REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

MISC. APPLICATION NO. 23 OF 2019

(CONSOLIDATED WITH ELRC MISC. APPLICATION 104 OF 2018

FORMERLY HCC. MISC.APPL. 372 OF 2018)

IN THE MATTER OF: THE ARBITRATION ACT NO. 4 OF 1995 (AMENDED ON 2009 & 2012)

IN THE MATTER OF: THE ARBITRATION ACT NO. 4 OF 1995 AND

IN THE MATTER OF: AN APPLICATION TO SET ASIDE THE FINAL AWARD ISSUED

BY THE HONOURABLE JACQUELINE OYUYO GITHINJI, CHARTERED

ARBITRATOR ON 16TH MAY 2018

BETWEEN

CHARLES GATHECA.....APPLICANT

-VERSUS-

ATLAS COPCO CMT & CT MANAGEMENT LIMITED....1ST RESPONDENT

ATLAS COPCA EASTERN AFRICA LIMITED.....2ND RESPONDENT

ATLAS COPCO AB.....3RD RESPONDENT

RULING

Background

1. The main issue for determination herein is whether the Final Arbitral Award published on 16.5.2018 should be set aside or recognized and enforced as a judgment of this court. The facts of the dispute herein are that the applicant was employed by the respondents Group of companies in Kenya, Zambia and Nigeria. In total he served the respondents for 20 years, part of which he was an expatriate which was governed by the respondents' Expatriate Terms and Conditions of Service published in her HR policies. His last work station was in Nigeria from 2012 where he was on a 3 years contract with the 1st respondent ending in 2015. When he joined the 1st respondent, his contract was governed by the Home Based Policy of 2006 but in January 2013, the respondents published the Global Mobility Policy. On 12.8.2013, his contract of service was terminated by the 1st respondent on ground of business down turn and thereafter a dispute arose between the applicant on one hand and the 1st and 2nd respondent on the other hand regarding the rights and obligations of the said parties upon termination of the applicant's assignment abroad. In the end the applicant filed suit number 1660 of 2014 before this court seeking terminal benefits plus compensation for wrongful termination among other damages. However, on 20.7.2015, the court stayed the suit and referred the dispute for arbitration within Kenya. After the hearing, the Hon. Arbitrator, Jacqueline Oyuyo Githinji, published the aforesaid final Arbitral Award.

2. The Applicant was dissatisfied and filed Civil Miscellaneous application number 372 of 2018 in High Court seeking for stay of the arbitral award and setting aside thereof, which application was on 17.12.2018 transferred to this court as Misc. Application 23 of 2019. In the meanwhile, the Respondents filed the application herein dated 5th September 2018, seeking for the recognition and enforcement of the said Arbitral Award as judgment of the court. Thereafter the files were consolidated and the parties consented to have the two applications canvassed by way of written submissions.

Applicant's Application filed on 14th August 2018 (Formerly HCCA Misc. App. 372 of 2018)

3. The Applicant's application dated 14.2018 is supported by the affidavit of Charles Gatheca (applicant) sworn on 14th August 2018 and is premised on the following grounds:

a) That in a final award dated 16th May 2018 the sole Arbitrator directed as follows:

I. The 3rd Respondent was properly enjoined to the proceedings and that her decision thereon was final.

II. Whereas the contracts of employment between the Claimant and the 1st and 2nd Respondents respectively were duly terminated through Notice by either party, the Home Based Expatriate Programme of the 3rd Respondent established residual legal and administrative obligations on each of the three Respondents at the end of the contract of employment between the Claimant and the 1st Respondent.

III. The 1st Respondents termination of the claimant's employment was neither discriminatory, unfair or unlawful.

IV. The Claimant only partially received his terminal benefits in the form of cost of repatriation, post-assignment security and pension and that the following benefit remains outstanding:

i.Severance pay, with group management approval, where circumstances make it impossible to offer a suitable appointment.

ii. In the absence of any formula for determination in the Home Based Expatriate Program, the Tribunal defers to the formula in the Employment Act 2007 i.e not less than fifteen days pay for each completed year of service, hence: 15 *[604,673.34/30]*19 Kes.5,744,399.58 with no interest thereon.

V. Declaration of wrongful termination: Claim fails.

VI. Termination dues in the amount of Kenya Shillings Thirty Three Million Two Hundred and Fifty Seven

Thousand and Thirty Three Cents Forty Six Only (Kes.33,257,033.46):Claim fails

VII. Interest on terminal dues at 14% from the date of filing suit until payment in full: Claim fails.

VIII. General and aggravated damages for racial discrimination, distress and mental anguish: Kenya Shillings Five Million Only (Kes.5,000,000) claim fails.

