



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 53 OF 2016

PETER WANJAMA.....PLAINTIFF

VERSUS

KENYA BREWERIES LIMITED.....DEFENDANT

RULING

1. The application before me seeks the setting aside of two (2) aspects of the Arbitral Award dated 23rd October 2015. The said two aspects in issue relate to:
 - a. **The award of 12 months Gross monthly pay, which was awarded to “assuage the Defendant’s callousness?”. The award was for Kshs. 12,904,204.80.**
 - b. **Costs of the reference, in the sum of Kshs. 812,000/-.**
2. It is common ground that the arbitration from which this application emanates, did not stem from an Arbitration Agreement. The parties herein went to arbitration pursuant to a consent Court Order.
3. That explains why the application before me was brought pursuant to Order 46 Rule 16 of the Civil Procedure Rules.
4. If the arbitration proceedings had been undertaken in accordance with the provisions of the Arbitration Act, the said statute would have also remained the reference point when any party was seeking to set aside the award.
5. The respondent has urged the court to hold that the Arbitral Award is both Final and Binding on the parties.
6. In that regard, the respondent drew the court’s attention to the Order for Directions No. 1, in which the applicant herein had reserved its right to appeal on points of law.
7. According to the respondent, that issue was not entirely settled because the arbitrator expressly invited the parties to enter into a written Agreement on the issue.
8. As the parties did not enter into a written Agreement on the issue regarding the intention of the applicant to reserve its right to appeal on points of law, the respondent invited this court to declare the application incompetent. The assertion is that the applicant failed to comply with the arbitrator’s request

to formalize the Agreement in writing; and that that therefore constituted a fatal flaw in the attempt to have the award set aside.

9. The applicant's response was that this is not an appeal. It is an application to set aside the arbitral award, pursuant to Order 46 of the Civil Procedure Rules.

10. It is true that the applicant has invoked Order 46, which empowers the court to set aside an award on the following grounds only;

“a) corruption or misconduct of the arbitrator or umpire;

or

b. that either party has fraudulently concealed any matter which he ought to have disclosed, or has willfully misled or deceived the arbitrator or umpire?.

11. I therefore, find on a prima facie basis, that the application before me is not an appeal in the strict sense.

12. The grounds upon which the applicant wishes to have the award set aside is that the arbitrator was guilty of misconduct.

13. In the case of **RASHID MOLEDINA & Co. (MOMBASA) LTD & OTHERS Vs HOIMA GINNERS LTD [1967] E.A 645**, at page 657, Spry J.A said;

“Under the statute law, an award can only be set aside for misconduct on the part of the arbitrator and that has been extended by interpretation (subject to an exception not relevant to these proceedings) to include an error of law apparent on the face of the award?.

14. That legal pronouncement was reiterated by the Court of Appeal in the case of **KENYA NATIONAL ASSURANCE Co. LIMITED Vs KIMANI & ANOTHER, CIVIL APPEAL No. 42 of 1984**.

15. It was the applicant's submission that, in Kenya;

“...an error of law apparent on the face of the award amounts to misconduct. The award of general damages for constructive dismissal in this case is an error of law apparent on the face of the award. We submit that by making this award, the Arbitrator misconducted himself”.

16. But the respondent reasoned that the applicant failed to prove the alleged misconduct by the arbitrator.

17. In the opinion of the respondent the act of awarding general damages in a case in which an employer had terminated the services of his employee, based on malice, prejudice or unreasonable basis cannot be deemed to be misconduct.

18. If the court were to give its view on that legal question, that would be tantamount to sitting on an appeal over the arbitrator.

19. In the case of **RASHID MOLEDINA & Co. (MOMBASA) LTD & OTHERS Vs HOIMA GINNERS LTD (1967] E.A 645**, at page 657, Spry J.A. said;

“What must always be borne in mind is that there is no appeal, in the ordinary sense, from the award of an arbitrator. The parties have chosen their own tribunal and they must, generally speaking, accept the result whether it is right or wrong. The circumstances in which the court will intervene are the exceptions to that general rule”.

20. In that case, the court went to address the question whether or not there was an error of law on the

face of the award.

21. In other words, when the court is called upon to determine whether or not to set aside an arbitral award, the decision would not be based simply on the existence or otherwise of an error of law: the said error of law must be apparent from the face of the award.

22. The Court of Appeal went on to conclude thus (*in the case of Rashid Moledina*);

“I do not think it was open to the learned Judge to consider whether the arbitrator was correct in his conclusion, and I would express no opinion on that question”.

23. Therefore, it is not my function to determine the correctness of the arbitrator’s finding.

24. The applicant submitted that the arbitrator erred by awarding General Damages for breach of contract. That submission is founded upon a long line of court decisions. Therefore, when the arbitrator awarded General Damages to “*assuage for pain and shock*” suffered by the respondent, it is the applicant’s contention that that was an error.

25. On the other hand, the respondent presented several authorities in which the courts in Kenya had awarded General Damages.

26. The bottom-line therefore is that there has been instances where the courts have awarded General Damages for unlawful termination of employment, whilst there have also been instances in which the courts have declared that General Damages were not awardable.

27. By choosing to award General Damages, can the arbitrator be said to have made an error apparent on the face of the award?

28. What is an error of law on the face of the award?

29. Platt J.A quoted the following words from **Champsey Bhara & Co. Vs. Jivraj Ballou Spinning and Weaving Co. Ltd [1923] A C 480**, when making his determination in **KENYA NATIONAL ASSURANCE Co. LTD Vs. KIMANI & ANOTHER, CIVIL APPEAL No. 42 of 1984**;

“An error of law on the face of the award means, in their Lordship’s view, that you find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgement, some legal proposition which is the basis of the award and which you can say is erroneous”.

30. I understand the applicant in this case to be saying that once the arbitrator had expressly said that General Damages are not awardable in employment cases, he made an error when he then proceeded to award General Damages.

31. In my considered opinion, the arbitrator was entitled to choose one or the other line of the authorities on the issue of General Damages being awarded in Employment cases. He could have gone along with the authorities which had held that General Damages were not awardable, or he could have gone along with the authorities which had awarded General Damages. If he made that choice, the court could not fault him.

32. Therefore, the arbitrator cannot be faulted for choosing the line of authorities which had held that General Damages are not awardable in employment cases.

33. Having made that choice, the arbitrator ought to have stayed the course.

34. But he did not. He recognized that General Damages were not awardable, but proceeded to award the same. To my mind, that constitutes misconduct.

35. Therefore, to the extent that the arbitrator awarded General Damages, the award is set aside.

36. As regards the costs of the reference, the applicant reasoned that the arbitrator did not provide any basis for awarding Kshs. 812,000/-.

37. Assuming that the failure to explain the basis for that sum constituted a mistake of omission, I nonetheless hold that the applicant has not satisfied the court that such failure was reason enough to set aside that award.

38. Therefore, I decline to set aside that aspect of the award. However, as the overall arbitral award has been reduced, I find that Justice demands, that the costs of the Reference be varied to reflect the reduction.

39. The applicant also asked the court hold that the respondent was not entitled to Compound Interest.

40. I refrain from making any determination on that matter because it was not a part of the issues raised in the application dated 9th November 2015. That was an application for setting aside two (2) aspects of the arbitral award, namely the award of General Damages and the Costs of the Reference.

41. In the final analysis, the application is successful, to the extent that the award of General Damages is set aside. In the light of that fact, I order the respondent to pay to the applicant, the costs of the application.

DATED, SIGNED and DELIVERED at NAIROBI this 16th day of February 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Munene for the Plaintiff

Kahura for Njeru for the Defendant

Collins Odhiambo – Court clerk.