



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 216 OF 2017

BENJAMIN MANDILA.....CLAIMANT

VS

XFOR SECURITY SOLUTIONS (K) LTD.....RESPONDENT

JUDGMENT

Introduction

1. By his claim brought by Memorandum of Claim dated 9th March 2017 and filed in court on 21st March 2017, the Claimant seeks relief for constructive dismissal. The Respondent filed a Memorandum of Reply on 7th April 2017.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Human Resource Manager, Lenus Mwakio. Both parties also filed written submissions.

The Claimant’s Case

3. The Claimant states that he was employed by the Respondent as a Security Officer earning a monthly salary of Kshs. 13,400 from September 2013. He was initially based in Mombasa but was later transferred to Devki Steel Mills Company in Athi River.

4. The Claimant further states that on 26th March 2016, he was electrocuted while on duty. He suffered injuries on the chest and a fracture on his right leg for which he was hospitalised. The Claimant avers that sometime in June 2016, the Respondent’s Human Resource Manager instructed him to resign temporarily so as to seek further medical attention. He was promised that he would be paid his terminal dues.

5. The Claimant was not paid his salary for June 2016, prompting him to write a resignation letter on 8th July 2016. He states that he wrote the resignation letter against his will.

6. On 15th February 2017, the Human Resource Manager called the Claimant to collect a cheque for Kshs. 3,092. The Claimant declined to pick the said cheque as the amount did not constitute his full terminal benefits.

7. It is the Claimant’s case that the Respondent’s failure to pay him his salary for June 2016 was in breach of duty and an act of coercion which amounts to constructive termination. He now claims the following:

- a) Salary in lieu of notice.....Kshs. 13,400
- b) Salary arrears for June 2016.....13,400
- c) Unpaid leave days.....31,267
- d) 12 months’ salary in compensation.....160,800
- e) Service pay for 3 years.....20,100
- f) Costs plus interest

The Respondent’s Case

8. In its Memorandum of Reply dated 3rd April 2017 and filed in court on 7th April 2017, the Respondent admits having employed the Claimant as pleaded in the Memorandum of Claim. Regarding the Claimant's injuries, the Respondent states that while on duty at a client's premises on 26th March 2016, the Claimant was electrocuted through his recklessness.

9. Despite the Claimant's negligence, the Respondent covered all his medical expenses and continued paying his salary while under medical attention. The Respondent avers that once the Claimant stabilised, he was asked to present himself to a Medical Officer for assessment and completion of Directorate of Occupational Safety and Health Services (DOSHS) Form 1 but the Claimant did not comply.

10. The Respondent denies that the Claimant was asked to temporarily resign for further medical attention. The Respondent states that the Claimant opted to immediately resign on his own volition as per his resignation letter dated 8th July 2016, citing the reason of physical injury and need for further medical attention.

11. The Claimant's resignation was accepted vide the Respondent's letter dated 18th July 2016. His dues were tabulated at a sum of Kshs. 31,226. The Respondent avers that the Director for Occupational Safety and Health assessed compensation for the work related injury at Kshs. 3,092.30. The Respondent is willing to pay this amount together with Kshs. 31,226 in final dues.

Findings and Determination

12. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case for constructive dismissal;
- b) Whether the Claimant is entitled to the remedies sought.

Constructive Dismissal?

13. On 8th July 2016, the Claimant wrote to the Respondent as follows:

"HUMAN RESOURCE MANAGER,

XFOR SECURITY COMPANY,

P.O. Box 8806,

MOMBASA KENYA.

Dear Sir,

REF: JOB RESIGNATION

I am an Xfor officer whose name appears above. Due to physical injuries that I experienced while on sites of job, have really forced me resign as you had ordered me to do (sic). So I need further medical attention, it might take long until the time of recovery which Xfor cannot tolerate at all. I have surrendered Xfor full uniforms to the Operation Manager. You can call him for further confirmation.

Yours faithfully,

(Signed)

Benjamin Mandila"

14. The Respondent's Human Resource Manager, Lenus Mwakio wrote back to the Claimant on 18th July 2016, acknowledging receipt of the resignation letter but denying the Claimant's averment that he had been advised to resign. By the same letter, the Respondent admitted that the Claimant was entitled to the sum of Kshs. 31,226 being leave pay for 70 days. He was advised to collect a cheque in this regard and to direct any concerns to the Human Resource Manager.

15. The question before the Court is whether the circumstances of the Claimant's separation from the Respondent disclose a case of constructive dismissal. Constructive dismissal occurs where an employer engages in conduct which renders the employment of an employee untenable.

16. In *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR* the Court of Appeal, citing with approval the definition of constructive dismissal by Lord Denning MR in *Western Excavating (ECC)Ltd v Sharp [1978] ICR 222 or [1978] QB 761* stated the following:

"The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to

leave without notice because of the employer's conduct.....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."

17. The Respondent's Human Resource Manager, Lenus Mwakio testified that after the accident on 26th March 2016, the Claimant was allowed time off to recuperate. Indeed, it is on record that the Claimant was not only supported in the payment of his medical bills, but was also paid his full salary for up to three (3) months while on a recuperation program.

18. The Claimant wants the Court to believe that he was forced out of employment by the Respondent's conduct. In the ***Maria Kagai Ligaga Case*** (supra), the Court of Appeal confirmed that in cases of constructive dismissal, the burden of proof lies with the employee.

19. The Claimant agrees that he was asked by his employer to avail himself for medical examination with a view to determining his capacity to resume duty. The Court finds and holds that this was a reasonable request. In fact, the Claimant was under a duty to subject himself to the medical examination.

20. The Claimant testified that he attended the medical facility appointed by his employer but did not find the Respondent's Operations Manager who was to pay for the medical examination. He appears to have made no further effort to get in touch with his employer until he surfaced with his resignation letter dated 8th July 2016.

21. Has the Claimant proved constructive dismissal? I think not. Having been on fully paid sick leave for at least three months, the Claimant should have been more proactive. He ought to have followed up with his employer for a medical examination to determine his capacity to resume work. Moreover, in response to the Claimant's resignation letter as well as in his testimony before the Court, the Respondent's Human Resource Manager, Lenus Mwakio was emphatic that at no time did he prevail upon the Claimant to resign.

22. Consequently, the Claimant's claim for constructive dismissal fails and is dismissed. That same axe falls on the claims for one month's salary in lieu of notice and salary arrears for June 2016. No basis was laid for the claim for service pay which therefore also fails and is dismissed.

23. The claim for leave pay is admitted and is consequently payable.

Final Orders

24. In the end, the only amount due to the Claimant is the sum of Kshs.31,226 for leave pay, as admitted by the Respondent.

25. Each party will bear their own costs.

26. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 26TH DAY OF JULY 2018

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JUDGE

Appearance:

Mrs. Kyalo for the Claimant

Miss Kagwi for the Respondent