



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 6 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

PROF. KEFAH RABAH.....CLAIMANT

-Versus-

JARAMOGI OGINGA ODINGA UNIVERSITY

OF SCIENCE AND TECHNOLOGY.....RESPONDENT

J U D G E M E N T

By a Memorandum of Claim dated 24th November, 2014 and filed on 9th January, 2015 the Claimant seeks the following orders against the Respondent -

a) To pay the Claimant dues as tabulated below:

i. Salary for the month of September 2013 = **Kshs.321,239.00/-**

Less Kshs.89,599/- = **Ksh.231,640/-**

ii. Payments for extra courses taught = **Kshs.1,617,000.00/-**

iii. Accrued leave days (82 days) = **Kshs.706,460.30/-**

iv. Final payment under the CBA = **Kshs.232,000.00/-**

v. Severance pay at the rate of 3 months for every completed year of service = **(321,239 x 4) = Kshs.1,284,956.00/-;**

vi. Damages Compensation under section 49

(Kshs.321,239 x 12 = 3,854,868/=);

TOTAL KSHS.7,926,924.30/-

b) Interest on (a) above from the date the same became due and payable until payment in full;

c) Costs of the suit.

d) Any other relief this Honourable Court may deem fit to award under the circumstances

The Respondent filed a statement of Response on 12th February, 2015 denying the allegations in the Memorandum of Claim and prayed that the same be dismissed with costs.

At the hearing of the case the Claimant testified on his behalf while the Respondent called Prof. Joseph Bosire (RW 1) the Deputy Vice Chancellor in charge of Academic Affairs, and CS Rosemary Ngesa (RW2), the Registrar in charge of Planning and Administration. The parties thereafter filed and exchanged written submissions.

Claimants Case

Prof. Kefa Rabah testified that he was employed by the Respondent on 1st September 2010 as a professor of Physics. On 10th March, 2011 he was appointed a Dean, School of informatics and Innovative Learning Systems.

As dean the Claimant's duties were to develop programs, allocate teaching duties and ensure the school runs smoothly. In addition the dean was required to teach. The Claimant testified that he initially taught one class but was later added another one. He testified that according to the policy any extra hours are paid for. The claimant testified that the number of courses he taught was later increased to 3 (three). He testified that each course was 42 hours. He therefore claimed payment for extra hours in the sum of Shs.1,617,000 for 7 semesters.

The Claimant claimed further payment of Shs.1,232,000 in respect of adjustments of salary and allowances following implementation of the Collective Bargaining Agreement for 2010 - 2013. He also claimed salary for September 2013 which he alleged was not paid, and payment for teaching PHD students after leaving employment of the Respondent.

The Claimant testified that sometime in 2013 he was offered employment as Deputy Vice Chancellor (Administration and Finance) at Kabarak University. He sought leave of absence from the Respondent's Vice Chancellor who declined on grounds that the Claimant was going to a private university. He was therefore forced to give a resignation notice on 14th August, 2013. The notice stated that the resignation would be effective from 1st October, 2013.

The Claimant testified that he was supposed to give 6 months notice but discussed with the Vice Chancellor and agreed to off set the notice period not served from his outstanding annual leave days.

Under cross examination the Claimant stated that he resigned because he had been offered a better job opportunity at Kabarak University, that he had 82 leave days at the time of resignation which he traded off with his notice. The Claimant admitted that the letter accepting his resignation dated 19th August, 2013 stated that he owed 46 days leave after offsetting outstanding leave days with notice. He stated he had been paid some money for CBA but it was less than what was paid to other professors who were at the same level as him. The Claimant further stated that he did not submit any proof that he taught the extra lessons that he had claimed for.

Respondent's Case

The Respondents Case is that the Claimant was paid all that was due to him and he is not owed any money by the Respondent. RW1 testified that there was no proof that the Claimant taught extra subjects for which he has claimed Shs.1,617,000 for the period April, 2012 to September 2013. He further testified that it was his responsibility to approve extra courses but did not approve the extra courses claimed by the Claimant.

RW2 testified that the Claimant's resignation was accepted and a letter written to him setting out his entitlements and liabilities. She testified that it is the Respondent's policy to withhold the last salary of an employee leaving employment. Such withheld salary is released after the employee has cleared with the university. She testified that the Claimant's September 2013 salary was withheld pending his clearance but he was paid after clearance. She testified that at the time of resignation the Claimant had accumulated

82 leave days which was used to recover part of his notice leaving a balance of 46 days that the Claimant was supposed to pay the university. She testified that upon leaving service the Claimant was entitled to a passage and baggage allowance of Shs.12,400 which was paid together with withheld salary for September, 2013 in the sum of Shs.329,239. That the Claimant was also paid Shs.76,190 for extra classes taught and CBA arrears of Shs.81,077 making a total of Shs.490,906. From the payment a deduction was made of 46 days notice amounting to Shs.396,307 and Shs.5,000 imprest that the Claimant had not accounted for leaving a balance of Shs.89,599. This was subjected to income tax at 30% leaving a balance of Shs.62,719.30 that was due to the Claimant and which was paid by a KCB Cheque dated 30th October, 2013.

During Cross examination RW2 stated that the Claimant did not resign out of frustration but because he got a better job. She further stated that the 46 leave days recovery made from the Claimant's terminal dues was based on basic salary. She further stated that the Claimants pension was paid by the Administrators of the pension scheme.

Submissions

In the written submissions filed on behalf of the Claimant it is submitted that he resigned due to work related frustration and was therefore constructively dismissed. The claimant relied on the case of **Kenneth Kimani Mburu & Another v Kibe Muigai Holdings Limited [2014]eKLR, Max Masoud Roshankar & another v sky Aero Limited [2015]eKLR, Tailors & Textiles Workers Union v African Cotton Industries Limited [2014]eKLR and Western Excavating (ECC) Ltd v Sharp (1978)IRLR27.**

It was further submitted that the Claimant had proved that he is entitled to payment for the extra courses claimed and further that the Claimant is entitled to six months pay in lieu of notice as was held in **Rehana Mohammed v MM Mobile Limited [2011]eKLR.** It was further submitted that the Claimant is entitled to 82 leave days as admitted by the Respondent and damages for unfair termination based on the fact that he was constructively dismissed.

For the Respondent it is submitted that the Claimant was not constructively dismissed as demonstrated in the letter of resignation which does not refer to any frustration by the Respondent. The Respondent refers on the case of **Max Mansoud Roshankar & Another** quoted by the claimant in which the court quoted with approval the test for constructive dismissal as set out in the case of **Pretoria Society For the Care of the Retarded v Loots [1987] & BLLR 721(LAC)** as follows.

- i) There was no other motive for the resignation. In other words, the employee would have continued the employment relationship indefinitely had it not been for the employer's unacceptable conduct.
- ii) The Employee is infact stating that under the intolerable situation created by the employer, he can no longer continue to work, and has construed that the employees behaviour amounts to a repudiction of the employment contract.

The Respondent further relied on the case of **Marete v Attorney General** in which the test for constructive dismissal was stated as follows;

"The employer made a fundamental change in the contract of employment and that such change was unilateral; that the situation was so intolerable the employee was unable to continue working. i.e.

- i) The employee would have continued working had the employee not created the intolerable working environment.*
- ii) The employee resigned because he did not believe the employee would abandon the pattern of creation unacceptable work environment."*

The Respondent further submits that the Claimant did not refer to any frustration in his testimony in court. The Respondent urges the court to reject the argument.

On the specific prayers the Respondent states that RW 2 in her testimony gave a breakdown of payments made to the Claimant which included his September salary.

Regarding the payment for extra courses taught the Respondent submits that what was produced by the Claimant were computer generated internal memos that have no relationship with the Respondent. The Respondent further submitted that the Claimant did not submit any proof that he taught the lessons such as attendance sheets signed by the students. The Respondent submits that it is the burden of the Claimant to prove that he taught the extra lessons as claimed and he cannot shift the burden to the Respondent for failing to produce the records as attempted in the Claimant's written submissions.

The Respondent submitted that the prayer for accrued leave days must fail as it is based on constructive dismissal. That the claimant did not prove he is owed a final CBA payment of Shs.232,000 claimed and that the Claimant is not entitled to severance pay as he was not declared redundant.

Findings and Determination

I have considered the evidence and submissions by both parties. The issues that arise for determination therefrom are the following -

- (1) Whether the Claimant was constructively dismissed or voluntarily resigned.
- (2) Whether he is entitled to the prayers sought.

1. Constructive Dismissal

The Claimant alleges that he was constructively dismissed by the Respondent while the Respondent's position is that he voluntarily resigned.

Although constructive dismissal is not provided for in Kenyan legislation, there is sufficient jurisprudence from the Kenyan Courts on the subject which have set out the circumstances when a resignation will be deemed to be constructive dismissal. Both the Claimant and the Respondent have cited jurisprudence on this subject in their written submissions. In the case of *Kenneth Kimani Mburu (Supra)* the Court held that a resignation will be deemed to be constructive dismissal where an employee is forced to leave his job against his will because of the employers conduct. In the case of **Max Mansoud Roshankar & Another** the court described constructive dismissal as follows -

"Constructive termination is a concept now appreciated and applied by the Industrial Court (read Employment and Labour Relations Court) as it occurs within employment and labour relations. It occurs when employees resign because their employer's behaviour has become so intolerable or made life so difficult that the employee has no choice but to resign. The concept of constructive dismissal is underpinned on the notion that there is implied in a contract of employment a term that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or highly likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Breach of that implied term will entitle the employee to treat him or herself as wrongfully dismissed."

In the case of **Western Excavating (ECC) Ltd** quoted with approval in the case of **Tailors & Textiles Workers Union (Supra)** the court stated that an employee is free to leave work without notice where the employer has by conduct shown that it no longer intends to be bound by one or more of the essential terms of the contract.

In the instant case, the Claimant testified that he got a better job with Kabarak University as Deputy Vice Chancellor, Administration & Finance. He further testified that he requested leave of absence but was told

that the same could not be granted because he was going to a private university. The refusal of the Respondent to grant the Claimant leave of absence was not in breach of any term of his contract and cannot form the basis of a claim of constructive dismissal.

The other grounds cited by the Claimant being non-payment for extra courses taught were not reasons for his leaving. The Claimant has not produced any evidence that there were any outstanding payments for extra work that he sought payment for and was refused, or that he was frustrated during the period he worked with the Respondent. His letter of resignation does not refer to any frustration. In the letter of resignation he thanks the Respondent for offering him an opportunity to work there.

The Claimant's allegation of constructive dismissal is therefore without foundation or legal basis and is accordingly dismissed.

The Claimant prayed payment of salary for September 2013 in the sum of Shs.321,239 less Shs.89,599 which he was paid. In her testimony RW2 demonstrated that the Claimant's salary for September 2013 was paid but the Respondent deducted the Claimant's liabilities being unaccounted for imprest and notice not served. I find that the Claimant was paid his September 2013 Salary by cheque dated 30th October 2013 which he did not deny receiving.

The Claimant further prayed for Shs.1,617,600/- extra courses taught. He produced a schedule he prepared and also several internal memos covering the period January 2012 to August 2013.

In a letter dated 13th February, 2014 the Claimant wrote to the Respondent seeking payment for extra classes taught without specifying how many sessions were taught or how much money he was demanding. The Respondent subsequently paid him Shs.76,190.40 on account of approved extra courses. It is not clear whether this amount is included or excluded for the amount claimed by the Claimant.

The Respondent denied owing the amount claimed. RW1 testified that all extra courses were approved by him in advance and none of the courses claimed by the Claimant were approved. During cross examination the claimant admitted that there is no evidence to show that he actually taught the extra courses claimed.

It is trite law that he who alleges must prove. The Claimant testified that the procedure for making claims for extra courses taught was that he wrote a memo and then the Respondent computed. He further testified that students sign an attendance form to prove that they attended the class. The Claimant admitted that he had no proof that he taught the classes. He did not produce copies of the memos he wrote seeking computation of payments or attendance registers signed by students as proof that he taught the extra classes claimed. Although the Claimant left employment on 1st October 2013, he has made claims for courses alleged to have been taught as far back as the semester January to April 2012. The total number of courses in the internal memos produced by the claimant are 31 while what is contained in his breakdown at appendix 4 page 18 is 33. In his testimony he stated he initially taught 2 courses which was increased to three yet in his breakdown there are 5 instances where he claims for 5 or 6 courses taught.

I find that the Claimant has not proved that he taught any extra courses for which he was not paid by the Respondent.

The Claimant claimed Shs.232,000 in respect of final payment under CBA. Asked to explain how he arrived at the computation he stated he did not know how much he was entitled to but used what was paid to other professors of his rank to extrapolate what was payable to him. He did not produce the computation or explain how he arrived at the amount that he had claimed. He did not even explain how much the other professors of his rank were paid or who they were. He stated that he did not ask the union to explain or tabulate for him what he was entitled to. He admitted having been paid by the Respondent but insisted the amount he was paid was not correct.

The Respondent on the other hand stated that the Claimant was paid CBA arrears amounting to Shs.81,077 and the same was paid together with his final dues after deduction of his liabilities to the

Respondent and income tax.

I find that the Claimant has failed to prove that there were any CBA arrears due to him that has not been paid by the Respondent and consequently dismiss the prayers.

The Claimant further prayed for severance pay in the sum of Shs.1,284,956 and damages for unfair termination in the sum of Shs.3,854,868. He is not entitled to either as he was not declared redundant nor was he unfairly terminated.

For the foregoing reasons, the entire claim filed by the Claimant has not been proved and is dismissed with no orders for costs.

Judgement Dated, signed and delivered this 1st day of December, 2016

MAUREEN ONYANGO

JUDGE