



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 270 OF 2017**

**CHARLES NDEREVA NDWIGA.....CLAIMANT**

**VERSUS**

**THIKA CLOTH MILLS LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed suit seeking the determination of an issue he framed as unfair, unlawful and wrongful termination; non-payment of terminal dues and compensatory damages. The Claimant averred that he was employed in February 2002 as a machine attendant in the Dyeing Department of the Respondent at a basic salary Kshs. 10,934.91. He stated that on 30<sup>th</sup> April 2013 he was involved in an accident and was excruciatingly injured on his right forearm while operating the machines in the course of his employment at the Respondent's place of business in Thika. He experienced great pain and underwent numerous surgical operations leaving his right forearm totally paralysed. The Claimant averred that the Respondent allowed him to continue with employment with expedition the Claimant would continue to perform his duties as before. However, the injuries sustained from the said accident and the paralysis of his right forearm hampered him from working as being right-handed he could hardly perform basic chores. The Claimant averred that the Respondent continued to pile work making his working conditions unbearable such that the Claimant felt compelled to leave employment. The Claimant averred that as a result, he wrote and tendered his letter of resignation from employment on account of the fact that he had been put in a position by the Respondent that made it impossible for him to perform his contract of employment. The Claimant averred that the Respondent accepted his resignation and issued him with a certificate of service and the Claimant was requested to collect his dues from the chief accountant but none was ever given to the Claimant despite having cleared with the Respondent. The Claimant therefore avers that he was entitled to terminal dues and compensatory damages for his termination which was without lawful cause. He sought salary in lieu of notice, service pay for 15 years of service, compensation for unfair termination for 12 months which was the maximum compensation as well as costs of the suit and interest.

2. The Respondent was opposed and filed a response to the claim in which it averred that the Claimant was compensated under the work injury benefit compensation and that he has in addition to this suit filed another suit at the Chief Magistrate's Court of Thika Case No. 113 of 2015 where he claims for damages for the injury sustained. The Respondent avers that the Claimant did resume work after five months of treatment where he was assigned light duties as his permanent incapacity was assessed at 60%. It was averred that the Claimant did on 30<sup>th</sup> September 2014 issue a resignation to the Respondent letter citing health conditions and gave a one month notice as per the collective bargaining agreement. The Respondent accepted the letter and indicated Claimant was welcome to return to work if he so desired. The Respondent averred that he was paid his salary for the month of October 2014, leave pro rata and was issued with a certificate of service. The Respondent avers that all dues lawfully liable to the Claimant were settled in law. The Respondent avers the Claimant is not entitled to service pay as he was a member of NSSF and entitled to the gratuity per the collective agreement. The Respondent avers that the Claimant resigned from his employment and all dues entitled to him were settled. The Respondent denied the jurisdiction of this court and thus sought the Claimant's claim be dismissed with costs to the respondent as it lacked merit.

3. The Claimant filed a response to the Respondent's memorandum of reply in which he averred that he was an employee from 11<sup>th</sup> of February 2002 till his termination. He denies that he was employed on casual basis and indicated that he was employed on permanent basis and worked continually for the Respondent throughout the period of his employment without discontinuation. The Claimant averred that there was no change of status in his employment as a machine attendant from date of employment to his termination. The Claimant avers and insists that he had not been assigned lighter duties as alleged because he would have had no reason to resign had he been given such light duties. He averred that the Respondent kept assigning him difficult tasks that were hard for him to put up with and given his medical condition he had no option but to resign. He averred that no payment of terminal dues had been made by the Respondent. The Claimant therefore sought his suit to be allowed as prayed.

4. The Claimant testified on 23<sup>rd</sup> of January 2018 and stated that he was employed by the Respondent from February 2002 till October 2014 which is a period of twelve years and eight months. He said that at the time of his employment was employed as a machine attendant and as a machine attendant operated a machine and earned Kshs. 10,900/- or there about. He said that the company did not have any issues with his employment for the 12 years of service. He testified that on 30<sup>th</sup> April 2013 he suffered an accident, injured his hand and that was why he

had a glove on his right hand. He stated that he was operating the machine when he got injured and the company catered for his medical expenses. It took six months before he could regain use of his hand and resumed employment. He said that he was required to continue operating the machine and he stated he had difficulty in operating the machine due to the injury and because he had only the full use of one hand. He said they continued to give him work but it was difficult to undertake. He thus sought lighter work but this was not done and when it was impossible for him to perform, he wrote a resignation letter. He stated the Respondent accepted his resignation and when they replied, asked him to get his pay from accounts. He stated that he was given some Kshs. 6,000/- and some cash which was leave allowance. He therefore sought redress and that his lawyer wrote seeking for the payment of the sums that he claimed but the Respondent did not reply to his lawyers demand letter. He therefore sought the court to order his benefits to be paid as per the claim.

