



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2048 OF 2012

(Before Hon. Justice Mathews N. Nduma)

FRANKLIN NJERU.....CLAIMANT

VERSUS

KENYA KAZI SERVICES LIMITED.....1ST RESPONDENT

KENYA KAZI LIMITED2ND RESPONDENT

THE KK GROUP OF COMPANIES.....3RD RESPONDENT

J U D G M E N T

1. The Claimant brought this suit on 9th October, 2012 by a statement of claim dated 8th October, 2012. The Claimant seeks the following reliefs:-

- (a) Compensation equivalent to 12 months' salary for unfair termination of employment/wrongful dismissal.
- (b) Payment for 105 accrued leave days Kshs.2,795,864.
- (c) Gratuity in respect of 11 years Kshs.3,866,280.
- (d) Payment in lieu of two (2) months notice Kshs.1,171,600.
- (e) Repatriation costs equivalent USD 2,000.
- (f) Salary to date.
- (g) Certificate of Service.
- (h) Costs and Interest.

2. Further particulars were sought by the Claimant regarding the corporate status and directorships of the 1st, 2nd and 3rd Respondents. The Claimant also sought particulars about who exactly was his employer whilst working in Kenya in the Republic of Burundi. The particulars were provided.

3. This was followed by an amendment to the Claim filed on 27th February, 2013 in which the three Respondents were sued in the suit.

4. The suit is opposed vide the Respondents' joint reply to Amended statement of claim in which they reiterate the contents of statement of Reply to the claim filed on 27th November, 2012.

5. The reply was filed under protest with regard to The KK Group of Companies stating that the 1st Respondent is a non-existent entity in law and is denied that the Claimant worked for KK Group of companies for a period of six (6) years or at all. The contents of the statement of claim in paragraphs 1 – 29 are denied in toto especially as they relate to anything done by KK Group of companies.

6. Kenya Kazi Limited responded to the claim vide a statement of reply dated 27th November, 2012 in which the claim is denied in toto and

the 2nd Respondent denies that it employed the Claimant from 1999 in Kenya and avers that when the Claimant proceeded to Burundi, it was a new and distinct contract of employment not related either in terms of duties or engagement with the employment in Kenya.

7. The 2nd Respondent avers that it is a shareholder in KK Rwanda and KK Burundi and they are not its branches but independent companies incorporated under the respective laws of each county and with distinct corporate personality and directorship that cannot bind it legally unless expressly stated in the Articles of Association.

8. That the Claimant's employment while in Rwanda and Burundi was not under the control and reporting system of the 2nd Respondent and his salary and terms of engagement were directly controlled by the said companies.

9. That the Claimant was not working from April 2011 and did not therefore expect a salary for the period and his claim under paragraph 28(f) is denied.

10. That the employment law in Kenya, Rwanda and Burundi are different and the Claimant cannot seek to enforce employment in those countries in Kenya without citing those laws. That in any event those laws are not applicable in Kenya.

11. The 2nd Respondent also denies, the salaries claimed at the end of the Kenyan and Burundi engagement stating they are not correct.

Claimant's Case

12. The Claimant testified under oath in support of his case. He stated that he had worked for the Respondents for a period of 11 years. That his employment was constructively terminated by the Respondents and that they did not pay his terminal dues upon termination. These terminal benefits are set out in the statement of claim and the amended statement of claim.

13. That he worked from November 1999 to May 2011. He started as a payroll clerk in Mombasa and in March 2006 was transferred to Nairobi. In June 2006 he was transferred to Burundi.

14. In 2008, he was transferred to Rwanda as Regional Accountant overseeing Rwanda, Burundi and Congo. That he held this position until his employment was terminated in May 2011.

15. The Claimant relied on the contract of employment and supply of particulars marked 'A'. That he sued the three Respondents. The 1st Respondent Kenya Kazi Services Limited was his first employer in Kenya. They signed the contract.

16. That the 1st Respondent is the main shareholder of the 2nd and 3rd Respondents as seen in the supplied particulars.

17. The secondment contract to Burundi is attached to the original memorandum of Claimant page 5 and is dated 15th August, 2006. That this was a promotion. The Claimant discussed the secondment with Mr. Patrick Hughes and in terms of the discussions, his employment in Kenya was not terminated. He was simply seconded and would come back once his sojourn in Burundi would come to an end. His brief was to train a local person in Burundi for two(2) years and return to his job in Kenya thereafter. That he was to continue earning the Kenya salary with an enhanced package in Burundi. That is what happened.

18. That by the time he left Kenya, he was the Finance Manager Kenya Kazi Limited which owns 99.2% shares in KK Security Rwanda. 1% share is owned by the same Director who owns all the other companies, Mr. James Omwando and Derick Oatway respectively.

19. That there was an organogram shown on page 4 and 5 of the supplementary list of Claimant's documents. That Derick Oatway is the Chairman whereas James Owando is the Chief Executive Officer. That the 'Group' refers to Kenya Kazi Limited which was the Claimant's employer.

20. That the Claimant reported to the Chief Finance Officer Mr. Patrick Hughes with a copy to the CEO and the Chairman and Country Managers. That this was the *modus operandi* until he left his employment while still in Rwanda. The Claimant produced the reports he made as explained while based in Rwanda.

21. At the time he separated from the Respondents in May 2011 he earned a gross pay of equivalent of Kshs.585,800 (In Rwanda franks). He produced a pay slip at page 55 for April 2011. He used CBK exchange rate of 99 Kshs. To the US dollars in the amended claim for the period 15th April, 2011 to 27th May, 2011 @ 6.9734.

22. That Kenya Kazi Limited, paid the Claimant Kshs.45,000 in his Kenya account up to September 2008. Thereafter he earned a consolidated sum of USD 53,875 paid in Rwanda. That he was in Rwanda for 2 years from 2008 up to August, 2010. In 2006 he was in Burundi.

23. The Claimant was asked by Mr. Lukas Ndolo, the General Manager, if he wished to relocate to Kenya and he agreed. He was to be replaced by a Kenyan in the position of Chief Accountant Rwanda. By 2010, December Claimant had helped recruit a replacement. Claimant oriented the new employee until February, 2011. The Claimant applied for the position of Treasury Manager for the group and Branch Manager Westlands. These had been advertised. The Claimant was not considered for the positions. Claimant was requested to write a letter of transfer to Kenya. The letter was not acted upon.

24. The Claimant handed over in Rwanda, and Mr. Patrick Hughes directed the Claimant to meet him in Kenya on 15th May, 2011. Mr.

Hughes told the Claimant at the meeting in Kenya that he no longer has a position for him. That he was to be cleared from the company. This did not happen. The Claimant was then informed that his employment would be terminated and was referred to Human Resource for further communication. That his final dues would be based on a gross pay of Kshs.120,000. This is when the dispute arose since the Claimant was expecting terminal benefits based on his last gross pay in Rwanda in April, 2011.

25. The salary was stopped in May 2011. The Claimant felt stranded, confused and helpless. He suffered a lot since he had paid from his pocket relocation express to Kenya, and was jobless. He could no longer pay his mortgage. He lost his medical cover for self and family. He struggled to pay school fees and felt unstable and betrayed. He was left in limbo after giving the Respondent excellent service.

26. The Claimant prays to be awarded as prayed in the statement of claim including compensation. Gratuity for 21 years; payment in lieu of leave days not taken; two months salary in lieu of notice as per the contract agreed; relocation costs reimbursement in the sum of USD 2,000; unpaid salary for May 2011 to August 2011 when he filed suit since he got no letter of termination. He seeks certificate of service and these awards be calculated on a gross pay of Kshs.585,000.

27. That gratuity to be calculated at 18 days salary for each completed year of service in terms of the wage order in the security sector. The Claimant cannot access terminal benefits in Rwanda, and the Respondents should compensate him in Kenya. The gratuity should be for five (5) years.

28. That the award should be less Kshs.766,681 paid in Kenya by the Respondents in September 2011. That of the 11 years, 6 years were served in Kenya and 5 years in Burundi and Rwanda. That Claimant received the cheque under intense duress due to the financial hardship he was suffering at the time. That the cheque was received subject to proper computation of his final dues. Correspondence to this effect is on record. Claimant relies on all documents filed before court and with submissions in the amended statement of claim.

29. The Claimant was closely cross examined by Wambola for the Respondents. The Claimant was persistent in his version of events, throughout the cross-examination and his testimony was largely consistent and credible on the employment history and the written and oral promises given to him while employed in Kenya, Burundi and Rwanda.

