



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1143 OF 2014

SILAS MWANDIHI SANYA.....CLAIMANT

VERSUS

KENINDIA ASSURANCE CO. LTD.....RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim lodged with the Court on 10 July 2014, Silas Mwandihhi Sanya (Claimant) alleged constructive dismissal and underpayment of wages.
2. Kenindia Assurance Co. Ltd (the Respondent) denied underpaying the Claimant and asserted that the Claimant resigned voluntarily.
3. The Cause was heard on 24 October 2018 when the Claimant testified and closed his case. The Respondent opted not to lead any evidence.
4. The Claimant filed his submissions on 15 November 2018 (6 days late) while the Respondent filed its submissions on 30 November 2018.
5. The Court has considered the pleadings, evidence and submissions, and condensed the Issues for determination under the themes herein under.

Constructive dismissal

6. The test for what amounts to *constructive dismissal* was set out by the English Court of Appeal in *Western Excavating (ECC) Ltd v Sharp* (1978) IRLR 27.
7. The Claimant resigned through a letter dated 12 July 2012 but did not set out any reasons in the letter.
8. During testimony however, the Claimant stated that the circumstances which forced him to quit were that he was appointed as a subordinate staff deployed to the *Filing section* but was instead added additional functions (clerical and messengerial) without adequate remuneration and when he questioned the added functions, the Deputy Head of Department asked him to resign as *there were millions of Kenyans who could perform the duties*.
9. According to the Claimant, he was forced to perform the additional duties and also go back to *Filing*, and that the additional duties made him lag behind in the *filing tasks*.
10. The Respondent did not bring forth any evidence to challenge or rebut the testimony of the Claimant on the additional functions but took the position, during cross examination that as a subordinate staff, the Claimant could perform any suitable functions allocated to him by his supervisors.
11. But to show otherwise, the Claimant had in his testimony drawn the attention of the Court to various *collective bargaining agreements* in place to show that the functions he was performing were reserved or meant for *Clerical staff grade II* and that he addressed a complaint to his Union in 2011 to intervene with the Respondent.
12. From the un rebutted evidence on record, the Court is satisfied that although appointed as a *subordinate staff*, the Claimant was assigned additional functions and duties meant to be performed by *clerical staff*, without adequate remuneration or consultations and that he raised complaints in the course of employment on the additional duties.

13. The Court therefore finds that the Respondent breached section 10(5) of the Employment Act, 2007.

14. In consideration of the above and finding comfort in the persuasive authorities of *Hilton v Shiner Ltd* (2001) IRLR 727; *Land Securities Trillium Ltd v Thornley* (2005) IRLR 765 and *Milbrook Furnishing Industries Ltd v McIntosh & Ors* (1981) IRLR 309, the Court reaches the conclusion that the Claimant was justified to resign and plead constructive dismissal.

Compensation

15. For the constructive dismissal, and considering that the Claimant served the Respondent for about 6 years, the Court would award the equivalent of 6 months gross wages as compensation.

16. The Claimant's wages at time of separation as admitted by Respondent in submissions was Kshs 15,970/-.

Underpayments

17. The Claimant sought underpayments for the years 2006 to 2012 and computed the same as Kshs 636,508/- (inclusive of leave allowance).

18. In the view of the Court, *underpayments* constitute a *continuing injury* and in terms of section 90 of the Employment Act, 2007, a cause of action for the same ought to be instituted within 12 months of cessation. The cessation in this case was on 12 July 2012 when the Claimant resigned.

19. This Cause was lodged in Court after more than 24 months after separation and therefore this head of claim is statute barred.

Leave

20. The Claimant sought leave allowance totalling Kshs 40,127/-. This was included in the computations sent to the Respondent on 18 December 2012 and was shown to range from 2007 to 2012.

21. In light of clause 14 in the collective bargaining agreement, section 10(3) & (7) as read with section 74 of the Employment Act, 2007, the Court will allow this head of claim.

Conclusion and Orders

22. The Court finds and holds that the Claimant was constructively dismissed and awards him

(a) Compensation	Kshs 95,820/-
(c) Leave	Kshs 40,127/-
TOTAL	Kshs 135,947/-

23. Claimant to have costs on half scale for having filed submissions late.

Delivered, dated and signed in Nairobi on this 7th day of December 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Munoru, Research Economist, Banking, Insurance and Finance Union

For Respondent Ms. Atieno instructed by Ochieng Opiyo & Co. Advocates

Court Assistant Lindsey