



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
NAIROBI

CAUSE NO.219 OF 2015

[FORMERLY NAIROBI HCCC NO.751 OF 2005]

JOHN NJENGA NDUNG'U.....CLAIMANT

VERSUS

KENYA WINE AGENCIES LTD..... RESPONDENT

JUDGEMENT

1. The claim herein was filed before the High Court under HCCC No.751 of 2005 and later transferred to this court under Cause No.219 of 2015.

2. The claim was filed on 17th June, 2005 and defence filed on 1st November, 2005. The claimant replied to the defence on 14th November. The respondent amended the defence and made counterclaim on 30th March, 2007. The claimant amended the reply to defence and also replied to the counterclaim on 15th April, 2007. Both parties filed bundles of documents.

3. There are agreed issues. Claims

In the main the claimant is seeking special damages for;

1. April, 2005 salary at Kshs.359,445.60
2. Pay in lieu of leave Kshs.620,671.33
3. Leave transport allowance Kshs.167,212.33
4. Gratuity Kshs.637,56.03
5. Claim for two sets of tyres Kshs.84,100.00
6. Board and committee meeting minutes Kshs.495,000.00
7. Units of participation (long service schemes) Kshs.147,490.00
8. Expected earning up to completion of contract salary and gratuity Kshs.7,368,356.82
9. 20 years' Service Scheme Award Kshs.30,000.00

Total Kshs.9, 909,432.11

Less dues to the respondent;

1. Company debt Kshs.707,900.75

2. NIC loan Kshs.1,212,100.00

Total due Kshs.1, 920,000.75

Kshs.9, 909,432.11 -1,920,000.75 = Kshs.7, 989,341.36 total due

10. An injunction restraining the respondent from interfering with the claimants quiet possession of motor vehicle KAN 143R.

11. An order directing the respondent to transfer motor vehicle KAN 143R to the claimant and to provide all the relevant documents to effect the transfer.

12. Certificate of Employment.

The respondent in defence has a counter-claim. The counterclaim seek for orders that;

The Counter-Claim

1. Advances to the claimant during 2004 and 2005 Kshs.340,000.00

2. Goods sold to the claimant in 2003 and 2004 Kshs.3,939.13

3. Payments for claimant's house security 2003 and 2004 Kshs.146, **992.90**

4. School fees Kshs.4,481,549.56

5. NIC loan balance Kshs.1,387,523.00

6. Amounts paid to the claimant without respondent's approval Kshs.952,560.00

7. Overpaid gratuity through exaggerated basic pay Kshs.335,989.00

Total Kshs.7, 648,462.59 Less

1. Amounts recovered from the claimant Kshs.1,765,000.00

2. Cheque payment by the claimant Kshs.35,000.00

3. Credit from fuel consumption Kshs.20,038.80

Total Kshs.1, 820,038.80

Balance owing Kshs.5, 828,423.79

Claim

4. The claimant was by a contract dated 31st March, 1995 employed by the respondent as the Deputy Managing Director for a term of three (3) years, renewable. The contract was renewed by a letter dated 2nd July, 2004 for a period of 2 years from 1st April, 2004 to 1st April, 2006.

5. On 19th April, 2005 the respondent unlawfully and uncontractually terminated the claimant's employment without paying him his salary or benefits and depriving him numerous benefits under the contract. It was an agreed term of the contract that the consolidated salary was Kshs.589, 076.00 per month; payment I lieu of leave; at the end of 3 years be entitled to gratuity equivalent to 25% of the basic salary; a car for personal and official use as under the company's car scheme for manager; termination notice at 3 month or payment in lieu thereof; and summary dismissal would be with payment of all accrued amounts at such a date.

6. Contrary to the terms and conditions of the contract issued to the claimant, he was dismissed from his

employment without the respondent pays his dues. The claimant was entitled to purchase the company car allocated to him by the respondent under the Company's Car Scheme. The claimant made payments for the same for the purchase of Motor Vehicle Registration No.KAN 143R but the respondent failed to issue the claimant with the necessary documents to effect transfer and instead demanded the immediate return of the same.

7. The claim is that the termination of employment has occasioned the claimant loss and damage. This has also occasioned publication by gutter press allegations against the claimant that he was corrupt. The termination of employment was without basis, irregular and contrary to the law. It amounted to wrongful termination of employment and damages are due.

8. The claimant testified in support of his claim.

9. The claimant joined the respondent's employment in 1985 as a Financial Controller and in the year 1995 he was promoted to Deputy Managing Director on fixed contract terms. His last contract for two years was running from 1st April, 2004 to 1st April, 2006 but was terminated on 19th April, 2005.

10. The claimant served under different managing directors, his last being Mr Francis Oyugi who had taken over from Mr Chemngoren. There was also a Board of Directors appointed to oversee operations within the respondent entity.

11. Before the claimant was terminated from his employment, several incidents took place and are material in his case. In November 2003 while he was travelling on company business to Rwanda his office was smeared with human waste, a matter which was investigated internally. In March 2003, the managing director accused the claimant of fraud and investigations commenced during when he was sent on forced leave. The Efficiency Monitoring Unit (EMU) was invited to undertake investigations but the outcome was never shared. Two people posing as journalists tried to blackmail and extort money from the claimant alleging that they had damaging information against him in relation to his office and would publish it. Upon a report of the extortionists to the police they were arrested and charged. The two had faxed their allegations to the managing director whose basis was similar to what he had reported to the Minister leading to EMU investigations against the claimant that saw him sent on compulsory leave.