30. The Claimant's immediate supervisor while he was away from Kenya was Regional Manager Great Lakes Region, Mr. Lucas Ndolo, on matters finance based in Kenya. That the Claimant received two salaries by Kenya Kazi Limited and KK security Rwanda. The Kenya salary was however stopped in September 2008 and integrated for all employees on secondment. When he left he received only one salary in Rwanda in the sum of USD 800. The Claimant persisted on all the claims explained in chief and set out in the Amended Statement of Claim.

Defence

31. RW1, was Mr. Michael Ndungu Kariuki, who worked as the Human Resource Business partner for the Respondents in Kenya. He was employed in June 2017. He took over from Mr. Willis Ayieko. Willis filed a written statement on 8th May, 2015 which RW1 adopted as the Respondent's evidence in chief.

32. He told the court that the Claimant was entitled to pension in Rwanda. That the Claimant had been paid terminal benefits upon leaving Kenya for Burundi and Rwanda and could not therefore get any terminal benefits from Kenya which is a distinct and separate business entity. He denied that KK Kenya Limited controlled KK Burundi and Rwanda. That KK Group of companies was just a trade name and was not registered. It is not an umbrella company.

33. RW1 denied that the Claimant worked for 11 uninterrupted years. He was unable to explain why pay slips for payments made in Burundi were paid by KK Group of companies (Kenya) between 2006 and 2008. RW1 admitted that the contract provided for termination by giving two (2) months notice. He insisted that employment in Burundi and Rwanda was separate from that in Kenya. RW1 could not refute the claim of 105, unpaid leave days. RW1 further explained that the letter heads showed 'KK' Group of companies. Since these were sister companies with common shareholders but were distinct and separate companies and therefore the contracts of employment by each entity cannot be lumped up together as a matter of law or fact.

Determination

34. The issues for determination are as follows:-

- (i) Was the Claimant continuously employed by the Respondents for 11 years in Kenya, Burundi & Rwanda or were these separate and distinct contracts of employment by different employers.
- (ii) Was the Claimant constructively dismissed from employment and if so, did the dismissal occur in Rwanda or in Kenya.
- (iii) What law is applicable to the claim for constructive dismissal and payment of terminal benefits and does the Kenya court have jurisdiction over the dispute?
- (iv) Is the Claimant entitled to the reliefs sought.

Issue 1

35. From the totality of facts before court, it is beyond pre-adventure that the Claimant was employed by the Respondents in various capacities since 28th November 1998, first for a period of six years within Kenya (Mombasa and Nairobi) then for five (5) years serving in

the Respondents regional branches in Burundi and Rwanda.

36. In the last two (2) of the said five (5) years, the Claimant served as Regional Accountant responsible for accounting and finance functions of the Respondents in the Great Lakes region including KK Rwanda, KK Congo and KK Burundi.

37. It is common cause that the Claimant for 11 years period served the Respondents with dedication and excellence hence his steady rise in rank to positions of substantial responsibility with the Group.

38. It is without a doubt that in his tenure in the Regional Office, the Claimant was still under supervision and control of the Head Office in Nairobi on his finance docket.

39. The various correspondence between the Claimant and his superiors at Nairobi is testimony of this fact.

40. It is also not in dispute that up to 2008, the Claimant whilst in Burundi received salary from both Nairobi and Burundi officers.

41. Whilst in Rwanda however, he was fully paid by the Rwanda Office and in terms of a contract signed in Rwanda for two years. However, at all material time even during that two year period, the Claimant was supervised by Mr. Patrick Hughes, the Chief Finance Officer KK Group of companies.

42. It is undeniable that the Claimant was presented with no option when uprooted from Kenya to Burundi and from Burundi to Rwanda. The Claimant at each point of transition had a *fait accompli* and the Respondents cannot be heard to state that the claimant had separate and distinct employers at any one time in his 11 years continuous service to KK Group of companies. The group traded under this name whether or not it was a marketing façade, mattered not to third parties and employees including the Claimant believed and on reasonable grounds that they dealt with one big regional entity in the security sector.

43. The initial employment of the Claimant was in Kenya and the Kenyan employment law was applicable. He continued to be subjected to terms and conditions of service contracted in Kenya, and part of the salary paid in Kenya, whilst in Burundi. The subsequent contract in Rwanda did not in express terms derogate from the secondment and legitimate expectation that the Claimant, at the appropriate time would return to his home country and the Headquarters of his employer KK Group of companies by whatever name.

