



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

SUIT NO. 2066 OF 2013

RICHARD LITUNYA INYANGALA.....CLAIMANT

VERSUS

MECHEM (PTY) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant seeks resolution of an issue he framed as unfair termination. In the suit filed on 31st December 2013, he averred that he was employed as a cleaner by the Respondent on 29th January 2012 and as the time of termination was earning USD 350 a month. He averred that the pay was without allowances despite the job being in the war torn country of Somalia. He averred that he was deployed as a driver from March 2013 ferrying water from the Indian Ocean and supplies from the airport without attendant allowances. He averred that he worked in a 24 hour facility and could be called upon to perform duties at any time including Sundays and public holidays. He averred that the Respondent failed to accord him the safeguards under Section 41 of the Employment Act, he thus sought payment of all his benefits; an order for reinstatement; general damages and costs.

2. The Respondent appeared under protest and filed a notice of preliminary objection on 10th January 2014. The objection was to the effect that this court lacked jurisdiction to hear the claim. The Respondent filed a replying affidavit which was sworn by Stephan Smith the country manager Somalia of Denel Soc Limited trading as Denel Land Systems a subsidiary of the Respondent herein. He deposed that the Respondent, based in Geneva Switzerland has a "camp management" contracts all over Somalia. He deposed that the Claimant was engaged as a cleaner earning US \$350 a month and was never promoted to any other position and that his pay per month rose to US \$425 upon completion of one year in March 2013. He deposed that the Claimant was dismissed for his violent conduct toward fellow employees, gross misconduct and insubordination. He also deposed that the Claimant's pass to access the UNOPS compound in Mogadishu, Somalia was withdrawn by the United Nations upon his dismissal. A Memorandum of Defence was filed on 30th January 2014 which averred that it was not registered in Kenya and did not have an office in Kenya as it was a company based in South Africa to which Kenya laws do not apply. The Respondent averred that the Claimant's services were lawfully and legally terminated by letter dated 30th May 2013 due to the Claimant's violent conduct towards fellow employees, gross misconduct, inciting personnel to strike on tribal/ethnic grounds and insubordination. The Respondent averred that the Claimant was paid his salary for the month of May and was issued with a certificate of service. The Respondent urged that the suit be dismissed with costs.

3. The Claimant filed an amended Statement of Claim on 17th July 2014. In the amended claim, he averred that while on leave in Nairobi on 30th May 2013 he was summoned to the Respondent's agent Jean Ng'ang'a to meet at Nakumatt Prestige, Ngong Road where he was verbally notified of his termination letter without being granted an opportunity to defend himself and collect personal belongings. He averred that the Respondent's agent did not state the reason for termination. The Claimant sought 12 months compensation USD 5,100, one month notice USD 425, personal valuables USD 750 making a total of USD 6,275. The Respondent filed an amended Memorandum of Defence on 13th August 2014. In the amended defence, the Respondent denied that the Claimant was verbally informed of his termination. The Respondent averred that this Court lacked jurisdiction to entertain the claim.

4. The Claimant testified on 6th May 2015 and stated that he was employed on 29th January 2012 earning USD 350 a month and was deployed to Mogadishu at UN camp and on arrival on 30th January 2012 was oriented by Mr. Gordon the camp manager. He was to clean the accommodation and offices. He testified that on 30th May 2013 while on leave, he was called by Jean Ng'ang'a to meet her at Ngong Road Prestige where his services were terminated. He stated that he was not issued with a termination letter but that he signed it and she kept it in her handbag. He testified that his contract was terminated on account that he was rude and incited others at the camp. He stated that he had gone on leave three times and this was his fourth leave in Kenya. The flights would be booked by Gordon in Mogadishu and in Kenya Ng'ang'a would book tickets. He stated that after three months he would come home for 24 days leave. He testified that he was not promoted and in the third week after deployment in Somalia he could be called to do other work. He stated that from 2013 there was an additional \$75 that he received. He testified that he never faced a disciplinary panel and that he never had a quarrel with his colleagues even for a single day. He stated that he left personal items valued at \$750 in Mogadishu together with his testimonials and school certificates. He prayed for compensation for the loss of employment and costs of the suit.

