Kawino v Population Services International (PSI) (Cause 2563 of 2016)
[2025] KEELRC 1436 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1436 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 2563 OF 2016

CN BAARI, J

MAY 15, 2025

BETWEEN

ARTHUR KAWINO ..... CLAIMANT

AND

POPULATION SERVICES INTERNATIONAL (PSI) ..... RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 7th December, 2016 and filed on 15th December, 2016, seeking the following reliefs as against the Respondent;

    i. One month's salary in lieu of notice..... USD.8,842.00

    ii. August salary..... USD.8,842.00

    iii. 12 months' salary in compensation for unfair termination USD.106,104.00

    iv. Loss of salary for 18 months..... USD.159,156.00

2. The Respondent entered appearance on 9th January, 2017 and subsequently filed a Notice of Preliminary Objection dated 31st March, 2017, arguing that the Court lacks jurisdiction and seeking that the suit be struck out. The Court (differently constituted) allowed the objection and struck out the suit in a ruling rendered on 17th November, 2017. The Court, again differently constituted, allowed an application for review and reinstated the suit, hence this judgment.

3. The Respondent filed a Reply to the Memorandum of Claim dated 21st April 2017, denying the averments in the Statement of Claim, and reiterating its position that the Court lacked jurisdiction to hear and determine this matter.

4. The suit was first heard by Hon. Justice James Rika on 13th April, 2023, and 27th November, 2023 when the Claimant testified in support of his case. Cross-examination of the Claimant concluded on 5th November, 2024 before this Court, and the Respondent's case was subsequently heard on 6th November, 2024.

5. Both parties filed submissions in the matter.

The Claimant's Case

6. The Claimant states that he was an employee of the Respondent on full time basis from 21st January, 2016. He avers that before he was employed by the Respondent, he underwent a competitive recruitment process for the position of Business Operations Technica1 Advisor.

7. The Claimant states that this position was available at the Respondent's South Sudan Office and was interviewed through skype by the South Sudan and Washington Team, and a one on one interview with the Respondent's Senior Deputy Regional Director based in Nairobi.

8. The Claimant states that all the interviews took place while he was in Kenya, and was informed of his successful interview by the Respondent's International Recruitment Specialist, People Department, Ms. Jeane Mboma, who was based at the Respondent's Head Office in Washington DC. The Claimant states that he was sent the Offer Letter and Contract for his acceptance, which acceptance was to be evidenced by means of electronic signature.

9. The Claimant states that he executed the Offer letter and contract and returned the signed copy to the Respondent's People Department, Ms. Tanya Earnshaw, and the Respondent equally signed their part of the contract and sent him a copy for his records.

10. The Claimant states that having executed the agreement, he was required to formally take up his new post on 21st January, 2016 and to facilitate his travel to the Republic of South Sudan, he was sent an introduction letter by John Lasu - the Respondent's Administrator in South Sudan.

11. The Claimant states that the purpose of the introduction letter was to enable him process an entry visa from the South Sudan Embassy here in Kenya, and when he processed the entry visa, the Respondent forwarded to him a plane ticket to South Sudan.

12. It is his case that he formally took up his position as the Respondent's Business Operations Technical Advisor in the Republic of South Sudan on 22nd January, 2016.

13. The Claimant avers that as the Business Operations Technical Advisor and pursuant to his employment contract, he was answerable to the Respondent's Country Representative in South Sudan, but he was made to report to the Respondent's Deputy Country Representative - Mr. Gerishon Gachoki.

14. The Claimant states that on or about 9th July, 2016, he was relocated together with four others employees of the Respondent from Juba South Sudan to Nairobi as a result of infighting between South Sudan Government Forces. He states that they landed at the Jomo Kenyatta International Airport on board a Kenya Airways Flight No. KQ351.

15. The Claimant states that he applied for leave, rest and relaxation from 29th July, 2016 and was to resume on 17th August, 2016. He avers that he worked at the Respondent's Regional Office in Nairobi from 11th July, 2016 to 27th July, 2016.

16. It is his case that while he was on leave, he received an email dated 9th August, 2016 from the Respondent's Deputy Country Representative for South Sudan, Mr. Gerishon Gachoki, which informed him that he had violated the Respondent's security protocol by carrying more than one bag during relocation. He states that the email equally informed him that his employment was terminated, with his last day of service indicated as 9th August, 2016.

17. The Claimant states that the reason given for the termination of his employment was that he had ignored and failed to follow security protocols relating to grab bag and luggage allowed to the Respondent's employees during an evacuation.

18. The Claimant states that he did respond to the email vide his letter to the Respondent's Regional Director, Ms. Susan Mukasa and the Deputy Regional Director, Ms. Stephanie Dolan, requesting for a meeting to state his side of the story.

19. The Claimant further states that on or about the 11th August, 2016, Ms. Stephanie Dolan, the Respondent's Deputy Regional Director, wrote to him requesting whether they could discuss the issue of his termination via skype and/or if agreeable to him, whether he could go the Respondent's offices for a meeting to which she proposed the 15th August, 2016 at 11.00 a.m, which proposal the Claimant agreed to.

20. The Claimants states that he presented his boarding pass, baggage tag and the Respondent's South Sudan Security manual to demonstrate that he was in no way in breach of the Respondent's security protocol. He is categorical that the Respondent's security manual for South Sudan is expressly clear that the go bag during relocation/evacuation should not exceed 15kg, and that his run away bag during the said relocation was exactly 11kg.

21. The Claimant states that after the discussion with Ms. Stephanie Dolan, the Respondent's Deputy Regional Director, she promised to conduct her own independent investigations and get back to him with her findings on the matter.

22. The Claimant states that his termination had nothing to do with an alleged breach of the Respondent's Security Protocols, but everything to do with the Respondent's Deputy Country Representative, Mr. Gerishon Gachoki's dislike towards him.

23. The Claimant states that to date, he has not been briefed on the findings of the investigations, if any, carried out in respect to his termination as promised by Ms. Stephanie Dolan, the Respondent's Deputy Regional Director.

24. The Claimant states that he was not given an opportunity to be heard and was condemned unheard and his termination was contrary to the Respondent's employee manual for South Sudan.

25. The Claimant further states that had he been given an opportunity to respond to any allegations levied against him, he is certain that his termination could have been avoided, but he was not accorded the universal right of a fair hearing.

26. The Claimant avers that throughout the period he was employed by the Respondent, he worked diligently and was never cautioned for any wrongdoing or misconduct.

27. It is the Claimant's case that his termination or dismissal from employment was arbitrary, illegal, unlawful and discriminatory as the same was done contrary to the provisions of the Respondent's Employee Manual, and the International Labour Laws as the Respondent failed and/or ignored to give the Claimant any notice or an opportunity to reasonably respond to the accusation leveled against him.

28. That as a consequence, the Claimant has suffered extreme hardship from the unfair and unlawful dismissal.

The Respondent's Case

29. The Respondent states that on 16th September 2015, it advertised for the position of Business Operations Technical Advisor which position was to be based in its office in Juba, South Sudan, and whose full job description and the required qualifications were specified in the said advertisement.

30. It avers that the Claimant expressed interest in the position, applied and was thereafter interviewed for the position. The Respondent further states that it subsequently through its Deputy Director, People, Learning and Performance, vide a letter dated 20th January 2016, extended an offer of employment to the Claimant for a fixed term beginning 21st January 2016 up to 31st December 2017. That the said contract was subject to an extension depending on the continued availability of funds from the DFID and the Global Fund.

31. The Respondent avers that the said offer was subject to the execution of an Employment Agreement by the Claimant. It states further, that the Letter of Offer expressly stated that the Claimant's employment was an "at will" employment by specifically providing that, "your term of employment will be at will. While we have every expectation of a mutually satisfactory employment relationship, PSI reserves the right to terminate your employment at any time, with or without cause....."

32. The Respondent states that on 21st January 2016, the Claimant accepted the offer and signed the Employment Agreement dated 20th January 2016, signifying his acceptance of the terms and conditions contained therein, which terms were to govern the employment relationship between the Claimant and itself.

