



IN THE INDUSTRIAL COURT OF KENYA AT MOMBASA

CAUSE NO. 43 OF 2014

TAILORS & TEXTILE WORKERS UNION **CLAIMANT**
AFRICAN COTTON INDUSTRIES LIMITED **RESPONDENT**

JUDGMENT

The Tailors & Textile Workers Union (Union) filled a Memorandum of Claim in Court on 31 March 2011 against the African Cotton Industries Ltd (Respondent) stating the issue in dispute as *wrongful dismissal of Mrs. Saliffah [Shariffa] Mohammed (Grievant) and refusal by the management to pay her terminal benefits.*

- The Grievant was employed by the Respondent as a telephone Operator on 2 January 1990. In 1995 she was promoted to a secretarial position. In 1996, the Grievant resigned for personal reasons and was paid her terminal dues.
- On 1 October 2006 the Grievant resigned yet again on personal reasons after giving one month notice. The Respondent accepted the resignation through its letter of 16 October 2006 and advised the Grievant to clear before getting her terminal benefits. The Grievant did not clear and reported to the Union.
- The Conciliator found that the Grievant was forced to quit through persistent pressure and recommended that the Grievant be paid terminal benefits in accordance with the Collective Bargaining Agreement between the Union and the Respondent.
- **Union's case**
 10. The Union further pleaded that the dismissal of the Grievant was due to her joining the Union.
 12. In regard to the separation, the Grievant stated that she was not given any warning prior to dismissal and that the real reason for her dismissal was because she had declined sexual advances from the Respondent's General Manager.
 14. The Grievant also stated that she was a member of the Union from 2004, though her job was not one of those designated in the Collective Bargaining Agreement and that she had pending leave for 2005/6.
- **15. Respondent's case**
 17. The Respondent contended in its Response that the Grievant voluntarily resigned through letter dated 1 October 2006 and the same was accepted with instructions to the Grievant to clear before collecting her terminal benefits and certificate of service.
 19. The Respondent also pleaded that pursuant to the provisions of the Industrial Relations Charter, the Grievant being a Personal Secretary was barred from joining a union.
 21. The Union had filed some submissions together with the Memorandum of Claim. The Respondent filed its submissions on 14 August 2014.

From the pleadings, documents and submissions, the central issues are whether the Grievant voluntarily resigned or was forced to resign to entitle her to claim constructive

dismissal, whether the Grievant was unionisable, applicable law and appropriate relief if Court finds in her favour.

At the time of the Grievant's resignation, the employment relationship was primarily governed by the Employment Act, cap. 226 (repealed), Trade Disputes Act (repealed) common law and the contract itself.

- The present Cause will therefore not be determined on the basis of the Constituion, 2010 and the Employment Act, 2007 or the Labour Relations Act, 2007.

The statutory framework in Kenya then and now does not expressly provide for constructive dismissal. An employer could dismiss without cause provided notice or pay in lieu of notice was given/paid.

- The doctrine of constructive dismissal was discussed at length in *Western Excavating (ECC) Ltd v Sharp* (1978) IRLR 27. From that decision, constructive dismissal was explained as a situation where an employee is entitled to terminate his contract of employment without notice by reason of the employer's conduct. In short, the employee has a right to treat himself as discharged because of the employers conduct. The conduct of the employer should be significant and go to the root of the contract.
- However in testimony, the Grievant brought in the issue of sexual harassment as the real reason for being forced out.
- Has the Grievant made out a case that the General Manager made it intolerable for her to justify her resignation? The context of the pleadings and evidence must be considered.
- The Grievant made much about sexual harassment as the real reason for separation. The allegations of sexual advances were mentioned in oral testimony for the first time. The Grievant stated that she did not make a complaint to the Respondent's Human Resources Manager or Managing Director (because she stated the Director's wife was suffering from a terminal disease).
- In my view, the Grievant has failed to demonstrate that the Respondent or the General Manager had made the working conditions so intolerable to entitle her to resign either because of union membership or sexual harassment. The sexual harassment allegations are serious charges and should have been pleaded. They appear more of an afterthought.
- The conclusion the Court reaches is that the Grievant resigned voluntarily and it is not necessary to discuss the other issues raised for determination.

Days worked in October 2006

39. Annual leave

41. The Respondent did not indicate how many days leave the Grievant had. It did not cross examine the Grievant on the issue of 32 days leave. The Court would find in favour of the Grievant in the sum of Kshs 17,784/-.

The Union anchored this head of relief on the Collective Bargaining Agreement. The Respondent however posited that on the basis of the Industrial Relations Charter, the Grievant's position excluded her from being a member of a Union.

44. The Court is aware that under the current statutory framework (section 59 of Labour relations Act) all unionisable employees whether members of a union or not are entitled to benefit from the terms and conditions agreed in a Collective Bargaining Agreement.

45. Two months notice

47. The Court has reached the conclusion the Grievant voluntarily resigned. She gave one month notice. This relief is not applicable.

The Grievant sought Kshs 173,400/- for what was pleaded as 12 months' salary, as compensation for wrongful loss of employment. In light of the finding that the Grievant voluntarily resigned, this head of relief fails.

The Court finds and holds that the Grievant voluntarily resigned and was thus not constructively dismissed and is entitled to and is awarded and the Respondent is ordered to pay her

1. 32 days outstanding leave Kshs 17,784/-

The reliefs for gratuity, two months notice and compensation are dismissed.

- **Delivered, dated and signed in open Court in Mombasa on this 29th day of August 2014.**

Judge

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Stephen Radido

For Union
Tailors & Textile Workers Union

Mr. Omondi, Industrial Relations Officer,

For Respondent
of Kenya Employers

Mr. Molenje, Senior Legal Officer, Federation