



REPUBLIC OF KENYA
INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1188 OF 2012

GEOFFREY KWATEMBA OPESACLAIMANT

-VERSUS-

BIBLIA HUSEMA BROADCASTING.....RESPONDENT

Mrs. Judith Olukoye for Claimant.

Mr. Lucas Sawe for Respondent.

JUDGMENT

This matter was brought by way of a Memorandum of Claim dated 10th July, 2012 and filed on 13th July, 2012.

The allegations that constitute the cause of action may be summarised as follows:

That by a letter of appointment dated 21st April, 2009 the Claimant was employed by the Respondent as a news editor in their broadcasting house in Nairobi.

The starting salary for the Claimant was Kshs.12,000/=, house allowance of Kshs.5,000/= and travelling allowance of Kshs.2,500/= making a total gross monthly salary of Kshs.19,500/=.

The appointment took effect from 1st April, 2009.

By letter dated 25th February, 2010, the Claimant was transferred to Eldoret as operational manager with effect from 25th March, 2010. He served in Eldoret in that capacity until 24th February, 2012 when he received a letter transferring him to ***Biblia Husema Broadcasting***, Lokichogio as the radio station manager.

In terms of the letter, he was to report on 9th March, 2012 for orientation and official handing over.

The Claimant responded to this letter of transfer by a letter dated 5th March, 2012 in which he gave three reasons why the Respondent should consider not to transfer him as follows:

- a. *He had a child aged 4 ½ years old already attending school and would be detrimental to the child if he were to withdraw him from the school in the middle of the term. That the mother of the child*

was out of the country and therefore was at the time a single parent.

- b. That he was attending a bachelors degree programme in communication and media in Eldoret at Kisii University College, a constituent college of Egerton University and the same programme is not available at Lokichogio; and*
- c. He was apprehensive to take up the management role as he had been demoted from a similar management position for no good reason.*

He requested the Respondent to reconsider the transfer.

On 7th March, 2012, the Acting Director of the Respondent **Mr. Festus M. Kimuyu**, made a telephone call to the Claimant asking him to report to Lokichogio immediately or else his services would be terminated. The Respondent did not write a formal response to the Claimant's letter of 5th March, 2012.

On 12th March, 2012, the claimant tendered a letter of resignation by giving three months notice from the date of the letter. He requested to be paid his terminal dues for the three years period he had served.

In the letter he cited frustration by the Acting Director giving some examples including the following:

- 1. The Acting Director granted him two weeks leave but later reported to the Board that he had absconded work without authority and he was forced to write a letter of apology;*
- 2. That the Acting Director forced him to write a letter to a member of staff by the name of Irene Ndunde sending her on unpaid suspension;*
- 3. That the Acting Director unilaterally altered the minutes of a management meeting so as to effect a transfer of Vincent Anguche to Lokichogio as a punishment.*

The Claimant believed that the transfer to Lokichogio was also meant to punish him.

He thanked the Respondent for having given him opportunity to serve in various capacities.

It is not in dispute that at the time of resignation the Claimant earned a gross salary of Kshs.24,000/=.

On 23rd March, 2012, the Acting Director accepted the resignation of the Claimant by a letter of the same date in which he stated that the Claimant was to leave the employment immediately and that he would be paid one month's salary in lieu of notice at the end of March, 2012 and that other terminal dues would be processed.

In paragraph 12 of the statement of claim, the Claimant avers that the one month salary in lieu of notice was paid less Kshs.6,613/= and he claims payment of three months' salary in lieu of notice. He reiterated this claim in his sworn testimony.

The Claimant also avers in paragraph 13 of the statement of claim, which averment he supported in his sworn testimony, that he was paid a 10% commission on all the jobs which he sourced for the Respondent.

He told the court that the commission paid was reflected in his pay slips and bank statement.

By a letter dated 2nd April, 2012, the Claimant's advocate demanded payment of three months notice pay in the sum of Kshs.72,000/=. Leave pay for the period of 1st May, 2009 to 31st March, 2012 in the sum of Kshs.72,000/=. 10% commission with respect to the business sourced from **Bishop Ben Bahati; Pastor Titus Zakayo; Apostle James Kithia; Pastor Mwaniki; Apostle Jeremiah Kioko** and a

pastor from Kitengela totaling Kshs.53,000/=.

In addition, the Claimant demanded payment of Kshs.10,000/= being unpaid medical expenses, Kshs.14,800/= being unremitted NSSF contributions and Kshs.60,000/= being unremitted contribution to group Provident Fund.

The Respondent in response offered to pay Kshs.72,000/= in lieu of leave; Kshs.14,800/= being NSSF contributions, Kshs.60,000/= being unremitted Provident Fund dues and Kshs.24,000/= being one month's salary in lieu of notice. The total amount payable was Kshs.170,800/=.

The Claimant now claims payment of:

1. *Kshs.383,450/= being unpaid 10% commission;*
2. *Kshs.54,613/= being payment in lieu of notice; and*
3. *Damages for wrongful dismissal; and*
4. *Costs and interest.*

The Respondent filed a Statement of Defence dated 6th August, 2012 on 7th August, 2012.

The Respondent states that the Claimant was entitled to payment of one month's salary in lieu of notice in terms of the staff warrants, condition and terms, Clause G attached to the Statement of Response.

The Respondent avers that no terminal dues are due to the Claimant as same were fully paid via a cheque dated 17th May, 2012 for Kshs.146,500/= pursuant to the letter of demand.

The claim for payment of 10% commission is totally denied by the Respondent stating that the Respondent was a stranger to any agreement for payment of such commission.

The matter was set for hearing on 8th March, 2013, when the Respondent, for a second time sought an adjournment of the matter on the basis that counsel for the Respondent Mr. Lucas Sawe was not available to attend court as he was attending to a sick member of the family at Eldoret Hospital. The Respondent's representative on the day, M/s. Ndegwa also told the court that the Respondent was also discussing settlement of the matter with the Claimant.

Mrs. Judith Olukoye for the Claimant strongly opposed the application for adjournment stating that this was a second time in a row when the Respondent was seeking adjournment of the matter.

That prior to coming to court, his counterpart or his representative had not informed him of the intention to seek adjournment and that no formal communication for settlement or at all had been made to him. He urged the court to proceed with the hearing.

The court noted that on 4th December, 2012 the matter was set for hearing but was adjourned because Mr. Lucas Sawe did not attend court though he was represented by a Mr. Mwanthi. The claimant was awarded wasted costs in the sum of Kshs.3,000/= plus court adjournment fees of Kshs.400/= to be paid before the next hearing date.

On 8th March, 2013, Mr. Lucas Sawe did not again attend court and had not paid the wasted costs and court adjournment fees.

The court set aside the file, same to proceed for hearing at 12 noon, upon refusal of the application for adjournment at around 10.00 a.m. in the morning.

The matter proceeded with the testimony by the Claimant and both parties were directed to file written submissions within seven (7) days. Both parties complied. In particular the Respondent filed its written submissions on 2nd April, 2013.

In its submissions, the Respondent reiterates its case that the Claimant resigned voluntarily and his employment was not terminated. That they had fully paid terminal benefits due to the Claimant comprising of Kshs.72,000/= in lieu of leave days. Kshs.14,800/= and Kshs.60,000/= for NSSF and Prudent Fund contributions due respectively. That the payment was forwarded via a cheque dated 17th May, 2012. In addition the Respondent paid Kshs.24,000/= in lieu of one month's notice. The Respondent reiterates that there was no agreement for payment of 10% commission on work sourced by the Claimant and the claim should be dismissed.

From the evidence before court, I am satisfied that the Claimant resigned from employment in response to a transfer from Eldoret station to Lokichogio.

The question that arises is whether the conduct by the Respondent towards the Claimant was such that it amounted to a constructive dismissal.

In the case of **Moses Dlamini and Bromor Foods Swaziland (pty) Ltd Case No. 127/97 (IC) page 7**. I relied on the decision in **Fernant v. Key Delta (1993) 14 ILJ at 464** as follows:

“It is clear in terms of the common law a contracting party is only entitled to cancel a contract on grounds of repudiation where the words or conduct of the other party are such as to evince a clear intention not to perform the obligation due under the contractdismissal of an employee is the ultimate result of the employer’s intention to end the employment relationship between it and the employee. Constructive dismissal is only a manner or form in which dismissal can take place and should therefore comprise of all those elements which constitute actual dismissal. The expression constructive indicates that some of the elements of actual dismissal are not directly experienced though present.”

The court is not satisfied that the act of transferring the Claimant to Lokichogio to head its radio station amounted to a silent repudiation of the contract of service between the parties.

The further frustrations cited by the Claimant are also not sufficient reasons for the court to conclude that the employee could no longer reasonably be expected to continue in his employment and therefore left his employment.

Accordingly the court finds that the Claimant has failed to prove on a balance of probabilities that he was unlawfully constructively dismissed by the Respondent. His resignation was voluntary in the circumstances of the case.

The other issue for determination is whether the Claimant was entitled to payment of 10% commission as claimed or at all.

In the letter of demand, the Claimant demanded payment of Kshs.153,600/= for outstanding 10% commission. However in the statement of claim filed later, the Claimant claims Kshs.383,450/=. The specific claims contained in the letter of demand are as set out in the statement of claim but additional claims have been added.

No explanation was forthcoming from the Claimant why these additions were not contained in the letter of demand dated 2nd April, 2012.

The Claimant has produced receipts to support the claim for 10% commission and a statement of his account **No. 0300195167873** held with Equity Bank for the period 1st January, 2012 to 30th June, 2012 show the various payments in respect of 10% commission. More importantly, and in addition, the Claimant has produced pay slips for the months of September, 2009, March and June, 2010 and May, 2011 which clearly show that the Respondent paid commissions to the Claimant.

The Respondent made bare denial of this claim stating that it is a stranger to any agreement to pay

the 10% commission. The court finds that the documentation produced in court has provided sufficient proof on a balance of probabilities that the Claimant was entitled and was regularly paid 10% commission for the jobs he sourced for the Respondent.

There being no evidence to counter the figures presented in the statement of claim the court finds that the Claimant is entitled to payment of Kshs.383,450/= being 10% commission duly earned by him which is still due.

The claim for payment of three months' salary in lieu of notice is unsubstantiated by any evidence. However, the Claimant indicates that the payment in lieu of one month's notice was paid less Kshs.6,613/= which the court presumes to be statutory deductions including tax.

In the final analysis, the court directs the Respondent to pay the Claimant Kshs.383,450/= being unpaid 10% commission as at the time of resignation.

The Respondent is to pay interest on the said sum at court rates with effect from the date of filing suit to the date of payment in full.

For the avoidance or doubt all other claims by the Claimant contained in the statement of claim are dismissed.

The Respondent is also to pay the costs of the suit.

Dated and delivered at Nairobi this 13th day of August, 2013

MATHEWS N. NDUMA

PRINCIPAL JUDGE