

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 478 OF 2015

GERAPHAS NYAKUNDI NYANGAU.....CLAIMANT

VS

CAREER DIRECTIONS LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. The claimant was employed by the respondent as a Yard Clerk from 14.4.2014 at a monthly salary of kshs.19,716.00. That he worked well without any disciplinary issue until 2.1.2015 when he was suspended for the allegation that he corruptly solicited for funds from a customer. That on the same date he was served with a show cause letter to which he responded denying the offence. That on 27.1.2015 he was invited for a disciplinary hearing after which he was directed to remain in the suspension although he was not found guilty of the offence of corruption. That since then he was never called back to work and no salary was paid to him and on 21.5.2015, he served a demand letter through his lawyer but no response was received from the respondent. Consequently the claimant has formed the opinion that he has been constructively dismissed from work unfairly and brings this suit claiming terminal dues plus compensation for unfair termination.
2. Despite service, the respondent filed no defence and the suit was heard *ex parte* on 12.11.2015 when the claimant testified as cw1. Thereafter the parties were directed to file written submissions but they all defaulted.

Analysis and Determination

3. There is no doubt that the claimant was employed and suspended by the respondent as pleaded in the suit. The issue for determination are whether the indefinite suspension without pay amounted to constructive termination and whether the reliefs sought ought to issue.

Constructive termination

4. The pleadings filed and evidence adduced by the claimant have neither been contested nor rebutted by the defence. It is also clear from the suspension letter and the show cause letters dated 2.1.2015 that the claimant was accused by the respondent of corruption namely, soliciting money from a customer as an inducement to clear his goods. There is no dispute that he denied the offence both in writing and orally during the disciplinary hearing held on 27.1.2015. It is also not in dispute that the claimant was not found guilty and punished for the offence after the hearing but he was kept under the suspension. That no communication was sent to him and no half salary was paid to him during the indefinite suspension as promised under the suspension letter.
5. The court finds from the evidence presented before it that the indefinite suspension without pay, even after a disciplinary hearing, amounted to constructive termination of the claimant's employment. It is trite that constructive termination of employment occurs in circumstances where the employer makes a fundamental breach of the contract or if his conduct prevents the employee from discharging his obligations under the contract. In such a case the employee is entitled to treat the said breach or conduct of the employer as sufficient ground for him to repudiate the contract and claim remedy. In this case the respondent charged the claimant with corruption but failed to

prove and use it to punish the claimant. She however kept him under suspension without pay forcing the claimant to file this suit. On a balance of probability the court is satisfied that the services of the claimant were constructively terminated by the respondent. The termination was unfair and unjustified because no valid and fair reason was proved by the respondent against the claimant.

Relief

6. In view of the foregoing finding, the court makes declaration that the termination of the claimant's employment was unfair, unlawful and unjustified. For the same reason, the claimant is awarded terminal damages under section 49 (1) of the Employment Act read with sub section (4) thereof. He is awarded kshs. 19716.00 being one month salary in lieu of notice. He is also awarded kshs.19,716.00 being salary for December 2014. He will also get kshs.9,200.80 in respect of 14 days leave outstanding. He is also awarded kshs.118,296.00 being salary for the suspension period from January and July 2015 when the suit was filed. He is further awarded 3 months salary as compensation for the unfair and unjustified termination being kshs.59,148.00. The reason for the last award is because the claimant was not to blame for the termination through misconduct. He was also capable of getting an alternative job within 3 months after dismissal.

Disposition

7. For the reason stated above, judgment is entered for the claimant declaring his termination unfair and unjustified and awarding him **kshs.226,076.80**. He will also get costs and interest.

Signed, dated and delivered this 6th day of May 2016.

ONESMUS MAKAU

JUDGE