



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 35 OF 2014

JOSEPH OTIENO AKECH

CLAIMANT

v

RAI PLYWOODS (K) LIMITED

RESPONDENT

JUDGMENT

1. Joseph Otieno Akech (Claimant) sued Rai Plywoods (K) Ltd (Respondent) on 19 February 2014 and he stated the issues in dispute as *unfair and illegal termination of employment and failure to pay terminal dues*.
2. The Respondent filed a Response on 21 March 2014 and list of witnesses and documents on 22 May 2014. The Cause was heard on 6 July 2015 and submissions were filed on 29 July 2015 and 1 October 2015.
3. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the Claimant was dismissed/is still under suspension and appropriate remedies/orders*.
4. But first a brief background.
5. On 14 February 2011, the Claimant was arrested by the Police and later on charged (on 12 April 2011) with conspiracy to commit a felony.
6. A day after the arrest on 15 February 2011, the Respondent suspended the Claimant without pay to pave way for investigations into allegations involving misappropriation of funds belonging to Plywood Savings and Credit Co-Operative Society (the Saccho belonged to employees of the Respondent and the Claimant was a treasurer/member of its Management Committee). The suspension was for an indefinite period.
7. On 3 February 2012, the Claimant and 3 others were acquitted under section 210 of the Criminal Procedure Code.
8. The Claimant's advocate consequently wrote to the Respondent on 26 March 2012 seeking the revocation of the Claimant's interdiction. The Respondent did not respond to the letter hence the present proceedings.

Whether Claimant dismissed/still under suspension

9. The Claimant as well as the Respondent's Human Resources Manager testified.
10. According to the Claimant, he was never served with notice of termination of employment, termination letter, or any other letter after the suspension by the Respondent.
11. The Respondent's Human Resources Manager on his part testified that the Claimant was still on it's the record and that his employment had not been terminated. In the view of the witness, the Claimant was still on suspension.
12. The witness further stated that he wrote to the Claimant on 24 February 2011 asking him to come and show cause (copy of letter not produced) and that the Claimant's advocate wrote to the

- Respondent on 9 February 2015.
13. The Respondent's Human Resources Manager unequivocally admitted that the Claimant was still an employee of the Respondent.
 14. With the admission, the Court still has to determine whether in fact and in law, an employment relationship subsists as there are contradictory positions advanced by the parties.
 15. The Claimant was suspended indefinitely by the Respondent and the stated reason for the suspension was to facilitate investigations. The letter did not clarify whether the investigations were with a view to disciplinary action against the Claimant. It is not even clear whether the investigations were to be conducted by the Police.
 16. Police investigations have the objective/purpose of preferring criminal charges. Those charges were laid but the Claimant and others were acquitted.
 17. An employer should not wait for the Police to conduct investigations before conducting disciplinary proceedings unless the employee is informed expressly the outcome of such investigations would be material.
 18. In any case, the Respondent did not take any action after the Police concluded their investigations and charged the Claimant in 2011. If these Police investigations were material, at least the Respondent should have notified the Claimant of what action it intended to take after the acquittal.
 19. The Respondent made much of the investigations and report by the Commissioner of Cooperatives. Again, the suspension letter did not disclose whether the investigations referred to in the suspension letter were the ones to be carried out by the Commissioner. These investigations appear to have been concluded by 17 August 2012.
 20. There is nothing on record to suggest that the Respondent intended or used the outcome of these investigations for purposes of disciplinary action.
 21. After the acquittal of the Claimant and his co-accused persons, his advocate wrote to the Respondent seeking to know the status of his suspension/employment but there was no response to the advocate's letter.
 22. If the Claimant was still on suspension nothing would have been easier to do than advise the advocate of that fact.
 23. A suspension should have a contractual or statutory foundation or backing. Generally, under the common law, a suspension of an employee should have a contractual basis. Without the contractual authority, unilateral suspension by the employer with or without pay would constitute breach of contract (see *McKenzie v Smith* (1976) IRLR 345, which holding I endorse as being appropriate in our jurisdiction).
 24. In the case at hand, the Respondent has not shown under what authority it suspended the Claimant without pay.
 25. In the humble view of the Court, the suspension of the Claimant without pay and for an indefinite period not only constituted a breach of contract by the Respondent but it also constituted an unfair labour practice and it was open to the Claimant to sue for unfair termination/wrongful dismissal after the plea to revoke the suspension was not responded to.
 26. Further, the Respondent ought to have been aware, and was put on notice by the Claimant's advocate of the acquittal, and by not asking the Claimant to resume duty or take appropriate disciplinary action, the Respondent frustrated the Claimant from performing his side of the contract when he showed a desire to return to work.
 27. The effect of the Respondent's conduct/failure to respond or call the Claimant after the acquittal was to frustrate the contract such as to destroy the whole object of the contract, if it still subsisted.
 28. In effect, the Respondent created a hostile work environment for the Claimant and he was entitled to consider himself as having been dismissed (see *Western Excavating ECC Ltd v Sharp* [1978] IRLR 27 for a discussion on constructive dismissal).
 29. The contention by the Respondent's witness in Court that the relationship still subsisted was without legal or contractual backing.
 30. The further contention by the Respondent in its submissions that the Claimant did not resign in writing for the doctrine of constructive dismissal to be implicated is without legal basis.
 31. This is so because the dismissal in constructive dismissal cases is involuntary and an employee can resign verbally or by conduct in such situations (see *Mnguti v Commissioner for Conciliation, Mediation & Arbitration* (2015) ZALC JHB 277, whose holding on legal principles on resignation I endorse as sound even within out legal framework).

Other pending civil proceedings

32. In its submissions, the Respondent made reference to pending civil proceedings (Eldoret CMCC No. 57 of 2013 and Eldoret CMCC No. 59 of 2013). These other cases were not proved in this Cause nor their relevance demonstrated.

Surcharge

33. As regards the issue of surcharge, that is an issue between the Claimant and the Saccho, which is an independent juristic person with its own interests.

Appropriate remedies/orders

2 months pay in lieu of notice

34. The Claimant did not lay any contractual or statutory basis for 2 months pay in lieu of notice as opposed to the statutory 1 month.

35. In view of the conclusion reached and pursuant to section 35(1)(c) of the Employment Act, 2007, the Court finds he is entitled to 1 month pay in lieu of notice. It was not disputed that the monthly basic wage was Kshs 35,000/-.

Unpaid wages/allowances/benefits

36. No case was made for these heads of claim nor was a legal basis demonstrated. These are declined.

Reinstatement

37. The Claimant is currently employed elsewhere and reinstatement would not be an appropriate remedy. Considering the Claimant's length of service and circumstances of separation the Court is of the view that maximum compensation pursuant would be an appropriate remedy.

Conclusion and Orders

38. The Court finds and holds that the suspension of the Claimant was unlawful and an unfair labour practice and further that the conduct of the Respondent after the suspension amounted to constructive dismissal entitling the Claimant to consider himself as dismissed.

39. The Court awards and orders the Respondent to pay the Claimant

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|------------------------------------|----------------|
| a. 12 months wages as compensation | Kshs 420,000/- |
| b. 1 month wage in lieu of notice | Kshs 35,000/- |

TOTAL

Kshs 455,000/-

40. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 11th day of December 2015.

Radido Stephen

Judge

Appearances

For Claimant

Ms. Fatma instructed by Gordon Ogola, Kipkoech & Co. Advocates

For Respondent Mr. Aseo instructed by Gicheru & Co. Advocates

Court Assistant Nixon