



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 193 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

MILTON M ISANYA.....CLAIMANT

-Versus-

AGA KHAN HOSPITAL KISUMU.....RESPONDENT

JUDGMENT

The Claimant MILTON ISANYA was employed by the Respondent, a health provider in Kisumu in February 2004 as a supervisor. He resigned from employment by memo dated 24th July 2012. The reasons for his resignation as stated in the memo addressed to the Chief Operating Officer was that he wished to concentrate on his studies which he was pursuing. At the time of resignation the Claimant was the Laboratory Manager earning a monthly salary of Kshs.113,000 per month and had worked with the Respondent for 8 years.

In his Memorandum of Claim filed on 7th August 2014 he alleges that his resignation was not voluntary, that the Respondent demanded his resignation and threatened to terminate his services without benefits if he failed to resign.

He prays for the following remedies:

1. That the Honourable Court do find that the Respondent having acknowledged and accepted the Claimant's resignation and having made an undertaking to settle the Claimant's benefits thereof the Respondent was and is bound to honour the same.
2. That the Honourable Court do find that the Respondent's action of continued withholding and failing to remit and or neglect to pay the Claimant his rightful benefits is unlawful and untenable.
3. That his Honourable Court do order the Respondent to pay the Claimant for 55 working leave days accrued as at 31/07/2014.
4. That this Honourable court does find that the claimant's dismissal was unprocedural.
5. That this Honourable Court do order the Respondent to honour its undertaking to the Claimant by paying the Claimant a sum of KSHS.986,589/- having already honoured part of the undertaking computed as follows:

(a) Ex gratia for the 8 years served.....Kshs.452,000/=

(b) 1 month salary.....	Kshs.113,000/=
(c) Sanas accreditation equivalent to 1 month salary.....	Kshs.113,000/=
(d) 55 Working leave days $55/30 \times 113,000/=$	<u>Kshs.207,667/=</u>
SUB TOTAL	Kshs.885,667/=
(e) Interest 20% of Kshs.885,667 x 20/12.....	Kshs.295,222/=
SUBTOTAL.....	Kshs.1,180,889/=
Less payment already made.....	<u>Kshs.194,300/=</u>
GRAND TOTAL	Kshs.986,589/=

The Respondent filed a Statement of Response to the Claim denying that the Claimant resigned due to coercion by the Respondent. The Respondent avers that the Claimant's performance was so terribly poor that he would have been summarily dismissed had he not resigned. The Respondent denies owing the Claimant as alleged in the Memorandum of Claim or at all.

At the hearing of the Claim, the Claimant who was represented by Mr. Shivega instructed by Mr. Samba of CO Samba & Company Advocates, testified on his behalf. The Respondent, represented by M. Menezes of LG Menezes & Company Advocates called one witness, Maurine Roselyn Arwa, its Senior Assistant Human Resources Manager, who testified on behalf of the Respondent. The parties thereafter filed and exchanged written submissions.

Claimant's Case

The Claimant testified that he was prevailed upon to resign by the late Dr. Michael Amolo. He testified that there was a problem with staffing when he took over as Laboratory Manager which he had mentioned to the Senior Management Team(SMT).

The Claimant testified that in August 2012 he was called by the Medical Director to the Chief Operating Officer's (COO's) office where he met the Medical Director Dr. Amolo with the Senior Assistant Human Resources Manager Maurine Arwa. He was then told to resign as they did not want him. He was told by the Medical Director that it was better to resign than be dismissed. He asked how soon the resignation was required and was told it should be not later than 2 weeks. He testified that he was assured by the Medical Director that he would ensure the Claimant is paid his dues and that he should not tell anyone about it. He testified that the Medical Director told him to make sure that the letter of resignation did not give the impression that it was written under duress.

He testified that in the letter of resignation he gave the reason that he wished to pursue his studies. He testified that the letter of resignation was accepted and the Medical Director assured him that he would be paid ex gratia. He testified that in the response to his letter of resignation he was offered payment of 15 days salary for every completed year worked based on current salary and would be paid another one month's salary for his facilitation of ISO certification of the Hospital. He testified that he was further informed he would be paid for his earned leave and his pension contributions.

The Claimant testified that he was not paid anything. He testified that he wrote several reminders but the Medical Director responded to one only stating that there was a budget going on and the COO would respond to his claim once the budget process was completed. He testified that he thereafter instructed his advocate to send a demand letter to the Respondent following which he was advised to collect his terminal dues.

The Claimant testified that when he went to collect the terminal dues he was issued with a cheque for

Kshs.24,000 which he declined. That after some time he was sent a cheque of Kshs.111,367. When his advocate wrote to ask for a breakdown he was sent another cheque for Kshs.82,993.

It is the Claimant's evidence that he was not paid as agreed, that he was offered payment of ex gratia at 15 days salary for every year worked in addition to one month's salary which was for recognition of his efforts in the accreditation. He further testified that he had 55 days' annual leave as reflected in his payslip for July 2012 but was paid for only 11 days' leave.

Under cross examination the Claimant stated that he appreciated that Dr. Amolo was deceased and there was no way to prove the discussions with him. He admitted that in his letter of resignation he lied when he stated he was resigning to concentrate on his education. He confirmed that in the resignation letter he thanked the entire hospital management team for the wonderful opportunity to work for the Hospital. He also admitted that in the demand letter from his advocate dated 12th September 2012 it is confirmed that he opted to resign. He further confirmed that in the demand letter he stated he had 11 outstanding leave days.

The Claimant confirmed having been paid ex gratia at one months' salary, July 2012 salary and 11 days earned leave. He further confirmed having been paid pension by Jubilee Insurance. He confirmed he was a member of NSSF but was not aware that he was not entitled to gratuity.

The Claimant confirmed having received several letters complaining about his performance. He confirmed that at the meeting with Dr. Amolo on 24th July 2012 several issues relating to his performance were raised.

In the written submissions filed on behalf of the Claimant it is argued that the Claimant was constructively dismissed. It is submitted that the Claimant worked so hard for the Respondent that his department was ISO certified. It was submitted that the Claimant brought to the Respondent's attention all the shortcomings in the department but the Respondent never responded to the concerns or when it responded, it was usually late and without genuine concern. It was submitted that the Respondent made it extremely difficult for the Claimant to efficiently perform his work at the laboratory. It is submitted that the Claimant demonstrated these concerns by reference to a series of communication between him and the Respondent.

The Claimant relied on the decision in the case of **Catherine Kinyany v MCL Saatchi and Saatchi** in which the court held that for a claim of constructive dismissal to succeed, the Claimant must show that the Respondent acted in a way that made it extremely hard for the Claimant to continue working.

Respondent's Case

Ms. Maurine Roselyn Arwa RW1 on behalf of the Respondent testified that on 24th July 2012 she was asked to convey the management team's performance appraisal to the Claimant who was the Laboratory Manager. This was done in a meeting attended by the Claimant, the late Dr. Amolo and herself. She testified that Dr. Amolo relayed to Mr. Isanya that management had lost confidence in his management of the laboratory due to complaints relating to wrong diagnosis and that there were cases where management had to pay compensation to Clients for the wrong diagnosis. There were also complaints on turn around time of specimen and handling of lab equipment. She testified that Mr. Isanya acknowledged that there were issues and he opted to resign. She testified that the Claimant gave her his resignation letter dated the same day. According to the letter the reason for resignation was his studies.

RW1 testified that the Respondent responded to the letter on 30th July 2012 acknowledging receipt of the resignation and offered the claimant ex gratia payment equivalent to one months' salary. She stated that the offer was not for 15 days salary for every year worked as alleged by the Claimant. She testified that the letter also offered to pay 11 days leave. She referred to the Claimant's leave application from at document No. 18 of Defence which reflects the Claimant's leave balance as 11 days.

RW1 testified that a payslip was issued in the month of July 2012 which erroneously reflected that the

Claimant had a leave balance of 55 days. She explained that this was a payroll system application which generated leave days for all employees which was erroneous and that the leave form gives the correct position.

RW1 testified that she did not hear Dr. Amolo tell the Claimant that he would be paid 15 days salary per year worked as ex gratia and neither did she tell the Claimant the same. She testified that subsequent to the resignation the Claimant was paid Kshs. 111,367 which was broken down as one months' salary as ex gratia and 11 days leave less statutory deductions. She testified that an additional payment of Kshs. 82,993 was made to the Claimant by separate cheque. The Claimant was further paid Kshs. 658,770 on account of pension.

Under cross examination RW1 stated that the issues raised in Respondent's document No. 8 are what led to the Claimant's resignation. She testified that the reason given in the letter of resignation is different. RW1 testified that the issue of poor performance had been raised with the Claimant previously. She stated that the Claimant at one time stated that staffing was one of the reasons for his poor performance.

RW1 denied that the conditions at the workplace prompted the Claimant's resignation.

In the written submissions filed on behalf of the Respondent it is submitted that the Claimant voluntarily resigned and was paid all that was due to him.

Determination

I have carefully considered the pleadings and evidence before the court as well as the written submissions filed by the parties. The issues for determination as extracted by the Claimant which I will adopt are whether the Claimant voluntarily resigned or was constructively dismissed by the Respondent and what remedies the Claimant is entitled to.

Constructive Dismissal

1. Constructive Dismissal

Black's Law Dictionary (9th Edition) defines constructive dismissal as:

“A termination of employment brought about by the employer making the employee's working conditions so intolerable that the employee feels compelled to leave”

The concept of constructive dismissal is however not expressly provided for in the Employment Act. The Act does not even give any guide as to what would constitute constructive dismissal. The concept has however received sufficient attention in our courts as reflected in the rich jurisprudence in the decided cases, setting out what can fairly be considered as general guidelines on what would constitute the subject. In the case of **Joseph Aleper & another v Lodwar Water and Sanitation Company Limited [2015] eKLR, Marete D.K.N.** considered the issue and reviewed several decisions on the subject as follows:

"The Claimants in their written submission ably make a rendition of the origins of the doctrine of constructive termination of employment and its application in our jurisdiction as hereunder;

Constructive dismissal has its roots in the law of contract under the doctrine of 'discharge by breach.' Under this doctrine, an employee was entitled to treat himself as discharged from further performance of his obligations where the employer's conduct was a significant breach going to the root of the contract. The termination would be due to the employer's conduct. Such conduct may include unilateral reduction in pay or failure to pay the employee.

In England, constructive dismissal was given statutory clothing through the Redundancy

Payments Act 1965 and later the Trade Unions and Labour Relations Act, 1974 and the same was discussed in Western Excavating (ECC) Ltd v Sharp [1978] ICR 221

This doctrine has not been given any statutory backing in Kenya and therefore we submit and agree with Justice Radido when he stated in Anthony Mkala Chitavi V Malindi Water & Sewerage Company Ltd Cause No.64 of 2012 that:

“The doctrine and principles developed in other comparative jurisdictions would be equally applicable in Kenya because of the entrenchment of a justiciable right to fair labour practices under Article 41 of the Constitution.”

In the above quoted case of Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 Lord Denning MR noted that an assessment of what was a constructive dismissal applied the ordinary 'contract test' so that a dismissal must first be established as follows:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct.”

Therefore a distinction should be made of the two facets of the definition of constructive dismissal:

- i. The employer making a unilateral alteration or breach of the employment contract to the detriment of the employee.*
- ii. The employer making or otherwise permitting working conditions of the employee to be intolerable for him to continue working.*

The second facet of this definition is in fact what was stated by Mbaru J in Emmanuel Mutisya Solomon V Agility Logistics Cause No.1418 of 2011

Justice Linnet Ndolo in Benuel Mariera V Awand Enterprises Limited Mbsa. Cause No 191 of 2013 defined constructive termination under both limbs and stated as follows:

“It is trite law that when an employer by action or omission materially breaches the contract or otherwise makes it impossible for an employee to perform his contract of employment then the contract is deemed to have been constructively terminated by the employer.”

The Claimants' circumstances fell squarely under both limbs. That is their employment contracts were unilaterally altered by the Respondent through its action of advertising their jobs under different titles and qualifications that they could not meet. The Respondent also made it impossible for the Claimants to continue offering their services to the Respondent”

In Cause Number 611 [N] of 2009 between Maria Kagai Ligaga v. Coca Cola East and Central Africa Limited [unreported], the Court held that constructive dismissal occurs where an employee is forced to leave his job against his will, because of his employer's conduct. Although there is no actual dismissal, the treatment is sufficiently bad, that the employee regards himself as having been unfairly dismissed.

The basic ingredients in constructive dismissal are:-

- a. The employer must be in breach of the contract of employment;*
- b. The breach must be fundamental as to be considered a repudiatory breach;*

c. The employee must resign in response to that breach; and

d. The employee must not delay in resigning after the breach has taken place, otherwise the Court may find the breach waived.

In the case of **Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited [2014] eKLR** Rika J. expressed himself on the concept as follows:

The conduct by the employer must be shown to be so intolerable that it made it considerably difficult for the employee to continue working. At the heart of constructive dismissal is breach of the duty of trust and confidence. The employer's behaviour must be shown to have destroyed or seriously undermined trust and confidence. In the English Employment Rights Act 1996 and the South African Labour Relations Act Number 66 of 1995, constructive dismissal occurs when an employee terminates the contract under which he is employed, with or without notice, in circumstances which he is entitled to terminate it without notice, by reason of the employer's conduct. Although the Court is not bound by this definition, the two Statutes conform to the definition of the term given by most labour and employment law publicists.

Do the facts of this case disclose constructive dismissal? I reproduce the claimant's letter below:

To: *The Chief Operation Officer*

From: *Milton Masi Isanya*

CC: *Medical Director*

Date: *24th July, 2012*

REF: **RESIGNATION**

I wish to tender my resignation with effect from 1st August 2012. As you are aware that I am pursuing my studies, I will definitely need adequate time to concentrate on my education and this is why I am tendering my resignation.

