



**REPUBLIC OF KENYA**

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

**CAUSE NO. 490N OF 2009**

**SOLOMON BUSAKA**

**CLAIMANT**

**v**

**AUTOLITHO LIMITED**

**RESPONDENT**

**JUDGMENT**

1. Solomon Busaka (Claimant) was appointed by Autolitho Ltd (Respondent) as a Prepress Operator through a letter dated 1 September 1999.
2. On 15 October 2008, the Claimant gave the Respondent a 24 hour notice of resignation.
3. According to the Claimant's letter of resignation, he was resigning because the Respondent had refused to give him salary increments as agreed with the Kenya Union of Printing, Publishing, Paper Manufacturers & Allied Workers (of which he was a member). He also alleged that the Respondent had implemented the increments for other employees and he had been singled out because of his active union membership.
4. The Claimant followed the resignation notice with letter dated 29 October 2008 asking to be paid his terminal benefits.
5. On 1 September 2009, the Claimant instituted legal proceedings against the Respondent alleging *unlawful dismissal* and seeking compensation and terminal benefits.
6. In a Reply to Claim filed on 4 December 2009, the Respondent contended that the Claimant resigned voluntarily and was paid all due increments.
7. The parties also filed documents and witness statements and the Cause was heard on 27 May 2015 by Nzioki wa Makau J but he could not hear it to conclusion because he was transferred out of Nairobi.
8. On 22 February 2018, I took part of the Claimant's cross-examination, re-examination and the Respondent's case.
9. The Claimant filed submissions on 12 March 2018 while the Respondent filed its submissions on 14 March 2018.
10. The Court has considered the pleadings, evidence and submissions and identified the Issues for Determination as, *whether there was constructive dismissal, whether Claimant was paid terminal benefits and appropriate remedies.*

**Constructive dismissal**

*What is constructive dismissal"*

11. The doctrine of *constructive dismissal* was discussed in detail in the case of *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344 (see also *Elizabeth Wairimu Kuria & Ar v Quickmart Supermarket Ltd* (2014) eKLR and *Vincent Omollo Obuom v Catholic Diocese of Nakuru* (2015) eKLR. The Court discussed the rival tests and ended up endorsing the contract test.

12. The test, essentially as to what amounts to constructive dismissal as endorsed in the authority is that 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. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

13. From this test, the duty the Court is called upon to do is to look at the conduct of the employer which might have led to the employee leaving.

14. In the resignation letter and in the Memorandum of Claim, the Claimant contended that he was forced to resign because of frustrations by the Respondent who had failed to pay him salary increments as agreed in a collective bargaining agreement signed between the Kenya Union of Printing, Publishing, Paper Manufacturers & Allied Workers and *Member Companies of the Printing Trades Group of the Federation of Kenya Employers* for the period 2007/2009. He alleged that other employees were paid the increments.

15. The Claimant filed an extract of a collective bargaining agreement between Member Companies of the Printing Trades Group of the Federation of Kenya Employers (of which the Respondent was a member) and the Union.

16. The agreement was signed on 20 December 2007 and it provided for a 9% salary increment.

17. A collective bargaining agreement becomes effective upon registration by the Court and it is common knowledge that many times such agreements are signed and registered long after the effective date. In such cases, the employees are paid in arrears.

18. In the instant case, the Claimant did not disclose when the collective bargaining agreement was registered by the Court for its implementation to commence.

19. The Court is therefore unable to determine that the Respondent had evinced an intention not to fulfil a fundamental term of engagement, *payment of wages* as contractually agreed, by the time the Claimant was resigning.

20. The Claimant also alleged that other employees had been paid the increments but he did not even name one such employee.

21. The Court concludes that the Claimant did not discharge the burden placed upon him by section 47(5) of the Employment Act, 2007 to prove the resignation was anchored on a fundamental breach by the Respondent.

### **Terminal benefits**

22. The Claimant admitted that the Respondent paid him Kshs 34,609/- but strongly resisted the suggestion that it was terminal benefits.

23. According to the Claimant, he did not sign any discharge in respect of final dues and the signature on the discharge was a forgery.

24. The Claimant did not disclose exactly what the Kshs 34,609/- he purportedly received was for.

25. The Respondent called a shop steward who was involved in the separation between the Claimant and the Respondent.

26. The witness testified that Union was involved in the computation of the Claimant's final dues and that the Claimant signed the discharge in his presence before he handed to him the cheque for Kshs 34,609/-. The witness also signed the discharge.

27. Considering the failure by the Claimant to explain what the Kshs 34,609/- was for and the testimony of the shop steward, the Court is minded to find that the Kshs 34,609/- comprised the Claimant's final dues (less loans and deductions).

### **Service pay**

28. Service pay was not expressly pleaded by the Claimant.

29. Despite the failure, the Court notes from a copy of pay slip he filed in Court that he was a contributor to the National Social Security Fund and thus not eligible in terms of section 35(5) &(6) of the Employment Act, 2007 to service pay.

### **Overtime**

30. The Claimant did not plead or lead any evidence on overtime.

31. Before concluding, the Court notes that the Claimant did not set out in the pleadings the lost benefits or any other benefits he was seeking. The categorisation was vague and the Claimant did not help his case when he failed to itemise the benefits during testimony.

### **Conclusion and Orders**

32. In light of the above, the Court finds no merit in the claims presented by the Claimant and orders that the Memorandum of Claim be dismissed with no order as to costs.

**Delivered, dated and signed in Nairobi on this 6<sup>th</sup> day of April 2018.**

**Radido Stephen**

**Judge**

### **Appearances**

For Claimant                Ms. Mwatsama instructed by Mjeni Mwatsama & Co. Advocates

For Respondent            Mr. Okao instructed by Okao & Co. Advocates

Court Assistant            Lindsey



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