IX. General and aggravated damages for loss of future earnings, loss of career and emotional distress: Kenya Shillings Ten Million only (Kes.10,000,000) claim fails.

X. Costs of the suit and interest thereon: Claim fails XI. Tribunal's fees and expenses: parties are jointly and equally responsible as details in her terms of engagement which fees and expenses she duly acknowledged as fully discharged by the parties as at 2nd May 2018.

XII. Legal and other expenses of the parties: The parties shall bear their legal and other expenses.

b) That the Final award published on 26th May 2018 is in fragrant disregard/contravention of public policy for the following reasons:

i. Failing to give a reasoned award as was required by the parties specifically reasons for failing to award the prayer for general and aggravated damages for distress, mental anguish, loss of future earnings, loss of career emotional distress ad interest as prayed for by the Claimant provided by law.

ii. That the Sole Arbitrator disregarded the Respondents' Global Mobility Policy and the Respondents' Summary of Changes document which provided for one month's pay in assessing the Applicant's final dues which resulted to an unfair computation of the Applicant's final dues.

iii. That the Sole Arbitrator made a mistake of facts in her final Award by stating that the Applicant did not return to the 2nd Respondent's office after his repatriation while evidence was presented to the Tribunal indicating the contrary.

iv. The Sole Arbitrator made a mistake of fact by indicating that the Respondents' witness gave evidence in relation to matters that occurred in Nigeria with regard to Danissa Lillo's discriminatory behaviour while in fact he did not.

v. The Sole Arbitrator failed to take into account documentary and testimonial evidence produced by the Applicant in relation to his claim for discrimination and unfair treatment by the Respondents which resulted to the failure of the claim for discrimination.

c) That the final Award by the Sole Arbitrator is contrary to established principles of the Fair Administrative Actions Act and principles of law and justice for reason that it is unconstitutional.

d) That in light if the findings of the arbitrator and the gist of the Final Ward, this Honourable Court has a constitutional duty to set aside the same.

4. The Supporting Affidavit reiterated the grounds set out in his application and further urged the Court to set aside the final award published on 16th May 2018. The Applicant also filed a Further Affidavit annexing the entire Arbitral award.

Respondents' Case

5. In response to the application, the Respondents filed Grounds of Opposition on 14th November 2018 and a Replying Affidavit sworn on 13th November 2018 by Joseph Muchina, the 2nd Respondent's Business Controller Manager, in which he reiterates the grounds of opposition. In brief he averred that the Applicant's last engagement was as an employee of the 1st Respondent in Nigeria and that the employment contract between the 1st Respondent and the applicant provided for termination at will and the Respondent's employment was severed as a result of economic downturn of the 1st Respondent.

6. He further averred that the Respondents were served with the said claimant's application after filing their application to enforce the final award in this Court. That the High Court lacks jurisdiction to hear and determine the matter being employment dispute referred for arbitration by this court. That public policy cited as the ground for setting aside the final arbitral award is not valid since the threshold for that ground has not been met. That the applicant ought to have appealed to the High Court against the issues which he accused the arbitrator of having erred in law instead of framing the issues as matters of public policy. Finally, he opposed the prayer for stay contending that the Applicant has not met the legal requirements for the grant of such prayer.

Applicant's submissions

7. The Applicant submitted that the wording under section 35 (1) and (2) of the Arbitration Act is instructive that this Court has jurisdiction to hear and determine this application. That the application is not time barred as the final award was published on 16th May 2018 and as provided under section 35 (3) of the Arbitration Act the applicant has 3 months of challenge the arbitral award which would be 16th August 2018 while he filed the application on 15th August 2018.

8. He submitted that he was an expatriate under the Respondents' Expatriate Policy which was later replaced by the Global Mobility Policy after his expatriation. He further averred that the Global Mobility Policy was in force when the Respondent decided to terminate the Applicant's employment and that the Home based Policy was only applicable when the Applicant was taking up assignment in Nigeria but not after the end of the contract. That the Arbitrator chose the Home Based Policy instead of the Global Mobility Policy which was incorporated into his contract of employment upon taking a position outside his country. He contended that no justification was given in applying the Home Based Expatriate Policy. He relied on **Kenya Post Office Saving Bank & another v The Advertising Company Limited & another [2017] eKLR** where the court set aside an arbitral award for being in conflict with public policy because the Arbitrator denied the applicant fair trial by being selective in the evidence upon which he based his decision and also by failing to give reasons for dismissing or discounting crucial evidence tendered during the arbitration.