5. In cross-exam he testified that he signed a contract of employment and that he did not have a copy as Ng'ang'a retained the copy. He stated that he did not get a copy of the contract or the termination letter. He testified that he did not get the certificate of service. He stated that his work was in house-keeping but that he was given additional work in the driving department. He was referred to his pleadings and confirmed that his driving licence was issued on 20th March 2013. He testified that he was a driver as from 17th June 2012 to 30th May 2013 and that he was issued with a drivers permit in Somalia. He stated that the Kenyan drivers licence is not what is used to drive in Somalia. He testified that he signed his termination without reading it as Ng'ang'a was very rude and just told him to sign. He said she pointed fingers at him and told him "wewe, weka kidole hapa" and that she said that if it wasn't for her relationship with his father it would have been different. He stated that she never gave him an opportunity to defend himself. He testified that he was given his leave days and that there was a clinic in the camp and they did not pay for treatment. He stated that he was the one who had come up with the value of \$750 for his valuables. He conceded that he did not have a price list for the items. He testified that he was aware the Respondent had brought items from Somalia and that he got 2 boots which were his. He denied being insubordinate and stated that he took instructions and never incited workers. He testified that he was not in a position nor did he have capacity to incite. He sought reinstatement and denied that the access card was issued by the UN.

6. In re-exam, he testified that only Kshs. 33,080/- was banked and that the sum was not paid in full. He stated that he was never told of the allegations of a tribal nature.

7. The Respondent called Jean Njeri Ng'ang'a who testified on 28th October 2015. She stated that the Claimant was contracted under Mechem Consultants in January 2012 and worked at the United Nations Operations Project in Mogadishu, Somalia. She testified that the Claimant was contracted as a cleaner and worked as a cleaner in his time there. She stated that there were constant reports of conflicts with personnel and that he had problems with Kenyans at supervisory level. She testified that he was given verbal warnings but the behaviour did not change. She stated that while he was on leave in early May, she was instructed to terminate his contract as the UN had terminated his security clearance and he could not be flown back as they did not have security clearance for him. She testified that they met and had coffee at Prestige Plaza and she asked him what had occurred in Mogadishu and he told her that people in Mogadishu did not like him because he was the most hardworking of the lot. He implied that they were "ingilia-ring" him or undermining him. She said the Claimant was paid all his terminal benefits and the salary for May 2013. She stated that the Claimant's belongings were delivered from Mogadishu and the Claimant refused to collect them or the certificate of service. She testified that the Respondent did not have offices in Kenya and that she was the only employee of the Respondent and worked on consultancy basis from her home.

8. In cross-examination she testified that the Claimant had not been called to Kenya and was here on leave. She stated that the Claimant's issues were explained to him as and when they came up and that he had issues with co-cleaners. She testified that she was authorized by the country manager to terminate the services of the Claimant as he had altercations with other employees and had tribal based conflicts. She stated that it was around the time of elections and that at the time of hire they saw the employees as Kenyans. She stated that there was mix of tribes working in Somalia. She testified that the Claimant was paid for May even though he was on leave and had not worked in May. She stated that the reasons for dismissal were a basis for summary dismissal and notice was not payable.

9. In re-examination, she testified that the dismissal was summary and reasons were stated in the letter – insubordination, gross misconduct including but not limited to assaulting fellow employees and inciting personnel to strike on tribal/ethnic grounds and continued disregard for authority among others.

10. The Respondent sought an adjournment for further hearing as it intended to call 3 more witnesses. The case was deferred to 21st March 2016 but it did not proceed then. The case went off the rails from that time and did not proceed on the subsequent dates set for hearing until 18th September 2017 when James Ndambiri Mithamo testified. He stated that he was the house keeping supervisor and that the Claimant was under his supervision in Somalia. He stated that the Claimant was good at first then he became rude and violent towards the colleagues and clients as well. He testified that he would give the Claimant 40% as the Claimant was not performing. He stated that the Claimant never worked as a driver as the Respondent had drivers and that the Claimant taught himself driving during his free time.

11. In cross-examination he testified that he gave the Claimant verbal warnings and that he was not aware of the written warnings from the country manager. He stated that there was a gap of 2 months between the warning and the time the Claimant came to Kenya. He testified that the Claimant came home on leave and was terminated while on leave, paid up to the time of his termination. He was not sure of the exact amount the Claimant earned a month but said it was about \$400 a month. He testified that before one left for leave there was briefing and he stated that he did not know if there was any disciplinary meeting before the departure as he was on leave at the time the Claimant left Somalia. He stated that his junior supervisor George Wakahiu sent the Claimant's items.

12. In re-exam, he testified that one is given verbal warnings and the last warning is written. He stated that he was aware the Claimant was paid.

13. The case was adjourned for further defence hearing on 7th November 2017 when called George Wakahiu Ndichu and Stephan Smith testified. Wakahiu testified that he was a logistics officer but had been a normal cleaner in 2012-2013 and then a supervisor in 2013. He stated that he found the Claimant in employment and they called the staff they found there pioneers. He testified that when supplies would arrive the pioneers would decline to help off-load supplies. He stated that before he went on leave, the Claimant was not cleaning the ablution block well and almost beat him up and the Claimant was issued with a warning. He testified that on return from leave he found out that the Claimant had been dismissed and on enquiring was told the Claimant had been engaged in tribalism and violence. He stated that the supervisor was employed by the UN and because they came from the same tribe, he (witness) was told by the Claimant that he (witness) was employed because of his (witness) tribe. He stated that Stephan asked him to go and pack all the stuff for the Claimant as one of his roommates and that he did so. He testified that he shared a room with the Claimant, Anthony Mburu and Moses Mwathi. He stated that the items were packed in a container and gave them to the logistics manager and he confirmed that the items were brought to Kenya. He said that what he did not know is whether the Claimant got them.

14. In cross-examination he stated that the Claimant was issued with verbal warnings in 2013 and he could not tell the specific dates. He testified that when one is called to the office it is only the office that knows who will get a warning. He stated that he was on leave when the

Claimant was fired and that he was not consulted. He testified that the dismissal was by the country manager Stephan Smith and he could not tell if it was through verbal or written means. He stated that they did not take an inventory before packing the Claimant's items and that he was told to pack the items that were in a cupboard/wardrobe by Stephan. He stated that he had recommended the dismissal of the Claimant.

15. The last defence witness was Stephan Smith who testified that he was from Namibia and was the Respondent's country manager for Somalia. He stated that the Claimant was contracted by the hiring company and per the agreement was responsible for his own belongings including leave periods. He testified that under the agreement disputes, if any, were to be referred to arbitration in Switzerland and that the Geneva court is the forum for disputes. He stated that he became aware of the Claimant's attitude when he was told that from the UN Security Officer there was a complaint on altercation. He was called by the UN Security Operations officer of UN Mine Action Services (UNMAS). He testified that during the regular meetings he had with the staff he asked about the issue and was told of the altercation and tribalism. He stated that this was the first time he heard that Kenyans had tribal issues and that it was around the 2013 elections. He testified that the reason for the dismissal was insubordination, inciting tribal animosity and strike.

16. In cross-exam he testified that the letter issued was the standard letter and that Jean in Nairobi gave the letter as he was in Somalia. He stated that the Claimant got the annual increment and earned \$425 at the time of dismissal. He testified that he had come to Court to give transparency that he would do anything needed to resolve issues as Switzerland is too far from here. He stated that there was no requirement for warning for this breach of contract. He testified that he did his investigations but did not prepare a report. That marked the end of oral testimony.

17. The parties indicated they would file written submissions and these were filed on 21st November 2017 for the Claimant and on 14th December 2017 for the Respondent. The Claimant submitted that the issues for determination were:-

- i. whether the Claimant's termination was unfair or not
- ii. what reliefs are available

The Claimant submitted that the evidence led leaves no doubt the Claimant was not heard at all on the allegations on the termination letter dated 30th May 2013. The Claimant submitted that this was a violation of his fundamental rights to fair hearing and in contravention of Section 41 of the Employment Act, 2007. The Claimant submitted that clauses 18, 22, 24 and 24.4.5 (on notice) of the contract of employment dated 28th January 2012 between Meclon Consultants Limited and the Claimant ousting the jurisdiction of this court succumb to Kenyan law on employment. The Claimant submitted that the evidence on record does not show any particular incident where the Claimant assaulted fellow employees as no name was even given. The Claimant submitted that the employer was duty bound to prove the reason for termination was valid under Section 45 of the Employment Act. The Claimant submitted that he was entitled to recover compensation under section 49(1)(c) as the dismissal was unlawful and unfair. He thus submitted that he was entitled to the sum of USD 5,100 being compensation for 12 months, one month salary in lieu of notice of USD 425. He also submitted that it had been confirmed by the Respondent's witnesses that his belongings were left in Mogadishu and he thus was entitled to USD 750 making a total of USD 6,275 and a certificate of service.

18. The Respondent submitted that the reasons for the termination of the Claimant were valid and that the testimony of the witnesses for the Respondent was collaborated. The Respondent submitted that it was worthy to note that the Claimant was contracted by a firm called Meclon Consultants Limited which is based in Geneva, Switzerland and that the Respondent is a company based in South Africa with no registered office in Kenya. The Respondent submitted that it was worthy to interrogate the exact relationship between the Claimant and Respondent in view of Section 2 of the Employment Act which defined an employer to mean any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager, or factor of such person, public body, firm, corporation or company. The Respondent relied on the case of **Abyssinia Iron & Steel Limited v Kenya Engineering Workers Union [2016] eKLR** where the Court of Appeal (Musinga, Gatembu, Murgor JJA) defined outsourcing as defined by businessdictionary.com and further referred to the case of **Elizabeth Wacheke & 62 Others v Airtel Networks Limited & Another [2013] eKLR** held that *upon the transfer of an undertaking, business or any part thereof to another employer by reason of a measure or legal transfer, the rights and obligations arising from that contract of employment shall be transferred to the new employer*. The Respondent submitted that the Claimant was never engaged in the core business of the Respondent and was only contracted by Meclon Consultants Limited to provide cleaning services, a service that was outsourced by the Respondent. The Respondent thus submitted that the first point of call was for the Claimant to sue Meclon Consultancy Services Limited and subsequently enjoin the Respondent herein as a third party afterwards if he decided to pursue a claim. The Respondent submitted that the contract of service was a foreign contract of service in within the meaning of Section 84 and 85 of the Employment Act as it was to be performed in Somalia and neither the Respondent nor Meclon Consultants Limited have regional offices in Kenya. The Respondent relied on the case of **Desi Esi Annie Amanor-Wilks v Action Aid International [2014] eKLR** for the proposition that the applicable law was Swiss law as prescribed under clause 22 of the contract of service. The Respondent submitted that this was in line with the notion of party autonomy and the only way that notion could be dispelled was by proving that the contract relationship was formed in Kenya or performed in Kenya. The Respondent submitted that however, proof that it was formed within Kenya's territorial boundaries is not enough where the same is performed elsewhere as shown in **Dede v Action Aid (supra)** where the court assumed jurisdiction based on where the contract was performed. The Respondent submitted that there would be a dilemma should a decree issue in favour of the Claimant as neither Meclon Consultants Limited nor the Respondent have a registered office in the country.

19. The first issue for determination is whether there is jurisdiction over the claim. The secondary issues are whether there was a valid dismissal and what orders are fit for grant. The Claimant sued the Respondent. He worked in Somalia though his contract was with Meclon Consultants Limited of 42 Rue du 31-December PO Box 6193 1211 Geneva 6, Switzerland. The Claimant was responsible for taxation (income tax or equivalent) and social security (or equivalent) relating to the remuneration derived from the contract. The contract provided under clause 18 that the agreement shall be governed by and construed in accordance with the laws of Switzerland and the parties to the contract agreed to the jurisdiction of the Geneva Courts in connection to all matters related to or derived from this agreement. Further, under clause 22 the agreement provided that if any dispute arise between the parties relating to the agreement either party may refer such dispute for settlement to an independent Arbitrator appointed for that purpose by the President for the time being of the Chartered Institute of Arbitrators in Switzerland. The agreement provided that the findings of such Arbitrator shall be binding on the parties and the costs shall be

borne by the parties in whatever proportion that he shall determine. The contract it seems, was for performance outside of Switzerland as indicated in clause 31. The contract was not to be performed in Kenya and was not by a company based in Kenya. Under the provisions of Part XI of the Employment Act 2007 seem not to have been observed in respect of the contract. Under Section 83, the contract of service should have been attested by a labour officer, secondly, the contract must be in the prescribed form and finally there was security for its due performance requisite to be executed. In the case before the Court, none of these elements were shown to exist. In the agreement which is before me, there is an ouster of jurisdiction expressly giving the intent of the parties. As the contract was not brought within the ambit of the reach of this court I have no option but to declare that the suit was filed in the wrong forum and therefore cannot be of any aid to the Claimant. The Respondent seems to have acquiesced to the progress of the suit in the wrong forum and must suffer the consequences of not recovering any costs for the adventure.

20. The suit is struck out as there is no jurisdiction to entertain the same. Each party to bear their own costs.

It is so ordered.

Dated at Nairobi this 10th day of January 2018

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 22nd day of January 2018

Radido Stephen

JUDGE