



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA

CAUSE NUMBER 339 OF 2016

BETWEEN

KENNEDY OBALA OAGA.....CLAIMANT

VERSUS

KENYA PORTS AUTHORITY.....RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on 4th May 2016. He states he was employed by the Respondent as a Supplies Officer, in the year 1999. He and 3 other Employees had sued their Employer, the Respondent herein, in E&LRC Cause No. 258 of 2015, seeking to have the Respondent barred from taking disciplinary action against the Employees, on allegations that the Employees had supplied the Respondent with fake academic certificates to gain employment.

2. Cause No. 258 of 2015 was dismissed by the Court, the Court having found that the Claim was premature, having been filed before exhaustion of the internal disciplinary process. The Claimant states that following the decision of the Court, the Respondent hastily convened a Committee of Inquiry. He was given less than 24 hours to appear before this Committee on 25th November 2015. He was made to appear before the Committee without adequate preparations. The Committee Members were selected without regard to the provisions of Respondent's Disciplinary Handbook.

3. The Claimant, believing the Respondent to have acted in a manner that destroyed, or seriously damaged Employer-Employee relationship, wrote a letter of resignation on 27th November 2015. Resignation was with immediate effect. The Claimant relied on Section B17 (b) 2 (c) of the Human Resource Manual 2011. He paid to the Respondent 1 month salary in lieu of notice, at Kshs. 144,200, through a Bankers Cheque dated 27th November 2015.

4. The Claimant states he continued reporting to the Respondent's Offices after resignation for purposes of clearance. He was kept in the dark, until 8th January 2016, when he was served with a letter stating his resignation was not accepted by the Respondent. He was given a letter of summary dismissal dated 12th January 2016. The Respondent held that resignation was meant to circumvent the outcome of the disciplinary process. He was summarily dismissed on the ground that he was found to have presented forged academic/professional certificates to the Respondent to gain employment.

5. Against this background, the Claimant prays for Judgment against the Respondent, in the following terms:-

(a) Declaration that Claimant lawfully resigned from Respondent's service, with effect from 27th November 2015, and that the purported rejection of the Claimant's resignation is null and void, as the Claimant ceased to be an Employee of the Respondent on 27th November 2015.

(b) A declaration that during the period the Claimant remained in Respondent's payroll, and by extension, an 'Employee,' despite having lawfully resigned, the Respondent subjected the Claimant to forced labour and that the summary dismissal of the Claimant was unfair in procedure and substance, and was null and void.

(c) General damages.

(d) Costs of the Claim.

6. The Respondent filed its Statement of Response on 9th September 2016. The Claimant was an Employee of the Respondent. He was

found to have altered his academic certificates supplied to the Respondent on employment, to indicate he obtained Division II, while records from the examining body KNEC, showed he obtained Division IV.

7. The Respondent constituted a Disciplinary Committee, in accordance with Respondent's Disciplinary Handbook 2015. The Claimant was given a fair hearing.

8. He tendered resignation, to circumvent the disciplinary process. Dismissal was fair. The Respondent prays the Court to dismiss the Claim with costs.

9. Parties agreed on 8th November 2017, to have the dispute considered and determined, on the strength of their Pleadings, Witness Statements, Documents and Submissions. They confirmed filing of Submissions on 12th February 2018.

Claimant's Submissions

10. The Claimant reiterates the contents of his Pleadings and Witness Statement. He submits Section B. 17(c) of the Human Resource Manual 2011, allowed him to terminate his contract of employment, through a letter of resignation, accompanied by the tendering of one month's basic salary in lieu of notice. This provision states that termination becomes effective with immediate effect.

11. Section 35 and 36 of the Employment Act 2007, allow Parties to a contract of employment, to terminate the contract through notice, or payment of salary in lieu of notice.

12. The Claimant ceased to be an Employee of the Respondent on 27th November 2015, upon tendering resignation and paying to the Respondent notice pay. Termination became effective on 27th November 2015, and was well - founded under Section B. 17 (c) of the Human Resource Manual, and Sections 35 and 36 of the Employment Act 2007.

