



**REPUBLIC OF KENYA**

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

**CAUSE NO. 568 OF 2016**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**DOUGLAS OMUNYIN OTUNGU..... CLAIMANT**

**VERSUS**

**BOARD OF TRUSTEES, REDEEMED CHRISTIAN**

**CHURCH OF GOD..... RESPONDENT**

**JUDGMENT**

1. The Claimant initiated this suit by a memorandum of claim dated 31<sup>st</sup> March 2016 and filed on 8<sup>th</sup> April 2016 alleging that his services were summarily dismissed by the Respondent.
2. The Claimant avers that on 6<sup>th</sup> March 2014 he was employed by the Respondent as a Gardener/Groundsman at a monthly net salary of Kshs.10,500/-. The letter of appointment dated 30<sup>th</sup> January 2015 and signed on even date provided that the Claimant would be on probation for one (1) year and his duty station was Karen Resident of the Special Assistant to the General Overseer East Africa Region and would be housed in compound and would report to the administration office for duty allocation. The Claimant was entitled to three off days for every completed month of service or payment of Kshs.2,000/- in lieu of the three days off. The Claimant and family were entitled to NHIF cover and NSSF contributions would be made.
3. The contract was terminable by one month's notice of either party.
4. The Claimant avers that the Respondent required him to perform duties of the duty guard from the date of employment and his pleas to the Respondent to hire a day security officer or pay for the extra duties went unheeded. That he could neither proceed on leave nor take off days and worked all the time including public holidays.
5. The Claimant further avers that on October 2015, he left the Respondent's driver at the Respondent's premises to purchase drugs at a nearby shop and was away for about seven minutes. That on his return, the Respondent's Bishop wife scolded him and pleas for forgiveness fell on deaf ears and he was locked outside the gate for 15 minutes.
6. That when the Bishop returned one week later, he held a staff meeting with some of the employees. The Claimant was excluded. That at the end of the month of October his services were terminated without any notice pay or reason for termination. The October salary was however paid.
7. Subsequently, the Claimant reported the dispute to the Labour Office on 17<sup>th</sup> November 2015. The Respondent did not honour summons of the Labour Office until 8<sup>th</sup> December 2015 when it sent a representative who requested for time for instructions.

8. That he reported to the Labour Office on 21<sup>st</sup> December 2015 and a meeting was scheduled for 7<sup>th</sup> January 2016 on which date the Respondent's representative was accompanied by a lawyer who produced a copy of a letter as well as a cheque of Kshs.7,000/- dated 2014 as evidence of payment for pending leave and requested for time to compute terminal dues. The Respondent did not attend any other meeting at the Labour Office.

9. The Claimant prays for –

(a). An order that the Respondent pays the Claimant the amounts particularised under paragraph 10 of the memorandum of claim as follows

i). One month's salary in

lieu of notice..... Kshs.10,500.00

ii) Unpaid leave..... Kshs.16,961.53

iii) Unpaid public holidays.....Kshs.7,700.00

iv) Unpaid day guard salary as per

minimum wages

v) Damages for wrongful termination.... Kshs.126,000.00

**Total.. Kshs.380,599.58**

(b) Certificate of service

(c) Interest on the sum of Kshs.380,599.58

(d) Costs of this suit.

10. The Claimant further avers that at the end of October 2015 when he was summarily dismissed, he was told to write a resignation letter failing which he would not be paid terminal dues. That he was coerced into writing the letter but was only paid the salary for October 2015.

11. The Respondent filed its response to the memorandum of claim and counter claim on 8<sup>th</sup> July 2016. It admitted that it employed the Claimant as a gardener at a salary of Kshs.10,500/- per month and denies having made the Claimant a day guard.

12. It is also denies the contents of paragraphs 4, 5, 6, 7, 8 and

9 of the memorandum of claim. That the allegations were farfetched, misguided, untrue and fictitious and the claim had not basis in law. It is further averred that the Claimant received all his dues. That the Respondent's representative was generous and kind to the Claimant and treated him like their son. That the Claimant took his off days and whenever he worked on public holidays he would be paid and was not entitled to a certificate of service.

13. In its counter claim, the Respondent prays for –

i) One month's equivalent in lieu of notice

ii) Damages for leaving the place of employment unattended

iii) Damages for inconvenience cause to the organisation.

### **Evidence**

14. The Claimant adopted the written statement and was cross examined. The witness testified that he used to work from 8 am – 5 pm and kept the key to the gate and had to keep off birds from the piece of land and pump water to the tanks if there was no water in the compound. He told the Court that he left employment towards the end of November, 2015.

15. That the resignation letter was precipitated by an incident involving the Pastor's wife who wanted to go out of the compound but the Claimant was unavailable even after his name was called out. That the Claimant found her opening the gate which she did and closed it and passed over the keys to the Claimant after he apologised.

16. He further testified that he opened the gate and entered the compound. That when the Pastor came back, he was unhappy and did not speak to the Claimant for about one week. The Claimant testified that the Pastor had intimated to other pastors that he would not work with the Claimant for having been arrogant to the wife. That after two (2) days other pastors visited the residence.

17. He also testified that after resignation he stayed in the compound for one (1) week for the Pastor to get a replacement which they did and the Claimant showed him the tasks at hand and subsequently handed over to the Pastor after breakfast.

18. On cross examination, the Claimant confirmed that he was an employee of the Respondent from March 2014 to October 2015. That Pastor James Abilla was the Supervisor and was introduced to the Church by Pastor Morris who hailed from near his home area.

19. The Claimant confirmed that he wrote the resignation letter and signed it giving the employer 11 days' notice of termination. The letter was directed to Pastor James Abilla, the Senior Administrator. That salary for October was paid. He also confirmed that he had a sitting with all the pastors excluding the Pastor's wife before he resigned.

20. On re-examination, the Claimant testified that his payslip did not show any NSSF or NHIF payments. That on 15<sup>th</sup> October 2015, he applied for a loan of Kshs.20,000/- and was given.

21. The Respondent had two witnesses. RW1 PASTOR JAMES DAVID ABILLA adopted the witness statement and on cross examination confirmed that he was not a resident of the Karen Residence and did not work there.

22. The witness confirmed that the Claimant was a needy person who was engaged by the Church and worked during the day. That NSSF and NHIF contributions were neither deducted from the Claimant's salary nor remitted. That Pastor Peter had a security guard and a driver at the resident. He confirmed four pastors met and prevailed upon the Claimant not to quit employment but he was adamant. That he personally talked to the Claimant about it but he declined his request to stay on.

23. He testified that he had minimal interactions with the Claimant at the workplace but the Claimant had no previous misconduct or complaint against him and his basic pay was Kshs.5,500/-.

24. On re-examination the witness confirmed that he was the one responsible for workers and other administrative matters. He also confirmed that the Claimant took his resignation letter to him. The letter precipitated the meeting of the pastors.

25. That the payslip had an item on house allowance although he was housed in the compound. That the Senior Pastor often gave out money and gifts.

26. RW2 MORRIS AUNYUSAT adopted the witness statement and was cross examined. The witness confirmed that he knew the Claimant as an employee of the Respondent and he had given a notice of resignation.

27. That he had introduced the Claimant to the Church as a needy person and sought help for him and the Claimant often testified how Pastor Peter and his family treated him well. He testified that he had known the Claimant for a long time and his attempts to persuade him to rescind the resignation were unsuccessful.

#### **Claimant's Submissions**

28. The Claimant identifies three issues for determination namely: –

- i) Whether the Respondent repudiated the contract of employment;
- ii) Whether the Claimant was constructively dismissed;
- iii) Whether the Claimant is entitled to the remedies sought.

29. As to whether the Respondent repudiated its part of the contract, reliance is made on the words of Koome J. (as she then was) in **Samson Emuru v Ol Suswa Farm Ltd [2006] eKLR** on the duty of the employer to provide the servant with a safe place of work and not merely to warn against unusual dangers known to them.

30. Reliance is also made on the **Halsbury's Laws of England, 4<sup>th</sup> Edition Vol. 16 paragraph 560** on the common law duty to take reasonable care for the safety of employees.

31. Finally, the decisions in **Joseph Aleper & another v Lodwar Water and Sanitation Company Limited [2015] eKLR**, **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221**, **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR**, **Emmanuel Mutisya Solomon v Agility Logistics, Cause No. 1448 of 2011** and **Benuel Mariera v Awanad Enterprises Ltd [2014] eKLR** are relied upon to canvass the principle of constructive dismissal.

32. As regards whether the Claimant was constructively dismissed by the Respondent, the Claimant relies on **Blacks Law Dictionary (9<sup>th</sup> Edition)** for the definition of constructive dismissal. Similarly, extensive reliance is made on the Court of Appeal decision in **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** on the applicability of the principle of constructive dismissal to the instant case. It is contended that the expansion of the Claimant's duties to include security guard in addition to being a gardener without commensurate remuneration strained the Claimant financially and he was denied medical leave or annual leave and no overtime pay. That put together these actions of the Respondent made the environment toxic and intolerable for the Claimant leading to the resignation.

33. The decisions in **Rose Mwikali Nzuki v Food for the Hungry Kenya [2015] eKLR** was also relied upon to urge that constructive dismissal existed where when viewed in the light of all circumstances, a reasonable person would come to the conclusion that the employer no longer intended to be bound by the terms of the contract.

34. It is submitted that the additional duties given to the Claimant by the Respondent were fundamentally different from the contract he signed and went to the root of the contract. That there was a casual link between the Respondent's conduct and the Claimant's resignation after being humiliated by the Pastor's wife.

35. On the remedies sought, it is submitted that the Claimant is entitled to all the reliefs sought since he had established that the dismissal was unfair.

#### **Respondent's Submissions**

36. The Respondent did not isolate any specific issues for determination but submitted that the Claimant's letter dated 6<sup>th</sup> June 2016 clearly shows that the Claimant resigned from employment and was not terminated as alleged. That the documentary evidence on record and the oral testimony did not reinforce each other but contradict, a fact reflected more vividly by the amounts claimed or demand through the Labour Officer, Kituo Cha Sheria and the statement on record. It is submitted that the Claimant was not entirely honest.

37. It is further submitted that the Claimant's claim is untenable and unsustainable and he has not discharged the burden of proof as provided by Section 107 of the Evidence Act. The decision in **Treadsetters Tyres Ltd v John Wekesa Wepukhulu [2010] eKLR** is relied upon to reinforce the submission on burden of proof.

38. As regards the reliefs sought, the Respondent submits that the Claimant is not entitled to any, the off duty was paid as evidenced by the payslip on record, he had no leave days pending, service had not materialised and the watchman/guard duties were not proved. Finally general damages had not been proved.

39. On the counter claim, the Respondent contends that it is entitled to the payment because the Claimant did not give one (1) month' notice in accordance with agreement. That he gave a notice of 11 days' notice.

40. The Respondent prays for the dismissal of the suits in its entirety.

### **Determination**

41. The issues for determination are: -

- a) Whether the Claimant was constructively dismissed;
- b) Whether the Claimant is entitled to the reliefs sought.

42. Although the provisions of the Employment Act, 2007 do not expressly recognise the concept or principle of constructive dismissal, the jurisprudence from this Court and Court of Appeal establishes beyond peradventure that the principle of constructive dismissal part of our law of employment. The principle was aptly captured by Lord Denning in **Western Excavating ECC Ltd v Sharp [1978] 2WLR 344** in the following words –

*“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. 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.”*

43. Closer home, in **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR**, the Court of Appeal expressed itself as follows: -

*“The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behaviour towards him was so unreasonable that he could not be expected to stay – this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constituted a repudiatory breach of the contract of employment – this is the contractual test.”*

44. In this case, the Court of Appeal affirmed and adopted the contractual test approach. The Court observed that –

*“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 the contract of employment. Whether a particular breach of contract is repudiatory is one of mixed fact and law. The criterion for evaluating the employers conduct is objective; 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 (i.e. causal link must be shown, i.e. the test is causation)”*

45. The Court of Appeal then formulated the legal principles germane to a determination of whether a constructive dismissal has taken place. The principles include the fundamental or essential terms of the contract, repudiatory breach, conduct of the employer must be fundamental or significant breach going to the root of the contract of employment, objective test, causal link, leaving with or without notice, burden of proof on the Claimant, facts of the case varied. Significantly, *“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.”*

46. Finally, in **Leena Apparels (EPZ) Limited v Nyevu Juma Ndokolani [2018] eKLR** the Court of Appeal re-affirmed the key issue in an allegation of constructive dismissal was the employer’s conduct. The Court observed that:

*“However, it is worth remembering that in constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of employee – unless waiver, estoppel or acquiescence is in issue. In other words, an employer is required not to behave in a way that amounts to a repudiatory breach of contract.”*

47. The Court is in agreement with these sentiments.

48. The principle of constructive dismissal was applied in **Joseph M. Kivilu v Kenya National Examination Council [2021] eKLR** where the Claimant had been placed on indefinite suspension with no salary from 29<sup>th</sup> March 2016 to 24<sup>th</sup> March 2017 when he resigned in frustration. The letter of resignation catalogues the tribulations he had to endure for almost one year.

49. In the instant case, the Claimant avers that at the end of the month, and after being excluded from a staff meeting, he was informed that his services had been summarily dismissed and that he should put in his resignation letter failing which he would not be paid terminal dues.

50. Intriguingly, the Claimant made no reference to termination in his evidence in chief or in cross examination. Relatedly, he admitted on cross examination that he wrote the resignation letter and signed the same. That he was requesting for wages and would resign at the end of the month. The Claimant’s letter of resignation is reproduced below –

*“Douglas Omunyin Otungu*

*Karen Residence*

*19<sup>th</sup> October 2015*

*The Senior Administration*

*Redeem Christian Church of God*

*NAIROBI*

*Dear Sir*

*I hereby submit my letter to management to requisition or to give the Church time by the end of this month. I need all my service or wages and salary of October; I will resign this month.*

*Thank you.*

*Your faithfully*

*SIGNED (Claimant)*

51. This letter does not set out or indicate the reason(s) for resignation. Contrary to the contents of paragraph 9 of the memorandum of claim, the Claimant led no evidence that he had been coerced to write a resignation letter. Relatedly and worthy of note, the Claimant's written statement makes no reference to the resignation letter at all.

52. Similarly, whereas in his evidence in chief, the Claimant stated that he was not invited to a staff meeting when the Senior Pastor came back, on cross examination he confirmed that there was a sitting between all of them before he resigned.

**Why did the Claimant resign or was he terminated as alleged by the memorandum of claim"**

53. As to whether the Claimant was terminated or not, the issue did not go beyond the averment in paragraph 8 of the memorandum of claim. The Claimant adduced no scintilla of evidence or suggestion that he was summarily dismissed when and how. Neither the Claimant nor the Respondent's witnesses adverted to the issue of termination.

54. In the absence of evidence in support of the averment the irresistible finding is that the Claimant was not terminated but resigned by a letter dated 19<sup>th</sup> October 2015, a fact he admitted in evidence.

55. RW1 testified that he prevailed upon the Claimant to rescind the resignation but he was adamant. RW2 confirmed on re-examination that he had known the Claimant for a long time but his attempts to talk him out of the resignation fell through.

56. From the Claimant's resignation letter, the reason(s) for leaving the Respondent's employment is indiscernible.

57. The Claimant submits that he resigned because of the harsh working environment the Respondent subjected him to. That the Respondent repudiated the contract it entered into with the Claimant. That he was treated in an inhumane and degrading manner. That he was denied annual leave. That he worked for 12 hours in a day and was forced to work for the three off days for pay and his duties were expanded without his consent and that the Respondent had no pension scheme.

58. It is noteworthy that the Claimant averred and testified that although he was employed as a gardener/groundsman, he also performed day guard duties. In addition, although he testified that he had the key to the gate, he did not testify that he was stationed there or opened the gate for every person who called in. As a resident, he needed the key and being called upon occasionally to open the gate did not Court's view make him a guard. Moreover, he did not protest for over one and half years. Relatedly, the Claimant adduced no evidence of any inhumane or degrading treatment or that he was denied leave or worked for 12 hours or was forced to work on all off days.

59. The encounter with the Pastor's wife at the gate where he alleges to have been quarrelled emerges as an isolated incident and inadequate to sustain the submission that the Respondent treated the Claimant in an inhumane and degrading manner.

60. For the above reasons, the Court is satisfied that the Claimant has not on a balance of probabilities proved that he performed the duties of a guard at the Respondent's gate.

61. Typically, in resignation's employees notify employers the reason(s) for the drastic action or step, particularly where an employee is unhappy with the conduct of the employer.

62. In this case the Claimant's resignation letter is reticent on the reason or reason(s) and other than the testimony that the Claimant acted as a day guard, a fact he appears to have acquiesced for the entire duration of this employment. The Court has no other material to rely on to impute a constructive dismissal of the Claimant.

63. The judicial authorities cited elsewhere in this judgment are consistent that constructive dismissal focuses on the conduct of the employer which must be proximate cause for the resignation unless acceptance, waiver, acquiescence or estoppel is in issue.

64. In this case, the Claimant was employed on 6<sup>th</sup> March 2014 and resigned on 19<sup>th</sup> October 2015 but alleges that the Respondent assigned him day guard duties from the date of employment and his pleas to the Respondent to have a day guard fell on deaf ears.

65. The Claimant's terms of employment changed on 6<sup>th</sup> March 2014 and remained the same until he resigned more than 1½ years later. He acquiesced the employment status quo and cannot be heard to say the circumstances were different. He is estopped from relying on the guard duties as the effective reason for his resignation.

66. In **Premier Construction Limited v Josephat Bwire Lukale & 5 others [2017] eKLR** the Court of Appeal stated that –

*“It means therefore that constructive termination or dismissal will be imputed only where the employer is in breach of some fundamental term of the contract of employment that makes it untenable for the employee to remain in the employment of the employer compelling the former to resign in response to that breach.”*

67. It is a trite law that he who alleges must prove. Section 7 of the Evidence Act is unequivocal on this.

68. For the above reasons, it is the finding of the Court that the Claimant has not on a balance of probabilities proved that he was constructively dismissed by the Respondent.

69. As to whether the Claimant is entitled to the remedies sought, it follows that having found that the Claimant resigned on his own accord and was not constructively dismissed, the reliefs founded on termination are unsustainable. Consequently, the Court proceeds as follows: –

**(a) An order that the Respondent's termination of the Claimant was unfair and wrongful**

70. Having found that the Claimant was not constructively dismissed, the order sought is **declined**.

**(b) An order that the Respondent pay the Claimant Kshs.380,599.85**

71. Having found that the Claimant was not terminated, the sum of Kshs.380,599.85 claimed is **declined**.

**(c) Certificate of Service**

72. The Respondent to issue a Certificate of Service to the Claimant within 30 days of this judgment.

**(d) Service Pay**

73. The Respondent's witnesses testified that the Respondent did not deduct or contribute to the NSSF contrary to the requirements of the law, the Claimant is entitled to service pay for every year worked. **The Claimant is awarded service pay for the duration served.**

**Counter claim**

74. As regards the counter claim, the Respondent submitted that it was entitled to one month's salary because the Claimant did not give the one month's notice required by law. That he gave 11 days' notice. The Claimant did not submit on this issue.

75. The uncontroverted evidence of the Claimant is that after his resignation was accepted, he stayed on for one more week to enable the Respondent secure a replacement and added another two (2) days. That he introduced the new employee to the tasks ahead and left the following day after handing over to the Pastor. At no time did the Respondent indicate to him that his notice was insufficient and would thus claim one (1) month's salary in lieu of notice. The cordial relationship between the parties explains the gesture of the Claimant to remain in office until the Respondent secured a replacement and apprised the new employee on the tasks at hand.

76. For the above reasons, the Court is satisfied that it would be inequitable for the Respondent to claim notice pay.



77. The counter claim is **declined**.

78. Each party shall bear its own costs.

79. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF FEBRUARY 2022**

**DR. JACOB GAKERI**

**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, this 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 this 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.

**DR. JACOB GAKERI**

**JUDGE**



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