



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

CAUSE NO. 50 OF 2013

CLAVER ALEX MKOSICLAIMANT

VERSUS

CORNER GARAGE TR LIMITED.....RESPONDENT

J U D G M E N T

Introduction

1.The claimant has brought this suit claiming terminal dues arising from the alleged unlawful termination of his employment by the respondent on 29.2.2012. The respondent has denied liability for the alleged unlawful dismissal and averred that it is the claimant who deserted work on 29.2.2012 after defying orders from the Directors and insulting him. In addition the respondent has counter claimed against the claimant the sum of Ksh 128,157 being loan and advance payment made to him during his tenure of employment.

2 .The suit was heard on 5.12.2013, 28.7.2014, and 23.6.2015 when the claimant testified as Cw1 and the respondent called Mr. Shiraz Shamsudin Abdulkadir as Rw1. Thereafter both parties filed written submissions.

Analysis and Determination.

3 .There is no dispute that the claimant was employed by the respondent from 28.3.1998 as an accountant and his salary was Ksh 25,000 per month. There is also no dispute that his employment with the respondent ended on 29.2.2012. The issues for determination are:

- a) whether the claimant deserted work or he was unlawfully dismissed.
- b) whether the reliefs sought in the suit should be granted.
- c) whether the counter claim should be allowed.

Desertion is Unlawful Dismissal.

4 .Cw1 testified that on 29.2.2012, he reported to work as usual but the Director of the respondent Mr. Latif Pandya told him that henceforth he (Cw1) was going to work for a sister company called Synergy Gases (K) Ltd. Having not been issued with any appointment letter by the respondent for 13 years Cw1 requested for a transfer letter to protect his interests. That the Director was not pleased with the claimant's request for the transfer letter and abused him and chased him away from the office. Cw1 was not happy with the manner in which he was dismissed and rushed to

report the matter to the labour office who heard the dispute and recommended that the respondent pays some money.

5 Rw1 is the financial controller for the respondent and he confirmed that Cw1 was the respondent's accounts assistant from 1998 to 29.2.2012 earning a salary of Ksh 25,500 per month. That on 29.2.2012 Cw1 was called by the Director Mr Latif Pandya to go to Synergy Gas (K) Ltd to assist in Cylinder reconciliation. That the request to assist was not a transfer from the respondent to Synergy Gas (K) limited. That Cw1 refused to take the Directors instructions and abused him and turned to threaten Rw1 before disappearing. Rw1 denied that Cw1 was dismissed and maintained that it him who deserted work.

6 .After careful evaluation of the material before it, this court finds on a balance of probability that, the claimant never deserted work but rather, he was dismissed by the Director Mr Latif Pandya. The conduct of the claimant of reporting the dispute to the labour office immediately after the dismissal does not reflect the conduct of a deserter. The reason for the dismissal of the claimant was his refusal to go on a transfer from the respondent to assist company called Synergy Gas Ltd without a letter. The court finds merits in the claimant's evidence that it was not safe for him to take the verbal order of transfer to another entity because for 13 years he was never given any appointment letter by the respondent. In this court's view the employer should have made clear to the claimant the terms upon which he was to join the new entity. For the foregoing reasons, the court is satisfied that the claimant was dismissed. The question that arises is whether the said dismissal was **Unfair and Unlawful**.

7 .Under section 45 of the employment Act (E.A, termination of employment is unfair if it is done without a valid and fair reason and if done without following a fair procedure. In this case the claimant alleged that he was terminated through a transfer to another entity without any letter to secure his interest. That the transfer was unilateral and when he requested for a letter for the transfer the Director abused him and chased him away forcing him to report the matter to the labour office. In response, Rw1 alleges that Cw1 was only instructed to assist in the sister company on temporary basis and he became abusive and deserted work. The court has already rejected the explanation by Rw1, that Cw1 deserted work. The court therefore agrees with the claimant that he was dismissed summarily after refusing a transfer to another entity without clear terms in writing. The court has not been showed any written contract for the claimant providing for transfer of the claimant from the respondent to any other entity associated with the respondent whether on temporary or permanent basis. Consequently, the alleged transfer to the sister company amounted to both breach of contract and unlawful and unfair termination of the claimant's employment because such termination was done without the consent of the claimant and without any lawful cause.