13. The letter of summary dismissal, coming 40 days after resignation, has no force of law. It was malicious, scandalous and meant to deny the Claimant his rights.

14. He has cleared with all the Departments of the Respondent. He is beyond 50 years of age, and ripe for retirement. He exercised his option to resign, and retire from active service. He is entitled to his pension benefits. The option to terminate a contract of employment is not the preserve of an Employer.

Respondent's Submissions

15. The Respondent submits that the issue about pension benefits, was not part of the Claimant's Pleadings. Parties are bound by their Pleadings. The Claimant does not have the liberty to introduce new issues through his Submissions.

16. The Court in Cause No. 258 of 2015, found the Claim had been filed prematurely. The Claimant was placed at liberty to submit to the disciplinary process. The Respondent constituted a Disciplinary Committee. The Claimant subjected himself to this process. He tendered resignation before the process was concluded. The Respondent lawfully declined resignation.

17. The Court held in *Kenya Union of Commercial, Food & Allied Workers v. B.S. Mohindra & Company (K) Limited [2015] e-KLR*, that an Employee who terminates his contract to escape disciplinary action, acts in bad faith. Resignation by the Claimant in the present Claim, was an act of bad faith. He should have been patient enough to await the outcome of the disciplinary process.

The Court Finds:-

18. The Claimant was an Employee of the Respondent State Corporation. He held the position of Supplies Officer. This was until 27th November 2015, when, according to him, he tendered his resignation with immediate effect, and paid one month salary in lieu of notice at Kshs. 144, 200 to the Respondent. According to the Respondent however, the Claimant left employment on 12th January 2016, when the Respondent summarily dismissed him, after finding the Claimant guilty of presenting forged academic certificates to the Respondent, to gain employment.

19. The Claimant and other Employees of the Respondent similarly situated, had before filing the instant Claim, filed Cause No. 258 of 2015 in this Court, asking the Court to bar the Respondent from subjecting the Claimant and Co-Employees to disciplinary proceedings. The Court rejected that Claim, and placed the Employees at liberty to submit to the disciplinary process. It is not contested that the Respondent constituted a Disciplinary Committee. The Claimant presented himself before the Committee. He was heard. Before verdict was delivered, the Claimant tendered resignation on 27th November 2015.

20. After 27th November 2015, the Claimant states he continued reporting to work for purposes of clearing with the Respondent, presumably to open the way for payment of pension. He considered his contract terminated, with immediate effect, on 27th November 2015, having paid 1 month salary in lieu of notice to the Respondent.

21. It was not until 8th January 2016, that the Respondent wrote to the Claimant, informing him that his resignation had been rejected, and his Bankers' Cheque forwarding notice pay to the Respondent, returned to the Claimant.

22. On 12th January 2016, the Respondent wrote to the Claimant, communicating its verdict from the disciplinary process. It was found that

the Claimant was guilty of an act of gross misconduct, by presenting to the Respondent forged academic certificate. He was summarily dismissed on 12th January 2016.

23. The primary issue in dispute is whether Claimant's resignation on 27th November 2015, was valid, lawful and binding on the Parties. The Second question, is whether summary dismissal which followed resignation, had any legal effect. Lastly, does the Claimant merit the prayers sought?

24. It is clear from the Pleadings, that the Claimant prays for 2 declaratory orders, general damages, and costs. There is no prayer regarding pension benefits.

25. In a recent decision of this Court, *Edwin Beiti Kipchumba v. National Bank of Kenya Limited [2018] e-KLR*, it was held that resignation by an Employee from employment, is basically termination of employment at the instance of the Employee. It is a unilateral act. The Employment Act does not require the Employer to accept a notice of termination issued by the Employee, for that notice to take effect.

26. The Employment Act does not bar, or in any way limit an Employee, from terminating his/her contract of employment before, during or after, a disciplinary hearing.

27. The Claimant resigned after being heard by the Disciplinary Committee, but before the Disciplinary Committee gave its verdict. Resignation was immediate. There was no notice period, the Claimant having opted to pay the Respondent, 1 month salary in lieu of notice.

