IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, KIAGE & M'INOTI, JJ.A)

CIVIL APPEAL NO. 314 OF 2017

BETWEEN

IAN EDWARDS.....APPELLANT

AND

BYTES TECHNOLOGY GROUP KENYA LTD.....RESPONDENT

(Being an appeal from the Judgment and Orders of the Employment and Labour Relations Court at Nairobi (Abuodha, J.) dated and delivered on 17th February, 2017

in

ELRC No. 60 of 2014)

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JUDGMENT OF THE COURT

In January 2010, **Bytes Technology Group Kenya Ltd** "*the respondent*" employed **Ian Edwards** "*the appellant*" as a Business Development Director. The respondent was incorporated locally as a subsidiary of its parent or holding company based in South Africa when the latter sought to spread its business wings and or tentacles to Kenya. After completion of his probationary period, the respondent, an ICT service provider, employed the appellant on a permanent basis and tasked him with the responsibility of growing its business in Kenya and to make it profitable. The appellant was to generate business opportunities which were to be forwarded to respondent's head office to be followed through financially. The employment contract stipulated that the appellant would be remunerated with a gross annual package of USD 149,000 excluding statutory deductions. The contract further provided that the appellant would use a serviced company vehicle for company business. As a matter of fact the respondent was incorporated in Kenya by its parent company some eleven months after the appellant had arrived in Kenya and when he had already identified suitable office premises and staff. This was in accordance with instructions from the parent company that the appellant begins to market its products in advance, before formal set up. Pursuant to those instructions, the appellant set up, marketed and generated several business opportunities which he forwarded to the parent company for technical, logistical and financial support in completing the orders. The parent company had undertaken to invest resources in the form of funds until such time when the local outfit became profitable. The appellant had even been instructed to incur expenses out of his own pocket which he would be reimbursed later. However, the parent company failed or refused to invest adequate resources in setting up the Kenyan office.

In October 2012, the appellant wrote an *email* to the parent company advising it that they would need to downgrade his sales targets until such time as it allocated adequate resources towards the operations of the Kenyan outfit. The *email* triggered events that eventually led to his termination from employment on 22nd November 2012 when a visiting delegation from the parent company presented him with a "*Termination of Employment Agreement*" which he was required to sign immediately in order for his terminal dues to be paid. The appellant accused the respondent of ambush since according to him, the meeting was meant to discuss the challenges facing the local operations. In response to his earlier *email*, he was contacted by the parent company and advised that his employment had been summarily terminated but he protested against the termination and was advised to remain in office to await a visit by senior officials from the parent company to discuss the challenges facing the local operations. It is in this meeting that he was ambushed with the termination agreement.

It is on that premise that the appellant approached the Employment and Labour Relations Court "*the court*" seeking *inter alia*, a declaration that the termination of this employment was unlawful; damages for unlawful termination; refund of expenses incurred on behalf of the respondent and terminal dues. He claimed that the procedure used to terminate his employment was unlawful for failing to comply with the Employment Act; the contract of his employment and the respondent's disciplinary code. He contended that no formal notice of termination

was given, nor was he informed the reason for his termination or offered an opportunity to explain or present his defence. He claimed further that he was denied the right to a fair hearing, in particular the rules of natural justice. It is on that footing that he prayed for USD 83,138.26 together with interest at court rates from the date of expenditure till settlement in full made up as follows; USD 14,118.43 he expended in obtaining a requisite work permit; USD 50,590.00 spent in purchasing a company motor vehicle and USS 18, 429.83 for expenses incurred in running the respondent's business locally. The appellant's tabulated his terminal dues as USD 12,416.00 being salary for the month of January 2013; USD 12,416.00 being one month's salary in lieu of notice; USD 24,942.00 being 2-years service pay; USD 23,000.00 as 2% commission on the Gross Profit Target and USD 45,000.00 as Performance Based Incentive Target (PBIT). In addition, the appellant sought an award of USD 149,000.00 being 12 months pay as damages for unlawful termination.

The respondent denied the claims and maintained that the appellant's employment was terminated in accordance with the provisions of the Employment Act after being accorded a fair hearing. The respondent refuted the claims that it had ambushed the appellant with termination agreement and added that the appellant had advance notice of the meeting and had been informed of its purpose. That at the said meeting the appellant made representations which were duly considered and found unsatisfactory. That it terminated the appellant's employment on account of poor performance. It alleged that as the Business Development Director, the appellant had the responsibility of sourcing and generating business to sustain the local outfit and denied that it had undertaken to invest any resources therein. According to the respondent, the setting up of the Kenyan outfit was solely based on the availability of funds and the appellant's performance in achieving the same. The main plank of the respondent's defence was that the appellant was an underperformer. He was slow and incompetent in producing qualified business plans and forecast reports for the region despite several demands by the respondent to deliver, hence the termination.

The respondent averred further that upon the appellant's termination, it paid all his terminal dues after deducting unpaid taxes, that is, pay as you earn "*PAYE*" for remission to the Kenya Revenue Authority "*KRA*". The respondent claimed to have learnt that the appellant was not remitting his PAYE to KRA during his employment despite the appellant being aware that his salary was inclusive of tax. That as the only senior representative of the respondent in Kenya, the respondent had charged him with the responsibility of remitting tax. In response to the appellant's claim for reimbursement of alleged monies expended towards acquiring work permit, the respondent pleaded that the appellant was required to claim refund by providing proof of the expenses but had neglected or failed to do so. The respondent maintained it refunded the appellant's expenses amounting to USD 18,429.83 as part of the terminal dues it paid him after termination though the appellant had not provided proof. The respondent alleged that the monies the appellant expended towards the purchase of a company motor vehicle had also been refunded to him.

The respondent denied that the appellant was entitled to USD 23,000.00 as 2% commission on the Gross Profit Target and USD 45,000.00 as PBIT and alleged that payment of any commission or incentive was at the sole discretion of its Board of Directors and was dependent on generated sales. It accused the appellant ofnegligible sales which were not profitable as to earn him any commission based on gross profit and performance-based targets.

The respondent raised a counter-claim to the effect that upon termination of his employment the appellant was required to return the company's two motor vehicles and a computer in his possession but had failed to do so. The respondent's claim was that continued use of the motor vehicles by the appellant had denied it the profitable use of the same and that the regular use of the two motor vehicles had considerably depreciated their values. The respondent therefore claimed damages for the loss of use of the two vehicles at the rate of Kshs. 13, 500/- per day which it alleged was the daily market rate for car hire services in Nairobi. In total, it claimed Kshs. 9,315,000.00 from the appellant with a further sum of Kshs. 27,000/- daily from 1st September 2014 until such a time as the appellant delivered up the motor vehicles to the respondent. The appellant in response denied the counterclaim and averred that the respondent had failed to take possession of the motor vehicles. Neither had it directed him where to take the vehicles. He further denied using the motor vehicles.

On those set of facts, the court below was not persuaded that the appellant's employment was terminated lawfully and fairly as required by virtue of section 45 of the Employment Act and that the respondent had not demonstrated the alleged poor performance by the appellant. The court found too that two years was a relatively short time to set up a company, in a foreign market, and make it profitable. This was especially considering that the appellant was not adequately furnished with resources to set up and make a foot print in Kenya. The court then awarded the appellant USD 86,912.00 being seven months' salary as compensation for unfair termination. It rejected the appellant's claim for USD 83, 138.26 on the basis that no evidence was adduced to prove the alleged expenses by the appellant. The court took into consideration the sum of USD 51,026.00 paid to the appellant as terminal dues after deduction of PAYE tax. The learned Judge rejected the appellant's claim that he was not responsible for payment or remission of payable tax to KRA and held that the terminal dues paid constituted justified terminal benefits since the appellant '*did not produce any document to show that he was exempt from tax or that the respondent was responsible for payment of tax on his behalf*.'

Concerning the counterclaim, the court disallowed it on the footing that no evidence was led to prove that if the motor vehicles were hired out, they could have yielded the income claimed by the respondent. Besides, the respondent had not demonstrated to the court any effort it made to repossess the vehicles in question from the appellant and whether the appellant resisted any such attempt.

Vide his memorandum of appeal dated 4th September 2017; the appellant raised 10 grounds which can be condensed into four broad grounds upon which he contests those findings by the learned Judge. The appellant complains that the Judge erred in law and in fact in holding that he was responsible for deducting tax or remitting the same to KRA; in finding that his claim for USD 83, 138.26 incurred on behalf of the respondent was not supported by evidence; and by failing to make determination on the issue of his entitlement to bonus and commission which had been raised. In his determination, the Judge had ordered each party to bear their own costs. The appellant contests that order by the Judge on the basis that costs ought to follow the event in the absence of any compelling reason.

In turn, the respondent filed a cross-appeal accusing the learned Judge of wrongly dismissing its counter-claim on the basis that it did not adduce evidence to show it suffered loss. The respondent also complains that the seven-month salary compensation to the appellant was excessive in the circumstances of this case. It is easily discernable from the cross-appeal that the respondent is not contesting the Judge's finding against it for unfair termination.

Both parties opted to canvass the appeal by way of written submissions. In its submissions, the appellant maintained that as a new entrant in the Kenyan market, the respondent's business was entirely dependent on financial and other material support from its parent company to enable it to establish locally, which was not forthcoming. On statutory deductions, he submitted that he was not obligated to deduct statutory deductions from his salary since that was contrary to the terms of the employment contract. The appellant remained adamant that it was an express term of the contract that his annual package of USD 149,000.00 was exclusive of statutory contributions. That at all times, he believed that PAYE was being properly remitted by the respondent.

The appellant cited **rule 4** of the Income Tax (PAYE) Rules, under the Income Tax Act which obligated an employer to deduct tax from emoluments payable to an employee liable to pay tax. The rule further provides that failure to deduct tax as provided is an offence. The appellant therefore argued that in light of the foregoing statutory provision, the respondent ought not to have succeeded in its claim that the duty to deduct and remit tax lay with him and not the respondent. The respondent as a large multi-national firm could not abdicate its duty to remit statutory deductions and unlawfully place it on the appellant's shoulders. As proof of deduction and remission of tax to KRA the respondent had exhibited an RTGS payment slip which the appellant contested on the basis that it did not demonstrate that PAYE was remitted on the appellant's account since there was no reference to the appellant at all. The appellant argued that the trial court ought not to have accepted the slip as proof that tax was indeed remitted to KRA on his account by the respondent.

The appellant further submitted that his claim for reimbursement of USD 83,183. 00 was supported by evidence and ought to have succeeded. He submitted that his claim for commission and bonus was disregarded by the trial Judge by failing to make a determination. The appellant also faulted the Judge for holding that each party bears its own costs. Since the Judge had found largely in his favour, he submitted that in principle costs follow the event and in the absence of any compelling reason, the Judge ought to have awarded him costs of the suit.

In response to the respondent's cross-appeal, the appellant submitted that the respondent had failed to inform him of any person with authority to take possession of the vehicles, nor had it dispatched any person to take possession of the vehicles. Neither had the respondent directed him where to take the vehicles. He alleged that the only senior member other than him had left the respondent's employment and had left his vehicle with the appellant. He added that he could not use the motor vehicles since that would have meant incurring further costs on insurance and for the respondent's benefit. Further according to the appellant, a claim for loss of use is under the head of special damages which had to be specifically pleaded and proved, which the respondent had failed to do. The appellant in conclusion supported the seven-month salary compensation since in his view it could not be deemed as excessive in light of the respondent's egregiously unfair and unjust manner of termination.

The respondent in its written submissions pointed out from the outset that as the head of its Kenyan business and as its sole representative locally, the appellant was responsible for ensuring that his tax obligations were met. That it expected the appellant to ensure he complied with all local legislation including the Income Tax Act. It pointed out that its witness had testified that the respondent had not been incorporated locally until sometime in 2011. That when it realized that the appellant had not been remitting tax, it deducted the unpaid tax from his terminal dues. The respondent argued that the appellant's remuneration package amounting to USD 149,000 was a gross package inclusive of tax. The appellant was responsible for his income tax deductions. It maintained that it was justified to deduct and remit tax to KRA.

Contrary to the appellant's allegations that it failed to settle his terminal dues, the respondent submitted that it had produced evidence during the trial to show that it paid USD 12,471.00 to the appellant as pay in lieu of notice; USD 24,942.00 as service pay; USD 52, 505.00 as refund for motor vehicle purchase; USD 18, 430 as refund of company expenses and leave pay amounting to USD 5, 563.00 totaling USD 113,912.00. That it deducted USD 55,607.00 as unpaid PAYE; medical deductions amounting to USD 7,278.00 and USD 3,070.00 as tax on leave pay and paid the appellant USD 51,026.00. The respondent therefore supported the Judge's finding that the appellant's terminal dues were duly paid. It reiterated that the appellant's claim for reimbursements amounting to USD 83, 138.00 was unsupported by evidence as he had failed to submit the necessary documentation for refund of the same. In response to the appellant's claim for refund of work permit fees, the respondent explained that it had agreed to refund the expense upon production of the necessary documentation which the appellant failed to do. It however stated that it had paid the claim for the expenses amounting to USD 18, 429.83 and the motor vehicle expenses as per the appellant's claim as part of his terminal dues.

In response to the appellant's contention that the Judge failed to address his bonus and commission claim, the respondent blamed the appellant for under performance. The respondent contended that it relied on the appellant to make sound and profitable business decisions to get the local business running. It submitted however that after two years in employment the sales made by the appellant were negligible and not profitable such that as at October 2012 it was no longer economical to continue operations in Kenya, which called upon its management to make decision on the way forward. It explained that payment of bonus and commission was based on targets to be met and performance. According to it, the appellant's performance was an issue as no targets were being met and the business failed to peak as expected. In the circumstances, it argued that it was unreasonable for the appellant to expect bonus and or commission.

With regard to the appellant's contention that he ought to have been awarded costs of the suit as the suit was determined in his favour, the respondent contended that the trial court had exercised its discretion to award costs judiciously in the circumstances of this case and the Judge could not be faulted. It cited the following authorities; **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others (2014)eKLR** and **Timothy Busienei & 2 Others v Mechai International Ltd (2017) eKLR** for the proposition. In support of its cross-appeal, the respondent submitted that the Judge failed to consider documentary evidence tendered by it in support of loss of use of its motor vehicles which it stated were still in the appellant's possession. It claimed that there was evidence that it had demanded the return of the vehicles by the appellant and that the Judge should have allowed its claim for loss of use based on the market rates for the motor vehicles. The respondent further submitted at length in bid to demonstrate that it had valid reasons for terminating the appellant's employment and that due process was followed. Though the respondent does not contest the finding of unfair termination, it maintains however that it had valid reasons to terminate the appellant thus making the seven months' salary compensation to the appellant manifestly unfair in the circumstances. It concluded by urging us to vary the award to one month's pay. It relied on the case of **CMC Aviation Ltd v Mohammed Noor (2015) eKLR** for the proposal.

The issues for determination in this appeal as far as we can see are: -

Who between the appellant and respondent was obligated to deduct and remit PAYE to KRA; whether or not the appellant was entitled to the bonus and or commission claimed; whether the appellant was refunded for the expenses expended on behalf of the respondent; whether the Judge erred in ordering each party to bear their own costs; and finally, the fate of the cross-appeal.

As alluded to earlier, upon terminating the appellant's employment the respondent paid him terminal dues after deducting USD 55,607.00 as unpaid PAYE for the period October 2011 to November 2012. The court in its determination found and held that the USD 51,026.00 paid as terminal dues constituted what was justly payable to the appellant. The court went on to state that the appellant did not produce any document to show that he was exempt from tax or that the respondent was responsible for payment of tax on his behalf. Before this Court, the appellant contests the said findings on the ground that his terminal dues were subjected to unlawful and unwarranted statutory deductions. The appellant considered the PAYE deductions as an afterthought and a bid by the respondent to avoid paying the sums duly owing to him and that PAYE deduction flew in the face of the employment contract and the law. The appellant cited **Clause 5.1** of the Employment Contract which provided as follows:

> ***"5.1. A gross annual package ("Package") amounting to USD 149,000.00 substantially as set out in Appendix A. For sake of clarity, it is recorded, that this package represents the total Cost to the Company excluding statutory contributions and/or charges. The employee acknowledges that the package includes the full allowances and/or benefits referred to 6, 7 and 8 hereunder plus the use of a service company motor vehicle, with fuel for company business."*** *[Emphasis added]*

According to the appellant, that clause expressly provided that deduction and remission of tax was the respondent's responsibility. The appellant furthermore hinges his contention on Rule **4** of the Income Tax (PAYE) Rules, under the Income Tax Act which obligates an employer to deduct tax from emoluments payable to a taxable employee and remit to KRA.

The respondent on its part maintained that it expected the appellant to comply with the Kenyan law including the Income Tax Act. Well the respondent, as the appellant's employer was also expected to adhere to the law. The Income Tax Act does not place responsibility or any obligation on an employee to deduct or remit tax to KRA. The Act places such responsibility on the employer, in this case, the respondent and goes ahead to criminalize failure by an employer to comply with the said regulation no doubt to enforce compliance. In our view, the argument is reasonable and well founded. The respondent cannot claim not to have known that it was obligated to deduct and remit the appellant's PAYE to KRA by law and only came to realize that it was not being remitted when time came to terminate the appellant's services. The respondent cannot claim ignorance of the law. The respondent appears to shift responsibility bestowed upon it by law on the appellant for no apparent reason. This holding we have perforce arrived at is consistent with our decision in **Erastus Mureithi vs. Co-operative Bank of Kenya [2017] eKLR** on the location of that duty.

The respondent ultimately complied with the law and deducted for remission to KRA PAYE with regard to the appellant. The matter would probably have ended there were it not for the assertions made by the appellant that the respondent violated the employment contract by deducting PAYE from his terminal dues and that the Judge erred in upholding the same. A literal reading of the clause suggests that the package of USD 149,000.00 payable to the appellant *excluded* statutory contributions and/or charges. In fact, it seems that the provision was inserted in the contract for clarification and to avoid confusion. The respondent's claim that it expected the appellant to deduct tax from his salary would be to create confusion against a clear contract provision. Even applying the *contra proferentem* rule, a clause in a contract considered to be ambiguous should be interpreted against the interests of the party that drafted it, in this case the respondent. The terms of the contract cannot be said to have taken the respondent by surprise and in our view, it knew of its obligation under the employment contract and the Kenyan law in matters tax. The Judge stated in his judgment that the appellant had failed to produce any document to show that the respondent was responsible for payment of tax on his behalf. We find, respectfully, that the Judge failed to consider the provisions of the employment contract that was before court, and the law which both behooved the respondent to remit tax on the appellant's behalf. We therefore find that deduction of PAYE from the appellant's terminal dues was contrary to the terms of the contract and ought to be reversed.

The appellant has faulted the Judge for disregarding his claim for bonus and commissions and failing to make a determination thereof. The respondent submitted that such incentives were discretionary and were dependent on generated sales. The respondent contended that the appellant had produced negligible sales which were not profitable as to entitle him to a commission based on gross profit and performance-based targets. We do not think the appellant was entitled or rather had earned a commission or bonus. Without belaboring the point, the appellant himself pleaded that he could not attain the sales targets projected because the local business was not doing well. The *email* that triggered the termination of his employment was written by him to request a downgrade of his sales targets. The appellant was employed in January 2010 and the respondent was incorporated 11 months after he was employed. The trial court found that the tentative two years the appellant had worked were a relatively short period to register a company in a foreign company, set up its operations and put it to profitability especially considering the employee was a foreign national who was not adequately funded. Even if the business leads generated by the appellant were not followed up so that the failure to achieve profitability or generate business could not be visited on the appellant, the bottom line is that business did not flourish or pick up so as to entitle the appellant to commission and bonus.

The appellant claimed a refund of USD 83,138.26 as expenses he incurred on behalf of his employer. That amount comprised USD 14,118.43 expended towards obtaining a work permit; USD 50,590.00 towards the purchase of the company motor vehicle and USS 18, 429.83 for expenses incurred in running the respondent's business locally. The respondent conceded to the amount expended on motor vehicle and duly refunded the same to the appellant as part of his terminal dues. The remaining claim is USD 14,118.43 which the appellant claims he spent to obtain a work permit. The respondent throughout maintained that it was ready and willing to refund this amount subject only to proof of the same by the appellant. However, the appellant failed to produce documentation to justify the refund of the alleged expenditure. Similarly, the Judge rejected the claim on ground that it was not supported by evidence. Being a claim in the nature of special damages, the appellant was expected to specifically plead and prove the same to succeed. He however failed on the latter since no evidence was tendered to justify reimbursement of the expense.

We cannot fault the Judge for rejecting the claim.

The appellant has further contested the Judge's order that each party bears their costs. In the appellant's view, the Judge having largely found in his favour ought to have awarded him costs since '*costs follow the event*' unless for such reasons as a court may advance given the

circumstances of a case. In this regard, the respondent submitted that the Judge exercised his discretion judiciously and the order should therefore not be interfered with. Costs in employment matters are granted pursuant to section **12 (4)** of the Employment & Labour Relations Court Act. The provision has been interpreted by courts as conferring upon the trial court unfettered discretion in the award of costs. Courts interpretation of the provision has been to the effect that costs in employment claims do not automatically follow the event unlike in other civil claims. See **Alfred Mutuku Muindi v Rift Valley Railways (Limited) [2015] eKLR.** Though the trial Judge did not advance reasons for his order that each party bears their own costs, the appellant has not demonstrated that the learned Judge exercised his discretion wrongly or injudiciously to warrant interference by this Court and none is discernable. It is not entirely lost to us that the appellant did not entirely succeed in his suit. This ground of appeal must therefore also fail.

With regard to the cross-appeal, the respondent faults the Judge for dismissing its counterclaim. The respondent had prayed for Kshs. 9,315,000.00 damages for loss of user of its two motor vehicles which it claimed the appellant had failed or refused to return after termination of his employment. The respondent exhibited a quotation in bid to demonstrate daily market rates for car hire services in Nairobi. The trial court disallowed the claim on the basis that the appellant did not lead evidence to prove that if the motor vehicles would have been hired out they could have yielded the income claimed. In his submissions the appellant has explained that he was ready and willing to return the said motor vehicles save that the respondent did not have permanent offices in Kenya or another senior officer to whom the vehicles could have been be returned or surrendered to. The appellant submitted that another employee of the respondent, one **Ed Williams** had also left the company's vehicle with him upon leaving the respondent's employment. The respondent did not deny those claims. The appellant further submitted that at no time was he directed to deliver the company vehicles to a specific person or place and he refused or failed to do so. Being in the nature of a special damage, the respondent's claim was speculative and was also unproved as the Judge rightly held.

Having found that the appellant's employment was terminated unfairly and contrary to the law, the trial court awarded the appellant as damages USD 86, 912.00 which was equivalent to seven months' salary. The appellant had in his pleadings claimed USD 149,000.00 which was equivalent to 12 months' pay as damages for unfair termination. The respondent termed the award manifestly excessive and suggests compensation equivalent to one month's pay. The respondent cited the case of **CMC Aviation Ltd v Mohammed Noor (2018) eKLR** where the Court of Appeal reduced the compensation previously awarded by the employment court to a claimant for unfair termination from 12 months pay to one month pay.

In making the award, the Judge was exercising discretion. We have no reason to believe that the Judge exercised his discretion injudiciously. We reject this ground of appeal.

In conclusion, the respondent will pay the appellant the illegally deducted PAYE amounting USD 55,607.00. The appeal succeeds to that limited extent. Otherwise the cross-appeal fails and is dismissed. Each party shall bear his and its costs of this appeal.

Dated and delivered at Nairobi this 27th day of July, 2018.

ASIKE- MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR