

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

SUIT NO. 443 OF 2017

EPHANTUS NG'ANG'A.....CLAIMANT

VERSUS

KIRINYAGA CONSTRUCTION (K) LTD.....RESPONDENT

JUDGMENT

1. The claim herein filed suit seeking the payment of dues from the respondent between February 2013 to May 2015 when he avers he was employed by the Respondent as a chairman on a monthly salary of Kshs. 17,600/-. The Claimant averred that in May 2015 the Respondent abandoned or refused to perform its part of the employment contract with the Claimant which actions constituted fundamental breaches of the said contract, and which breaches indicated the Respondent had repudiated the contract of employment. the Claimant set out the particulars of the breach which were

- (a) Failing to pay the Claimant his salary over an unreasonable period
- (b) Stopping payment to the Claimant
- (c) Failing to assign work
- (d) Refusing the Claimant access to the work place
- (e) Failing to assign duties to the Claimant to date

The further averred that the conduct by the Respondent amounted to constructive unfair dismissal. The Claimant thus sought payment of terminal benefits made up of the salary arrears for 4 months Kshs. 70,400/-, damages for unfair dismissal – Kshs. 211,200/- being 12 months salary as compensation, house allowance for 33 months equivalent to 15% of the monthly salary Kshs. 84,150/-, severance pay for the 2 years worked at 15 days per year Kshs. 17,600/-. The Claimant also sought payment of costs of the suit and interest.

2. The Respondent though served did not enter appearance or file a defence. The Claimant's case proceeded as an undefended cause. The Claimant had attached to his claim the statement wherein he had stated that he was employed by the Respondent as a chairman of the surveying department at the Naromoru-Karicheni-Munyu Road earning Kshs. 17,600/- a month.

3. The Claimant testified on 14th March 2018. He stated that he was employed by the Respondent at the material times and that he was paid by the Respondent through the bank. He stated that the salary before deductions was Kshs. 19,500/- and after deductions was Kshs. 17,600/- he sought the payment of the arrears, service and costs of the suit as well as house allowance.

4. The Claimant filed submissions on 20th March 2018 and in the submissions stated that the Claimant was denied access to the workplace despite being owed 4 months salary. The Claimant relied on the case of **Western Excavating (ECC) Ltd v Sharp (1978) 1 All ER 713** where the court considered the proper test to be applied in deciding whether an employee has been constructively dismissed as not the reasonableness of the employer's conduct but to ask whether the conduct is such as in law would entitle the employee to treat himself as discharged from contractual obligations under the employment contract. The Claimant submitted that in **Malik v BCCI (SA) (1997) 3 All ER 1** where it was held that it is an implied term of every employment contract that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee and that once such conduct obtains, the employee is entitled to treat the breach as repudiation of the contract of employment. The Claimant submitted that the situation obtaining between him and the Respondent amounted to constructive unfair dismissal as held in the Malik case above. He thus sought remedies under Section 49 of the Employment Act and asserted that under Section 31 of the Employment Act, the Respondent was obligated to provide reasonable housing and failing which the employee is to be paid a house allowance being 15% of the basic pay. He submitted that he was not enrolled to any gratuity scheme and was entitled to payment of Service as Section 35(5) of the Employment Act made provision for payment of service pay for each year of service. He thus sought payment of the sums he enumerated in his claim.

5. The Claimant was obligated to prove his case on a balance of probabilities. The Claimant asserted that he was employed by the Respondent as a chairman. He did not elaborate what the expression 'chairman' meant or what his duties were. Be that as it may, he did not indicate how the 19,500/- which he testified was his gross salary was computed. He exhibited a bank statement for some months in 2014 and the bank statement only revealed one payment of Kshs. 17,113/- made by **Haravkiri** on 24th November 2014 per the entry on the bank statement. There were no notes on the remittance of Kshs. 17,113/- and it is unclear whether the Respondent used the *nom de guerre* Haravkiri in its business transactions. The payment of Kshs. 17,113/- was in contrast to the sum of Kshs. 17,600/- the Claimant asserted was

his net pay after deductions. In his testimony he stated that NHIF and NSSF dues were paid but in his submissions and the claim he sought payment of service suggesting that no NSSF dues were remitted for him. Under Section 35 of the Employment Act, the employee is not entitled to any service pay if he is a contributor to NSSF. It is unclear whether the Claimant was an NSSF contributor or not. From the foregoing, it is clear that there was no proof on a balance of probabilities, the claim would of necessity fail. As the claim was undefended I will dismiss it as I must but make no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 24th day of April 2018

Nzioki wa Makau

JUDGE