44. The testimony by the Claimant on how he was treated by an employer he had served with dedication, commitment and implemented and overseen successful financial programme in the region for a period of eleven (11) years is heart breaking.

45. Once again, the faceless corporate entity has shown its cold back on a servant who made tremendous contribution to its being growth and meteoric rise in the entire region.

46. The Claimant's employment was not terminated upon expiry of contract in Rwanda. Promise upon promise on his deployment was made followed by an expectant wait and then a disappointment.

47. Eventually, the Claimant had to plan his own repatriation to Kenya, at great personal sacrifice and expense given that he was still in limbo at the time.

48. The Claimant whilst in Kenya continued to remain hopeful as he awaited deployment upon the end of the secondment to the region. After a meeting with Mr. Hughes, his supervisor, he was promised a substantial exit package on the basis that no position has been found for him in Kenya. At the time he had no income and was on verge of great financial embarrassment. He could no longer pay for the upkeep of self and family and his mortgage was about to be recalled.

49. The package was never paid and no deployment was done, despite demand hence this suit.

50. The court relies on **ELRC, at Kericho Cause No. 6 of 2014, [2015] eKLR** where Marete J. explained in detail the concept of constructive dismissal in Kenya as follows:-

“The doctrine has not been given any statutory backing in Kenya and therefore we submit and agree with justice Radido when he stated in **Antony Mkala Chitavi v Malindi Water & sewerage Company Limited cause No. 64 of 2012** that –

“The doctrine and principles developed in other comparative jurisdictions would be equally applicable in Kenya because of the entrenchment of a justiciable right to fair Labour practice under Article 41 of the constitution.”

51. Lord Denning MR in **Western Excavating (ECC) Limited v Sharp [1978] KR 221** stated –

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance, if he does so, then he terminates the contract by reason of the employer's conduct.”

52. The Claimant's position as at 28th June, 2011 was stated in an email of the same date, to Mr. James Omwando, the CEO and majority shareholder of KK Group as follows:-

“It has been 2 months since the company moved me from Rwanda. I accepted the fact that there was no open position available from email correspondences with Patrick, Jerusha and Jane Kamene. I however expected the company to sort my terminal benefits dues in a fair and equitable way but all meetings I held with Patrick did not lead to this as he could not get your approval.

I had informed him that the minimum I could accept was a payment of USD 28,600 which was actually the terminal dues worked at Kshs.240,000 which is less than half of my last salary.”

53. This was a response to an offer by Patrick to the Claimant based on a basic salary of Kshs.120,000 per month plus a relocation allowance which offer the Claimant rejected.

54. The Group Human Resources Executive in an email of 8th July, 2011 had asked the Claimant to clear himself from Rwanda and after that she would take up the matter of terminal benefits from there. On 22nd July, 2011 Jerusha, proposed that the group would pay the Claimant as follows:-

“The way forward now is for Rwanda to pay you your final dues based on what you were earning at the time of your departure and for the period that you were in both Burundi and Rwanda – a total of five years. Rwanda will also have to terminate your services there formally for the records. Kenya will then pay your final dues for the six years that you worked with the company. This will be based on what a comparable position in Nairobi is earning today.”

55. From their correspondence, it is clear, that this was a matter for determination by the KK Group head office, in Nairobi. The final disagreement which led to this suit was in Nairobi, and the Claimant had without formal termination relocated to Nairobi, with a promise of deployment which never materialized following many correspondence and a few meetings.

56. Conflict of laws (on private international law or international private law as it is sometimes known) is a set of procedural rule that determines which legal system and which jurisdiction apply to a given dispute. The rules under conflict of laws apply when a legal dispute has a ‘foreign’ element such as a contract agreed to by parties in different countries.

57. Regarding the concept of domicile, a person can remain domiciled in a jurisdiction even after they have left it, if they have maintained sufficient links with that jurisdiction or have not displayed an intention to leave permanently.

58. Kenya office continued to pay part of the Claimant’s salary in Kenya when he went to Burundi. This happened up to 2008. The Respondents admit terminal benefits claimed for the substantial period of the 11 year service by the claimant are payable by Kenya and that the final payments shall be paid by the head office in Kenya. The constructive dismissal occurred in Kenya.

