



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1393 OF 2010

(Before Hon. Lady Justice Maureen Onyango)

ROBERT INDIAZI.....CLAIMANT

VERSUS

TEMBO SACCO LIMITED.....RESPONDENT

JUDGMENT

The Claimant sued the Respondent for unfair, unreasonable, forced and compulsive termination of employment and seeks the following reliefs:

1. A declaration that the Claimant's services were unfairly terminated and that the Respondent do pay the maximum compensation of 12 months' salary for unlawful termination of the Claimant's employment services.

2. A declaration that the resignation be found to have been constructive dismissal and for unconditional reinstatement without loss of benefits, position or status.

3. 3 months' salary in lieu of notice 216,682.17

Basic +House Allowance + Travel Allowance

$(48,047.93 + 13,816.80 + 10,362.62) \times 3$ months

Accrued salary in arrears from November 2009 433,564.34

to April 2010

Basic +House Allowance + Travel Allowance

$(48,047.93 + 13,816.80 + 10,362.62) \times 6$ months

4. Accrued outstanding leave of 145 days 414,097.70

$(145 \text{ days} \times 8 \text{ hours} \times (48,047.97 + 13,816.80))$

173.3 Average Hours per year

5. Accrued outstanding leave travelling allowance 49,763.94

@ 20% of Basic salary per annual leave of 28 days

$(145 \text{ days} \times 9,609.59)$

28 days per year

6. Salary increment arrears @ 7% of basic salary 18,859.98

From July 2009 to April 2010 (3,143.33 x 6)

7. Severance pay @ 21 days per each year of service 645,764.71

[T.E.A. of 2007, Section 40 (10 (8))]

21 days x 8 hours x 8 years x 48047.97

173.3

8. Yearly bonus for 2009 22,500.00

9. Yearly honorarium for year 2009 20,000.00

10. 12 months maximum for unfair termination

(48,047.97 + 13,816.80 + 10,367) x 12 866,728.68

Total 2,687,761.30

11. Cost of the suit.

12. Any other further and better relief that this Honourable Court may deem to grant.

The Respondent through its memorandum denies the allegations and avers that the Claimant decided to resign voluntarily and seeks the following prayers:

1. A declaration that there was no constructive termination of the Claimant's employment.
2. A declaration that the Claimant cannot use the Honourable court to force an employer-employee relationship where it has completely broken down.
3. A declaration that the Claimant having resigned voluntarily is estopped from getting any terminal benefits.
4. That the Claimant is not entitled to any compensation from the Respondent.
5. That the Claimant's case be dismissed.

Claimant's Case

On 1st July 2002, the Respondent offered the Claimant employment as an Assistant Accountant which employment was to commence on 1st July 2002. The Claimant accepted and performed his duties with dedication, loyalty and due diligence which earned him salary increments over the years. He served until 18th November 2009 when he received a letter from the Respondent suspending him from work. He received another letter on 18th December 2009 extending the period of his suspension for another one month.

The Claimant avers that he received no further communication until 20th March 2010 when he received a letter from the Respondent inviting him to a meeting with the Respondent's management committee. He avers that the disciplinary meeting was hurried and he was not given sufficient time and opportunity to defend himself contrary to the Respondent's policy and rules.

He further avers that the Secretary and Chairman of the Respondent threatened that if he refused to resign, he would appear before the management committee and would be arrested and arraigned in court on trumped up charges. As such, he wrote the resignation letter dated 19th April 2010 which was acknowledged by the Respondent vide a letter of the same date, wherein the Respondent claimed to be owed by the Claimant. The Claimant responded to the letter on 29th April 2010 stating that he had been given two options of resigning and getting the tabulated benefits or summary dismissal with no pay. There was no reply to his claims. However, the Respondent's General Manager wrote to the Respondent's custodian of the provident fund and asked them to release the claimant's benefits under the provident fund.

