



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1546 OF 2018**

**JOHN KIMINGI.....CLAIMANT**

**VERSUS**

**DAMCO LOGISTICS KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein John Kimingi instituted this claim vide a Memorandum of Claim suing Damco Logistics Kenya Limited constructive dismissal and non-payment of outstanding terminal dues. He avers that he was employed by the Respondent (then registered as Maersk Logistics Kenya Limited) on 1<sup>st</sup> April 2008 as a Bond Clerk and that he diligently worked for the Respondent until 22<sup>nd</sup> December 2016 when he unwillingly resigned from the Respondent's employment. That he had started having problems with his Managers on baseless grounds and his team at the Bonds department started getting frustrated. That his decision followed his discovery of a plot to maliciously discredit his work with a view to eventually have him dismissed from employment; through an email dated 17<sup>th</sup> November, 2016 erroneously sent to him by the Respondent's Head of CSO where it was maliciously mentioned that he allegedly owned a truck that was being used by the Respondent Company contrary to the rules and policies of the company. That he escalated the issue with the HR office requesting for the same to be addressed with a view of setting the record straight and that he received an unsolicited email from the same Manger who threatened to have him investigated on owning a truck and advising him on the company's exit procedures. He avers that he was greatly affected by the malicious plot and witch hunt as he was emotionally drained and the working environment was no longer conducive to him and that he was not able to effectively carry out his duties due to the breakdown of communication between him and his line managers. Further, that he was being allocated duties despite being a team leader of a busy department and he thus engaged the HR on a suitable exit process. That his proposal was however not considered and he unwillingly tendered his resignation from the Respondent's company with the HR advising him that a normal and condition-less resignation would prompt the Respondent's management consider an exit package as proposed by the Claimant. That his last gross salary was computed at Kshs. 139,105.42/- per month as a Team Leader in the Bonds Department and that he had previously not had any disciplinary cases with the Respondent. He further averred that the Respondent's action amounted to unlawful constructive termination of his employment because all the allegations made against him were false, baseless and unsubstantiated. That as a result of the constructive dismissal, he had to take a separate another medical insurance cover for himself and his son and defaulted in repayment of a bank loan. He asserts that the Respondent has declined to pay his full terminal benefits which he thus seeks together with 2 months' salary in lieu of notice; compensation for unlawful termination of employment; and general damages for loss of amenities. He prays for Award or Judgment against the Respondent for:

- a) A declaration that the Respondent's termination of the Claimant's employment was unlawful.
- b) In the alternative the Claimant be compensated and be paid his terminal benefits.
- c) An Order for the Respondent to pay the Claimant his terminal dues and compensatory damages totalling to Kshs. 1,947,475.88/= as tabulated.

- d) The Respondent be ordered to compensate the Claimant for unlawful termination at the equivalent of twelve (12) months gross salary.
- e) The Honourable Court do issue any such orders and give directions as it may deem fit to meet the ends of justice.
- f) An Order for the Respondent to pay the Claimant costs of this claim plus interest

2. In his witness statement the Claimant states that during the period of his employment the Respondent's Company name changed to APM Global Logistics Kenya Limited and then to Damco Logistics Kenya Limited. He states that due to his exemplary performance and commitment to service delivery, the Respondent reviewed his salary on an annual basis with timely appraisals and bonuses and he feels he was pushed out of the company with no apparent reason. Further, that he has greatly suffered damages as he has been unable to secure employment since he left the Respondent's Company and prays that the Court allows the prayers as set out in his Memorandum of Claim.

3. The Respondent filed a Memorandum of Reply averring that the Claimant's performance had declined below standard in 2015 and that he was further served with a Show Cause Letter for demonstrating laxity in handling an urgent matter involving the Kenya Revenue Authority. It avers that the Claimant verbally resigned to Mr. Moser, his supervisor, on his own volition and further made a request for a redundancy package before he started making accusations of a plot to discredit his work and to unfairly dismiss him from employment. That the Respondent's HR advised the Claimant on 30<sup>th</sup> November 2016 that a redundancy package was not available to him as he had tendered a resignation and that the Claimant then wrote a resignation letter dated 22<sup>nd</sup> December 2016 resigning from employment. It further averred that the Claimant had been assured by his supervisor that there was no plot against him and the advice on exit procedures followed the Claimant's request for a redundancy which was not available to him. That it provided the Claimant a conducive working environment contrary to his allegations and that he is not entitled to any terminal dues by virtue of his own resignation from the Respondent's employment. That it waived in good faith the 3 months' notice pay which the Claimant was to pay the Respondent as per Clause 4.2 of his employment contract and prays that the claim herein is dismissed with costs.

4. The case was heard with both the Claimant and the Respondent's witness tendering oral evidence. The Claimant adopted his filed witness statement as part of his evidence in the case and further produced his filed documents as exhibits. He stated in Court that he worked for the Respondent for about 9 years and was supervising 3 people in 3 different locations at the time he was leaving the Respondent. That his issues started with the email on November 14<sup>th</sup> from Mr. Moser whose second email was an intimidation and that the said Mr. Moser then verbally told him to just resign in a meeting with the HR. He further stated that the Respondent never solved the issues he raised and that his emails were responded to verbally. That the Respondent offered him Kshs. 300,000/- which he declined and confirmed having produced his appraisal letters as proof of his exemplary performance. He also confirmed that he was only paid leave.

5. The Claimant stated under cross-examination that there would be no conflict if he had a truck as company policy was clear that one was open to engage the Respondent which is a transport and logistics company. He confirmed notifying Mr. Moser that he did not have a truck and that the engagements he had between 14<sup>th</sup> November and the time of his resignation is what made him resign and that the Respondent did not counter offer his proposed exit package. He further confirmed not having served the Respondent with a notice and denied that his resignation was precipitated by the anticipated redundancy package. He stated in re-examination that there was no opportunity to ventilate the issues.

6. The Respondent's witness, Rose Ngari admitted her filed statement and the Respondent's List of 19<sup>th</sup> July 2019 as evidence in Court. She stated in cross-examination that she was the Claimant's direct Manager and was not aware of what preceded the impugned email and neither was she involved in the discussions between the Claimant, HR and the area Manager. She confirmed that the company allowed for increments while factoring high or low performance and stated that it was not unprocedural for Mr. Moser to call for investigations even though he was not the Claimant's direct manager because the buck stopped with him.

7. The Claimant submits that the Blacks' Law Dictionary (9<sup>th</sup> 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*". That a reading of the email from Mr. Gregor Moser shows that he intended to have the Claimant investigated over an alleged ownership of a truck in use by the Company and which results would end a "whole performance discussion". That the said discussions were not made aware to the Claimant for his participation and he denies requesting for a Redundancy Package as alluded by the Respondent and as can be demonstrated in his email dated 30<sup>th</sup> November 2016 at 12:18pm to Mr. Omondi

Wycliffe the HR Manager. He submits that he clearly explained his reasons for resignation in his letter which also gave a recount of his ordeals. He cited the Court of Appeal case of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** where the Court found that the Claimant was constructively dismissed from employment and held at para 39 as follows:

*“Based on our independent re-evaluation of the evidence and the context in which the letter dated 16<sup>th</sup> June, 2009 was written we are satisfied that the letter of termination by the Respondent was not voluntary. In constructive dismissal, it is not mandatory that the employee must leave immediately without notice, the employee may leave immediately or may terminate the contract with notice, or no notice the departure must be within a reasonable time and the employer's conduct must be effective cause of leaving or termination...”*

8. The Claimant submitted that the Court in the Coca Cola case (*supra*) clearly outlined the principles relevant in determining constructive dismissal as follows:

- a) What are the fundamental or essential terms of the contract"
- b) Is there a repudiatory breach of the fundamental terms of the contract through conduct of the employer"
- c) The conduct of the employer must be a fundamental breach or 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 essential terms of the contract.
- d) An objective test is to be applied in evaluating the employer's conduct.
- e) There must be a causal link between the employer's conduct and the reason for employee terminating the contract i.e. causation must be proved.
- f) An employee may leave with or without notice so long as the employer's conduct is the effective reason for termination.
- g) The employee must not have accepted, waived, acquiesced or conducted himself to be estopped from asserting the repudiatory breach, the employee must within a reasonable time terminate the employment relationship pursuant to the breach.
- h) The burden to prove repudiatory breach or constructive dismissal is on the employee.
- i) Facts giving rise to repudiatory breach or constructive dismissal are varied

9. The Claimant submitted that the approach taken by Mr. Gregor Moser was unfair and in breach of the provisions of Clause 4.2 of the employment contract which allows the Respondent to terminate his employment without notice if he is found guilty of any conduct to justify summary dismissal. That the non-engagement of the Claimant's direct Manager also constituted a repudiatory breach of the terms of his employment as it affected his optimum productivity as required under Clause 5 of his contract. The Claimant largely adopts the contractual approach discussed in the **Coca Cola case** (*supra*) that whenever an employee alleges constructive dismissal, a Court must evaluate if the conduct of the employer was such as to constitute repudiatory breach of contract of employment; the employer's conduct does not have to be intentional or in bad faith before it can be repudiatory and the employee must be able to show that he left in response to the employer's conduct. The Claimant urges the Court to find that the Respondent's conduct constituted repudiatory breach of the highlighted terms of the employment contract and he resigned in response to and or as a result of such the employer's conduct. The Claimant further relied in the cases of **Peter Kaburu Karanja v Kirinyaga Construction (K) Limited [2020] eKLR** and **David Waithaka v World Vision International [2019] eKLR** where the Court expounded the concept of constructive dismissal with regards to the contract test. The Claimant submitted that he has demonstrated that he resigned solely because of the Respondent's hostile and unfair conduct towards him and that he terminated his employment within the reasonable time of 1 month from the date the cause of action arose. That he has further discharged his onus of proving his case as against the Respondent, particularly the specific terms of the employment contract breached by the Respondent by its conduct and has shown that the repudiatory breach was a direct and casual link to his resignation. He submits that he has fulfilled all the principles of constructive dismissal as set out in the Coca Cola East Africa Ltd case (*supra*) and proven that he was constructively dismissed from employment.

10. The Respondent submitted that constructive dismissal is founded in the Constitution under Article 41 because of the

entrenchment of a justifiable right to fair labour practices (see **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR**). The Respondent denies that the Claimant has shown that he was constructively dismissed and his resignation thus deemed to be voluntary and submits that its conduct is far from being 'in fundamental breach that goes to the root of the contract of employment' and also far from being 'so heinous and so intolerable as to make it considerably difficult or impossible for the employee to continue working' as discussed in the **Coca Cola v Maria Ligaga** case. That to the contrary, the evidence shows that it was merely acting in furtherance of one of its laid down policies i.e. the Conflict of Interest Policy, relating to an enquiry whether the Claimant owned a truck that was used by the Respondent and which policy the Claimant had duly signed on. The Respondent further submits that as per the **Coca Cola v Maria Ligaga** case, the test to be applied is an objective one; so that the query to be made is not whether the Claimant was justified to resign, but whether an ordinary employee who receives an email from his senior manager touching on the company's human resource procedure would be justified to resign in response thereto. The Respondent contends that if this was the standard then Kenyan courts would be awash with cases of constructive dismissal. It further submits that the Claimant's case did not disclose a harsh or hostile working environment and it instead showed 9 years of his work, promotions and salary increments go down the drain as a result of his voluntary resignation, on the mistaken belief that he would be entitled to a redundancy package.

11. The Claimant asserts constructive dismissal arising from the email exchange he had with a Mr. Moser of the Respondent. His assertion is that the resignation was as a result of the circumstances precipitated by the Respondent's management. He bemoaned the lack of support from the Human Resources Manager who declined to document some of the happenings and instead resorted to verbal meetings. If there was a classic case of constructive dismissal, this is it. Just because there was a matter of conflict of interest, the manner in which the inquiry was conducted was cloth and dagger fashion with no one willing to expressly state what the reservations or concerns were. Like in the **Maria Ligaga v Coca Cola Limited** case (*supra*), the employer made it impossible for the contract of service to be performed as expected by placing the employee under a cloud of suspicion. As an aggrieved individual it was natural for the Claimant to anticipate a recompense, a package so to speak, for the abrupt end of his contract but the Respondent did not avail any. In a case for constructive dismissal, the Employment Act permits the court to award compensation up to a maximum of twelve (12) months' salary. Bearing in mind the period the Claimant had diligently served the Respondent an award of 12 months' gross salary would not be improper in the circumstances. The Claimant earned Kshs. 139,105.42 a month. In the final analysis I enter judgment for the Claimant against the Respondent for:

- a) Compensation in terms of Section 49 of the Employment Act to a maximum 12 months – Kshs. 1,669,265.04.
- b) Costs of the suit
- c) Interest on the sum awarded in (i) above from date of judgment till payment in full.

It is so ordered.

**Dated and delivered at Nairobi this 2<sup>nd</sup> day of June 2021**

**Nzioki wa Makau**

**JUDGE**



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