Relief to the Claimant.

8 . In view of the foregoing findings that the claimant never deserted work, the court declares that termination of his employment was unlawful as prayed. He never sought reinstatement to employment under section 49 (3) of the EA but only prayed for damages under section 49 (1) of the EA. He is therefore awarded one month salary in lieu of notice, salary for February 2012, plus six months gross salary as compensation for the unfair and unlawful termination of employment. In awarding the foregoing, the court has considered the fact that the claimant was not to blame for the termination. The court has considered the fact that the claimant had served the respondent for reasonably long period of 13 years. Lastly the court has considered the fact that the claimant could, with due diligence, secure another employment within 6 months. The claimant pleaded that his salary at the time of dismissal was Ksh 25,000. The court therefore awards him Ksh 200,000 for the said 3 items. He will also get a certificate of service as required under section 51 of the EA.

9 .The prayer for service pay is however dismissed because the claimant was a member of the NSSF and his employer contributed to the said Social Security Fund according to the pays slips

produced as exhibits. Under section 35 (6) of the EA, an employee who is covered by social security under the NSSF Act is disqualified from claiming service pay.

Counter Claim

10 .Rw1 told the court that during his tenure of office, the claimant requested for and he was advanced loans by the respondent. That as at the time of separation on 29.2.2012, the claimant had outstanding loan balance of Ksh 128157 which he counter claimed against the claimant. He however agreed on humanitarian grounds to an amicable settlement in terms of the proposal made by the labour officer during conciliation being payment of Ksh 93,905.50 in full settlement.

11.The claimant denied that he was advanced any loan by the respondent. According to him, the employer only assisted him to pay hospital bill of Ksh 47,245 and 37,245 for his child and his wife on 13.6.2002. He denied that the money was meant to be a loan and it was never deducted from his pay slip. On cross examination Cw1 changed the story to say that the money given by the employer to pay medical bills was salary advance and not loan and that the said advance was fully recovered through salary deductions. He admitted that on 30.11.2004 and 11.9.2008 he was advanced Ksh 9,000 and Ksh 28,500 respectively. He further admitted that he was being deducted the advance on his pays slips.

12 .The court has considered the foregoing arguments by both Rw1 and Cw1 and finds on a balance of probability that the claimant was advanced money on credit basis by the respondent in 2002, 2004 and 2008. The money was all meant for the claimant's domestic needs. Recovery of the said credit was done through salary deductions on the pay slip up to March 2009 according to the documents filed by the defence. It was however not clarified what debt was repaid fully or not by March 2009. In this court's view, the debts dating bank to 2002 and 2004 became time barred in or about 2009 and 2010 respectively after the lapse the 6 years. As regards the debt for 2008, the same is recoverable because the counter claim was filed in 2012 within 6 years. There is no evidence of its repayment. The counter claim is therefore allowed to the extent of Ksh 28,500 which was admitted by the claimant. That sum of Ksh 28,500 will be set off against the award of Ksh 200,000 given above to the claimant.

Disposition

13. For the reasons stated above judgment is entered in favour of the claimant declaring his dismissal unlawful and awarding him the sum of Ksh 171,500 plus costs and interest. He will also get a certificate of service. It is so ordered.

Dated and Delivered at Mombasa this 23rd day of October 2015.

ONESMUS MAKAU

JUDGE

23.10.2015

Coram

Before Justice Onesmus Makau

C/Assistant -

For the Claimant:

For the Respondent:

Court

Judgment delivered in their presence/absence in open court.

ONESMUS MAKAU

JUDGE