



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 322 OF 2015

(Formerly Milimani E & LRC Cause No.36/2013)

(Before Hon. Lady Justice Maureen Onyango)

ALFRED WEKESA KATAMICLAIMANT

-Versus-

THE REGISTERED TRUSTEES CATHOLIC

DIOCESE OF KITALE.....1ST RESPONDENT

THE MANAGEMENT COMMITTEE ST. CHARLES

LWANGA POLYTECHNIC SCHOOL2ND RESPONDENT

THE MANAGEMENT COMMITTEE

BISHOP KORIR ACADEMY3RD RESPONDENT

THE ADMINISTRATOR

KOLONGOLO HEALTH CENTRE

(KOLONGOLO CATHOLIC MISSION

DISPENSARY).....4TH RESPONDENT

J U D G E M E N T

By his memorandum of claim dated 11th January 2013 the Claimant seeks the following remedies against the Respondents -

i) **THAT** the Court do examine the reasons and merit of the Claimant's resignation and find that the Respondent(s) frustrated the employment contract between the parties and therefore constructively dismissing the Claimant.

ii) **THAT** the Court do find that the Respondent(s) action of continued withholding failing, refusal and or neglecting to compute and disburse the rightful terminal benefits, unpaid dues and

underpayment of salary is unlawful and untenable.

iii) **THAT** the Respondent(s) have been in breach of the Employment Act Cap 226 Laws of Kenya and other relevant labour laws.

iv) **THAT** the Respondent(s) are under obligation to pay the grievant his unpaid dues, wages and salaries earned but not paid, unpaid salary arrears arising out of underpayment.

v) **THAT** the Respondent do pay damages for breach of contract by failing to confirm the appointment of the grievant.

vi) **THAT** as a result, the Court do order the Respondent to pay the Claimant all the terminal benefits and other unpaid dues computed as hereunder;

a. Underpayment of salary;

i. October, 2006 to May, 2009

(Kshs.3,043 x 31 months) - Kshs. 94,333.00

ii. May, 2009 to May, 2010

(Kshs.5,205.00 x 12 months) - Kshs. 62,460.00

iii. May, 2010 to May 2011

(Kshs.6,426.00 x 12 months) - Kshs. 77,112.00

iv. May 2011 to May, 2012

(Kshs.8,104.00 x 12 months) - Kshs. 97,248.00

v. May, 2012 to August, 2012 - Kshs. 40,328.00

Total - **Kshs.371,481.00**

b. Salary arrears for August, 2012 - Kshs.17,082.00

c. Underpayment for June, July, 2012

(Kshs.5,500.00 instead of Kshs.7,000.00) - Kshs.3,000.00

d. Gratuity for 6 years worked equivalent to

18 days salary per year -Kshs.47,100.60

e. Damages for breach of contract

f. Costs of this Claim

g. Interest on (a), (b), and (c) above.

h. Any other relief as this Honourable Court may deem just and fit to give.

It is the Claimant's case that he was employed as an accountant on 31st October, 2006 and was attached to the 2nd, 3rd and 4th Respondents whose institutions are run/managed and or controlled by the 1st Respondent. His salary was Shs.7,000 per month. He was compelled to resign. It is the Claimant's case that he resigned due to frustrations by the Respondents and therefore he was constructively dismissed.

The Respondent filed a Memorandum of Reply denying the allegations in the Claim. The Respondent avers in the Reply that the wages paid to the Claimant were agreed and paid when due, that the Claimant resigned on his own volition and that no salary arrears are owed to him by the Respondents.

The Respondents did not attend court for the hearing although they were properly served with the hearing notice and an affidavit of service filed in court bearing the Respondent's Advocates Stamp. The Respondents further failed to file written submissions in spite of having been served with a mention notice to confirm filing of submissions and to take date for judgement.

At the hearing of the case the Claimant testified that he was employed by Catholic Diocese of Kitale and then sent to work in 3 other institutions that is the 2nd, 3rd and 4th Respondents. He was employed as an accounts Assistant/ Accounts clerk. He was receiving fees at Kolongolo Healthcare Centre, Bishop Korir Academy which is an ECD/Primary School, and at St. Charles Lwanga Polytechnic School. His salary was shs.7,000. He testified that after his probation expired he was not issued with a contract of employment. In may 2012 his salary was reduced to Shs.5,500. It is the reduction of his salary that prompted him to resign on 3rd July, 2012.

The Claimant testified that the reasons for resignation was refusal to give him a contract, underpayment and reduction of his salary in May, June and July, 2012.

In the written submissions filed on behalf of the Claimant, it is submitted that the Claimant's dismissal was a resignation. The Claimant relied on the case of **Antony Mkala Chitari v Malindi Water and Sewerage Company Limited [2013]eKLR** in which the court stated -

"Constructive dismissal has been defined in Pretoria Society for the Care of the Retarded Versus Loots [1997] 6 BLLR 721 as a situation in the work place, which has been created by the employer, and which renders the continuation of the employment relationship intolerable for the employee to such an extent that the employee has no other option available but to resign."

The court further stated that;

"The doctrine of constructive dismissal has not been given statutory underpinning in Kenya. But the doctrine and principles developed in other comparative jurisdictions would be equally applicable here because of the entrenchment of a justiciable right to fair labour practices under Article 41 of the Constitution and the need to interpret the Constitution in a manner that advances human rights and fundamental freedoms in the Bill of rights and the doctrine that the Constitution is always speaking."

It was submitted that the Claimant had been advocating for a salary increase to no avail. It was submitted that the unilateral reduction of the Claimant's salary to Shs.5,500 was a fundamental breach and the Claimant was entitled to treat himself as discharged by the Respondents as stated in the case of **Antony Mkala Chitavi** when the court stated -

"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 employers conduct was a significant breach going to the root of the contract. The termination would be due to the employers conduct. Such conduct may include unilateral reduction in pay or failure to pay the employee." (Emphasis is ours)

The Claimant further relied on the case of **Vincent Omollo Obuom v Catholic Diocese of Nakuru[2015]eKLR** in which the court held that -

"Payment of wages as agreed and on due dates is one of the essential of an employment contract. Failing to pay agreed wages goes to the root of the contract of employment.

The Respondent was in breach when it did not pay wages according to the agreed terms. The Respondent was also in breach in withholding wages in 2012".

The Court consequently finds that the Respondent was in breach of an essential term of contract and therefore the claimant was entitled to treat himself as having been discharged by the Respondent's conduct."

It was further submitted that the statutory minimum wage for the Claimant was Shs.10,343 for 2006, Shs.12,205 for the period May 2009 to April 2010, Shs.13,426 from May 2010 to April 2011, Shs.15,104 from May 2011 to April 2012 and Shs.17,082.60 for the period May to July 2012. In support of the prayers for underpayments the Claimant relied on the case of **Joseph Aleper & Another v Lodwar Water and Sanitation Company Limited[2005] eKLR** and **Kenya Union of Commercial, Food and Allied Workers v Day Lite Dry Cleaners [2013] eKLR**.

In Support of the prayer for gratuity it was submitted that under section 35(5) of the Employment Act the claimant is entitled to Service Gratuity provided he is not excluded by section 35(6). It was submitted that the Claimant is not excluded by section 35(6). In support of his claim for service gratuity the Claimant relied on the case of **Elijah Kipkoros Tonui v Ngara operations T/A Bright Eyes Limited [2014] eKLR** where the court stated that -

This position has since changed with the coming into force of the Constitution of Kenya, which under Article 41 calls for fair Labour Practices. Decisions of the Honourable Judges of the Industrial court have in the recent past viewed the payment of service pay as a bare statutory minimum, and enforced the provision even in the absence of express fixed terms of service pay, based on the 15 days' minimum salary for every completed year of service given under the redundancy law, and which is also the floor in most industrial wage orders on severance, gratuity or service pay. Employees who hold terms and conditions of employment without fixed terms on the service pay should not be discriminated, and the Court fully embraces recent decisions which have adopted the 15 days' salary for each completed year of service, whenever such default is present.

On the burden of proof the Claimant relied on section 9(2) and 10(7) of the Employment Act and the decision in the case of **Anthony Ochieng Onyango v Lwala Mixed Secondary School & 2 others [2014] eKLR** in which the court stated that -

"The terms of this employment contract cannot be ascertained.

Under Section 9(2) of the Employment Act, 2007;

'An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with sub-section (3)."

It is also important to note that under Section 10(7) of the Employment Act, 2007:-

"If in any legal proceedings, an employer fails to produce a written contract or the written particulars prescribed in sub-section (1), the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer"

Since there is no written contract displayed by the respondents, then this court assumes that what the Claimant has stated is truth unless otherwise proved by the respondent."

For damages the Claimant relied on section 49(1) (c) of the Act.

Determination

This case was not contested by the Respondent who failed to attend court or adduce evidence besides the Memorandum of Reply whose averments have not been supported by either documentary or viva voce evidence. The issues for determination are therefore whether the Claimant's resignation constituted a constructive dismissal and whether he is entitled to the prayers sought.

In its recent decision in **Kisumu Civil Appeal No.55 of 2015**, the court of Appeal stated as follows with regard to constructive dismissal -

Although the doctrine of constructive dismissal is not defined by the Employment Act, 2007, this Court, in a recent decision, had opportunity to pronounce itself on the doctrine where it upheld a decision by the Employment and Labour Relations Court. That was in COCA COLA EAST & CENTRAL AFRICA LIMITED v MARIA KAGAI LIGAGA [2015] eKLR. The court cited with approval several authorities, among them, WESTERN EXCAVATING (ECC) LTD v SHARP [1978] 1 CR 222 where Lord Denning held:

“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. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice.”

In the present case the claimant testified that his reason for considering his resignation as constructive dismissal is that he was not given a contract, he was underpaid and his salary was reduced. There is no proof that the Claimant's Salary was reduced from Shs.7,000 to Shs.5,500 for May, June and July, 2012. The payroll extracts filed by the Claimant does not reflect his name for the said period. There is also no letter from the claimant written to his employer complaining about the reduction of his salary. The Claimant had been receiving a salary of Shs.7,000 from 2006 when he was employed and cannot rely on the same to constitute a ground for constructive dismissal. The non-issuance of a contract can also not be a ground for constructive dismissal as the Claimant was issued with a letter of appointment upon his employment. The same is at his appendix 1 dated 31st October, 2006.

The Claimant's letter of resignation does not mention underpayments or reduction of his salary as grounds for his resignation. The letter states that **"I am resigning because since my employment in 2006 I have not had a contract and no salary increment, my efforts to have this worked out over the years have been fruitless.**

For the court to make a presumption of constructive dismissal the employee must prove that there has been fundamental breach of his employment contract, as was stated in the case of ELIZABETH KWAMBOKA KHAEMBA (Supra) or that the employer has made the environment in which he works so hostile or so uncomfortable to make it impossible or extremely difficult for him to work, or has treated him in such a way that it is no longer feasible for him to work for or with the employer as was the case in MARIA KAGAI LIGAGA. In this case the Claimant has not proved that the employer reduced his salary as alleged and nothing had changed from the circumstances he had been working in since October 2006 when he was employed. He did not adduce any evidence to prove that he had asked for a contract and it had been refused or that he had asked for a salary increment.

I find that the Claimant has not proved constructive dismissal and that he resigned out of his own free will.

Remedies

The Claimant's prayer for salary arrears must fail as he has not proved that his salary was reduced. The

