



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 150 OF 2012

GHARIB HASHIM RASHIDCLAIMANT

VERSUS

WILHELMSSEN SHIPS SERVICES LIMITEDRESPONDENT

J U D G M E N T

INTRODUCTION

This is a claim for employment terminal dues after the claimant resigned from employment by serving notice on the respondent. The pleadings, evidence and submission show that the parting was acrimonious and that led to refusal by the respondent to pay terminal dues to the claimant. The issue for determination is whether the claimant is entitled to any remedy before the court. This court says yes.

BACKGROUND

The claimant was employed by the respondent on 1/10/2007 as an operations supervisor and promoted to the Operations Manager. His salary was kshs75500/ per month which translated to ksh.58455.90 net. As at the time of recruitment of the claimant the respondent operated in name and style of

BAT-HAF BRAWIL AGENCIES LTD but later changed the name to the current one.

On 1-4-2010 the claimant served a 30 days termination notice on the respondent which notice was to take effect on 30/4/2010. The notice was accepted and the claimant handed over as instructed. Thereafter his boss a Mr. Norman Akram Moghan changed his attitude towards the claimant and made it impossible for him to continue working because of hostility and frustrations. As a consequence of the said impossibility to serve the claimant went on leave for the remainder of the notice period.

After the expiry of the notice period, the respondent refused to pay to the claimant his salary for April 2010 and cash in lieu of the outstanding 11 leave days. He now brings this suit claiming ksh.89,075.60 being the salary for April 2010 and 11 days leave. He also seeks general damages. The respondent has denied liability and accused the claimant of breaching the employment contract through desertion and failing to hand over. The respondent further averred that as a consequence of the said breach by the claimant she suffered loss which should be set of by withholding the claimants dues. The suit was heard on 22/5/2013 and 8/8/2013 when the claimant testified as CW1 and Mr. Lee Konde testified for the defence as RW1.

CLAIMANT'S CASE

CW1 confirmed that he was employed by the respondent on 1/10/2007 by letter produced as exhibit 1. He started as an Operations Supervisor and ended up as the Operations Manager. He worked until 1-4-2010 when he served a resignation letter to the respondent which was to take effect on 30/4/2010. The RW1 acknowledged receipt of the letter by email by which he instructed the CW1 to hand over to Mr. Daniel Majiba. He handed over all the operational work plus company property to the said Daniel Majiba.

He completed uploading data to the system regarding the work he was doing and RW1 acknowledged the banding over by email. On 14/4/2010, after reporting to work RW1 asked CW1 to hand over the company mobile phone to which CW1 complied but removed the SIM Card because it was his personal line. After 11.00am CW1's line lost network of which he confirmed from safaricom, that the line had been blocked on instruction from the respondent. He protested that the line was his but the network provider advised him to make written request after he proved ownership by showing receipt for purchase to the safaricom supervisor. The line was however not restored even after the safaricom supervisor called the respondent to explain the protest.

On 15/4/2010, the CW1 went to work as usual and found the respondent's ICT officer working on his (CW1's) computer and when she left he found that she had changed the password. CW1 could not therefore work and just stayed there upto 12 noon. He felt frustrated and shunned by all the other workers. He used his colleagues computer during the lunch break to write to his boss Mr. Norman Akram explaining his frustration at work and requested for leave instead of serving the unexpired notice period. As a liason officer, CW1 felt he had no work to do without a phone and access to email. Mr. Akram responded rudely to the said CW1's email telling him not to raise issues where there was none.

The CW1 decided not to report to work to 16/4/2010 and instead went to the police to report the issue of his phone line. After a meeting with Akram at the police, CW1 was advised to file a civil case in court to pursue the restoration of his phone line. On 26/4/2010 CW1 wrote to RW1 asking whether there was any issue pending in the handing over but no response came even after CW1 repeated the email on 28/4/2010.

CW1, then went to the office on 30/4/2010 to get clearance and terminal dues but RW1 told CW1 to go away without any dues because he left without handing over. CW1 instructed a lawyer to demand for his dues but the respondent replied denying liability.

CW1 in conclusion prayed for ksh.75000 being one month salary in lieu of notice and a further claim for 11 leave days. He explained that as at the time he left in April 2010, he had 24 accrued leave days of which he utilized 13 leaving 11 days still outstanding. He also prayed for general damages for hardship occasioned on him during the termination. He asked the court to enforce the contract of employment signed on 1/10/2007.

On cross examination, he confirmed that his starting salary was ksh.20000/ and ended at ksh.75000/ per month. He maintained that he handed over properly although the respondent wanted him to go extra mile and train his successor. He also confirmed that the person who changed his computer password was Grace who was the IT and customer care manager and she however never gave CW1 the new password. CW1 denied deserting work. He was pushed out by the conduct of Mr. Akram which showed that CW1 was not needed in the company. The said conduct included taking away phone, blocking the telephone line, email address and his computer.

He clarified that when he filled leave form on 11/1/2010 he had 36 outstanding leave days and utilized only 12 leaving 24. He maintained that his boss Mr. Akram authenticated the accrued leave days by signing the leave form.

DEFENCE CASE

RW1 is the Finance and Administration Manager for the respondent. He admitted that the CW1 was employed by the respondent on 1/10/2007 as pleaded in the claim. He further admitted that CW1 applied for leave on 4/1/2010 but RW1 advised the boss not to approve it because there were visitors coming from the Headquarters. On 1-4-2010 the claimant served him with a resignation notice to which he responded on 8/4/2010 accepting the resignation.

On 15/4/2010, CW1 left before the expiry of the notice period and before handing over. As a consequence of the above default the respondent was sued due to a disputed bill of USD 47000 owed to the port due to lack of proof of payment. RW1 admitted that there was a dispute about telephone line 0722 871208 whereof post paid bills were paid by the respondent. It was later discovered that the lone belonged to the claimant. RW1 contended that on 1-4-2011, the respondent drew a cheque of ksh.111,305.90 towards CW1's terminal benefits on exgratia basis because he was in breach of the contract. CW1 however rejected the pay.

On cross examination, RW1 admitted that he was equal in rank with CW1 and both were answerable to the General manager. He admitted that he wrote an email acknowledging that CW1 had done handing over. He also admitted that on 13/4/2010 he received an email showing updates on the MV. Dalvina and MV. Suryatama and there was no issue with the former. RW1 further admitted that on 15/4/2010, he received an email from CW1 telling him that he was leaving the same day. RW1 also admitted that there was no complaint from Mr. Majiba about any operational matter not being handed over.

RW1 admitted further that he saw an email Akram replying to the claimants complaint that he Akram was frustrating him (CW1). By the said email Akram told CW1 to hand over and just leave but the email did not specify what was to be handed over. RW1 confirmed that the General Manager approved leave for CW1 on 11/1/2010 but the same was postponed to 9-24th February 2010. According to RW1, CW1 had no outstanding leave days as at the time of his resignation. RW1 did not however have the leave records for CW1 to support his allegation. RW1 also admitted that the respondent was wrong for demanding the claimants Sim card for 0722 871208. He admitted that the Sim card brought acrimony between claimant and the respondent. He confirmed that the respondent was previously operating as Bat-Haf Barwil Agencies Ltd.

RW1 confirmed that he received email on 15/4/2010 at 1pm from the CW1 complaining that he had been frustrated from discharging his duties during the notice period by the blocking of his phone and email address. The email came from the common email address. As regards the ex-gratia dues, RW1 confirmed that it was 2 months salary less taxes. He admitted that at the time of drawing the said cheque, they wanted to have the claimant attend court to testify in a case filed by the respondent MV. Suryatama. The claimant however refused the cheque and never went to testify in favour of the respondent until his dues in this suit were settled. RW1 admitted that he CW1 was never paid for the days worked in April 2010.

On re-examination RW1 changed his story on leave day to say that CW1 utilized his leave days between 9-24th February 2010 and from 15th-30th April 2010. After the close of the hearing both parties filed written submissions of which have considered in this judgment.

ANALYSIS AND DETERMINATION

The issues for determination arising from the pleadings, evidence and submissions are:

- 1. whether the contract of employment wa terminated through breach or mutual agreement.**
- 2. Whether the claimant is entitled to the reliefs sought.**

In answer to the first question, it is not in dispute that the claimant served a notice to terminate his services on 1-4-2010 with 30/4/2010 as the effective date. Service of the said notice was acknowledged by RW1 on 8/4/2010 through email to the claimant. RW1 also admitted the said service on oath during his testimony. To that extent the parties demonstrated in writing their intention to terminate their contract

by a mutual agreement.

The intention of the two parties was to unconditionally end their relationship by 30/4/2010. Any termination earlier than 30/4/2010 would amount to breach unless consented to by both parties. The claimant testified that he did his handing over of work and property of the respondent as instructed by RW1. The above fact was acknowledged by RW1 on oath when he said that the claimant's successor had no complaint on the handing over of operations duties. The RW1 also did not have any problem of accounts or property because he never raised any issue. The only issue raised was the Sim card for the Safaricom line which belonged to the claimant.

The claimant intended to serve the respondent until 30/4/2010 but could not do so due to hostile attitude exhibited by his boss Mr. Akram and other workers immediately the handing over was concluded. Firstly the claimant's official email was blocked and the password of computer changed. Secondly his mobile phone was repossessed and the line blocked. His colleagues at work shunned him and he felt unwanted.

Instead of treating the new circumstances as enough breach for purposes of terminating the contract through construction, he opted to go for leave for the remainder of the notice period because he still had 24 days outstanding for leave. He notified the RW1 of his departure a fact which was admitted by RW1 on oath. According to CW1, he did not desert work but was lawfully on leave. RW1 maintains that the CW1 deserted work without handing over and was therefore guilty of breaching the contract. There is however no specific aspect of handing over which the RW1 or his boss Mr. Akram identified.

The court is therefore satisfied that the contract was terminated through mutual agreement and not breach. The only party who probably would have been blamed for the breach is the respondent had the CW1 left the job altogether without going for leave. The reason for the foregoing reasoning is that a contract is deemed breached and therefore terminated by construction if the employer makes it impossible for a willing employee to perform his work.

In this case however the CW1 on oath stated that he never left work, but went on leave until the notice period lapsed. That is clearly pleaded and corroborated by the reduction of the claim for leave days from 24 to 11 days. In other words CW1 went for leave from 16/4/2010 until 29/4/2010 and then reported to the office on 30/4/10 to collect his dues.

As regards the issue for the reliefs sought, it is obvious from my foregoing findings that the claimant is entitled to his salary for April 2010 and the 11 leave days. The court therefore declares that it was unlawful, unfair and wrongful for the respondent to have refused to pay the said dues to the claimant after the lapse of the notice period on 30/4/2010. This court therefore awards the claimant Ksh.58,455.90 being net salary for April 2010. The claimant is also entitled to cash in lieu of 11 leave days that is to say $11/30 \times 58,455.90 = 21,433.83$. The prayer for general damages has no legal basis in view of the court's finding that the termination was by mutual agreement and is dismissed.

DISPOSITION

For the reason stated above judgment is entered for the claimant against the respondent for payment of

1. **Salary for April 2010**58,455.90
2. **11 days leave**21,433.83

79,889.73

The above sum will attract interest at court's rate from 30/4/2010 until payment in full. The claimant will also have costs of suit plus interest.

Signed, dated and delivered this 6th day of December 2012

ONESMUS MAKAU

JUDGE