



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 81 OF 2019**

*(Before Hon. Lady Justice Maureen Onyango)*

**PETER KABURU KARANJA**

**CLAIMANT**

**VERSUS**

**KIRINYAGA CONSTRUCTION (K) LIMITED RESPONDENT**

**JUDGMENT**

Vide the Claim filed on 8<sup>th</sup> February 2019, the Claimant seeks to have his resignation declared involuntary and unlawful. In particular, he seeks the following reliefs-

- a. Salary arrears for nine months amounting to Kshs.1,440,000.00.*
- b. The difference between the agreed net salary and the amounts paid for four months amounting Kshs.5,620.00.*
- c. Service pay for the period worked amounting to Kshs.80,000.00.*
- d. A declaration that the resignation was involuntary hence it amounted to wrongful/unfair termination of employment.*
- e. Damages for wrongful/unfair termination of employment amounting to twelve months pay that is Kshs.1,920,000.00.*
- f. Itemized pay statements and statements on statutory deductions for the entire duration of employment.*
- g. Certificate of service.*

The suit is undefended as the Respondent did not file a response or present a witness for examination.

The Claimant avers that the Respondent employed him on 16<sup>th</sup> September 2014 as a crusher foreman earning a net monthly salary of Kshs.160,000.00. He avers that the Respondent was erratic in making payment and would sometimes pay him after 3 months which eventually led to his resignation. He asserts that the resignation was involuntary hence amounts to wrongful termination.

It is averred that at the Claimant's last day of service, the Respondent owed him 9 months' salary in arrears. It is further averred that the Claimant was never provided with any pay slips. He was thus, he was unable to establish whether NSSF deductions were made and remitted.

The Claimant testified as CW1 and reiterated the averments in his claim and witness statement. He added that he has been unemployed

since leaving the Respondent's employment.

On cross examination, he admitted that his resignation letter had indicated that he was resigning due to personal issues but contended that his resignation was driven by non-payment of salary. He conceded that he had not requested for payment statement or certificate of service. He further conceded that after leaving employment he was issued with 2 cheques of Kshs.150,000.00 each, but contended that the same were less than his two months' salary.

Upon re-examination, he elaborated that the reasons for his resignation were explained in his resignation letter.

After the hearing both parties filed their written submissions.

### **Analysis and Determination**

I have carefully considered the claim, the evidence presented before this Court and parties' submissions and find that the the issues for determination are:-

- a. Whether the claim is time barred by dint of section 90 of the Employment Act, 2007.
- b. Whether the Respondent's failure to pay the Claimant his salary amounted to constructive dismissal.
- c. Whether the Claimant is entitled to the reliefs sought.

### **Limitation of Time**

It was the Respondent's submission that this claim was time barred. Section 90 of the Employment Act requires a claim to be commenced within three years next after the act, neglect or default complained of. In his resignation letter of 29<sup>th</sup> March 2016, the Claimant issued the Respondent one month's resignation notice effective from 1<sup>st</sup> April 2016.

The issue in this claim is constructive dismissal hence the cause of action arose at the end of April which is the time the resignation became effective. As such, the statutory limit for filing the claim would have been at the end of April 2019. Since the claim was filed on 8<sup>th</sup> February 2019, it was still within the 3-year limitation period hence not time barred.

### **Constructive Dismissal**

The Claimant submitted that he was constructively dismissed since his resignation was prompted by the Respondent's failure to pay his dues, while the Respondent submitted that there was no constructive dismissal as the resignation was voluntary and the Claimant opted not to resign after the default complained of.

The Court of Appeal case of **Coca Cola East and Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** at paragraph 30 of its judgment, outlined the principles relevant in determining constructive dismissal as follows-

- a. *What are the fundamental or essential terms of the contract through the conduct if the employer"*
- 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.*

In his resignation letter of 29<sup>th</sup> March 2016, the Claimant explained his reasons for termination as follows-

*"PETER K. KARANJA*

*P.O. BOX 193*

*NJORO*

*0722683349*

*29/03/2016*

*TO*

*THE MANAGING DIRECTOR*

*KIRINYAGA CONSTRUCTION (K) LIMITED*

*P.O. BOX 48632 – 00100 NAIROBI*

*Dear Sir,*

***REF: RESIGNATION NOTICE AS A CRUSHER FOREMAN***

*I do hereby give a one-month notice of my resignation as from 1<sup>st</sup> April 2016 due to my personal issues. At the same time I take one month leave starting from the same date both to run concurrent.*

*I take this opportunity to thank the management of Kirinyaga to have given me one and half (1 ½) years to serve you. I did it with all my effort and experience making sure, that the crusher gives maximum production and good quality of aggregate without any problem. My main issue of resigning is because of delaying my salary. I have tried to persevere of which up to date I have not been paid 9 months salary. I got frustrated very much of which I was unable to sustain myself anymore even to pay house rent.*

*So please I ask the management kindly to organize and pay my salary of (10) months. Leave and Notice inclusive.*

From the Statement of Accounts from Equity Bank as adduced by the Claimant, it is evident that at the time the Claimant was writing his resignation letter, he had not been paid for a cumulative period of 9 months.

The Respondent's failure to pay the Claimant his salary for a cumulative period of 9 months was a fundamental breach. The breach was compounded by the Respondent's failure to pay the Claimant his salary for the three consecutive months leading to his

resignation. This meant the claimant could not cater for his needs, a fact he explained in his resignation letter. The Court of Appeal in **Coca Cola East and Central Africa Limited v Maria Kagai Ligaga [SUPRA]** observed as follows–

*“29... The second interpretation is that the employer’s conduct is so grave that it constituted a repudiatory breach of contract of employment – this is the contractual test. The contractual test is narrower than the reasonable test... we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a 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... The employee must be able to show that he left in response to the employer’s conduct...”*

In the case of **Maureen Wanjiru Mwangi v Blue Sea Energy**

**Limited [2020] eKLR** it was held that the Respondent’s failure to pay the Claimant’s salary amounted to constructive dismissal.

The Respondent did not file a response to the claim and therefore

the allegations pleaded in the claim remain uncontroverted. I find that the failure to pay the Claimant his salary amounted to his constructive dismissal.

### **Reliefs**

The Claimant prayed for 9 months’ salary arrears. The Respondent did not adduce any evidence to controvert the Claimant’s assertion that there were 9 months’ salary arrears. This excluded the month when he was on leave while serving one month’s termination notice. The statement of account adduced by the Claimant indicated that he was paid Kshs.160,000.00 on the same day he issued his letter of resignation. As such, he is awarded 9 months’ salary arrears less the Kshs.300,000.00 that he admitted to have been paid by the Respondent after resignation.

The Claimant is further awarded the difference between the agreed net salary and the amounts paid for 4 months totalling to **Kshs.5,620.00** as the Respondent has not presented any controverting evidence to.

The Claimant sought an award for service pay for the period worked amounting to Kshs.80,000.00. Though the Respondent did not adduce any evidence to prove that the Claimant was a member of NSSF or a pension scheme, the Claimant failed to provide the basis for the computation of the said sum such NSSF statements hence the same is declined. Section 35 (5) of the Employment Act provides as follows-

**An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.**

The Claimant is awarded 6 months’ compensation for constructive dismissal. I have taken into consideration the circumstances outlined in Section 49(4) of the Employment Act. Further, though the Claimant only served for 19 months, I take note that the Claimant has not been awarded service pay, that no evidence was adduced to show that he was in a pension scheme or that deductions were made to NSSF, or that he was paid any compensation or *ex gratia* payment. I have further taken into account the fact that he was compelled to resign due to fundamental breach by the respondent causing him financial embarrassment and anguish.

The Respondent is directed to issue to the Claimant a certificate of service whose particulars are in line with Section 51(2) of the Employment Act. The Respondent is also directed to issue the Claimant with an itemized statement outlining the salary payments and statutory deductions made for the entire duration of his employment.

### **Conclusion and Orders**

In conclusion, the resignation of the claimant is declared to be constrictive dismissal and judgment entered for the claimant against the respondent as follows –

1. Unpaid salary for 9 months Kshs.1,440,000.00
2. Salary underpayments Kshs.5,600.00
3. 6 months' salary as compensation Kshs.960,000.00

**Total Kshs.2,405,620.00**

Less amount paid (300,000.00)

**Amount Due Kshs.2,105,620.00**

4. Certificate of service
5. Itemised pay statements for the work paid.
6. Costs.
7. Interest at court rates from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF JUNE 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**



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