



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2498 OF 2012

(Before D. K. N. Marete)

JONATHAN PATRICK ONDIEKI NYANGAU.....CLAIMANT

VERSUS

NAIROBI CITY WATER & SEWERAGE CO. LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Memorandum of Claim dated 6th December, 2012. The issue in dispute is therein cited as;

“The unlawful forced resignation of the claimant”

The respondent in a Respondent’s Amended Written Statement of Response dated 23rd June, 2013 prays that it be dismissed with costs.

The claimant in a Claimant’s Response to the Respondent’s Amended Written Statement of Response dated 27th June, 2013 answers the amended defence.

The claimant’s case is that on or about the 18th May, 2004, the respondent took over the services of the claimant from Nairobi City Council where he had worked since May, 1972 in the position of Accountant Grade 5 drawing a monthly salary of Kshs.49,108.00 inclusive of house allowance. He had risen through the ranks to the position of Management Officer, a position he held as at 4th October, 2005 when he was forced to resign.

The claimant’s further case is that in 2004/2006, he experienced long term sickness that kept him in and out of hospital but did not compromise his performance: his record of employment was exemplary and blemish free.

The claimant’s other case is that on or about the 6th March, 2006, he had fully recovered from his medical condition and was declared fit to resume work with the respondent. He had diligently, committedly and honestly served the respondent throughout his six (6) year stint of service and would have been able, ready and willing to continue such service were it not for his forced resignation imposed on him the respondents Managing Director. This was on learning that he was confined at Bomet Police Station on false charges which charges were soon thereafter withdrawn under section 87A of the Criminal Procedure Code. He had by this time steadily risen to the position of Accountant Grade 5 in the respondent establishment. This communication came by way of a letter of appointment dated 26th August, 2005. Then, he earned Kshs.49,108.00 as salary.

The claimant avers that he variously made efforts to rescind his resignation but his efforts were thwarted by the respondent. He puts it thus;

13. The claimant avers that the said rejection of the withdrawal of his forced resignation was malicious and made without due process and consideration of the circumstances the forced resignation.

He prays as follows;

1. Declaration that the Claimant was wrongful forced and coerced into resigning from the Respondent’s employment.

2. Reinstatement into the Respondent’s employment without any loss of benefits.

3. In the alternative compensation for the forced unlawful resignation.

4. *Payment of all the lawful terminal benefits set out in paragraph 8(ii)*

5. *Costs of this suit and interest thereon*

6. *Interest on the sum awarded at court rates*

The respondent's case is a denial of the claim. This is as follows;

- The respondent's denies that the claimant had a six year stint of service. On the contrary, he had only served for less than two years at the time of departure.
- The respondent avers that by a letter dated 4th October, 2005, the claimant tendered his resignation from employment citing health reasons.
- He was paid his terminal dues as requested.
- The respondent came to learn later that the reason for the claimant resignation was occasioned by panic and fear of losing his benefits should the respondent get wind of his indictment on a charge of murder. This was not bailable then. She puts it thus;

7. It should be noted that at that time, the offence of murder was not bailable and the Claimant could have been dismissed from employment under the Respondent's employment Rules enshrined in a document called HUMAR RESOURCES POLICIES AND PROCEDURE MANUAL that governed all the Respondent's employees (see Appendix marked NCWSC 5).

- The claimant launched an appeal against lack of reinstatement or revocation of resignation but this was declined. She again puts it thus;

9. The Respondent states that the heading of the letter dated 7th May 2012 "RE: SUMMARY DISMISAL" (referred to as Respondent 4 above) was a typographical error and should be disregarded and that the body and substance of the letter clearly indicates that the Respondent had merely refused the Claimant's request to reinstate him.

10. The Respondent further states that the Claimant's employment with it ceased on 4th October, 2005 when he voluntarily resigned from the Respondent's employment and this suit is therefore time barred by virtue of section 90 of the Employment Act CAP. 11 Laws of Kenya.

The claimant in a response to the Respondent's Amended Statement of Response comes out as follows;

4. The claimant further states that, the Managing Director of the Respondent coerced the Claimant to resign from his employment or risk losing all his benefits. The Managing Director of the Respondent sent the Claimant's wife to Bomet Police Station where the Claimant had been remanded to convince the Claimant to write a resignation letter in which he was to ask the Respondent to pay him the Claimant's benefits.

5. The Claimant also states that out of desperation and fear of losing his benefits, the Claimant did as the Managing Director of the Respondent had ordered him to do.

He adds that;

- His resignation was on the instigation of the Managing Director
- It was based on fear of losing his terminal benefits.
- At the time of his arrest, he had not been charged with any offence of murder.
- He resigned out of coercion from the respondent.
- The letter dated 7th May, 2012 was a summary dismissal and no more. The respondent's letter headed SUMMARY DISMISSAL was written on 7th May, 2012. To date, the said "typographical error" has never been corrected.

The matter came to court variously until the 18th 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 the claimant resignation was due to coercion of the respondent?

2. Whether the claimant is entitled to the relief sought?
3. Whether the claimant summary dismissal is justified?
4. Who bears the costs of this cause?

The 1st issue for determination is whether the claimant resignation was due to coercion of the respondent. The claimant's in his written submissions dated 2nd March, 2017 reiterates his case of forced resignation. It is his case that he was coerced into early retirement and on appeal against this, he was summarily dismissed.

The claimant sought to buttress his case by relying on the authority of **Peter Mureithi Ngata vs. The Hon. Attorney General Elrc Cause No. 716 of 2011** where the court observed as follows;

(a) The dismissal of the Claimant from service by the Judicial Service Commission was declared wrongful and unlawful.

(b) The Claimant was re-instated to this employment as a Senior Resident Magistrate with effect from 18th June, 2001 under the current terms and conditions of service for that office save that period of the said unlawful dismissal shall be deemed as unpaid leave.

He also relied on the authority of **Silas Rukungu Karanja vs. Teachers Service Commission Industrial Cause No. 567 of 2012** where Ongaya, J. at page 41 observed as follows;

“In the instant case, the Respondent in discriminating the Claimant behaved in a high handed malicious, insulting and oppressive manner and flagrantly breached express statutory provisions that the Claimant was entitled to.”

The respondent did not file any written submissions but chose to rely on her pleadings and other filings on record.

Overall, this matter tilts in favour of the respondent's case. This is because the claimant has not in any way adduced any evidence in support of his case for coercion in his tender of a letter of early retirement. It is trite law that he who alleges must prove. This is illustrated by section 107 and 109 of the Evidence Act, Chapter 80, Laws of Kenya as follows;

107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

Again,

109 “The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

I must admit that the claimant was an experienced officer. He had worked from 1972 to 2005. His allegation of a forced resignation by a letter dated 4th October, 2005 is mostly unusual and unnatural. This is the 21st century and any reasonable person cannot claim intimidation into drawing or signing documents they did not know or believe in.

It was always the claimant's burden to prove his case of forced or induced retirement. He has not. The long and short of this is that the claimant's case falls by the way side for want of proof. I therefore find a case of no pressure or coercion in the early retirement of the claimant. And this answers the 1st issue for determination.

On a finding of no coercion in the early retirement of the claimant, issues No.s 2, and 3 also fall by the wayside. They are not necessary for determination.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same. And this rests all the issues for determination and therefore the claim.

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. Mureithi holding brief for Ong'uti Instructed by M/s J. A. Guserwa & Company Advocate for the claimant.
2. Mr. Bwire holding brief for Kioko instructed by MNM advocates LLP for the respondent.