28. The Respondent ceased to have the jurisdiction to discipline the Claimant on 27th November 2015. Although the disciplinary hearing had concluded, there was no verdict at the point the employment contract was terminated. The Respondent could not deliver a lawful verdict arising out of the disciplinary process, after termination of employment. The Claimant was no longer an Employee of the Respondent, after 27th November 2015.

29. The Court is fortified in this finding, by the decision of the Labour Court of South Africa, in *Mtati v. KPMG (Pty) Ltd (2017) BLL 315 (LC)*. The Employee tendered 2 resignation letters, the first after the Employee found out the Employer was investigating her for misconduct. The first letter gave the Employer notice when termination would become effective.

30. The Employer constituted a Disciplinary Committee. The Employee was invited to attend hearing. She issued a second letter of resignation with immediate effect. She challenged the authority of the Disciplinary Committee to continue with the process in light of her immediate resignation. The Disciplinary Committee Chairperson overruled the Employee's objection, went on with the hearing, found the Employee guilty of misconduct, and recommended her dismissal.

31. The Employee challenged the Disciplinary Committee's decision at the Labour Court. The Court held that where an Employee tenders resignation immediately, the Employer is immediately deprived of jurisdiction to continue with the disciplinary process. Resignation takes effect immediately. Authority to discipline the Employee is based on the existence of a contract of employment. Without a contract, there is no authority.

32. The Court went on to distinguish the consequence of immediate resignation, and resignation by notice, on pending disciplinary process. If the Employee has given notice, and is serving notice period, the Employer retains jurisdiction to discipline the Employee until notice takes effect.

33. The Claimant, Kennedy Oballa Oaga resigned with immediate effect. He was not serving notice period at any time after 27th November 2015. He was not serving notice period on 8th January 2016, when the Respondent informed him that his resignation had been rejected. He was not serving notice period when the Respondent dismissed him on 12th January 2016. He was not an Employee of the Respondent after 27th November 2015. The Respondent did not have authority to pronounce any decision on a former Employee, after 27th November 2015.

34. It is common for Employees who commit acts of gross misconduct, such as the Claimant herein, to tender resignation to avoid the consequences of their acts. Such consequences include denial of terminal benefits; stigma associated with dismissal for gross misconduct; and diminished employability.

35. The Claimant resigned because he felt by doing so, he would avoid or mitigate the consequences of summary dismissal.

36. The Court does not agree with the finding in *Kenyan Union of Commercial, Food & Allied Workers Union v. B.S. Mohindra & Company (K) Limited [2015] e-KLR*, that an Employee under disciplinary proceedings should patiently wait for the outcome of the process. There is no limitation imposed on an Employee who desires to terminate his contract of Employment under Section 35 and 36 of Employment Act 2007, except that termination is preceded by a written notice, or pay in lieu of notice. The Court has not come across any provision limiting the right of termination in the Employment Act 2007, the Kenya Ports Authority Act Cap 391 the Laws of Kenya, the Disciplinary Handbook, and the Human Resource Manual, which governed the Claimant's contract of employment. There is no clause, or provision, compelling an Employee to put off his decision to leave employment before the outcome of a disciplinary process initiated against him.

37. The existing legal framework enables Employees to resign, and place themselves beyond the disciplinary authority of their Employers.

38. There are jurisdictions where Employers have designed legal frameworks which enable them, to investigate Employees' misconduct, and to drive the process of disciplinary hearing to its logical outcome. In such jurisdictions are to be found legal provisions, to the effect that an Employee against whom disciplinary proceedings are pending, shall not resign, without prior approval of the Employer. Any letter of

resignation issued by an Employee in such a situation does not take effect, unless accepted by the Employer. Other restrictive laws require an Employee who desires to resign when faced with disciplinary proceedings, to give notice of resignation of a period sufficient to the Employer, to bring the disciplinary proceedings to an end. An Employer may require, in clear terms in the Human Resource Manual, that where an Employee resigns to avoid disciplinary proceedings, he shall not be entitled to any benefits which would be payable on regular termination. It would be useful to retain the disciplinary proceedings in the Employee's personal file, with a footnote that he resigned to avoid disciplinary proceedings. With proper laws and regulations at the workplace, it is possible to disincetivize rogue Employees who desire to escape the consequences of a disciplinary process, by immediate resignation.

39. Our law as currently framed, does not have any provisions, which would restrict the Claimant from taking the pre-emptive action he took, to escape summary dismissal. There are no such restrictions either, in the Human Resource Manual and Disciplinary Handbook, which regulated the Parties. The Respondent, encountered with this deficiency of the law and the regulations, resorted to self-help. Rejection of Claimant's resignation, and his purported summary dismissal long after he had resigned, had no support in law.

40. The Court is convinced, and declares, that the Claimant resigned lawfully on 27th November 2015. The purported rejection by the Respondent, of the Claimant's resignation is null and void, as is the decision to summarily dismiss the Claimant 40 days after he resigned.

41. The return of the Banker's Cheque to the Claimant by the Respondent, did not result in reversal of resignation. Resignation took effect immediately. The Respondent received the letter of resignation and notice pay. What the Respondent chose to do with the money paid by the Claimant as notice pay, was Respondent's own business. There was no requirement that resignation is accepted by the Employer. There was no room, barring agreement of the Parties, for rescinding termination of 27th November 2015.

42. There was one date, when termination of the Claimant's contract took effect. This was on 27th November 2015. It is not conceivable to have 2 dates, when termination would be deemed to have taken effect. It is not conceivable to have an Employee's date of termination, and a different Employer's date of termination. There was one contract of employment. It could only be terminated on one date, not on two different dates. The decision to summarily dismiss the Claimant was null and void.

43. That decision cannot however, be declared unfair in procedure and substance, as the Claimant prays the Court to declare. The Claimant resigned, pre-empting any inquiry by this Court, on the fairness of procedure and validity of reasons leading to summary dismissal. Summary dismissal was null and void, not based on an Employer-Employee relationship, and it makes no sense to inquire whether, or declare, such a decision is fair or unfair. The decision must be treated as if it was never made. It was null and void, without any legal consequences. To say it was unfair, would suggest that decision has legal consequences.

44. Forced Labour occurs where a person is coerced to work through use of violence, intimidation, or other subtle means, such as accumulated debt, retention of identity papers or denunciation to immigration authorities.

45. The Claimant was not forced to work, after 27th November 2015. He submits he continued to report to work for clearance. Clearance cannot amount to being subjected to forced labour. The Claimant was at the workplace from 27th November 2015, to clear with the Respondent, in the hope that he would by doing so, access pension benefits.

46. The prayer for general damages is rejected. The Claimant used legal loopholes to pre-empt summary dismissal. The Respondent seems to have acted in misapprehension of the law, in summarily dismissing the Claimant, rather than acted in deliberate breach of the contract of employment, such as would warrant award of general damages to the Claimant.

47. The Disciplinary Handbook 2015 lists forms of punishment under Section K.11. Among these, is termination of contract of service (as provided for in the Employee's contract). The Respondent could terminate the contract regularly as a form of punishment, or summarily dismiss the Claimant. The Claimant opted to terminate the contract, before the Respondent exercised its right of imposing the penalty. As termination is one of the penalties open to the Respondent to impose, and considering the Claimant chose to terminate the contract himself, the Court does not see in what way the Respondent can be held liable to pay general damages to the Claimant for breach of contract. The Claimant terminated the relationship as he, and his Employer, was entitled to do.

48. It has been noted elsewhere that the Claimant does not pray for pension benefits in his Pleadings. He attempted to introduce a prayer for pension benefits through his Submissions. This is irregular. In the end, it is doubtful that the Claimant's pre-emptive resignation, had the effect intended by the Claimant.

IN SUM, IT IS ORDERED:-

a) It is declared the Claimant lawfully resigned from the service of the Respondent on 27th November 2015.

b) It is declared rejection of the Claimant's resignation by the Respondent, is null and void.

c) It is declared that the Claimant was not subjected to forced labour.

d) It is declared that summary dismissal decision made by the Respondent is null and void.

e) The prayer for General Damages is rejected.

f) No order on the costs.

Dated and delivered at Mombasa this 20th day of March 2018.

James Rika

Judge