In relation to the above, I would like to sincerely take this opportunity to thank you and the entire SMT for having given me this opportunity to serve in this wonderful hospital as a Manager in the department of Pathology.

I am also grateful for the opportunity that you and the entire SMT accorded me during the audits for ISO 15189:2007 which saw the Department of Pathology achieve the accreditation under my guardianship. For this I unreservedly extend my gratitude.

Finally, as you are aware that I had used my professional certificates to register both the Kisumu and Kisii laboratories, the KMLTTB requires me to give them a one months' notice before withdrawing the use of my certificates. I will therefore give the KMLTTB a one month's notice as required by the boards by laws to have my professional certificates withdrawn which is until 30th August 2012. So by this notice, I do hereby declare that I shall not have any claims of any kind, whatsoever during this period that I would have notified the KMLTTB of the stoppage.

I wish you and the entire hospital every success in all the future endeavours that you will embark on.

Yours Sincerely,

Milton Masi Isanya

Pathology Manager

Aga Khan Hospital

KISUMU

I do not find the Claimant's resignation to constitute constructive dismissal. In his letter of resignation he thanked the Respondent and the entire senior management team and even allowed the Respondent to use his certificate for a month. That is not the tone of an employee who has been forced out of work due to frustration by his employer's conduct.

In his testimony the Claimant did not give a history of treatment that would be considered as a hostile environment at work. In fact it was the Claimant's evidence that he did not want to resign but only did so because he was threatened with summary dismissal. This means he resigned to avoid a possible summary dismissal. That does not fit into the definition of constructive dismissal. In constructive dismissal the desire to resign is from the employee as a result of a hostile working environment or treatment by the employer. A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tenders resignation. I find no evidence of constructive dismissal in the Claimant's case.

Remedies

In the letter accepting his resignation the Respondent offered to pay the Claimant the following:

- *Ex gratia settlement for your service with us including the SANAS accreditation equivalent to one month salary*
- *11 working leave days accrued as at 31st July 2012*
- *Refund of your own and 50% of employer's contributions to the staff pension scheme as per the scheme rules*
- *Less any liability you may owe the Hospital*

The Claimant was subsequently paid the following:

1. Ex gratia settlement equivalent to one months salary	Kshs. 110,549
2. 11 leave days as at 31st July 2012	Kshs.40,534
Total	Kshs.151083
Less PAYE,NSSF, NHIF	Kshs.39716
Net	Kshs.111367
3. July 2012 salary	Kshs.82993
4. Pension	Kshs.658,770.19

The Claimant prayed for payment of the following:

- (a) Ex gratia for the 8 years served kshs.452,000
- (b) 1 months' salary Kshs.113,000
- (c) SANAS Accreditation equivalent to one months' salary Kshs.113,000
- (d) 55 working leave days Kshs.207,667

(e) Interest Kshs.295,222

Less payment already made Kshs.194,300

I will now consider the prayers.

Ex gratia

By its definition ex gratia is a payment made out of the giver's own grace. The definition of ex gratia according to the Black's Law Dictionary is "*As a favour; not legally necessary.*"

The Respondent's letter acknowledging the Claimant's letter of resignation clearly states that the ex gratia together with SANAs will be paid at one month's salary. The Claimant's demand for payment of Ex gratia for the 8 years served at Kshs.452,000 is therefore without basis. Having been paid one month's salary as ex-gratia, the prayer is dismissed.

1 month's salary Kshs.113,000

Having resigned from employment the Claimant is not entitled to pay in lieu of notice. The prayer is therefore without basis and is dismissed.

SANAS Accreditation equivalent to one month's salary Kshs.113,000

This prayer as observed under ex gratia above is without basis as the Claimant has already been paid what was offered by the Respondent. The prayer is dismissed.

55 working leave days Kshs.207,667

As admitted by the Claimant in his letter of demand dated 12th September 2012 from Aboge & Company Advocates, and as demonstrated by the Respondent through the leave forms, the Claimant was entitled to only 11 leave days which were paid for by the Respondent and acknowledged by the Claimant. The claim is therefore without basis and is dismissed.

Interest Kshs.295,222

Having not succeeded in the claims giving rise to the basis for the prayer for interest, the interest claimed has no basis. Even if the Claimant had succeeded he would still not be entitled to interest at 20% claimed or any other figure from the date stated as such interest would be at the discretion of the court. For these reasons the prayer for interest must fail and is accordingly dismissed.

Conclusion

Having failed in all the prayers sought in the Memorandum of Claim the entire claim must also fail and is accordingly dismissed. Each party shall bear its costs'

Dated, Signed and Delivered this 22nd day of September, 2017

MAUREEN ONYANGO

JUDGE