



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE. NO. 732 OF 2015

JACK OPONDOH KWEMBA.....CLAIMANT

VERSUS

SUNDAY PUBLISHERS LIMITED/ THE SUNDAY

EXPRESS NEWSPAPER.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant was employed by the Respondent as Sports Editor from 2009 to 31.3.2014 when he resigned. Thereafter he brought this suit on 15.5.2015 alleging that his resignation was not voluntary and prayed for declaration that this amounted to constructive dismissal. He further prayed for terminal dues plus compensation for wrongful and unlawful constructive dismissal totalling to Kshs.6,427,500.

2. The Respondent admitted that she employed the claimant but for a monthly salary of Kshs.21,250 per month with no agreement for house allowance. She averred that her Managing Director's involvement in politics was a separate activity from her business. She further averred that she fulfilled her obligations towards the claimant as well as the statutory obligation and contended that the claimant resigned because he could not fulfil his obligations. Finally, she averred that the claimant voluntarily resigned and prayed that the suit should be dismissed with costs.

3. The main issues for determination arising from the pleadings is whether the claimant resigned voluntarily or he was constructively dismissed by the respondent. To answer the said question, both parties tendered evidence and thereafter filed written submissions.

Claimant's Case

4. The claimant testified as Cw1 and basically adopted his written statement dated 23.4.2015 and produced a bundle of 29 documents as exhibits. In brief, he stated that he was employed by the respondent on 26.1.2009 as a Sports Editor for a monthly salary of Kshs.50,000 per month plus House Allowance of Kshs.15,000. His working hours was from 8.00 a.m. to 5.00 p.m. and if he was to work overtime, he was to be paid an automatic Kshs.1,000 per hour. The agreement was never reduced into writing nor he given any payslips. However, that default never bothered him because he had worked with the Respondent's Managing Director (MD) at the Standard Media and he trusted him.

5. He further stated that from February 2009 to May 2009, he was not paid Salary forcing him to write to the Managing Director the letter dated 20.6.2009 to ask for his salary. As a result, the MD called him to his office and promised him that he would be put into the payroll immediately and be paid his salary arrears plus allowances. However, that did not happen as promised. However on 10.12.2009 his appointment as Sports Editor was confirmed in writing by memo from the MD and thereafter he was included in the payroll from January 2010 but for monthly salary of Kshs.21,200 plus house allowance of Kshs.3,750 instead of the agreed salary of Kshs.50,000 plus house allowance of Kshs.15,000 per month.

6. He further stated that he thereafter went to see the MD about the turn of events and to claim the salary arrears and allowance and he promised him that the salary would be adjusted in due course when the finances improve while the salary arrears plus allowances for February to December 2009 would be paid once the company received the expected "BIG PAYMENTS". The said salary adjustment was however never done.

7. The claimant further stated that in November 2012 the respondent sent him to Kampala for official duty for one week and paid him Kshs.25,000 for his transport and subsistence but before returning to Kenya his assignment in Kampala was extended by another week and the company promised to reimburse him Kshs.25,000 upon his return. However when he returned, he was only reimbursed Kshs.5,000

leaving a balance of Kshs.20,000 which is still owing.

8. The claimant further stated that in 2013 the MD started interfering with his editorial work and went against professional ethics for journalist by showing open bias to some candidates in the 2013 general elections. The claimant contended that when he could not take any more frustrations due to the working environment he tendered one month's resignation notice and demanded his accrued dues. However, the same was withheld and to his shock, he learned from NSSF and NHIF that all the deduction made from his salary of Ksh.200 for NSSF and Kshs.320 for NHIF. were never remitted to the said Agencies for the 5 years and 3 months he worked for the respondent. He therefore prayed for the reliefs set out in his suit. He contended that he never went for any annual leave due to pressure of work in his docket and he was not paid cash in lieu.

9. In cross examination he admitted that the resignation letter did not cite any reason for the resignation; that the letter never accused the employer of any wrong doing; and that he never served any demand letter after the resignation setting out the claims in the instant suit. He further admitted that he wrote the letter dated 31.3.2011 through the Managing Editor accepting the salary of Kshs.25,000, and that he will wait for an increase after 6 months. He also admitted that he was not given any written promise that the salary would be increased and contended that the company was being run verbally including the employment contracts.

10. He stated that there was a letter upon which he was basing the claim for reimbursement of Kshs.20,000 spent in Kampala, but admitted that he had no receipts to prove the expenses incurred. He further admitted that he has nothing to prove that he worked overtime but maintained that every Friday he used to work upto 10 p.m. when he was preparing the paper for the publication. Finally, he contended that he was never given a certificate of service.

Defence case

11. The Respondent's Director Mr. Ayub Savula testified as Rw1. He confirmed that he is a Member of Parliament and 60% shareholder in the respondent while M/s Hellen Kemboi, holds 40% shares. He contended that the company has structures and never engages in verbal agreements. He pointed out at various letters and memo signed by him to prove the foregoing allegation.

12. He testified that the claimant was employed by the respondent but he voluntarily resigned and went to start another Newspaper called The Sun. He denied that he agreed to pay the claimant basic salary of Kshs.50,000, house allowance of Kshs.15,000 and overtime pay of Ksh.1,000 per hour.

13. He further denied that he promised the claimant salary adjustment from Kshs.21,250 to Kshs.50,000 and house allowance from Kshs.3,750 to Kshs.15,000 per month. He also denied that he instructed the Company Accountant to pay the claimant his arrears of his salary and house allowance for February to December 2009 totalling to Kshs.71,500. Finally, he denied claim for reimbursement of Kshs.20,000 expended by the claimant during his official duties in Kampala Uganda. He therefore prayed for the suit to be dismissed with costs because all the claims by the claimant are founded on alleged verbal promises which cannot be substantiated.

14. In cross examination, Rw1 contended that the claimant was issued with appointment letter upon his appointment. He further contended that the claimant was issued with payslips but he was paid either by cash or cheque. He however admitted that there was no Board resolution for hiring of the claimant. He admitted that as the CEO, he was the one running the respondent but there was also a HR Officer.

15. He further stated that the claimant's salary in 2011 was Kshs.21,250 but in 2013 it was increased to Kshs.22,100 plus house allowance of Kshs.3,900 per month. He maintained that there was never any verbal agreement that he was paying the claimant Kshs.50,000 as basic salary. he contended that the respondent was registered employer with the NSSF and she remitted NSSF contribution for the claimant. He dismissed as untrue the letter from NSSF dated 27.5.2014 which stated that the respondent was not a registered employer with the Agency.

16. He admitted that the claimant was not paid any terminal dues or issued with a certificate of service after the resignation because he never went back to demand for the same.

17. M/s Hellen Kemboi testified as Rw2. She confirmed that she is also a Director of the Respondent company in charge of operations. She denied that the claimant was wrongfully was dismissed and contend that he voluntary resigned by his letter dated 3.3.2014. She further stated that there was no reason cited for the resignation in the said letter. She described the claims set out in the suit as an afterthought and without merit because they are founded on alleged verbal agreements and promises, which were not referred to in the resignation letter. She contended that the respondent has a policy of communicating discussions formally to her staff as shown by the documents filed by the claimant as his exhibits.

18. On cross examination, Rw2 stated that the claimant was not given any letter of Appointment. She admitted that she never interacted with claimant and that she was not privy to the verbal agreements between him and Rw1. Finally, she contended that the claimant accepted a salary of Kshs.25,000 per month by his letter dated 31.3.2011.

Analysis and determination

19. After hearing the evidence and considering the submissions filed, the following issues arose for determination:-

- (a) Whether the claimant voluntarily resigned or he was constructively dismissed.
- (b) If the answer to (a) above is dismissal, whether the same was unfair and wrongful.
- (c) Whether the reliefs sought should be granted.

Voluntary Resignation Vs Constructive dismissal

20. The letter by the Claimant dated 3.3.2014 reads as follows:

“Dear Sir,

REF: RESIGNATION

This letter serves as a notice of my resignation from the company with effect from March 31, 2014.

Kindly prepare my dues as follows:-

1. My dues as for the current Labour Laws for the four(4) years I have worked for the company as Sports Editor as per the attached copy of a letter signed by yourself dated December 10.2009.

2. My accumulated Annual leave days as per the current Labour Laws since I have never taken my leave for four years since my confirmation as Sports Editor on 10th December, 2009

3. My pending claim for sh.20,000 which I incurred while on official duty in Kampala in 2012 and the same was approved by yourself for payment but out of Kshs.25,000 I was claiming I was only paid shs.5,000 leaving a balance of shs.20,000.

4. Please take note that since I joined the company I have NEVER taken any loan or salary advance as such I do not owe the company any money. Let me take this opportunity to thank the company for the period I have worked as Sports Editor and I wish you all the best.

Yours sincerely

Jack Kwemba

Sports Editor.”

21. The contents and the tone in the foregoing letter does not, in my view, point to an involuntary resignation. The claimant did not state any reason for his resignation in the letter. He also did not accuse the employer of any fundamental breach of the contract of service which forced him to resign. He, therefore, did not prove that the employer created a bad working environment which prevented him from executing his part of the contract. He also did not prove that the employer fundamentally breached the terms of the contract that he treated the contract as terminated.

22. The court appreciates from the exhibits produced by the claimant including the letters he wrote to the respondent seeking salary increment on diverse dates between 2011 and 2014. I have also noted that he was also subjected to disciplinary action for late reporting and also breach of editorial policy of the paper in 2011. In my view, the time between the said disciplinary actions and the resignation was over two years and as such, I do not think the same had any link to the resignation. In addition, the letter dated 18.3.2012 by claimant to the respondent shows that the issue of low salary was not a problem of the claimant alone but the entire staff of the respondent. I take judicial notice that in the circumstances of low pay a reasonable employee can resign to look for greener pastures elsewhere. However, such an employee cannot, in my view, easily succeed in a claim for constructive dismissal against the employer. Consequently, I return that the claimant has not proved constructive dismissal of his employment contract by the respondent as alleged.

Unfair termination

23. In view of the finding that the claimant resigned voluntarily, I return that the alleged unfair and wrongful dismissal does not arise.

Reliefs

24. The claimant sought declaration that his resignation amounted to wrongful and unlawful constructive dismissal. However, I decline to make the said declaration because I have made a finding of fact that the resignation was voluntary.

25. I further decline to make declaration that the respondent violated and/or trampled upon the claimant's Rights to Fair Labour Practices as envisaged by Article 41 of the Constitution of Kenya. The said order is not founded on competent constitutional pleading and it is therefore untenable. The competency threshold for constitutional pleadings was established by the High Court of Kenya in Anarita Karimi Njeru –v- Republic [1979]eKLR where it was held that:

“We would, however, again stress that if a person is seeking redress from the high Court on a matter which involves a reference to the constitution, it is important (if to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provision said to be infringed, and the manner in which they are alleged to be infringed.”

26. The claimant also prayed for basic salary and house allowance at the rate of Kshs.50,000 and Kshs.15,000 respectively, for the months of February 2009 to December 2009. The respondent admitted in paragraph 3 of her defence that she employed the claimant from 26.1.2009

but averred that his salary was Kshs.21,250 with no house allowance. He did not prove that he paid the claimant the said salary in the month of February to December 2009.

27. The claimant has proved that he was working for the respondent from February 2009 by filing copies of the respondent's Newspapers starting the February 1-7, 2009 edition. The claimant has admitted that there was no written contract and that after confirmation of his appointment in December 2009 he accepted a salary of Kshs.25,000 per month. In all fairness the court resolves the dispute of the unpaid salary for the said period by awarding the claimant the admitted salary of Kshs.21,250 plus house allowance of 15% of the said salary equaling to Kshs.3,187.50 because the respondent admitted that the said salary did not include house allowance. Consequently, the respondent will pay the claimant $Kshs.24,437.50 \times 11 = Kshs.268,812.50$.

28. The claimant further prayed for arrears on the underpaid salary and house allowance for the period from January 2010 to March 2014 based on the alleged verbal agreement for basic salary of Kshs.50,000 and house allowance of Kshs.15,000 per month. The said claim is however dismissed because of lack of evidence to substantiate the alleged salary, and also because the claimant wrote a letter in early 2010 accepting a salary of Kshs.25,000 per month.

29. The claim for overtime pay at the rate of Kshs.1,000 per hour is dismissed for lack of evidence. In addition, the claim has been exaggerated because it did not factor the hours he reported to work late prompting disciplinary action against him in 2010 and 2011.

30. The claimant contended that he never went for any leave due to pressure of work and prayed for 30 days leave for 5 years. Rw1 admitted that the claimant never took his annual leave for the period of his service. I therefore award him cash for the accrued leave for the period from February 2009 to March 2014 equaling 5 years. There was no evidence produced to prove that the claimant was entitled to 30 days' annual leave. I therefore award him the minimum annual leave provided under section 28 of the Employment Act being 21 days which translates to 105 leave days not taken. Consequently, I award the claimant $Kshs.25,000 \times 105/26 = 100,961.15$.

31. The claimant also prayed for service pay at the rate of 15 days' pay per year of service. He produced a letter from the NSSF to prove that the respondent not only failed to remit NSSF contribution for him but also to prove that she was not a registered employer with the Fund. Consequently, I award the claimant service pay at the rate of 15 days' pay per year of service being $Kshs.25,000 \times 15/30 \times 5 = Kshs.62,500$.

32. Finally, the claimant prayed for Kshs.20,000 being balance of the transport and subsistence for his official duties in Uganda. The respondent never reimbursed the same said sum which the claimant expended after his trip was extended by a week. I therefore grant that claim as prayed because the respondent did not dispute the fact that the claimant was officially on duty abroad.

33. In conclusion, I enter judgment for the claimant against the respondent for the sum of **Kshs.452,273.65** plus costs and interest at court rates from the date of filing the suit. The award is however subject to statutory deductions.

Dated and delivered at Nairobi this 1st day of November 2019

ONESMUS N. MAKAU

JUDGE