12. The claimant also testified that following various allegations made against him by the managing director and which information had been leaked to the gutter press, he did not have a cordial working relationship with the managing director, Mr Oyugi. On 1st March, 2005 the managing director had sent the claimant on compulsory leave without an explanation or reason. On 7th April, 2005 the managing director sent the claimant a letter with various accusations and invited him to a disciplinary hearing. These accusations were similar to what EMU was investigation and to the extortionists' claims. The claimant replied to all the allegations made against him. Such allegations related to;

1) That the claimant approved, authorised and or facilitated the overpayment of gratuity to the tune of Kshs.335,898.00;

2) Approved, authorised and or facilitated irregular payment of performance pay of Kshs.952,560.00;

3) Approved, authorised and/or facilitated the payment of an advance of Kshs.1,250,000.00;

4) Approved, authorised and/or facilitated payment to Mr Chemng'orem and himself Kshs.1,989,468.00 and Kshs.1,046,322.00 respectively while they had company cars;

5) Approved, authorised and or facilitated the abuse or misapplication of company funds by failing to adhere to proper and or full compliance with the requirements of the education trust fund; and

6) Approved, authorised and or facilitated overdraw of his benefits from the education trust fund to the tune of Kshs.4, 196,681.33 without the approval of the trustees.

13. The claimant denied all the allegations made against him. The allegations that there was overpayment of gratuity is not true as such relate to a contract which expired on 31st March, 2004. The performance payment of Kshs.952, 560.00 was part of the monthly remuneration payable at the end of each contract. Such payments for performance were paid at the end of each contract as follows; Contract for 1st April, 2001 to 30th June, 2002 paid Kshs.534, 807.00; Contract for 1st July, 2002 to 30th June, 2003 paid Kshs.564, 767.00; and Contract for 1st July, 2003 to 31st March, 2004 was paid Kshs.589, 076.00. 14. The contested payment of Kshs.952, 560.00 followed a board meeting which passed a resolution to consolidate staff salaries into the payroll effective 1st July, 2003. For the claimant, the payment of Kshs.589, 076.00 was based on due salary as at 30th June, 2003 after adjustment of 5% to reflect increase in the cost of living. .

15. With regard to allegations that the claimant approved and was paid an advance of Kshs.1,250,000.00 against future gratuity, he replied that he applied to the managing director for an advance to assist meet school fees for his children. The request was considered and approved and a disbursement was made.

16. On the payment of Kshs.Kshs.1,046,322.00 while he had a company car, the claimant replied that he was never provide with the details of such payment for him to be able to respond. Where such payments were made, the car scheme allowed for the same.

17. On allegations with regard to failure to adhere to education fund trust rules and regulations, the claimant replied that the respondent operated a Staff Education Trust Fund for the benefit of staff member in the scheme. It had its own criteria on how an application and approval was to be processed. Each employee who was a member had an account therein and a portion of his salary was remitted thereto. All contributions therein belonged to the individual employee as the respondent did not make a contribution for the scheme.

18. On allegations that he claimant was paid Kshs.4, 196,681.37 from the Education Trust Fund without approval he replied that the managing director instructions for a debit of an amount without the claimant's approval. Such did not have a breakdown and his requests to know the details went unanswered by the respondent.

19. The claimant also testified that when he was invited to the disciplinary hearing with the same allegations as set out above and also similar to what the Minister and EMU were investigating him on, he prepared and sent to each board member his responses to the allegations made.

20. When the claimant appeared before the disciplinary committee of the board on 13th April, 2005 he was not asked to make any clarifications to his responses. The only question he was asked was whether he had instructed Philip Bartay to pay his gratuity and performance pay in a memo issued to the officer to which the claimant denied such assertions. The claimant had not authorised payments to himself. The memo filed by the claimant at page 95 of his bundle has various overwritten notes where Mr Bartey notes he was to discuss the payment with the Managing Director. The advance the claimant had requested for in 2001 was being recovered as noted in the memo.

21. No other questions were asked by the disciplinary committee. The claimant remained on suspension.

22. The claimant also testified that following the disciplinary meeting, he tendered his resignation noting the goings within his office and with the board having ignored his responses and to avoid losing his benefits. There was no reply to his resignation letter by the respondent.

23. Following the disciplinary hearing, various resolutions were passed including that the claimant should be asked to resign from his position failure to which he would be dismissed. These options were never communicated to him and had this been done, he would have considered the option of a resignation so as not to lose his benefits. Following the disciplinary meeting, the full board held its meeting on 19th April, 2005 and approved the resolution of the disciplinary committee to summarily dismiss the claimant.

24. Following the summary dismissal, the claimant issued the respondent with a cheque for Kshs.785,

249.35 in accordance with the car scheme so as to retain the car he was using at the time.

25. The claimant is seeking to be paid the due salary for April, 2005 as this was unpaid. From the monthly salary of Kshs.597, 076.00 for the 18th days at work before dismissal, the amount claimed is Kshs.349, 445.60.

26. The due leave days should be paid. The claimant was entitled to 30 days of leave and had 71 days due all being Kshs.1, 985,777.19.

