



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1442 OF 2012

PETER KIOKO WAMBUA.....CLAIMANT

VS

THE REGISTERED TRUSTEES

GERTRUDE'S CHILDREN HOSPITAL.....RESPONDENT

AWARD

Introduction

1. Peter Kioko Wambua, the Claimant herein worked for the Gertrude's Children Hospital between 15th November 2010 and 19th October 2011. He filed a claim on 22nd August 2012 seeking payment of his terminal dues. The Respondent filed a Memorandum of Reply and Counterclaim on 26th October 2012 to which the Claimant filed a Reply on 8th November 2012.
2. The matter was heard on 23rd April, 18th July and 20th November 2013 with Mr. Gachomo appearing for the Claimant and Miss Bonyo for the Respondent. The Claimant testified on his own behalf and then called Angelo Kiuma. The Respondent's Human Resource Officer, Lucy Hudson and Chief Accountant, Samuel Njuguna Mugo testified for the Respondent. Both parties filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent on 15th November 2010 in the position of Project and Maintenance Manager at a monthly salary of Kshs. 190,000. The Claimant's employment was confirmed with effect from 1st March 2011. Effective 1st August 2012, the Claimant's salary was reviewed to Kshs. 214,700. The Respondent also approved a bonus of 37% in favour of the Claimant over and above 30% paid earlier. Contribution to the staff pension scheme was reviewed from 7% to 10%.
4. On 19th October 2011, the Respondent's Chief Executive Officer, Gordon Odundo summoned the Claimant and his supervisor, Angelo Kiuma to a meeting at which he made allegations of fraud against the Claimant. It was the Claimant's case that the allegations were unfounded and malicious and that thereafter, the Respondent forced the Claimant to resign.
5. The Claimant claims the following:

- a) 67% bonus.....Kshs. 163,949
- b) Accrued leave days.....Kshs. 214,700
- c) 3 months' salary in lieu of notice.....Kshs. 644,100
- d) Certificate of service
- e) Costs plus interest
- f) Any other relief the Court may deem just to grant

The Respondent's Case

6. In its Reply and Counterclaim, the Respondent admitted having employed the Claimant as a Project and Maintenance Manager effective 15th November 2010. The Claimant's salary was increased with effect from 1st August 2011. He was also paid a bonus amounting to Kshs. 70,300 for the 2010/2011 financial year. According to the Respondent, the next bonus payment would be in July 2012 at the close of the 2011/2012 financial year for which the Claimant would only have qualified if he was in the Respondent's employment as at December 2011.

7. According to the Respondent, the Claimant opted to resign effective 19th October 2011, without giving the requisite notice. The Respondent stated that this was in breach of the Claimant's contract of employment. The Respondent accepted the Claimant's resignation on 21st October 2011. At the time of resignation, the Claimant had 27 accrued leave days.

8. The Claimant's terminal dues which were released to him were not sufficient to cover 3 months' salary in lieu of notice which was due from the Claimant to the Respondent. The Respondent therefore claims the sum of Kshs. 644,100 by way of counterclaim.

Findings and Determination

9. The main issue for determination in this case has to do with the mode of separation of the Claimant from the Respondent's employment. The Claimant claims that he was coerced to resign while the Respondent maintains that the Claimant voluntarily resigned without giving the requisite notice.

10. The Claimant testified that on 18th October 2011 he and his immediate supervisor, Angelo Kiuma were instructed to attend a meeting at the office of the Respondent's Chief Executive Officer, Gordon Odundo on 19th October 2011. At the meeting allegations of fraud and corruption were made against the Claimant and his supervisor.

11. The Claimant further testified that following these allegations, the Respondent's Chief Executive Officer, Gordon Odundo told the Claimant to leave immediately. Odundo then instructed the Human Resource Manager, Linah Kowitti to ensure the Claimant's immediate departure.

12. Kowitti told the Claimant to accompany her to her office where she gave a plain paper to the Claimant on which he was to write a resignation letter. Thereafter Kowitti instructed the Claimant to clear his office and then escorted him to his car. Two hours later, Angelo Kiuma told the Claimant that he had also been asked to resign but had declined. Kiuma's employment was terminated on the same day.

13. The Claimant's account of the proceedings of the meeting held on 19th October 2011 was corroborated by Angelo Kiuma who told the Court that the Chief Executive Officer had made

allegations of serious financial impropriety against the Claimant.