Respondent's Case

On 14th November 2009, the Claimant authorized payment of unapproved dividends to unknown persons and subsequently the dividend file for the year 2003-2008 disappeared mysteriously. The Respondent avers that the Claimant was suspended because of gross misconduct,

which suspension was extended to allow enough time for investigations. At the disciplinary hearing, it was evident that the Claimant had been involved in the fraud and as such the board decided to dismiss him. However, the Claimant pleaded with the Respondent to allow him to resign.

Further, the Claimant had requested the Respondent's general manager to write a letter releasing his pension benefits from the provident fund as he was in dire need of the money. The Claimant has been invited to collect his certificate of service but he has never bothered to do so.

The Respondent avers that the Claimant resigned voluntarily and is estopped from pleading constructive dismissal and unconditional reinstatement. At the time of the Claimant's resignation, he owed the Respondent Kshs.1,115,648.40 from a loan facility which he had granted to himself illegally. As such the Respondent deducted all the terminal benefits that were due to the Claimant to offset the outstanding loan and the Claimant still owes the Respondent Kshs.231,099.08.

The Respondent avers that this Court lacks the jurisdiction to determine any issues on bonuses paid by an employer to the employee as it is discretionary and depends on the performance of the business and the employee. Further, the Claimant is not entitled to any of the reliefs prayed for as his dues were paid to him upon his resignation.

Evidence

CW1 **Robert Indiazi**, the claimant, testified that on 18th November 2009 he was issued with a suspension letter on the ground that he had paid unauthorized dividend to a member of the SACCO which was not true. The suspension letter did not require the Claimant to show cause and did not indicate the person who was paid the unauthorized dividends. The Claimant stated that he processed the payment as per the procedure, he gave the member a payment voucher, referred to the file and did the necessary checks. CW1 also testified that the suspension was extended for another month and that he was not paid his dues during this period.

CW1 testified that he received the letter dated 17th March 2010 requiring him to appear before Tembo SACCO Central Management Committee. He attended the meeting where he was asked to explain what happened and the procedure followed. He did not get the minutes of the Management Committee Meeting of 27th March 2010. He was asked to write a statement which he wrote on 18th November 2009. He was not called to a disciplinary hearing on account of this matter but was told to appear before the Management Committee on 19th April 2010. CW1 further testified that the General Manager, Chairman and the Secretary told him that the Management Committee had decided that he should quit his job so that they can safeguard the Respondent's assets. He was told to resign or the police would be called. He wrote the letter on 19th April 2014 to avoid arrest. The Claimant stated that he was told that he would be paid his dues. When he followed up on the matter, he was referred to Madison Insurance who paid him his employee contribution to the Provident Fund but no employer contribution was paid to him.

The Claimant stated that he was given 21 days to clear his debt. He was not paid the calculated amount of Kshs.698,597.88 as it was used to offset his debt. The Claimant testified that the amount of Kshs.495,049.82 was for the salary under suspension and accrued leave days.

Upon cross examination, the Claimant stated that he only responded to the questions asked at the meeting on 27th March 2010. He stated that he appeared for hearing before the committee but there was no quorum. The Claimant also stated that he never saw the investigations report even though the counsel for the Respondent stated that his advocate had it since 2012. He insisted that he was seeing the investigation report for the first time. He admitted that he was paid own contribution by Madison Insurance.

During re-exam, the Claimant stated that he did not sign the minutes.

RW1, **Lydia Gema Mungai** who is the CEO of Tembo SACCO and the General Manager at the time in issue, stated that the reason for the Claimant's suspension was because he was implicated in some irregularities and there was need for investigations to be carried out. The Claimant authorized the payment of a dividend to a member who had resigned. Investigations were carried out and the Claimant was called to be presented with the findings of the investigations. She stated that the Claimant's suspension was prolonged because the information that they had requested for from some government agencies took a little longer than expected.

