



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO419 OF 2014

NATHAN OGADA ATIAGAGA CLAIMANT

VERSUS

DAVID ENGINEERING LIMITEDRESPONDENT

JUDGEMENT

1. The dispute herein is the wrongful dismissal of the Claimant and non-payment of terminal dues.
2. The claim was filed on 19th March 2014, the Respondent entered appearance on 10th April 2014 and filed a defence on 25th April 2014. Hearing date was fixed for 27th July 2015 but at the hearing only the Claimant was present with the Respondent being absent despite being served with a hearing notice on 5th December 2014. Such records are filed and an Affidavit of Service sworn by Richard Wachira. The matter proceeded in the absence of the respondent. At the mention to confirm filing of written submissions, the Respondent counsel was in attendance and sought to re-open the trial but the court directed that there should be a formal application as in the interim judgement was due. Such formal application has not been filed.
3. The claim is that in July 2007 the Claimant was employed by the Respondent as a Supervisor at a salary of Kshs.64, 000.00 per month which was increased to Kshs.88, 100.00. On 2nd December 2013 the Claimant resigned from his position and gave notice of 2 months after noting several problems in late payments of salaries; working hours; medical cover; safety at work; among other concerns. The late payment of salaries made working conditions very harsh leading to the Claimant to resign which is tantamount to constructive dismissal.
4. The claim is that upon the Respondent receipt of the claimant's resignation letter, they opted to dismiss him. As a result, the Claimant suffered due to lack of a salary, vacation pay and notice pay or his severance pay with aggravated damages resulting from emotional distress associated with termination without notice. The Respondent thus breached the claimant's contract in that they failed to issue him with notice; there was no compensation; outstanding wages were not paid; there was no severance pay; and his terminal benefits were not paid and there was no just cause or reason for the termination. Despite the existence of an employment contract with a commitment to maintain employment of the claimant, the Respondent terminated the same in utter disregard to the contract. The claimant's legitimate expectation of the Respondent to respect the employment contract and its terms was violated. The Claimant is seeking damages for this breach.
5. The claim is for 2 months' notice pay; unpaid salary for November 2013; days worked in December 2013; unpaid leave and service pay. The Claimant is also seeking for compensation for unfair termination.

6. In evidence, the Claimant testified that he is a trained Mechanical Engineer and on 23rd July 2007 he was employed by the Respondent until December 2013 when he resigned due to the non-payment of his salaries. He gave 2 months' notice to take effect on 2nd December 2013. On 8th December 2013 he was issued with a clearance form and told to leave the Respondent premises without being allowed to serve notice period. He was not paid for November 2013. He is seeking for his dues with a 2 months' notice pay; November and December salaries; leave pay and for the unfair termination. When he resigned he had hoped to be paid his dues to start his own business, but with the dismissal he had no capital to do so. He has suffered irreparable damage and loss due to the actions of the Respondent and holds them liable to pay damages.

Defence

7. In the filed defence, the Respondent admit that they had employed the Claimant but his salary was only increased due to changing economic times and not due to good performance. That there was no letter of resignation done by the Claimant and the dismissal was not based on any such resignation. The Respondent also deny that the Claimant ever complained about working conditions; work hours or medical cover or safety at the work place. That where there were late payments of salaries it was due to factors beyond the respondent's control such as economic downturn which in any case was not a regular occurrence as set out by the claimant. There was thus no constructive dismissal.

8. The defence is also that the unsatisfactory conduct of the Claimant including promoting and creating disharmony between work staff and management led to his dismissal. The termination was therefore lawful and justified. All claims are denied as upon dismissal the Claimant was paid all his terminal dues. That in the circumstances of the alleged resignation, the Claimant should not be making any claims as he left work voluntarily.

Submissions

9. In submissions, the Claimant stated that he was an employee of the Respondent and was forced to resign from his position due to the non-payment of his salaries. When the salary was paid it would be late forcing him into hardships. The Respondent also introduced long working hours and failed to adhere to safety at the work place. Upon resignation, the Claimant was dismissed and issued with a Certificate of Service.

Determination

10. The claim is based on unlawful and or wrongful termination of employment and the non-payment of terminal dues. The claim that follows is that the Claimant was forced to resign from his position due to various complaints part of which are the late payments of his salaries and poor work conditions. The Claimant states that he gave his resignation letter upon which he was dismissed and not allowed to serve notice. This affected him as he was not paid his terminal dues and was made to leave work before his intended date and due to the non-payment of his dues, the business he wanted to set up was impossible. The Claimant does not attach his letter of resignation. This fact is denied by the respondent. In his statement of Reply to the defence, the Claimant does not pursue this issue at all.

11. Constructive dismissal, occurs when an employee 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 force the 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. In the case of **Mariana Onica and Another versus Sky Aero Limited, Cause No.1815 of 2014** the court 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 he did.

12. There was no evidence called to support the defence filed but in paragraph 5(c) of the defence the Respondent states;

If there had been late payment in salary which is denied, the same was occasioned by factors beyond the control of the respondent, such as economic downturn and is not a regular occurrence as made out by the claimant.

13. Such is the defence. The evidence of the Claimant was that he resigned from his position due not the late payments of his salaries. Indeed he is claiming his salary for November and December 2013 that have not been paid. Even with the general denials made by the Respondent in defence, the Claimant was able to establish the fact of the later payment of his dues under oath, which evidence was not challenged. I take it that the Claimant offered his labour for pay, such pay was delayed and as an employee who had gone out and worked for the respondent, he undertook his part of the bargain but was never paid in time. This is find to be an intolerable condition the Claimant was put under and for him to be subjected to such a situation, apart from being intolerable, it is inhuman and degrading. Where an employee has given out their labour for pay, fair labour practice demands that such an employee should be remunerated for the same otherwise such an employee is reduced into a life devoid of any humanity as he has to beg and live on the mercy of his employer, relatives or friends and well-wishers. That is not the purpose of employment law. Given labour must be remunerated and in good time.

14. Any employee put in circumstances such as the Claimant was, can claim constructive dismissal. This should have been the case for the claimant, but he has no such letter of resignation.

15. That said, the Claimant was dismissed from his employment. The Respondent does not offer any written reasons save for the general averment that the Claimant was in the habit of promoting a creating disharmony between work staff and management that led to his dismissal. It is now trite that upon termination or dismissal of an employee, the notice must be in writing stating the reasons for the same. To issue a Certificate of Service is not sufficient. Whatever the reason that has caused the dismissal, this must be stated in writing. In this case I find not such notice, reason or reasons for dismissal contrary to the provisions of section 43 of the Employment Act. Whatever misconduct an employee has committed, such an employee is entitled to be heard before any summary action that an employer intends to take even in very serious circumstances such as are outlined under section 44 of the Employment Act. In the absence of meeting these substantive issues and taking the Claimant through the procedural processes required in law that are mandatory, any resulting dismissal becomes an illegality *ab initio* and the same is an unfair labour practice contrary to article 41 of the constitution.

16. In this case I find the Claimant was dismissed for no justifiable cause known in law or a just cause that can find any validity or justification. Such amounts to unfair dismissal under the provisions of section 45 of the Employment Act.

Remedies

17. On the finding that the Claimant was unfairly dismissed he is entitled to compensation. This shall be assessed at the maximum rate based on his last salary of Kshs.88, 150.00.

18. There is a claim for notice pay of two months. The Claimant does not state why he is basing his notice pay on 2 months. He has not attached his contract of employment that could have outlined the notice period as 2 months. Despite evidence that he had issued his resignation notice for 2 months, this is not a justification that he should be paid for the 2 months without any justification. In the absence of any evidence to support his claim for 2 months' notice, the minimum legal notice period of one (1) month's pay, which shall be awarded. This is assessed at Kshs.88, 150.00.

19. There is a claim for November and December 2013 pay that is due. There is no evidence submitted by the Respondent that such salaries were paid. The Claimant is thus awarded salary for November 2013 at kshs.88, 150.00 and December salary for days worked at kshs.21, 156.00.

20. Unpaid leave is claimed. This claim is empty. The claimed leave is not stated as to which period it covered. Even where it was due, the Claimant had a duty to outline this claim in his evidence. It cannot be issued in a blanket form, it must have a basis. This is declined.

21. The Claimant is seeking service pay. Annexure "NOA2" is the pay slip of the Claimant for the month of September 2013. Part of the due noted are NSSF and NHIF deductions. By virtue of section 35(6) of the Employment Act, upon the payment of the due statutory dues, the Claimant is not entitled to any service pay. This claim is declined.

Judgement is entered for the Claimant against the Respondent in the following terms;

- a. **The Claimant was unfairly dismissed;**
- b. **Compensation awarded at Kshs.1,057,800.00;**
- c. **Notice pay at kshs.88,150.00;**
- d. **Salary for November 2013 at kshs.88,150.00;**
- e. **Salary for 8 days worked in December 2013 at Kshs.21,156.00;**
- f. **Interest is due on (c), (d) and (e) above;**
- g. **Costs of the suit.**

Delivered, dated and signed in open Court at Nairobi this 21st Day of September 2015.

M. Mbaru

JUDGE

In the presence of:

Court Assistant.....

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