



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 2238 OF 2014

YARON GUREVICH..... CLAIMANT

- VERSUS -

CARNATION PLANTS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 26th November, 2021)

JUDGMENT

The claimant filed the statement of claim on 16.12.2014 through Rachier & Amollo Advocates. The claimant prayed for judgment against the respondent for:

- a) Special damages of USD 518, 066.67 (Kshs.46, 107, 874.00 converted at Kshs. 89 to the dollar).
- b) General damages.
- c) Costs of the suit.
- d) Interest on (a) and (b) above at Court rates.
- e) Any other relief that the Honourable Court deems proper.

The claimant pleaded as follows:

- a) The respondent employed the claimant as Administration, Logistics & Operation Manager. The agreed monthly payment was USD 5000 in first three months; USD 6500 for next 4-12 months in service; USD 7500 for next 13 – 36 months in service; and USD 9000 for the next 30 – 60 months of employment. The claimant was also entitled to monthly house allowance USD 1000; a moto vehicle and a driver; a cell phone and laptop; health insurance cover; and annual return ticket to his home country (Israel). He worked diligently as engaged.
- b) On 16.01.2014 his employment was terminated in an unfair, unprocedural and wrongful manner. The alleged reasons for termination were gross misconduct, insubordination, violation of the company laws and regulations and abuse of office powers. On 24.01.2014 he was asked, without notice, to immediately handover the company property including sim card, motor vehicle and to vacate respondent's provided house.

c) The termination was in breach of the contract and unfair because the claimant was not given the six months' contractual termination notice or paid in lieu of the six months; 16 days worked in January 2014 were not paid; he was not given information on grounds of termination; he was not heard prior to termination; and, fair procedure was not followed at all.

The claimant's further case is that he has suffered loss of employment, mental anguish, loss of livelihood and secure income, and no terminal dues had been paid. The claims included:

- a) Pay in lieu of notice 6 months' x USD 9500 = USD 57, 000.
- b) 12 months' salary USD 9500 X 12 = USD 114, 000.
- c) 16 day worked January 2014 USD 9500 X16/30 = USD5066.67.
- d) Leave pay for 2012 and 2013 USD 9500 X 2 = USD19, 000.
- e) Pay for loss of expectation for remainder of the contract term 34 -months x USD 9500 = USD 323, 000.
- f) Total amount USD 518, 066.67.

The respondent filed the memorandum of response on 26.03.2015 through Michuki & Michuki Advocates. The respondent pleaded as follows:

- a) The dismissal or termination of the claimant's employment was fair and within the law.
- b) The claimant was dismissed upon reasonable cause and in accordance with the Employment Act, 2007.
- c) After termination the claimant failed to return the respondent's property and therefore a certificate of service per section 51 of the Act had not been issued.
- d) The employment contract was oral but subject to Employment Act, 2007. The salary paid was as per the pay slip. The purported contract exhibited for the claimant is between the claimant and a third party, not the respondent. The respondent did not breach the contract and the termination was not unfair. Instead the claimant breached the contract of service by:
 - i. Engaging in gross misconduct and conduct unbecoming of an employee for example shouting vulgarity at the CEO in front of all the managers.
 - ii. Failure to obey lawful orders from superiors and in particular to hand over his original work permit to the respondent despite numerous requests by the respondent.
 - iii. Unlawfully acting for the respondent without authority such as signing a contract letter issued by Toyota Kenya binding the respondent in respect of certain motor vehicle bought for them.
 - iv. Using his position to procure love affairs with junior staff members.
 - v. Unlawfully obtaining computer passwords and without authority accessing employees' computers including that of the CEO.
 - vi. Conducting himself in a coarse manner and making rude comments to the CEO amounting to insubordination.
- e) In view of the claimant's conduct, the termination was fair, per rules of natural justice, and per

the provisions of the Act.

f) The termination was on account of gross misconduct per section 44 (3) and 44(4) (d) and (e) because, the claimant used abusive or insulting language or behaved in a manner insulting to his employer or person placed in authority over him by his employer; and, the claimant knowingly failed or refused to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.

g) The termination was not unfair per the provisions of section 45(2) of the Act. No fundamental rights of the claimant were violated.

The respondent prayed that the claimant's claim be dismissed with costs.

The claimant filed on 09.04.2015 the response to the respondent's memorandum of response. The claimant urged that the respondent ought to have given him sufficient notice of termination, proof of reason of termination, and a hearing subsequent to the termination of his service. Further he was entitled to information surrounding the circumstances of the termination, a certificate of service upon the termination and payment of final dues. The claimant repeated his allegations as pleaded in the memorandum of claim.

The respondent filed on 10.11.2017 amended response to the memorandum of claim and counterclaim. The respondent deleted the pleading that the payment was as per payslips. The respondent counterclaimed that at the time of his departure from the respondent, the claimant failed to account for petty cash entrusted by the respondent to him in the course of his employment amounting to Kshs. 10, 761, 864.00. Further, by an undertaking dated 03.02.2014 the claimant undertook to return the respondent's information including computer hard disk which he unlawfully took away. He further undertook not to contact and or engage any of the respondent's workers and ex-workers by way of alternative employment. It was a term of the said undertaking that in event of breach of the undertaking the respondent would be entitled to liquidated damages of USD 100,000.00. The respondent counterclaimed that the claimant acted in breach and failed or neglected to abide by the terms of the said undertaking and the respondent claimed the USD 100,000.00. Further, the respondent advanced the claimant a sum of Kshs.2, 253, 798.80 which the claimant had failed to repay. The respondent prayed for:

- a) The claimant's claim be dismissed with costs.
- b) Company funds unaccounted for Kshs. 10, 761, 864.00.
- c) Amount advanced to the claimant Kshs.2, 253, 798.80.
- d) Liquidated damages for breach of undertaking USD 100, 000.00.
- e) Costs of the suit.

The claimant filed the reply to counterclaim on 11.01.2018. The claimant denied he ever made the alleged undertaking. He denied he ever possessed the hard disc as alleged. Further, the contract of service had no penal clause or restriction on employment of the respondent's staff. The entire counterclaim was denied. The claimant prayed that the counterclaim be dismissed with costs.

The claimant testified to support his case and his witness (CW2) was Thomas Skaper. The respondent's witnesses included Yossi Shamia (RW1) who had worked for the respondent as a consultant; Monila Gohil (RW2) who was the head of finance at the material time; Peter Onchaga (RW3) the Farm IT Administrator; Samuel Ogada Orata (RW4) who testified that the claimant telephoned him with a view to persuading him to go and work elsewhere (at SELECTA); Noelle Vwamu the deputy head of human resource manager at the time; Harel Dan (RW6) the Farm Manager; and Evi Fieldman (RW7), the respondent's CEO.

Parties filed final submissions. The Court has considered the pleadings, the evidence and the final submissions. The Court makes findings as follows.

To answer the **1st issue** the Court returns that parties were in a contract of service. As testified by the claimant and RW7 the claimant started working for the respondent on 06.11.2011 following the contract of service by email dated 28.10.2011. The position was as Operation & Administration & Logistics Manager based at the respondent's farm offices in Kitengela, about 60Kms from Nairobi. The claimant confirmed that his last monthly pay deposited at his bank's salary account was USD 7, 500. He testified that he was paid a further USD 2000 cash but he provided no evidence of such payment such as payment vouchers. The Court finds that the parties were bound by the written contract of service, there was no evidence of renegotiation for payment of USD 2000 as alleged for the claimant, and his last monthly pay was therefore Kshs. USD 7, 500.

To answer the **2nd issue**, the Court finds that the employment was terminated on 16.01.2014 as per the letter of termination of services dated 16.01.2014. The letter set out the reasons of termination including:

- a) The claimant shouting at the CEO at the meeting of 15.01.2014 and asking the CEO to release him.
- b) The claimant having severally asked the CEO (during the last one year) to release him from duties.
- c) On 08.01.2014 the claimant shouted vulgarity at the CEO in front of all managers, asked the CEO to send him away and the claimant stormed out of the meeting in presence of Dan, Yossi, Amir and Alon.
- d) In 2012 the claimant collected his original work permit and despite repeated requests that he hands it for custody by the respondent as required, he disobeyed that lawful instruction.
- e) He signed, without authority, a contract letter issued by Toyota Kenya binding the respondent in respect of certain motor vehicle bought from them.
- f) The claimant used his position to procure love affairs with junior members of staff.
- g) The claimant, without authority, demanded computer passwords for all the computer users at the respondent from the IT Manager and had without authority accessed other employees' computers including the CEO's.
- h) The claimant had conducted himself in coarse manner making rude comments to the CEO which conduct amounted to insubordination.

The letter stated that the claimant had been given opportunity to respond but had failed to give any reasonable excuse for his conduct which amounted to gross misconduct terminable summarily under the Employment Act. The letter further stated, "**As such the company has decided to accept your request and release you from your services summarily.**" The letter required the claimant to return the company property and to vacate the provided house Apartment No. 3A on Ndemi Lane Apartments. He was to clear and get paid his final dues.

To answer the **3rd issue** for determination, the Court returns that the termination was not unfair. There is no reason to doubt the evidence by RW7 that at the meeting of 08.01.2014 being a regular meeting with farm managers and in response to RW7's queries to the claimant, the claimant interrupted the CEO by shouting and screaming that he was fed up with working at the farm and he shouted, "**No one will tell me what to do and how to do my job in the farm that this is my style and no one will tell me not you Evi and no one else.... If you don't like it release me from duties now.**" There is no reason to doubt that on that day the claimant left the meeting as he banged the table shouting, yelling and screaming that no one would tell him what and how to do it at the farm. Further there is no reason to doubt that after he got

out of the office, he started to bang on the window of the office shouting, **“I better known than anyone in this meeting room, just leave me alone, don’t want me to stay, release me.”** The Court further finds that on 15.01.2014, RW7 called the claimant in a meeting at the Head Office in Nairobi and informed him that in view of the behaviour on 08.01.2014 and previous cases of misconduct (as set out in the termination letter), the respondent had decided to take a disciplinary action against the claimant, unless if he gave a reason in defence for the unprofessional behaviour. The Court further finds as credible RW7’s evidence that the claimant replied that RW7 could act as he wished and as they could not work together any more, it was in the interest of all parties that the claimant is released from his job. The Court finds that the claimant asked to be released from his job and while complying with that request, the respondent set out in the termination letter the reasons and circumstances leading to the acceptance of that release. The Court returns that the respondent set out to invoke the disciplinary action based on the matters that were levelled against the claimant and as was subsequently enumerated in the letter of termination but the claimant asked to be released (instead of facing the disciplinary process) and the respondent acceded to release him. The Court therefore finds that the separation was by agreement, the claimant asking to be released, and the respondent accepting to release him. Thus the letter of termination stated, **“As such the company has decided to accept your request and release you from your services summarily.”** It was a termination by agreement and the Court finds accordingly.

While making that finding the Court finds that delving into the matters, as the background and circumstances as set out in the letter of termination, will not serve much purpose towards a finding of fairness or otherwise of the termination. The termination was by agreement and it was not unfair. Parties are bound by that agreement. The claimant’s claims and prayers for compensation for alleged unfair termination and notice pay are found misconceived and unjustified. While making that finding the Court returns that in any event the evidence on record show that the matters of misconduct as levelled and enumerated in the termination letter substantially existed as at termination. For instance, and in particular, the respondent established that indeed the claimant had shouted at the CEO in most disrespectful manner and more than once; the claimant had failed to release to the respondent the original work permit despite repeated reminders; the claimant had signed without authority a contract with Toyota Kenya for the purchase of some motor vehicle; and he had indeed engaged in certain love affairs at the work place. Such are matters but for the agreement to separate, existed and amounted to fair reason for termination within sections 43 and 45 (2) of the Employment Act, 2003. The Court finds that such matters amounted to 100% contribution by the claimant to his separation and his allegations of unfair or unlawful termination was unjustified and the Court further returns that the levelled matters therefore disentitled him to compensation under section 49 of the Act.

The claimant testified that he was terminated on 15.01.2014, on 16.01.2014 he handed over and shortly thereafter, he joined a new employer, Amiran. The Court finds that the respondent, as per RW7’s testimony, has established that the claimant carefully and unprofessionally so, triggered his separation with the respondent having already secured alternative employment or in no doubtful anticipation that he was going to alternative employer, Amiran - and who was a leading supplier to the respondent so that the claimant had used his exposure while in the respondent’s employment to secure or obtain that alternative employment. The claimant is found to have fully authored his separation from the respondent and the termination was not unfair at all as it was by agreement and in line with the claimant’s request to be released and in furtherance of the claimant’s pursuit of alternative employment he had already secured with the respondent’s leading supplier.

While making that finding the Court returns that the claimant moved to the new employment shortly after the termination and his claim for payment for the remainder of 34 months of the term contract was misconceived and unjustified. There is no attribution to the respondent’s action or omission to justify that claim and it will fail as unreasonable and unjust especially in the circumstances of the case that the claimant triggered the separation to move to the new employer.

The Court finds that per section 43 and 45 of the Employment Act, 2007 the respondent has established the reason for termination to be that the claimant requested to be released from employment and the respondent agreed, resulting in the letter of termination. In view of the agreement to separate, notice pay and compensation have been found not due at all. For the 16 days worked in January 2014 the same is not

disputed and is awarded at **USD 4, 000** per the respondent's submissions.

The claimant made no submissions on the claim and prayer for general damages which is deemed abandoned.

The **4th issue** is whether the respondent is entitled to the counterclaim and as prayed for. The Court finds that the claim and prayer for unaccounted funds said to be Kshs. 10, 761, 864 was a continuing injury throughout the claimant's employment and whose cessation was on the date of termination on 16.01.2014. The counterclaim was filed on 10.11.2017 and the Court finds that the claim was time barred under section 90 of the Employment Act, 2007 because 12 months from cessation of the continuing injury had lapsed as at the time the counterclaim was filed. The respondent counterclaimed for Kshs. 2, 253, 798.00 amount advanced to the claimant. The evidence shows that the money was paid in favour of the claimant with respect to his son's school fees, payment of insurance, air tickets for his wife and son and rental car for his father. The Court finds that the particulars of the claim set out in evidence and submissions were not specifically pleaded and the claimant could not therefore effectively defend that specific counterclaim. Further, the evidence of the payment does not state that the payment was an advance. The Court finds that the fact that the same was a loan or advance has not been established and in view of the deficiency in the pleading, the counterclaim will fail. The respondent counterclaimed for **USD 100, 000** for breach of undertaking. There is no dispute that the undertaking was signed. The undertaking is at page 122 to 124 of the bundle. The evidence is that the claimant breached the undertaking requiring him not to engage any of the company's workers or ex-workers. In particular, the claimant's own witness CW2 confirmed that the claimant poached the respondent's workers. The only objection to that counterclaim by the claimant is that after he signed the undertaking, he was not thereafter paid his anticipated final dues. However, the undertaking has not mentioned a precondition of payment of final dues for its taking effect. The Court finds that the evidence by CW2 and the respondent's witnesses has established that the claimant breached the undertaking and he conducted several respondent's employees and poached several of them to work with the claimant's subsequent employers. The counterclaim is allowed. The claimant will pay the respondent **USD 96000** having set off the USD 4,000 found due to the claimant from the respondent.

The Court has considered the parties' margins of success and returns that the claimant will pay the respondent 50% of the costs of the entire proceedings. In conclusion, judgment is hereby entered for the parties for:

- 1) The claimant to pay the respondent **USD 96000** by 01.02.2021 failing interest to be payable thereon at Court rates from the date of this judgment till full and final payment.
- 2) The claimant to pay the respondent 50% of the costs of the entire proceedings herein.
- 3) The Deputy Registrar to return the Court file herein to the Court Registry at Nairobi by close of 29.11.2021.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 26th November, 2021.

BYRAM ONGAYA, JUDGE