27. Leave came with an allowance for travel based on basic pay at 5%. In the period of 2003/2004 the claimant had been paid Kshs.112, 350.00 and was then due for leave as at 18th April, 2005 and therefore had earned travel allowance. Due amount being Kshs.129, 202.50.

28. Gratuity due for the last contract 2004/2005 is Kshs.646, 012.50.

29. On the claim for two new tyres, all managers were entitled to change of tyres every 4 years as set out under the car scheme for managers. When not changed, one could claim for the same in cash payment. The claimant had a Mercedes car and tyres were each at Kshs.8, 000.00 and for the two sets, he was entitled to Kshs.84, 000.00.

30. The claimant sat in board meetings and took minutes because there was no secretary at the time. For his time and secretarial duties he gave to the board and had the board paid for such service, the claimant had been the *de facto* company secretary. For the additional duties in 72 meetings, his claim is for less at 33 such meetings all computed at Kshs.15,000.00 per meeting total due being Kshs.495,000.00.

31. Units of participation were a share option the claimant found when he joined the respondent on 1st March, 1985. Under the scheme, when one completed 10 years of unblemished record, he would get unit shares. This scheme collapsed in 2004. There was cessation of membership as at 30th June, 2004. The claimant has served for 19.4 years and had a total of 116,896 units. On the gross pay of Kshs.1,519,648.00 and to ensure there was cash flow within the organisation, the board decided that not all staff could be paid at once and a 65% was to be paid in November, 2004 and the balance in January/February, 2005. The respondent had prepared all the supporting documents for these payments. The claimant was paid first portion in November, 2004 but balance due is Kshs.147, 490.00.

32. On the claim for long service and unit scheme payment, the claimant testified that the respondent made this payments to keep its employees motivated. Upon 10 years of service, one got units and a certificate. Upon 15 years of service one got a cash reward of Kshs.15, 000.00 or a gift worth the same amount. After such anniversary, every 5 more years earned the practice was repeated with gifts and rewards. The claimant was due for an award of Kshs.30, 000.00 at the time of exit.

33. Following the wrongful dismissal from employment, the claimant lost earnings and benefits under his contract which was not due until 30th June, 2006. Had he been allowed to complete the contract term, he would have earned Kshs.7, 470,776.98 and this is due. Such is inclusive of gratuity.

34. The claimant also testified that he owes the respondent a sum of Kshs.1, 802,640.75. The claimant took a loan with NIC bank and guaranteed by the respondent. The bank recalled the same and the respondent must have paid. The respondent has not explained why they want to be paid more than kshs.590, 540.75 that had been due on this loan to NIC as secured.

35. The claimant had an arrangement with the respondent to pay for security at his residence and would be refunded. The claimant was to get the bills and make payments to the respondent.

36. Following the summary dismissal of the claimant, at age 53 made it impossible for him to secure new employment; the allegations made against him were grave and never investigated. This damaged his career and has been unable to secure new employment. His life was destroyed together with his children. Damages should be paid.

Defence

37. The response to the claims is that by a contract of employment of 31st March, 1995 the respondent renewed the claimant's employment for a period of two years. Employment was terminated by letter dated 21st April, 2005 which was lawful and justified.

38. During his employment, the claimant was entitled to a basic salary of Kshs.480, 120.00 per month or as directed by the board. The claimant had a house allowance of Kshs.52,100.00 per month which was paid in arrears and was reviewed by the board. There was a gratuity pay at the end of 3 years of the contract period at 25% of the basic salary. There was a car scheme for the claimant to benefit from. Leave or leave payment allowances in lieu was a benefit.

39. The defence is also that the claimant was terminated from his employment with the respondent due to various irregularities. He approved, authorised and facilitated the overpayment of a gratuity of Kshs.335, 598.00 to himself without management approval. He also received an irregular payment of Kshs.952, 960.00 for performance without approval. There was irregular payment of Kshs.1,250,000.00 to the claimant as interest free salary in advance despite a contractual requirement that gratuity would only be paid in arrears. The claimant received Kshs.1, 046,332.00 despite having a company car which was irregular. The claimant also irregularly caused to be withdrawn Kshs.4, 196,681.37 to his benefit from the senior management education trust Fund. For these irregularities, the respondent was entitled to dismiss the claimant summarily. No notice pay was due.

40. Under the company car scheme, the claimant was entitled to purchase a car of his choice upon board approval. Any purchase of a car whose engine capacity exceeded 1600cc was to be approved by the board under the set scheme. Under the procurement regulations any purchase of an asset whose value exceeded Kshs.500, 000.00 was to be approved by the tender committee of the board. In this regard, the claimant purchased a Mercedes C200 vehicle registration No.KAN 143R with an engine capacity of 1998cc valued at kshs.4, 795,416.00 without board approval and contrary to the car scheme and the procurement regulations.

41. The respondent admits that the claimant issued cheque of Kshs.785, 249.35 on account of the motor vehicle KAN 143R. Upon the return of the vehicle to the respondent, the paid amounts shall be refunded.

42. Matters published of the claimant in the gutter press were based on extraneous, circumstantial and irrelevant grounds. The summary dismissal of the claimant was based on irregularities committed against his contract of employment.

Counter-claim

43. The respondent in counterclaim has set out that the claimant owes the respondent a sum of Kshs.5, 82,427.80. The particulars of such a claim are that;

- a) *Advances made to the claimant during 2004 and 2005 Kshs.340,000.00*
- b) *Goods sold to the claimant during 2003 and 2004 Kshs.3,939.13*
- c) *Payment made for claimant's house security during 2004 and 2005 Kshs.146,992.90*
- d) *Schools fees Kshs.4,481,549.56*
- e) *NIC loan balance Kshs.1,387,523.00*
- f) *Amount paid to the claimant without approval Kshs.952,560.00*
- g) *Amount overpaid to the claimant in gratuity through exaggerated basic pay Kshs.335,898.00*

Total Kshs.7, 648,462.59

Less

a) Amount recovered from the claimant Kshs.1,765,000.00

b) Cheque payment by the claimant Kshs.35,000.00

c) Credit from claimant's fuel consumption Kshs.20,038.80

Total Kshs.1, 820,038.80 Balance due Kshs.5, 828,423.79

44. The respondent's counterclaim is for judgement against the claimant for the sum of Kshs.5, 828,423.80 with interests and payment of Kshs.1, 387,523.00 at 17% per annum from 1st March, 2006 until payment in full.

45. In evidence, the respondent called Philip Bartay as the sole witness.

46. Mr Bartay testified that he joined the respondent in February, 1990 and is the Warehousing Manager and worked with the claimant while he was the Deputy Managing Director. At the time he was the human resource manager. The claimant's employment regulated under a written contract. He had a basic pay of Kshs.48, 120.00 per month together with various benefits. Such terms could only be reviewed by the board. There was a house allowance, car and gratuity pay at 25% of basic pay and which were regulated under various schemes and regulation.

47. By letter dated 2nd July, 2004 the claimant's contract was renewed for a period of 2 years effective 1st April, 2004. Such employment was also regulated under the staff regulations. Such entitled the claimant a leave travel allowance at 5% of basic pay; travel, hotel, meals and education allowances for children as set out under the Education Trust Fund. The car scheme regulations required purchased cars be within 1600cc or get board approval.

48. On 1st August, 2001 the claimant ordered for a Mercedes C200, from DT Dobbie at Kshs.4,759,416.00 and the dealer issued an invoiced at 2.5% discount. The claimant facilitated and approved payment for the vehicle which was registered in the joint names with the respondent. The claimant did not follow procurement procedures under the car scheme and there was no board approval for the purchase of this vehicle. The engine capacity and costs were higher than set out in the scheme. Upon termination of employment, the respondent had discretion to retain the vehicle.

49. Mr Bartey also testified that in 2005 it came to the attention of the respondent that the claimant had performed various financial irregularities as deputy managing director by making irregular payments to himself. At the end of his contract of 31st March, 2004 the claimant was entitled to a gratuity. He, however, overstated his basic pay and made an overpayment to himself vide memo dated 17th May, 2004. The basic pay for the period 1st April, 2001 to December, 2002 as Kshs.99, 450.00 but the claimant stated it to be Kshs.146, 010.00 and Kshs.157, 691.00 for gratuity payment which was irregular.

50. For periods in 2003, the claimant claimed basic pay to be Kshs.103, 925.00 to Kshs.187, 250.00 which were used to approve gratuity payment irregularly. Such was also without board approval. Proper computation of gratuity due should be Kshs.1, 106,027.00 instead of Kshs.1, 444,923.00 thus an overpayment of Kshs.335, 898.0.

The claimant also facilitated irregular payment for performance of Kshs.952, 560.00 which he was not entitled to under his contract.

51. The claimant's due salaries were payable in arrears, but he caused to be paid Kshs.1, 250,000.00 which he failed to repay back to the respondent. Such advances were to cover November and December, 2004 and February and March, 2005 but never paid back and still due and owing.

52. Bartey also testified that under the car scheme, the claimant was entitled to fuel expenses to a

maximum of 2,500 km per month. The managing director was required to authorise additional allowances for long distance business travel. Despite having a company vehicle, the claimant also made mileage claims amounting to Kshs.1, 046, 322, 00 to which he was not entitled.

53. The claimant had his house security paid for by the respondent for a reimbursement. He failed to reimburse Kshs.146, 992.00

54. Under the education trust fund, the respondent paid for education of the claimant's children which payment should have been paid under the trust fund regulation. The claimant unilaterally approved for himself the payment of Kshs.4, 196,681.37 without the trustee's approval. The claimant abused his office for such irregular payments.

55. The claimant incurred expenses in the purchase of goods from the respondent which was not paid for at Kshs.3, 939.13.

56. The claimant took a loan with NIC bank which the respondent executed an irrevocable letter of set off with an undertaking to maintain Kshs.1, 700,000.00 in a fixed deposit account for the bank to apply the same to set off the loan any time. The claimant failed to repay the loan forcing the respondent to pay a sum of kshs.1, 387,532.00.

57. Mr Bartey also testified that on 7th April, 2005 the claimant was invited for a disciplinary hearing for the 3th April, 2005 with regard to his duties and the misapplication of funds. His written defences and representations were considered by the board committee and a decision of the full board taken to dismiss him from employment on 21st April, 2005.

58. The claimant was directed to return the company car, but declined. Such vehicle was to be assessed by the respondent but the claimant has retained the same irregularly. The payment of Kshs.785, 249.32 as full payment for the same was not procedural. Any owing amounts to the claimant ought to be deducted from his terminal dues.

59. At the time the claimant was dismissed by the respondent he was entitled to;

a) Pro rata gratuity from 1st April, 2004 to 18th April, 2005 Kss.589,837.00

b) Leave travel allowance Kshs.50,000.00

c) Salary for 18 days Kshs.357,445.60

d) Long service award Kshs.144,719

e) 60 leave days not taken Kshs.518,058.00 Total Kshs.1, 662,060.00

60. At the time of his dismissal from employment the claimant owed the respondent Kshs.7, 648,462.59 which was set off with his dues and a balance of Kshs.5, 828,423.79 is unpaid. Claims for unpaid gratuity do not arise as such accrued for work done. Claim for two sets of tyres are without basis as the claimant has refused to return this asset of motor vehicle KAN 143R to the respondent. Efforts to repossess the vehicle were frustrated by the claimant.

61. At the close of the hearing, both parties filed detailed written submissions.

The court has in this judgement put into account the pleadings, the statements list of documents filed, the evidence of both parties and the written submissions. The issues which emerge for the court determination can be summarised as follows;

Whether the termination of employment of the claimant was wrongful; tyres

Whether the claimant should be allowed quiet enjoyment and the transfer of motor vehicle registration number KAN 143R

Whether the remedies sought are due

Whether the counterclaim has merit(s)

62. From the Memorandum of Claim, the Statement of Defence and Counter-Claim, some issues are agreed save for the due amounts. Drawing from the terminal dues admitted as due in the Statement of Defence I note the following as not disputed;

63. Salary due for April, 2005 at 18 days. In this regard, the respondent has admitted owing Kshs.357, 445.60 while the claimant asserts a sum of Kshs.359, 446.00 as due. The gross salary at the time of termination was Kshs.599, 076.00 per month. From the records, the last pay slip issued to the claimant for April, 2005 sets out his gross salary at Kshs.599, 076.00 per month and this should be the basis for computation of the salary due for the 18 days worked before his dismissal. As such, the pay due is as computed by the claimant at Kshs.359, 446.00.

64. Leave days outstanding. The claimant claimed for pay in lieu of leave Kshs.620, 671.33 and the respondent admitted owing 60 days of untaken leave valued at Kshs.518, 058.00. In his submissions, the claimant has set out a claim for 71 days due for untaken leave days. From the Memorandum of Claim and the admissions by the respondent and the basis of the due untaken leave days being the last paid gross salary at Kshs.599,076.00 for the 60 leave days, the due amount is Kshs.1,198,152.00.

65. Leave transport allowance. The claimant's contract of employment provided for the application of the staff regulations in place. Under Clause 22 of the staff regulations it stipulated that his leave transport allowance was 5% of the annual basic pay or at a rate determined by the board. Where such leave transport allowance was thus due and not paid as at the time of termination of employment, the basic pay applicable is as was due at kshs.187,250.00 per month all at Kshs.9,362.50 at 5% and which translates for the annual basic salary at Kshs.112,350.00 as due.

66. Long service award. The claimant is seeking Kshs.147, 490.00 and the defence has Kshs.144, 719.00. The claimant has made basis of his claim under Clause 66 of the staff regulations. The respondent's basis is a 35% of the salary due and I find this computation fair and reasonable at kshs.144, 719.00.

67. Pro-rated gratuity from 1st April, 2004 to April, 2005. The claimant is seeking Kshs.637, 156.00 and the respondent has offered Kshs.589, 837.00. Gratuity was due to the claimant under his contract at 25% of his basic salary upon completion of his contract. The respondent has made a computation lower than that of the claimant on the grounds that the claimant used a higher basic pay than was due. As set out above, the basic pay due to the claimant at the time of termination of employment was Kshs.187, 250.00 per month of which 25% is Kshs.46, 812.50 and for the year a total sum of Kshs.561, 750.00. Of this claim, the respondent has thus made a reasonable computation which shall apply herein at Kshs.589, 837.00.

68. The claimant was dismissed from his employment with the respondent vide letter dated 21st April, 2005 effective 19th April, 2005. The grounds thereof were that pursuant to the provisions of Rule 53(e) and (k) Staff Regulations for Supervisory (non-unionisable) staff and the provisions of the Employment Act Chapter 226 and following a disciplinary hearings, the respondent's board made a decision to dismiss the claimant from his employment. Prior to this notice, on 13th April, 2005 the claimant had been invited at a disciplinary hearing. A decision was made to dismiss him from employment and on 19th April, 2005 the board ratified the same.

69. During the disciplinary hearing, matters that the claimant was required to respond to related to a notice issued to him with regards to having *approved, authorised and or facilitated* the overpayment of gratuity to himself by signing the payment cheques without the board approval, made a payment for performance pay, made a salary advance payment, made mileage payments to himself while he had a

company car, made payments to himself from the senior management education trust fund which payments were irregular and amounted to gross misconduct. The claimant was also required to answer to allegations that he committed other malpractices of guaranteeing the managing director to access a loan facility contrary to set regulations for employees, he purchased a motor vehicle outside the set policy regulations and after the irregular purchase, the claimant took away the vehicle without the authority of the respondent.

70. To these allegations, the claimant respondent that he was entitled to a gratuity pay after end of each contract and when he was paid Kshs.335, 898.00 it was a 25% of his basic pay after serving 3 years contract. Such basic pay was based on his consolidated salary paid partly through the payroll and partly through the various benefit schemes. Such an arrangement had been approved by the board to avoid employees being overtaxed in the benefits they received. The defence to this payment is also that the claimant had an approval from the managing director and since all payments by cheque requires four (4) signatories, the same was processed procedurally and the payment was regular.

71. On the allegation that the claimant received a performance pay of Kshs.952, 960.00 irregularly, his defence was that this payment was part of his contract benefits and the computation for the same was procedural.

72. On the allegation that the claimant received a salary advance of Kshs.1, 250,000.00 interest free irregularly, his defence was that he made a request from the managing director for an advance to enable him meet personal needs and the same to be recovered from the due gratuity and which was approved. The claimant was to repay back, but he did not

73. On the allegation that the claimant received Kshs.1, 046,322.00 millage claims while he had a company car, the defence is that the claimant had no company car at the time for the mileage claims and had made a request to have a company car which was approved by the managing director. Use of out-dated car schemes instead of the most current of 1st January, 1996.

74. The allegation that the clamant made irregular overdraft of his account on the Education Trust Fund and his defence was that the bank account had 4 signatories and no withdrawal could be made without the requisite signatory's authorisation and complying with the singing mandate. That there is no evidence of irregular benefit to the claimant and all withdrawals were authorised by the managing director.

75. Where the cause of action arose on 21st April, 2005 with the letter dismissing the claimant from his employment with the respondent. The applicable law was the Employment Act Cap 226 Laws of Kenya the parties had a contract of employment regulating the employment. There were staff regulations spelling out more terms not included in the contract of employment.

76. The parties had therefore set out the terms and conditions of employment and how termination of the same was to be addressed. This I find to be in consonance with section 16 of the Employment Act Cap 226, as repealed. The law then allowed an employer to terminate employment as stipulated in the agreement of employment without assigning any reason as this was not a dismissal from employment which required a reason for the same. This has since changed with the enactment of the Employment Act, 2007.

77. The claimant has relied on the finding in **Ezekiel Nyangoya Okemwa versus Kenya Marine & Fisheries Research Institute [2016] eKLR** and the application of the Service Commission Act Cap 185 Laws of Kenya and the requirements for the application of natural justice in hearing an employee before dismissal. Such findings reiterated the findings in the case of **John Benson Githiji versus Attorney General & 4 others [2014] eKLR**. However, the context here is different as the issues for determination were held to be within the ambit of the Employment Act, 2007 unlike in this case where the applicable law is the Employment Act Cap 226, now repealed.

78. the Court of Appeal in **Rift Valley Textiles Ltd versus Edward Onyango Oganda Civil Appeal No. 27 of 1992 (Cak) [1990-1994] EA 526**, held that where a notice period is provided in the contract of

employment, then an employer need not assign any reason for giving the notice to terminate the contract. Therefore, unless a contrary intention is manifested in the letter of termination, the Court should not speculate as to the real intentions behind the said termination.

79. With regard to the case of whether there was wrongful termination of the claimant's employment, where statute stipulates the procedures to be followed before termination of employment and the employer fails to follow the same, the resulting termination of employment is wrongful as held in the case of **Kenya Ports Authority versus Silas Obengele Civil Appeal No. 38 of 2005**. As set out above, the contract was under a contract of employment. It provided for a notice before termination of employment. There were staff regulations and under such, the claimant was issued with notice requiring him to answer to various allegation to which he made his detailed responses, the board committee invited him to a disciplinary hearing and the a finding was made based on the allegations and responses and hearing thereto. Prior to the claimant being invited to the disciplinary hearing, other agencies of government had also moved in to undertake investigations. Without the board being influenced by whatever findings these agencies made, on 19th April, 2005 the board confirmed the findings of the disciplinary process and decided to dismiss the claimant from his employment.

80. Under the applicable law, the Employment Act Cap 226, repealed it was not mandatory for an employer to give an employee a hearing where there were grounds that warranted summary dismissal. As held in **Margaret Omondi versus Kenya Revenue Authority [2013] eKLR** under the repealed Employment Act Cap 226, there was no requirement for procedural fairness in termination of employment. See also findings by the Court of Appeal in of **Barclays Bank of Kenya Ltd versus Njau [2006] 2 EA 15**.

81. The claimant was given a hearing by the disciplinary committee and from the evidence from the shop floor, a decision was made that the allegations made warranted summary dismissal. The applicable law did not require the respondent to administer procedural justice to the claimant. On the basis of findings made following the response made by the claimant, the hearing allowed under the highest organ of the respondent, the board and there being no requirement for substantive justice, the claimant cannot claim the same herein as such are principles only available under the Employment Act, 2007. As of April, 2005 there was no statutory obligation to abide procedural or substantive justice. The resulting termination of employment of the claimant vide notice of 21st April, 2005 was therefore not wrongful. It was permissible under his contract of employment and the regulations applicable to his employment with the respondent.

82. With regard to claims for payment of due salaries until the end of contract period, the gratuity due and the benefits thereto, I am persuaded by the findings of the Court of Appeal in the case of **Dalmas B Ogoye versus KNTC Ltd. Civil Appeal No. 125 of 1996[1995-1998] 2 EA 265** and in **Barclays Bank of Kenya Ltd versus Njau [2006] 2 EA 15** that;

... Where the contract of employment embodies notice period, then damages to a person dismissed unlawfully is to be worked out on the basis of the notice period. It follows that the plaintiff's entitlements on termination is to be made with reference to the letter of appointment.

83. The claims for expected earnings up to completion of contract and gratuity at Kshs.7, 368,356.82 must fail. The claimant is only entitled to the pay for days worked, gratuity due up to the time of last date at work and any benefit due thereof. Future earnings on a contract that was terminated as under its terms are not justified.

84. During the hearing, there emerged that the claimant was also faced with the allegations of guaranteeing a loan to the managing director and that he purchased a motor vehicle outside the allowed regulations. The claimant admitted that the matter of guaranteeing a loan to the managing director Mr Francis Oyugi led to both being charged under the Anti-Corruption and Economic Crimes Act before the Chief Magistrate's Court Case No.20 of 2007. Under such charges the claimant was found guilty.

85. These being matters relating to the claimant's employment with the respondent, having undertaken his employment terms and conditions in an irregular manner to accrue a benefit to another employee, and

being the accountable officer as deputy managing director, such amounted to gross misconduct under the meaning of section 16 of the Employment Act Cap 226, repealed. Such warranted his summary dismissal. Even though this was not the reason for the termination of employment as at 21st April, 2005, the claimant cannot be made to benefit from an illegality.

86. For the purchase of Motor vehicle KAN 143R the claimant relied on board paper that had changed the allowed engine capacity from 1600cc to 2000cc. however, the respondent submitted a policy document of the respondent of 1996 after the one the claimant had relied upon of 1985. Both put into account, each required the board to approve any changes to the requirements of a car purchase beyond 1600cc or above the value of Kshs.5, 000,000.00. The claimant as the beneficiary under the car scheme for which he was to purchase cannot thus have approved such a benefit. For checks and balances, either a higher officer, spate and different from the claimant ought to have made that approval even where the engine capacity or the monetary value was higher than required under the regulations. In this case, the board approval was necessary noting the benefit reverting to the claimant. Such approval was not obtained or given to allow for the purchase of a motor vehicle outside the set regulations. The costs and attendant ownership was not above board.

Remedies

87. The claimant is seeking for quiet possession of motor vehicle KAN 143R on the basis that under the car scheme he was entitled to the same and upon termination of his employment he made effort to pay for its full value. That he ranked in priority as the officer who was using the motor vehicle.

88. The claimant admits that the respondent had a car scheme in place during his employment. Under the car scheme, there were regulations on how the benefit was to accrue to an employee. Part of the regulations was to have the car assessed before the same could revert to the employee in possession or be applied at the discretion of the respondent.

89. The last communication with regard to motor vehicle registration KAN 143R by the respondent was vide letter dated 14th June, 2005. Such required the claimant to return the vehicle to its assessment for purposes of its disposal under the set regulations. The claimant was to get priority. Such a measure I find to be fair, but the claimant failed to oblige.

90. At the time of termination of employment, the vehicle in possession of the claimant was the property of the respondent. Such ownership has not changed as the claimant has retained possession while title and log book is still held by the respondent. Change of title cannot be forced upon the owner. Demand for return of the subject vehicle has been made with the purpose of having the same assessed and for the respondent as the owner to decide as to whether the claimant is best suited as to be conferred with change of title. The claimant has failed to honour the demand.

91. The court cannot protect quiet enjoyment of goods the claimant did not have ownership. His relationship with the respondent has since ceased. Return of all assets belonging to the respondent is imperative. The orders sought with regard to the claimant keeping possession and ownership of motor vehicle KAN 143R cannot issue in his case. Such would be to deny the owner justice due from the property. The demand to return the same for assessment and for the respondent to make a decision thereon was reasonable and fair but the claimant failed to oblige. Whatever rights over the vehicle the claimant held ended with his employment and the least for him to do was to return it to the respondent and engage their good offices for the same to be sold to him and thus gain lawful title. Such cannot be circumvented through other means.

92. Claim for tyres worth Kshs.84, 100.00 is made on the grounds that this was a benefit during employment and stipulated under the car scheme. The claimant testified that motor vehicle KAN 143R was purchased on 1st August, 2001. He enjoyed a benefit of change of tyres every 4 years and where there was no change, the cash value/benefit thereof. With the motor vehicle, a Mercedes Benz C200 Compressor, the two sets of tyres were valued at Kshs.8,000.00 each and total value due to him as a benefit was thus Kshs.84,100.00. Where this benefit was due, it was to accrues within 4 years of use of

the subject vehicle. Employment ended on 19th April, 2005 a period of 3.8 months, being 4 months short of the due benefit. Such benefit is not prorated. It does not accrue under the car scheme rules.

93. The claim for long service scheme benefit of Kshs.30, 000.00 and claim for until participation award at Kshs.50, 000.00 in my view relate to the same matter. To award in both would be a double benefit without justification.

