



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 2296 OF 2014**

**SAMUEL KARIMI MUCHIRI.....1ST CLAIMANT**

**HEARTLIGHT NAFULA OTUNGA.....2ND CLAIMANT**

**MOLLENA ACHIENG ODHIAMBO.....3RD CLAIMANT**

**ABDUL ADATIA.....4TH CLAIMANT**

**VERSUS**

**POPATLAL MADHAVJI & BROS LIMITED.....1ST RESPONDENT**

**KENYA COMFORT HOTEL.....2ND RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimants have brought this suit seeking declaration that their employment was unfairly terminated by the respondent and prayed for terminal dues plus compensation for the unfair termination. It is their case that the termination was not for just cause and it was done without following the procedure provided under the labour laws and the constitution of Kenya.
2. The respondents deny the alleged unfair termination and aver that same from the second claimant who resigned the other claimant's services were terminated for a good cause and after following a procedure. They therefore prayed for the suit to be dismissed with costs.
3. The main issue for determination is whether the claimant's services were unfairly terminated. In answer to the said question, the 1st – 3rd claimants testified as Cw1, Cw2 and Cw3 but the hearing of the 4th claimant was dispensed with by consent due to ill-health and his written statement adopted. On the other hand, the respondents called their General Manager Mr. John Kiriamu who testified as Rw1. After the hearing, both sides filed written submissions, which I have carefully considered herein.

**Claimant's Case**

4. Cw1 testified that he was employed by the respondents as an Accounts Clerk on 21.8.2002 earning Kshs.13,000 per month. He rose to become Senior Accountant earning Kshs.45,000 per month. In May 2012 he sought paternity leave but he was denied. In June 2012 the Accounts office was relocated from Milimani to Westlands and in the process documents were disarrayed and that affected the work at the department. In addition, the employer failed to provide water and food as it was the case at Milimani Office and when Cw1 raised the issues with the Managing Director during her visit to the new office, she alleged that he had addressed her inappropriately. Thereafter Cw1 was served with a termination notice on 31.7.2012 citing poor filing, lack of cooperation and attitude towards the seniors.
5. Cw1 contended that the termination was not preceded by any warning, show case letter, hearing. He further contended that the poor filing was not his fault but done by persons who were employed to transfer the files to the new office without the understanding of filing system. He also believed that his request for paternity leave and for provision of water and other facilities at the new office had everything to do with his termination. He therefore prayed for compensation for the wrongful termination plus terminal dues which were not paid to him after the termination. He contended that he has suffered as a result of the termination and he has since not secured another job.
6. On cross examination, Cw1 admitted being paid Kshs.72,850.50 made up of August salary, 14 days paternity leave plus 23 annual leave days. He further admitted that he was a member of NSSF and the employer remitted contributions every month. He also admitted to being given certificate of service after the termination. He further admitted that a memo dated 16.7.2012 was issued warning the Accounts Department but contended that it was not directed to him personally.

7. Cw2 testified that she was employed by the second Respondent as an Account on 7.1.2008 and her salary was Kshs.44,850 per month. In or about June/July 2012, the Accounts offices were relocated to Westlands. By then, she was 5 months pregnant but she was forced to carry heavy Loads of files to the new office. Due to the much work, the Chief Financial Controller provided additional personnel from house – keeping office plus one casual to assist in the relocation of the accounts office. In the process of relocating, the files, most documents were disarranged thereby creating a challenge in the filing.

8. Cw2 further testified that at the new office there was no provision of water and there was no one to clean the office and when Cw1 raised the issues with the MD during her visits, she responded that there was nothing hard in cleaning, even herself could do that and she further alleged that Cw1 had addressed her inappropriately. Like Cw1, Cw2 stated that she was served with a termination Notice on 31.7.2012 citing poor filing, lack of cooperation and attitude as the reason for the termination.

9. Cw2 denied the alleged reasons and contended that she was never served with any warning or given any hearing before the termination in relation to the cited reasons. He further contended that after termination, her terminal dues were withheld including her salary for August 2012. She therefore prayed for the reliefs sought in the suit.

10. On cross examination Cw2 contended that the termination took effect on 30.8.2012 after the one month notice served on 31.7.2012. She admitted that she worked through the notice period and that NSSF was remitted for her by the employer. She further admitted that she was called to collect her dues but she declined after reading the contents which was only the salary for August 2012. She also admitted that she was served with a personal warning plus a general warning to the Department. She however believed that her termination was due to her pregnancy because before the termination, the employer issued a memo requiring that employees should give 2 months' notice before going for maternity leave. She nevertheless admitted that in 2009 she was given maternity leave for 3 months and was even given Kshs.5,000.

11. Cw3 was also employed by the respondents as Accounts clerk on 14.2.2002 and rose to become the Chief Accountant earning Kshs.45,500 per month. She testified that between September 2010 and November 2011, the Kenya Revenue Authority did an in depth Audit on respondents Accounts during which time she was made to work for long hours from 7 a.m. to 12 midnight. That during such sessions, she was insulted and harassed by her supervisors as a result of which her health deteriorated.

12. On 31.1.2012, she reported to work as usual and sought permission from the operations Director to deliver some documents to a school going child and return after one hour. The permission was however declined and because of the importance of the documents and the urgency, she went to deliver the same and returned to work shortly only to find a warning letter from the Operations Director. After considering the Director's conduct, she tendered her resignation, which she now describes as constructive termination by the employer through constant harassment and insults despite having worked for her for 10 years without any warning letter. She therefore prays for terminal dues plus compensation as prayed in the suit.

13. On cross examination, Cw3 contended that her resignation was not voluntary but through pressure and vulgar language used against her daily by her seniors. She admitted that she gave one week notice but the employer endorsed on it that she should give one month notice or she be deducted one month salary. She however contended that the 7 days notice she gave was out of courtesy. She admitted that the only pending claim for service charge was for January 2012 and further admitted that her employer remitted all her NSSF contributions.

14. The 4th claimant never attended court due to ill health and the counsel for both sides agreed to adopt his written statement, he testified that he was employed as Manager of Eagle Staw Apartment, owned by the 1st Respondent in 1983. That in 1989, he was made to write books for other newly businesses owned by the 1st Respondent including the 2nd Respondent. He contended that all the said businesses were managed and controlled by the first Respondent including the second respondent. That on 1.1.2011 he was retired on medical grounds but was compelled to work until 30.6.2012 without payment of his retirement benefits. He therefore considered his termination as unfair, wrongful and contrary to the law and his employment contract. She concluded by stating that due to much work, she used to cash her annual leave days.

## **Defence Case**

15. Rw1 confirmed that he is General Manager for the Respondents. He testified that the Directors decided to relocate the Hotel's Head office from Milimani to Westlands. He further testified that the first to go was the Accounts department but the staff was reluctant to move until disciplinary action was threatened. That even after the relocation the claimants were reluctant to work complaining about lack of water, food and office cleaner. That they developed a don't care attitude, became uncooperative and unwilling to give accounting reports as required by Managers. That they become abusive and whenever accounting documents was required they demanded that whoever needed the same, including the Management, should go for them at the Westlands office. That when the MD went there to see the claimants, they addressed her in an inappropriate manner.

16. Rw1 contended that as a result of the aforesaid matters, it was decided that the first and third claimants be terminated by notice of one month as per their contracts and letter dated 31.7.2012 were served on them. However, Rw1 contended that the second claimant was not terminated but she resigned by serving 7 days termination notice on 31.1.2012 and failed to serve through the said period or do any handing over. He denied that her resignation was tantamount to a constructive termination and further denied that she was harassed to an extent of tendering the resignation. As regards the 4th Claimant, Rw1 contended that, he lawfully retired from employment but continued as a consultant (independent contractor) until May 2012 when he deserted without prior notice, before the lapse of the consultancy contract on 30.6.2012. He denied that the third claimant was terminated due to her pregnancy and averred that the 2012 pregnancy was not her first pregnancy during her employment.

17. Rw1 further testified that the first claimant collected his cheque for terminal dues but the third claimant declined and instead pleaded for chance to continue working. He admitted that her terminal dues including salary for August 2012 plus accrued leave are the only dues payable to her because she was served with termination notice and that she was a member of NSSF. As regards the second claimant, Rw1 contended that she deserted work without serving proper notice and as such, she lost her salary for January 2012. He contended that all the

other reliefs sought are not available to her because she deserted employment. Finally Rw1 contended that the fourth claimant requested for retirement and he was paid all his dues totaling to Kshs.1,450,000 and thereafter agreed to offer services as a consultant earning Kshs.95,000 per month for 18 months during which he worked at his own schedule and was free to report and leave work at any time. That he used to report at 11 am and leave at 3 pm. That consultancy contract was to end on 30.6.2012 but he deserted in May 2012 without any prior notice. He therefore denied the claim for the 4th claimant.

18. On cross examination, Rw1 contended that the first and 3rd Calimant developed an attitude at work after transfer to Westlands office. He denied that the employees were working on public holidays and further stated that they had one rest day per week. He explained that service charge was paid on monthly basis and admitted that the first and 3rd claimants worked through August 2012. He however could not ascertain whether they were paid their service charge for that month. He admitted that the second claimant was not paid salary and service charge for January 2012 and stated that it is because she deserted employment without notice. He maintained that the 4th claimant retired on medical grounds and signed a consultancy contract but he deserted the contract before the expiry date of 30.6.2012. Finally, he denied the allegation that the claimants worked overtime.

### **Analysis and Determination**

19. There is no dispute that the claimants were employed by the respondents until 2012. The issues for determination are:

- (a) Whether the claimants' were unfairly terminated.
- (b) Whether they are entitled to the reliefs sought.

### **Unfair termination**

20. Under section 45(2) of the Employees Act, termination of employment is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case, the respondents contended that the 4th claimant retired voluntary on medical grounds and signed an agreement to that effect on 23.12.2010. That retirement package was agreed at Kshs.1,450,000 less PAYE but vide the said agreement, he was retained as a consultant for a monthly fee of Ksh.95,000, for 18 months effective 1.1.2011. The said claimant has not disputed the validity of the written agreement dated 23.12.2010 by which he retired on medial ground and was retained as consultant at a monthly fee. I therefore find and hold that he voluntarily and for a valid reason retired effective 1.1.2011. He was sickly and almost 80 years them. In this courts view, the consultancy contract at a fee was not a relationship over which this court's jurisdiction can be exercised. I therefore eschew making any determination on the termination of the said consultancy agreement. Suffice it to say, however, that the 4th Claimant never denied, in his written statement, that he deserted from the consultancy agreement in May 2012 without prior notice to the respondents.

21. The second employee to go was the second claimant who served a resignation notice of seven days. She cited harassment from the Management as the reason for her termination. She contended that on 31.1.2012 she sought permission to deliver some crucial documents to a school going child in the city centre but it was denied. She however went out to deliver the documents but returned after a few minutes only to find a warning letter on desk. In response, she served a resignation of 7 days. In her view, she gave the 7 days out of courtesy because she was even entitled to just leave because the harassment amounted to unfair constructive termination of her 10 years employment.

22. Rw1 on the other hand denied the alleged harassment and accused the second claimant of arrogance and of service of a shorter notice than provided under her contract. He further contended that the claimant never even served through the 7 days notice and never handed over her keys which forced the employer to break into her desks. He further contended that the company was thrown into a spin after the second claimant deserted without a proper notice. He therefore denied the alleged constructive termination and accused the second claimant of breach of the contract by deserting without notice.

23. After careful consideration of the evidence and submissions, I agree with the Respondent that the second claimant was to blame for terminating her services. Admittedly, she sought permission and after being denied, she defiantly went away and returned without any apology. That was gross misconduct of absenting herself from her work place without permission, and insubordination contrary to section 44(4)(a) and (e) of the Act and the employer was entitled to dismiss her summarily but the employer only served her with a warning letter. Consequently, I find and hold that the second claimant had no basis to consider the warning letter as constructive termination. It is now well settled that constructive termination of employment occurs where the employer conducts himself in a manner that prevents the employee from discharging his mandate or commits a repudiatory breach. In this case, the employer did nothing to prevent the employee from discharging her obligations under the contract.

