



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Cause 1476 of 2011

JAMES KABENGI MUGO

..... CLAIMANT

VERSUS

SYNGENTA EAST AFRICA LIMITED

..... RESPONDENT

Rika J

CC. Elizabeth Anyango

Mr. Gachuba instructed by Onyoni Opini and Gachuba Advocates for the Claimant

Walker Kontos Advocates for the Respondent.

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. This Claim involves a substantial amount of money. The amount of Kshs. 81,402,848.30 is pleaded. This is in addition to other prayers which include the transfer of a motor vehicle; grant of costs; and interests. One would expect the Respondent to apply itself fully in answering to the Claim. That is not what happened.
2. The Statement of Claim was filed on 1st September 2011. This was supplemented by a second Statement of Claim filed on 9th February 2012. The Respondent filed its Statement of Reply on 19th September 2011. The matter has been scheduled severally for procedural directions or hearing. It was before the Court on 15th November 2011, 2nd February 2012, 26th March 2012, 13th June 2012, 27th July 2012, 2nd November 2012, and lastly 26th November 2012. On all these occasions, the Respondent appeared only once, the 26th March 2012, through an Advocate. Very unfortunately, the Respondent's Advocates did not appear in Court on 2nd November 2012, when Mr. Gachuba appeared, and led the Claimant in giving his evidence. The affidavit of service with regard to the hearing notice shows that the Advocates for the Respondent, Walker Kontos Advocates, received the hearing notice on 31st July 2012 at 3.00 p.m., through their Court Department.
3. In brief, Mugo testified that he is qualified as a Certified Public Accountant [CPA-K], a member of the Institute of Internal Auditors of America, and a member of Information Systems Auditors and Control Association [ISACA] of America, Kenyan Chapter. He was employed by the Respondent Company, as the Compliance Manager, in a letter dated 3rd September 2009. The employment took effect on 7th

October 2009. He was head-hunted by the Respondent from the Audit Firm KPMG, whom he served as a Senior Associate in Bahrain. He was supplied with his job description. His monthly remuneration comprised basic salary of Kshs. 220,000; telephone benefit of Kshs. 3,100; car benefit of Kshs. 50,000; fuel allowance of Kshs. 30,000; employee pension of Kshs. 22,000; excess pension of Kshs. 2,200; accident and medical insurance for the claimant, spouse and up to 4 children; retirement benefit scheme, with the company contributing 15% of the claimant's basic salary; and 21 days of annual leave.

4. He worked from 7th October 2009 to 8th April 2011. He was, on the latter date, summoned by the Head of Human Resources Emily Kamunde, and given the option to either voluntarily resign or have his contract of employment terminated at the instigation of the employer. Even before the Claimant made his choice, Ms. Kamunde circulated an email message to all the employees of Syngenta, announcing that James Kabengi Mugo, the Compliance Manager, would be leaving the Respondent with effect from 15th April 2011. The Claimant did not resign. On 8th April 2011, the Respondent withdrew the Claimant's company car KBK 718Z and two fuel cards. He received the letter of termination dated 8th April 2011, on 12th April 2011. The reason for termination was given as poor performance. He wrote his former employer a letter demanding to be reinstated. The Respondent replied through the Federation of Kenya Employers, alleging that the Claimant had resigned voluntarily. The Claimant alleged that he performed his duties diligently. He in the course of his duties differed with his fellow Officers Emily Kamunde, William Ngugi [Head of SBS Transformation] and Walter Njenga [Sales Department]. This was based on their poor management and lack of financial probity. The relationship deteriorated, leading to the eventual termination.

5. In May 2010, the Claimant together with Global Internal Audit personnel from Basel Switzerland conducted an Internal Audit of the Respondent, which highlighted lack of credit policy. This implicated the Heads of Sales and Finance. The Head of Finance was unhappy with Mugo and slammed him with a warning letter. Employees had taken loans with Citibank guaranteed by the Respondent contrary to Global Policy. The Head of Finance tried to interfere with these audit findings, and was unhappy when the Claimant refused to suppress the impropriety. Mugo testified he was denied a hearing before termination. He intended to work for the Claimant until retirement at the age of 60 years. He was subjected to unfair termination contrary to Section 41 and 45 of the Employment Act 2007. Against this backdrop the Claimant seeks-

- a) Letter of termination and letter by the FKE in response to the Claimant's demand letter, be all expunged from the Claimant's employment record;
- b) Respondent be ordered to reinstate the Claimant to his previous position, or in the alternative-:
- c) The Claimant be paid by the Respondent 12 months' salary in compensation totaled Kshs. 3,013,958.30;
- d) Telephone benefit between 1st and 15th April 2011 at Kshs. 1,550;
- e) Car benefit between 1st and 15th April 2011 at Kshs. 25,424;
- f) Transfer of Motor Vehicle KBK 718Z to the Claimant;
- g) Salary for 26 years remaining until the Claimant would have retired at the age 60 years at Kshs.78,362,915.30; and
- h) Costs with interests.

6. The Respondent as seen above did not attend Court to challenge Mugo's spirited evidence. The Respondent however, did file a Statement of Reply, which the Court is obligated to consider. The Respondent concedes the Claimant was its employee, working as the Compliance Manager, under the terms and conditions of employment contained in the letter of employment dated 3rd September 2009, exhibited in the Statement of Claim as appendix 1. It is also accepted by the Respondent that it instigated the termination of the Claimant's contract of employment, in a letter dated 12th April 2011. Termination was in accordance with the contract of employment, which allowed either party to terminate by giving the

other 3 months' notice, or pay 3 months' salary in lieu of the notice. The Claimant agreed to this mode of termination by signing the agreement. He is estopped from adopting another inconsistent legal position. The Courts also are called upon to enforce parties' agreements. Section 35 of the Employment Act endorses termination by notice. It is not a meaningless piece of legislation. Termination by notice is accepted by law, unless the notice is a mask for other reasons that are prohibited under Section 46 of the Employment Act. The Claimant's termination was grounded on his failure to meet his performance targets. He was appraised and found wanting. He was given a warning letter dated 4th October 2010 by the Chief Finance Officer and the Managing Director, stating that, "*failure to improve your job performance on a continuing basis, will result in further disciplinary action, up to and including dismissal.*" The Respondent submits that the Claim is baseless and should be dismissed.

The Court Finds and Awards:-

7. The Claim for anticipatory salaries of 26 years, calculated at Kshs. 78,362,915.30 has not been established. The Claimant testified he intended to work until he is 60 years. He alleged he had 26 years left in employment. He did not direct the mind of the Court to the contractual clause or legal provision, which fixed his retirement age at 60 years. Employers and employees in the private sector are free to fix the retirement age of the employee. The popular retirement age, mainly due to the influences of public sector employment, and a succession of Collective Bargaining Agreements in both the private and public sector, is 60 years. This however is not a legal provision contained in the Employment Act 2007. It does not govern all employment relationships. A party advancing the position that he/she would have retired at the age of 60 years must direct the mind of the Court to the relevant Statute; Regulation Order; Employment Policy; Individual Contract of Employment; Collective Bargaining Agreement; or the Employer's Internal Rules and Regulations. The Claimant just came up with a popularized retirement age, and asked the Court to adopt it as the minimum standard. There was no evidence whatsoever that the Claimant was to retire at the age of 60.

7. Secondly, even if he had clearly established that he would have retired at the age of 60, there is nothing in law that compels the Court to grant him the anticipated salaries for the rest of his working life, while in reality he is not actively rendering any labour to the Respondent. This Court has held the view in the past Awards that compensation for employment wrongs should be proportionate to the economic injury suffered, be reasonable and not aim at punishing the employer, or unjustly enrich the employee. In ***Cause Number 611 of 2009 between Maria Kagai Ligaga v. Coca Cola East and Central Africa Limited***, this Court was of the view that "*the Court observes the principle of a fair go all round. The purpose of employment compensation is to redress injuries in a proportionate way, not unjustly make rich aggrieved employees. Courts, even in advanced countries hardly make compensation based on the remainder years of service.*" This Court has recently restated the position in ***Industrial Court Cause Number 1722 of 2011 between David Mwangi Gioko and 51 Others v. Nairobi City Water and Sewerage Company***. The law encourages employees who lose their jobs through one form of termination or the other, to move on and mitigate their losses. One cannot sit still and expect to collect his salary for the remainder of his expected working years. Salaries are meant to compensate employees for rendering labour. The Court would not grant the Claimant 26 years' salary for no work, adding up at a staggering Kshs. 78,362,915.30. Replication of injuries and multiplication of compensatory remedies is against the principle of a fair go round, and the overall policy of fair work. The Claim for anticipated salaries is declined.

8. The Court is satisfied from the evidence of the Claimant that his contract of employment was terminated without valid reason or reasons. The Employment Act 2007 makes it obligatory for employers to substantively justify termination decisions, and carry out the termination processes in a procedurally fair manner. Employment is no longer at the will of the employer. If there are any legal or contractual provisions that appear to advocate employment at the will of the employer, such provisions should be read as being subservient to the minimum statutory termination standards created under Section 41, 43, and 45 of the Employment Act 2007. The duty to give reason or reasons for termination is in absolute terms. It is imposed in absolute terms by the law. The reasons for termination listed under section 46, comprise activities that would result in what are characterized as automatically unfair termination. These are not the exclusive grounds of termination, but grounds that automatically result in unfair termination. Other grounds such as the fact that the Court finds the Claimant was not heard, or that in the totality of the process, was not treated in accordance with rules of natural justice and equity, warrant the finding of

unfair termination. It is not correct as submitted by the Respondent therefore, that only when a termination notice is given for ulterior reasons, would the notice be found insufficient calling into play the law of unfair termination. There must be substantive justification, and procedural fairness, in all forms of termination of employment. The Kenyan Employment Law no longer accepts that employers can fire employees at will, for any reason or no reason. The at-will doctrine which the Respondent has asked the Court to uphold had strong roots in the American Employment Law. It must be noted however that America has traditionally had other strong human rights laws, which have always afforded employees protection against unfair termination. That jurisdiction has also had the benefit of vibrant judge made exceptions to the at-will doctrine . In the **California Supreme Court Case of Guz v, Bechtel National Incorporation 24 Cal 4th 317 & P3d, 1089 100 Cal, Rptr. 2d. 352 [2000]**, the Court explained the at – will doctrine as follows,

“ An employer may terminate its employees at will, for any reason or no reason... the employer may act peremptorily, arbitrarily, or inconsistently without providing any specific protections such as prior warnings, fair procedures, objective evaluation or preferential reassignment.”

This at will doctrine was the dominant termination law in Kenya prior to the advent of the Employment Act 2007. It has been propounded in employment termination decisions in the Kenya Court of Appeal. Judge made exceptions made their way into our scene, through the Awards of the Industrial Court which interpreted Section 15 of the Trade Disputes Act expansively, as to require the giving of reasons, and consideration of rules of natural justice, in termination decisions. The Law has now been made unambiguous, with the employment protections that came with the enactment of the Employment Act in 2007.

9. The Claimant was not heard. The persons, who led in alleging that he had performed poorly, were Kamunde, Ngugi and Njenga. There is enough evidence that these Officers had axes to grind with Mugo. They could not be expected to carry out fair investigation and trial, of the issues alleged against the Claimant. Kamunde used the Respondent’s webpage, to announce the resignation of the Claimant even when he had not acceded to such resignation. It is precisely because of the circumstances such as the Claimant was faced with, that the at-will doctrine has strongly been rejected by the Employment Act 2007. The Court finds that the Claimant was not given a valid reason or reasons for termination. Adverse comments in his performance appraisal records were inserted after he had left employment. He was working well, exposing financial improprieties here in Kenya, to the Corporate Heads in Basel Switzerland. In the end he was victimized after having been seduced by the Respondent, to leave a well paying job in the Middle East. **The Court is satisfied the Claimant merits compensation for unfair termination, which the Court grants at 9 months’ salary.** The telephone benefit and car benefit were given by the Claimant’s contract of employment. They are well founded in fact, and are granted as pleaded. **The Claimant will have Kshs. 1,550 as telephone benefit from for the period 1st to 15th April 2011, and Kshs. 25,424.70 in car benefit over the same period.** It was not explained by the Claimant to the Court, why he wants to have his former employer’s car KBK 718Z, transferred to him. He did not show that there was a scheme in place that allowed him to keep his employer’s car for good at some point. **The prayer for transfer of the car is declined.** He seeks to have letters written by his former employer terminating his contract, and two other letters written by the Federation of Kenya Employers in response to the Claimant’ letter of demand before filing of the Claim, expunged from his employment record. This is a most bizarre prayer. How does the removal of the termination letter from an employment file that is closed, help the Claimant? Why does the Court have to order an employer to throw out letters that were written in response to a letter from the Claimant? **This is a most bizarre prayer and is rejected.** The Court does not think that the Claimant should be reinstated to work at Syngenta Limited. He was not compatible with the majority of the top management staff, whom he viewed as incorrigibly corrupt, and bent on frustrating the Claimant’s career at Syngenta. He cannot fit in the Respondent, because his work ethics and attitude, is not at par with a majority of the top management staff. It is prudent that he takes his compensation, moves on and lets Syngenta be. **The prayer for reinstatement is rejected.** The Claimant earned a grossmonthly salary of Kshs. 271,163.20 as shown in his Pay Advice for March 2011. In sum the Court Awards:-

[a] Termination was unfair;

[b] The Respondent shall pay to the Claimant 9 months' gross salary at Kshs. 2,440,468.80 in compensation;

[c] The Respondent shall pay to the Claimant telephone benefit at Kshs. 1,550, and car benefit at Kshs. 25,424.70;

[d] The Respondent shall pay to the Claimant the total amount of Kshs. 2,467, 443.50 within 30 days of the delivery of this Award; and,

[e] No order on the costs and interest.

Dated and delivered at Nairobi this 25th day of April 2013.

James Rika
Judge