



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 384 OF 2015**

**MOSES WANYAMA OMONDI.....CLAIMANT**

**VERSUS**

**AGILITY LOGISTICS LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 22nd November, 2019)

**JUDGMENT**

The claimant filed the memorandum of claim on 13.03.2015 through Ojiambo & Company Advocate. The claimant prays for judgment against the respondent for:

- a) Kshs.21, 000.00 unlawful deductions from the salary for May to June 2013 and January to February 2014.
- b) Kshs. 264,000.00 compensation for constructive dismissal.
- c) Kshs.44, 000.00 being salary for April and May 2014.
- d) Kshs.330, 000.00 service pay of 15 days per month for period served.
- e) Kshs.22,000.00 for leave days earned but not taken or paid.
- f) Kshs.22,000.00 pay in lieu of notice.
- g) Kshs.16,000.00 being unpaid dues for trips taken to Rwanda.
- h) Kshs.99,000.00 unpaid house allowance.

The memorandum of response was filed on 10.09.2015 through Mumia & Njiru Advocates. The respondent prayed that the claim be dismissed with costs.

The claimant testified to support his case. The respondent did not call a witness.

To answer the **1st issue** for determination, there is no dispute that the parties were in a contract of service. The respondent employed the claimant by the letter dated 05.12.2011 in the position of Truck Driver. The claimant's last consolidated monthly pay was Kshs.22, 000.00.

The **2nd issue** for determination is whether the termination of the claimant's employment was unfair. The respondent's case was that the claimant was absent from duty sometimes in April 2014. He resurfaced at the office and things would not remain the same. He was subjected to disciplinary process but then he walked away and failed to turn up for the scheduled hearing. Thus the claimant terminated his employment and unfair constructive termination cannot be found in his favour. The Court observes that the respondent offered no evidence to support its case as pleaded and as per the foregoing narration.

The claimant's case is that he fell sick on 10.04.2014 and was placed on bed rest by his doctor. He then called his manager about his inability to report at work. The medical records exhibited show that the claimant was attended to at the Nairobi City County Remand Prison Health Centre on 10.04.2014. He was given an off duty and on 23.04.2014 the doctor recommended that he was fit to resume duty. The claimant resumed duty on 23.04.2014 and the respondent refused to assign duty to the claimant. The respondent also refused to pay the salary for April 2014. The claimant was given a show cause notice for hearing on 07.05.2014 at 11.00am for the alleged misconduct of absence from duty without permission or prior information for a long time. The claimant replied by his letter dated 30.04.2014 that he had been sick and

was given 14 days bed rest by the doctor and which he had reported by telephone call. He had resumed duty once the doctor advised him that he was fit to work and he had reported at work consistently. He attached the sick off notes.

The claimant further testified that on 30.04.2014 he attended the disciplinary hearing but no meeting was held and no further communication was given to him. The claimant's case is that by the respondent's conduct, the contract stood repudiated and he considered himself constructively terminated and unfairly so. The particulars of the respondent's repudiatory conduct included refusal to allocate work upon the claimant resuming duty on 23.04.2014 and thereafter; locking out the claimant from the office and confining him at the yard; issuing the show-cause notice whereas the respondent knew the claimant was unwell; on 07.05.2014 the disciplinary meeting was not held and the respondent made no further communication to the claimant; after resuming from the sick off the respondent failed to allow the claimant to sign in as having reported at work; the salary for April 2014 was not paid at all; in May – June 2013 Kshs.21,000.00 had been unfairly deducted from the salary; and it was human to fall sick but the respondent rejected the explanation. Thus the claimant left employment.

The Court has considered the claimant's evidence and which was not rebutted in any manner. The Court finds the claimant's evidence coherent and consistent as establishing the claimant's claims for unfair constructive termination. The Court follows the Court of Appeal's holding in **Coca Cola East & Central Africa Limited –Versus- Maria Kagai Ligaga [2015]eKLR** (Visram, Azangalala, and Otieno-Odek JJA) thus, “...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. Whether a particular breach of a contract is repudiatory is one of mixed fact and law.”

As submitted for the claimant, the respondent engaged in a fundamental breach of the contract of service when it refused to accept and acknowledge the claimant's entitlement to a sick leave or off as is provided for in section 31 of the Employment Act, 2007 and that the claimant had notified about his sickness; the refusal to assign work upon resumption from sick off and confining the claimant at the yard; refusal to undertake a disciplinary hearing on 07.05.2014 contrary to section 41 of the Act; and refusal to pay the salary for April 2014. The Court returns that the respondent breached the cited terms and conditions of the contract of service and was thereby guilty of making it impossible for the claimant to perform the contract of service. The claimant was entitled to consider himself dismissed in the manner he did. The Court returns that the claimant has established unfair constructive termination.

The claimant had worked from 05.12.2011 to 08.05.2014 making about 2.5 years. The claimant had not contributed to his termination and he had a clean record of service. The aggravating factors are that the respondent refused to pay the salary for April 2014 including the days the claimant had actually served and, there is no indication that the respondent discharged its obligation on medical attention as provided for in section 34 of the Act. The claimant desired to continue in service. The Court has considered the evidence against the factors as envisaged in section 49 of the Employment Act, 2007 and returns that 8 months' gross pay at Kshs.22, 000.00 per month making **Kshs.176, 000.00** will meet justice in the case.

The termination was abrupt and the claimant is awarded **Kshs. 22,000.00** in lieu of a month's termination notice. Salary for April 2014 is awarded at **Kshs.22, 000.00** and for 8 days in May 2014 at **Kshs.5, 866.70**. The claimant was a member of NSSF and the prayer for service pay will fail as per provisions of section 35 of the Act. **Kshs.22,000.00** is awarded under section 28 of the Act and the terms of the contract for leave days due but not taken or paid for. The claimant offered no evidence on the claim for pay on the trips to Rwanda and the prayer will fail.

Finally the Court returns that the claims for deductions for Kshs.21, 100.00 were time bared under section 90 of the Act because they were a continuing injury that ceased at the end of February 2014 and the 12 months of limitation period had lapsed as at the time the suit was filed. In the submissions the claim for house allowance was surrendered for the claimant. In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) Payment of the sum of **Kshs.225, 866.70** by 15.01.2020 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- b) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday, 22nd November, 2019.**

**BYRAM ONGAYA**

**JUDGE**