5. In cross-examination he stated that he was employed by the Respondent as machine attendant and was working from 2002 till 2014. He stated that he earned Kshs. 10,900/- or thereabouts and that the company paid all his medical expenses at the time was injured. He testified that he received workman compensation which was around Kshs. 600,000/- or there about that he had sued the Respondent for the injury. He stated that he was not assigned different work and was required to do manual work. He said that he did not write formally to request for lighter duties and that he received some Kshs. 6,000/- and that he was a contributor to NHIF and NSSF.

6. In re-examination he stated that he was employed from 2002 to 2014 and that his job remained the same all throughout. He admitted he was paid for the injury to his hand which is different from terminal dues.

7. The Respondent called John Sammy Nzau a senior industrial relations officer with the Respondent concerned with personnel matters. He testified that the Claimant was employed in 2002 as a casual and on permanent basis in 2010. He testified the Claimant was in the processing department as machine attendant and worked as such and in April 2013 was injured by a machine, was treated for about five months for the injury. When the Claimant came back, his right hand could not be fully used and therefore he instructed the Department to give the Claimant light duties. He testified that the Claimant was no longer working as a machine attendant and was instead given work as an office messenger moving papers from office to office. He stated the Claimant worked for about one year and on 30<sup>th</sup> September 2014 the Claimant gave one month's notice and left a month later after he was cleared and all his dues were paid to him including his salary for October and leave. The Claimant was informed by the director that he was wished all the best but if he wanted to return he was welcome. He stated that the Claimant did not complain about the duties that he undertook and that all his benefits were paid. He testified that the Claimant was not entitled to service pay as he was an NSSF contributor and that his Sacco dues were paid. He stated that the Claimant resigned through the right procedure and was cleared through the right procedure and he was therefore not entitled to any other benefits as his dues were duly paid. He therefore prayed that this suit should be dismissed.

8. He was cross-examined and testified that when the Claimant left in October 2014 as permanent employee and that it was true he had been employed in 2000 and as a casual or contract employee up to 2010. He testified that after the injury the job changed and that prior to the injury the Respondent could the Respondent could the Claimant was a machine attendant. He referred to the letter where he gave instructions that the Claimant be assigned light duties and requested his department to do so. He stated that he followed up.

9. The next witness for the Respondent was Mr Simon Ndirangu who worked as a supervisor in the finishing department. He stated that the Claimant was working under him from 2002 till 2014 and that when the Respondent could the Claimant joined he was trained on the job and that became a machine operator. He testified that the Claimant was employed on permanent basis and suffered an injury in 2013. He stated that when the Claimant was released from hospital he did not go back to work as a machine operator as per the doctors report. He said that the Claimant was given light duties. He was shown the memo written by the Respondent's first witness and stated that he recalled seeing it. He stated that the Claimant was thereafter given duty of transporting documents to support production. He stated that he did not hear any complaint from the Claimant for the time the Claimant worked as a messenger.

10. In cross examination he stated the Claimant was a permanent employee from 2010 and that the Claimant worked till 2014 when he left in October. He testified that he was the overall supervisor and he did not respond to the letter on light duties. He stated that on the payslip the Respondent did not capture the assignment of the Claimant's new duties. He stated that the Claimant was in the dyeing department.

11. In re-examination he stated that the work area is a small office and the Claimant was working outside his office with another clerk. He said that the department is 30 x 35 m wide and that he was able to see the Claimant because he worked very near the Claimant. He stated the Claimant did not make a complaint to him. That marked the end of oral testimony.

12. The parties filed written submissions. The Claimant submitted that the issues for determination were whether there was constructive dismissal; whether the Claimant is entitled to the relief sought; who bears the costs of the cause. The Claimant cited the case of **Joseph Aleper & Another v Lodwar Water and Sanitation Company Limited [2015] eKLR** where the court held that *It is trite law that when an employer by action or omission materially breaches the contract or otherwise makes it impossible for an employee to perform his contract of employment then the contract is deemed to be constructively terminated by the employer*. The Claimant also cited the case of **Ezekiel Nyangoya Okemwa v Kenya Marine & Fisheries Research Institute [2016] eKLR** where Rika J. held that *constructive dismissal occurs where the employee resigns by reason of the employer's conduct. Owing to the intolerable behaviour of the employer, the employee resigns, believing himself to have been fired*. The case of **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** was also relied on where Ndolo J. stated that *constructive dismissal is a situation at the workplace which has been pushed by the employer, which renders the continuation of the employment relationship intolerable for the employee to such an extent that employee is no other option available but to resign*. The Claimant submitted that he was constructively dismissed as his letter of resignation indicates clearly that he was facing difficulties in performing his duties. It was submitted that therefore this letter he made it clear to the Respondent the sole reason why he was resigning from employment was due to inability to perform his duties, on account of the accident he sustained in April 2013. He asserts he therefore was frustrated to resign and that means he was constructively terminated. It was submitted that in the letter accepting the Claimant's resignation, it is clear the Respondent accepted the circumstances that led the Claimant to resign which was that the Claimant was unable perform his duties. The Claimant submitted that if the Respondent had assigned him lighter duties nothing would have been easier than to point that out in the letter accepting his resignation or through a contract of employment. The Claimant submitted that it was clear he retained the same job and the same duties. He submitted that he was entitled to the relief sought as well as the costs for the suit.

13. The Respondent submitted that the Claimant was not unlawfully dismissed from employment but rather the Claimant had resigned. The Respondent submitted from the provisions of section 45 of the Employment Act it was evident that resignation by an employee cannot amount to unfair termination. It submitted that in this case the Claimant issued a resignation letter where he stated that he needed time to go and be looked after by his family. The Respondent further submitted that when an employee resigns from work, it is only prudent to have the intended resignation accepted. It was submitted in this case the employer was kind enough to actually offer the Claimant an opportunity to come back to work if he so wished. However, the Claimant still choose to leave and the employer would not hinder him from doing so. The Respondents cited the case of **Benson M. Nyamai v Teachers Service Commission [2015] eKLR** where the claimant in that case resigned to go seek a parliamentary seat and after losing in the polls returned but was not accepted back. He came to court seeking for declaration that the termination was unlawful and invalid. The court in that case dismissed the claim and said the claimant was not entitled to reinstatement as he had voluntarily resigned from employment. The Respondent submitted that similarly in this case, the Claimant actually did resign from his employment and that the resignation was on medical grounds which was accepted by the Respondent. The Respondent submitted that there were no reasons adduced to show that there was constructive dismissal. **Harvey on Industrial Relations and Employment volume 1 page 403 and 404** was cited. It was indicated that clearly no harsh working condition or circumstances that could have led to a constructive dismissal were in place. The case of **Kenya Union of Commercial Food and Allied Workers v BS Mahindra & Co (K) Ltd [2015] eKLR** was cited as well. The Respondent submitted that no claim for constructive dismissal would arise when employee voluntarily tenders resignation. The Respondent submitted there was no entitlement to the payment sought by the Claimant in his claim as he simply wanted to enrich himself following his injury.

14. The Claimant by all accounts resigned from his employment and there was no indication that the situation that existed at his workplace was the sole reason for his resignation. In his letter of resignation he clearly states that he is unable to perform the duties assigned and that he wished to go home to be taken care of by his family. He did not indicate that he wanted lighter duties or that the tasks were menial and taxing, he did not indicate that he was working as a machine attendant and therefore no longer able perform heavy tasks. It is clear that his resignation was on medical grounds as he clearly states in the letter. In order for the resignation to amount to constructive dismissal the words of Mbaru J. cited with approval by Ndolo J. in the case relied on by the Claimant, **Rebecca Maina v Jomo Kenyatta University** (supra) that there must be situation at the workplace which has been created by the employer, which renders the continuation of the employment relationship intolerable for the employee to such an extent the employee has no other option but to resign. Similarly in the case of **Ezekiel Okemwa v Kenya Marine Fisheries Research Institute** (supra) Rika J. held that constructive dismissal occurs where the employee resigns owing to the intolerable behaviour of the employer. The employee resigns, believing himself to have been fired. None of these circumstances seem to exist in the claim before me. I therefore hold and find that the suit against the Respondent is not merited and therefore dismiss it. I make no order as to costs.

It is so ordered.

**Dated and delivered at Nyeri this 6<sup>th</sup> day of April 2018**

**Nzioki wa Makau**

**JUDGE**