14. The Respondent disputed the Claimant's account of the events preceding his resignation on 19th October 2011. Samuel Njuguna Mugo who attended the meeting of 19th October 2011 told the Court that this was a routine meeting held to discuss costs relating to repairs and renewals. According to Mugo, no allegations of impropriety were made against any of the persons in attendance.

15. The Court has considered the evidence presented by the parties in this regard and has arrived at the conclusion that the account of the proceedings of the meeting of 19th October 2011 as presented by Mugo conceals material facts. If indeed this was a routine meeting called to discuss costs relating to repairs and renewals, why would two senior managers working in the same Department leave the Respondent's employment on the same day of the meeting?

16. The Court found Mugo to be an unreliable witness and rejected his evidence as far as the events of the meeting held on 19th October 2011 are concerned and the Respondent did not produce minutes of the meeting to confirm its position on this matter. The result is that the Court adopts the account as presented by the Claimant and corroborated by Angelo Kiuma as the true position.

17. Having settled the issue of the proceedings of the meeting of 19th October 2011, I will now deal with the question whether the circumstances were so severe as to constitute coercion leading to inevitable resignation by the Claimant. In the written submissions filed on behalf of the Respondent, the Court was referred to the definition of duress in the *Halsbury's Laws of England (Fourth Edition)* as well as in the case of *Singh Vs Singh [1971] 2 All ER 828*.

18. However, the contexts of these authorities differ significantly from the case before this Court. In my view, coercion or duress in a commercial or matrimonial situation does not carry the same weight as in an employer/employee environment.

19. The Claimant does not deny having written the resignation letter dated 19th October 2011. He however states that he wrote the letter out of coercion and duress arising from the proceedings of the meeting held on the same day. Having adopted the Claimant's account as corroborated by Angelo Kiuma, the Court finds that the events leading to the Claimant's resignation fall within the province of constructive dismissal.

20. In the case of *Emmanuel Mutisya Solomon Vs Agility Logistics (Industrial Court Cause No 1448 of 2011)* Mbaru J defined constructive dismissal 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.”

21. In the case of *Farber Vs Royal Trust Co [1997] 1 S.C.R* Gonthier J held that where an employer creates a situation that fundamentally interferes with the work environment the employee may treat his employment as wrongfully terminated and resign giving rise to an obligation on the part of the employer to pay damages in lieu of reasonable notice.

22. In the instant case, the Claimant was confronted by the Chief Executive Officer with serious allegations of financial impropriety in the presence of his immediate supervisor, the Chief Accountant and the Human Resource Manager and told to resign. It is my opinion that the Respondent at that point made continuation of the Claimant's employment untenable and was therefore guilty of constructive dismissal. In light of the foregoing, the Claimant's claim for three months' salary in lieu of notice is allowed and the Respondent's counterclaim must therefore fail.

23. With regard to the claim for bonus payment, the Respondent made great effort to demonstrate why the Claimant was not entitled to the second tranche of bonus for the year 2011, being 37% of his basic salary. The Respondent's case was that since the Claimant had not worked up to December 2011, then he was not entitled to the second tranche of the bonus.

24. The Respondent was however unable to explain the contents of its letter dated 23rd August 2011 which stated *inter alia*:

“The Board of Trustees have also approved another bonus payment of 37% of your basic pay in addition to the 30% paid earlier in recognition of your efforts for the past year.”

25. A plain reading of this letter which was signed by the Respondent's Chief Executive Officer indicates that as at 23rd August 2011, the Claimant had already earned the 37% bonus and it could not be withdrawn by his resignation on 19th October 2011.

26. In response to the Claimant's claim for accrued leave days, the Respondent produced leave forms showing that the Claimant had taken 5 leave days. He is therefore entitled to 28 days' leave pay.

27. In the final analysis I make an award in favour of the Claimant in the following terms:

a) 3 months' salary in lieu of notice.....Kshs. 644,100

b) Bonus at 37% of basic salary.....Kshs. 79,439

c) Leave pay (214,700/30x28).....Kshs. 200,387

Total.....Kshs. 923,926

28. I further award the Claimant the costs of this case. He is also entitled to a certificate of service. The Award amount will attract interest at court rates from the date of the Award until payment in full.

29. This Award is subject to statutory deductions in accordance with Section 49(2) of the Employment Act, 2007.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF APRIL 2014

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JUDGE

In the Presence of:

.....***Claimant***

.....***Respondent***