



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR
RELATIONS COURT AT MALINDI
CAUSE NUMBER 22 OF 2018

[Formerly Cause No. 729 of 2015, E&LRC at Mombasa]

BETWEEN

OMAR KAHASO KAZUNGU.....CLAIMANT

VERSUS

VIPINGO SAVINGS & CREDIT

CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Omollo Onyango & Company, Advocates for the Claimant

H.N.Njiru & Company, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 25th September 2015. He states, he was employed by the Respondent as a Casual Security Guard at the beginning, in the year 2008, earning a monthly salary of Kshs. 3,900. This salary was later improved to Kshs. 7,598 monthly. He was transferred to the Posho Mill Department through a letter dated 14th November 2013. He protested transfer on medical ground. The Respondent insisted the Claimant moves, his medical condition notwithstanding. The Claimant held his ground and was dismissed. He asks the Court to declare that termination was unfair, and grant other orders as follows:-

- a) Notice pay at Kshs. 7,598.
- b) Annual leave over a period of 5 years at Kshs. 37,990.
- c) 12 months' salary in compensation for unfair termination at Kshs. 91,176.

Total...Kshs. 136,764.

- d) Costs and any other suitable relief.

2. The Respondent filed its Statement of Response on 26th February 2016. The Response is in the nature of a general denial.

3. The Claimant gave evidence, as did Respondent's Board Member Ochieng' Obunyo, on 27th June 2019 when proceedings closed.

4. The Claimant adopted as his evidence, the Statements of Claim and Witness on record. He adopted also, his bundle of documents. He

reiterated that he worked for 5 years. He could not work at the Posho Mill as directed by the Respondent, because he had chest problems. He supplied the Respondent with a report from a doctor, saying he should not work at the Posho Mill. The Respondent insisted the Claimant works at the Posho Mill. The Claimant was compelled to resign. Efforts by the Labour Office for settlement through conciliation yielded nothing.

5. Cross-examined, the Claimant told the Court he was denied his salary after declining to work at the Posho Mill. He presented medical evidence to the Respondent, showing the Posho Mill was not a suitable workplace for him. The Doctor who recommended he does not work at the Posho Mill has since left employment. The Claimant was not able to trace him. The Claimant worked day and night shifts. The Labour Office calculated terminal dues at Kshs. 23,000. Redirected, the Claimant told the Court that the Doctor confirmed he had chest problems. The Claimant was compelled to resign. He was not supplied with details of terminal dues calculated by the Labour Office.

6. Ochieng' Obunyo confirmed the Claimant was Respondent's Employee. In 2013, the Respondent experienced staff shortage at its Posho Mill. The Board resolved to transfer the Claimant to the Posho Mill on temporary basis. The Claimant asked for time to think about the transfer. He returned to the Respondent with a letter, stating he could not work at the Posho Mill. The Respondent trusted him to work at the Posho Mill where he would be tasked with collecting money. He stayed out for almost 3 days, without working at the Posho Mill or the Guarding post. He later reported to the Respondent with a letter from a Doctor saying he should be assigned light duty. He did not seek treatment at Respondent's own Vipingo Health Centre. He declined all persuasion from the Respondent to work at the Posho Mill and resigned. He took annual leave as shown in the leave application forms on record. The Respondent did not terminate Claimant's contract. He is not entitled to compensation and notice pay as claimed.

7. The Witness told the Court on cross-examination that the Respondent has not asked for notice pay from the Claimant. The Staff Policy did not have provision for 3 months' notice or pay in lieu of notice. The Claimant did not sign Staff Policy. He is not shown to have been present in the meetings of the Board. The Claimant was honest and would handle cash at the at the Posho Mill. He said he could not work at the Posho Mill because he was unwell. He gave a medical report. The Respondent did not seek second opinion. He said he did not apply to work at the Posho Mill when he joined. He had a duty to report at the Posho Mill first, even if he had medical issue. The Board meeting of 30th November 2013 resolved there was no option, but to fill Claimant's position. Resignation was on 9th December 2013. The Board met again on 7th December 2013 when it was proposed the Claimant apologizes. He was being assigned the Posho Mill to collect cash. He was not so advised in the letter transferring him. The letter did not state also, that he was to work at the Posho Mill temporarily. The medical report availed by the Claimant to the Respondent was inconsistent. He was given a fair hearing. He resigned before the Respondent could resolve the disagreement. In concluding his evidence on redirection, Obunyo told the Court it was not unusual, to move Employees laterally.

The Court Finds: -

8. The Claimant was employed by the Respondent as a Security Guard. The letter of employment indicates commencement date was 1st January 2009.

9. He resigned on 9th December 2013, due to what he stated in his letter of resignation, to be unavoidable reasons. His latest exhibited pay slip is for June 2013, showing basic salary was Kshs. 6,177 and house allowance of Kshs. 1,029 – total Kshs. 7,205. Other allowances shown in the pay slip were variable forms of pay.

10. The Claimant seeks annual leave pay over a period of 5 years. The Respondent exhibited Leave Sheets, indicating the Claimant took leave for the years 2009 and 2010. The pay slip for May 2012 shows the Claimant received annual leave pay of Kshs. 4,356. In 2013, he was paid Kshs. 6,415. He utilized his annual leave, or was paid cash in lieu of leave. His prayer for annual leave pay has no merit.

11. The Claimant appears to plead implicitly, that he was constructively dismissed by the Respondent. He alleges that he was being compelled to transfer to the Posho Mill, where he could not work, owing to his medical condition. He availed medical report to the Respondent, who insisted the Claimant moves to work as a cashier at the Posho Mill. Believing the Respondent had unilaterally altered his contract, the Claimant resigned.

12. Although the Respondent explains that transfer was temporary, and the Claimant was only being assigned a cashier's role at the Posho Mill, there is merit in the view that the Respondent constructively dismissed the Claimant.

13. The letter of transfer did not indicate that transfer was temporary. It did not advise the Claimant that he would only collect cash at the Posho Mill. His medical report was not contested by the Respondent. The report confirms that the Claimant suffered bronchitis and abdominal pain. It would be expected that a patient who suffers chest problems, would aggravate these problems, by working in an environment which probably was replete with grain dust and diesel fumes. Why would the Respondent expose the Claimant to such aggravation, even if temporarily? There was no second medical opinion sought, and even though the Respondent states it has a health facility within the workplace, no evidence was brought to Court from this facility, contradicting the Claimant. He was appointed and worked as a Security Guard. Asking him to convert into a cashier, even though temporarily, amounted to unilateral change in a term of contract, contrary to the Employment Act. The concept of constructive dismissal was discussed in depth in the Court of Appeal decision, ***Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] e-KLR***. Where the Employee resigns as a result of the Employer having created intolerable working conditions, making it impossible for the Employee to continue discharging his role, resignation by the Employee, as a result of such changed conditions, is deemed to be constructive dismissal. There is no doubt in the mind of the Court that the Respondent herein, by seeking to convert a Security Guard who suffered chest problems, into a Posho Mill Cashier, made it impossible for the Claimant to continue honouring his contract.

14. The Court is satisfied that termination was at the instance of the Respondent. The Respondent did not establish fair and reasonable ground to justify its action leading to termination. In its letter of recommendation issued to the Claimant, dated 18th January 2014, the Respondent stated it terminated Claimant's services on account of a restructuring exercise. This reason does not match the evidence given by the Respondent in justifying termination. It is noted that on other occasions, the Respondent stated that the Claimant resigned while the

Respondent was in the process of disciplining him. ***It is declared termination was unfair.***

15. The Claimant had worked for close to 5 years. His record was without blemish. He was compelled to resign on account of the Respondent's conduct. The Respondent described the Claimant as a hardworking man, cooperative, and ever ready to work under minimum supervision. His contract was indeterminate. There has been debate recently in the labour law field, on when it is appropriate to grant 12 months' salary in compensation for unfair termination. One would think this debate is wasteful, because remedies are issued at the discretion of the trier of facts, guided by the applicable legislation. Earlier debate was about when orders of reinstatement should be made. Employers have favoured the approach that these remedies should be granted rarely. Some Courts have developed a jurisprudence which favours complete disregard of the remedy of reinstatement. Having repeatedly expressed the view that reinstatement should not be readily granted, the next line of attack for remedial minimalists, appears to be the remedy of maximum compensation. It is now the position from certain legal sources, that 12 months' salary in compensation for unfair termination must also be availed to Employees sparingly. While the Court has an obligation to take into account the matters listed under Section 49 of the Employment Act in granting remedies, and to exercise its discretion judiciously, it must not be stifled in exercise of its remedial jurisdiction, and move remedies in a direction that makes the remedies unavailable to Employees, who need them most. The remedies of reinstatement and maximum compensation must not be allowed to die, or merely exists in the law books, through curtailment of judicial discretion. Employees have the right to effective remedies. Courts, while balancing the interests of Employees and Employers, must guard against erosion of effective remedies. It is a wrong approach to advance the view that Employees must be content with tokenisms. Some of our recent Judgments wrongly suggest there is a longing for reversion to the position that termination is at the will of Employers. ***The Claimant merits and is granted 12 months' salary at Kshs. 86,460 in compensation for unfair termination.***

16. ***He is granted 1 month salary in lieu of notice at Kshs. 7,205.***

17. ***He is allowed the prayer for costs.***

IN SUM, IT IS ORDERED:-

[a] It is declared that termination was unfair.

[b] The Respondent shall pay to the Claimant equivalent of 12 months' salary in compensation for unfair termination at Kshs. 86,460 and notice at Kshs. 7,205 - total Kshs. 93,665.

[c] Costs to the Claimant.

Dated and delivered at Mombasa this 31st day of October 2019.

James Rika

Judge