REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

ELRC CAUSE NO. 740 OF 2019

JOROEN TOLLENAAR aka JOHAN TOLLENAAR.....CLAIMANT

VERSUS

AFRICAN COFFEE ROASTERS.....RESPONDENT

JUDGMENT

1. The Claimant instituted this claim against the Respondent vide a Statement of Claim dated 27th September 2019 for unlawful dismissal. He avers that he was employed by the Respondent on 1st January 2018 as a Chief Executive Officer in the Respondent's Athi River Export Processing Zone branch, for a two-year contract with automatic renewal subject to renewal of visa. The Claimant averred that his initial consolidated salary was €12,043.00 per month and he was also entitled to other benefits including but not limited to: payment for accommodation of €2000.00 per month; bonus of 25% of the Annual Basic Fee; pay for 25 working leave days; and four month's sick pay per year. The Claimant averred that his exemplary performance over the years earned him good performance appraisals and the Respondent who received many clients increased its turnover. He further avers that or about 18th June 2019, he was invited to the Respondent's offices in Denmark and served with a letter dated the same day terminating his services effective last day of July 2019 but releasing him from his duties immediately. He avers that the Respondent did not follow statutory procedure of termination of employment and the said letter did not set the grounds and justification for his termination. The Claimant averred that the Respondent never issued him with an invitation to show cause and instead invited him for a business meeting, straight from compassionate leave and then served him a termination letter. The Claimant averred that his emails to the Respondent requesting for a meeting to discuss the reasons and how the decision to terminate his services was arrived at together with letters claiming his dues were declined and or ignored. The Claimant avers that he has never received any warning letter in the period of his employment at the Respondent company and that as at the time of termination, he had signed an employment contract which was to run until December 2019 and with automatic renewal. He asserts that the Respondent's action was malicious and biased towards him because he was not accorded time to show cause and he enumerates the particulars of the said malice and unlawful acts as follows:

i. Terminating the Claimant's employment without having given him any hearing.

ii. Terminating the Claimant from work without basis in fact and in law or at all whatsoever.

iii. Dismissing the Claimant from his employment when there was no fundamental breach of the contract of service on the part of the Claimant.

iv. Failing to act with justice and equity in terminating the services of the Claimant.

v. Failing to accord the Claimant a right to appeal the decision to terminate his employment.

The Claimant thus prays for Judgment against the Respondent for: three (3) months gross salary in lieu of notice; 25 unpaid leave days prorated on gross income; four (4) months sick pay; Twelve months' gross salary as compensation for wrongful dismissal; extraneous allowance for overtime (worked both day and night) at the Government approved rate for health workers in Kenya; confirmation of remittance of any statutory deductions (as applicable); issuance of Certificate of Service by the Respondent; general damages; exemplary damages; interest at court rates till date of full payment; and cost of the suit.

2. The Claimant asserts in his witness statement that he was generally managing the Respondent at the Athi River Export Processing Zone. He asserts that the Respondent is a daughter company of COOP AMBER which is the biggest retail in Denmark in terms of shops/outlets and turnover. He states that he was hired to develop products and brands that could sell and he goes on to discuss the accomplishments he made in the Respondent during employment period with the said company. He further asserts that the Respondent never issued him with a HR Policy when he was employment and that he analysed and signed the policy when it came into existence in May 2019. He stated that further, he was never given KPI's but had to reach break-even. He is convinced that his employment was terminated because the company had hired

another CEO who was appointed and published in the Danish Newspaper on 26th June 2019.

3. The Respondent filed a Memorandum of Response dated 18th December 2019 denying that the Claimant was dedicated and diligent in performing his duties. It avers that the reason for termination was specified both in the letter of termination and the exit meeting held between the Claimant and the Respondent and denies that it did not follow statutory procedure of terminating employment. The Respondent asserts that termination of the Claimant's employment was a culmination of several discussions regarding his performance which had been consistently low for the period he was in charge at the Respondent Company. The Respondent avers that the Claimant however, did not improve in his job performance and that there was therefore no malice or unlawful action in its decision to terminate his services. It further avers that the Claimant was indeed paid all his terminal dues as per his contract of employment and the same communicated to his lawyers and asserts that the reason for termination was valid and lawful. The Respondent further avers that the Claimant's termination was not grounded on the circumstances of summary dismissal envisaged under Section 44 of the Employment Act and it was therefore not required to invite the Claimant to a hearing for purposes of showing cause why his employment should not be terminated. It denies that the Claimant is entitled to the reliefs claimed and prays that the Claimant's suit be dismissed with costs. The Respondent also filed two witness statements made by Lasse Bolander and Kim Henry Jensen both residing in Denmark. Mr. Lasse who is the Chairman of the Board of Directors of the Respondent, states that the Claimant was at all material times aware that his employment was predicated on his performance, diligence and productivity. He further states that despite severally discussing the deteriorating financial position with the Claimant through conference calls and emails, there was simply no improvement and the Claimant was therefore sacked for his poor job performance. He states that the Claimant ought to have acknowledged receipt of his terminal dues in his pleadings before Court. Mr. Kim on his part describes how catastrophic the Claimant's performance was in 2018 and 2019; which he states was mainly due to the Claimant failing to meet the Company's sales activities and targets, consequently resulting in a liquidity shortage and a small and insufficient green beans inventory at the end. He asserts that the Claimant had no capacity to improve the fortunes of the Company and neither did he demonstrate that he had a concrete plan to help improve the company fortunes. In response, the Claimant filed a Reply dated 27th August 2020 denying all averments made by the Respondent in its Memorandum of Response and praying that judgment be entered against the Respondent as prayed for in the memorandum of claim.

4. The Claimant and the Respondent's witnesses Mr. Lasse Bollander and Mr. Henrik Jensen testified in line with their statements and the pleadings filed by the respective sides. The matter was subsequently directed for written submissions which parties dutifully filed. The industry and efforts made given the parties were in different parts of the world are commended – both at the hearing and the subsequent submissions.

5. In his submissions, the Claimant submits that he was never given a hearing before the termination, no meeting was held for discussions about his work performance and he was never given any warning and further, that his evidence to that effect was not rebutted. He cites the case of **Jane Samba Mukala *v* Ol Tukai Lodge Limited [2013] eKLR** where the Court held that:

> *"…where poor performance is shown to be a reasons for termination, the employer is placed at a high level of proof as outlined under section 8 of the Employment Act to show that in arriving at this decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance. Section 5(8) (c) further outline the policy and practice guidelines that include having a performance evaluation system that can be used by an employer in ensuring their employees get a fair chance when they are of poor performance.*
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> *Therefore it is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further what measures they have taken to address poor performance once the policy or evaluation system has been applied. It will not suffice to just say that one has been terminated for poor performance. The effort leading to this decision must be demonstrated. Otherwise, it would be an easy option for abuse.*
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> *Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and an explanation on their poor performance shared where they would in essence be allowed to defend themselves or be given an opportunity to address their weaknesses. In the event a decision is made to terminate an employee on the reasons of poor performance, the employee must be called again and in the presence of another employee of their choice, the reasons for termination shared and explained to such an employee."*

6. The Claimant submitted that under Section 41 of the Employment Act, before terminating the employment contract on account of misconduct, performance or physical incapacity, the employer must first explain the reasons to the employee in a language he understands and in the presence of another employee or union official of the employee's choice and thereafter accord the two a chance to air their representations before the termination is decided. Additionally, the Claimant submitted that the burden of proving that a fair procedure was followed lies with the employer. He further submits that under Section 45(2) of the Employment Act, termination of employment contract of an employee is unfair if the employer fails to prove that it was grounded on valid and fair reason and that it was done after following a fair procedure and that a reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements. The Claimant submitted that the procedure is fair if it accords to equity and justice by according the employee a hearing before the dismissal and on any appeal or review preferred, paying the employee any accrued benefits and giving the employee a certificate of service. In support of his submissions he cited the case of **Walter Ogal Anuoro *v* Teachers Service Commission [2013] eKLR** where the Court held there must be both substantive justification and procedural fairness for a termination of employment to be deemed fair. The Claimant also relied on the case of **James Ondima Kabesa *v* Trojan International Limited [2017] eKLR** where Onyango J. discussed the mandatory procedure under Section 41 of the Employment Act and submitted that the employer is also expected to observe the rules of natural justice of giving the employee notice of the impending hearing and the grounds for the disciplinary hearing so as to enable the employee prepare to defend themselves. The Claimant submitted that the Respondent's witnesses confirmed that indeed no hearing took place before the Claimant's employment was terminated. The Claimant submitted that the Respondent has consequently failed to prove a fair procedure was followed before termination of the Claimant's employment on account of poor performance. He submits that he is thus entitled to compensation for unfair and unlawful termination as under Section 49(1)(c) of the Employment Act and all reliefs sought in the Memorandum of Claim.

7. The Respondent in its written submissions submits that the Claimant has failed to prove his case on a balance of probabilities as is

required by law. It further submits that the Claimant's employment was terminated by invoking Clause 19 of his contract which allowed either party to terminate the contract by issuing a one-month notice or by paying one-month salary in lieu thereof. That this right can also be invoked under Sections 35 and 36 of the Employment Act without assigning reasons for terminating the contract of employment. Further, that a party terminating a contract under Sections 35 and 36 of the Employment Act cannot be said to not have had a valid reason for the termination but it nevertheless gave the reason for termination as unsatisfactory performance, which is a valid reason for termination as under Section 45 (a) of the Employment Act. It further submits that the provisions of Section 43 of the Employment Act vest the burden of proving unfair termination on the employee and the burden of justifying the grounds of termination on the employer. The Respondent relies on the case of **Alois Makau Maluvu *v* Cititrust Kenya Limited & Another [2018] eKLR** where Onyango J. stated:

> *"In cases of discipline on grounds of poor performance, all an employer has to prove is that the employee was aware of the applicable standards of performance and efforts were put in place to support the employee with time to allow for improvements as was stated in the case of FREDERICK OWEGI v CIC LIFE ASSURANCE and JANE WAIRIMU MUCHIRA (supra)…"*

8. The Respondent submitted that its witness first defence witness (DW1) testified and his testimony duly corroborated by its second defence witness (DW2), that there was a constant engagement between the Board, through DW1, and the Claimant on his performance as CEO of the Company. The Respondent submitted that DW1 also testified there were conversations leading to up to the meeting of 18th June 2021 in which meetings there was discussion on the financial situation of the company and that the Claimant knew exactly why he was being called for the said meeting. The Respondent submits that it indeed accorded the Claimant a hearing as dictated by rules of natural justice and Section 41 of the Employment Act and that to that extent, the termination was in accordance with the law. The Respondent further submits that it controverted the Claimant's allegation that he was not given a chance to appeal the decision to terminate his employment. The Respondent asserted that clause 10.11.5 of the Respondent's human resource policy, exhibited at page 83 of the bundle of documents provides for an appeal. It submitted that the Claimant having failed to invoke his right to appeal, he cannot therefore lay the blame on the Respondent. On the legal fairness requirement for termination of employment on the ground of poor performance as set out in Section 41 of the Employment Act, the Respondent relies on the authority of **James Ondima Kabesa *v* Trojan International Limited [2017] eKLR**. The Respondent submits that with respect to 12 months' compensation, its position is that compensation is not aimed at facilitating unjust enrichment of the party claiming unfair termination. It relies on the case of **Elizabeth Wakanyi Kibe *v* Telkom Kenya Ltd [2014] eKLR** where the Court cited with approval the case of **D.K. Njagi Marete *v* Teachers Service Commission [2013] eKLR** where it was held that remedies for termination of employment ought to be proportionate to the economic injuries suffered by employees, and should not be aimed at facilitating unjust enrichment of those employees. It further submits that Courts have held that where a Claimant prays for an award of remedies under Section 49(1) of the Employment Act, the Court will award the salary due in lieu of notice and it cited the case of **CMC Aviation Limited *v* Mohammed Noor, [2015] eKLR**. The Respondent submits that this Court ought to disallow the prayer for 12 months' compensation as the Respondent has demonstrated that the termination was fair and in accordance with the law. The Respondent urged the dismissal of the Claimant's case.

9. The Court has considered the pleadings of parties, the evidence adduced and the testimony of the 3 witnesses who testified in coming to this decision as well as the law, the submissions of parties and reflected on the various positions taken by the Claimant on one side and the Respondent on the other. It is common ground that the Claimant was employed in the position of the CEO of the Respondent and served for some while before his termination at a meeting in Denmark with members of the Respondent. In the view of the Respondent, the Claimant was stated to have been a poor performer and this was stated to have resulted in poor turnover and a poor stock of green beans thus placing the Respondent in a poor financial state. On his part the Claimant asserts that he performed well and that the company was able to make significant progress. After evaluating the performance of the Respondent, it is clear there was a period the performance was poor but in some part the performance improved though despite the improvement the financial position of the Respondent was poorer than targeted. The Respondent did have reason, no doubt, given the expectations of performance from the Claimant. The Claimant was notified of the problem at meetings and via emails as the parties were able to confirm. Section 41(1) of the Employment Act requires an employer contemplating the dismissal of an employee for reason of poor performance to do the following:-

> *41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.* (emphasis supplied)

10. Despite the fact that the Claimant was always aware that his job was predicated on performance or that his continued service was one upon which performance was based, it is clear the Respondent did not accord the Claimant the safeguards under Section 41. The email sent to him did not spell out that he was being called for a disciplinary hearing. In any event no proceedings were produced for such a hearing rendering the dismissal somewhat unexpected. His termination from employment by the Respondent was therefore unlawful to that extent. He was to boot called in for a meeting where his dismissal was communicated shortly after he had buried his late father. Such timing was insensitive and unfair to his grieving soul. In as much as the Claimant seeks general and exemplary damages, the Court is unable to grant them in this case. The Claimant did not support his claims for unpaid leave, overtime, sick pay, extraneous allowance for overtime worked (both day and night) and as such these too fail. In the final analysis, taking into account all the foregoing, the Claimant's suit is only successful to the extent of proving that the Claimant was dismissed unfairly without due regard to the tenets of natural justice and the provisions of Section 41 of the Employment Act. For this he will be entitled to 3 months salary as compensation which is €36,129.00 as well as costs of the suit to be based on this sum. Judgment is hereby entered for the Claimant against the Respondent for:-

i. €36,129.00 as compensation for unlawful dismissal

ii. Costs of the suit based on this sum.

iii. Interest on the sum in i) above at Court rates from date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE