



**REPUBLIC OF KENYA**

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

**ELRC CAUSE NO. 255 OF 2020**

**YARON GUREVIUCH .....CLAIMANT**

**VERSUS**

**SELECTA KENYA GMBH & CO. KG.....RESPONDENT**

**JUDGMENT**

1. Claimant is foreign national formally employed by the Respondent as its General Manager until 27.3.2020 when he was served with a six months termination notice. However, the employer offered to pay salary in lieu of notice and directed the claimant to handed over all the company property and leave immediately. The claimant complied with the said directive under the watch of the respondent's managers. The claimant averred that, no reason was cited for the termination and no hearing was accorded to him.

2. Thereafter the respondent paid the claimant only two month's salary in lieu of notice and on 2.6. 2020 he was served with a show cause letter charging him with alleged acts of misconduct that occurred in 2019. The letter also threatened to stop his terminal dues. e did not responde to kthe letter

3. The Claimant did not respond to the letter dated 15.6.2020 and the respondent summarily dismissed him and terminated tenancy agreement for the claimant's residence. As a result, the claimants brought this suit seeking the following reliefs.

*a) A declaration that the termination herein was unfair and unlawful;*

*b) Payment of Kshs 9,704,460.16 as particularized in paragraphs 23 and 25 of the claim;*

*c) 12 month's salary for unfair and unlawful termination of employment pursuant to section 49(1) (c) of the Employment Act,2007 amounting to € 85,200.00 (Kshs. 10,319,536.24 as per the Key CBK indicative exchange Rate as at 12<sup>th</sup> June 2020;*

*d) A certificate of Service;*

*e) Costs of the Suit;*

*f) Interest on (b) and (c) above at court rates from the date of filing suit until payment in full;*

*g) Any other relief(s) this Honourable court may deem fit to grant in the circumstances.*

4. The respondent filed defence dated 13/7/2020 and amended it with leave of the court. It denied the alleged unfair termination and averred that the claimant was dismissed for having unwarranted relationship with a female staff and for destroying company documents without authority from the company. The claimant was invited to show cause but he adamantly refused to put a defence or appear before the respondent. It further averred that it was entitled under the contract of employment to dismiss the claimant for gross misconduct without compensation and consequently, it prayed for the suit to be dismissed with costs.

5. The suit went to full hearing where both parties gave evidence and thereafter filed written submissions.

**Claimant's Case**

6. The claimant testified as CW1 and basically adopted his written statement and bundle of 22 documents filed with the claim as his evidence. He confirmed that he was employed by the respondent as its General Manager and therefore he was the senior most officer of the company in Kenya but answerable to the CEO IN Germany.

7. On 27.3.2020, the claimant reported to work at 7.30 a.m. and found his juniors who asked him to join them at the dining hall. Those present included Respondent's HR Manager, Security Manager, Production Manager and Breeding Manager. They served him with a termination letter signed by the CEO.

8. After the service he was told to clear, surrender car key, office keys, phone, laptop and credit card of the company before being taken home in a pickup. He was not accorded any hearing before the termination. He wrote an email to the company HR Manager requesting for the reason for the dismissal but none was given.

9. The termination letter offered to pay 6 months' salary in lieu of notice but only 2 months was paid. On 2.6.2020 he was served with the show cause letter but he never attended the show cause meeting because he was no longer employee of the respondent. He contended that the accusation that the burned documents of 7 years and below was false. He stated the burnt documents were 10 to 15 years old sorted by the HR manager and they were damaged by rats in the store. According to him no complainant was raised between 2019 and 2020 about the burned documents.

10. He contended that the termination was not due to the documents issue and no other reason was stated in the dismissal letter. He took nothing home on the 27.3.2020 when he was escorted by a pickup. He was also not summoned to the police in Juja to answer to the in relation to the complaint in relation to the OB filed by the respondent.

11. He prayed for terminal dues plus bonus of Euro 13732 declared by the CEO on 9.3.2020 at Windsor Hotel. His contract was not for fixed term and as such the termination put him to an awkward state. He accused the CEO of tarnishing his name to potential employees. Consequently, he prayed for 12 months' salary as compensation for unfair termination.

12. On cross examination he denied that he had romantic relationship with Anne Obura the Respondent's procurement Officer. He also denied harassing her sexually. He admitted that the CEO wrote to him email dated 20.3.2020 instructing him to dismiss Anne Obura from employment and he responded accepting to comply with the instructions. However he was dismissed on 27.3.2020. However, he was dismissed on 27.3.2020

13. He contended that although half of his salary was paid by Selecta Kham in Germany, he was employed by the respondent for a position in Kenya and for a performance in Kenya. He maintained that his salary was €7000 but it was increased to €7100 per month. He reiterated that he was paid the salary for only 2 months after the termination.