9. On the issue of racial discrimination, he submitted that he demonstrated that the Respondents' Business Controller engaged employees including the Claimant and particularly Africans in a condescending, rude and arrogant manner which made working with her almost impossible. That the Applicant's evidence on racial discrimination and differentiation treatment was further reiterated by Alfred Muthomi an employee of the 2nd Respondent on how he received discriminatory treatment from the Business Controller but chose not to pursue the matter. That in dismissing the claim of racial discrimination, however, the Arbitrator quoted JM's testimony, who did not make any comment relating to the claim of racial discrimination since he was based in Kenya and hence lacked the capacity to comment on the matters that occurred in Nigeria. He therefore submitted that the Arbitrator erred in quoting the statement that was never made by the said witness.

10. As regards termination notice, he submitted that the termination of the contract was by way of notice without clearly pointing out the period of notice the Applicant was entitled to in the event of end of assignment or end of employment. He submitted that the 6 months' notice issued to him was notice for the end of assignment but not end of employment. He contended that he was entitled to sufficient notice period after the end of employment as provided under section 35 of the Employment Act and the Global Mobility Policy which provides for one months' notice for each year of service with the group and a maximum of 12 months.

11. In addition to the foregoing, he submitted that the reason cited for the termination of his employment was a downturn in business within the

global mining and construction sector. He submitted that the alleged downturn in business was refuted by the expert evidence of Alfred Muthomi who stated that the 1st Respondent was doing well financially as it was able to pay salaries and taxes. He submitted that the Respondent, only singled him out and never complied with the laid down procedures for redundancy. He therefore contended that there was never a redundancy but it was an unfair termination disguised as redundancy.

12. He averred that under section 40 of the Employment Act provides for the procedure to be followed in redundancy including the issuances of two notices but he was only issued with the termination letter. He relied on **Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013]eKLR** to fortify his submission that the statutory procedure for redundancy under section 40 of the Act was not followed before his lay off.

13. He submitted that the findings of the Arbitrator are unsupported by the evidence on record and it disregarded the evidence by the respondent's witness which showed that he was entitled to be employed by the 2nd Respondent after end of his assignment in Nigeria by dint of the Global Mobility Policy. In conclusion, he submitted that the findings of the Arbitrator contradict Articles 27, 41 and 47 of the Constitution. That the findings further contradicted section 5 of the Fair Administrative Action Act and sections 5, 35, 40 and 45 of the Employment Act. He therefore urged the court not to enforce the arbitral award but instead set it aside for being contrary to public policy.

Respondents' submissions

14. The Respondents submitted that the transfer of High Court Misc. Civil Application No. 372 of 2018 to this Court prejudices them as the applicant's application was a knee-jerk reaction to their application seeking to enforce the arbitral award in ELRC Misc. Civil application No. 104 of 2018 which was filed earlier. They further submitted that the applicant has not met the requirements for grant of stay orders under Order 42 Rule 6 (2) and (5) of the Civil Procedure Rules for the following reasons:

a) No informal application for stay was made by the applicant immediately after delivery of the Final award.

b) The applicant has not proved that the will suffer substantial loss unless the stay order is granted.

c) The stay application has been overtaken by events.

d) The Applicant has not indicated to this Honourable Court of his willingness and ability to offer security of Kshs.48,257,033.46 being the sum initially claimed.

15. The Respondents further submitted that the applicant's issues are neither issues of public policy nor valid grounds warranting setting aside of an arbitral award under section 35 (2) of the Arbitration Act. In their view, the issues raised are best suited for an appeal, which is now time barred and relied on **Superior Homes (K) Limited v Joyce Cherotich Sang [2014] eKLR** and **Kenyatta International Convention (KICC) V Greenstar Systems Limited [2018] eKLR**.

16. They further submitted that the parties had agreed on the procedure to be followed in the arbitral proceedings and contended that the applicant is estopped from claiming that the final award is contrary to the established principles of Fair Administrative Actions Act as well as Article 47 of the Constitution and principles of law and justice. That the adoption of the Final Award as a decree of this Court shall not prejudice the applicant since he was awarded Kshs.5,744,399.58 as severance pay. That the applicant has not proved that the arbitration process was not expeditious, lawful, reasonable and procedurally unfair. They therefore urged the court to dismiss the applicant's application but to allow their application No. 104 of 2018.

17. The issues for determination arising from the two applications herein are:

a) Whether the court lacks jurisdiction to determine the application for setting aside of the award.

b) Whether the application is time barred.

c) Whether the application dated 14.8.2018 has meet the threshold for setting aside an arbitral award.

d) Depending on (a) above, whether the application date 5.9.2018, for recognition and enforcement of the arbitral award should be allowed.

Analysis and determination

(a) Whether this Court lacks jurisdiction to determine the matter.

18. The Respondents had contended in their Replying Affidavit aver that the Court lacks jurisdiction to determine this application for setting aside the final arbitral award. As at that time, the application was in the High Court. The Applicant on his part relied on section 35 (1) and

(2) of the Arbitration Act and submitted that the word of the section is instructive that the Court has jurisdiction to hear and determine the matter. Section 35 (1) of the Arbitration Act provides that that a party has recourse to the High Court against an arbitral award by an application for setting aside the award.

19. After considering the nature of the dispute, being employment dispute, and the fact that the impugned arbitral award arose from a referral of the said dispute for arbitration by this court, the High Court transferred the application to this court. Consequently, the issue of jurisdiction was resolved and it is no longer an issue. It is now trite that this court is of equal as the High Court but with specialised jurisdiction to determine disputes related to employment and labour relations by dint of Section 12 of the Employment and Labour Relations Court Act. The instant application being centred around an employment dispute and notably this matter having initially been filed in this court as Cause 1660 of 2014 before the matter was referred to arbitration, this court is the proper forum for determining the same. It follows therefore that the reference of the High Court in Section 35 (1) and (2) of the Arbitration Act should be deemed to refer to this court when the arbitral award in issue relate to employment disputes in the context of section 12 of the Employment and Labour Relations Court Act. The foregoing view is fortified by **CMC Aviation Limited & another v Anastassios D. Thomos [2017] eKLR** where Ochieng J held:

> ***"It is therefore my considered view that although Section 35 of the Arbitration Act cites the High Court as the forum before which a party can seek to set aside an arbitral award, the Employment and Labour Relations Court would have similar authority if the award was on in relation to employment and labour relations. That is because the constitution had decreed that such matters would be dealt with by the Employment and Labour Relations Court."***

(b) Whether the application for setting aside the Arbitral Award is time barred.

20. There is no dispute that the impugned award was published on 16.5.2018 and the application for setting aside the same filed on

15.8.2018. Under section 35 (3) of the Arbitration Act the period for filing such application is 3 months. In this case, the time taken to file the application was exactly 3 months counting from 16.5.2018 to 15.8.2018. I there find and hold that the application is not time barred.

(c) Whether the arbitral award published on 16th May 2018 should be set aside.

21. Section 35 (2) of the Arbitration act permits setting aside of an arbitral award in the following circumstances:

> **(2) An arbitral award may be set aside by the High Court only if—**
>
> **(a)the party making the application furnishes proof—**
>
> **(i) that a party to the arbitration agreement was under some incapacity; or**
>
> **(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or**
>
> **(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or**
>
> **(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or**
>
> **(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or**
>
> **(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;**
>
> **(b) the High Court finds that—**
>
> **(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or**
>
> **(ii) the award is in conflict with the public policy of Kenya.**

22. The application herein does not stand on any of grounds for setting aside arbitral award set out under section 35 (2) (a) of the Arbitration Act but rather on the alleged conflict with public policy under section 35 (2) (b) of the Act. The applicant prays for the setting aside of the impugned award because it is contrary to public policy for being inconsistent with the Constitution, the Employment Act, the Fair Administrative Action Act and the rules of natural justice. He further contended that the Arbitrator disregarded evidence and failed to give reasons for dismissing the reliefs sought. In a nutshell he contended that the award was unsupported by the evidence presented by the parties and it was contrary to justice, and ultimately, it resulted to violation of the redundancy process under the Employment Act of Kenya and under-assessment of his separation benefits.

23. According to the Respondents, the issues raised are not issues of public policy but rather they are grounds of appeal to the High Court. That the issues raised by the applicant only relate to the Arbitrator's decision that the Home Based Expatriate Policy was the one that applied to the applicant's case as opposed to the Global Mobility policy.

24. I have carefully considered the rival contentions. It is clear that in paragraph 7.3 of the Arbitral Award, the Hon Arbitrator held that:

> ***"The parties variously refer to the Home based Expatriate Policy (June 2006) and the Global Mobility Policy (January 2013) though the interface between the two policies is not immediately clear, nor is it clear whether the Global Mobility Policy applied retrospectively-likely not-…"***

25. In addition, the Hon Arbitrator found that no evidence was adduced by the respondents to prove that support was extended to the applicant to secure another assignment upon his repatriation, and proceeded to assess the applicant's aforesaid terminal benefits based on the Home Based Expatriate policy. She however declined to grant the claim for compensation for discrimination and wrongful termination.

26. Setting aside arbitral awards on ground of conflict with public policy is not novel in Kenyan courts. For years now, Kenyan courts have discussed the meaning and the scope of what constitutes conflict with the public policy under section 35 (2) (b) of the Arbitration Act. In

Christ for All Nations v Apollo Insurance Co. Ltd [2002] 2 E.A 366 Ringera J held that:

> ***"I am persuaded by the logic of the Supreme Court of India and I take the view that although public policy is a most broad concept incapable of precise definition, or that as the common law Judges of yonder years used to say, it is an unruly horse and when once you get astride of it you never know where it will carry you. An award could be set aside under section 35(2) (b) (ii) if the Arbitration Act as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the***

Constitution of Kenya or to other laws of Kenya, whether written or unwritten or (b) Inimical to the national interest of Kenya or

(c) contrary to justice or morality. The first category is clear. In the second category I would without claiming to be exhaustive include the interest of the national defence and security good diplomatic relations with friendship nations and the economic prosperity of Kenya. In the third category, I would again without seeking to be exhaustive include such considerations as whether the award was induced by corruption, fraud or whether it was founded on a contract contrary to public morals".

27. Similarly, in **Rwama Farmers Co-Operative Society Limited v Thika Coffee Mills Limited [2012] eKLR** Mabeya , J held:

"From the foregoing, it is quite clear that the term "conflict with the Public Policy" used in Section 35 (2) (b) of the Arbitration Act, is akin to "contrary to Public Policy", "against Public Policy" "opposed to Public Policy." These terms do not seem to have a precise definition but they connote that which is injurious to the public, offensive, an element of illegality, that which is unacceptable and that violate the basic norms of society."

28. In **Kenya Post Office Saving Bank & another v The Advertising Company Limited & another [2017] eKLR** where Amin J held:

"Further, it is clear from the above analysis that the Arbitrator was selective in the evidence on which he based his decision. He gave no reasons for discounting or dismissing the evidence incorporated in the Agreement itself and also the correspondence. In the circumstances, the Applicant Postbank has not had a fair trial. That is contrary to public policy. In addition, the Constitution gives the High Court supervisory jurisdiction including to ensure a fair trial where a person or body exercises a judicial or quasi-judicial function (Article 159(3) CoK)"

29. The questions that beg for answer are, what is the public policy in contracts when it comes to litigation, and, whether the impugned arbitral award is in conflict with the said public policy. Another question that arises is whether there is public interest in the manner in which proceedings in litigation/arbitration are conducted. In my view, the public policy regarding contracts, whether commercial or employment, when it comes to litigations is that the court or the tribunal's power is limited to enforcing the terms of the contract as agreed by the parties and the court cannot rewrite it for them. In this case, there is no dispute that the in January 2013, the respondents published the Global Mobility Policy to apply to all their expatriates. On page 7, the said policy stated that:

"This Global Mobility policy applies in all cases where an *employee* moves to duties outside the Home Country to undertake an assignment with a Group company in another country."

30. Both parties agreed in evidence and submissions that the said Global Mobility Policy applied to the applicant at the time of his exit. Mr. Joseph Muchina who testified for the respondents before the Arbitrator admitted that the said Group policies were incorporated into the employees' employment contracts particularly the expatriates.

In indeed the 1st respondent admitted in its written submissions to the Arbitrator that Article 22.2 of the Global Mobility policy applied to the applicant. The respondent stated that:

"(h) <u>Whether the termination fell under clause 21</u> <u>or 22 of the Global Mobility policy</u>.

Without a doubt this was termination resulting from the party exercising option to terminate the existing employment contract. Indeed it is the end of employment and the instances under clause 22.2 agree entirely with the circumstances."

31. After considering the foregoing, it appears to me, that although the Hon Arbitrator did very well in justifying her decision by reasons, she never the less misdirected herself by rejecting and/or ignoring clear evidence and submissions presented by both sides. In so doing, her award ran contrary to public policy because she refused to interpret and enforce the contract of service that was presented to her by the parties instead, she re-wrote the contract for them by deciding which parts to enforce and which to leave out.

32. In addition to the foregoing, it is my view the public policy requires that in any litigation/arbitration proceedings, all parties thereto be accorded fair trial especially in relation to how the pleadings, evidence and submissions presented by the parties are dealt with. It is no doubt that where the tribunal ignores clear pleadings, evidence and submissions, which admit certain facts, the ensuing decision is contrary to principles of fairness and justice. In this case, the arbitrator rejected clear evidence and submissions that the Global Mobility Policy of January 2013 applied to the applicant's contract and proceeded to assess damages under the Home Based Policy of 2006. She selectively picked on the evidence upon which she based her award and that denied the applicant fair trial and the final arbitral award was contrary to justice, right to fair hearing and fair administrative action as guaranteed by Article 50 and 47 of the Constitution and therefore contrary to public policy. The award also prejudices the administration of justice through ADR as contemplated by Article 159 (2) (c) of the constitution whose objective is to reduce backlog of cases in our courts of law.

33. The foregoing view is fortified by the precedents cited above which support the position that an arbitral award is in conflict with public policy if it is "contrary to the constitution and the law", "contrary to justice and morality", or "if a party was not accorded fair trial". The Arbitrator deliberately refused to interpret and enforce the Global Mobility Policy, which provided for the rights and obligations of the parties to the employment contract herein upon termination of the expatriate assignment abroad and instead enforced an obsolete Policy against the agreement between the parties to the contract. The flipside of the foregoing finding is that the Arbitrator misdirected herself by rejecting clear evidence and submissions presented to her by both sides and instead selectively picked the evidence upon which to base her award and thereby denied the applicant a fair trial. Consequently, I hold that the applicant has proved on a balance of probability that the award is in conflict with the public policy of Kenya and should be set aside.

34. As regards the claim for racial discrimination, a reading of the Arbitral Award is clear that the arbitrator found that Danissa Lillo simply

had a bad disposition but there was no systemic discrimination. In my view that explanation was sufficient justification for dismissing the alleged discrimination. Although the applicant contents that the Arbitrator based the dismissal of the claim for discrimination on non-existent testimony by the defence witness, JM, I have also noted AM, a witness for the applicant had indeed stated that Danissa Lillo did not racially discriminate the applicant but she was short tempered and rude to everyone including a manager who was white. That statement by AM corroborates the view that the reference to JM might have been a typographical error in the award in paragraph 6.3 of the Arbitral Award where the Arbitrator stated as follows:

> ***"There is no evidence to sustain a claim of racial discrimination against the Claimant by any of the Respondents, or their agents, and this claim therefore fails on merit. Indeed, JM's testimonial evidence indicated that Danissa Lillo simply had a bad disposition and there was no systemic discrimination… there is no evidence to suggest that the Claimant was singled out for unfair treatment in his termination by the 1st Respondent given the various prior communications to all its employees indicating that the business was not performing as expected…what would have been instructive in the present case is evidence as to whether, despite the 1st Respondent claiming a downturn in business within the sector, it proceeded to retain substantially all expatriates other than the Claimant…"***

Respondents' application dated 5.9.2018.

35. In view of the finding herein above that, the arbitral award be set aside, the application for recognition and enforcement of the award must fails. The reason being that under section 37 of the Arbitration Act, the same reasons for setting aside an arbitral award, are the same reasons provided for refusing to recognize the same. Having therefore found that the arbitral award herein is in conflict with public policy, I refuse to recognize and enforce it as a judgment of this court.

Conclusion and disposition

36. I have found that the application for setting aside the arbitral award is not time barred and this court has jurisdiction to determine it because it relates to an employment dispute which was referred for arbitration by the same court. I have further found that the award published by the arbitrator on 16.5.2018 is in conflict with the public policy and it must be set aside as prayed. The applicant's counsel submitted from the bar that the terminal benefits assessed by the Hon Arbitrator in the impugned award is not challenged. However, the wording of the orders sought in the Motion are that the entire arbitral award be set aside. Consequently, I allow the Notice of motion dated 14.8.2018, set aside the entire award published on 16.5.2018 and refer the dispute back for arbitration before any Arbitrator of the parties' choice in Kenya. All the three respondents shall remain enjoined in the proceedings.

37. In the end the application, dated 5.9.2018 is dismissed in view the foregoing. The applicant (Claimant) is awarded costs of the two applications.

Dated, Signed and Delivered in Open Court at Nairobi this 12th day of July, 2019.

ONESMUS N. MAKAU

JUDGE