



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 738 OF 2015**

*(Before Hon. Lady Justice Hellen S. Wasilwa on 17<sup>th</sup> September 2019)*

**SAMMY MURERE BIKETI.....CLAIMANT**

**VERSUS**

**INSTEEL LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant, Sammy Murere Biketi filed a Memorandum of Claim dated 28<sup>th</sup> April 2015 for unfair and unlawful constructive dismissal and non-payment of his terminal dues against the Respondent, Insteel Limited.
2. He avers that he was employed by the Respondent on 26<sup>th</sup> July 2007 initially on a six months' probation with an interim review every 3 months and that he was thereafter permanently confirmed on 22<sup>nd</sup> February 2008 as a Sales Executive.
3. That he had good work ethics and was diligent which earned him yearly salary increment and bonuses as follows: Kshs.65,000/= bonus in 2008; salary review from Kshs.75,000/= to 101,500/= on 27<sup>th</sup> September 2010; Kshs.104,187/= bonus in 2011; and promise to review salary in 2012. That his many accolades earned him promotions up to the position of an Exports Manager and that he was earning a basic salary of Kshs. 114,000/= at the time of leaving the Respondent's workplace. He annexes **App. 1 - 7** in support of his Claim.
4. He avers that on 10<sup>th</sup> July 2013, the Respondent without any lawful reason and/or excuse unfairly caused his constructive dismissal by barring him from entering his place of work and that the Respondent is yet to issue him with any dismissal letter to date. That he was at no time officially reprimanded or placed on any disciplinary program and that he thus claims for salary arrears from 1<sup>st</sup> August 2012 to date.
5. That he has communicated to the Respondent through its lawyers in the letter dated 5<sup>th</sup> November 2014 and other letters and the Respondent's lawyers in their letter dated 1<sup>st</sup> December 2014 admitted the existence of un-served termination letter hence this claim.
6. He continues to aver that his terms of employment with the Respondent were that upon termination/redundancy, he is entitled to terminal benefits and that he has since suffered mental anguish with the Respondent's failure to respond. The Claimant thus seeks as follows:-

***i) Notice 1 month's salary Kshs.114,000.00***

***ii) 90 unutilised Leave days (90/30 x 114,000) Kshs.....342,000.00***

***iii) Service Pay (6 x 15/30 x 114,000) .Kshs.342,000.00***

***iv) Pro rata leave (8 months/12 x 7/4 x 114,000) ...Kshs.133,000.00***

***v) Compensation for unlawful termination***

***(12 x 114,000) .....Kshs.1,368,000.00***

***vi) Unpaid salary from August 2012 to 01/12/2014***

(27months x 114,000) Kshs. 3,078,000.00

Kshs. 5,377,000.00

7. The Claimant further avers that he was not issued with any warning letter prior to the termination and prays that this Court do Order and Award that:-

**1. The Constructive Termination of the Claimant be and is hereby declared unlawful and hence null and void.**

**2. The Respondent do re-engage the Claimant in work comparable to that in which the Claimant was employed prior to his dismissal or other reasonably suitable work at the same wages with no loss of benefits together with salaries and allowances in arrears for both the period he had been working and out of office/work.**

**3. The Claimant be reinstated and treated in all aspects as if his employment had not been dismissed.**

8. Alternative to the demand for his reinstatement, the Claimant demands for monetary compensation as follows:-

**1) The Respondent be ordered to pay the Claimant terminal dues as enumerated under Clause 2(m) in the sum of Kshs. 5,377,000.00.**

**2) Interest on clause 2(m) from date of termination until payment in full at Court rates.**

**3) Any other statutory entitlements.**

**4) The Respondent to pay legal costs in this suit.**

9. He also filed his Witness Statement dated 2<sup>nd</sup> April 2019 stating that he was issued with an employment letter dated 26<sup>th</sup> July 2007 which he signed on 31<sup>st</sup> July 2007 and that after his probation period and confirmation, he was issued with a confirmation letter and a pay hike from Kshs. 50,000/= to Kshs.65,000/=.

10. That due to his consistent performance, the Respondent promoted him to Job Grade M31 which is technically equivalent to a senior sales executive within the exports sales and that being motivated with the salary reviews he received from the Respondent, he worked extra hours without any overtime payment.

11. That he received a letter dated 27<sup>th</sup> April 2012 from the Respondent appreciating and recognising his efforts and good work and giving him another bonus and that he was among staff who received the highest bonus during that year.

12. Further to that, he received a letter dated 28<sup>th</sup> June 2012 indicating that his salary had been reviewed to Kshs.136,817/= out of his 2011 performance against his KPIs and that he was moved up to Job Grade C2 where he became an Executive Sales Assistant to the Exports Manager.

13. He states that for two consecutive years while in employment of the Respondent, he had never gone for his annual leave because of the work load and when exhaustion set in, he requested for a 10 day leave to go and rest, which was given to him.

14. That when he was on leave, he received a call from the Exports Manager, Mr. Khawaja Sohail Deen demanding an explanation about complains from some customers that he had not reconciled their accounts and not received their goods as per what they had paid.

15. That he informed the said manager that he was out of the country for his vocation and requested him to talk to the customers to wait for his return for reconciliation because according to his records, they did not owe anyone with the said customers having collected the goods.

16. That when he went to the company after his leave, he was denied access at the entry gate with the reason that some reconciliation were being done and that he should wait until he was recalled. That he called the HR Officer, Gillian Jepkemboi on several occasions asking about his case who kept telling him he would soon be called and insisting that it was just a formality to assist them finalise the investigations.

17. The Claimant continues to state that he was never given any letter or notice to show cause or a chance to participate in any reconciliation or investigation despite requesting to access documents in his office. That his salary stopped coming in five months down the line, he exhausted his savings, he could no longer service his loans and his car was auctioned in December 2012 and that life became unbearable for both him and his family.

18. That when he could not afford to pay rent anymore, he moved to his sister in law's servant quarters. That he however continued being hopeful that he would be called once investigations were over as promised by the Human Resource and that he could not be dismissed on allegations of hearsay without being fairly heard.

19. That on 26<sup>th</sup> March 2013, the Respondent's lawyer Mr. Anthony Kung'u called him requesting to meet him along Mombasa road at Astro Petrol Station restaurant and so they met the next day at around 2.00 pm. That the said lawyer informed him they had a return to work formula for him and acknowledging that the Claimant's efforts had not been forgotten by the Respondent.

20. That they needed to justify his return to duty since the allegations still existed and so the lawyer proposed he temporarily agrees to deposit as a security or make a commitment pending the reconciliation and investigation.

21. That another proposal was for him to return to duty on 1<sup>st</sup> April 2013 and all his salary would be deducted towards the repayment of the money in question but he raised his concern with the lawyer that if they were to deduct everything, he would not be able to sustain himself. That he needed to top up the balance of \$2589.42 or put in a security covering the deficit and that the lawyer insisted they agree on a figure as his salary and bonuses could only clear \$15,536.52 within six months.

22. That he informed the lawyer he had a title deed valued close to the said \$2589.42 which he was willing to give out as security and the lawyer requested him to rush home and come back with it as the lawyer went to prepare the settlement deed as per their agreement.

23. That they parted ways at 3.30pm agreeing to meet back at the same place in one and half hours and he returned at exactly 5.10pm with the title and an official search of the said property. That the lawyer came back with the settlement deed and a blank land transfer form which he went through and raised the following issues:-

**a) The deed indicated that the Claimant had admitted to have received the money from the customers which he had not.**

**b) The deed did not indicate that if the Claimant managed to prove otherwise, his security would be returned.**

**c) Finally, the deed did not indicate that it was a return to work formula as he had been informed.**

24. That he felt the Deed was fishy and argued the same to the lawyer who assured him not to worry and that having prepared the document he would act for both him and the Respondent. That taking the lawyer's word, he signed the documents at around 8.00pm in the night and requested the lawyer to pick his Pin Certificate and copy of ID from his employment file and that he gave out his title for LR. No. Mavoko Town Block 3/12741.

25. The Claimant states that when the said 1<sup>st</sup> April 2013 for his resumption came, he received no communication and when he called the company's lawyer, he told him to keep waiting and that the HR officer also informed him to be patient.

26. That a few days later, a civil case was filed against him despite having agreed with the company's lawyer to sort out the issues in question and that he could not prove his innocence in the said case without accessing the vital documents in his office and despite his lawyer demanding for the same. That no official complaints had ever been filed by the said customers and that the Respondent based its case merely on the settlement deed.

27. That he thereafter learnt of his dismissal through a letter dated 1<sup>st</sup> December 2014 from Michuki and Michuki Advocates which indicated that he had been issued with a dismissal letter from the Respondent back in September 2012 and that he was shocked that all along while he thought his position was assured, he had been dismissed without his knowledge. Apart from the prayers in his Claim, he further prays for the title to his property LR. No. Mavoko Town Block 3/12741.

28. The Respondent filed its Memorandum of Response dated 27<sup>th</sup> July 2015 denying the Claimant's averments and averring that his dismissal and/or termination was fair and within the law for being in breach of company policy by absconding from work without any communication or notice.

29. That it terminated the Claimant's employment in accordance with the employment contract and that the termination letter included reasons for his dismissal and a computation of all amounts due to him to be paid on 02/09/2012 upon clearance. That it was justified in its actions owing to the Claimant's acts and omissions which could have led the Respondent to lose huge amounts of money and that the Claimant also fraudulently misappropriated its customer's money entrusted to him.

30. That it thus sued him in CMCC No. 2888 of 2014 for recovery of the said money where judgment was duly entered in its favour against the Claimant for Kshs.1,490,688.65. That a decree was issued on 29<sup>th</sup> January 2015 for the named sum after the Claimant's defence was struck out for being a sham as he had admitted to owing the Respondent the said amount and that it counterclaims against him for this full sum as he still owes it the decretal sum.

31. It annexes documents marked **ANN1** and **ANN2** in support of its case and avers that the Claimant's claim for damages is untenable because:-

**a) The claimed terminal dues are not payable as his dues were computed in his letter of termination of employment and paid.**

**b) The claim of gratuity is not available by virtue of Section 35(5) of the Employment Act.**

**c) Damages at 12 months' salary are not due since the dismissal was lawful on a fair process.**

**d) The Respondent is not obliged to re-engage him in employment as he had exhibited disloyalty in his work and was dishonest and out rightly fraudulent.**

## **Evidence**

32. The Claimant, CW1 testified in Court that he wished to adopt his filed Witness Statement as his evidence and stated that he was not issued with a Certificate of Service and was never terminated. In cross-examination, he stated that his boss asked him not to go on leave and that he went on 10 days' leave on 6<sup>th</sup> August 2012 to 16<sup>th</sup> August 2012.

33. That he returned to work on 17<sup>th</sup> August 2012 when he was denied entry by the guard and further testified that he never received the termination letter, which is at *page 6* and was denied the chance to go back to the company. He confirmed that he signed the document at page 29 of the Respondent's bundle acknowledging he owed some money.

34. In re-examination, he testified that the deed of settlement was drawn on 27<sup>th</sup> March 2013 and effected on 4<sup>th</sup> April 2013 to 15<sup>th</sup> April 2013 and that by the time he was drawing the said Deed, he was not aware of any termination letter.

35. The Respondent's counsel closed his case after submitting that his clients were not able to come to Court.

#### **Claimant's Submissions**

36. The Claimant submits that the failure by the Respondent to adopt its written statement dated 26<sup>th</sup> April 2019 renders the pleadings hollow and that the same cannot be relied upon. That the Respondent's failure to notify him and level charges against him contravenes both **Section 41 of the Employment Act** and **ILO Convention 158** and that the purported email correspondences attached to the Respondent's witness statement cannot be relied upon as they were not adopted by the author as evidence.

37. He submits that his evidence is uncontroverted and that the Respondent did not adduce evidence as to any investigation having been conducted and did not prove service upon him of the said termination letter. That the company's lawyer's action of drawing and registering a deed of settlement depicts that he was still an employee who had not been dismissed and that the Respondent failed to prove any reason of the termination under **Section 43(1) of the Employment Act**.

38. He urges this Court to award him 12 months' salary and he relies on the case of **Clement Oduor Onyango –v- Judicial Service Commission [2019] eKLR** where the Court held that the Claimant was not issued with a notice to terminate the contract nor given an opportunity to explain his case and awarded him 12 months' salary as compensation for the unlawful termination.

39. He also cites the case of **John Gichuru Ngunju –v- Hospital Association Limited t/a the Nairobi Hospital [2018] eKLR** where the Court held that the Claimant was not accorded a fair hearing before his dismissal as envisaged under Section 41 of the Employment Act and awarded him 8 months' salary as compensation for the unlawful and unfair termination.

40. The Claimant submits that the Respondent be ordered to issue him with a certificate of service as provided under **Section 51 of the Employment Act** and further, that it be ordered to pay costs and interest from the date of filing suit.

#### **Respondent's Submissions**

41. The Respondent submits that the termination of the Claimant's employment was in accordance with **Section 44(4)(a) of the Employment Act** which lists absenteeism as amounting to gross misconduct and that it was also in line with **Clause 8 of the contract of employment**.

42. That the ***Black's Law Dictionary (9<sup>th</sup> Edition)*** defines *constructive dismissal* as "A termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave." That therefore for constructive dismissal to succeed, the Claimant must show that the Respondent's actions made it hard for him to continue working and which position is supported by the case of **Milton M. Isanya v Agakhan Hospital Kisumu [2017] eKLR** which quoted *Catherine Kinyany v MCL Saatchi and Saatchi*.