94. Claim for taking board minutes is based on the fact that the claimant as the deputy managing director attended board meetings and had the duty to take minutes. That since, the respondent hired a company secretary to undertake such duties and is remunerated. The claimant attended the board meetings as part of management and was allocated the duty to take minutes. The claimant was paid an allowances while attending at such board meetings. The board had the discretion to make provision of further remuneration of the attendance of the claimant required him to undertake duties over and above his requirement to attend as part of the management. The claimant by being paid an allowance to attend at board meetings and earning a salary at the same time, such I find to be double pay for time used for the purpose and benefit of the employer and thus well compensated for such duties as taking such minutes. To claim for more would be similar to being paid a salary, an allowance and an extra pay, thus triple for time taken which would have otherwise not accrued had the claimant been attending to his regular duties and deputy managing director.

Counter-Claim

95. On the claim for goods sold and not paid for at kshs.3, 939.13 and payment for house security at kshs.146, 992.90 these are not contested. Such are due in terms of the counter-claim.

96. The counter-claim for salary advance of Kshs.1, 250,000.00 interest free is claimed on the basis that this advance was irregular. The claimant has confirmed that indeed that was this advance payment request which went to his children for schools fees and was approved by the managing director. That this amount was deducted from the gratuity payable for the period. In submissions, the claimant asserts that the advance payments were deducted from his January, 2005 salary.

97. The January, 2005 pay slip is attached by the respondent at page 120 in the bundle similar to page 91 of the claimant's bundle. Both statement agree on the gross salary at Kshs.2, 993,559.00 and the deductions being;

PAYE ...

Third party recoveries Kshs.100, 130.00

Family medical insurance ...

Consumer co-op. ...

Total deductions ...

98. The deduction for the salary advance impugned by the claimant is not set out. Where such related to the deduction of *third party recoveries* the due amount is Kshs.100, 130.00 and not the stated salary advance of Kshs.1, 250,000.00. Subsequent pay statements for February and March, 2005 have a similar figure of Kshs.100, 130.00.

99. In submissions, the respondent's case is that the claimant was advanced a salary for November, December, 2004 and February to March, 2005 and he failed to repay the sum of kshs.340, 000.00. From the records and annexure No.127 to the respondent's bundle, the computation of what is due from the claimant in this regard is the amount of Kshs.340, 000.00.

100. Claim for school fees is for the sum of kshs.4, 481,549.56 as set out in the counterclaim. This being a claim from the claimant by the respondent, the burden of prove cannot be vested upon the respondent.

The claimant admitted to having benefited from the education trust fund and that he was owing at the time of his termination. In submissions, the claimant does not offer any evidence save to challenge the figures set out by the respondent. The claim for Kshs.4, 481,546.56 is thus due to the respondent with regard to the education fund.

101. Loan balance is admitted save the amounts due. The claimant has acknowledged that indeed there was a loan due from him, at the time of termination the amount of Kshs.1, 212,100.00 was due but he has not repaid this amount. This loan was secured by the respondent who repaid the same. Having enjoyed the loan facility and then failed to repay the same, the same is due and owing with interest until paid in full. There has been demand and reminder to pay but the claimant has not obliged or offered to offset the same in a manner agreeable to the respondent. The claimant has not made effort to negotiate a preferential rate or a rate that is not punitive after cessation of his employment with the respondent. The claimed amount of Kshs.1, 387,532.00 is therefore due and owing at bank rates/going commercial rates until paid in full.

102. The claim for Kshs.952, 560.00 as an irregular payment as performance pay through overstated basic pay. As set out above the basis of the basic pay is addressed and all payments due or owing to the claimant ought to apply this rate. I find no justification to the claimant of overstated annual basic pay applied by the respondent for the purpose of this claim for performance pay. In all contracts ending in each phase, the claimant was paid such performance pay. Where due and unpaid, the last basic pay for computation of such a benefit should apply.

103. The claim for overstated gratuity pay of kshs.335, 898.00 apply as above. An eschewed basic pay by the respondent cannot achieve the set objective where the basis for the counter-claim for paid gratuity is such basic pay. Such claim is not justified.

Accordingly, judgement is hereby entered for the claimant and for the respondent in terms of the counter-claim in the following terms;

1. The claimant is awarded the following;

- (a) Salary due for 18 days in April, 2005 at Kshs.359,445.60;**
- (b) Untaken leave days Kshs.1,198,152.00;**
- (c) Leave transport allowance Kshs.112,350.00;**
- (d) Gratuity due Kshs.589,837.00;**
- (e) Long service pay Kshs.144,719.00;**
- (f) Certificate of Employment**

2. The respondent is awarded the following in the counterclaim;

- (a) Unpaid Advances to the claimant Kshs.340,000.00;**
- (b) Unpaid Goods sold to the claimant Kshs.3,939.13;**
- (c) Unpaid claimant's house security Kshs.146, 992.90;**
- (d) Unpaid NIC loan balance Kshs. 1, 387,532.00 payable with interest at current on-going commercial rates;**
- (e) Unpaid school fees Kshs.4,481,549.56; and**

3. The dues owed to the claimant shall be offset from the dues owing from the respondent in

counterclaim whichever is higher.

4. Whatever is paid and acknowledged shall be put into account.

5. Each party shall bear own costs.

Delivered in open court at Nairobi this 20th day of April, 2018.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Nancy Bor

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