REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 640 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

RICHARD KIOKO KAKULI..... CLAIMANT

VERSUS

SAI RAJ LIMITED..... RESPONDENT

JUDGMENT

The main facts of this claim are not contested. The claimant was employed by the respondent originally on causal terms in different capacities until 1st January 2013 when he was engaged as a Decoroof Plant Machine Operator/Crusher Operator/Mixer. His first salary was Kshs.16,000. The same was by letter dated 1st March 2014 increased to Kshs.22,000 broken down into basic of Kshs.18,000, house allowance of Kshs.2,700 and transport allowance of Kshs.1,300. However by letter of demotion dated 1st November 2014 the claimant's salary was reduced to Kshs.16,000.

According to the claimant, he was issued with the letter of demotion on 11th November 2014. He declined to receive the letter and asked for an explanation for the demotion and reduction of salary. The following day on 12th November 2014 he reported to work and changed into the working uniforms. He then went to the office of Mr. Atil, the deputy Directors who had issued the letter of demotion and found him with Mr. Odera (Chief Accountant) and Mr. Festus (supervisor). When he asked why his salary was reduced he was told that if he did not want to work he should remove his uniform and leave. He complied removed the uniform and left. He never went back to the workplace after that date.

The claimant further states that among the terms of employment was a specific agreement on the issue of "*Confidentiality and Nondisclosure Agreement*" whose terms were extremely oppressive, unconscionable and curtail the claimants constitutional right to gainful employment in the event of termination of his employment by the Respondent. The said clause reads as follows;

> "*You shall perform your duties at all times for the betterment of the company. Should you be found doing anything malicious you can be subjected to police intervention. You cannot divulge any information relating to the company to any person what so ever outside the company premises. You will also not work for any fiberglass or related company in Kenya after you have worked with us. By signing this agreement it means you will* ***never*** *work for any fiberglass company in Kenya and it is your duty to let the potential employer taking you on for any job that you have signed the following agreement. This agreement is a life time agreement in relation to any fiber glass company. You also agree not to divulge any information relating to Sai Raj during and after our working with us. You may apply for a job in any other filed BUT NOT in the Fiberglass filed and or any other products Sai Raj is dealing and will deal with including plastics, refrigeration, queue management and trading lines. If found working you will be subject to a minimum penalty of $1OOOOOUSD of which you agree to by signing this agreement."*
>
> [Emphasis added]

The claimant avers that the said clause in the contract is unlawful, illegal and ought to be vacated and the claimant declared free to work in the fiberglass industry without encumbrance. The claimant avers that his training is in the fiberglass industry and the Respondents termination of employment coupled with the above term of the contract violate his fundamental rights under Article 30 and 41 of the Constitution of Kenya 2010, that is, the right not to be held in slavery or servitude, not be required to perform forced labour, the right to fair labour practices, to fair remuneration and reasonable working conditions.

The respondent's case is that when the claimant was employed on 1st January 2013, he was obedient and hardworking leading to the salary increase in March 2014 from Kshs.16,000 to Kshs.22,000. That after the salary increase the claimant's performance deteriorated resulting in him being issued with several warning letters. The respondent exhibited warning letters dated 5th September 2014 and 29th May 2014. It also

exhibited a letter cautioning the claimant on cleanliness dated 3rd July 2013. That because of the deteriorating performance the claimant was on 10th November 2014 issued with the letter of demotion which also reduced his salary. That the claimant was not happy with the demotion and did not report to work thereafter, what the respondent considered as absconding duty.

In his memorandum of claim dated 27th February 2015 and filed on 20th April 2015, the claimant prays for judgment against the respondent as follows –

i) One month's salary in lieu of notice of – Kshs.22,000.

ii) Damages in the sum of $100,000

iii) General damages.

iv) Detailed Certificate of Service.

v) Costs of this claim plus interests

The respondent filed a defence dated 6th and filed on 8th July 2015 in which it denies the averments of the claimant as set out in the memorandum of claim. He states that the claimant was unhappy with his demotion and absconded duty even before the demotion, instead of appealing or seeking review of the demotion. The respondent further avers that at the time of absconding duty the claimant had not paid Kshs.5,000 out of a loan of Kshs.10,000 advanced to him which he was to repay in two monthly instalments in October and November 2014.

The respondent avers that the claimant entered into the employment contract wilfully and denies that the confidentially and Nondisclosure Agreement in the contract was unconscionable.

It prays that the claim be dismissed with costs.

At the hearing the claimant testified on his behalf while the respondent called one witness Mr. Alex Muika, as Assistant Supervisor who testified on its behalf. Thereafter the parties filed and exchanged written submissions.

Claimant's Submissions

The claimant submitted that Section 10(5) of the Employment Act provides that no employment terms can be changed without consultation of an employee. For emphasise the claimant relied on the case of **Elizabeth Kwamboka Khaemba v BOG Cardinal Otunga High School Mosocho & 2 Others |2014| eKLR** where Wasilwa, J. observed as follows;

> *"The key position is that the employer cannot alter employee's employment contract without consulting the employee. The wording of the section is couched in mandatory terms, an indication that the employer cannot unilaterally revise the contract unless there is consultation. In the current case there was no consultation and the decision to change the duties and position of the claimant was made is shrouded in malice as an extension of the "disciplinary" process instigated against the claimant.*
>
> *The end result of changing the Claimant's contract without consultation with him is tantamount to terminating the existing contract and therefore amounts to an unfair and unjustified termination;"*

The claimant also relied on the decision by Marete J. in the case of

Kenya Plantation and Agricultural Workers Union v James Finlays (K) Limited [2018| eKLR.

It is further the claimant's submission that the termination of his contract was in violation of Sections 45(2)(a), (b) and (c) of the Employment Act. On this he relies on the case of **Gilbert Mariera Makori v Equity Bank Limited [2016] eKLR,** where the court observed as follows;

> *"Section 41 is very categorical on the procedure to be followed before an employee can be dismissed or terminated on grounds of misconduct, poor performance or physical incapacity. First the employer must explain to the employee in a language the employee understands, the reason for which the employer is contemplating the termination or the dismissal. This must be done in the presence of a witness of the employee's choice, who must be either a fellow workmate or a union shop floor official if the employee is a member of a union.*
>
> *After such explanation the employer must hear the employee's representations and the representations of the person accompanying the employee to the hearing. The employer must then consider the representations made by and/or on behalf of the employee, before making the decisions whether or not to dismiss or terminate the services of the employee."*

The claimant also relied on the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR**, where the court observed thus; -

> *"Section 41 of Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions,*

whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice.

The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets."

The claimant also relied on the case of **Jared Aimba v Fina Bank Limited [2016] eKLR** where the Court of Appeal found that –

"*However, under section 45 and 41 of the Employment Act, termination for a valid reason or on grounds of misconduct is supposed to be accompanied by a fair process involving notification of the employee of the grounds and affording the employee an opportunity to be heard prior to termination."*

The claimant further relied on the case of **Shankar Saklani v DHL Global Forwarding (K) Limited [2012] eKLR** where the Court held that a notice and a hearing are mandatory and necessary even in cases of summary dismissal only that in summary dismissal, the notice is permissible to be shorter than is prescribe by statute or contract. The claimant also relied on the case **of Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR** where Mbaru J. held that section 41 of the Employment Act, 2007 is couched in mandatory terms and where an employer fails to follow the mandatory provisions and an employee is terminated after such flawed process such termination is ultimately unfair. The claimant also relied on the case of **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR**, where Ndolo J. held that whereas each case would be considered on its own merits, noncompliance with any provisions of section 41 of the Act rendered any disciplinary action out rightly unfair.

On the issue of unconscionability, the claimant relied on the following cases:-

In the case of Margaret Njeri Muiruri where the court held as follows:-

"*Courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case (See Black's Law Dictionary, 9th Edition, Gardner, Ed.)"*

In the case of **Kenya Commercial Finance Company Ltd v Ngeny & Another [2002] 1KLR** where the court stated:

"*The court will not interfere where parties have contracted on arms-length basis. However by its equitable jurisdiction, this court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions, thereafter imposes additional terms upon the other party. Equity can intervene to relieve that party of such conditions."*

Halsbury's Laws of England Volume 22 (2012) 5th Edition at Paragraph 298 states of unconscionability:

"*Even in the absence of duress of persons or undue influence, there has long been jurisdiction to interfere with harsh and unconscionable transactions in several different areas of the law: for instance, in respect of salvage agreements; or against contractual penalties, forfeiture of mortgages, extortionate loans or expectant heirs. ... The jurisdiction of the courts to set aside is based on unconscientious conduct by the stronger party; relief will not be granted solely on the grounds that the transaction is unfair or improvident."*

The claimant submits that the notice contemplated under Section 40 of the Employment Act, 2007 is important in two respects.

1. Where the employer fails to prove the justification for termination of employment and;

2. Such termination of employment is inherently unfair in view of sections 43 and 45 of the Act.

The claimant submits that Section 43(1) of the Employment Act, 2007 provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reasons or reasons for termination and where he fails to do so, the termination shall be deemed to be unfair termination within the meaning of Section 45. Section 43(2) provides:

The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

The claimant avers that he was dismissed without notice, there was no hearing and he was not given a chance to present a defence. That the termination of his employment was unfair for lack of a valid and justifiable reason.

The claimant avers that his summary dismissal was unfair and unlawful and occasioned loss and damage. This is as follows;

Particulars of Unlawful Termination

a) Terminating the claimant's employment without reasonable cause

b) Terminating the claimant's employment on unsubstantiated grounds

c) Failure to give the claimant reasons for his termination

d) Failure to prove the reasons for termination

e) Engaging in witch hunt to unlawfully terminate the claimant's services

The claimant avers further that as a result of the unlawful termination, he has suffered great economic loss, damage and prejudice as regards his financial affairs.

Particulars of Damages of Suffered by the Claimant

i) One month's salary in lieu of notice of - Kshs.22,000/=

ii) Damages for unlawful termination in the sum of $ 100,000

iii) General damages.

iv) Detailed Certificate of Service.

Claimant submits that the Respondent's assumption that it had the capacity to terminate the services of the Claimant as a matter of right was a misconceived legal phenomenon in light of Section 43 of the Employment Act 2007. That the claimant was denied hearing as provided for by Section 41 of the Employment Act. The Human Resources Manual in any event, superseded the termination clause contained in the letter of contract agreement.

The claimant avers that his termination was not on the ground of poor performance; that the termination was on the ground of salary reduction. The Claimant states that he was told by his employer that if he did not want to work for that salary he should remove his uniform and leave and was immediately sacked. That the respondent has not rebutted through evidence the averments of the claimant.

The Claimant prays the Court to find that his Constitutional, Contractual and Statutory rights were violated. That the Court to grant the remedies as prayed and costs of this claim plus interests.

Respondent's Submissions

The respondent submits that the claimant has not proved his case to the standards set out in Sections 107 and 109 of the Evidence Act. It submits that it is both common and trite law in evidence that "*he who alleges must prove*". In this case, the burden of proof lies with whoever would want the court to find in his favour in support of what he claims.

That Section 107 of the Evidence Act states "***Whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."***

That respondent submits that it was imperative for the Claimant to prove that he was arbitrarily and unjustifiably terminated without his terminal dues and benefits. That it was on the Claimant to prove how his rights under both the Constitution and the Employment Act have been violated by the Respondent. The respondent relied on **Constitutional Suit No. 128 of 2006, Lt. Col. Peter Ngari Kagume & Others v Attorney General** where Nyamu J. (as he then was) stated that –

> *"When a court is faced by a scenario where one side alleges and the rival side disputes, the one alleging assumes the burden to prove the allegation."*

The Respondent further submits that it did not terminate the Claimant's employment. Rather he absconded work as from 22nd November or thereabout and did not return. That the Claimant refused and/or ignored intimations of the Respondent to return and sort the matter amicably.

That Section 35(c) of the Employment Act expressly states that

> **Where a contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of the notice in writing.**

The respondent submits that though the Claimant avers that he absconded work as a result of termination by the Respondent, the Claimant has failed to produce evidence to prove this assertion. The Respondent submits that no termination notice was issued to the Respondent and that no hearing before termination as expressed in Section 41 of the Employment Act was conducted. Furthermore, there was no summary dismissal issued against the Claimant for abandoning his post as put forth in Section 44 of the Employment Act. Further that the Confidentiality and Non-Disclosure Agreement was duly executed by the Claimant.

The respondent submits that the assertion by the Claimant that the discretion clause contained in the Confidentiality and Non-disclosure agreement curtails his rights under the Constitution and Employment Act from working for gainful employment for any other employer in Kenya: is false both in fact and in law.

That Section 2 of the Contracts in Restraint of Trade Act expressly states "***Any agreement or contract which contains a provision or a covenant whereby a party thereto is restrained from exercising any lawful profession, trade, business or occupation shall not be void on the ground that the provision or covenant is therein contained."***

The respondent submits that Section 3 of the Contracts in Restraint of Trade Act provides for voiding of such provisions in instances of termination contrary to the terms of service: ***"Notwithstanding and in addition to anything contained in section 2, any such provision or covenant shall be void in any case where an employer terminates the services of an employee in contravention of the terms of the contract of service."***

The respondent further submits that during cross examination, the Claimant admitted that he had received special training from the Respondent in *deco roof*. That the claimant admitted that the deco roof was not done by any other person and entity and therefore special to the Respondent.

That it is both common and trite law that a party of appropriate age and understanding is normally bound by his signature to a document, whether he reads it or not. That this was expressed in the case of **Levison v Patent Steam Carpet Cleaning Co Ltd [1977] 3 All ER 498**. In essence, a party is estopped from denying his consent to be bound by the provisions/terms contained in that document.

That according to **Halsbury's Laws of England, 5th Edition**, the absence of a limit will not make a restraint void. For it is reasonable that a restraint imposed, in respect of the limit as to time, for the protection of a business should be wide enough to protect that business in the hands of not only the covenantee, but also of the legatee, representative or the assignee, and with this object the restraint may be co-extensive with the lifetime of the covenantor.

That Article 40 of the Constitution provides *that "**The State shall support, promote and protect the intellectual property rights of the people of Kenya.**"* That it has been on the admission of the Claimant and the Respondent witness that the Respondent's processes and trade were secret and unknown to its competitors.

On the remedies sought by the claimant the respondent submits that it did not terminate the claimant's employment and the claimant is therefore not entitled to damages as prayed or pay in lieu of notice. It is further the respondent's submission on the prayers for damages amounting to USD one hundred thousand ($100,000), that the claimant has not proved the loss occasioned to him so as to petition this court to award him such an amount.

That damages must be specifically pleaded and strictly proven before a court of law before they can be awarded as was held by the Court of Appeal in **Hahn v Singh. Civil Appeal No. 42 of 1983 [1985] KLR 716**, at P. 717 and 721 where Kneller, Nyarangi, JJA, Chesongi Ag. JA. stated as follows: -

> "*Special damages must not only be specifically claimed but strictly proved … for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularly of proof required depends on the circumstances and nature of the acts themselves."*

The respondent urged the court to take judicial notice of Section 2 of the Contracts in Restraint of Trade Act. ***"Any agreement or contract which contains a provision or a covenant 'whereby a party thereto is restrained from exercising any lawful profession, trade, business or occupation shall not be void on the ground that the provision or covenant is therein contained."***

It prays that the claim be dismissed with costs.

Determination

I have considered the pleadings, evidence and submissions of the parties herein. The issues for determination are the following –

1. Whether the claimant's employment was terminated unfairly or he absconded duty.

2. Whether the claimant is entitled to the remedies sought.

One the issue whether the claimant absconded duty or had his employment terminated, the claimant testified that he was issued with a letter of demotion which reduced his salary from Kshs.22,000 to Kshs.16,000 per month. This was admitted by the respondent who indeed is the one that exhibited the letter of demotion.

The letter accused the claimant of several incidents of misconduct, which are not substantiated. The letter is reproduced below –

> *"Sai Raj Limited*
>
> *P.O. Box 43490-00100*
>
> *Baba Dogo Rd*

Ruaraka,

Nairobi, Kenya

+254 20 8562254/3597777/0

To: MR. RICHARD KIOKO Date of agreement: 01/11/2014

LETTER OF DEMOTION

We are sad to inform you that after reviewing your performance

and output in the recent months, we have decided to demote you. You are being relegated due to the following reasons:

i. Not following instructions of the seniors

ii. Disobedience to your seniors

iii. Extremely low productive output

On a daily basis, you are given several tasks and you fail to complete them on time. This has been pointed out to you on several occasions and you have also been fined for the same reason many times in the recent past.

Your salary is also hereby reviewed down as follows:

Monthly Kes.16,000 broken down as a basic salary of Kes.14,000/= and a housing allowance of Kes.2,100/= and a transport allowance of Kes.1,900/=

We hope you can improve on your performance after which your contract will be reviewed again.

Regards,

Adil Noordin

Decoroof Manager – Sai Raj Ltd"

The warning letters attached by the respondent in its bundle of documents are dated 3rd July 2013, 29th May 2014 and 5th September 2014. After this the claimant received the letter of demotion. The letter does not state what the claimant did between the date of the letter dated 5th September 2014 and the letter of demotion which is dated 1st November 2014, though issued to the claimant on 11th November 2014.

A warning and a demotion are both disciplinary measures which can only be taken against an employee after being taken through a disciplinary procedure and found guilty

An employer is therefore required to take an employee through disciplinary process before a decision to demote or issue a warning letter is arrived at.

Secondly, a demotion and salary reduction can only be resorted to as an alternative to termination upon the choice of an employee. This is because of the consequences of a demotion. A demotion impacts on the self-esteem of an employee while a reduction of salary impacts on the quality of the employee's life. It would mean that the employee would have to adjust his expenses so that they can fit within the reduced salary. Thus an employee must be consulted and must be given an opportunity to choose between either termination or reduction of salary. It is not the unilateral decision of the employer to reduce the salary of an employee.

In this particular case the respondent has further stated that the claimant had taken a loan that was to be recovered from his October and November 2014 salary. The letter of demotion does not state the effective date of demotion but being dated 1st November 2014, it is logical to conclude that the claimant would have earned the reduced salary in the month of November 2014.

The claimant testified that upon asking for reasons why the salary was reduced he was told that if he did not want to work he should leave and that is what he did. This evidence is not controverted by the respondent. RW1 was not at the meeting where this conversation transpired. He testified that there was no meeting on the date the claimant left. He however contradicted himself severally over the issue during cross examination.

A unilateral reduction of salary is a fundamental breach of contract for which an employee is entitled to repudiate the contract as was held in the case of **Milton M. Isanye v Aga Khan Hospital, Kisumu (2017) eKLR,** the court observed that –

"A constructive dismissal occurs where the employer does not express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tenders resignation."

In this case I have already observed that the demotion and reduction of salary was unfair as the claimant was not given a hearing. This was sufficient ground for the claimant to terminate his contract on grounds of fundamental breach and seek compensation.

I have further observed that the claimant's averments that he was told to go away when he asked for reasons for the reduction of salary was not rebutted by the respondent.

Whichever way one looks at the case, whether from the point of view of unfair termination or repudiation leading to a presumption of constructive dismissal, the respondent is liable for the unfair termination and I hold accordingly. The allegation that the claimant absconded duty is not supported by any evidence

Remedies

The claimant is entitled to pay in lieu of notice which I award him at Kshs.22,000.

The prayer for damages in the sum of USD 100,000 was not justified by the claimant. It is not clear why he made a claim in US dollars when his salary was in Kenya shillings and his contract did not make any reference to US dollars.

Be that as it may, the law in Kenya provides for maximum compensation up to 12 months' salary only for unfair termination of employment.

Taking into account the circumstances of this case, that is the very

highhanded manner in which the respondent treated the claimant, the manner in which he was terminated, the length of service and all other relevant factors, it is my finding that compensation of 8 months' salary is reasonable in this case. I thus award the claimant the same in the sum of **Kshs.176,000.**

The claimant further prayed that I declare clause 1 of his contract under the title "*Discretion*" which forbids him to work in a company dealing with fibreglass unconscionable. I agree with him. The respondent cannot restrain any employee from using his learned skill for life unless it compensates him for the same. Otherwise it would be an unfair denial of livelihood for the claimant. Had the restraint been only against disclosing the company's trade secrets or a total bar for a specific period of say one year, then it would have been reasonable.

I thus declare the clause unconscionable, null and void.

The respondent shall pay the claimant's costs to this claim and interest shall accrue on decretal sum from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF APRIL 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE