



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 834 N OF 2009

PETER OMARE NYANGESERA

CLAIMANT

v

THE REGISTERED TRUSTEES OF IMPALA CLUB

RESPONDENT

JUDGMENT

1. Paul Omare Nyangesera (the Claimant) filed a Statement of Claim against the Registered Trustees of Impala Club (Respondent) on 26 December 2009 seeking terminal benefits. The Respondent filed its Response on 19 May 2010.
2. The Cause proceeded through submissions before Chemmutut J. on 25 May 2010 after which the Judge indicated that he would deliver an award on notice. Chemmutut J. ceased to hold office of Judge in 2012 before he could deliver the award.
3. Consequently the file was assigned to me and the Deputy Registrar wrote to the parties on 10 September 2012 to appear before me on 21 September 2012 for directions. However, on 21 September 2012 I did not seat due to other official engagements and a notice was put up that the cause would be mentioned on 24 September 2012.
4. On 24 September 2012 none of the parties appeared and I directed that the parties be at liberty to move the Court appropriately. There was no action from the parties and therefore on 20 November 2012 the Deputy Registrar wrote to the parties to appear before Justice Nzioki wa Makau on 29 November 2012 for directions. It appears from the record none of the parties appeared.
5. In the meantime, I had been transferred to Mombasa and the file was transmitted to my new station. In this regard the Deputy Registrar Mombasa wrote to the parties vide EMS courier on 13 May 2013 to appear before me on 4 June 2013 for directions.
6. On 4 June 2013 the file was placed before Makau J. because I was out of the country and again none of the parties appeared. The Judge directed the Deputy Registrar to issue fresh notices to the parties.
7. On the same day, the Deputy Registrar sent out a notice to the parties to appear for directions on 15 July 2013.
8. On 15 July 2013 Ms. Njuguna appeared on behalf of Mr. Odero for the Claimant but there was no representation for the Respondent. Ms. Njuguna informed me that I could prepare a judgment based on the proceedings taken by Chemmutut J.
9. Rule 21 of the Industrial Court (Procedure) Rules 2010 allow the Court with the agreement of the parties to determine a suit on the basis of pleadings, affidavits, documents filed and submissions while rule 22 allow the Court to proceed where a hearing notice was served upon a party but the party does not attend Court. I would treat this case as one where the Respondent has failed to appear and proceed to determine the Cause on the basis of what is on record.

Claimant's case

10. The Claimant's case is that he was employed by the Respondent on 1 January 2009 on a one year fixed contract set to expire on 31 December 2009, as a bar supervisor (annexure PON 1). The salary was agreed at Kshs 12,000/- per month.
11. On 23 April 2009 the Claimant was suspended on allegations of theft of money amounting to Kshs 92,000/-. The Claimant was arrested but not charged and remained on indefinite suspension up to time of the lapse of the contract.
12. According to the Claimant at the time of alleged theft he had left the Respondents' premises and handed over to another employee.
13. The Claimant asserted the suspension was in breach of contract and therefore he was constructively dismissed. The Claimant seeks unpaid salary for the balance of the contract of Kshs 96,000/- and two months' salary in lieu of notice of Kshs 24,000/-.

Respondent's case

14. For the Respondent, it was pleaded that there was a theft of Kshs 92,000/- and the Claimant was suspended to pave way for investigations and that the investigations established that the Claimant's mobile phone number was used to communicate with another suspect and that the Claimant procured a taxi which carried the suspect from the scene of crime.
15. The Respondent pleaded further the Claimant was summarily dismissed pursuant to section 44(4) (g) of the Employment Act.

Issues for determination

16. From the foregoing the main issues for determination are
 - a. whether the Claimant was summarily or constructively dismissed
 - b. whether the dismissal was in accord with the Employment Act and
 - c. appropriate remedies if the dismissal was unfair.

Evaluation

17. According to the Claimant he was constructively dismissed. But according to the Respondent, the Claimant was summarily dismissed.
18. The Claimant was on a monthly wage. Section 35 (1)(c) of the Employment Act requires contracts where wages are paid periodically at intervals of or exceeding one month to be terminated by the giving of written notice.
19. The Respondent did not exhibit any written notice it gave to the Claimant of its intention to dismiss him or of the dismissal letter itself.
20. Constructive dismissal has not been given any statutory definition in Kenya. The general principles on constructive dismissal in England was set out in the case of *Western Excavating (ECC) Ltd v Sharp* (1978) IRLR 27 CA and from that decision constructive dismissal has been defined 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. I must determine whether the particular set of facts presented before the Court constitute a repudiatory breach of contract by the employer to entitle the Claimant to claim constructive dismissal.
22. The Claimant was suspended, the suspension letter was not presented before Court. He was arrested but was not charged by the Police. The Respondent submitted that the investigations were beyond its control.
23. Under these circumstances I would agree with the Claimant that he was entitled to consider himself constructively dismissed. And therefore the dismissal was substantively unfair.
24. And if I were wrong in that conclusion I would still hold the summary dismissal procedurally

unfair because it was not in compliance with sections 35(1)(c), 41(2) and 45 (1) of the Employment Act. The Respondent was under an obligation to hear any representations by the Claimant before dismissing him.

Appropriate remedy

Unpaid salary

25. The Claimant seeks Kshs 96,000/- being unpaid salary. He was suspended on 23 April 2009. His contract was meant to run until December 2009. Essentially, he is seeking salaries from May to December 2009.
26. Section 49(1)(c) of the Employment Act provides one of the primary remedies for wrongful dismissal or unfair termination as the equivalent of a number of months' wages not exceeding twelve months gross wages.
27. I would award the Claimant the equivalent of 8 months' gross wages as compensation and I assess the same in the sum of Kshs 96,000/-.

Salary in lieu of notice

28. The Claimant, under this head of relief sought two months' salary in lieu of notice. The contract he signed with the Respondent was for a fixed term and therefore did not have a clause on termination through notice.
29. I would therefore fall back on section 35(1)(c) and 36 of the Employment Act and award him the equivalent of one month salary in lieu of notice in the sum of Kshs 12,000/-.

Conclusion and Orders

30. In conclusion I find and hold that the Claimant was constructively dismissed and hence the dismissal was procedurally and substantively unfair and award him

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|------------------------------------|---------------|
| a. 8 months' compensation | Kshs 96,000/- |
| b. One month pay in lieu of Notice | Kshs 12,000/- |

TOTAL **Kshs 108,000/-.**

31. There will be no order as to costs.

32. The Deputy Registrar to transmit this file back to Nairobi upon delivery of this judgment.

Delivered, dated and signed in open Court in Mombasa on this 27th day of September 2013.

Justice Radido Stephen

Judge

Appearances

Ms Njuguna instructed by Odero-Olonde & Co. Advocates for Claimant

Mugambi Mungania & Co Advocates on record for Respondent but did not appear at giving of directions