



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1569 OF 2014

(Before D. K. N. Marete)

ANYTON MBITHI WILLY.....CLAIMANT

VERSUS

CHOKA SUPPLIES LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 8th September, 2014. The issues in dispute are therein cited as;

- *Refusal to pay terminal dues and Gratuity to Anyton Mbithi Willy the above named claimant.*
- *Refusal to pay leave days accumulating to six months.*
- *Refusal to pay monthly salary of the month of July 2014.*
- *Unfair and constructive dismissal of Anyton Mbithi Willy.*

The respondent in an Amended Respondent's Defence and Answer to the Claimant's Memorandum of Claim and Counter Claim dated 5th September, 2016 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times, he was employed by the respondent until it constructively and unlawfully dismissed him without notice and using abusive language.

The claimant's further case is that his terms and conditions concerning contract of service for casual workers are set out in the Employment Act, 2007. He was dismissed on 22nd July, 2014 with regard to due process. He was not paid his salary, was denied leave and terminal dues. His benefits were withheld as hereunder;

- a) *Salary due from the month of July, 2014 amounting to Kshs.15,000.*
- b) *Unpaid leave accumulating to six months*
- c) *General damages for unlawful and constructive termination of service.*

He prays as follows;

- i) *Salary due for the month of July, 2014 is paid to the claimant.*
- ii) *Interest on (i) above at commercial rate as published by Central Bank of Kenya from when they became due.*
- iii) *The respondent does pay the unpaid leave to the claimant.*
- iv) *The respondent to pay costs of this claim with interest at court rates.*

The respondent's case is a denial of the claim.

She further denies a case of wrongful and unfair termination as pleaded or at all. Her contention is that there is unlikely to be any evidence in support of these allegations.

The respondent's other case is that the suit is fatally defective and that she shall in the first instance move the court to have the same struck out.

The respondent's other case is that the plea of unlawful dismissal is a fabrication as the claimant really voluntarily absconded duty the whole of July therefore falsifying his claim. She puts it thus;

- a) *The claimant allegations of unlawful termination is false and the Claimant is put to strict proof thereof.*
- b) *That claimant voluntarily abandoned his duties for the whole month of July and the Respondent did not know his whereabouts only for him to appear on 22nd July, 2014.*
- c) *The claimants allegations that he was denied leave is absurd and untrue and the Respondent wish to aver that at no time did the Claimant seek leave and denied as alleged and in any event the Claimant is put to strict prove thereof.*
- d) *That the claimant suit is an abuse of the court process and the Respondent shall during the hearing affirm the same.*
- e) *The claimant was fully paid in accordance with the statutory provisions and the claimant's claim of unpaid salary for the Month of July, 2014 is baseless.*
- f) *The Respondent further wish to state the claimant abandoned his duties and failed to comply with the terms of his contract.*
- g) *The claimant suit herein is premature and ripe for dismissal by this Honourable Court as the same raises no triable issues to be considered by this court.*

The respondent files a counter claim arising out of breach of contract occasioned by the claimant absconding duty. He merely left work and did not serve notice as stipulated in the service contract therefore occasioning loss to the respondent.

She prays as follows;

- 1) *Special damages of Kshs.15,000.00*
- 2) *General damages for breach of contract*
- 3) *The cost of this suit*

The matter came to court variously until the 15th October, 2018 when the claimant in the absence of the respondent agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Whether there was termination of the employment of the claimant by the respondent?
2. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
3. Whether the claimant is entitled to the relief sought?
4. Is the respondent's case for counter claim sustainable?
5. Who bears the costs of this claim?

The 1st issue for determination is whether there was termination of the employment of the claimant by the respondent. The claimant in his written submissions dated 19th October 2018 reiterates his case of constructive and unlawful termination of employment. He therefore so justifies his claim.

Of concern to this court is the absence of proof of the claimant's case. His witness statement mentions a service contract dated 1st January, 2014 which he does not adduce in evidence. The claim is enjoined with the following annextures;

1. Demand letter dated 18th August, 2014.
2. Copy of NSSF provisional member statement of account for the period 1st November, 2009 to 30th June, 2014.
3. NHIF member data summary indicating contribution on various months between March, 2004 to December, 2011.

4. Various cash/cheque deposit vouchers into the claimant's account.

These establish an employment relationship but are not evidence of unlawful termination of employment.

The respondent in her witness statement filed on 24th July, 2013 counters the claimant's case by the evidence of Michael Mungi Karanja. This restates the respondent's case as presented and pleaded.

The claimant falls short of proving his case on a balance of probabilities. It must therefore fail. I therefore find a case of no termination of the employment of the claimant by the respondent.

In the absence of a case of unlawful termination of the employment of the claimant by the respondent, issues No.s 2 and 3 fall by the wayside. They are not worth of determination.

The 4th issue for determination is whether the respondent's case for counter claim is sustainable. This is dependent on whether the respondent has indeed proven a case of absconding duty by the claimant. I hold that this has not been done. It merely remains a possible allegation. The fact that the claimant has not proved a case of unlawful termination does not necessarily amount to the respondent's case of his absconding duty. In any event, this matter is only won on a balance of probabilities. The counter-claim therefore fails.

I am therefore inclined to dismiss the claim and counter claim with orders that each party bears their costs of the same.

Dated and signed this 29th day of November 2018.

D.K. Njagi Marete

JUDGE

Delivered and signed this 3rd day of December 2018.

Maureen Onyango

PRINCIPAL JUDGE

Appearances

1. Mr. Omondi holding brief for Wambugu Instructed by Philip Henry & Associates Advocates for the claimant.
2. No appearance for the respondent.