



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1794 OF 2015

JOHN G. THUMBLI.....CLAIMANT

VERSUS

KENYA AIRPORTS AUTHORITY.....RESPONDENT

JUDGEMENT

1. The claimant through a memorandum of claim filed on 8th October, 2015 averred he was employed by the respondent on 15th April, 2004 as General Manager – Finance. According to him, he served the respondent diligently and with utmost dedication. Reviews and appraisals on his performance at the Finance Department were exemplary.
2. The claimant stated that the respondent as a public body was subject to the Public Procurement and Disposal Act in procurement of goods and services. The Act provided for procedures to be followed and the responsibility of various actors within the procurement proceedings.
3. Sometimes in 2011, following approval by the respondent's board of Directors, the respondent invited bids for tender No. KAA/JKIA/752 for provision of Passenger Transfer Services (Apron Bus Services at JKIA. In line with the said Act the tender was advertised, bids returned, evaluation conducted, the tender awarded, negotiations carried out. Letter of offer issued and a contract eventually signed.
4. According to the claimant the resultant contract was a pure business concession that was self-financing where the concessionaire was to fund total costs of the contract and charge for services which was to be paid from charge levied on airline operators. The tender award was not contested by any bidder before the Public Procurement Administrative Review Board or before any court of law and no irregularity was raised at all.
5. The claimant further alleged that throughout the procurement process he does not invite bids, evaluate or award tenders or sign any contract. Sometimes on 15th May, 2015 the President during the opening of a terminal facility at JKIA issued a directive that persons responsible for the said tender should be held to account. On 20th May, 2015 a press release was issued to newsrooms forwarding the name of the claimant as amongst those interdicted for 3 months ostensibly to pave way for investigations.
6. According to the claimant it was not clear what had precipitated the said directive or the basis upon which the same was issued. The claimant was not aware of any misfeasance on the subject tender or any investigations being carried out by the various oversight institutions including Public Procurement Oversight Authority. On 18th May, 2015 the respondent wrote to the claimant demanding a statement and on 19th May, 2015 the respondent served the claimant with a show cause letter and interdiction letter for a period of three months. Further the claimant furnished the respondent with a detailed response to each of the allegations raised against him.
7. On 23rd June, 2015 the claimant was invited to clarify certain issues arising from his response to show cause letter, the claimant was however never allowed to have a fellow employee of his choice to be present during the said meeting besides no meaningful hearing was conducted and the said meeting was for all intents and purposes a mockery and intended to show semblance of a fair hearing while in essence a decision to terminate the claimant's service seemed to have already been reached.
8. On 27th July 2015 the claimant was issued with a letter of termination. The said termination letter did not fault the claimant on anything in particular that he did or where his involvement in the procurement process came in. The said termination letter according to the claimant was laced with generalized conclusions intended to validate the respondent's decision. The claimant further alleged that following investigations into the said procurement by EACC no irregularities were established and the claimant was exonerated.
9. The respondent on its part alleged that on 18th May 2015 the respondent wrote to the claimant following a directive from the President to the respondent's Board to ensure accountability over the issue of tender No KAA/JKIA/752. In the said letter the claimant was requested to forward a statement on his involvement in the tender and more specifically why the contract was awarded given that the World Bank had

provided funds to procure seven apron buses. The claimant responded to the letter and indicated inter alia that he was a member of the tender committee which deliberated on the said tender. He further stated that the World Bank funded apron buses were additional buses and had no relationship to the tender in question.

10. The claimant was subsequently interdicted on 19th May, 2015 pending investigations. In the letter of interdiction the claimant was further asked to show cause why disciplinary action should not be taken against him for allowing a procurement process to go on with clear knowledge there were no adequate funds as recommended by the first negotiation committee, accepting to be included as a member of a negotiation committee on a matter which was yet to be concluded by the tender committee where he was the Chair, failure to advise the negotiation team on financial aspects during the negotiations held on 12th August, 2013 to counter the projected cost analysis as provided by Ms Relief & Mission Logistics Ltd, failing to advise the team and management on the negative financial impact the authority was to be exposed to as a result of the contract being skewed to the disadvantage of the authority.

11. On 10th June, 2015 the claimant responded to the show cause letter indicating inter alia that he had no power to stop or allow the procurement process and that he was not aware of any negative financial impact the authority was exposed to as a result of the contract. On 23rd June, 2014 the respondent wrote to the claimant inviting him for a disciplinary committee meeting scheduled for 26th June 2015.

12. Following the disciplinary committee meeting, the respondent wrote to the claimant terminating his service after his written and oral response was found unsatisfactory. In the termination letter the claimant was informed that he had carelessly and improperly performed his duties and that he would be entitled to three months' salary in lieu of notice, salary and allowances upto 26th June, 2015, leave days earned but not utilized and pension benefits.

13. In his oral evidence the claimant reiterated the averments in the statement of claim and further stated that he was adopting as his evidence in chief the witness statement filed on 8th October, 2015 and also his bundles of documents filed with the claim. The claimant stated that his termination was in connection with investigations by EACC where he was exonerated from any wrong doing in connection with the tender. His termination occurred before the conclusion of investigations by EACC.

14. In cross-examination he stated that he was a member of the tender committee as deputy chair. It was his evidence that he received the letter dated 18th May, 2015 and responded to the issues raised in the letter. He was thereafter interdicted and asked to show cause in the interdiction letter. He responded giving his explanations and reasons. He was thereafter invited to a disciplinary hearing by the Board. He attended and participated. He was terminated thereafter.

15. The claimant stated that he never provided any advisory opinion to the tender committee and never provided any report on the financial aspects of the tender. It was his testimony that the General Manager-Finance was different from tender process.

16. In re-examination he stated that he never wrote to EACC and that the gazette notice was by EACC not PPOA. It referred to the tender which was the basis of the termination. He further stated that it was not his power to award contracts at the respondent and that he did not initiate any procurement service. The tender was initiated by the Board. It was further his evidence that he did not decide which entity should be awarded a tender. The claimant further stated that no advisory was sought from him and that procurement was an independent process and no advisory was needed. He further stated that the buses were out sourced and there was therefore no financial implication on the respondent.

17. The respondent's witness Mr Daniel Chepnoi Mos informed the court that he worked for the respondent as a legal assistant. He adopted as his evidence in chief the documents filed by the respondent with the memo of response. According to him, the claimant had the responsibility to prudently manage respondent's finances. He stated that the claimant was issued with an interdiction letter which alluded to the procurement process. There were no sufficient funds for the tender. The claimant failed to advise the respondent's tender committee about it.

18. According to Mr Mos, the tender had negatively impacted on the respondent. There was actual financial risk. The claimant had the obligation to advise the Board on any matter which had financial implications. The claimant offered no advice to the Board and management. The claimant was informed of the reasons for termination and it had nothing to do with the tendering process. The claimant never appealed the termination and he was not the only one terminated. He further stated that the investigations by EACC were different from the respondent's internal investigations.

19. In cross-examination he stated that the claimant's termination was partly due to the tender for apron buses. There was a presidential directive that those involved in the tender be held to account. The respondent issued a press statement pursuant to the presidential directive. The claimant was among those interdicted. The interdiction was to pave way for investigation. He however did not have the investigation report in court. He was however aware EACC conducted investigations and found nothing wrong with the procurement of the apron buses. There was no evidence of excessive monthly charges. He further stated that the termination was before conclusion of investigations by EACC. He further stated that the tender was approved by the Board and that the claimant did not sit in the Board. Mr Mos further stated that the respondent was not to incur any expense in the concessionaire tender and it was the respondent who initiated the tender and awarded it.

20. It was further the evidence of Mr Moss that the claimant did not evaluate tenders alone. The decisions are taken as a collective and that the claimant had no veto powers and that he did not sign contracts. He further stated that there were no issues with the procurement prior to the presidential directive and further that there was no letter to the claimant asking for advice on the tender.

21. Justice Nderi Nduma in the case of **Kennedy Maina Mirera Vs Barclays Bank of Kenya Ltd [2018] eKLR** stated that in a claim for unfair termination the claimant must adduce a prima facie case that tend to show that his employment was not terminated for a valid reason and that the employer did not follow a fair procedure in terminating his employment. Once the claimant presents a prima facie evidence to that effect, the burden shifted to the employer to rebut that evidence by demonstrating that there was valid reason to terminate the

employment and in effecting the termination, a fair procedure was followed. If the rebuttal is not sufficient then the claimant is said to have proved his case on a balance of probabilities.

22. The Learned Judge clearly and accurately expounded and elaborated on the provisions of section 43(1) of the Employment Act and I have nothing useful to add. The claimant contested his termination on the main grounds that the tender in issue which informed his dismissal was in accordance with the Public Procurement and Disposal Act. The tender was issued by the respondent, bids evaluated and the tender awarded and contract eventually signed. According to the claimant, although he sat in the tender committee, the decisions were made as a collective.

23. The claimant further stated regarding accusation over allowing the tender to go on without an advisory over the financial implication of the tender, that the tender was a concessionaire agreement and the respondent was not to incur any expense. Second the Board before awarding the tender and having the contract signed never wrote to him asking for his opinion on the financial implications of the tender. The claimant further stated that the tender went on well until the presidential directive that those behind the tender be called to account. The claimant further stated that the tender was subject of investigations by EACC who later returned that there was nothing irregular with the procurement process and the tender. The claimant had however been terminated by the time the EACC gave the outcome of its investigations. It was for these reasons that the claimant felt there was no valid reason for the termination of his contract.

24. The respondent on the other hand justified the termination on the grounds that the claimant failed to give an advisory on the financial implications of the tender and that the tender exposed the respondent to risk of loss. The respondent further stopped short of stating that the termination was as a result of the presidential directive that those behind the tender be held to account.

25. The evidence presented by the respondent in support of these justifications was rather cloudy and ill-grounded. In fact the respondent's witness Mr Mos admitted in court that there was nothing wrong with the tender until the presidential directive. Further, whereas the respondent alleged that the tender exposed it to financial risk no evidence was produced to support this claim besides the evidence by the respondent 's witness Mr Mos contradicted this allegation when he admitted in cross-examination that the contract was a concessionaire agreement where the contractor would collect their charges from airlines that used the apron buses and that the contract had no financial implications on the respondent.

26. As observed above, in a claim for unfair termination of employment, once the claimant has established prima facie case that there existed no valid or justifiable reason for termination, the respondent/employer has the duty to justify the termination. In this particular case the claimant has satisfied the court prima facie that the respondent had no valid or justifiable reason to terminate his service. Any reason if at all proffered by the respondent was the presidential directive over the tender that those responsible be held to account. The directive coming from an office as powerful perhaps operated in the minds of the respondent's Board that holding to account meant someone or some people had to be sacrificed through termination of their contracts of service. This cannot be a justifiable or valid reason as contemplated by section 43 (1) of the Employment Act.

27. It is the courts view that the termination of the claimant's contract was absolutely unnecessary and selective since it was the respondents Board that finally awarded the tender only to turn around and terminate the claimant's contract of service for no valid or justifiable cause save for an amorphous directive which was not supported by any forensic or tangible evidence.

28. In this particular case the court will award the maximum 12 months' salary as compensation for unfair termination of service. That is to say the sum of Kshs 11,142,024/=. This will be in addition to the claimant's terminal benefits mentioned in the termination letter if not paid already.

29. The award shall be subject to taxes and statutory deductions but shall attract interest at court rates until payment in full. The claimant shall further have costs of the suit.

It is ordered.

Dated at Nairobi this 6th day of May, 2020

Abuodha Jorum Nelson

Judge

Delivered this 6th day of May, 2020

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

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