RW1 testified that on 17th March 2010, the Claimant was summoned to appear before the Central Management Committee and was to be heard on 27th March 2010 but he failed to appear. He appeared on 19th April 2010. She stated that the Claimant was given an opportunity to be heard. The Committee decided to dismiss the Claimant but the Claimant requested to be allowed to resign, which request was granted. The Claimant wrote a resignation letter which was acknowledged by RW1 on the same day. She stated that she informed the Claimant that his dues were to be used to offset his outstanding debt. The Claimant had savings of Kshs.389,500.00 which was used to offset the loan leaving a balance of Kshs.726,148.00 to be recovered from the Claimant's dues. She further testified that due to taxation, the Claimant's dues were 495,049.00 which left a loan balance of 231,099.00 after offsetting the loan.

RW1 stated that they did not force the Claimant to resign because the other option they had was to dismiss him summarily. According to her, the Claimant was not entitled to any notice because he was the one who resigned.

Upon cross examination, RW1 conceded that the Claimant's suspension exceeded 30 days yet it was not conducted by the police. Further, his salary was stopped until April 2010 and that he was not paid house allowance when he was suspended. Further, RW1 conceded that the letter inviting the Claimant to the hearing did not state that it was a disciplinary hearing and neither did it state the reasons for the meeting or advise the Claimant to come with a colleague. She further admitted that the agenda for the meeting was to present the investigations report. She asserted that the meeting was not an ambush and that the Claimant did request for more time.

RW1 stated that the Claimant was not given the option to resign or be dismissed. She also stated that the Claimant did not come back to sign the minutes. She also stated that gratuity was paid to the date when pension started and the Claimant was on pension. RW1 did not have the

documents to prove that the Claimant had 122 days instead 145 days.

Upon re-examination, RW1 stated that the disciplinary meeting was held on 19th April 2010 and not in March. Further, she stated that the matter was reported to the police but the Supervisory Committee took over the investigations. She also clarified that the delay was because they were waiting for Registrar of Person's confirmation on IDs that were used to withdraw the money that was paid irregularly. Further, that the leave days were reconstructed from the Claimant's personal file.

Claimant's Submissions

The Claimant submitted that he was coerced into resigning and never did so willingly. Further, he was not given a hearing as required by law. He relied on the case of *Pitus Omeri v Bob Morgan Services Limited [2013] eKLR* where the court relied on the case of *Bartholomew Wanyama Vs Moses Gitari & 2 Others (Industrial Court Cause No. 973 of 2011)* in which it was observed as follows:

“An employee on suspension has a legitimate expectation that at the very least, they will be afforded an opportunity to defend themselves against any adverse findings that may arise from investigations carried out during their suspension.”

The Claimant relied on the case of *Henry Ochido vs. NGO Co-ordination Board [2015] eKLR* to submit that there was no good faith in the Respondent's actions who were hell bent on getting rid of the Claimant at all costs.

The Claimant submitted that it was clear by refusing to reinstate the Claimant within 30 days of his suspension, summoning the Claimant to a meeting which turned to be a disciplinary hearing, ambushing him with allegations, not sharing the findings of the investigations in advance with the Claimant and tabling the option to resign over summary dismissal, the Respondent had made the continued employment of the Claimant untenable. That it was not clear why the Respondent readily accepted the resignation of an employee who was facing serious disciplinary issues. He further relied on the case of *Henry Ochido vs. NGO Co-ordination Board [Supra]* where the court observed as follows:

“...Constructive dismissal or discharge has been defined by the Court in *Nathan Ogada Atiagaga versus Davis Engineering Ltd. Cause No.419 of 2014* as follows: Constructive dismissal, occurs when an employee resign because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to force the employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge...

Due to the conduct of an employer that make the work environment intolerable, the employee is thus forced to tender his resignation. As submitted by the Petitioner in the case of *Emmanuel Mutisya Solomon versus Agility Logistics, Cause No. 1448 of 2011*, and the basics of a constructive dismissal can be described as,

... Situation in the workplace, which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee to such an extent that the employee has no other option available but to resign. The concept of constructive dismissal is underpinned on the notion that there is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or highly likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Breach of that implied term will entitle the employee to treat him or herself as wrongfully dismissed.

