



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 357 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

RICHARD NYAUNDI MARASI CLAIMANT

-Versus-

THE BOARD OF MANAGEMENT, GETURI

MIXED SECONDARY SCHOOL RESPONDENT

JUDGMENT

The Claimant filed this suit vide his Memorandum of Claim dated 22nd September 2015 in which he alleges that he was indefinitely suspended by the respondent on 17th July 2015. He avers that the indefinite suspension constituted constructive dismissal and seeks the following orders-

- a) Declaration that the Indefinite Suspension constitutes and/or mounts to Constructive Summary Dismissal/Termination of the Claimant by the Respondent.
- b) Declaration that the Dismissal, was Irregular, Illegal, Unlawful and amounted to Unfair Labour Practices and contrary to the provisions of **Section 41 of the Employment Act, No.11 of 2007.**
- c) Payments of **Kshs.2,343,401.80/-** only, (details in terms of paragraphs 16 hereof).
- d) Interests at Court rates (14%) Per Annum.
- e) Costs of the suit/Proceedings be borne by the Respondent.
- f) Any such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.

There appears to be no defence filed by the Respondent on record. However the Respondent filed witness statements and bundle of documents.

The case was heard on 16th June 2016 when the claimant testified and on 19th September 2016 when the Respondent's evidence was taken. The parties thereafter filed and exchanged written submissions.

Claimant's Case

The Claimant testified that he was first employed by the Respondent in 2005 and was later issued with an appointment letter dated 9th January 2006. He was appointed as school clerk at a salary of Kshs. 2000 per

month. The appointment was on probation for 2 years. The Claimant testified that he was never confirmed although he requested for confirmation of his employment severally.

The Claimant testified that on 13th July 2015 he was issued with a letter of discipline requiring him to appear before the board the following day on 14th July, 2015. He states that the letter did not specify the charges against him. He states that after the Board meeting he was issued with a letter of indefinite suspension when he asked to be informed of the charges against him.

The Claimant testified that after the suspension he went to the Labour Office who informed him that he was being underpaid by the Respondent and tabulated his terminal dues. He further testified that he was not paid house allowance.

Under cross examination the Claimant stated that he complained to the board about underpayment both verbally and in writing. The Claimant stated that he worked under 3 principals. Mr Ogoti who worked up to 2005, the late Aaron Ariga and the current Principal Mr. Gilbert Nyabuto. He stated that his last salary was Kshs. 18,200 which was too low compared to salaries from the Ministry of Education.

The Claimant stated that Mr. Nyabuto joined the school in 2009 as Deputy and became principal upon the death of Mr. Ariga. He stated that he had a good relationship with Mr. Nyabuto from the time he was Deputy Principal. He testified that at one time he wrote a letter to the Board Chairman complaining about misuse of school property without informing the Principal although he was working under the principal.

The Claimant denied that he ever intimidated school staff. He stated he was not aware that teachers had complained that he was intimidating them and had asked for transfer. He further stated he was not aware that teachers demanded his suspension.

The Claimant stated that at one time he wrote a letter to the Labour Office on behalf of all staff but denied that the letter was abusive. He denied inciting non-teaching staff against the principal and board members. He stated that he was not aware that at the time he left office there was bad relations between him and the board and principal. He admitted that there was a time he complained that the Principal was collecting money and not issuing receipts. Another time he complained that Mr. Daniel Bosire a board member took timber from the school and returned it without being officially recorded. The Claimant denied that in 2014 during national examinations he informed the supervisor that there was a leakage of the exams. He denied that he was working for the downfall of the school.

In the written submissions filed on behalf of the Claimant it is argued that his indefinite suspension constituted unfair labour practice and violated sections 41, 42, 43 and 44 of the Employment Act. It is further submitted that the Respondent failed to comply with Article 41 of the Constitution.

It is submitted that the Claimant was entitled to reasonable remuneration commensurate with his qualifications and scope of work as accounts clerk/bursar. It was submitted that the claimant was subjected to chronic underpayments. It is submitted that the Claimant is entitled to underpayments in the sum of Kshs 1,081,755.60 made up as follows:

	Year	Monthly Salary Paid	Minimum Wage	Balance (Annual)
(i)	2005	2,000/=	9235.00	86,820/=
(ii)	2006	2,500/=	10,343/=	94,140/=
(iii)	2007	2,500/=	11,584/-	109,010.40
(iv)	2008	2,500/=	12,205/=	116,460/=
(v)	2009	3,500/=	12,206/-	104,460/=

(vi)	2010	4,000/=	13,406/=	113,112/=
(vii)	2011	6,000/-	15,104/=	109,248/-
(viii)	2012	8,500/=	17,083/=	102,996/=
(ix)	2013	8,500/=	19,474/=	131,688/=
(x)	2014	15,000/=	19,474/=	53,688/=
(xi)	2015	16,800/=	21,811.10	<u>60,133/=</u>
TOTAL				<u>1,081,755.60</u>

It is further submitted that the Claimant was entitled to house allowance of Kshs. 291,385.80 and medical allowance of kshs. 93,170 for the entire period he was in employment of the Respondent which he was never paid. It was further submitted for the Claimant that he is entitled to leave allowance of Kshs. 192,582.60, gratuity of Kshs. 287,907.40 at the rate of one months' salary per year for the 11 years that he worked for the Respondent. The Claimant further prays for 3 months salary in lieu of notice at Kshs. 78,520.20 and full compensation of 12 months gross salary at Kshs. 2,343,401.80

It is submitted that the Claimant was under sections 28, 30, 35 and 49 of the Employment Act entitled to a minimum wage inclusive of house and medical allowance as follows:

Year	Minimum Wage (Inclusive of House & medical Allowance)
(i) 2005	11,082.10
(ii) 2006	12,411.70
(iii) 2007	12,163.40
(iv) 2008	14,646.10
(v) 2009	14,646.10
(vi) 2010	16,111.20
(vii) 2011	18,111.30
(viii) 2012	20,499.70
(ix) 2013	23,363.80
(x) 2014	23,368.80
(xi) 2015	26,173.40
TOTAL	<u>196,582.60</u>

The Claimant prays for judgement against the Respondent as prayed in the Claim.

Respondents Case

The Respondent called three witnesses. RW1 GILBERT NYABUTO MOGUCHA, the Principal testified that he joined the Respondent as Deputy Principal on 24th January 2007 and became Principal on 5th May 2015. When he joined the school the Claimant was performing duties of accounts clerk. He testified that the Claimant was employed in 2005 but was issued with a letter of appointment on 9th January 2006. His designation was school clerk. He worked until 17th July 2015 when he was suspended by the Executive Board of Management (BoM) of the Respondent. The reasons for suspension was that he unprocedurally wrote letters to the BoM Chairman and third parties without notifying his immediate supervisor who is the Principal. RW1 referred to a letter dated 24th February 2014 at page 4 of Respondent's bundle which the Claimant wrote to the Chairman of BoM and copied to TSC, County Director, Kisii, County Director of Education, Kisii, but without going through the Principal. TSC advised him to write letters through the Principal.

He testified that the second reason for the Claimant's suspension was that at a Board meeting held on 26th June 2015 the Claimant was instructed to prepare payroll for salaries of June onwards as he had not been preparing any but by 17th July, 2015 when the Board met he had not done so. The third reason was that he increased salaries for himself and non teaching staff without authority from January 2015. The annual salary increment was 5% but the Claimant increased salaries by between 11% and 22%. It was further discovered that he had been paying himself house allowance without authority and without disclosing to BoM. The Claimant was further accused of inciting non-teaching staff. On 24th March 2015 the Claimant convened a meeting of non-teaching staff without authority. At the meeting some teachers and BoM members were insulted by the non-teaching staff. This caused disharmony at the school.

RW1 further testified that there was a time the Claimant went to the Labour Office claiming he was sent by non-teaching staff who denied sending him. He further testified that the Claimant used to threaten teachers and the Principal and at one time the Claimant sent an imposter to threaten him. The imposter called him and introduced himself as an officer from TSC. RW1 further testified that a senior teacher by the name Mr. Sifuna complained that some personal information in the custody of the Claimant was used by an imposter to threaten him. The information was about monies advanced to the teacher and was to be offset by his airtime allowance. After investigations it was discovered that the imposter was an auditor who had been transferred from Kisii to Homa Bay County. The imposter threatened teachers claiming he had custody of their files and information that he could use to get them dismissed. This resulted in teachers going on strike and threatening to march to TSC office.

RW1 further testified that the other reason for the Claimant's suspension was that he had gone to the Labour Office and brought a letter. The issue was the way he went for the letter. RW1 testified that the Claimant cheated him that he was going to an Mpesa shop that he operated near the school only to turn up later with the letter from the Labour Office. The Claimant used the letter to incite non-teaching staff. He also gathered members of the public at his Mpesa shop and told them that there was a crisis at the school. The Claimant did not serve the Labour officer's letter upon the principal but merely dropped it at his desk.

RW1 testified that all these actions of the Claimant caused a crisis at the school and that is why he convened the BoM meeting of 17th July 2015. He testified that the Claimant was invited and attended the meeting where he was interviewed by members of the BoM. At the meeting the Claimant admitted his mistakes and asked for forgiveness. The BoM however did not forgive him because of the crisis he had created at the school, that teachers had stopped teaching and students, parents and Parents Teachers Association (PTA) were all in a state of panic. He testified that parents threatened to storm the school and went to the school on 6th July 2015 where RW1 had to calm them down after informing them that there was a team looking into the matter.

RW1 testified that at the time of the Claimant's suspension there was no full board as the term of the Board had expired in February 2015 and a new Board had not been constituted and it is only the full Board which had powers to discipline staff and the claimant was informed of this fact in the letter of suspension. He testified that this was the reason why the suspension was indefinite to await the installation of a new Board, which was inaugurated in February 2016 and held its first meeting on 1st April 2016.

RW2 NICODEMUS KARORI testified that he works at Kisii County Government as accountant and was the BoM Chairman. He testified that he learnt about the Claimant's case when he became chairman of the BoM in February 2016 from the minutes. He testified that when the new BoM learned that the Claimant had a case pending in court it decided to stop the Claimant's half salary which he had been earning from the date of his suspension pending conclusion of his court case and a letter dated 4th April 2016 was written to the Claimant advising him about the decision of the BoM.

RW3 JULIUS OCHWANGI GETONTOGORO a support staff at the Respondent School testified that he joined the school as a cook in 2012. He testified that he worked with the Claimant who was the accounts clerk and in charge of other staff including himself and also the staff representative at the BoM. He testified that the Claimant also paid salaries for the BoM employees. He testified that there was no time that the BoM staff sent the Claimant to the Labour office to go and complain about underpayments. He stated that the staff held a meeting with the Deputy Principal after the death of the former Principal Mr. Aaron Ariga who had been ailing for some time, and agreed that the issue of salaries was presented to the Board.

RW3 testified that there was a time that a man suspected to be a witch visited the Claimant at the School and passed through the school kitchen. The man was trembling and refused to disclose his name. He testified that teachers refused to eat on that day and there was a lot of tension in the school.

In the written submissions filed on behalf of the Respondent it is submitted that the Claimant was given a hearing by the Executive Committee of the BoM before he was suspended, and that he asked for forgiveness at the meeting. It is submitted that the claimant failed to prove his allegations on a balance of probability during the hearing of this case and the case ought to be dismissed with costs.

Determination

I have considered the pleadings and evidence on record. I have further considered the written submissions filed on behalf of the parties. The issues arising for determination are in my opinion the following:

1. Whether the Claimant's suspension amounted to constructive dismissal, and if so,
2. Whether such dismissal was unfair, unlawful and amounted to unfair labour practice,
3. Whether the Claimant is entitled to the prayers sought.

1. Constructive Dismissal

The Employment Act does not define constructive dismissal nor give any guide as to what would constitute constructive dismissal. Black's Law Dictionary (9th Edition) defines constructive dismissal as:

“A termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave”

Never-the-less the issue has come up in court severally and our courts have developed general guidelines of what would constitute the same. In the case of **Joseph Aleper & Another v Lodwar Water and Sanitation Company Limited [2015] eKLR** the issue of constrictive dismissal was discussed at length by **D.K.N. Marete J.** who also considered several decisions on the subject as follows:

"The Claimants in their written submission ably make a rendition of the origins of the doctrine of constructive termination of employment and its application in our jurisdiction as hereunder;

Constructive dismissal has its roots in the law of contract under the doctrine of 'discharge by breach.' Under this doctrine, an employee was entitled to treat himself as discharged from further performance of his obligations where the employer's conduct was a

significant breach going to the root of the contract. The termination would be due to the employer's conduct. Such conduct may include unilateral reduction in pay or failure to pay the employee.

In England, constructive dismissal was given statutory clothing through the Redundancy Payments Act 1965 and later the Trade Unions and Labour Relations Act, 1974 and the same was discussed in Western Excavating (ECC) Ltd v Sharp [1978] ICR 221

This doctrine has not been given any statutory backing in Kenya and therefore we submit and agree with Justice Radido when he stated in Anthony Mkala Chitavi V Malindi Water & Sewerage Company Ltd Cause No.64 of 2012 that:

“The doctrine and principles developed in other comparative jurisdictions would be equally applicable in Kenya because of the entrenchment of a justiciable right to fair labour practices under Article 41 of the Constitution.”

In the above quoted case of Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 Lord Denning MR noted that an assessment of what was a constructive dismissal applied the ordinary 'contract test' so that a dismissal must first be established as follows:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct.”

Therefore a distinction should be made of the two facets of the definition of constructive dismissal:

- i. The employer making a unilateral alteration or breach of the employment contract to the detriment of the employee.*
- ii. The employer making or otherwise permitting working conditions of the employee to be intolerable for him to continue working.*

The second facet of this definition is in fact what was stated by Mbaru J in Emmanuel Mutisya Solomon V Agility Logistics Cause No.1418 of 2011 Justice Linnet Ndolo in Benuel Mariera V Awand Enterprises Limited Mbsa. Cause No 191 of 2013 defined constructive termination under both limbs and stated as follows:

“It is trite law that when an employer by action or omission materially breaches the contract or otherwise makes it impossible for an employee to perform his contract of employment then the contract is deemed to have been constructively terminated by the employer.”

The Claimants' circumstances fell squarely under both limbs. That is their employment contracts were unilaterally altered by the Respondent through its action of advertising their jobs under different titles and qualifications that they could not meet. The Respondent also made it impossible for the Claimants to continue offering their services to the Respondent”

The concept was also the subject of this Court's Award in **Cause Number 611 [N] of 2009 between Maria Kagai Ligaga v. Coca Cola East and Central Africa Limited [unreported]**. The Court found that constructive dismissal occurs where an employee is forced to leave his job against his will, because of his employer's conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed. The basic ingredients in constructive

dismissal are:-

- a. *The employer must be in breach of the contract of employment;*
- b. *The breach must be fundamental as to be considered a repudiatory breach;*
- c. *The employee must resign in response to that breach; and*
- d. *The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.*

In the Ligaga Award, the Claimant was transferred from Kenya to Uganda, retransferred to Kenya then to Mozambique, all within a very short period and with short notice. She was never allowed to settle in any position or market and was finally repatriated to Kenya and moved from one town to the other at considerable disruption to her family life. She resigned, and the Court found that the resignation was involuntary and amounted to constructive dismissal. The Award has since been upheld by the Kenya Court of Appeal.