43. That the Claimant has failed to demonstrate the same and that it is he who failed to return to his workplace as he had obtained another job and thereafter executed a deed of settlement confirming that some monies had been misappropriated/lost due to his actions.

44. That as per **document 7 in the Respondent's Certificate of Computer print-outs** filed in this Court on 30<sup>th</sup> April 2019, the Claimant informed Mr. Sohail that he would not be returning to Kenya as he had already taken another job.

45. That from the foregoing, it is evident the Claimant was never denied access to its premises and in particular his office as he never returned and therefore the claim for constructive dismissal is untenable.

46. It urges this Court to be convinced that the Claimant failed to return to work due to the shady dealings he had engaged in and did not want to account to the Respondent's clients. That it had sufficient and valid reasons to terminate the Claimant's employment in accordance with **Section 43(1) and (2) of the Employment Act** and that absconding from one's workplace warrants dismissal as was noted in **Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Limited [2014] eKLR**.

47. The Respondent submits that having submitted that the termination was lawful and in accordance with the rules of natural justice, it further submits that the Claimant is not entitled to compensation and the prayers sought in the Statement of Claim and the same should be dismissed with costs.

48. That the Claimant was a member of the NSSF and a Pension Scheme and he is therefore not entitled to Service pay and since he has not proved the claim of 90 unutilised days, the same remain as allegations and is untenable.

49. That it is its view that if any salary is due to the Claimant, it must be up to the date of constructive dismissal as pleaded by him in his Statement of Claim and that he must be bound by his pleadings.

50. That it is trite law that parties are bound by their pleadings and submissions which position was also noted in the case of **Daniel Otieno Migore v South Nyanza Sugar Company Limited [2018] eKLR**. That the prayer for a return of the Claimant's title deed was only sought in his submissions and was not pleaded at all and that the same cannot be granted by the Court.

51. It finally submits that if however this Court was to find that the Claimant is entitled to any reliefs, it should be guided by the case of **Kenneth Kimani Mburu & Another v Kibe Mungai Holdings Limited [2014] eKLR** where the Court found it fit to award 5 months' salary in damages for unfair constructive dismissal.

52. I have considered all the evidence and submissions before me. I note that the Respondent filed their documents but never submitted any evidence before Court.

53. The Court of Appeal has already pronounced itself on the issue of pleadings not adopted in evidence. Indeed, it is trite law that pleadings are not evidence. In Kimathi and **Others –V- The Foreign and Commonwealth Office (2018) EWHC 2060 (GB)** the High Court (Stewart J.) opined as follows:-

***“Pleadings and Evidence”***

***... the first matter of principle is that the contents of a statement of case are not evidence in a trial, even though verified by a statement of truth. This is the effect of CPR Rule 32.2 and CPR Rule 32.6.”***

54. In Adina Property Services Limited –V- Europa 2000, Arden L j. said at paragraph 18:-

***“Mr. Baning submits that there was an allegation of an easement in the paragraph 20 claim, which was verified by a statement of truth. This does not assist since our allegation so verified is not evidence for the purposes of the trial (see CPR 32.6(2).”***

55. In the Court of Appeal in JJA Visram, Mwilu (as she then was) and Otieno Odiek in **CA No. 140/2008, Kenneth Nyaga Mwige –V- Austin Kiguta and 2 Others [2015] eKLR** where the Court held:-

***“Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.”***

56. Having said this, the Respondent having not presented any evidence before this Court, their pleadings and submissions notwithstanding, the Claimant's case remain uncontroverted.

57. Based on the Claimant's case the Claimant averred that he was constructively discharged by the Respondents without any hearing. He avers that he learnt of his termination through a letter dated 1<sup>st</sup> December 2014 from Michuki and Michuki Advocates. There is no proof that the Claimant had been served with any dismissal letter prior to this date.

58. In the circumstances, I would consider the Claimant was terminated on 1<sup>st</sup> December 2014 and he is therefore entitled to payment of his withheld salary upto and including 1<sup>st</sup> December 2014 from the time salary was stopped on August 2012 = 21 months x 114,000 = Kshs.3,078,000/=.

59. I also award Claimant 8 months' salary as compensation for unfair termination = 8 x 114,000/= Kshs.912,000/=.

60. The Claimant established that he did not go for leave during the period of employment and is therefore entitled to unpaid but earned leave which Respondent set at 43 days and which is = 163,400/=

**TOTAL = 4,153,400/=**

61. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement

**Dated and delivered in open Court this 17<sup>th</sup> day of September, 2019.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ongicho for Claimant – Present

Nderitu holding brief Michuki for Respondent