



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1210 OF 2013

CHRISTOPHER MUTHENGI.....CLAIMANT

VERSUS

ROTO MOULDERS LIMITED.....RESPONDENT

JUDGMENT?

1. The Claimant filed suit on 31st July 2013 and averred that he was employed by the Respondent for 18 years from 1992 to July 2010. He was promoted to the position of supervisor, dispatch from April 2001 to July 2010 when his services were terminated. The Claimant averred that he was earning Kshs. 46,000/- at the time of his resignation from employment on 5th July 2010 due to a lot of witch hunting, threats and harsh working conditions. The Claimant thus sought a declaration that the resignation was constructive dismissal and that the Respondent had continued withholding, failing, refusing and or neglecting to pay the Claimant's terminal dues despite demands for the payment. The Claimant sought payment of one month salary in lieu of notice Kshs. 46,000/-, off days for 18 years Kshs. 4,328,182/-, leave not taken for 18 years Kshs. 700,615/-, service for 18 years Kshs. 310,980/-, unpaid July salary Kshs. 46,000/-, compensation for wrongful constructive dismissal, costs of this claim, interest at court rates and any other relief the Honourable Court may deem just and fit to grant.
2. The Respondent was opposed to the suit and filed a Reply to the Statement of Claim on 19th September 2013. The Respondent averred that the Claimant was its employee from 1992 to 2001 and that the termination in 2001 was on account of redundancy for which the Claimant was paid his dues. The Respondent averred that it entered into a new contract of employment with the Claimant on 1st July 2001 and the contract was terminated by the Claimant through resignation on 4th July 2010. The Respondent pleaded that contrary to the Claimant's averments, he was not a stellar employee and was suspended for 7 days in February 2010 for insubordination. The Respondent averred that the Claimant's employment was not terminated unlawfully nor was he forced to resign. The Respondent thus averred that the Claimant was not entitled to the orders sought.
3. The Claimant testified on 12th May 2015 and stated that he was presently in the transport business and was previously an employee of the Respondent initially as an operator earning 20,000/- from 15th September 1992 till his promotion as a supervisor in the dispatch section. He testified that he worked for 18 years and earned Kshs. 46,000/- a month at the time of his termination of contract. The Claimant testified that in February 2010 a new HR Manager joined the company and the manager wrote a letter to the Claimant requiring him to pay casuals. The Claimant opted to resign

after threats that were issued that he would be dismissed. The Claimant testified that his job was good but the HR Manager was bad and he opted to resign. The Claimant thus sought the benefits he was entitled to being salary, leave pay, leave allowance and costs.

4. In cross-examination by Mr. Njoroge for the Respondent he testified that he was pushed to resign by the HR. He testified that there were casuals he was supervising in dispatch and he was told to pay them yet they were workers for the company. He testified that the 7 casuals were employed and were already in service when the HR manager reported. He testified that he had not hired the casuals and that these casuals worked for the company and were paid salaries by the company. He stated that he never went on leave. He admitted being suspended in February 2010 by the HR manager and he did not seek redress as he felt the management was together in this. He testified that he joined Jojo Tanks which is owned by a brother to the owner of the Respondent. He testified that he later left and does business now. He stated that he resigned due to the pressure that was there. He admitted that the employer paid NSSF dues for him. He stated that he never went on off or leave even once in the 18 years. He testified that he was paid 32,356/- for the 8½ years he had served the Respondent.
5. In re-examination he testified that he was still in dispatch after suspension and that he was promoted. He stated that the HR manager was on his case so he left.
6. The Respondent called Jeremiah Joel Nyagah Muringa the HR manager of the Respondent. He testified that he was employed from 1st January 2013 and he was not in employ of the Respondent when the Claimant was employed there. He testified that the records indicate the Claimant resigned. Prior to that the Claimant had been suspended and asked to given an explanation on the casuals. He testified that the Respondent maintained a register and it indicated that the Claimant worked and took breaks. He testified there was no record that the Claimant worked for 18 years. He referred to the leave application forms for the Claimant for 2002, 2003, 2004, 2005, 2006, 2007, 2008 and 2009. He testified that the Claimant was paid all his dues.
7. In cross-examination by the Claimant's advocate the witness testified that the employees execute the policies of the Respondent. He stated that casuals are taken on demand and the overall HR manager is the one who must know who the staff are. The HR manager has power to hire and fire. He testified that the memo was written to the Claimant to explain because the casuals in his department were not on a one month contract.
8. Parties filed submissions and the Claimant filed his submissions on 2nd June 2015 while the Respondent filed submissions on 4th June 2015. In his submissions, the Claimant submitted that his employment was from 1992 till July 2010 when he was constructively dismissed. The Claimant submitted that he was given a letter titled misconduct and he took that to be a witch-hunt and he opted instead to resign as the demand to pay casuals was unmerited as payment of all workers was the mandate of the human resource department. He relied on the case of **Catherine Kinyany v MCL Saatchi & Saatchi [2013] eKLR**, **Elizabeth Kwamboka Khaemba v Bob Cardinal Otunga High School Mosocho & 2 Others [2014] eKLR** and **Joseph Ndung'u v Mastermind Tobacco (K) Ltd [2014] eKLR**.
9. The Respondent submitted that the Claimant was not a role model employee and was subject of a disciplinary action and suspension during the pendency of his employment. The Respondent submitted that the Claimant was terminated on account of redundancy in the year 2001 and was subsequently rehired in 2001 under new terms. The Respondent thus submitted that the case before Court dealt with the contract commencing 2001 and ending in 2010. The Respondent submitted that the Claimant's employ was not constructively terminated and that the Claimant was given a letter to show cause but instead of replying was insubordinate and refused to respond. The Respondent submitted that the Claimant's suit was not proved and should be dismissed with costs.
10. The Claimant resigned from employment of the Respondent. He alleges constructive dismissal. He was working in the dispatch section of the Respondent. The Respondent's HR manager was

stated to have told the Claimant to pay some casuals leading to his resignation. The Claimant resigned in 2010 and filed the suit in 2013.

11. It is clear there was a contract of employment between the Claimant and the Respondent. The employ of the Claimant was from 2001 to July 2010 when he resigned. The previous contract from 1992 was terminated in 2001 and terminal dues paid. The Claimant asserts there was constructive dismissal. Constructive dismissal is when an employer creates a situation in the workplace that 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 Claimant asserted that the Respondent's new management had made his work intolerable. No evidence of this was availed in the nature of a complaint, letter or email from him. He however attached the undated internal memo addressed to him which was to the following effect:-

Ref: Misconduct

Notice is hereby issued concerning your actions that amount to misconduct that can lead to termination of your services with Roto Moulders Ltd.

The management decided to give all casuals a contract of one month. You decided on your own to maintain a group of people (7) whom you are calling 'permanent casuals'. This is tantamount to defrauding the company you have been working for. You are therefore required to make arrangements on how you will pay the following casuals by Monday 8th February 2010.....this office expects a written explanation why a more serious disciplinary measure cannot be taken against you.

12. The Claimant resigned on 4th July 2010. He did not indicate what happened between February 2010 and the date of resignation. The Respondent accepted the resignation letter but indicated that it disagreed with the validity of the reasons for resignation.

13. The Claimant resigned from employment and though he asserts it was on account of the intolerable working conditions at work failed to provide any evidence of this. I thus find that there is no constructive dismissal. The Claimant sought payment for public holidays and this was disproved by the Respondent who availed the roster and duly approved leave application forms for the Claimant. The Claimant peddled falsehoods during his testimony and attempted to embellish the truth. The upshot of the foregoing is that the Claimant failed to prove his case on a balance of probabilities. I thus dismiss his suit with costs to the Respondent.

Orders accordingly.

Dated and delivered at Nairobi this 27th day of July 2015

Nzioki wa Makau

JUDGE