24. Finally, the first and third claimants were the last to leave. To begin with, it is a fact that they were transferred to the Westlands Branch from the Head Office at Milimani. Rw1 alleged that the said claimants were reluctant to go to the new offices and they only went there after disciplinary action was threatened. That after relocating, they poorly performed their filing and became uncooperative and arrogant to their seniors, and complained about lack of food, drinking water and office cleaner which were available at the Head Office. As a result, they were served with termination notice of one month.

25. The claimants admitted to raising the complaint with the management about lack of water and cleaner at the new office. They however denied the alleged poor filing and misconduct. They blamed the poor filing on the staff who disarranged the accounting documents during the relocation exercise. The first claimant blamed his termination on his request for paternity leave and for raising the grievances on behalf of employees in the new office. The third claimant in addition, contended that she was terminated because she was pregnant citing a new circular which was published directing employees to serve 2 months notice of intention to proceed on maternity leave.

26. After careful consideration of the evidence and submissions, I find that the respondent failed to follow a fair procedure before terminating the first and third claimants' services for the alleged misconduct. Under section 41 of the Employment Act, before terminating the

employee's contract on account of misconduct, poor performance or physical incapacity, the employer must explain to the employee, the reason for which termination is being considered and thereafter invite the employee and another employee or union official of his choice to air their representations for consideration before the termination is decided. In this case, the claimants were served with a notice of termination citing reasons but they were never accorded a chance to defend themselves as provided under section 41 above. That state of affairs meant that the claimants were condemned unheard and it rendered the termination unfair within the meaning of section 45 of the Act. It was made more unfair because even Rw1 never proved the reasons for the termination, that is, that the claimants were to blame for the poor filing system and that they acted arrogantly. He gave hearsay evidence in that respect by alleging that the claimants were disrespectful to the Managing Director and other senior staff to the extent of refusing to give accounting reports when requested and instead asking the concerned officers to go for the documents at the Westlands office.

**Reliefs**

27. In view of the finding that the first and the third claimants were unfairly terminated, I award each one 6 months salary compensation for unfair termination. In granting the said compensation I have considered the claimants' long service and the fact that they did not contribute to the termination through proven misconduct. The second and fourth claimants are however not entitled to compensation because their services were not unfairly terminated. They are also not entitled to salary in lieu of notice for the same reason.

28. The claimants will not get the prayer for severance pay because their termination was not on account of redundancy. Likewise the claim for service charge is dismissed because, although the first, second and third claimants worked through the months claimed, no evidence was tendered to show how the sums claimed were arrived at.

29. The claim for paternity leave by the first claimant is dismissed because it has been proved by documents that he was paid for the said leave. The second claimants claim for accrued leave on 14 days has not been substantiated by evidence and it is dismissed. Indeed, she admitted in evidence that due to pressure of work the workers used to sell their leave days. The claim for accrued leave for 2011/2012 is also dismissed, as it was not prosecuted by evidence. It is clear on record that Cw2 never raised the issue of annual leave in her testimony in court or in her written statement.

30. The second claimant will not get her salary for January 2012 because she never served one month notice before terminating her contract through resignation. She admitted that she only served 7 days' notice and the evidence by Rw1 that she never even worked through the 7 days' notice period was not contested. The third claimant will however get her salary for August 2012 as prayed because it has been admitted by Rw1.

31. The third claimant's prayer for General damages for discrimination on ground of pregnancy is dismissed for lack of evidence that she was indeed terminated on ground of pregnancy. The grounds cited in her termination letter were clear and they did not include pregnancy.

32. Finally, the claim for overtime, rest days and public holidays worked is dismissed for want of evidence.

**Conclusion and Disposition**

33. For the reasons that the second and fourth claimants were not unfairly terminated and that none of the reliefs claimed by them have been proved, their claims are dismissed with costs. However I enter judgment for the first and third claimants against the respondents jointly and severally in the following terms:

**(a) First Claimant**

Compensation for unfair termination.....273,000

**(b) Third Claimant**

Compensation for unfair termination.....275,100

Salary for August 2012.....45,850

**320,950**

34. The first and third claimants will have costs plus interest at court's rates from the date hereof. The said sums shall be paid subject to the relevant statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 28th day of September 2018**

**ONESMUS N. MAKAU**

**JUDGE**