



**REPUBLIC OF KENYA**

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

**CAUSE NO 351 OF 2018**

**PETER MUUNDA MWANZIA.....CLAIMANT**

**VERSUS**

**AIR SEA LOGISTICS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. What is before me is an employment dispute between Peter Muunda Mwanzia and his former employer Air Sea Logistics Limited. Mwanzia's claim is documented in a Memorandum of Claim dated 29<sup>th</sup> May 2018 and filed in court on 30<sup>th</sup> May 2018. The Respondent filed a Memorandum of Reply on 20<sup>th</sup> September 2018 to which the Claimant responded on 22<sup>nd</sup> September 2020.

2. The dispute went to full trial where the Claimant testified on his own behalf. The Respondent called its Human Resource Manager, Benson Kiguru. The parties also filed written submissions.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent as an Accountant with effect from 6<sup>th</sup> June 2013. He was stationed at the Mombasa office.

4. The Claimant claims that upon reporting for duty at Mombasa, he realised that he was to perform finance duties for other two companies namely; Air Connection Ltd and Expolanka Freight Limited, which he describes as the Respondent's sister companies.

5. The Claimant states that on or about April/May 2017, Air Connection Ltd was sold to Panalpina Ltd. The Claimant adds that after the sale, the Respondent's Managing Director, Wasantha Ranasinghe offered him a position in the finance office of Panalpina, to perform the same duties he was performing as the Respondent's Accountant.

6. The Claimant avers that apart from being the Respondent's Managing Director, Wasantha Ranasinghe was the Head of East Africa for Expolanka Freight Ltd as well as General Manager, Sales for Air Connection Limited and Panalpina Ltd.

7. The Claimant further avers that upon receiving the offer to join Panalpina Ltd, he inquired if the salary would change to match his qualifications, duties and responsibilities as well as the salary of his peers in the Finance Department.

8. The Claimant states that the Respondent's Managing Director informed him that the same terms and conditions applicable at Air Sea Logistics Ltd would apply at Panalpina Ltd, upon which the Claimant declined the offer.

9. The Claimant goes on to state that around mid-June 2017, the Human Resources Manager for Expolanka Freight Ltd, Benson Kiguru called him and stressed on him about shifting to Panalpina Ltd. The Claimant gave Kiguru the same answer he had given the Respondent's Managing Director.

10. On 23<sup>rd</sup> June 2017, Benson Kiguru sent an email to the Claimant on the shift to Panalpina Ltd. In the email, Kiguru required the Claimant to send him a soft copy of his curriculum vitae, if he accepted the offer to join Panalpina Ltd.

11. On 27<sup>th</sup> June 2017, Kiguru sent the Claimant another email inquiring about his decision. The Claimant responded on the same day, indicating that under the same terms and conditions offered, his response was still negative.

12. On 4<sup>th</sup> July 2017, the Claimant received a letter from the Respondent's Managing Director via email, informing him of the termination of his employment, effective 31<sup>st</sup> July 2017. The letter also notified the Claimant that terminal benefits amounting to Kshs. 341,356.66 were payable to him. The Claimant was required to sign the letter so that his dues would be processed.

13. On 19<sup>th</sup> July 2017, Benson Kiguru sent an email to the Claimant, asking him to sign a copy of the termination letter and return it so that his terminal benefits could be processed.

14. The Claimant signed the letter as requested and sent it to Kiguru so as to enable processing of his dues. Nonetheless, the Claimant requested Kiguru to indicate the reason for the termination in the termination letter. The Claimant also asked for his Certificate of Service.

15. The Claimant states that Kiguru promised to do a separate letter for reference by future employers. Kiguru did not issue a separate letter containing reasons for the termination. The Claimant was also not issued with a Certificate of Service.

16. The Claimant points out that after completing his handing over and accounting for all the money entrusted to his care by the Respondent, it emerged that the Respondent owed him Kshs. 138,209 as at 31<sup>st</sup> July 2017 incurred on account of out of pocket expenses, while paying for various company expenses. This money was released to the Claimant on 4<sup>th</sup> October 2017, following intervention by his Advocates.

17. The Claimant states that the letter documenting the release of this money to him required him to sign off that he acknowledged receipt of the money in full and final settlement of his claim against the Respondent and that he did not intend to pursue the matter any further. The Claimant signed the letter on a '*without prejudice*' basis.

18. The Claimant submits that there was no valid reason for the termination of his employment. He further submits that the Respondent did not comply with the mandatory redundancy procedure set out in Section 40 of the Employment Act. Specifically, the Claimant points out that the Respondent failed to serve him and the Labour Officer with a month's notice, the Respondent did not disclose the selection criteria and did not offer to pay the Claimant severance pay.

19. The Claimant therefore claims the following:

- a) 12 months' salary in compensation for unfair termination
- b) Certificate of Service

- c) Costs plus interest

### **The Respondent's Case**

20. In its Memorandum of Reply dated 14<sup>th</sup> September 2018 and filed in court on 20<sup>th</sup> September 2018, the Respondent admits having employed the Claimant as an Accountant, pursuant to letter of appointment dated 2<sup>nd</sup> July 2013.

21. The Respondent however denies the Claimant's averments that the Claimant worked for three sister companies.

22. In response to the Claimant's averments regarding an offer made to him to shift to Panalpina Ltd, the Respondent states as follows:

- a) By a resolution, the Respondent's directors resolved to wind up the operations of the Respondent in Kenya in favour of its sister companies known as Panalpina Limited and Expolanka Freight (PVT) Limited;

- b) In view of the above, the Respondent's management issued a circular to all employees and offered similar positions to all of them in the said companies. All of them accepted the offer to work in the new companies, apart from the Claimant;

- c) The Claimant refused and/or declined the offer to work with Panalpina Limited, which was made in good faith and was aimed at ensuring continuity of the Respondent's business. The Claimant gave the Respondent conditions which it could not have met at that point;

- d) The Respondent's management held various meetings with the Claimant and indeed exchanged communication through email. Even after much persuasion by the Respondent's management, the Claimant declined the offer to work with Panalpina Limited. The Respondent was only left with the option of terminating the Claimant's employment;

- e) The Respondent was guided by the letter of appointment as well as the law, in terminating the Claimant's employment;

- f) The Claimant and the Respondent mutually agreed on the modality of separation since that was the only option in view of the fact that the Claimant had rejected the Respondent's offer.

23. The Respondent states that the Claimant's termination was pursuant to the letter dated 4<sup>th</sup> July 2017. The Respondent adds that upon termination, the Claimant's terminal dues were calculated as per the employment letter and in compliance with the law. The Respondent states that the Claimant received the terminal dues without any objection and signed for them as full and final settlement.

24. Regarding the Claimant's averment that there was no reason for the termination, the Respondent states that the termination letter was issued against the backdrop of the Claimant's refusal to take up employment from the Respondent's sister company. As such, the Respondent submits that the reason for termination was apparent and clear to the Claimant.

25. Furthermore, the Respondent adds that the meetings held, coupled with email communication exchanged, attest to the fact that a request was made to the Claimant to take up the offer given by the Respondent. According to the Respondent, it was apparent from the foregoing deliberations that the consequence of the Claimant's refusal to take up the offer would lead to his termination since the Respondent had stopped operating in Kenya. The Respondent avers that the Claimant was issued with his Certificate of Service, in compliance with the law.

### **Findings and Determination**

26. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful and unfair termination of employment;
- b) Whether the Claimant is entitled to the remedies sought.

### **Unlawful Termination?**

27. On 4<sup>th</sup> July 2017, the Respondent wrote to the Claimant as follows:

*“Dear Peter,*

#### **RE: TERMINATION OF EMPLOYMENT FROM AIR SEA LOGISTICS LTD**

*I refer to our discussion held on 30<sup>th</sup> June 2017 with yourselves (sic) in respect of the above.*

*This is to notify that we will terminate your employment from Air Sea Logistics Ltd with effect from 31<sup>st</sup> July 2017.*

*Upon termination from Air Sea Logistics Ltd the following terminal benefits will be processed for your collection:*

- 1. Gratuity/service – 15 days for every completed year – **Ksh. 133,104.34***
- 2. Outstanding leave days up to 31<sup>st</sup> July 2017 – 46 days – **Ksh. 126,633.99***
- 3. Outstanding leave allowance up to 31<sup>st</sup> July 2017 – **Ksh. 3,683.33***
- 4. Notice pay – 1 month –Ksh. 77,935.00*

**Total Ksh. 341,356.66**

*The above Total amount will be subject to tax and all other statutory deductions. If agreeable please sign a copy of this letter so that we can proceed with the payment of your dues.*

*Yours Sincerely,*

*(signed)*

*Wasantha Ranasinghe*

**Director”**

28. One of the Claimant’s complaints is that the termination letter did not disclose the reason for termination and there was therefore no valid reason as required in law. However, while it is true that the termination letter did not state the reason for termination, there is correspondence on record to the effect that the Claimant was offered a position in a company closely related to the Respondent, an offer he rejected because his demand for a higher salary was not met.

29. The Respondent’s Human Resource Manager, Benson Kiguru told the Court that following the sale of the business previously undertaken by Air Connection Ltd, which was closely connected to the Respondent to Panalpina Ltd, a decision was made that the Respondent’s operations in Kenya be wound up in favour of Panalpina Ltd.

30. Documentation effecting these transactions was not presented to the Court. From his own testimony

however, the Claimant appears to have been aware that a major reorganisation was taking place within the sister companies, and that this reorganisation would affect his own employment with the Respondent.

31. The Claimant told the Court that an offer was made to him by the Respondent's Managing Director, Wasantha Ranasinghe to move to Panalpina Ltd on his obtaining terms and conditions of employment. Follow up emails were sent to the Claimant by Benson Kiguru on 23<sup>rd</sup> June 2017 and 27<sup>th</sup> June 2017. At every point, the Claimant was clear that he would not take up the offer to move to Panalpina Ltd unless his salary was increased.

32. The circumstances of this case disclose what is ordinarily referred to as transfer of services or outsourcing. As observed by the Respondent's Counsel in final submissions, there is no statutory law governing this aspect of employment. The Courts have however sought to develop some jurisprudence in this area.

33. In a three Judge Bench decision of this Court (**Nduma, Ndolo & Nzioki wa Makau JJ**) in **Wrigley Company (East Africa) Limited v Attorney General & 2 others [2013] eKLR** we set the following parameters:

*a) Ordinarily employers are not expected to outsource their core functions;*

*b) An employer will not be permitted to use outsourcing as a means to escape from meeting accrued contractual obligations to its employees;*

*c) An employer will not be permitted to transfer the services of its employees without the express acceptance of each affected employee and in all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect; and*

*d) Outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise.*

34. The Court was also referred to the decision in **Elizabeth Washeke & 62 others v Airtel Networks (K) Ltd & another [2013] eKLR** where **Mbaru J** relied on the **United Kingdom Transfer of Undertakings (Protection of Employment) Regulations, 2006** which permit outsourcing as a business model. Under these Regulations, an employee can decline transfer of services but such an employee is deemed to have resigned and cannot lay a claim in redundancy. The learned Judge also referred to the South African **Basic Conditions of Employment Act** under which an employee who declines an offer of alternative employment is not entitled to severance pay.

35. The Claimant testified that all employees previously working for the Respondent were absorbed in Panalpina Ltd, an offer he himself rejected.

36. Even in a redundancy situation, the purpose of prior consultations is to try and mitigate loss of jobs. In this case, the Respondent offered a similar job on obtaining terms and conditions, to the Claimant, but the Claimant gave an unreasonable condition, which the employer was unable to meet. Moreover, the Claimant was paid all his accrued dues and he therefore has no recourse against the Respondent.

37. In the result, the Claimant's claim for compensation for unfair termination fails and is dismissed.

38. In light of the previous relationship between the parties, I direct that each party will bear their own costs.

39. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 8<sup>TH</sup> DAY JULY 2021**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Kariuki h/b Miss Gitari for the Claimant

Mr. Mwangi for the Respondent