



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 320 OF 2017**

**WYCLIFFE OCHIENG OLALE.....CLAIMANT**

**VERSUS**

**SIGHT & SOUND LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein sued the Respondent asserting that he was an employee of the Respondent in the Finance and Administration Office as a General Manager. He averred that he had been appointed by a letter dated 6<sup>th</sup> December 2005 and that he served the Respondent diligently. He averred that he worked until 21<sup>st</sup> December 2016 when the Respondent terminated the Claimant's contract with it on malicious and unfounded claims of gross misconduct. The Claimant averred that the Respondent's agents subjected him to humiliation by stopping the payment of his allowance and other benefits. The Claimant averred that he earned Kshs. 99,440.65 as basic, a house allowance of Kshs. 17,548.35 and NHIF dues of Kshs. 1,700/- a month. He averred that his leave entitlement was 30 working days. He thus sought reinstatement to employment and in the alternative, the payment of damages for his unlawful job loss, payment of all outstanding dues and allowances as well as compensation for 12 months.

2. The Respondent in its defence averred that the Claimant was appointed vide a letter dated 1<sup>st</sup> January 2005 but not 6<sup>th</sup> December 2005. It denied the Claimant served in the finance and administration office of the Respondent as a General Manager. The Respondent denied that the Claimant had served it diligently. The Respondent averred that the Claimant blatantly flouted the employment contract executed on 3<sup>rd</sup> January 2005 when he commenced work. The Respondent averred that the Claimant breached his fiduciary duties as the General Manager of the Respondent by intentionally starting a business christened Galstrack Enterprises Limited which dealt with the same products as his employer while still under employment. The Respondent averred that it encountered frequent incidences of pilferage and disappearance of goods that prompted the lodging of a criminal complaint at Parklands Police Station. The Respondent averred that to exacerbate the situation the Claimant proceeded to solicit, poach and divert the Respondent's clients to his competing business thus exposing the Respondent to conflict of interest. The Respondent averred that the actions of the Claimant warranted summary dismissal as these actions amounted to gross misconduct. The Respondent averred that the dismissal of the Claimant was justified and done in good faith to salvage the Respondent from the drastic losses in business and profit occasioned by the Claimant's illegal conduct and mischief. The Respondent thus sought the dismissal of the Claimant's suit and by way of counterclaim averred that the Claimant had breached the contract of employment by opening up a business selling the same products as the Respondent, diverting the Respondent's client's to his competing business and subsequently doing business with them, and as a result sought a the Claimant herein be obligated to account to the Respondent for all the gains, profits and benefits he earned from his parallel business ventures while working for the Respondent. The Respondent thus sought damages for the loss of business, profits and goodwill as well as the costs of the main suit and the counterclaim.

3. The Claimant filed a reply to the defence and a defence to counterclaim in which he averred that the averment that he was appointed in January 2005 was accurate. He averred that he observed all the rules and regulations of the Respondent while diligently serving the Respondent. The Claimant averred that he was entitled to leave for 30 working days in a calendar year. He thus sought the dismissal of the counterclaim and entry of judgment as per his memo of claim.

4. The Respondent though duly served did not attend the hearing of the suit on 4<sup>th</sup> October 2021. The Claimant testified that he presently does car-tracking business and that he was employed by the Respondent in 2005 till 2016. He said that he was employed as an accountant on 6<sup>th</sup> December 2005. He stated that he served in that position until 2013 when he was appointed as the general manager. He testified that he earned Kshs. 118,689/- a month. He stated that the officials of Respondent called him one day at lunchtime and handed him over to CID officers who after some investigations found nothing. He testified that the Respondent took away his laptop and all his documents which were on his desk. He thus payment of his claim as sought.

5. The counterclaim for the defence was dismissed for reason the Respondent was absent and did not prosecute it. The Claimant and Respondent were to file submissions and in his submissions the Claimant submitted that the claim relates to unlawful termination of the Claimant. It was submitted that he was employed by the Respondent vide a letter dated 6<sup>th</sup> December 2005 as a General Manager in the

Finance and Administration Office. The Claimant submits that he served the Respondent diligently for a period of 11 years and on 21<sup>st</sup> December 2016, was dismissed from duty by the Respondent vide a letter dated 21<sup>st</sup> December 2016 based on a decision that was unprocedural, of pure malice and relied on false allegations. It was submitted that the termination of the Claimant was unlawful, malicious and it did not follow procedure and was also not justified and had no reasonable cause whatsoever. The Claimant submitted that the issues for determination were:-

- a. Whether the termination of the Claimant from employment by the Respondent was unlawful, unprocedural and unfair.
- b. Whether the Claimant is entitled to the reliefs sought.

6. On the issue as to whether the Claimant was unlawfully, unprocedurally and unfairly terminated from employment by the Respondent, the Claimant submitted that terminations are not administrative acts as the detrimental effect of it impacts are on the employee's reputation, advancement, job security and fulfilment. He submitted that before termination can be found to be valid, the same must be based on fair reasons and must be implemented pursuant to fair procedure. The Claimant submitted that the dismissal herein is actuated by malice and is based on unfounded and unsubstantiated allegations and the said dismissal has ruined the Claimant's career and reputation. It was submitted that this dismissal is in contravention of the provisions of the Constitution, the Employment Act and The Labour Relations Act. The Claimant submitted that four elements ought to be discernible for the procedure of termination to be considered lawful;

- a) An explanation of the grounds of termination in a language understood by the employee;
- b) The reason for which the employer is considering termination;
- c) Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- d) Hearing and considering any representations made by the employee and the person chosen by the employee.

7. The Claimant submitted that Section 41 of the Employment Act enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer. The Claimant cited the Court of Appeal decision in the case of **National Bank of Kenya v Anthony Njue John [2018] eKLR** where the Court of Appeal stated:- "*Section 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 the explanation. (2) Notwithstanding any other provision 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.*"

8. The Claimant submitted that the process of terminating his employment was done contrary to Section 41 of the Employment Act as the Respondent sought to dismiss the Claimant from employment without getting any proof of the alleged crime. Further, it was submitted, the Claimant was not granted any hearing or any notice of termination contrary to due legal procedure which amounts to an unfair labour practice. The Claimant submits that the Employment Act protects employees against unfair labour practices such as dismissal of employees without adhering to proper procedure and without any reasonable cause as provided for under Section 43(1) of the Employment Act. The Claimant submitted that he was terminated from employment because of allegations which remain matters that are not proved, unsupported or suspect. The Claimant submitted that he was never issued with notice to show cause letter by the Respondent, the allegations made against him were followed with far and wide reaching sanctions, termination before hearing his case. The Claimant submitted he was not granted an opportunity to state his case and defend himself. He placed reliance on the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** where the Court held that:

*"... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination."*

The Claimant further relied on the authority of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Limited [2013] eKLR** where the Honourable court observed as follows;

*"The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defense/state his case in person, writing or through a representative or shop floor union representative if possible. Thirdly, if it is a case of termination, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction"*

9. The Claimant submits that the Respondent did not follow the laws and rules of natural justice in dismissing him and he therefore was and still is innocent. The Claimant submitted that he was a dedicated employee who served the Respondent diligently for many years and for that period; there has been no complaint or case of misconduct or any warning letter and the allegation by the Respondent that there is a case at Parklands Police Station is a way of misleading this court. The Claimant submitted that the Respondent has not attached any OB number or

report to confirm the same. The Claimant submits that he is a stranger to the said allegations as they are unsubstantiated and untrue. The Claimant submits the right to fair administrative action and fair hearing are envisaged in the Constitution under Article 47 and 50 respectively. The Claimant submits that his rights as an employee were violated as he was condemned maliciously and terminated without trial. The Claimant asserts the process of terminating him was unprocedural, malicious and against the rules of natural justice. He cited the case of **George Onyango Akuti v G4S Security Services Kenya Ltd [2013] eKLR** where the Court stated:

*"Section 45 (4)(b) of the Employment Act permits the court to find a termination unfair if in the circumstance of the case the employer did not act in accordance with justice and equity.*

The Claimant submitted that on the question as whether he is entitled to the reliefs sought, the award of compensation is one of the primary remedies where the Court finds unfair termination or wrongful dismissal. The Claimant submitted that the procedure of granting reliefs sought in wrongful termination was espoused in the case of **Abisalom Ajusa Magomere vs Kenya Nut Company Limited [2014] eKLR** where the Court awarded relief to the claimant for wrongful termination. The Claimant submits that he should be accorded maximum compensation as provided for under Section 49 of the Employment Act 2007 as a result of wrongful termination as well as damages for loss of employment and embarrassment calculated as 12 months salary Kshs. 1,401,468/-; 3 months pay in lieu of notice – Kshs. 350,367/-; annual leave calculated per one month for the number of years the Claimant has worked for the Respondent 11 months Kshs. 1,284,697/- together with interest and costs of the suit.

10. The Claimant was accused of gross misconduct and bundled out of office. The Respondent in its defence asserted the Claimant was running a parallel business to the detriment of the Claimant's employer. The business profile of the company in question M/s Galstrack Enterprises Limited by Caroline Wanjiru (Finance) indicated that *"Our director brings in wealth of experience gathered over 10 years working in an AV company (Sight and Sound Ltd)*. The search of the company information indicates the company was registered on 23<sup>rd</sup> January 2015. The Claimant is listed as a director though his percentage of shareholding was not shown as the copy was not clear enough to indicate the number of shares held. Nevertheless, he is incorrect in his surmise that there was no reason to terminate. The Respondent had cause to terminate. However, where an employer opts to terminate the services of an employee for misconduct such as is alleged here, the employer must ensure the safeguards of Section 41 are adhered to. As the Claimant was not accorded any modicum of fair procedure in the termination the Respondent would be sanctioned for this by an award of compensation for the unlawful and unprocedural dismissal. The Respondent had sought to press a counterclaim but neither particularised the loss suffered nor availed evidence to this effect. As such the claims by the Respondent being unproved are accordingly dismissed. The Claimant sought in his submissions for far more than he had pleaded and as such cannot recover on the limbs sought other than the following for which judgment is entered for the Claimant as against the Respondent for:-

- i. A declaration be and is hereby issued that the termination of the Claimant's contract was unlawful and unprocedural.
- ii. Compensation for the unlawful dismissal from employment 1 month's salary being Kshs. 116,989/-.
- iii. Costs of the suit based on the award herein.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2021**

**NZIOKI WA MAKAU**

**JUDGE**