REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 881 OF 2014

(Before Hon. Justice Mathews N. Nduma)

ERIC MWANZIA.....CLAIMANT

VERSUS

INTERCONTINENTAL HOTEL.....RESPONDENT

J U D G M E N T

1. The Claimant filed suit on 26th May, 2014 seeking the following reliefs:-

a) A declaration that the Claimant's dismissal by the Respondent is unlawful and unfair.

b) Reinstatement of the Claimant to his previous post without loss of any benefits.

c) In the alternative payment of the following benefits:-

(i) Salary inclusive of allowance and benefits for 19 years being the remainder of the period the Claimant would have worked until lawful retirement being the sum of Kshs.87,339,960/-.

(ii) Annual increase at the rate of Kshs.11,492.10 per annum for the remainder of the working period i.e. Kshs.2,620.199/=.

(iii) Airtime allowance at the rate of Kshs.15,000/- per month until his retirement ie Kshs.3,420,000/=.

(iv) Annual leave allowance at Kshs.12,500/- p.a. for the remainder of the period ie Kshs.237,500/=.

(v) Compensation for unlawful and unfair termination.

(d) An order for costs and interest.

2. The Claimant was represented by M/s. J. A. Guserwa & Company advocates. The Claimant testified under oath in support of particulars of claim.

3. The upshot of the Claimant's case is that he was employed by the Respondent on 19th December, 2008 in the position of Conventions & Banquets Manager. The Claimant worked well and was promoted to the position of Director of Convention and Event Sales. His salary was 383,070 as at August, 2018.

4. That the Claimant being an employee in the Band 4 Grade was entitled to annual bonuses as at 30th July, 2012 and telephone allowance at Kshs.15,000 per month.

5. The performance reviews for the period 2009, 2010, 2011 and 2013 showed that the Claimant exceeded expectations in his work performance.

6. On 15th May, 2013 the Claimant was summoned by the Respondent and informed that an abusive email had been sent to the Respondent's General Manager from the Claimant's domain name. The Claimant was arrested and charged in criminal case no. 1787/2013 with the offence

of sending an annoying email. The prosecution was terminated and the claimant acquitted for lack of any evidence in support of the charges.

7. The Claimant was placed on unscheduled leave upon return to his work after acquittal. The Claimant was given a letter to show cause why his employment should not be terminated for sending an annoying mail to the General Manager. The Claimant demanded to be shown the email but the same was not provided. The Claimant declined to respond to the letter to show cause in writing.

8. The Claimant was summoned to appear before a disciplinary hearing. The Claimant appeared with his advocate. The Claimant declined to make an oral response to the charges made against him, demanding that he be shown the purported email he had written to the General Manager. The advocate made submissions to the effect that the Claimant could only respond to the charges if the purported derogatory email was provided to him. The advocate emphasized that the Claimant had been acquitted of the charges and had nothing to explain.

9. A suit for malicious prosecution filed by the Claimant against the Respondent and the Attorney General was subsequently dismissed for want of proof.

10. The Claimant prays that the dismissal be declared unlawful. That he be reinstated to his job and in the alternative he be paid compensation and terminal benefits set out herein before.

Defence

11. The Respondent filed a Memorandum of Reply to the suit on 8th June, 2015. The Claimant called RW 1 Stephen Mutuwa a Senior Director, Human Resources, Africa and RW 2, Caroline Wanjiru Karanja Assistant human Resource Manager of the Respondent who led the conduct of the disciplinary hearing against the Claimant. The two witnesses testified that the Claimant was a good employee. That the Claimant was however suspected of sending derogatory email to the General Manager of the Respondent Mr. Kare Hala. That the Claimant was reported to the Police, charged with the offence of sending annoying mail but was acquitted for lack of evidence.

12. That, notwithstanding the Claimant was given a notice to show cause why his employment should not be terminated for gross misconduct.

13. The Claimant declined to respond in writing to the notice to show cause but instead his advocate wrote a letter demanding the Claimant to be furnished with the said email.

14. That the Claimant was subsequently called to a disciplinary hearing on 3rd August, 2013 to answer to the charge. The Claimant came with his lawyer. He declined to give an oral explanation to the disciplinary panel but instead his advocate reiterated that the Claimant had nothing to say unless the purported derogatory email was furnished to him.

15. The panel deliberated the matter and decided that the Respondent could no longer trust the Claimant and summarily dismissed him by a letter dated 26th August, 2013.

16. RW 1 and RW 2 emphasized that the Claimant failed to show good faith by defending himself in writing and orally. That Respondent could not trust him, hence the summary dismissal.

17. The witnesses stated that Claimant was paid all his terminal benefits. That the summary dismissal was for a valid reason. That despite the summary dismissal, the Claimant was paid one month salary in lieu of notice; was paid in lieu of leave days not taken and the suit be dismissed with costs.

Determination

18. The issues for determination are:-

(a) Whether the dismissal of the Claimant was for a valid reason and was done following a fair procedure.

(b) Whether the Claimant is entitled to the reliefs sought.

Issue (a)

19. From the totality of evidence before court, the Respondent failed to present the Claimant with any evidence on the allegations made against him to the effect that he had written an annoying email to the General Manager. The request by the advocate for the Claimant to the Respondent to furnish that claimant with the alleged email and the details of alleged domain from where the email originated was not heeded before and during the disciplinary hearing. The evidence by RW 1 and RW 2 clearly shows that the Respondent merely suspected the Claimant to be the source of the derogatory email. No evidence was presented before court also to demonstrate the truthfulness of the allegations made against the Claimant. The Respondent treated its very Senior Director badly, by causing him to be arrested, and charged without any evidence at all against him. Indeed, the Respondent failed to present any evidence before the Magistrate Court hence the termination of the charges.

20. The evidence by RW 1 and RW 2 that the Claimant failed to defend himself is without basis. The two letters by the advocate of the Claimant dated 23rd August, 2013, written to RW 1, clearly protested the innocence of the Claimant on all allegations and the Claimant demanded provision of documentary evidence by the Respondent to the contrary.

21. Clearly, the action by the Respondent violated sections 41, 43 and 45 of the Employment Act 2007. The Respondent had no valid reason to summarily dismiss the Claimant. The Respondent also failed to provide relevant documents to the Claimant to allow him to reasonably defend himself against these spurious allegations based on mere suspicion.

22. The process followed in dismissing the Claimant lacked transparency and was not fair also.

23. Accordingly, the summary dismissal of the Claimant was not for a valid reason and was not done following a fair procedure.

24. The Claimant is entitled to compensation in terms of section 49(1)(c) and (4) of the Acts.

Issue (b)

25. Regarding the issue whether the Claimant is entitled to the reliefs sought, the court finds as follows:-

Compensation

26. The Claimant held a very Senior Position in the Organization Structure of the Respondent. He had brilliant career prospects which were instantly destroyed on mere suspicion. The Claimant was embarrassed by unfounded criminal charges and prosecution, which were terminated for lack of evidence. The claimant lost his source of income without notice and suffered loss and damage. The Claimant did not contribute to the dismissal in the court's view. The claimant was not compensated for the loss of career growth and development. The Respondents confirmed that the Claimant was an excellent employee until the suspicions sufficed. This conduct by the Respondent was in the least most embarrassing and should be discouraged especially at this level of very Senior Management positions.

27. The court relies on the case of **Dr. Samson Gwer & 6 others v KEMRI & 3 others [2014] eKLR** in support of compensation equivalent to ten (10) months' salary, in compensation for the unlawful and unfair dismissal of the Claimant in the sum of Kshs.(383,070 x 10) 3,830,700.

28. The claim for loss of future earnings set out in paragraph 22(a)(i), (ii), (iv) is without any sound basis in law and is dismissed.

29. The Claimant wished to be reinstated to his previous position. The court considered this to be inappropriate remedy in the circumstances of this case given the level of the position and the direct relationship entailed on a daily basis, with the General Manager, who the Claimant was wrongly accused of having insulted in the anonymous emails.

30. In the final analysis, Judgment is entered in favour of the Claimant as against the Respondent as follows:-

(a) Kshs.3,870,700 in compensation.

(b) Interest at court rates from date of judgment till payment in full.

(c) Costs of the suit.

Dated and Signed in Kisumu this 11th day of February, 2019

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 15th day of February, 2019

Maureen Onyango

Judge

Appearances

M/s Guserwa & Co. Advocates for Claimant

Mr. Kontos for Respondent

Daniel Ngumbi – Court Clerk