14. He reiterated that he authorized burning of 10 -15-year-old document which were dumped in the food store. He exercised his authority as the senior most Manager in the company to burn the said documents. He admitted that there was no back up created and explained that the documents were mere garbage full of rats. No loss was caused by burning documents older than 15 years.

15. On re-examination he denied that he was dismissed for his relationship with Anne Obura. He contended that he gave his reasons for not wanting to dismiss Anne Obura and she resigned before dismissing her. He contended that contract of employment dated 15/9/2016 provided in clause 2 that Selecta Klemm employed him as General Manager Selecta Kenya. He clarified that there was no audit done before his dismissal and contended that the contract the account referred to in the defence papers was done after his exit. Finally, he stated that he was dismissed by both Selecta Klemm and the respondent.

### **Defence Case**

16. Ms Virginia Wamaitha Gitonga, Respondent's General Manager testified as RW1 and like the claimant she adopted her written statement and bundle of 6 documents as her evidence in chief. She confirmed that the respondent was paying the claimants Euro 3500 and that he was dismissed for having a relationship with an employee Ms Anne Obura who was reporting to him contrary to company policy.

17. RW 1 contended that the CEO gave the claimant an ultimatum vide email dated 20/3/2020 to dismiss Anne Obura or face disciplinary action. The claimant never dismissed Anne Obura until Anne Obura resigned vide the Email dated 1/4/2020.

18. RW 1 further contended that in the course of his duties she asked for some physical documents but she was told that the documents were burnt. She enquired from the claimant because the documents were still useful but he refused to resolve the matter. She then reported the matter to Juja police station and the police found the site where the documents were burnt.

19. Therefore she contended that the claimants misconducted himself by burning the documents without authority. Finally she contended that the further payment of salary to the claimant was stopped after the discovery of the said misconduct

20. On cross examination RW1 stated that she took over the position of General Manager after the claimant left the company on 27.3.2020; that she, together with other managers served the claimant with the termination letter from the respondent and the other from Selecta Klemm; that she served the letter at 8.00 a.m. at the conference room while the claimant was reporting to work; and that she served the letters with instructions from the Board which also instructed her to take over the office.

21. RW1 admitted that there was no warning letter issued to the claimant. She also admitted that the claimant handed over everything and she signed for the same. He did not know whether he removed anything from the office that day. She further admitted that there is no complaint against the claimant related to removal of items from the office.

22. She contended that the termination letter offered to pay his salary up to 30.9.2020 plus other benefits and for that reason he was still employee of the respondent on 2.6.2020 when he was served with show cause letter in relation to the destruction of documents.

23. RW 1 admitted that the termination letter did not state that the claimant was dismissed for sexual harassment. She further admitted that the show cause letter and the defence herein did not mention sexual harassment. However according to the email dated 20.3.2020 the dismissal referred to an affair with Anne Obura and demanded for her immediate dismissal. Despite the claimant responding to the said email on the same day and assuring the CEO that he had talked to Anne Obura, the latter continued working until 1.4.2020 when she resigned citing ill health and family issues.

The said resignation came late since the claimant had already been dismissed on 27.3.2020.

24. RW 1 admitted that she did not pursue criminal case against the claimant and instead she invited him to attend audit but he declined. She admitted that the claimant was paid salary for April and May 2020 plus allowances.

25. She further admitted that the contract of employment between the claimant and select Klemm stated in clause 1 that the claimant was appointed as General Manager Selecta Kenya and salary was Euro 3500 payable by Selecta Kenya and Euro 3500 by selector Klemm

26. The claimant submitted that the termination of his contract of employment by the letter dated 27.3.2020 was procedurally and substantively unfair because it was not grounded on a valid and fair reason and he was not accorded any fair hearing. To fortify the foregoing submission, he relied on section 41, 43 and 45 of the Employment Act which codifies the doctrine of fairness in terminating the contract of employment of an employee.

27. He further relied on the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage company Ltd [2013] eKLR** and **Mary Chemweno Kiptui v Kenya Pipeline Company [2014] eKLR** where the court upheld the principles of fair termination as set out by the said provisions of the Act.

28. As regards the summary dismissal by the letter dated 15.6.2020, the claimant submitted that the same was null and void because the contract had already been terminated on 27.3.2020. He further argued that the contract had ceased operation by dint of the letter dated 27.3.2020.

29. He also argued that the disciplinary proceedings commenced by the show cause letter dated 2.6.2020 and the dismissal were unfair since they were in anticipation of the claimant's contemplated legal proceedings against the employer. Therefore he prayed for the reliefs sought in the suit.

30. The respondent submitted that the termination of the claimant's employment was fair and in line with the law. It contended that he claimant was informed of misconduct of having a relationship with Ms. Anne Obura by the CEO at Windsor and he was instructed to fire her. He was also warned vide email dated 20.3.2020 but he failed to comply with the instructions to fire Anne Obura as a result of which he was dismissed vide the letter dated 27.3.2020.

31. Accordingly, the respondent submitted that the claimant was aware of the reason for the termination. For emphasis he relied on **Benson Muraguri Maina v Kassam & Bros Co Ltd [2016] eKLR** where the court held that the court ought to consider the conduct and capability of the employee up to the date of termination and existence of any warning letters.

32. The respondent maintained that the claimant was lawfully dismissed for engaging in unwarranted relationship with a female employee and failure to comply with orders from the CEO. It contended that the claimant has failed to prove that the termination of his services was unfair and for that reason he is not entitled to compensation. Consequently, it prayed for the suit to be dismissed with costs.

### **Analysis and determination**

33. There is no dispute that the claimant was employed by the respondent as its General Manager from 15.9.2016 until 27.3.2020 when he was served with a termination notice and cleared with the company save for payment of his terminal dues. There is also no dispute that on 2.6.2020, the respondent instituted disciplinary proceedings against the claimant and served him with summary dismissal letter dated 15.6.2020. The issues for determination are:

- a) *Whether the termination of the claimant's contract of service on 27.3.2020 was unfair and unlawful;*
- b) *Whether the summary dismissal of the claimant on 15.6.2020 was null and void;*
- c) *Whether the claimant merits the reliefs sought.*

### **Whether the termination on 27.3.2020 was unfair**

34. Under section 45 of the Employment Act, termination of an employee's contract of service is unfair if the employer fails to prove that it was grounded on valid and fair reasons and that a fair procedure was followed. Valid and fair reason is one, which relates to the employee's conduct, capacity and compatibility, or based on the employer's operation requirements. Fair procedure on the other hand refers to, but not limited to, according the employee a fair hearing.

35. In this case the claimant contends that he was not informed the reason for the termination and he was not accorded a fair hearing before the termination. The respondent contends that the claimant was informed the reasons for the termination namely; burning documents without authority, engaging in unwarranted relationship with a female employee and failure to obey instructions from the CEO.

36. The termination letter dated 27.3.2020 stated as follows:

***“Letter of dismissal***

***Dear Mr. Gurverch.***

***We hereby give you notice on the termination of the existing employment relationship between you and Slecta Kenya GmbH & Co.KG as of 30<sup>th</sup> September, 2020. In compliance with the employment contract between yourself and us we will pay you in lieu of 6 months’ notice. We hereby exempt you from the obligation to perform your work. The company will continue payment of your earnings and credit outstanding holidays as stated in your contract.***

***You are required to return any of the company assets and documents to which you had access during the period of your contract. Kindly be ready to hand over all company assets within your possession on receipt of this letter. As with all employee, you are bound by confidentiality and data protection policies.***

***We would like to thank you for your contribution, and wish to you all the best for the future.***

***With regards,***

***Selecta Kenya GmbH & Co. KG***

***Per Klemm”***

37. The above letter is silent on the reason for the dismissal of the claimant and there is no mention of any hearing accorded to the claimant before the termination. There is no indication whether the reason for the termination was the alleged relationship with the female employee or the failure to fire the female employee as directed by the CEO. The respondent has also failed to prove that the alleged relationship between the claimant and Anne Obura was true after the claimant denied the same. Further the respondent has failed to prove that the command given to the claimant by the CEO was lawful and justified. Consequently I hold that there was no valid and fair reason for dismissing the claimant on 27.3.2020.

38. Even assuming that there was a valid reason for the dismissal, the court finds that the respondent has failed to prove that the claimant was afforded a fair hearing to defend himself. Again the dismissal was communicated through his juniors which was humiliating and embarrassing. He was also not issued with any Certificate of Service after the termination.

39. Section 41 of the Employment Act provides that:

***“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 shop floor union representative of his choice present during this explanation.***

***(2) Notwithstanding any other provisions of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”***

40. The respondent has not shown that it followed the above mandatory procedure before dismissing the claimant. Even if it complied with the contract of employment by serving a written notice of 6 months and offered to pay salary in lieu of the said notice, the same did not absolve it from complying with section 41 above.

41. The foregoing is fortified by the Court of Appeal decision in **Kenfreight (EA) Limited V. Benson K. Nguti [2016] eKLR**, where the Court held that:-

***“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee’s conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure.....”***

***Apart from issuing proper Notice according to the contract (or payment in lieu of Notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service”.***

42. Having found that the respondent has failed to prove that there was a valid and reason for dismissing the claimant and that a fair procedure was followed, I proceed to hold that the dismissal vide the letter dated 27.3.2020 was unfair and unlawful within the meaning of section 45 of the Employment Act.

**Whether the dismissal on 15.6.2020 was null and void.**

43. The claimant submitted that the second dismissal on 15.6.2020 was of no consequence because his employment contract with the respondent had already been terminated by the letter dated 27.3.2020. I have carefully considered the said second dismissal.

44. Although the first dismissal vide the letter dated 27.3.2020 was intended to take effect in September 2020, the respondent opted to pay salary in lieu of notice and directed the claimant to handover and exit the company immediately. As a result the termination took effect immediately and nothing was outstanding under the contract except payment of the salary in lieu of notice plus other benefits.

45. It follows that, the purported disciplinary proceeding instituted against the claimant on 2.6.2020 and consequential summary dismissal were null and void because there was no contract of service between the parties. Therefore there was no basis in law or the contract of employment upon which the respondent could punish the claimant after their employment relationship had come to an end.

46. I gather support from **Kennedy Obala Oaga v Kenya ports authority [2018] eKLR** Rika J declared as null and void summary dismissal of an employee who had earlier resigned from employment. The court went on state that:

***“Summary dismissal was null and void, not based on an Employer- Employee relationship... The decision must be treated as if it was never made. It was null and void, without any legal consequences.”***

### **Reliefs**

47. In view of the finding above that the dismissal of the claimant was for no valid and fair reason and the fair hearing was not accorded to him, I make declaration that the dismissal was unfair and unlawful as prayed.

48. Flowing from the foregoing, I find that the claimant is entitled to salary in lieu of notice plus compensation for the unfair termination under section 49 (1) of the Employment Act. There is no dispute that the claimant was only paid salary for two months instead of the required six months. Consequently, I award him the outstanding 4 months' salary in lieu of notice being  $\text{€ } 7100 \times 4 = \text{€ } 28400$ .

49. I further award him 6 months' gross salary as compensation for unfair termination being  $\text{€ } 7100 \times 6 = \text{€ } 42600$ . In awarding the said compensation, I have considered that the claimant worked for 3 years scoring very high performance rating which earned him bonuses as evidenced by the email from the CEO dated 9.3.2020. I have also considered that the claimant did not cause his dismissal through misconduct. Finally I have considered that from the date of dismissal, he did not secure any other employment.

50. The claim for 3 months house allowance is allowed. The respondent submitted that the said allowance was paid but going by the letter dated 15.6.2020 by RW1 to the Landlord, the respondent stopped paying rent effective that date and authorized the Landlord to utilize any rental deposit as cost of repairs of the premises. Without any evidence that the respondent made further rent payments after the said letter to the landlord, the claim by the claimant is unshaken and I allow it as prayed being  $\text{Kshs } 250,000 \times 3 = \text{Kshs.}750,000$ .

51. The claim for 18 leave days is also granted because the same has not been disproved by leave records. Hence  $18 \times \text{€ } 7100/30 = \text{€}4260$ . The claim for bonus amounting to  $\text{€ } 13,732$  is granted because it was declared by the CEO vide the email dated 9.3.2020. The prayer for Certificate of Service is granted pursuant to Section 51 of the Employment Act.

52. All the other monetary claims are declined because they were benefits related to the actual performance of the contract.

### **Conclusion and disposition**

53. I have found that the dismissal of the claimant was done by the letter dated 27.3.2020 and it was unfair and unlawful within the meaning of section 45 of the Employment Act. I have further found that the purported second dismissal of the claimant vide the letter dated 15.6.2020 was null and void since there was no employment relationship subsisting between the parties then. Finally, I have found that claimant is entitled to some of the reliefs sought. Consequently, I enter judgement for the claimant against the respondent as follows:

**Notice, compensation, leave and bonus**      **€ 88,992**

**House allowance**                                      **Kshs. 750,000.**

The said award is subject to statutory deductions. The claimant is awarded costs plus interest at court rates from the date of filing suit since the bigger portion of the claim accrued before filing the suit. The claimant will also have Certificate of Service.

**DATED, SIGNED AND DELIVERED IN NAKURU THIS 29TH DAY OF OCTOBER, 2021.**

**ONESMUS N. MAKAU**

**JUDGE**

**ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall**

**be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**