



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO. 98 OF 2013
(Formerly Cause No. 1951 of 2011 at Nairobi)

STEVE MUTUA MUNGA.....CLAIMANT

-VERSUS-

HOMEGROWN (K) LIMITED.....1ST RESPONDENT

FINLAY (K) LIMITED.....2ND RESPONDENT

FINLAYS HORTICULTURE (K) LIMITED.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 20th September, 2013)

JUDGMENT

The claimant **Steve Mutua Munga** filed the memorandum of claim on 17.11.2011 through J.M. Mwangi & Company Advocates. The claim was against the 1st and 2nd respondents. The claimant filed the amended memorandum of claim to name and enjoined the 3rd respondent in view of the 1st respondent's change of name to the 3rd named respondent. The parties have no dispute about the named parties to the suit and during the hearing, it was agreed that the claim was essentially between the claimant and the 3rd respondent.

The claimant in the amended memorandum of claim prayed for judgment against the respondent for:

- a. **A declaration that the respondent's acts of coercing him to resign through threats, intimidation and duress amount to constructive wrongful dismissal from employment.**
- b. **Payment of accumulated three (3) months salaries.**
- c. **Payment of accumulated salaries for 12 months being compensation for wrongful dismissal.**
- d. **General damages for unfair and unlawful dismissal.**
- e. **Costs of the cause and interests.**

The respondents filed the response to the amended memorandum of claim and counterclaim on

31.05.2012 through Obura Mbeche & Company Advocates. The respondents prayed that the claim be dismissed with costs and an award be made in favour of the respondents' counterclaim of Kshs.924,750.00.

At the hearing of the case, the claimant testified to support his claim and the respondents' witnesses included the respondent's clinical officer Christopher Kibiwott Cherono(RW1), the respondent's clinical officer Mercy Njeri (RW2), the respondent's senior nurse Catherine Ndichu Wambui (RW3), the respondent's human resource manager for Nairobi Region Margaret Mwingirwa (RW4) and Vaslas Odhiambo, the respondent's human resource officer (RW5).

The claimant was employed by the respondents as a professional medical doctor designated as an executive employee by the contract dated 1.11.2008 being exhibit 1 on the memorandum of claim.

At the time material to this case, the 3rd respondent was undertaking a redundancy process affecting employees under the claimant's medical department. It was the claimant's role as the head of the department to undertake the selection of the staff to be targeted for redundancy in line with the respondent's guidelines that are said to have provided for the objective and fair applicable criteria. In that process, the claimant recommended for redundancy a nurse by the name Naomi Wanjiru as being the nurse most eligible for termination under the redundancy scheme.

It was the respondent's human resource practice to take the employees targeted for redundancy through an exit interview. The targeted nurse was one of the employees subjected to such exit interview. At the interview, she raised serious allegations against the claimant including that she had been unfairly targeted by the claimant for the redundancy. The allegations against the claimant by the nurse as documented at **exhibit C** on the memorandum of response and counterclaim included:

- a. Redundancy based on un-procedural criteria.
- b. Favoritism.
- c. Unfair disciplinary action taken against the nurse leading to unjustified warning.
- d. Over delegation to clinical officers and nurses.
- e. Unjustified sick offs by the claimant.
- f. Discriminatory approval on company sponsored trainings.
- g. Unfair or unclear criteria on rotation of nurses to the field.
- h. Lack of freedom of expression in the hospital.
- i. Nurse aider taken to the pharmacy section but not paid any allowances.
- j. Use of the medical canteen to prepare personal foodstuffs.

In view of the allegations, the respondent commissioned its officers not involved in the emerging allegations as independent investigators to undertake a preliminary investigation into the allegations against the claimant. The investigators included RW4, one James Kilonzo and assisted by RW5, the human resource officer overseeing the medical department situated at the Naivasha office, the claimant's station of deployment at the material time.

The said exhibit C is the report of the preliminary investigation. The report concluded that the claimant was guilty of the following misconducts:

- a. Professional negligence leading to death of a child in the hospital.
- b. Bribery where two nurses confirmed having given him money to earn their due confirmation.
- c. Harassment based on the reasonable evidence adduced by the various witnesses.
- d. Abuse of office.
- e. Favoritism.

The preliminary report made the recommendations that:

- a. appropriate disciplinary action be taken against the doctor for the cited misconducts;
- b. the nurse called Benta be investigated on resuming back from maternity leave on the whereabouts

- of staff passports or photocopies of identity cards as per staff demands; and
- c. the nurses should be allowed to have a gender representative in the Gender Committee to articulate their gender related issues.

The preliminary report was dated 12.06.2009. In the process of undertaking the preliminary investigation, the claimant had been requested and he had voluntarily agreed to remain away from the office with effect from 8.06.2009. On 15.06.2009, the claimant was recalled to a meeting with RW5 and the respondent's operation manager one Peter Francombe. At that meeting, the issues raised in the preliminary report were disclosed to the claimant and the claimant decided to tender the resignation letter rather than face the disciplinary process. The letter dated 15.06.2009 addressed to the respondent's managing director and signed by the claimant being exhibit B on the memorandum of response and counterclaim stated as follows:

“Dear Sir,

RE: RESIGNATION AS A MEDICAL DOCTOR

I hereby give my notice of resignation three months effective 15.06.2009.

I am grateful for the opportunity that you have given me to serve Homegrown Kenya Limited for the last five years.

Yours faithfully,

Signed

Dr. S.M.MUNGA”

Consequential to the resignation, the respondent paid the claimant a net sum of Kshs.697,903.00 comprising pay up to 15.06.2009; vehicle allowance up to 15.06.2009; notice pay of three months; gratuity due less tax and other due deductions that were not in dispute before the court. The claimant received the dues and signed a disclaimer thus, **“I hereby confirm that I have collected my final dues as computed above. I have no further claims whatsoever against Homegrown (K) Limited.”** The claimant signed the disclaimer on 24.06.2009 as per the exhibit No. 8 on the respondents' list of documents.

The issues for determination in this suit are as follows:

- 1. Whether the resignation was valid or lawful.**
- 2. Whether the separation was fair or unfair.**
- 3. Whether the respondent could waive the disciplinary process and if yes, what was the consequence of such waiver?**
- 4. What was the consequence of the disclaimer signed by the claimant on 24.06.2009?**
- 5. Whether the parties are entitled to the remedies as prayed for.**

On issue No. 1, the claimant has submitted that the resignation was not valid and was not lawful because the letter was hurriedly hand written, the investigation process did not accord the claimant a fair opportunity to exculpate himself, and the resignation was not obtained as of the claimant's free will but that it was obtained through coercion and intimidation. The claimant submitted that he was asked to resign or face disciplinary action. It was further submitted that a valid and lawful resignation would entail a voluntary exit from employment by the employee in exercise of freedom of choice.

For the respondent, it was submitted that as per the claimant's evidence he was at a meeting on 23.06.2009 (actually the meeting of 15.06.2009) asked by Peter Francombe to resign or face summary dismissal. He then wrote the resignation letter. The respondent submitted that the claimant voluntarily received the terminal dues and signed the disclaimer voluntarily.

As submitted for the respondent, by duress is meant the compulsion under which a person acts through fear of personal suffering as from injury to the body or from confinement actual or threatened (**Halsbury's Laws of England 4th Edition Vol. 9 Paragraph 296**). As further submitted for the respondent, coercion means compulsion by physical force or threat of physical force (**Black's Law Dictionary 8th Edition**).

Thus, as submitted, coercion and duress are substantially one and the same thing and the court further finds that the claimant has failed to establish the same in the circumstances of this case. On two occasions namely, on 15.06.2009 the claimant signed the resignation letter, and on 24.06.2009 again signed the disclaimer. The court finds that the parties engaged in voluntary contractual arrangements and they were accordingly bound. The court therefore, finds that the resignation was voluntary, valid and lawful. There is no evidence on record to show that at all material time the respondent did anything that vitiated the claimant's will to remain in employment and to instead resign. The evidence on record shows that the claimant being a highly experience medical doctor deliberately entered into agreements and arrangements culminating into the termination of his employment. At no point did the claimant protest against the respondent's acceptance of the resignation and payment of the terminal dues except after he had conclusively terminated the employment and consumed the benefits of the termination.

As cited for the respondent and in the circumstances of this case, the court upholds the opinion by Honourable Njagi J in **Kyengano –Versus- Kenya Commercial Bank Limited & Another [2004] I KLR 126** thus:

“Contracts are made by the parties themselves. Courts come in to construe these contracts and arbitrate any disputes concerning or touching upon them, but not to make those contracts for the parties. Parties to a contract are at liberty to negotiate whatever conditions they like. If a condition is harsh or unfair, then the other party is at liberty to reject it. However, once the parties have agreed to terms, it would be unfair thereafter for one of them to claim that some condition or conditions was or were unfair.”

Issue No. 2 is whether the separation was fair or unfair. The court finds that at the time the claimant decided to resign, the respondent had concluded the preliminary investigation that was to pave way for notice of the alleged misconduct or poor performance and hearing as envisaged in section 41 of the Employment Act, 2007. The court further finds that the respondent did not therefore breach any rules of fairness and due process because the resignation essentially led to the lawful abortion of the disciplinary process.

As for the reasons for dismissal, the claimant has submitted that there was constructive dismissal on account of duress or coercion. The court has already found that the claimant has failed to establish coercion. Secondly, the court finds that the claimant has not shown that the respondent's conduct was such that the claimant was entitled to consider himself as terminated. Indeed, the court has found that the respondent voluntarily resigned with full agreed benefits and the respondent, but for the resignation, was keen to pursue administrative disciplinary process in accordance with the contractual and statutory provisions.

Accordingly, the court finds that the separation was lawful.

The court has already answered issue No. 3 and found that the disclaimer served as a lawful and binding contract between the parties and as submitted for the respondent the claimant was thereby barred from going back against the agreement.

Issue No. 4 is whether the respondent could waive the disciplinary procedure. In this case, the disciplinary procedure had been undertaken up to the stage of the preliminary investigation that disclosed a case for which the claimant was to be invited to formally answer to the allegations. However, before notice and hearing, the claimant decided to resign and the respondent accepted the resignation. Thus, the court finds that the respondent was entitled to waive the disciplinary procedure by way of the valid

agreement that validated the resignation. The court holds that an employer may waive the right to undertake administrative disciplinary action by way of a valid and lawful contract with the employee as it happened in the instant case. In making that finding, the court upholds its opinion in **Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013 at Nakuru at page 7 to 8** of the judgment where it was stated:

“The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer’s discretion, it is the court’s considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination.”

The final issue for determination is whether the parties are entitled to the remedies as prayed for. The court finds that the separation was lawful and therefore all the prayers made by the claimant shall fail. The counterclaim was premised on the respondent’s case that the claimant gave a shorter termination notice of three months rather than the contractual six months. The court finds that the parties by agreement varied the contractual terms and the disclaimer and acceptance by the respondent of the claimant’s resignation letter were conclusive arrangements between the parties. Thus, the court finds that the claim and counterclaim shall fail with orders that each party shall bear own costs of the suit.

In conclusion, judgment is entered for the dismissal of the claimant’s claim and the respondents’ counterclaim and for parties to bear own costs of the suit.

Signed, dated and delivered in court at Nakuru this Friday, 20th September, 2013.

BYRAM ONGAYA

JUDGE