33. It is the Respondent's case that Clause 13(c) and (d) of the Employment Agreement provided that the Claimant's employment would be governed by the laws of the District of Columbia in the United States of America, and that any dispute that would arise would be referred to arbitration in Washington, D.C.

34. The Respondent states that from the onset, the Claimant did not perform his duties as was required, and in the manner that was expected of him as the Business Operations Technical Advisor which prompted PSI to place him on a Performance Improvement Plan (PIP) for 90 days.

35. It states that prior to the finalization of the performance improvement process, violence broke out in Juba, South Sudan making it necessary for the Respondent to immediately evacuate its staff from Juba. It avers that due to the security risks involved, and as is customary during emergency evacuation processes, all of its staff were required to strictly observe all security protocols as provided for in its Emergency Response Plan for South Sudan.

36. It is the Respondent's case that to ensure seamless execution of the evacuation exercise, all its staff at PSI South Sudan attended various trainings on emergency evacuations and were sensitized on the process to be followed during such emergency evacuation processes. That in particular, prior to joining the employ of the Respondent, the Claimant was trained on evacuation procedures to be followed in cases of an emergency, and that subsequently, on 28th June 2016, the Claimant participated in a mandatory training/drill which was conducted by the Olive Group.

37. It states that under its Emergency Response Plan for South Sudan, it was expressly provided that during evacuation, staff would only be permitted to carry a grab bag also referred to as a "go bag". It states that this requirement was informed by the need to ensure that in an emergency situation, staff are able to

move quickly and at the same time have everything they would need in order to survive what would turn out to be an arduous journey. It avers further that the said Emergency Response Plan also expressly provided that the "go bag" should not exceed 15 kilograms of weight.

38. The Respondent states that the rationale prohibiting a "go bag" in excess of 15 kilograms was that in the event of an emergency, carrying more items than would ordinary be contained in the grab bag would attract more attention from security personnel and could sometimes lead to possible arrest and detention of its staff and consequently disrupt the evacuation movement of the other staff thus posing a security risk.

39. It states that it is aware that on the eve of the evacuation scheduled for 9th July 2016, the Respondent's Deputy Country Representative, Mr. Gerishon Gachoki held a meeting with all staff concerning the evacuation rules and procedure to be adhered to by all staff including the requirement to limit baggage to one "go bag".

40. It is the Respondent's case that on 9th July 2016, during the evacuation of its non-essential staff from Juba, South Sudan, the Claimant, in flagrant breach of its Emergency Response Plan for South Sudan and of the instructions issued by the Crisis Management Team, travelled with multiple personal baggage, thereby jeopardizing his own security and that of the Respondent's entire staff. It avers that the incident was noted and documented by their Country Risk Manager, Mr. Frank Talbot.

41. The Respondent states that the above incident was not isolated as the Claimant had on other occasions blatantly ignored and failed to follow security protocol and directives issued by the Respondent.

42. It states that following the aforesaid breaches of the security protocol, and due to the Claimant's notoriety of disobeying security protocols and ignoring directives, it deliberated the consequences of the Claimant's conduct and invoked Clause 2 of the Employment Agreement effectively terminating the Claimant's employment at will, and in conformity with the laws of the District of Columbia.

43. It is the Respondent's position that since it was an express term of the Employment Agreement between the parties that the Claimant's employment was an 'at will' employment, it was well within its contractual rights to terminate the Claimant's employment as provided under the employment contract.

44. It is also its further position that since the law governing the employment relationship between the parties was the law of the District of Columbia as per Clause 13(c) of the Employment Agreement, it was well within its right to terminate the Claimant's employment 'at will' as the said laws of the District of Columbia permit the termination of employment 'at will'.

45. The Respondent states that it is aware that the decision to terminate the Claimant's employment was communicated to him via email on 9th August 2016, by his immediate supervisor, Gerishon Gachoki, and the reasons for the termination being breach of security protocol were clearly set out in the email.

46. The Respondent states that the Claimant was given an opportunity to be heard as he subsequently sought to discuss the reasons for his termination with the Respondent, and the opportunity was accorded as evidenced by the emails in the Claimant's Bundle of Documents.

47. It states further that under Clause 7 of the Employment Agreement, the parties agreed that should the Claimant's employment be terminated for any reason, the Claimant was not entitled to any compensation, severance or benefits other than those specifically provided for under the Employment Agreement or the laws of United States.

48. The Respondent avers that the Claimant has no reasonable or justifiable cause of action against it, and the claims made by him have no merit, and is not entitled to any of the reliefs sought or at all.

49. The Respondent prays that the Claimant's claim be dismissed with costs.

The Claimant's Submissions

50. It is the Claimant's submission, that the issue of whether this court has jurisdiction has already been comprehensively dealt with by this Court (Hon. Justice Wasilwa) in its ruling delivered on the 7th October 2019, finding that this court has jurisdiction to hear this matter. The Claimant placed reliance in the Court or Appeal decisions in Kanti & Company Limited Vs South British Insurance Company Limited (1981) eKLR, where the Court held that;

> " A defendant by entering appearance, submits to the jurisdiction of the court and as long as the unconditional appearance stands, the court is seized of jurisdiction to try that suit."

51. The Claimant further submits that the finding by this court that it has the jurisdiction to hear and determine this matter is based on a sound and unassailable interpretation of the law, and that the issue as to whether this court has the jurisdiction to hear this dispute is, therefore, res judicata.

52. He submits that the Respondent is estopped under the doctrine of res judicata from raising and relitigating the issue of jurisdiction based on the provisions of Clause 13(c) and (d) of the Contract. He had reliance in the case of Anne Delorie V Aga Khan Health Service Limited (2009) eKLR to support this position.

53. The Claimant submits that arbitration clauses, unless acceded to by the parties' consent, do not apply to employment contracts. He submits that the objection to this court's jurisdiction on the basis that the contract has an arbitration clause, must thus collapse.

54. It is the Claimant's submission that the contract was performed in both Kenya and the Republic of Southern Sudan. He sought to rely in the case of Dorcas Kemunto Wainaina v IPAS [2018] eKLR for the holding that: -

> " In terms of the test to apply in determining the proper law of contract and jurisdiction the court in Kleihans noted that the subjective test which was applied in Standard Bank of SA V Etroiken & Newman 1924AD 171 at 185 had not been rejected.
>
> However, the court preferred the objective test which entails an investigation into which law and jurisdiction does the contract have the most real connection.
>
> Some of the factors noted in the case to be considered in determining the proper law of contract included locus contractus, locus solutionis, nationally and domicilium of the parties(dominant and connecting features)."

55. The Claimant submits that similar to the foregoing case, the contract was performed in Kenya and Southern Sudan, never in the United States, and that the parties confirmed that the Claimant never travelled to the United States in the course of his employment. He submits that it is therefore not in dispute that the requirement of Clause 4 of the contract that required the Claimant to get authorization to travel to the United States was never complied with or enforced.

56. It is the Claimant's submission that the law applicable in this matter is the Kenyan Law as the Claimant was the Respondent's international employee who was based in Kenya even as he worked in the Republic of Southern Sudan. He submits further that at the time of his termination, he was working

in Nairobi, not Washington, DC, hence the laws of the United States are therefore not applicable to this dispute.

57. The Claimant submits that there is no dispute that he was not given a hearing before his termination as provided under Section 41 of the *Employment Act*, as read with Articles 47 and 50 of *the Constitution* of Kenya and Articles 10 and 6 of the UDHR and the ICCPR respectively. That the Respondent simply sent the email dated 9th August 2016, raising certain allegations against the Claimant, and then proceeded to terminate the Contract based on the said allegations without the benefit of a hearing.

58. He submits that the assertion by the Respondent that the Claimant was not entitled to a hearing under the Contract because his employment was allegedly "at will" employment has no legal basis.

59. The Claimant submits further that the phrase "except as may be restricted by law" clearly gives an exception to the general rule on "at will" employment. That the restrictions are contained in Section 41 of the Kenya *Employment Act*, Articles 47 and 50 of the Kenyan Constitution and Articles 10 and 6 or the Universal Declaration of Human Rights and the International Convention on Civil and Political Rights (ICCPR) respectively.

60. It is submitted that it is clear from the Respondent employee human resource manual that the Respondent fully acknowledges and recognizes employees' right to a fair hearing before the termination of their employment contracts.

61. The Claimant submits that he is entitled to the remedies outlined under both paragraph *71* and the prayers in the Statement of Claim dated 7th December 2016, and urges the court to allow the same as prayed.

The Respondent's Submissions

62. It is the Respondent's submission that the issue of this court's jurisdiction was determined in the ruling of 7th October 2019 upon which the court assumed jurisdiction over the matter. It is however the Respondent's submissions that the mere fact that this Honourable Court assumed jurisdiction, does not necessarily mean that the applicable law for purposes of determining the dispute herein is Kenyan Law, and specifically the *Employment Act* as submitted by the Claimant. The Respondent had reliance in Dorcas Kemunto Wainaina v IPAS (Cause 165 of 2015) [2018] to support this position.

63. To further support this assertion, the Respondent sought to rely in the case of Captain (RTD) Charles K.W. Masinde v Intergovernmental Authority on Development (2018) eKLR, where the Court while upholding the case of Dorcas Kemunto Wainaina (supra) stated as follows: -

> "I concur with the foregoing precedent and proceed to hold that this court is clothed with the jurisdiction to determine the dispute herein on basis of the applicable law chosen by the parties, that is to say, law of Djibouti."

64. The Respondent submits that the issue of the applicable law is a matter of agreement between parties, and more so, where the said parties come from different jurisdictions. That the first point of reference in determining the applicable law in a dispute is the contract executed by the parties. In this case, it is clear from the employment contract that parties agreed that the employment relationship between the parties would be governed by the laws of District of Columbia.

65. It is the Respondent's submission that the law requires that parties should be free to contract as they deem fit and no matter how unconscionable the bargain, the parties are bound by the terms of the contract. It submits further that the courts cannot rewrite the terms of an agreement except in cases

where there is fraud or coercion or undue influence. It had reliance in National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR), to buttress this position.

66. The Respondent submits that the execution of the contract has not been challenged by the Claimant who in fact confirmed during the hearing of the case, that he voluntarily executed the contract having read and understood the terms therein. It submits that the contract and the terms therein are therefore binding upon the parties, and urges the Court to uphold the intention of the parties as set out in the contract.

67. The Respondent submits that the Claimant's allegation that he did not have an opportunity to peruse the contract and the same was only availed to him in January 2016 after he had travelled to Juba South Sudan, is not correct and the allegation has been made as an afterthought.

68. It is the Respondent's submission that the Claimant confirmed on cross-examination that he had benefitted from the terms applicable to expatriates, including the remuneration and leave benefits, which he confirmed were not set out in the PSI Manual for South Sudan and confirmed further that they appeared in the PSI International Manual. It submits further that having benefitted on terms that are favourable, the Claimant cannot now seek to vary the terms of the contract to the extent of the applicable choice of law, as the same amounts to approbating and reprobating.

69. The Respondent submits that the Claimant's place of performance was in South Sudan and not Kenya, and it is for this reason that he was considered an expatriate employed by the Washington DC as he could serve in any other jurisdiction other than his resident country. That Kenyan laws would therefore not be applicable to a contract being performed in South Sudan.

70. The Respondent submits that the laws of the District of Columbia do not provide for procedure on termination of employment contract similar to the one envisaged in the Kenyan *Employment Act*, and that the US Laws recognize termination of employment at will. The Respondent sought to rely in the case of Toussaint v. Blue Cross & Blue Shield of Michigan (1980) where the Michigan Supreme Court emphasized that where a contract clearly provides for employment-at- will, the employer has the right to terminate the employee at any time for any legal reason. In this case, the court concluded that the employment agreement between the employee and employer could be modified by an express or implied agreement, but when the contract specifically stipulated an at-will arrangement, it would be upheld.

71. The Respondent further submits that there was a valid reason for termination of the employment contract, and that up until the point of filing this suit, the Claimant did not dispute the reason for his termination.

72. The Respondent submits that the provisions on issuances and procedure in termination of employment contracts is not recognized under the US Laws, hence the Claimant's employment contract was terminated lawfully and pursuant to the Laws of the District of Columbia as read together with the terms of the contract.

73. The Respondent urges this Court to dismiss the Claimant's claim with costs.

Analysis and Determination

74. The issues that present for determination are: -

    i. Whether the Kenya Laws and specifically the *Employment Act* is applicable to the dispute;

    ii. Whether the Claimant's termination was lawful; and

iii. Whether the Claimant is entitled to the prayers sought.

Whether Kenyan Laws, and specifically the *Employment Act* is applicable to the dispute

75. To start with, the issue of whether the dispute should have been referred to arbitration, was addressed by two judges of this court, one under a preliminary objection and the second one through an application for review, where the Court in the latter, held that the Respondent having unconditionally entered appearance in the matter, it submitted to the jurisdiction of the court, and could not turn against that position. I will thus let this issue rest.

76. On the applicable laws, the Respondent's position is that the contract of employment between the parties, expressly provided at its Clause 13(c) and (d) that the Claimant's employment would be governed by the laws of the District of Columbia in the United States of America, and that any dispute that would arise would be referred to arbitration in Washington, D.C.

77. The Claimant on his part contends that the interviews for the job were conducted physically at the Respondent's office based at Whitefield Place, School Lane, Westlands, Nairobi, Kenya and other locations within Nairobi, Kenya. He further asserts that although he was posted to Southern Sudan, his salary was paid through his Kenyan Bank Account and that he paid all his taxes in Kenya.

78. The Claimant further states that his posting letter dated 20th January 2016, and which he accepted and signed as part of the Contract, provided under the Special R & R that the designated R&R location for the Respondent's employees posted in South Sudan would be Nairobi Kenya, and that the Respondent would, in addition to paid USD 50 per diem, and reimbursed for air ticket to Nairobi.

79. It is the Claimant's further assertion that when violence broke out in South Sudan, he together with other employees of the Respondent were evacuated and brought to Nairobi, Kenya and that he served at the Respondent's offices in Westlands Nairobi, in the month of July, 2016, until his termination in August, of the same year.

80. It is therefore the Claimant's position that the Contract was to be performed both in Kenya and South Sudan.

81. By dint of the foregoing, the Claimant's position is that the laws applicable to his contract and by extension this case, is the laws of Kenya and not the laws of the District of Columbia in the United States of America as the Respondent suggests.

82. In the case of Dorcas Kemunto Wainaina v IPAS [2018] eKLR, also cited by both parties herein, the Court had this to say on the applicable laws:-

> "In terms of the test to apply in determining the proper law of contract and jurisdiction, the court in Kleinhans noted that the subjective test which was applied in Standard Bank of SA V Etroiken & Newman 924AD 171 at 185 had not been rejected.
>
> However, the court preferred the objective test which entails an investigation into which law and jurisdiction does the contract have the most real connection....."

83. The same approach was also taken in Seffontein v. Balmoral Control Contracts SA (pty) (2023)22 ILJ1090(CCMA) where the Court went on to state thus: -

> " As to the performance of the contract, despite the fact that the recruitment process was conducted from North Carolina, there is no evidence that the Claimant ever performed her

contract in the United States or North Carolina. She was based in Nairobi with the work trips to countries in the region.....

In as far as the choice of law is concerned, the dominant features connect the contract to Kenya rather than the United States and the Court so finds."

84. Further in United India Insurance Co. Ltd & 2 Others v East African Underwriters (Kenya) Ltd (1985) KLR 998, the Court of AppeaI held that:-

> " The courts of this country have a discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause therein conferring Juristliction. Jurisdiction clause however should normally be respected because the parties themselves freely fixed the forums for the settlement of their disputes; the court should carry out the intention of the parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless a strong reason for not keeping them bound by their agreement."

85. In the South African case of Genossenschaft v Monjane (2020), the Court held that even though the employment contract had a foreign law clause, South African courts could have jurisdiction if the work was substantially connected to South Africa, and that South African courts may assert jurisdiction if the employee worked in South Africa or if the dispute has a sufficient connection to South Africa.

86. Again in Koelzsch v. Luxembourg (2011, CJEU) the place where the employee habitually carries out their work takes precedence, even if the employer is based elsewhere.

The European Court of Justice held that

87. It is clear to this court that although clause 4 of the Claimant's contract envisaged that he would move to work in Washington DC, upon authorization, the said authorization did not come and the Claimant neither travelled nor worked in Washington DC. It is also not in dispute that the alleged breaches subject of this suit and the subsequent termination of the Claimant occurred in Nairobi, Kenya.

88. The Court further notes that the job advertisement indicated that the prospective candidate was to "serve as a liaison with PSI procurement department in Washington DC and in Nairobi Kenya to coordinate the import of health and other non-ethical commodities for PSI operations."

89. It is abundantly clear that the Respondent's intention in subjecting the Claimant's contract to the laws of the District of Columbia in the United States of America, a Country he had never been to; at least not in relation to his job, was purely to locking him out of court.

90. In light of the foregoing, I find and hold that the Claimant has shown strong reasons for this court to override the territorial jurisdiction clause in the contract, and I thus return that the laws of Kenya are applicable.

Whether the Claimant's termination was lawful

91. The Claimant's case is that his termination from employment by the Respondent was arbitrary, illegal, unlawful and discriminatory as the same was done contrary to the provisions of the Respondent's Employee Manual for South Sudan, and the International Labour Laws as the Respondent failed and/or ignored to give the Claimant any notice or an opportunity to reasonably respond to the accusation leveled against him. The Claimant contends that he was not given an opportunity to be heard and was condemned unheard.

92. The Claimant further states that had he been given an opportunity to respond to any allegations levied against him, he is certain that his termination could have been avoided, but he states that he was not accorded the universal right of a fair hearing.

93. The Respondent's position is that the letter of Offer issued to the Claimant expressly stated that the Claimant's employment was an "at will" employment by specifically providing that, "your term of employment will be at will. While we have every expectation of a mutually satisfactory employment relationship, PSI reserves the right to terminate your employment at any time, with or without cause....."

94. Section 41, 43 45 and 47 of the *Employment Act* demands that an employer, before terminating the services of an employee, informs the employee in a language the employee understands, the reasons for which termination was being considered. Further, Articles 41, 47 and 50 of *the Constitution* guarantee every worker a right to fair labour practices, a right to fair administrative action and at the very least, a right to be heard.

95. The Claimant herein, was sent an email dated 9th August, 2016 by the Respondent's Deputy Country Representative for South Sudan, a Mr. Gerishon Gachoki, informing him not only that he had violated the Respondent's security protocol by carrying more than one bag during evacuation, but also that his employment was terminated with his last day of service being 9th August, 2016, the same day of the email.

96. To say that the Respondent violated the laws herein cited, is an understatement. The Claimant, true to the Respondent, was terminated at will. In Mary Mutanu Mwendwa v Ayuda [2013] eKLR the Court held that the *Employment Act* has made it mandatory by virtue of Section 41, for an employer to notify and hear any representations an employee may wish to make whenever termination is contemplated by the employer, and is entitled to have a representative present.

97. Further in the case of Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2013] eKLR the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.

98. The Respondent did not attempt to comply with the laws on fair procedure. It is actually the Claimant that attempted to seek audience with the Respondent's Regional Director, Ms. Susan Mukasa, and a Deputy Regional Director named Ms. Stephanie Dolan, to explain the allegations against him, and which he did after he had been terminated.

99. I therefore find the Claimant's termination unprocedural and unlawful.

100. On whether the Respondent had valid and fair reasons to terminate the Claimant, the Claimant states that the reason given for his termination, was that he ignored and failed to follow the security protocols relating to grab bag and luggage allowed to the Respondent's employees during an evacuation.

101. The Claimants further states that he presented his boarding pass, baggage tag and the Respondent's South Sudan Security manual to demonstrate that he was in no way in breach of the Respondent's security protocol. He is categorical that the Respondent's security manual for South Sudan is expressly clear that the go bag during relocation/evacuation should not exceed 15kg and that his run-away bag during the said relocation was exactly 11kg.

102. In British American Tobacco (K) Ltd v Kenyan Union of Commercial Food and Allied Workers (KUCFAW) [2019] eKLR the Court quoted with approval the decision in Anthony Mulaki v Addax Kenya Limited, Cause No. 822 of 2012 where the Court held as follows:-

> " In examining validity of reasons, the court was correctly directed by the Respondent to the case of BRITISH HOME STORES LTD v BURCHELL (1980) LC.R. 303 E.A.T. where it was held that for the court to uphold the decision by the employer as being fair, it must be shown that: -
>
> a. The employer must believe at the time of termination, that the employee is guilty of the allegations against him/her
>
> b. The employer had reasonable grounds upon which to sustain that belief; and
>
> c. The employer carried out as much investigation as reasonable in the circumstances the employer need only be satisfied on the balance of probability."

103. It is the Respondent's position that from the onset, the Claimant did not perform his duties as was required and in the manner that was expected of him as the Business Operations Technical Advisor, which prompted PSI to place him on a Performance Improvement Plan (PIP) for 90 days.

104. The allegations against the Claimant on account of poor performance were unceremoniously dropped and his termination premised on a totally different ground.

105. The Respondent has not proved that the Claimant disobeyed the security protocols as his boarding pass shows that he only had one bag of 11kgs.

106. In my view, the Respondent having previously placed the Claimant on a PIP, and shortly terminating his services on the ground of breach of protocol, goes to say that the reasons for the termination are certainly not the reason the Respondent believed to exists at the time it terminated the Claimant. There is also no prove that the Respondent conducted any investigations on the issue leading to the Claimant's termination.

107. In whole, I find and hold that the Claimant's termination was both procedurally and substantively unfair and unlawful.

Whether the Claimant is entitled to the reliefs sought

108. Having reached a finding that the Claimant's termination was unlawful and unfair, it follows that he is entitled to the reliefs sought. which I award as follows: -

One month's salary in lieu of notice

109. The Claimant's termination was instant. It is evidently clear that he was neither issued with statutory notice nor paid in lieu thereof. The Claim thus succeeds and is awarded as prayed.

August salary

110. The Claimant admitted that he was paid for the 9 days worked in August, 2016. Employees are paid for rendering labour and not having worked after 9th August, 2016, the claim fails and is dismissed.

Months' salary in compensation for unfair termination

111. The Claimant was no doubt terminated unfairly and, on this basis, he is entitled to compensation in accordance with Sections 49 and 50 of the *Employment Act*, 2007. (See Benjamin Langwen v National Environment Management Authority (2016) eKLR).

112. In Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR the court pointed out that an award of the maximum of 12 months' pay must be based on sound judicial principles, and that the trial judge must justify or explain why a Claimant is entitled to the maximum award.

113. In the case of Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR the Court cited the case of D.K. Marete v Teachers Service Commission Cause No. 379 of 2009 where it was held that remedies are not aimed at facilitating the unjust enrichment of aggrieved employees, they are meant to redress economic injuries in a proportionate way.

114. In light of the foregoing and considering that the Claimant was in the service of the Respondent for only 7 months, I deem an award of 6 months' salary sufficient compensation for the unfair termination.

115. In the upshot, the Claimant's claim succeeds and orders granted as follows: -

    a. A declaration that the Claimant's termination was unlawful and unfair.

    b. That the Respondent shall pay the Claimant one month's salary in lieu of notice at USD 4,833.32

    c. That the Respondent shall pay the Claimant 6 months salary as compensation for the unfair termination at USD 28,999.92

    d. The Respondent shall also bear the costs of the suit.

116. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 15TH DAY OF MAY, 2025.

C. N. BAARI

JUDGE

Appearance:

Mr. Omondi h/b for Mr. Kenyatta for the Claimant

Mr. Kevin Okeyo h/b for Ms. Ogula for the Respondent

Ms. Esther S- C/A