



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 12 OF 2014**

**SAMUEL ITOTIA GITHUA**

**CLAIMANT**

**v**

**SECURITY GROUP KENYA LIMITED**

**RESPONDENT**

**JUDGMENT**

1. Samuel Itotia Githua (Claimant) was initially employed as a Human Resources Manager around 1 March 2009 by Security Group Kenya Ltd (Respondent).
2. At some point, the Claimant was promoted to General Manager and he was transferred to the Coast as Regional Manager.
3. On 10 October 2011, the Respondent wrote to the Claimant informing him of the termination of his employment effective the date of the letter and advised him of the dues payable upon the termination.
4. Through a letter dated 5 December 2011, the Respondent offered the Claimant fresh employment as General Manager, Western.
5. About one year later, on 31 October 2012 to be precise, the Respondent informed the Claimant that due to restructuring, it had been decided to abolish the position of General Manager-Western. The letter also set out payments due to the Claimant.
6. Through a letter dated 9 July 2012, the Respondent offered the Claimant the position of Branch Manager-Eldoret effective 1 November 2012. The Claimant accepted the offer but curiously, it appears that he appended his acceptance on 31 October 2010 (Claimant explained the discrepancies in dates as errors).
7. Come 19 June 2013, the Claimant wrote to the Respondent tendering his resignation as Branch Manager-Eldoret. The reasons he gave were poor pay and frustrations from a named employee. In the resignation letter the Claimant also made reference to unexplained extension of his probation period.
8. The Respondent wrote to the Claimant on 20 June 2013 informing him that his resignation had been accepted and informed him of his entitlements.
9. On 15 January 2014, the Claimant commenced legal proceedings against the Respondent alleging breach of contract and seeking a declaration that his demotion was malicious, unsubstantiated, unlawful and unprocedural. He also sought compensation, damages, wages for June 2013, loan balances and reimbursement of communication expenses.
10. The Respondent filed a Response on 29 April 2014. The parties filed supporting documentation and the Cause was heard on 20 January 2015 and 14 July 2015.
11. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the Claimant was unlawfully demoted contrary to Respondent's policies, whether the Claimant was forced to resign (constructive dismissal) and appropriate*

orders/remedies.

### **Whether Claimant was unlawfully demoted or whether the demotion was contrary to Respondent's policies.**

12. It is not disputed that the Respondent terminated the employment of the Claimant through a letter dated 31 October 2012. The reason given was restructuring.
13. In his testimony, the Claimant narrated that the Respondent's Managing Director called him to Nairobi and explained to him about the restructuring and that the position of Branch Manager was available. He was given 2 letters, termination of employment and appointment as Branch Manager.
14. The Claimant stated that he accepted the new appointment without being forced, and because he did not have an option due to financial commitments as he had an outstanding loan.
15. The Respondent's witness confirmed that there was restructuring because the Respondent found it not feasible to have a General Manager in the Western region.
16. The facts as presented are not disputed. The position of General Manager-Western was abolished. The services of the Claimant were terminated.
17. It was a case of redundancy. And in this regard, the Respondent should have complied with the conditions outlined in section 40 of the Employment Act, 2007. The Claimant should have been given 1 month written notice and paid one month's wages in lieu of notice. The local labour officer should have been informed as well.
18. Although the Claimant was offered 1 month pay in lieu of notice, he was not given 1 month written notice as required by section 40(1)(b) of the Act. There was no suggestion that the local labour officer was informed.
19. In this respect, the termination of the employment of the Claimant as General Manager through redundancy was procedurally unfair. But there is a difficulty. The Claimant did not present his cause of action (pleadings) as one of redundancy despite being ably represented.
20. The Claimant's case was that the demotion from General Manager to Branch Manager was unfair, unlawful, unprocedural and contrary to law.
21. But this cannot be from the facts as established. The Claimant's employment as General Manager may have been unlawfully/unfairly terminated on 31 October 2012 and that marked the end of the employment relationship.
22. When the Respondent offered him the position of a Branch Manager starting on 1 November 2012 that was a new and distinct contract. It was a separate contract. He might have been forced by his financial situation to accept it but it remains a distinct contract. This was not a case of demotion.
23. The Claimant could have accepted the termination and challenged the fairness of the redundancy but did not.

### **Whether Claimant was forced to resign (constructive dismissal)**

24. The Claimant's resignation letter dated 19 June 2012 gave the reasons for the resignation. The reasons he gave were *poor pay, frustrations from a Zachary Nyambu and un-explained extension of probation*.
25. In the course of testimony, the Claimant stated that he was forced by financial circumstances to accept the position of Branch Manager at less pay. He stated that otherwise the Respondent did not force him to accept the offer.
26. On this ground of financial circumstances, the Court is of the view that the Claimant cannot fault the Respondent. The pay was mutually agreed.
27. The other reason advanced by the Claimant was frustrations from one Zachary Nyambu. This, if proved would have brought the resignation within the parameters of constructive dismissal.
28. The Claimant failed to prove that the Respondent or any of its employees (named or others) had made the work environment so intolerable to him that he was entitled to resign and plead constructive dismissal.
29. The last ground advanced was unilateral extension of probation period. This if proved could have demonstrated unfair labour practice. But again, apart from the resignation letter, this was not pleaded nor evidence led.

30. The Court is unable, on the basis of the pleadings and evidence tendered to find that the Claimant's resignation was due to an intolerable work environment caused by the conduct of the Respondent or its employees.
31. Even if there was continuous employment, and the Claimant had based his claim on unilateral variation of employment terms, he might have not gone far in that respect because his staying on the job meant potential acceptance of the revised terms.
32. In such a case, I would have adopted as sound legal position in our jurisdiction, the holding in comparative case law expressed in *Harlow v Artemis Ltd* (2008) IRLR 629 and *Rigby v Ferodo Ltd* (1987) IRLR 516 (House of Lords) that an employee who stays at work after unilateral revision of terms have been imposed impliedly accepts the variation by conduct.
33. Before concluding, the Court observes that the Claimant might have had a good case had he taken the time to consider the appropriate cause of action to pursue.
34. From the foregoing, the conclusion that the Court reaches is that the Claimant has failed to prove his case and the Memorandum of Claim filed in Court on 15 January 2014 is ordered dismissed.
35. There is no provision in the rules of this Court or in the establishing statute that costs follow the event. The Employment and Labour Relations Court Act simply obligate the Court to make a just costs order.
36. Each party to bear own costs.

**Delivered, dated and signed in Court on this 20<sup>th</sup> day of November 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Omusundi instructed by Morgan Omusundi Advocates

For Respondent Mrs. Mbeche instructed by Obura Mbeche & Co. Advocates

Court Assistant Nixon