: salary in lieu of notice and compensation for unlawful termination. That the Court of appeal in **Coca Cola East & Central Africa Limited –v- Maria Kagai Ligaga [2015]** upheld the award of 9 months compensation in damages for constructive dismissal stating that it could not interfere with the trial Court's discretion to award such compensation.

32. That further, he is entitled to Kshs. 5Million in general damages for threats, intimidation and coercion in light of the senior position and long service it had with the Respondent and taking into account the barbaric manner in which he was forced to lose his employment. That he does not seriously pursue the option of reinstatement even though he prayed for it as an alternative and that costs of this suit should be awarded from 12/02/2016 when he lost his employment.

Respondent's Submissions

33. The Respondent submits that the Claimant has failed to set out particulars of coercion or prove that there was any coercion which allegation must be specifically pleaded. It cites the case of **Steve Mutua Munga –v- Homegrown (K) Ltd & 2 Others [2013] eKLR** where the Court held that for one to plead constructive dismissal on account of duress or coercion, the Claimant must first establish that there was the alleged coercion.

34. That the Claimant in this instant case was not coerced into resigning because his employment had already been effectively terminated and that he was aware of that decision.

35. That the key ingredient to coercion is threat and it urges this Court to be persuaded by the holding in **Edward Machuka Nyamora –v- Kenya Animal Genetic Resource Centre formerly (Central Artificial Insemination Station) [2018] eKLR** where the claimant had written a resignation letter without providing reasons for resigning and the Court dismissed his claim holding that him being in a senior position, he would have tendered the resignation under protest and state that it was not voluntary but forced. The Court above continued that the burden of proving he was forced was squarely on the claimant who failed to prove the same.

36. The Respondent contends that it submits on the issue of constructive dismissal purely on a without prejudice basis because the Claimant did not specifically plead so in his prayers. That in the **Western Excavating case** above, Lord Denning held that the contract test is a more accurate test than the reasonableness test which is more or less synonymous with fairness and that a breach of contract goes to the root of the contract.

37. That the Claimant in this instant case has failed to satisfy the contract test to claim constructive dismissal which burden of proving falls on him as was affirmed by the Court in **Julius Michael Ooko –v- Tata Chemicals Magadi Limited [2019] eKLR**. The Respondent submits

that the contract of service in this case was terminated by way of resignation agreement.

38. It submits following the voluntary resignation, the Claimant is barred from seeking remedies for wrongful dismissal and unfair termination under Section 49 of the Employment Act.

39. That in deciding the remedies to be awarded to the Claimant in the even this Court finds he was constructively dismissed, the Court must take into account the factors under **Section 49(4) of the Act** including but not limited to any conduct of the employee which caused or contributed to the termination.

40. That the Claimant has also not adduced cogent evidence for this Court to exercise its discretion and award him the maximum damage of 12 months' salary and is therefore not entitled to the same. That it relies on the decision of the Court of appeal in **CMC Aviation Limited v Mohammed Noor Civil Appeal No. 199 of 2013** and urges the Court to only award the notice period.

41. The Respondent submits that the Employment Act does not provide for general damages as a remedy for wrongful dismissal and unfair termination as emphasised by the Court in **Alphonse Maghanga v Operation 680 Ltd [2013] eKLR** and that the said prayer ought to be dismissed. It finally submits that this Court cannot also award the Claimant reinstatement since 3 years have lapsed since he resigned from employment.

42. I have examined all the evidence and submissions presented before me by both Parties herein. The issues for this Court's determination are as follows:-

1. Whether the Claimant was constructively terminated or he voluntarily resigned.

2. If claimant was terminated, whether due process was followed and if there were valid reasons for the termination.

3. What remedies to grant in the circumstances.

43. On the first issue, the Claimant gave evidence to the effect that on 5/2/2016, he was issued with a show cause letter and asked to respond by 8/2/2016. In the same letter, he was informed that he should attend a disciplinary hearing on 12.2.2016 at 3 pm.

44. The Claimant responded to the show cause letter vide a letter dated 8/2/2016 explaining his position. On 16/2/2016 he indeed attended the disciplinary hearing and thereafter was forced to write a resignation letter on the same day. He contends that he did not resign voluntarily but was coerced to do so.

45. The issue of constructive dismissal has been discussed by this Court in previous cases – see **ELRC No. 2422/2012 Rose Mwikali Nzuki vs Food for the Hungry Kenya (2015) eKLR** where this Court opined as follows:-

15. "A resignation is voluntary if the employer does not influence or prompt the employee to so resign. This is irrespective of whether the employee has committed some acts or omission which would otherwise warrant his dismissal. Where the employer prompts the employee to resign promising some carrot to wade off some stick then the resignation is not voluntary.

16. In this case, the resignation of the Claimant was prompted or discussed with the Respondent and this in itself is not a voluntary resignation but a constructive dismissal. The issue of constructive dismissal was discussed by the Supreme Court of Canada – David M. Potter vs. New Brunswick Legal Aid Services Commission, a statutory body corporate pursuant to a special act of Province of New Brunswick 2015 SCC 10. The court observed as follows:

"in cases in which this breach of the test applies, a constructive dismissal consists of conduct that, when viewed in the light of all circumstances, which lead a reasonable person to conclude that the employer no longer intended to be bound by the terms of the contract. The employee is not required to point to an actual specific substantial change in compensation, work assignments or so on, that on its own constitutes a substantial breach. The focus is on whether a course of conduct pursued by the employee evince(s) an intention no longer to be bound by the contract. In Re Rubel, at page 322, a course of conduct that does evince such an intention amounts cumulatively to an actual breach."

17. I therefore from the above analysis find that the Claimant didn't voluntarily resign but was in fact constructively dismissed".

46. It is indeed true that a resignation is not voluntary if it is influenced or prompted by the employer.

47. From the Respondent's case on 12th February 2016, after the disciplinary hearing the Respondent determined that the Claimant should be terminated. The Respondent however gave him an option of either resigning or being terminated.

48. This position is captured in the Minutes of the Disciplinary Committee hearing held on 12/2/2016 at 4 pm and filed by Respondents at page 35 of their documents. Recommendations of the Committee are as follows:-

“The Board considered the following outcomes:-

- ***Requesting him to step aside for further investigations***
- ***Early Retirement as requested***
- ***Termination/Dismissal for gross negligence***

Upon various considerations, it was unanimously agreed that Mr. Mwaura’s employment be terminated but given his long service he would be given as opportunity to resign instead if he so wished.

He opted to resign with immediate effect which the board accepted and waived the three months’ notice”.

49. Indeed the Claimant tendered his resignation accordingly and it was promptly accepted.

50. The resignation was indeed a ‘request’ from the Respondent as seen from the Minutes of 16/2/2016 and could not have been voluntarily. This indeed shows that the same was influenced by a certain promise or a threat to be terminated which in this case is a constructive termination.

51. I therefore find that the Claimant did not voluntarily resign but was constructively termination.

52. Having found that the Claimant was constructively terminated, the next issue is to determine whether the termination was fair and justified.

53. The Respondent’s position is that indeed the Claimant was found to have erred by not disclosing the real exposure position of the Respondent with Commercial Banks.

54. The Respondent averred that on 25th to 27th October 2015, during its bard retreat, the Claimant confirmed to the bank that the deposit held at Imperial Bank by the Respondent’s Funds was Kshs.334,160,821.91 That in addition, on 17th November 2015, the Claimant presented the same figure to the Finance and Investment Committee as well as the Board of CIC Asset Management Limited as the deposit held by the Respondent’s various Funds in Imperial Bank.

55. The Respondent aver that on 10/12/2015, they received a request from Capital Markets Authority to confirm the amounts of deposits held at Imperial Bank.

56. The Respondent carried out computation from their system and established that the deposit held by Imperial Bank was Kshs.605,482,191.78.

57. The Respondent aver that the Claimant as Managing Director of CIC Asset Management was at all times enjoined to verify the figures which he failed or neglected to scrutinise the summary furnished on or about 13th October 2015 and as a result deposits amounting to Kshs.200,000,000 and 83,000,000/= from Money Market Fund and Wealth Management Fund respectively were omitted from the said summary.

58. The Respondent’s position is that one of the Claimant’s duties was to ensure that reconciliation for deposits placed in Banks by the Respondent’s Funds was done monthly.

59. The Respondent avers that the reconciliation during the material time were done quarterly. They also contend that the Investment Committee charged with the duty of overseeing the day to day Investment activities was under the direct management or supervisor of the Claimant.

60. The Respondent submitted that at the material time, the approved limit for deposits of the Respondent’s funds at Imperial Bank was Kshs.485,000,000/=. They contend that the Claimant performed his duties carelessly and/or negligently and caused, approved and/or authorised the deposits to be made in Imperial Bank of Kshs.605,482,191.78 in excess of the agreed limit of Kshs.485,000,000 without the approval of the Respondent’s Board.

61. In view of these allegations, the Claimant was issued with a Notice to show cause letter of 5/2/2016 and he was expected to respond by 8/2/2016 and attend a disciplinary hearing on 12-2-2016 at 3 pm. The Claimant made a repose on 8/2/2016 and indicated that he was given the information he submitted to the Group Chief Executive Officer by the Investment Manager upon enquiring of the same. He apologised for the mistake blaming it on the inaccurate report he received from the Investment Manager.

62. At page 34 to 40 of the Respondent’s documents are Minutes of the disciplinary held on 12.2.2016. The Minutes show that the claimant was present during the hearing. During the hearing, the Claimant reiterated the position that he relied on the report from the Investment Manager, which he had no reason to doubt.

63. He also admitted that the reconciliation was being done quarterly and not monthly and that he was not regularly checking whether the company was excessively exposed to any bank.

64. From the Minutes submitted, the Respondent had a valid reason to consider terminating the Claimant's services, which was negligence of his duty as the Managing Director CIC Asset Management Limited.

65. The Claimant was also given an opportunity to be heard and he responded to all allegations levelled against him. The provisions of Section 41 of Employment Act 2007 were therefore followed. My finding is that though the Respondent constructively terminated the services of the Claimant, they followed due process and had valid reasons to do so.

66. In view of this fact, I do not find any merit in the Claimant's case and the case is therefore dismissed with no order as to costs.

Dated and delivered in open Court this 8th day of July, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Makumi for Claimant – Present

Kiche for Respondent