REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 497 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

JEROME J. DUFOURG...CLAIMANT

VERSUS

DOUGLAS RATEMO...1ST RESPONDENT

ZACHARIA OGOLA...2ND RESPONDENT

NICODEMUS BORE..3RD RESPONDENT

(ALL SUED AS OFFICIALS OF FC TALANTA)

JUDGMENT

This claim arose out of an employment contract between Jerome J Dufourg and FC Talanta through its officials; the Claimant and Respondents respectively.

The Claimant is a male adult citizen of the Republic of France. The 1st, 2nd and 3rd Respondents are the respective registered Chairperson, Secretary and Treasurer of FC Talanta, a society registered under the Societies Act CAP 108 laws of Kenya and operating in Kenya.

The claimant was employed by FC Talanta by a letter dated 21st January 2013 as the Executive Director. The terms of the contract of employment were that the claimant would be paid a monthly salary of Kshs. 100,000; the contract would run for a period of one year effective from 4th February 2013 and that the claimant would be issued a return ticket at the end of the contract.

The respondents filed their memorandum of response on 11th April 2013 in which they denied the allegations in the memorandum of claim. They averred that the claimant never performed his functions within the terms of the contract upon his assumption of office, and that the contract was terminated in October 2013 on grounds of misconduct in accordance with the relevant law.

The claimant testified on his behalf at the hearing. The 1st respondent testified on behalf of the respondents. Both parties filed and exchanged written submissions.

Claimant's Case

It is the claimant's case that the respondents frustrated the contract through constant sabotage and lack of support. That the respondent failed, neglected and/or refused to assist the claimant acquire a work permit, leading to claimant's constant harassment and assault by immigration officials on 28th October and 1st November 2013 at the behest and approval of the respondents leading to his eventual exit from the country due to the risk of deportation.

It is further the claimant's case that he was subjected to poor working conditions by the respondents who failed to reimburse the claimant for expenses he incurred in the normal line of duty subjecting him to frustration and financial embarrassment. Further the claimant avers that the respondents failed to facilitate the claimant's travel to attend several work related activities.

The claimant avers that these frustrations caused him to angrily communicate his frustrations to the respondent as he is of an outspoken nature.

It is further the claimant's case that the respondents failed to comply with due process in dismissing him and further failed to comply with

the requirements of natural justice, that the grounds for his summary dismissal were premised on bad faith as a result of speaking out his mind against the frustrations he was subjected to in his employment, that the disciplinary hearing was conducted in bad faith as notice of the hearing was given on Monday 21st October 2013 at 10.01 pm and the meeting was to take place on 22nd October 2013 at 2 pm.

The claimant relied on the case of ***The Management Committee of Makondo Primary School and Another –V- Uganda National Examinations Board, HC Misc. Civil Application No. 18 of 2010*** where it was held as follows –

> "*It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem* literally translates into 'hear the parties in turn*, and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."*

The claimant further contends that the respondents did not comply with Section 4(3) of the Fair Administrative Actions Act which provides for prior and adequate notice of the nature and reason by the proposed administrative action and an opportunity to be hard and to make representations in that regard.

The claimant further relies on the case of ***David Gichana Omuya –V- Mombasa Maize Millers Limited (2014 eKLR*** in which he court held –

> "*Section 41 of the Employment Act requires an employer to notify and explain to art employee in a language the employee understands of the reasons it is considering for terminating the services of the employee. The employer is also under an obligation to hear and consider any representation which the employee may make before taking the decision to terminate an employee.*
>
> *During the process the employee is entitled to have a fellow employee present and if a union member, a shop floor union representative.*
>
> *The requirements of section 41 of the Act have long pedigree in administrative/public law and arc usually referred to as the rule of natural justice. In employment law and practice, it is called procedural fairness."*

The claimant further relied on the decision in the case of ***Zakayo Karimi and Another –V- Royal Nairobi Golf Club (2017) eKLR*** in which the court held that notice of less than one day is insufficient and prejudicial rendering disciplinary process unfair.

It is further the claimant's case that reason for suspension hearing were not communicated to him and that the grounds for summary dismissal were not stated in the notice sent to him. The claimant relied on the case of ***George Onyango Akuti –V- G4S Security Services Limited (2013) eKLR*** where the court stated that Section 41(4)(b) of the Employment Act permits the court to find a termination unfair if in the circumstances of the case the employer did not act in accordance with justice and equity and further that an unfair termination could be because of no notice, no reasons, failure to comply with a statute or terms of the actual employment contract. The court further observed that "*The obligation on an employee is not as onerous as the obligations of an employer*,"

The claimant submits that he is entitled to the prayers sought as the respondents violated his rights under Articles 28, 41 and 48 of the constitution. He prays that the court grants all the reliefs sought in his memorandum of claim.

Respondents' Case

The respondent's case is that the claimant having been employed on 4th February 2013 and his employment terminated on 27th October 2013, is by virtue of Section 45(3) of the Employment Act not entitled to complain that he had been unfairly terminated as he had been in employment for only 9 months. The respondents submitted that in the case of ***Damsh Jalango and Another –V- Amicabre Travel Services Limited***, Rika J. observed that the decision in ***Samuel G. Momanyi –V- The Attorney General in Petition No. 341 of 2011 (2012) eKLR*** –

> "*… blurs the intention of Parliament in creating qualifying periods for employees to access certain rights and obligations; that employees are not normally recruited at face value and parties must be allowed a period of leaving each other*."

The respondent further referred to the **English Unfair Dismissal and Statement for Reasons of Dismissal (Variation of Qualifying Period) Order, 2012** which provides –

> "*There are strong objective reasons why qualifying periods are deemed necessary; and it is best left to the social partners to set the rules that suit the employment relationship in enforcing a right or fundamental freedom in the Bill of Rights. Adequate care and judicial caution is necessary because some of the limitations on such a right or freedom are justifiable in an open and democratic society; as stated in article 22 of the Constitution... To qualify for service pay under Section 35 of the Act an employee neds to have worked for a specific period."*

Relying on Sections 44, 45(2) and 46 of the Act, the respondent submitted that the claimant was given warnings and opportunities to reform but to no avail. That the Football Kenya Federation (FKF) wrote to the respondent's club FC Talanta, warning it of adverse action for the claimant's gross misconduct and went ahead to suspend the claimant from all football activities in the country. The respondent submitted that an employee's incompatibility is a fair reason for termination, relying on the case of ***Dede Esi Annie Amanor –Wilks –V- Action Aid International (2014) eKLR*** where the court upheld employee incompatibility as a fair reason for termination, observing that employers are

entitled to have harmonious working relationships in their organisations, and can do so by weeding out troublemakers, eccentrics and disruptive employees from the organisation. That what employers are required to demonstrate in such circumstances are that they gave the employee a chance to explain or rectify the incompatible behaviour. The respondent submits that the claimant remained of volcanic disposition and therefore there was justifiable, valid and fair reason to dismiss him from employment. The respondent submitted that it had demonstrated in its pleadings the nature of the claimant's character.

The respondent further submitted that the club was entitled to dismiss the claimant for gross misconduct under Section 44 of the Act relying on the case of ***Linus Barasa Odhaimbo –V- Wells Fargo Limited (2012) eKLR***.

The respondent submitted that that the Claimant –

i. Was indefinitely suspended by the Football Kenya Federation from all football activities in the country for gross misconduct, causing disharmony, insubordination, use of vulgar language and disrespect for authorities. He could thus not perform his duties in the Club or at all engage in any football activity in the country.

ii. On 29th April and 28th May, 2013, received a warning from the Technical Advisor following conduct unsatisfactory of the position held,

iii. On 20th June, 2013, the Claimant harassed and abused a colleague, for which he was warned and an incident report was made to the police.

iv. On 3rd July, 2013, the Claimant threatened, abused and assaulted the landlord and destroyed property at the residence rented by the club for his occupation leading to eviction, and this assault and destruction was reported at Parklands police station by the Landlord.

v. Refused and or neglect to appear before the immigration officers to validate his immigration status against efforts made by the club to ensure his compliance with the laws by ensuring a work permit was validated accordingly.

The respondent submitted that it had discharged its burden of proof under Section 47(5) and that the claimant was terminated in accordance with fair procedure.

The respondent submitted that the claimant was issued with notice to appear for a disciplinary hearing but elected not to appear. That he refused to respond to the invitation at all and instead went to his social media platform, his twitter account, where he posted that he would not bother to appear; that the issue whether or not notice was adequate was not raised by the claimant in his pleadings.

On the claimant's allegation that the respondents failed to provide him with a work permit as intimated to him and as provided by law, the respondents submit that this was not their responsibility, and that they did what they were required to do by law by issuing a recommendation to the claimant. That it is the claimant who failed or neglected to appear before the immigration officers for interview for purposes of issuance of the work permit. It is further respondent's submission that the issue in dispute is not failure to obtain work permit for the claimant but rather his unfair dismissal.

On remedies ought by the claimant the respondents submitted that in determining a complaint or suit for wrongful dismissal or unfair termination of employment, section 50 requires the Industrial Court to take into consideration –

> **"the circumstances in which the termination took place, including the extent, if any, which the employee caused or contributed to the termination; and**
>
> **The employee's length of service of service with the employer;**
>
> **any conduct of the employee which to any extent caused or contributed to the termination; and**
>
> **any compensation, including ex gratia payment,; in respect of termination of employment paid by the employer and received by the employee. "**

That Mc Gregor on damages, 15th Edition at page 406 discusses exemplary damages as follows;

> |"*The primary object of an award of damages is to compensate the plaintiff for the harm done to him; a possible secondary object is to punish the defendant for his conduct in inflicting harm. Such a secondary object can be achieved by awarding, in addition to the normal compensatory damages, damages which are variously called exemplary damages, punitive damages, vindictive damages, even retributory damages and comes into play whenever the defendant's conduct is sufficiently outrageous to merit punishment, as where it discloses malice, fraud, cruelty, insolence or the like. The exceptional cases in which exemplary damages may be awarded include; exemplary damages expressly authorized by statute, oppressive conduct by government servants and conduct calculated to result in profit. "*

That exemplary damages are awarded as punitive and not consolatory as the objective is purely punitive as was held by the court in ***Obongo v Municipal Council of Kisumu (1971) E A 91*** at page 94 where Spry VP held:

> “*It will be convenient to begin summarizing very briefly the effect of* ***Rookes v Barnard****. In the first place, it was held that exemplary damages for tort may only be awarded in two classes, of case (apart from any case where it is authorized by stature), these are first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government and secondly, where the defendant’s conduct was calculated to procure him some benefit, necessarily financial, at the expense of the plaintiff. As regards the actual award, the plaintiff must have suffered as a result of the punishable behaviour.; the punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings if the conduct were criminal: and the means of the parties and everything which aggravates or mitigates the defendant's conduct is to be taken into account, it will be seen that the house took the firm view that exemplary damages are penal, not consolatory as had sometime been suggested.”*

The respondent further submitted that in ***Kampala City Council v Nakaye [1972] E A 446*** at page 448, Luta JA noted;

> “*As regards, exemplary damages, these are awarded on the principle (as a result of* ***Brookes v Barnard****, 1964 A C 1129) that there has been wanton or oppressive and a high-handed conduct by the defendant in respect of which there must be a punishment as a deterrent to others who may act in a similar manner. In other words they are awarded in order to punish the defendant in an exemplary manner and not as a compensation to the plaintiff."*

That where damages fall to be assessed for breach of contract rather than in tort it is not permissible to award general damages for frustration, mental distress, injured feelings or annoyance occasioned by the breach. Damages for injured feelings cannot be recovered in contract for wrongful dismissal as was held in ***Imenye vs Kenya National Co. Ltd [1986] KLR 350***

> “*It should be borne in mind that the plaintiff s right, if any against the company arises ex contracto and not ex delicto. Even if / have found that the contract of employment had been broken by the company, the quantum of damages the plaintiff would have recovered would be the total income he would have received during the time of notice, that is, three months' salary. To suggest that the company incurred an obligation to provide compensation for the plaintiff on the basis of his “lost years" is to confuse damages awardable in tort for that which is properly awardable in contract...Even if he had remained unemployed till this day the company's liability would have been discharged once it paid or offered to pay him three months’ salary as stipulated in the contract of employment.”*

That none of the tests have been particularized apart from a wholesale invocation of the above remedy and as such, the Claimant’s prayer for general and exemplary damages is erroneous and should be dismissed.

The respondent submitted that Section 49 of the Employment Act gives guidance on the possible entitlement to an employee if the court were to find the termination was unfair. That if any damages are to be awarded to the Claimant, they should be based on the gross pay of Kshs.100,000.00 less the statutory and other deductions that accrued as at then.

That the **Authors Richard W. Painter and Ann E.M. Holmes** in their book referred to above, had this to say on damages at page 426;

> “*....as long as reasonable notice is given, the common law permits termination of contract of employment. Accordingly, it is only when the employer fails to give the required notice or wages in lieu of notice that the common law action of wrongful dismissal will lie. Even, then, the damages will be limited to the monies properly due during the period notice that should have been given together with monies to cover the period which, in the opinion of the court, would have elapsed for the employer to carry out proper dismissal procedure.”*

That if this court were to award the damages sought in terms of the notice period, it should be guided by the decision of the Court of Appeal in ***CMC Aviation Limited v Mohammed Noor [2015] eKLR*** where the court even though acknowledging liability on the part of the appellant reversed the amount awarded in terms of the notice period. It noted;

> “*The respondent was serving a two year contract of employment which was terminable by one month's notice or one month’s salary in lieu of notice. Had the appellant complied with the requirements of sections 41 and 45 of the Employment Act, the summary dismissal would have been a fair one... Taking all this into consideration, we think that the respondent was not entitled to twelve months gross pay as compensation for wrongful dismissal. In our view, since the contract of employment was terminable by one month *s notice, we believe that an award of one month's salary in lieu of notice would have been reasonable compensation. The trial court awarded that, albeit at a higher rate of US$9000 Instead of USS5,075 plus twelve months salary amounting to US$108,000. We hereby set aside the award of US$9000 as one month s pay in lieu of notice and substitute therefor USS5075. The award of US$108,000 is set aside in its entirety.”*

That the Claimant sought compensation for broken rent contract in Dubai and Visa paid in Dubai, that such reliefs are not payable by the Respondents since they were not terms of the contract entered into by the parties in this case.

That the Court of Appeal in ***National Bank Kenya Limited -vs- Pipeplastic Samsolit (K) Limited and Another*** **T20021 2. EA 503** held that:-

> “*A Court of law cannot rewrite a contract between the parties and that the parties are bound by the terms of their contract unless they can prove that coercion, fraud or undue influence was used to procure the contract.”*

The respondents pray that the claim be dismissed.

Determination

I have considered the pleadings, evidence on record and the written submissions of the parties together with the authorities cited. The issues for determination are whether the summary dismissal of the claimant was unfair and if he is entitled to the reliefs sought.

For termination of employment to be fair, the employer must demonstrate that there was fair procedure (Section 41 of Employment) and valid reason (Section 43 of Act). In the present case the reasons for dismissal of the claimant according to his letter of summary dismissal are stated in his letter of dismissal as follows–

> "*The FC Talanta Board sat on October 22nd, 2013 to deliberate on your suspension issued on September 2nd, 2013 and the related conduct following your suspension. It was noted that you refused to attend to the summon to present your case before the board.*
>
> *The Club has therefore found you culpable of gross misconduct on the charges levelled against you which you choose not to answer to. This included an abusive communication dated October 17th, continued threatening text messages towards FC Talanta board members, continued media involvement in direct violation of your suspension, fundamental breach of the confidentiality clause in your contract and an inability to perform your duties as per the contract following the suspension by the Football Kenya Federation.*
>
> *We have found no improvement on your conduct following two verbal warning dates April 29th, May 28th and a written warning dated June 6th, 2013. Directly following your suspension you have continued to break the terms handed to you by the FC Talanta board as a requirement of your suspension. We hereby summarily dismiss you from your employment with immediate effect."*

In the letter of suspension the reasons for suspension are given as follows –

> "*8th October 2013*
>
> *Mr. Jerome Dufourg*
>
> *Nairobi,*
>
> *Kenya*
>
> *Dear Jerome,*
>
> *RE: INDEFINITE SUSPENSION*
>
> *This serves to inform you that you have been indefinitely suspended from all football activities for gross misconduct, causing disharmony, insubordination, vulgar language, and disrespect for authorities at club level and the Federation and for your thin veiled attacks through the print and the social media.*
>
> *By this letter the Department of Immigration services is notified of the same and urgently advised to verify your immigration status, profile your activities in the country and establish your mission and agenda.*
>
> *Consequently all our members and associates are cautioned not to interact, associate or engage your services.*
>
> *SIGNED*
>
> *Michael Esakwa*
>
> *Secretary General FKF/CEO*
>
> *Cc FKF President Talanta FC*
>
> *Director of Immigration Services"*

It is evident that the reasons given in the letter of dismissal are not the same as those in the letter of suspension. Further, the suspension was for an indefinite period, and the letter of suspension did not require the claimant to respond to the charges levelled against him therein.

The notice for the hearing for the claimant's disciplinary case was, according to him, sent by email at 10.01 pm on 21st October 2013 for a hearing to be held at 2.00 pm on 21st October 2013. The letter did not inform the claimant of his right to be accompanied by a colleague to the meeting and did not set out the charges he was expected to respond to. The email message, appended at page 23 of the respondent's bundle of documents states –

> "*Your presence is required on the 22nd October 2013 for the review of your suspension.*
>
> *Venue: Kivi Milimani*
>
> *Time: 2 pm.*

Kindly make time to attend.

Regard"

The notice does not meet the threshold of a notice under Section 41 of the Employment Act.

The claimant further complained about frustration by the respondents. He singled out the failure to obtain a working permit for him for the entire period he was away and the use of the same reason to harass him using officers from the immigration department, issues that are not denied and are confirmed in the bundle of documents from both the claimant and the respondent.

From the foregoing I find that the dismissal of the claimant, apart from not meeting with threshold in Sections 41, 43 and 45 of the Act, was also unfair in terms of Section 45(4)(b) as the respondents did not act in accordance with justice and equity in terminating the employment of the claimant.

I thus declare the dismissal unfair both procedurally and substantively.

The claimant sought the following remedies –

i... General and exemplary damages for malicious termination

of employment...Kshs4,048,936.98

ii.. General damages for unlawful of employment equivalent

to 12 months' gross salary in accordance with section 49(1)(c)

of the Employment Act..Kshs.1,200,000.00

iii. Return air ticket to Island of Reunion................K.shs.113,307.80

iv. Unpaid leave (18.75 days for (9} months)............Kshs 62,499.99

v.. Unpaid salary for October, November, December 2013

and January 2014..Kshs.400,000.00

vi. General damages for harassment and breach of international

labour contract..Kshs29,890,000.00

vii.... One month's salary in lieu of notice paid to client's former

employer in Dubai...Kshs.267,601.75

viii. Broken rent contract in Dubai and moneys owed to the Claimant by

the Respondents..Kshs.421,973.36

ix. Visa paid in Dubai..Kshs.83,771.42

Total **Kshs.36,488,091.30**

The claimant did not justify the circumstances under which he claims exemplary damages nor give justification to support the amount claimed. As was stated in the case of ***Kampala City Council –V- Nakaye*** and ***Obonyo –V- Municipal Council of Kisumu***, exemplary damages are basically a relief in tort, where the defendant's conduct is sufficiently outrageous to merit punishment, or where the conduct disclose malice, fraud, cruelty or insolence or similar motive. The claimant has not proved that the actions of the respondent fell within the above yardstick to merit an award of exemplary damages.

The prayer is declined.

The prayer for general damages is likewise declined as it does not accrue from a breach of employment contract either under common law or statute. Further, the claimant only served for 9 months.

The claimant is entitled to the cost of a return air ticket as this was provided in his contract. I thus award him Kshs.113,307.80 as prayed as the respondents did not contest the amount claimed.

The claimant is also entitled to pro-rated annual leave for the period served. I award him 18.75 days at Kshs.72,115.40 calculated as (100,000 x x 18.75).

The prayer for salary for October, November, December 2013 and January 2014 is granted as the respondents did into deny that the claimant was issued with the letter of dismissal on 29th January 2014.

The claimant is entitled to general damages for harassment as the respondents did not deny that having failed to facilitate the claimant to obtain a work permit, on 29th January 2014 at 5.28 pm, Zacharius Ogola, the 2nd respondent went to his house with two policemen who assaulted the claimant and dragged him to the police station in the full glare of the public where he was kept in the cells for two hours. It was further not denied that again on 1st November 2013, the respondents caused officers from Immigration Department to arrest the claimant and lock him up at the cells in Nyayo House after which he was given an ultimatum to leave the country within 6 days or face deportation. These were not controverted by the respondents. I award the claimant the sum of Kshs. 1 million as general damages for the harassment.

The claimant is entitled to pay in lieu of notice of Kshs.100,000 and not the sum of Kshs.267,601.75 claimed. The claimant is further not entitled to broken rent contract in Dubai or to visa as he did not prove that the respondents were responsible for the visa application fees.

The claimant is however entitled to disbursements of own money spent on official business subject to proof.

The respondents shall also pay claimant's costs. The decretal sum shall attract interest at court rates.

Conclusion

In summary therefore I award the claimant the following –

1.Costs of return air ticket..Kshs.113,307.80

2.Pro rated leave..Kshs.72,115.40

3.Salary for October to December 2013 and January 2014............Kshs.400,000

4.General damages for harassment...Kshs.1,000,000

5.Pay in lieu of notice..Kshs.100,000

6.Reimbursements for monies owed to the claimant by respondents based on proof

7.Costs and interest at court rates.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE