



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 185 OF 2017

VICTOR AMOS NANDI OTIPA.....CLAIMANT

VERSUS

MALPLAST INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent on 11th May 2017 seeking resolution of a dispute he framed as the unfair, unlawful & wrongful termination and the non-payment of terminal dues and compensatory damages. The Claimant averred that he had been employed by the Respondent on 1st February 2015 as a human resource manager earning Kshs. 185,000/- a month. The Claimant averred that he loyally and devotedly worked for the Respondent but was attacked by fellow employees on 15th December 2015 and brutally hounded out of office. He reported to the nearby police station, sought treatment for his injuries and was advised by the Respondent's directors to keep off from the place of work as they consulted among themselves in order to get a resolution to the dispute. The Police arrested some of the employees of the Respondent but the Respondent's directors intervened and had them released with an assurance to the Police that the matter would be handled internally but since then no penal action has been taken. The Claimant believes that the forced removal from office was orchestrated by the Respondent through its directors given that the directors negotiated the release of the perpetrators who violently attacked the Claimant. The Claimant averred that he was never accorded an opportunity to defend himself before the Respondent before the decision on his termination was arrived at. He was not issued with a notice to show cause as to why he should not be dismissed. He sought payment of service pay being Kshs. 185,000/-, compensation for unfair termination Kshs. 2,220,000/-, general damages for breach of employment contract, punitive damages for the victimization of the Claimant by the Respondent, interest on the sums claimed as well as costs of the suit.

2. The Respondent entered appearance and filed defence through Mohamed Madhani & Company Advocates on 8th June 2017. The Respondent denied that the Claimant enjoyed a good working relationship with his colleagues and subordinate employees. The Respondent averred that the directors had to intervene to ensure that no serious harm would be occasioned to the Claimant and/or employees. The Respondent averred that on 15th December 2016 the directors spoke to the Claimant and the several employees with regards to the incident wherein it was established that the cause of the accident commenced from the fact that the employees were disgruntled with the Claimant as he would never listen to any of their complaints and that the Claimant was abusive towards them. The Respondent averred that its directors intervened in the situation before the Claimant suffered any serious harm and informed the Claimant that after receiving medical treatment he return to work while they observed the situation in the coming weeks to see if the friction between the Claimant and the other employees had subsided. The Respondent averred that the Police advised the Respondent to handle the matter internally as the issue related to a dispute between the Claimant and the other employees which in their opinion could be resolved amicably. The Respondent averred that it spoke with the employees involved and orally warned them that such behavior was not acceptable and that if they had grievances they should report to the human resource managers or the directors so that they can look into the matter. The Respondent further averred that on observing the situation in the weeks following the incident, it was clear the employees were still not happy with the Claimant and it was evident that the Claimant could no longer discharge his contractual duties to the Respondent and the other employees without putting his life at further risk. The Respondent averred that the directors played no part in the action that gave rise to the events of 15th December 2016 and that the actions giving rise to the events of 15th December 2016 were solely attributable to the Claimant over which the Respondent had no control and that the Respondent had tried to keep the Claimant in employment. The Respondent denied the court had jurisdiction to entertain the case as the Claimant and the Respondent performed the contract of employment in Nairobi and the alleged cause of action and the incident of 15th December 2016 occurred in Nairobi and the Employment & Labour Relations Court at Nairobi was the competent court to hear and determine the dispute herein.

3. Directions in the suit were issued on 30th November 2017 for hearing on 1st February 2017 by Ongaya J. and the case proceeded on the said date before me. The Claimant testified that he was employed by the Respondent as a human resource manager from 1st February 2015. He stated that he earned Kshs. 185,000/- per the employment contract and that he was commended verbally for work well done. He said he had a cordial relationship with his colleagues and subordinates in the company. There was no disciplinary issue between him and the Respondent. He was roughed up on 15th December 2016 by fellow employees barely 20 minutes after arrival at work. He stated that the employees were 15 in number invaded his office dragged him out of the office, kicked him but 3 of their colleagues shielded him and rescued

him. He stated that the directors were in the office but did not come to his rescue. He reported the matter to the Police and also sought treatment. He said that the Police were able to identify some of his attackers and placed them under arrest but Respondent's directors secured their release and called off the Police action stating that the issue would be resolved internally. He testified that no action was taken against the employees and he did not continue with his employment after the sick off as the Respondent's directors told him to stay away as the matter was being resolved. He obtained a P3 form which showed the extent of his injuries. He stated that nothing was done and on 21st February 2017 he was issued with a termination letter dated 31st December 2016 and did not contain any reasons for the dismissal. He confirmed receiving salary for January and that he was not given an opportunity to be heard and the abrupt dismissal according to him was therefore not valid or fair. He sought compensation for the unfair termination and damages for the negative publicity and damages suffered for the incident he suffered.

4. The Respondent filed a defence and though no witnesses were offered, there are three statements on record. In the statement by Bijesh Shah, it was stated that the Claimant earned Kshs. 160,870/- as basic, 24,130/- as house allowance making a gross salary of Kshs. 185,000/-. He recalled the incident of 15th December 2016 which occurred while he was in the factory. He heard some commotion which was highly unusual and he went out of his office to check what the noise was all about. He noticed that the Claimant was being attacked by other employees who were more than a dozen and he shouted at the aggressors and with the help of other employees not involved in the attack managed to stop it. He stated that in order to diffuse the volatile situation he advised the Claimant to seek medical attention while employees were spoken to as the action by the employees was highly unusual. He was informed at that point by the employees that the Claimant was very rude to them severally and that he would not listen to their complaints and they were therefore very angry towards the Claimant. He was very surprised and shocked and warned all the employees present that such behaviour is totally unacceptable and anyone engaged in further such behaviour there would be no option but to take serious action against them which would include reporting the matter to Police who would take action against them. He was aware that the Police did come to the Respondent's premises and to question some employees and that the Police were informed that the dispute was between employees of the company and the Claimant and that the employees had all been warned as they could not identify the aggressors individually. He stated that the Police were informed that the situation had never happened before and the management believed that the same could be internally resolved so as not to create a hostile working environment. The statement went on further to state that the Police agreed with the Respondent that the proposal by management was the best way to handle the situation internally as the dispute was among employees who need to be able to work together. He stated that contrary to the statements made by the Claimant neither he nor the other directors played any part in the incident and did not orchestrate the incident but they merely felt that it would not be productive to institute criminal action against employees as the same would add further bad blood to the entire situation. He wanted a peaceful working environment so that people could work in harmony and that he observed the working environment after the incident and even had casual conversations with the employees and it was apparent they were seriously unhappy with the Claimant and that if they were to continue working with the Claimant then the employees would seriously think about resigning. Given the situation it became apparent that the work environment was too hostile for the Claimant and a safe working environment could not be guaranteed. The Respondent therefore opted to dismiss the Claimant and paid him three month's salary in lieu of notice in accordance with the contract, a payment duly acknowledged by the Claimant in an email dated 2nd March 2017. He was of the view that the Claimant had brought this case to unjustly enrich himself and that the Claimant had even sought to be paid for the balance of the contract knowing full well he could not perform his contractual obligations. He thus sought the dismissal of the suit as the Respondent had not played any role in the incident of 15th December. There were two statements from Walter Sembe and George Budi who described themselves as fellow employees at the Respondent. The statements were exactly the same word for word save for the names of the witness. The statement was to the effect that the incident of 15th December 2016 where the Claimant was attacked by employees of Malplast was because many of the employees were disappointed with the Claimant's attitude towards them which included arrogance towards them, he did not listen properly to them, negative attitudes towards any suggestions made to him and tampering of the employees clocking system without proper reasons. It was stated that the Claimant's behaviour toward the employees was not like a human resource manager and therefore the witnesses believed that many of the employees were quite angry with the Claimant and could no longer work with him. The witnesses stated that the directors of Malplast informed them that is such an issue arose the employees should see them so that it is addressed without violence and the employees were warned that violence is not acceptable and everyone should work together peacefully.

5. The Respondent did not attend court and after hearing the Claimant's oral evidence, the Court permitted the Claimant to file submissions which were filed on 19th February 2018. In the submissions, the Claimant submitted that the issues for determination was

- a. whether the Claimant's termination was unfair, unlawful and wrongful,
- b. whether the Claimant is entitled to the reliefs sought,
- c. who is to bear the costs of the cause

The Claimant submitted on there was no fair hearing and relied on the case of **Kenya Union of Commercial, Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR** where Mbaru J. held that *in the eventuality an employee is to face summary dismissal or termination, Section 41 of the Employment Act now dictates that there must be a hearing to give such an employee an opportunity to defend self.* The Claimant submitted that Section 41 of the Employment Act was not adhered to as no explanation was given prior to the dismissal. It was the Claimant's position that the contract was terminated without following fair procedure and without a valid reason. Reliance was placed on the case of **David Kipkosgei Muttai v Green Palms Academy [2014] eKLR** where Makau J. held that *unfair termination occurs where the employment was terminated without a valid and far reason and without following a fair procedure.* The Claimant thus submitted that he was entitled to the relief sought in the statement of claim with costs to the Claimant.

6. The Respondent raised an issue of jurisdiction in their pleadings. As held in the case of **Owners of the Motor Vessel Lillian 'S' v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Nyarangi JA held as follows:-

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is

without jurisdiction.'

7. The authority for this holding by the learned Judge of Appeal is found in the writings of John Beecroft Saunders in a treatise, which is no longer published, headed **Words and Phrases Legally defined – Volume 3: I–N**. It states at page 113 the following about jurisdiction:-

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are

imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given. (Underline mine)

8. The court in which I sit is the Employment and Labour Relations Court. It is established under Article 162(2) of the Constitution and the Constitution grants the court the exclusive power to handle matters of labour and employment. There is no restriction imposed by the statute that was enacted pursuant to the constitutional provision in Article 162(2). The Employment and Labour Relations Act, formerly known as the Industrial Court Act 2011 was enacted by Parliament and did not make provision for limitation of the Court’s jurisdiction in regard to territorial limits. I exercise jurisdiction over the entire nation of Kenya. I presently sit in Nyeri having served in Nairobi since appointment. The Court has registries in some counties and sub-registries in other counties. The fact that there are some areas without a sitting judge does not deprive them of the right to access any court dealing with labour issues. It is for convenience that parties file at the nearest court and for proper administration of justice it may be convenient to file the suit at the place where the Claimant or Respondent carries on business or resides. In this case, the suit was filed in Nyeri within the Republic of Kenya and the court at Nyeri has jurisdiction. As no preliminary objection was raised the issue was not determined *in limine* but abided the hearing of the matter. I overrule the Respondent on the jurisdictional question and hold that I have jurisdiction over the matter.

9. The suit proper presents the court with a very disturbing scenario where employees took over the management of a company and brutalized a manager of the company and the directors of the Respondent actively assisted the culprits to escape the ‘short arm’ of the law represented by a dithering Police force. An assault had taken place and the Respondent facilitated the abridgment of the rights of the Claimant by failing to take action against the employees who assaulted the Claimant. Mr. Shah who made the telling statement for the directors of the Respondent says that he heard some commotion on 15th December. He found that as highly unusual and he went out of his office to check what the noise was all about. He noticed that the Claimant was being attacked by other employees who were more than a dozen and he shouted at the aggressors and with the help of other employees not involved in the attack managed to stop it. The director further states that that the Police were informed that the dispute was between employees of the company and the Claimant and that the employees had all been warned as they could not identify the aggressors individually. Shah stated that the Police were informed that the situation had never happened before and the management believed that the same could be internally resolved so as not to create a hostile working environment. His statement went on further to state that the Police agreed with the Respondent that the proposal by management was the best way to handle the situation internally as the dispute was among employees who need to be able to work together. The position of the Respondent was that the Claimant could not be retained as a result of the altercation that took place on 15th December 2016. It is not in dispute that the employees were violent and the management of the Respondent did absolutely nothing against the employees who were violent to the Claimant. That, in my considered view, was acquiescence and tacit approval of the action the employees took. No evidence was led as to the orchestration of violence by the directors and the Claimant cannot therefore blame them wholesale. I agree with the Respondent’s evidence in the statement by Shah that the directors did not plan or facilitate the execution of the violence by employees of the Respondent against the Claimant. The Claimant was dismissed in February though the dismissal was dated 31st December 2016 on the terms contained in the email correspondence between the parties. The Claimant received 3 month’s notice and this was in terms of the contract of employment. In regard to the issues crystallized for determination, the court has from the foregoing established that the dismissal of the Claimant was contrary to the law and that it was unfair, unlawful and wrongful. As held by Mbari J. in the case of **Kenya Union of Commercial, Food and Allied Workers v Meru North Farmers Sacco Limited** in the eventuality an employee is to face summary dismissal or termination, Section 41 of the Employment Act now dictates that there must be a hearing to give such an employee an opportunity to defend self. I am in agreement with my learned sister. The Respondent took no steps to provide the Claimant with the safeguards under Section 41 of the Employment Act whose citation is not necessary for purposes of the determination herein. The Claimant however, seeks a plethora of reliefs some of which can never be granted as they have no basis, the punitive damages sought are not among the reliefs this court can grant. The only relief that the Claimant can feasibly obtain is for the unlawful and unfair dismissal which would result in compensation in terms of Section 49 of the Employment Act. In view of the period of service and the nature of the dismissal, compensation of 6 months would suffice. The Claimant therefore would recover this sum from the Respondent.

10. The Claimant therefore succeeds to a certain extent against the Respondent and I enter judgment for the Claimant as follows:-

- a. Compensation for the unlawful, unfair and wrongful dismissal Kshs. 1,110,000/-.
- b. Costs of the suit.
- c. Interest on the sums in a) and b) above at court rates from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 12th day of March 2018

Nzioki wa Makau

JUDGE