In the case of **Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited [2014] eKLR** Rika J. defined the concept as follows:

The conduct by the employer must be shown to be so intolerable that it made it considerably difficult for the employee to continue working. At the heart of constructive dismissal is breach of the duty of trust and confidence. The employer's behaviour must be shown to have destroyed or seriously undermined trust and confidence. In the English Employment Rights Act 1996 and the South African Labour Relations Act Number 66 of 1995, constructive dismissal occurs when an employee terminates the contract under which he is employed, with or without notice, in circumstances which he is entitled to terminate it without notice, by reason of the employer's conduct. Although the Court is not bound by this definition, the two Statutes conform to the definition of the term given by most labour and employment law publicists.

In the present case the facts do not disclose any frustration of the claimant's contract by the Respondent. I do not find any evidence of constructive dismissal. In fact, there is no termination of employment as the Claimant was only sent on indefinite suspension on half salary as the executive BoM did not have powers to carry out disciplinary action against him and his presence in school was undesirable as he had a penchant to cause tension and disharmony as expressed in the evidence of RW1.

The second issue of whether such dismissal was unfair, unlawful and amounted to unfair labour practice must therefore also be answered in the negative having found that there was no separation in the Claimant's case. As to whether the suspension was unfair or unlawful, I find that in the circumstances of this case the Respondent had no other option to deal with the Claimant's issue than to suspend him. As is evident from the evidence on record, the Claimant appears to have entrenched himself in so much wheeler-dealing that he had become what the Employment Act at section 45(2)(b)(i) refers to as "compatibility". He had simply become incompatible to an extent that his presence in the school became synonymous with disharmony.

The final issue is whether the Claimant is entitled to the prayers sought.

The Claimant claims underpayments from 2005 to 2015. It is not clear under which category the Claimant based his tabulation of underpayments. I would categorise him as general clerk under **All Other Areas** column of the **Regulation of Wages and Conditions of Employment (General) Order** and taking into account limitation period consider only the last three years prior to filing of this suit being the period from September 2012. The salary of a general clerk under All Other Areas was Kshs. 10,301.15 from May 2012 and Kshs 13,152.50 from May 2015. He was in addition entitled to 15% house allowance. In his testimony the Claimant did not prove how much he was earning ever the years and it is therefore not possible for the court to determine whether or not he was underpaid. It is however clear that as at 2015 the

Claimant who was on a salary of Kshs. 18,200 was not being underpaid as his salary was above the consolidated minimum wage (basic plus house allowance) of Kshs. 15,125.40.

The claimant made reference to qualifications he acquired while in employment, but there is no evidence that the respondent was aware about such qualifications. In any event an employee is paid according to the work they perform and not the paper qualifications they hold. For example a clerk who holds a masters degree can not equate his worth with say a teacher who holds similar qualifications.

The Claimant further prayed for medical allowance. He did not mention anything about the medical allowance in his testimony. Even in the written submissions it is not stated how the entitlement arises. Under section 34 of the Employment Act an employer is only under a duty to provide medical treatment to employees when they fall sick. There is no provision for medical allowance. The section provides as follows:

34. Medical attention

(1) Subject to subsection (2), an employer shall ensure the sufficient

provision of proper medicine for his employees during illness and if possible, medical attendance during serious illness.

I find that the Claimant has not proved that he is entitled to payment of Kshs. 93,170 or any other sum or at all on account of medical allowance. The Claim is thus dismissed for want of proof.

The Claimant further prayed for leave allowance, gratuity and severance pay which like medical allowance he did not submit any evidence in support of. Severance pay becomes payable where an employee has been declared redundant while gratuity is only payable upon termination of employment where the terms of employment provide for it. The Claimant has neither been declared redundant nor his employment terminated. He has further not adduced evidence that he is entitled to payment of gratuity under his terms of employment. The Claim for notice and compensation must likewise fail as they become due upon termination and the Claimant's employment has not been terminated.

The claims must therefore fail and I dismiss the same accordingly.

Conclusion

In conclusion I find that the Claimant has not proved his case and dismiss the same. Each party shall bear its cost.

Dated, Signed and Delivered this 8th day of June, 2017

MAUREEN ONYANGO

JUDGE