

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT NYERI

CASE NO. 242 OF 2017

MOSES KIMANZI KATII.....CLAIMANT

VERSUS

H. YOUNG & CO. (E.A.) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent for determination of an issue he framed as unlawful termination, non-payment of terminal benefits and unpaid salary. The Claimant averred that the Respondent unilaterally and without notice dismissed him on 27th January 2017. He averred that he was not given an opportunity to be heard. He therefore sought the following reliefs – a certificate of service, 1 month’s salary in lieu of notice Kshs. 40,688/-, leave days for years worked Kshs. 122,064/-, severance pay Kshs. 61,032/-, general damages for wrongful dismissal Kshs. 488,256/-, costs of the suit and any other relief the court may deem fit and just to grant.

2. The Respondent averred that the Claimant resigned his employment on his own volition through a letter dated 27th January 2017. It was averred that the Claimant was not entitled to any of the claims enumerated in his claim and that upon resignation the Respondent calculated the Claimant’s dues which were paid to him together with his January 2017 salary.

3. He stated in his oral testimony that he was employed by the Respondent as a mason grade III and was unwell in January 2017. He was given bed rest for a month by his doctor and he notified the Respondent. He testified that he was not permitted to go on bed rest and was told he had to resign. He did not intend to terminate his contract of service and therefore wrote the termination letter due to the pressure he was under. He stated that he went to see the doctor again and was given another month and when he went to the Respondent they told him they did not want to see him. He expected payment for a month and that he and his family suffered as no pay was received in January. He stated that he was last at work on 26th January 2017. He testified that he had lost all hope of going back there.

4. In cross-examination he testified that he was complaining of backache and had difficulty breathing. He stated that he did not know the meaning of resignation and he expected to resume work. He testified that he did not get any pay and he took the payslip to head office to enquire and was told the pay had been withheld. He stated that he still has a problem with his chest and cannot work as before.

5. The Respondent called Nahum Cash Robert who stated that she was the administrator in HR department. She testified that she received the resignation from the Claimant from the site at Kibera. She stated that the Claimant was not paid as he did not give the one month notice.

6. In cross-examination she stated that the Respondent has site administrators who check if the staff have reported, time in and time out and whether they have conducted themselves well at work and so on. She testified that they are competent and they report to the head office. She stated that she received the Claimant’s letter of resignation and confirmed he was the one who signed the letter. She testified that it was procedural to be guided by decisions on site and that the document did was a sick off with one month bed rest. She stated that they were not instructed that the Claimant time was not able to come to work.

7. In re-exam she stated that the Claimant was not paid as he did not give a one month notice. She stated that if the Respondent had terminated the contract it would have been different. That marked the end of oral testimony and parties were to file submissions.

8. The Claimant submitted that the issues for determination were whether due procedure and substantive justice were adhered to prior to the Claimant’s dismissal and whether the Claimant is entitled to the reliefs sought. It was submitted that the intent while writing the letter was actually to inform the Respondent of his ailment so that he could justifiably take leave to nurse his ailment. He submitted that he was misled by the site administrator to write the letter on the undertaking and understanding that the same would safeguard his employment. He relied on the case of **Edwin Beiti Kipchumba v National Bank of Kenya Ltd [2017] eKLR** and the case of **Linah Chebet Ngeny v Independent and Electoral Boundaries Commission [2017] eKLR** where there were allegations of coercion. The Claimant testified that he was ready and willing to resume work and that his termination was not justifiable. It was submitted that the termination caused loss and damage to the Claimant which was quantified at Kshs. 712,040/- comprising the one month basic salary in lieu of notice, twelve months gross salary for unfair termination and terminal dues, transport allowance and bonus allowance. He also sought interest at court rates from the date of judgment till payment in full plus costs of the suit.

9. The Respondent submitted that the issues for determination were whether the Claimant was coerced to resign, whether the Claimant was unfairly terminated and whether the Claimant is entitled to the reliefs sought. The Respondent submitted that it received a resignation letter dated 27th January 2017 from the Claimant stating health issues. The Respondent granted the request and proceeded to process the Claimant’s terminal dues. The Respondent wondered how it could have coerced the Claimant to sign a resignation letter when it had given him 4 days off to attend to his condition? The Respondent relied on the cases of **Dorcas Mueni Muli v Kapric Apparels (EPZ) Limited [2017] eKLR** and **William Kariuki v Kenya Civil Aviation [2008] eKLR**. The Respondent submitted that in order for the Claimant to succeed he had to prove coercion. It was submitted that the claim is actually one of resignation which differed from constructive dismissal adverted to by the Claimant. The case of **Coca Cola East & Central Africa Limited v Mary Kagai Ligaga [2017] eKLR** was cited where the Court of Appeal held that constructive dismissal is where the Claimant terminates the contract of service in circumstances in which he is

entitled to terminate it without notice by reason of the employer's conduct. The Respondent submitted that the Claimant had not demonstrated that the conduct of the Respondent had led to the resignation. The Respondent submitted that the Claimant had not proved his claim for unfair termination and the suit should be dismissed with costs.

10. The Claimant in his claim pleaded that he was unjustly sacked by the Respondent per his averments in para 4 and 5 of the claim. He even gave particulars of the breach of contract. However in his testimony before the court he asserted that he resigned so as to rest due to an ailment and was to return to work thereafter. In his submissions he asserts that he was coerced to resign and that the coercion was tantamount to constructive dismissal. This claim must fail. The Claimant had a burden to prove that he was dismissed unfairly. He failed to prove either the constructive dismissal or the coercion on the other hand. He resigned from work and the consequence was that he was not entitled to notice since he is the one who owed the Respondent notice. He was the author of his own misfortune and displayed the lack of candor that is sadly becoming commonplace in the courts. He wanted to somehow enrich himself using the court as a vehicle in the evil scheme. This practice must stop! Better a little honestly earned than vast riches illegally obtained. The suit is dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Nyeri this 28th day of September 2018

Nzioki wa Makau

JUDGE