



IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 81 OF 2014

I. MESSINA [K] LTD .....CLAIMANT

VERSUS

DAVIDSON TSUI .....RESPONDENT

**J U D G M E N T**

**I N T R O D U C T I O N**

This is a suit brought by an employer against her former employee. The claimant accused the respondent of deserting employment without notice and seeks to recover one month salary in lieu of notice plus outstanding car loan balance. The total claim is for ksh.371098.

The respondent has denied the alleged desertion of employment and instead accused the claimant of wrongfully and unfairly terminating the employment contract by changing his computer password and throwing him out of the work premises and denying him access back to the office. He counter claims for his accrued employment benefits plus compensation for unfair termination. He has never the less admitted being indebted to the claimant in respect of his car loan.

The suit was heard on 25/6/2014 when the claimant called Peter Wambua Kwinga as CW1 while the respondent testifies as RW1.

**CLAIMANT'S CASE**

CW1 is the claimant's shipping and project manager. He confirmed that the respondent was employed by the claimant as Assistant Accountant on 10/4/2009 by letter dated the same date (Exh. 1). The respondent worked until 13/2/2013 when he deserted work. He was called to explain errors and forgeries in the accounting documents which had caused financial loss to the claimant.

As at the time of his desertion, the respondent had a car loan balance of ksh.296,156 advanced by the claimant on 18/7/2012 as per the agreement marked Exh.4. CW1 also prayed for ksh.85500 being one month salary in lieu of notice. He denied the allegation that the respondent was thrown out of office and blocked from accessing it. He contended that the respondent deserted work and as such he was no longer an employee for the claimant.

On cross examination, by the defence counsel, CW1 admitted that there were no minutes recorded for the meeting where the respondent was called to explain his accounting irregularities. He confirmed that after police investigation, the respondent was never charged but another employee was. He also admitted that

the claimant has not yet established that the respondent was to blame for the loss of the alleged USD156,000 and that is why they did not sue him for it.

## **DEFENCE CASE**

RW1 stated that he was employed by the claimant on 16/4/2009 by a letter and contract dated the same day (Exh.D1 and D.2). He started with a monthly salary of ksh.60000 which was later increased to ksh.82500 as per letter dated 27/4/2012 (Exh.D.3.c). He contended that his salary was excellent and he was never served with any warning letter or subjected to any disciplinary action for poor performance of duty. In January 2013, the claimant did internal audit wherein RW1 was involved. An error of USD 29000 was noted in which the debt had erroneously been entered as paid. According to RW1, the finance manager directed that the item be treated as debt pending collection.

On 12/1/2013, RW1 reported to work as usual but found the password of his office computer changed with the instructions of the Director and the Finance Manager. The reason given was that the two were investigating something. At 11.00 am RW1 was called to a meeting at the Directors office with the Finance manager and the CW1. The agenda was to explain why the client's account was credited before payment. The director, one Captain Fedele became angry and threw RW1 out the meeting and told RW1 that he was no longer wanted near the respondents premises. No dismissal letter was given to the RW1.

On 19/2/2013, RW1 wrote a letter to the Finance Manager (also the HR Manager) enquiring on the way forward but no response was made. RW1 was only paid salary for the 12 days worked in January 2013 being ksh.12000.. The payment was done through the bank. Towards the end of February 2013, the finance manager asked RW1 to record a statement at the Anti-Fraud at the Central Bank Mombasa. RW1 complied but after some time the investigator called him and told him that the Director of Public Prosecution (DPP) exonerated him from the alleged fraud. Instead a Mr. George Mwagiri was the one charged.

RW1 admitted receiving a car loan of ksh.400,000 from the claimant of which he was repaying at the rate of ksh.19585 per month. He contended that as at January 2013, the car loan balance was ksh.280,519.70.

With respect to his counter claim, RW1 contended that the action by the director to block RW1's computer then throwing him out of the office and warning him that he was not wanted at the premises amounted to unfair and wrongful dismissal. He explained that the said dismissal was not for valid reason and it was done without according him a hearing. He prayed for one month's salary in lieu of notice plus compensation for unfair termination. In the alternative, he prayed for declaration that he was still employed by the claimant and was entitled to the salary arrears from February 2013.

On cross examination by the claimant's counsel, RW1 confirmed that he was contributing 5% of his gross salary towards pension while the claimant contributed 10%. He explained that from July 2009 he was contributing ksh.3250 per month but as at January 2013 the contribution was ksh.4125 per month.

RW1 admitted that he never reported to the labour officer after being thrown out of the office. He further admitted that there were errors and mistakes in the freights collections accounts report but he contended that the error was not to blame on him but the whole department.

After the close of the hearing both parties filed written submissions.

## **ANALYSIS AND DETERMINATION**

The court has perused and considered the pleadings, evidence and submissions. The employment relationship between the parties is not disputed. The issues for determination are:

- 1. Whether respondent deserted employment, or he was unfairly dismissed.**
- 2. Whether the parties are entitled to the orders sought.**

## **Resignation or unfair termination**

CW1 alleged that RW1 deserted work without notice after being called to a meeting on 13/2/2013 to explain an error in accounting document. No other witness gave evidence in support of that view. RW1 on the other hand gave a more detailed explanation unlike the CW1 regarding the material day. He explained that he reported to work as usual on 12/1/2013 at 8.00am only to find his office computer blocked and upon enquiry he was informed that the finance manager and the director Captain Fedele had done so because they were investigating something. RW1 sat there doing nothing until 11.00am when he was called to a meeting with the Director, Finance Manager and CW1. At the meeting RW1 was asked to explain why a client was given a credit before payment. As the meeting progressed the Director became angry and threw RW1 out of the meeting and warned him that he was not wanted at the premises. The Director and the Finance manager did not testify in this case to deny the alleged change of computer password and the throwing out of the RW1 from the meeting and work place all together.

The RW1 also explained how he was called by the finance manager to go to the central bank Mombasa to record statement and how he was later exonerated by the DPP from fraud accusations by the claimant. On a balance of probability, therefore, the court finds that RW1 did not desert work but rather he was dismissed by the Director of the claimant Captain Fedele. RW1 reported to work ready to work but he was prevented from doing so by the director and the finance manager when they blocked his office computer. Finally he was thrown out of office and warned against being seen at the claimants premises. Thereafter he was not paid salary.

It is trite that when the employer prevents or makes it impossible for an employee to continue performing his obligation under the employment contract, the said contract of employment is deemed to have been constructively terminated. The termination is made more sure when the employer continuously and without any just cause withholds the salary due to the employee without any lawful cause.

In the present case the court accepts the respondents presumption of constructive dismissal and dismisses the claimants evidence that RW1 terminated the contract without notice by deserting employment. The question that follows is then, whether the dismissal of the respondent was unfair.

Section 45 of the Employment Act provides that termination of employment is unfair unless the employer proves that it was grounded on a valid and fair reason and that it was arrived at after a fair procedure. In the present case, the claimant, never discharged the burden of proving the existence of a valid and fair reason and that the dismissal was after following a fair process as required under Section 45 of the Act. Instead all the efforts were spend in accusing the respondent of deserting work. Although CW1 attempted to accuse RW1 for fraudulent entries to the books of accounts, no evidence was produced to hold the respondent personally liable or to rebut the RW1's evidence that he was exonerated from any blame by the DPP after the investigations by the Anti-Fraud Unit of the Central Bank. Indeed CW1 confirmed in evidence that the claimant has not yet established that RW1 was to blame for the alleged loss of USD 29000 and that is why she has not sued him to recover the money.

## **RELIEFS**

In view of the foregoing finding, the claimant's prayer for one month salary in lieu of notice is dismissed. She is however awarded ksh.280,519.60 being the car loan balance that was admitted by the respondent. The reason for the foregoing is that CW1 did not explain how the claim for ksh.296,156 was arrived at.

On the other hand the respondent's Counter-Claim is allowed Under Section 49 of the Employment Act, an unfairly dismissed employee like the RW1 is entitled to salary in lieu of notice, accrued employment benefits plus compensation for unfair termination. RW1 therefore get ksh.82500 being one month salary in lieu of notice. He will also get 12 months gross salary for unfair dismissal being ksh.990,000. In awarding the maximum compensation, the court has considered the fact that the dismissal was inhuman and not contemplated by constitution and the labour statutes . The involvement of the police in the matter worsened the situation. Lastly the RW1 has not been able to secure an alternative employment for a year now.

**DISPOSITION**

Judgment is entered for respondent at ksh.1,072,500 (less ksh.280,519.70 car loan balance)= 791980.30.  
Respondent will have costs and interest.

Orders accordingly.

**Dated Signed and delivered this 26<sup>th</sup> September 2014**

**O. N. Makau**

**Judge**