



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 593 OF 2010
ALFONCE MUA KASIMU.....CLAIMANT
VS
ELECTRICAL CARD SERVICES LTD.....RESPONDENT

AWARD

Introduction

1. By a memorandum of Claim dated 28th May 2010 and a supplementary memorandum of claim dated 20th August 2010, the Claimant sued the Respondent seeking payment of accrued dues as well as damages for breach of contract. The Respondent filed a statement of response on 30th July 2010 and a supplementary response on 16th November 2010.
2. The matter initially went before **Madzayo J** (as he then was) who heard the Claimant's case. When the parties appeared before me on 28th November 2013, they agreed that I proceed to take the Respondents' evidence and render an award.

The Claimant's Case

3. The Claimant was employed by the Respondent on 4th November 2008 in the position of accountant. On 30th October 2009, the Respondent withheld the Claimant's salary without any lawful cause. The Claimant continued working while pursuing payment of his salary but by November 2009 he had not been paid. There was no communication from the Respondent as to why the Claimant's salary had been withheld. Due to the withheld salary, the Claimant resigned from the Respondent's employment effective 30th November 2009.
4. The Claimant claims the following:
 - a. Salary for October and November 2009.....Kshs. 160,000
 - b. 21 days' leave pay.....Kshs. 80,000
 - c. Medical expenses refund.....Kshs. 2,500
 - d. Loan default charges.....Kshs. 1,500
 - e. House rent default charges.....Kshs. 10,400
 - f. Damages for breach of contract.....Kshs.1,440,000
 - g. Any other relief the Court may deem just to grant

The Respondent's Case

5. In its statement of response, the Respondent admits having employed the Claimant as an accountant effective 4th November 2008. The Claimant worked for the Respondent until 6th November 2009 when he resigned with immediate effect.

6. It is the Respondent's case that by failing to give notice of his intention to leave employment, the Claimant was in breach of the terms of his employment contract. The Respondent therefore claims Kshs. 80,000 being one month's salary in lieu of notice.

7. The Respondent denies withholding the Claimant's salary. The Respondent further contests the Claimant's claim that the decision to resign was precipitated by any wrongdoing on the part of the Respondent.

Findings and Determination

8. The issues for determination before this Court are as follows:

- a. Whether the Respondent withheld the Claimant's salary for October and November 2009;
- b. Whether the Claimant's resignation from the Respondent's employment was precipitated by the Respondent;
- c. Whether the Claimant is entitled to the reliefs sought.

The Claimant's Salary

9. The Claimant claims salary for October and November 2009 which he states has been withheld by the Respondent. The Respondent denies withholding any of the Claimant's salary. The Claimant's letter dated 6th November 2009 indicates that his resignation took effect immediately.

10. In his testimony however, the Claimant told the Court that in spite of the effective date given in the resignation letter, he actually continued working until 30th November 2009. There was however no corroborative evidence to this effect and the Court found it difficult to believe that after giving a clear effective date of his resignation, the Claimant continued working until the end of November 2009. The Court therefore reached the conclusion that the Claimant's last day of work was 6th November 2009 as indicated in his resignation letter.

11. The Respondent did not provide any evidence of payment of the Claimant's salary as at the time he left employment. Section 20 of the Employment Act, 2007 requires an employer to provide an itemised pay statement to its employees at or before the time any payment of salary is made. This statement which is commonly known as a payslip or salary voucher evidences payment of salary and an employer who fails to provide it cannot rely on its absence to defeat an employee's case. In employment matters, unlike in other civil cases, specific burden of proof is placed on the employer for the simple reason that the employer is the custodian of employee records. The Court therefore finds that the Claimant was not paid his salary for the month of October 2009 as well as for 6 days in November 2009.

The Claimant's Resignation

12. The Claimant states that the Respondent withheld his salary forcing him to resign. He therefore makes a claim for constructive dismissal. 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.”

13. The Claimant's resignation letter dated 6th November 2009 states *inter alia*:

“I hereby tender my resignation effectively immediately for the position of accountant. As for the notice, I shall forego the 13 days in respect to my leave days to serve as notice. For remaining time I shall offer assistance for the auditors during the project audit to ensure its success.(sic)

Regards

ALFONCE KASIMU”

Respondent’s Counterclaim

14. From this letter, there is no mention of any negative circumstances created by the Respondent that may have forced the Claimant to resign from employment. The claim for constructive dismissal therefore fails. The claims for medical expenses refund, loan and house rent default charges as well as damages for breach of contract were not proved and are dismissed.

15. With regard to the Respondent's counterclaim, the Court finds that the Claimant offered his 13 days pending leave to cover notice pay, leaving a shortfall of 17 days in notice period. I therefore allow the Respondent's counterclaim to this extent. This also dispenses with the Claimant's claim for leave pay.

Reliefs

16. In view of the foregoing findings I make an award in favour of the Claimant in the following terms:

- a. Salary for October 2009.....Kshs. 80,000
- b. Salary for 6 days in November 2009.....Kshs. 16,000

Total.....Kshs. 96,000

Less notice pay shortfall.....Kshs. (45,333)

Amount due.....Kshs. 50,667

Each party will bear their own costs.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16TH DAY OF JULY 2014

LINNET NDOLO

JUDGE

Appearance:

Mr. Ochola for the Claimant

Mr. Nyaribo for the Respondent