The intolerable conditions set by the employer are of the nature that the continued employment of employee is not tenable and he has to resign. Thus by the conduct of the employer there is a fundamental breach of the contract of employment, such breach has no reasonable cause, and such conduct has severely damaged the employment relationship. Such are matters that an applicant, Petitioner or claimant must address when claiming constructive dismissal.”

It is the Claimant's submission that the arbitrary forced termination by resignation from employment used by the Respondent culminated in his wrongful and unprocedural dismissal, was contrary to the law and an infringement on the Employment Contract, the applicable employment laws and Constitutional rights of the Claimant. The Claimant relied on the case *Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR* where Mbaru J. issued the criteria that employers should use when stating the reasons for termination.

The Claimant submitted that the dismissal procedure was legally flawed and therefore unprocedural. No lawful reasons for the termination was given and as such the Respondent has failed to prove that any issues warranting dismissal existed at the time of termination. The Claimant relied on the case of *Nicholus Muasva Kvuva v Farmchem Ltd [2012] eKLR* where Ongaya J outlined the dismissal procedure that an employer should undertake.

The Claimant relied on section 44 of the Employment Act 2007 to submit that the Respondent has failed to adduce evidence that proves on a balance of probability that indeed the Claimant had acted in a way to warrant termination of his employment services.

The Claimant relied on section 45 of the Employment Act 2007 to submit that the Respondent did not follow a fair dismissal procedure and that the manner, timing and reasons for the constructive termination of the Claimant's employment was unfair.

The Claimant urged the court to adopt the decision in the case of *Frederick Were vs. MK. Jeffrey's Hauliers [2013] eKLR (Cause No. 1985 of 2012)* where the court was of the opinion that an employee could claim compensation for unfair termination. He further relied on the cases of: *Joseph Sitati versus Kenya Ports Authority 2010 eKLR and Universities Academic Staff Union versus Masinde Muliro University (Cause no. 379 of 2010-unreported)* and *Moses Kaunda Moro v CMC Motors Group Ltd [2013] eKLR* where the court awarded full

compensation because there were no lawful or justified reasons for termination.

The Claimant submits that there was good reason for the court to award the Claimant damages as the Claimant did not pay his terminal dues.

Respondent's Submissions

The Respondent submits that it complied with the procedural requirement of **section 41 of the Employment Act 2007**. The Respondent also submits that it has proved beyond reasonable doubt that it conducted investigations into the allegations against the Claimant, produced an investigation report and, after hearing the Claimant, established that the Claimant was guilty of fraud and theft and it would have been justified to dismiss the Claimant summarily under section 44.

The Respondent submits it has been able to prove that it had a valid reason that entitled it to terminate the Claimant's employment and had set in motion a fair and rigorous disciplinary procedure under **section 45 of the Employment Act**

The Respondent submits that it gave the Claimant notice, investigations were conducted and a report produced, a hearing was conducted and the Claimant was found to have committed fraud and theft and thus liable for summary dismissal. The Respondent did not set any intolerable work conditions for the Claimant and instead allowed him resign. As such there was no constructive dismissal.

The Respondent submits that under section 47(5) of the Employment Act the employee has the burden to prove unfair termination/dismissal while the employer has the burden to prove justification of termination. The Claimant herein has failed to prove constructive dismissal since his resignation was justified and furthermore the employer had sufficient grounds to dismiss him. On the other hand, the Respondent has proved that the Claimant committed fraud by authorizing payment of dividends to a member who resigned in 1997, a fact that was admitted by the Claimant during cross examination. The Respondent further submits that from the evidence adduced in court, the Claimant has failed to prove his case and as such his claim should be dismissed with costs.

Issues for Determination

1. Whether the Claimant was coerced into resigning and if so, whether his employment was unlawfully and unfairly terminated.
2. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant was coerced into resigning and if so, whether his employment was unlawfully and unfairly terminated.

The Claimant submitted that he was coerced resigning and never did so willingly. Further, he was not given a hearing as required by law. He relied on the case of *Pitus Omeri v Bob Morgan Services Limited [2013] eKLR*. The Respondent submits that the Claimant has failed to prove constructive dismissal.

In the case of *Edwin Beiti Kipchumba v National Bank of Kenya Limited [2018] eKLR* the court defined constructive dismissal as follows:

*“What amounts to constructive dismissal? In **Industrial Court at Nairobi, Cause Number 611 [N] of 2009 between Maria Kagai Ligaga v Coca Cola East & Central Africa Limited**, the Court held that constructive dismissal occurs where the Employer's behaviour is so intolerable, that it makes it considerably difficult for the Employee to continue working. The Employee initiates termination, believing himself, to have been fired. The Employer is deemed to no longer be interested in honouring the terms of the contract of employment. The Employee must demonstrate that the Employer has engaged in repudiatory breach. The Court must be persuaded that the Employee has reason to resign. Employer's actions need not be coercive, threatening or in the nature of duress. The Court in the above decision found the Employee, who had serially been transferred from one country and region to another; who was never given an opportunity to settle down by her Employer and make career progression; and who resigned involuntarily, to have been constructively dismissed. The Employee was granted damages for wrongful dismissal. The decision was upheld in **Court of Appeal Civil Appeal Number 20 of 2010, Coca Cola East & Central Africa Limited v. Maria Kagai Ligaga [2015] e-KLR.**”*

From the Respondent's minutes of 19th April 2010, the findings of Agenda 3 were as follows:

“The Board is of the opinion that Mr. Robert Indiazi had not offered satisfactory explanations in response to the investigations findings. The Secretary put it to Mr. Robert Indiazi that as per the report and the evidence at hand he had been found guilty of fraud, forgery and theft from the society. The verdict of which as per the Tembo Human Resource Policy he was supposed to be summarily dismissed. On hearing this Mr. Robert Indiazi requested to be allowed to resign voluntarily and requested that was granted.

The executive board members then took the opportunity to advice Mr. Robert Indiazi on the need to uphold integrity as a value in his life and wished him well in his future endeavours.”

From the said minutes, it is clear that the respondent communicated the decision to summarily dismiss the claimant after finding him guilty of fraud, forgery and theft and that it is the claimant who requested to be allowed to resign instead of being summarily dismissed. I find no proof of constructive dismissal.

Since the claimant requested and was allowed to resign instead of being dismissed, he cannot complain about the process at the hearing as he did not allow it to proceed to its logical conclusion. I therefore find no proof of unfair termination as the claimant's employment with the respondent was terminated by way of his resignation.

Whether the claimant is entitled to the reliefs sought

The claimant is not entitled to salary in lieu of notice since he resigned without notice. His undated letter of resignation received by the respondent on 19th April 2010 states that the resignation is with effect from the same date. The letter does not mention any resignation notice. In effect therefore it is the claimant who should have paid the respondent pay in lieu of notice. He is thus not entitled to the prayer.

The claimant was paid accrued salary amounting to Kshs.415,790.17 as is reflected at Appendix LM3 of the respondent's bundle of documents. He is therefore not entitled to the same.

The claimant was also paid accrued outstanding leave of 122 days. In his evidence he did not explain how the 145 days he prayed for accrued as against the respondent's tabulation of 122 days as tabulated in Appendix LM3. I find the prayer for accrued leave not proved and dismiss the same.

The claimant did not adduce any evidence in support of leave allowance at 20% of basic salary. The same is dismissed as it has not been proved.

The claimant stated during the hearing that 7% salary increment was paid. He did not adduce any evidence in support of his prayer for yearly bonuses and the same is dismissed. He further did not adduce any evidence in support of the prayer for yearly honorarium which is accordingly dismissed. The prayer for compensation for unfair termination is not payable as the claimant was not unfairly terminated.

In the end the whole claim fails, with the result that the entire claim is dismissed. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE