



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

AT NAIROBI

CAUSE NO. 433 OF 2013

SIMON NGUGI KAMAU.....CLAIMANT

VERSUS

SILPACK INDUSTRIES LIMITED.....RESPONDENT

JUDGEMENT

1. The issues in dispute are;

a. that of unfair treatment and subjection to poor conditions of employment by the Respondent to the Claimant contrary to Occupational and Safety Act;

b. Wrongful dismissal of the Claimant from employment; and

c. Failure to pay terminal dues, severance pay, accrued benefits and salary arrears contrary to section 18 of the Employment Act

2. On 11th April 2013, the Claimant Simon Mburu Kamau filed his claim against the respondent, Silpark Industries Limited. Defence was filed on 3rd July 2013, and hearing proceeded with the call of the Claimant in support of his claim while the Respondent called Timothy Musyoki Muiwa and Florence Ambalo Endanyi in support of the defence case. At the close of the hearing, each party filed written submissions.

Claimant's case

3. On 1st May 2003 the Claimant was employed by the Respondent as a Machine Operator and was terminate don 1st November 2012. While in employment the Claimant was diligent in his duties. He was paid kshs.14, 580.00 per month.

4. The Claimant also stated that since 2009, due to fumes and products emitted by the raw materials from the Respondent Company, he developed an allergy as a result of which he developed acute episodes of bronchospasms making it impossible for him to operate in the production floor department where he was assigned. He sought medical attention from various institutions which recommended that he is unsuitable to work in his department due to hypersensitivity which recommendations were furnished to the Respondent for consideration but the Respondent refused and or neglected to offer the Claimant a healthy and safe working environment.

5. The Claimant also stated that the refusal by the Respondent to offer the Claimant a healthy and safe work environment amounted to constructive dismissal from employment as he could not continue working in the department noting his medical condition a fact that was well known to the respondent. The refusal to change the Claimant to a safe and conducive environment amounted to unfair termination; it was unfair treatment after serving for 9 years and denial to continue working so as to earn a living. This was therefore constructive dismissal without notice, payment of benefits or any redress.

6. The Claimant is seeking service pay, payment of remaining years of service on a retirement scale; accrued leave days, loss and damages as a result of breach of Occupational Safety and Health Act. That these amounts be paid with interests and costs of the suit.

7. In evidence, the Claimant testified that since 2000 he was employed by the Respondent as a casual worker with duties of machine operator and under training. In May 2003 he was taken on permanent basis and became the Machine Operator after successful completion of training. He was given his employment terms. He would produce rollers using plastics as the raw material. The plastics were in solids that had to be heated to high temperatures and this heating started to affect him as well as the dust. These changes have chemical reactions but the Claimant did not realise the effects until he started to develop allergies. The Respondent had a doctor who told the Claimant that he had allergies but he could not deal with the condition and had to seek for medical help from elsewhere. He went to Shepherd medical Clinic in 2009 but the condition deteriorated as he doctor was only giving him the same dose to clear his throat and advised that he should stop work with the respondent.

8. The Claimant submitted the doctor's report to the Respondent human resource officer Florence Ademi but declined to take it as it was not from a public health facility. The Claimant went back to see Dr Isaac at Shepherd Medical Clinic and was advised to go to a government hospital at Kiambu but opted to go to Thika Level 5 hospital where he was treated. The doctor made similar recommendations noting that he had an acute condition and that he should stop work under the same conditions or he should be deployed elsewhere.

9. The Claimant also stated that he took these medical reports to the Respondent but human resource officer disputed the reports. A meeting was held with the shop steward to discuss the status and the treatment documents, he asked for 3 days off as he was still unwell and when he asked about his new work place, the Claimant was told that he had to go back to his usual workplace. However the Claimant was willing to continue work with the Respondent but in a different capacity. He was not issued with a deployment letter and was told to report back to his workplace. The Claimant stated that at this point he had to think about his health, he had a family that depended on him and would not compromise on his health. Since there was no communication on a deployment, the Claimant decided to go and work elsewhere.

10. When the Claimant took 3 days off, he sought advice from an advocate who wrote to the Respondent a demand letter. There was no deployment despite demand. The Claimant is seeking for his service pay for 12 years, pay until retirement as he had to leave due to poor health, he had leave days due.

Respondent's case

11. The Respondent in defence denied all the claims and stated that on 2nd November 2012, the Claimant presented a letter from Thika Level 5 hospital stating that he had been receiving treatment for acute bronchospasms and also stating that he should avoid exposure to fumes in the industry. A meeting was convened to discuss the issue and it emerged the Claimant had visited the hospital once and was not clear how the conclusion had been arrived at. After the meeting, the Claimant took leave days to go and get medication and was to report back on 7th November 2012 for work. On 2nd November 2012 the Respondent followed up on the claimant's medical letter and the hospital advised that the letter should be disregarded.

12. On 7th November 2012 the Respondent receive a letter from the claimant' advocate that he had been constructively been dismissed form employment and on the same date the Respondent held a meeting to

discuss the letter with the Claimant particular the Respondent wanted to know whether the Claimant was willing to be re-deployed to work in another area or if he wanted to leave work due to his health condition. The Claimant was adamant that he was relying on the letter from his advocate.

13. On 22nd November 2012, the Respondent replied to the claimant's advocate noting that he had absconded work from 7th November 2012 and should report to work within 7 days failure to which disciplinary action would be taken. There was no response. On 9th January 2013 the Respondent issued the Claimant with a show cause letter for failing to report back to work. On 18th June 2013 there was a meeting held between the Respondent and the Claimant who stated that he had failed to report back to work since he had presented his medical report. The Respondent decided to summarily dismiss the claimant.

14. The Respondent also stated that the Claimant had a poor work history. On 14th June 2011 he was issued with a warning letter for producing polythene rolls without proper treatment up the side ends; and on 27th July 2012 the Claimant was issued with a warning for negligently producing approximately 500kgs of goods with wrong specifications.

15. In this case summary dismissal was lawful and appropriate; the Respondent did not fail to offer a conducive work environment as alleged in the claim; there was no constructive dismissal as the Claimant absconded duty; service pay is not due as the Claimant was registered with NSSF and NHIF; salary to retirement is not due as the respondents efforts to re-deploy the Claimant were rejected and this was a case of summary dismissal; he deserted work and thus no leave pay is due; and no damages are due under the Occupational Safety and Health Act. The claim should be dismissed with costs.

16. In evidence the Respondent called Timothy Musyoki Muiwa a shop steward and employed by the respondent. He worked with the Claimant and on 7th November 2012, the Respondent held a meeting at 3 pm where the Claimant was present. The Respondent wanted to know why the Claimant was not at work, re-deployment was discussed but the Claimant kept silent throughout the meeting and opted to rely on his advocate's letter and the medical report. The Claimant refused to sign the minutes and insisted that he would rely on his medical report. Another meeting was held on 18th June 2013 the agenda being the claimant's absence from work. The Claimant was in attendance and still insisted on relying on his medical report. As a result the Respondent decided to do summary dismissal.

17. The witness also stated that the Claimant was offered re-deployment at the meetings held but he rejected the same. This offer was not in writing but the Respondent was willing to re-deploy him. As a shop steward he was present when the offer was done, there is a policy in place and he was present at the meeting to ensure the Claimant was given a good offer. The Claimant was given options but he decided to stick by his medical report.

18. The other witness called by the Respondent is Florence Ambalo Andenyi the human resource assistant of the respondent. The witness was given a medical report by the Claimant in 2012. There was no prior record of any medical condition. She called Thika Level 5 hospital to ask on the medical report and was advised to ignore such a letter as for one to receive such a letter 4 doctors had to seat at a committee and in this case only one doctor had given the report and thus not valid. On 7th November 2012, the Claimant was called for a meeting but he refused to sign any minutes and walked out noting that he had a letter from his doctor and advocate. The purpose of the meeting was to re-deploy the Claimant as the medical letter did not talk of terminating him but move him from the fumes. The Claimant was aware of the agenda for re-deployment, but when this was mentioned, he stood up and left. On 18th June 2013 the Claimant was called for a disciplinary hearing following a show because letter as the Claimant had not reported to work. He was asked to explain why he was not at work and why he should not be redeployed and the Claimant replied that the human resource office told him to report back to his place of work. The Claimant became wild and left.

19. On the claims, the Claimant had his statutory dues to NSSF and NHIF paid. The Claimant was a former shop steward and he was aware that when one had a medical condition, the union and the

employee had to hold discussions for re-deployment. The Claimant was not retired on medical grounds. He was offered re-deployment but rejected the same.

20. The witness also stated that at the meetings held with the Claimant he did not want to discuss re-deployment and only stuck to his advocate letter and medical report. On 9th January 2013 the Claimant was asked to report back to his duty station as re-deployment was not finalised. When the Claimant took 3 days off in November, he was to report back to work after 3 days but instead he submitted his advocates' letter with demand of constructive dismissal.

Submissions

21. The Claimant submitted that he was employed on 17th April 2003 by the Respondent as a machine Operator and after serving for several years he developed allergies due to fumes and products emitted by the raw material he worked with. He sought medical help and the government doctor gave him a medical report from Thika Level 5 hospital on 1st November 2012. Despite the medical report, the Respondent failed to offer the Claimant a healthy and safe working environment or work in another department. The Claimant was never offered a re-deployment. No meetings were held with the Claimant to discuss his deployment as he never signed for any meeting for 7th November 2012 or any other.

22. The Claimant thus submitted that section 43 and 45 of the Employment Act was not followed as there was no reason for his dismissal. The procedure adopted in the dismissal of the Claimant was unfair and his appeal was not considered at all.

23. The Claimant also submitted that the conduct of the Respondent amounted to the constructive dismissal of the claimant. When the Respondent disputed the medical report submitted by the respondent, they did not send him to a doctor of their choice and his medical report was completely disregarded. The refusal to deploy the Claimant in a different department was meant to force him to leave his employment and was in breach of duty of care and contrary to section 6 of the Occupational Health and Safety Act. The Claimant is thus entitled to the reliefs sought being general damages for loss, pain and suffering as a result of breach of duty which should be compensated with 12 months' pay; service pay for years worked; withheld contributions to the staff retirement benefits scheme; pay for the remaining years until retirement; accrued leave and compensation for unfair termination.

24. The Respondent on their part submitted that the Claimant was liable to summary dismissal under section 44 of the Employment Act as without lawful cause he was absent from work after being clearly informed that the Respondent would assign him new duties so as not to endanger his health but he was adamant that he stood by his advocates letter. The Respondent denies that the place of work was not safe of healthy as alleged, there was compliance with all requirements under the occupational Health and Safety Act as Respondent conducted annual safety audits to ensure that it had a safe and healthy work environment.

25. The Respondent also submitted that there was no constructive dismissal of the Claimant as he simply failed to attend work and opted to instruct an advocate to make demands. He was called for meetings to discuss re-deployment but was insistent on getting his way. The claims are therefore denied especially service pay as he was duly registered with the relevant statutory bodies no payment is due for loss of employment as the Claimant absconded duty.

Whether there was constructive dismissal

Whether damages are due under the Occupational Health and Safety Act;

Whether there are remedies

26. Though the Employment Act does not directly define what 'constructive dismissal' of employment is, this can be surmised by various scenarios outlined in a case for unfair termination, reading on the

jurisprudence of the court and persuasion from other jurisdictions.

27. Apart from termination, constructive termination is a concept now appreciated and applied by the Industrial Court as it occurs within employment and labour relations. Constructive dismissal, also called Constructive discharge, 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. Since the resignation was not truly voluntary, it is in effect a termination. For example, when an employer makes life extremely difficult for an employee to resign rather than outright firing the employee, the employer is trying to effect a constructive discharge. In the case of **Emmanuel Mutisya Solomon versus Agility Logistics, Cause No.1448 of 2011** the court held that the basics are that constructive dismissal may be defined as a situation in the workplace, 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 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.

28. In the South African case of **Pretoria Society for the Care of the Retarded v Loots [1997] 6 BLLR 721 (LAC)**, the Labour Appeals Court has stated that the first test in a case for constructive dismissal was whether, when resigning, 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. It went further to state that when any employee resigns and claims constructive dismissal, he is in fact stating that under the intolerable situation created by the employer, he can no longer continue to work, and has construed that the employer's behaviour amounts to a repudiation of the employment contract. So in view of the employer's repudiation, the employee terminates the contract.

29. The Court further held that in bringing such a dispute, it is for the employee to prove that the employer was responsible for introducing the intolerable condition, and for the employee to prove that there was no other way of resolving the issue except for resignation. In other words, it is not for the employer or the Respondent in this case to show that he did not introduce any intolerable condition it is for the employee to show that indeed there were intolerable conditions, frustrations, breaches that trust and confidence supposed to be enjoyed in a conducive workplace environment dissipated and thus repudiation of the contract.

30. The above position is also buttressed in the case of **Maria Kagai Ligaga versus Coca Cola East and Central Africa Limited, Cause No. 611 (N) of 2009** and further quoted with authority in the case of **Marete versus Attorney General [1987] KLR 690** where the court held;

... While under section 43 and 45 of the Employment Act 2007 the duty in showing that termination was fair is on the employer, constructive dismissal demands the employee demonstrates that his resignation was justified. Other collateral issues that must be shown by the employee are: that 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; that the employee would have continued working had the employer not created the intolerable work environment; and that the employee resigned because he did not believe the employer would abandon the pattern of creating unacceptable work environment. These are some of the rules governing a claim for constructive dismissal.

31. In this case, the Claimant stated that he developed an allergy and was forced to seek medical attention initially at a private clinic and then at a public hospital, Thika level 5 hospitals where a doctor gave his a report recommending that he should avoid exposure to the allergens which are occupational health hazards to him. This was on 1st November 2012. From the evidence of the claimant, he presented this medical report to the Respondent human resource officer who ignored the same and failed to allocate him a conducive work environment. It was his further evidence that he requested for 3 days off to get medications and when he resumed duty, he was told to go to his workplace and knowing that he had a

family to take care of and wished to live long, he decided that the Respondent was not keen to allocate him alternative duties and thus did not report to his previous work place due to the health hazards exposure.

32. On 6th November 2012, the claimant's advocate, wrote to the Respondent and demanded that;

... Our instructions are therefore to demand from [for] the following dues;

a. All outstanding dues owed to our client from the company to date

b. Service pay for the years spent in your employment since 2003

c. All statutory dues that were deducted and never remitted to the respective statutory bodies

d. Payment of our client of the remaining years of service before retirement per the current salary

e. Payment of damages for injury to our client's health as a result of breach of the aforesaid Act.

33. On their part, the Respondent gave evidence that upon receipt of the medical report from the Claimant on 2nd November 2012, they called the hospital and were informed that such a medical report as held by the Claimant could not be issued by a single doctor but should have been issued by 4 doctors. The Claimant was given time off to get medication and was to report back but never did report but served the Respondent with a letter from his advocate making demands for his terminal dues. Noting the letter from the advocate, on 7th November 2012, the Respondent held a meeting between the claimant, the union representative and the Respondent but the Claimant was adamant that he would go by his medical report and the letter from his advocate. The Claimant contested that there was no such meeting and where such meeting was held he was not offered any re-deployment. In January 2013 the Claimant was issued with a show cause letter for failing to attend work and on 18th June 2013 there was a disciplinary hearing that led to the termination of the Claimant for absconding duty and having no good explanation.

34. Where an employee is sick, unwell or requires medical attention, they have a right to time off and treatment at the expense of the employer in time or in financial provisions. This is regulated under section 10 of the Employment Act;

10. (1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3) be given in instalments and shall be given not later than two months after the beginning of the employment—

...

(3) The statement required under this section shall also contain particulars, as at a specified date not more than seven days before the statement, or the instalment containing them, is given of—

a. any terms and conditions relating to any of the following—

...

(ii) Incapacity to work due to sickness or injury, including any provision for sick pay;

35. In the terms of employment, the issue of how sickness is to be handled or allowance given or time off required is to be outlined. Once this is done, the employer under section 30 of the Employment Act applies thus;

30. (1) After two consecutive months of service with his employer, an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of seven days with

half pay, in each period of twelve consecutive months of service, subject to production by the employee of a **certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre.**

(2) For an employee to be entitled to sick leave with full pay under subsection (1), **the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.**

(3) For the purposes of sub-section (1) and (2) "full pay" includes wages at the basic rate excluding deductions from the wages allowable under section 19.

[Emphasis added]

36. Thus there are parameters set on the enjoyment of sick off. Where the employee is sick and requires medical attention, such an employee is entitled to take time off with full pay to seek such medical attention. Such an employee must however produce a certificate of any incapacity/sickness/illness to the employer, which certificate should be signed by a qualified medical practitioner. Such a medical certificate should as of necessity note the nature of illness/sickness that the employee is being treated for or with regard to the privacy of such an employee, the certificate note as appropriate.

37. In this case, the Claimant has produced a medical note dated 1st November 2012 and another dated 29th October 2012 stating that;

TO WHOM IT MAY CONCERN

The above named patient was seen and treated here at Thika level 5 hospital for acute bronchospasm and has been given 3 days sick off until reviewed again on Thursday 1/11/2012.

...

The above named patient has been receiving treatment at the facility due to acute episodes of bronchospasms. According to the history, it's evident that he has hypersensitivity to the products and fumes in the industry. He has been advised to avoid the exposure to the allergens which are occupational hazards to him.

...

38. Thus the medical note, handwritten by Dr, Eunice Migweru stated. Is this the certificate envisaged under section 30 of the Employment Act? What is the veracity of its contents?

39. Absence from work is an issue so serious that an employer should address. Where such absence is caused by sickness, then the employer should take appropriate action to support the affected employee. Where an employee becomes sick and requires medical attention and has to be absent from work, and then they must disclose their whereabouts and allow the employer to interrogate such absence. The production of a handwritten medical note however urgent and whatever sickness or ailment an employee is suffering from, where the employer demands that proper certification be produced to confirm such illness or sickness to confirm the absence or need for support to such an employee, then such an employee must oblige. The practice that any medical note, treatment card from any establishment is acceptable is a notion that should be discarded.

40. In this case, the Claimant produced the medical note which I find does not conform to a medical certificate certified by a medical practitioner in the form contemplated under section 30 of the Employment Act. Even where such a handwritten note as submitted was done by a medical practitioner, details that outline the period of treatment on the background of the recommendations made with regard to the employment of the subject patient were never noted. Even where there was compliance with all requirements as under section 30 of the Employment Act, where the Respondent as the employer require

further medical confirmation due to the need of re-deploying the Claimant as suggested in the medical note, prudence demanded that such an issue be administratively addressed first before such a drastic action was taken. The actions of the Claimant in this regard and noting his evidence do not help the situation at all. On 2nd November when he presented his medical note to the employer, there must have been a conversation/meeting/consultations on the same as he notes that the human resource officer rejected the note. He however was granted 3 days off to buy medicines. Instead of reporting back to work he submitted a letter of demand from his advocate outlining his terminal benefits.

41. A diligent and keen employee who is represented by a union at the workplace does not act like the Claimant did. Instead of engaging the employer in a meaningful manner so as to be re-deployed from his department where he was experiencing health difficulties, he opted to take time off and instruct an advocate to make demands on the respondent/his employer. Why did the Claimant not consult with his union? What was so urgent and out of the ordinary that he could not wait for 3 days to resume work and see where he would be deployed?

42. I find no just cause for the Claimant to seek constructive dismissal on the face of his own evidence and actions in this case. I find no evidence that after the 2nd of November 2012 the claimant never reported back on duty at all as when he got 3 days off to buy medicines, he came back with his advocate's demand notice, and at the meeting convened on 7th November 2012 he failed to co-operate and eventually when he was called to show cause and attend his disciplinary hearing, he stuck to his letter of demands under the mistaken belief that this was the only alternative that he had. In the process the Claimant lost the only opportunity he had to earn a decent living, his job, out of his own doing and misadvised. He failed to consult with his union, which in essence is the legal entity that should have negotiated his terms of employment to ensure that he was not placed in an unsafe or unhealthy work environment. Had the claimant presented himself at his workplace as directed, the respondent would have then had a duty to address his medical condition by either reference to further medical assessment or re-deployment to another department. When the claimant decided to remove himself from the workplace, then the obligation on the employer to address his concerns was removed as well. When an employee, however justified opts out of work so as to claim constructive dismissal without a justifiable cause, such an employee cannot benefit in equity.

43. The circumstances that arise to an employee so as to enjoy a finding of constructive dismissal require one to come to court with clean hands. The actions of the claimant and his insistence that he was concerned about his future and the life of his family and thus decided not to report to work is contrary to a diligent and a willing employee to work and earn from his labour. By removing himself at the place of work voluntarily and then claim constructive dismissal has no justification under any written law or jurisprudence of this court or any other known labour practice.

44. I therefore do not find any iota of evidence that there was constructive dismissal or termination of employment of the Claimant by the respondent. What I find is the summary dismissal of the Claimant by the Respondent following long absence from work without any justification was in this case justified.

Remedies

45. On the finding that the case of the Claimant was a summary dismissal due to long absence from work, not compensation or notice pay is due. The Claimant for damages as a result of breach of the Occupational Safety and Health Act though claimed, the Claimant did not outline how this breach occurred or how he was affected with regard to his employment and the nature of damages sought as a result. Such claims once outlined require proof. I find no evidence to suggest there was damage, loss or any other negative result of the same. The medical note submitted only give a recommendation and not a certification that indeed the Claimant suffered any medical condition that warranted support or future attention. These will not be awarded.

46. Service pay is due as under section 35 of the Employment Act where statutory dues are not remitted. I find the pay slip of the Claimant outline deductions and remittances to HSSF and NHIF and thus such a claim lacks any basis and is dismissed.

47. Years of service claimed on the basis that there was constructive dismissal cannot stand based on the court finding there were valid grounds to justify summary dismissal.

In conclusion therefore, the claim must fail in its entirety and the same stands dismissed. Each party shall bear their own costs.

Delivered in open court at Nairobi this 2nd Day of March 2015.

M. Mbaru

Judge

In the presence of:

Lilian Njenga: Court Assistant

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