



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 347 OF 2015

MOSES MULUPI WAMALWA.....CLAIMANT

VS

BAKE 'N' BITE LTD.....RESPONDENT

JUDGMENT

Introduction

1. The claimant brings this claim seeking terminal dues plus compensation for unfair constructive termination of his employment contract by the respondent on 10.2.2015. The respondent has denied liability for unfair termination of the claimant's employment and avers that it is the claimant who terminated his services through voluntary resignation by his letter dated 10.2.2015.
2. The suit was heard on 30.9.2015 and 21.10.2015 when the claimant testified as Cw1 while the respondent called James Wambire and Harrison Kaunda as Rw1 and Rw2 respectively. Thereafter the counsel for both parties file written submissions.

Analysis and Determination

3. After careful consideration of the pleadings, evidence and submissions presented before it, the Court finds that the claimant was employed by the respondent as Credit Controller. That he worked without any disciplinary issues a fact that led to his salary being reviewed gradually from kshs.15,000/= to kshs.55,000/= per month. That he fell into problems with the respondent when a tender was secured for the supply of bread to Ng'ombeni Secondary School on 18.1.2015. That the claimant was accused of breaking company policy by supplying bread on credit without approval from the management. That the claimant was served with a Show Cause letter and suspended for the said offence but he resigned by his letter dated 10.2.2015. That his resignation was accepted by the respondent in writing on the same day. The issues for determination are:-
 - a. Whether the claimant voluntarily resigned from employment or he was constructively dismissed unfairly.
 - b. Whether the reliefs sought should issue.

Voluntarily Resignation vs unfair constructive termination

4. The claimant contended that he was forced to resign by the respondent's Operations Manager Mr. Twaha who told him that he could not continue working there. That before being told so, the claimant had suffered a suspension and lock out by the security guards with orders from Mr.

- Twaha. He denied any breach of company policy and maintained that he authorized supply of bread to Ng'ombeni Secondary School without informing the management because he acted in the interest of the company. He contended that all the supplied bread was paid for in full and no loss was suffered.
5. Rw1 admitted that he secured the tender to supply bread to Ng'ombeni Secondary School on 18.1.2015 but blamed the accused for continuing to supply without informing the management of the new client. Rw2 is the Assistant HR Manager for the respondent. He explained that the claimant breached the company policy by authorizing the supply of bread to the school on credit without approval from the management. That the claimant ought to have sought permission from the management to open an account for the school after the tender was given to the company. That the approval was supposed to be given by the Operation Manager, Accountant and the Director in writing but the claimant never bothered to seek their approval. That the management came to learn about the new tender after debt increased drastically in respect of credit sales by the Sales Driver along the Ng'ombeni route.
 6. In view of the evidence adduced, the Court finds on a balance of probability that the claimant misconducted himself by breaching the respondent's policy regarding sales on credit. He personally authorized supply of bread on credit to the Ng'ombeni school through the sales driver who in turn received credit note from the respondent unlawfully. That when he was put under investigations and suspension, he opted to resign. That the respondent, as the employer had the legal right to suspend, serve a show cause letter and even suspend the claimant while investigating his misconduct. The exercise of such right cannot be deemed to mean breach of contract that amounts to constructive dismissal.
 7. It is now trite that constructive dismissal occurs when an employee is forced to leave his employment on account of material breach of the contract by the employer. In this case, the resignation of the claimant was prompted by suspension and investigations into his admitted misconduct of breaking company policy on credit sales. The action taken by the employer, therefore, did not amount to unfair constructive dismissal of the claimant. He may have been asked by Mr. Twaha to resign in view of the said misconduct, however he was not coerced to write the resignation on 10.2.2015. He was free to decline the request to resign and fight on in the disciplinary process that had already been commenced. Having chosen to resign, he should not now be heard alleging that he was constructively unfairly dismissed. The answer to the first issue for determination is therefore that the claimant terminated his employment through voluntary resignation.

Reliefs

8. The claimant prayed for leave for earned in 2012, 2013 and 2014. His contract of employment provided 26 leave days per year. That all his leave applications were declined except the one he sought through the resignation letter dated 10.2.2015. The respondent never produced any leave records or submitted on the claim for leave earned. Consequently the court grants the claim for leave for 2 years namely 2013 and 2014. Cw1 admitted and produced letters to show that his salary in 2013 was kshs.40,000/= and kshs.55,000/= in 2014. He is therefore awarded $kshs.40,000/= \times 26/30 = kshs.34,666.70/=$ for 2013 leave plus $kshs.55,000/= \times 26/30 = kshs.47,666.70/=$ for 2014 leave. The total award in respect of the leave days earned and not utilized is kshs.82,333.40/=. In addition he will also get his salary for 7 days he was on suspension in February 2015 being $kshs.55,000/= \times 7/30 = kshs.12,833.35/=$.
9. However the claims for compensation for unfair constructive dismissal and salary in lieu of notice are dismissed in view of the finding herein above that it is the claimant who terminated his employment through a voluntary resignation. Likewise the claim of Sunday is dismissed for lack of particulars and evidence. Whereas it was proved that Cw1 was on duty on Sunday, 19.2.2015 that was not full proof that he worked every Sunday.

Disposition

10. For the reasons stated above, judgment is entered for the claimant for **kshs.95,166.75/=** plus costs and interest.

Signed, dated and delivered at Mombasa this 19th February, 2016.

ONESMUS MAKAU

J U D G E