



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

AT NYERI

CAUSE NO. 86 OF 2015

PATRICK KIOGORA MOSES.....CLAIMANT

VERSUS

MOBICOM (K) LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 11th December, 2015)

JUDGMENT

The claimant filed the memorandum of claim on 13.05.2015 through M/S F.K Gitonga & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the respondent's action to summarily dismiss the claimant from employment was unlawful, unfair and inhuman.
- b. A declaration that the claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
- c. The respondent to pay the claimant his due terminal benefits and compensatory damages totaling to Kshs.259,615.00.
- d. Interest on (c) above from the date of filing of the suit till payment in full.
- e. Costs of this suit plus interest thereon.

The respondent filed the statement of defence and counterclaim on 28.05.2015 through Kiboi & Company Advocates.

The claimant was employed by the respondent as a sales agent then promoted to a branch manager. At the material time he was deployed at Meru branch where he had established a residence with his family. The usual transfer process was that the respondent gave the staff enough notice to move on transfer.

On 8.01.2015 the deputy sales manager informed the claimant that he had been transferred from Meru to Maua with immediate effect and failure to report, his employment would be terminated. He was hurriedly made to hand over to the incoming officer as his replacement and who by then was present at the office having arrived as redeployed. The claimant explained to the sales manager Benson Wandeto that he needed time as it was not practical to report at Maua the following morning as he needed to prepare so as

to relocate on transfer as redeployed but Wandeto dismissed his pleas. The claimant testified that if he was given time he would have prepared to report as redeployed.

The following day he reported at the Meru office and was instructed that he must report to Maua that morning. When he asked for transfer allowance, he was not given the same. Stock taking on the previous night had been adjourned at midnight to the following morning. It took 2 hours to complete the stock taking and handing over on that morning. The claimant requested for a week to relocate but Wandeto denied him the chance and told the claimant that there were options for his replacement. The claimant then considered himself terminated constructively especially that he had no resources to travel to Maua as transferred. It was his case that the transfer notice was short and he was not facilitated by way of necessary transfer allowance to relocate to Maua. Wandeto had told him that if he failed to report on that date then he would not report thereafter.

The respondent's witness (RW) was Benson Wandeto. He testified that the claimant had a specific time within which to report but he did not recall what that time had been. Later he testified that the claimant had to move on the date of the handing over. RW further testified that the transfer allowance had not been paid as it would be paid later.

The court has considered the pleadings, the evidence and the submissions. The court makes findings as follows.

The **1st issue** is whether the termination took place. The court finds that the claimant's account of the circumstances of the termination is true as there is no reason to doubt that account. The court finds that once the respondent made it difficult for the claimant to move as redeployed by denying sufficient notice and providing the facilitative resources, the claimant was entitled to consider himself terminated. The termination was constructive.

The respondent submitted that it never terminated the claimant's employment. However, in **Joseph Mwangi – Versus - the Board of Governors, Mwiruti Secondary School [2012]eKLR**, this Court stated as follows:

“The next issue for determination is whether the claimant was unfairly terminated. The court considers that the employment relationship is of high trust and confidence under which the employer and employee must at all times uphold cooperation. Thus, it is the court's opinion that conduct by the employer that undermines such high trust, confidence and cooperation thereby occasioning breakdown in the employment relationship amounts to termination of the contract of employment. In such circumstances, it is the view of the court that a dismissal by way of constructive termination occurs if, the employee leaves employment by reason of the employer's breach of his, her or its obligation.” The court upholds that opinion as it applies to the present case.

The **2nd issue** is whether the constructive termination was unfair. The court finds that the circumstances were such that the claimant had a valid grievance and it was necessary that the respondent accords the claimant a chance to ventilate that grievance- that the notice was short and he needed facilitation to move. Under section 46 (h) of the Employment Act, 2007, such valid complaint would not constitute a valid reason for the termination. The court further holds that the failure to accord the claimant a genuine grievance management procedure amounted to an unfair labour practice that contravened Article 41 of the Constitution. Thus the court returns that the constructive termination was unfair.

The **3rd issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

- a. The claimant is entitled to the declaration that the termination was unfair.
- b. The claimant is entitled to Kshs.4,615.00 being pay for days worked in January 2015.

c. The claimant is entitled to one month pay in lieu of the termination notice under section 35(1) (c) of the Act being Kshs.15,000.00.

d. The claimant did not contribute to his constructive in any manner. The claimant wished to continue in employment. The court has considered the inconsiderate and most insensitive manner the respondent treated the claimant's pleas for better notice and facilitation. The court has considered that the claimant diligently handed over and was keen to obey the employer. The court awards him 12 months' salaries making Kshs.180,000.00.

e. The claimant is entitled to pay for the 2 years' annual leaves due but not taken making Kshs.30,000.00 as prayed for.

In conclusion judgment is entered for the claimant against the respondent for:

a. The declaration that the termination of the claimant's employment by the respondent was unfair, unlawful and inhuman.

b. The respondent to pay the claimant **Kshs.229,615.00** by 01.02.2016 failing interest to be payable thereon at court rates from the date of the judgment till full payment.

c. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 11th December, 2015.**

BYRAM ONGAYA

JUDGE