59. There is no doubt in court’s mind, that the law applicable to this dispute is the Employment and Labour Law of Kenya, and that suit was properly filed in Kenya. This is the domicile of the Claimant and the Respondent and the above said are the connecting factors which connect the Claimant to the Kenyan Law. It is for the KK Group of Companies to resolve this dispute and to determine the sources of any payments decreed by the Court.

60. This concludes issues (i), (ii) and (iii) and the remaining issue is issue (iv) whether the Claimant is entitled to the reliefs sought.

Reliefs Sought

61. It is settled law in Kenya that terminal benefits of an employee are calculated based on the terms of the actual contract itself and reckoned from the basic or gross salary (whichever is applicable) earned at the time of separation. Therefore, if an employee has served an employer for a continuous period of eleven (11) years, as is the case with the Claimant, the final dues are to be calculated based on the remuneration earned at the time of separation.

62. The claimant earned Rwanda francs 4,058,115 which when converted to Kenya shillings at the Central Bank Forex Exchange Rate for 15th April to 30th May 2011, when separation occurred at 6.9 Rwandese francs for every Kenyan shillings translated to Kshs.585,800.

63. The argument by the Respondents that terminal benefits be based on remuneration earned on diverse dates during the eleven (11) years of service is not supported by logic or any law.

64. Accordingly, the court finds the following terminal benefits to have been proved by the Claimant on a balance of probabilities based on the documentary evidence before court and oral testimony by the Claimant and awards the Claimant the following terminal benefits:-

- (a) Kshs.2,795,864, in lieu of 105 accrued leave days.
- (b) Kshs.1,171,600 in lieu of two months notice as per the contract of employment.
- (c) Admitted repatriation expenses equivalent to Kshs.USD 2,000 as at May 2011.
- (d) Certificate of Service.

Compensation

65. With regard to compensation, the court has arrived at the inevitable conclusion of law and fact, that the Claimant was unlawfully and unfairly constructively dismissed. He was taken in circles for several months with promises of placement in Kenya, upon being recalled from Rwanda, by the Head Office of the Respondents in Kenya. The Claimant suffered loss and damage. He was subjected to financial embarrassment, during the period he was in limbo and suffered mental torture and anguish. The conduct by the Respondents is a classical case of unfair labour practice prohibited under Article 41 of the Constitution of Kenya 2010.

66. The Respondents may have had a valid reason to separate from the Claimant after 11 years of dedicated service but the shoddy manner in which they treated him amounted to unfair conduct and a violation of both Article 41 of the Constitution and section 45 of the Employment Act, 2007.

67. The Claimant is therefore entitled to compensation in terms of section 49(1)(c) as read with sub-section 49(4) of the Employment Act, 2007.

68. In considering the factors under sub-section 49(4) of the Act, the Claimant had served without blemish for eleven (11) years. He relocated his family from Kenya and moved to Burundi and Rwanda to serve the Respondent. The Claimant had great expectation to be deployed in Kenya but was shoved left, right and centre several months without knowing whether he had a job or not.

69. The Claimant was not paid terminal benefits upon realization that he no longer had a job. He clearly wanted to continue working for the Respondents and had contributed immensely to the growth and development of the Respondents in the Great Lakes Region. The Claimant did not contribute to his constructive dismissal and made several applications for deployment internally, which positions had been advertised by the Respondents in Kenya in vain.

70. In **ELRC, Kisumu Cause No. 65 of 2016**, the court awarded the claimant who served her employer diligently for sixteen (16) years and had not contributed to the termination the maximum of the equivalent of 12 months salary for the unlawful dismissal. This case has similarities to the present one.

71. In ELRC, at **Bungoma, Cause No. 30 of 2017, Patrick Murambi Vs Nzoia Sugar Company Limited**, the court awarded the Claimant who had served the employer diligently for 20 years and had not contributed to the summary dismissal, the equivalent of 12 months.

Salary in Compensation

72. The Claimant in the present case has served continuously for eleven (11) years and had relocated to three different countries during the period. As observed he had served most diligently, risen through the ranks and was treated most unfairly in the end, to his loss and detriment. The court awards the Claimant the equivalent of ten (10) months salary in compensation in the sum of Kshs.5,858,000.

73. In the final analysis judgment is entered in favour of the Claimant as against the Respondents jointly and severally as follows:-

(a) Kshs.2,795,864, in lieu of 105 leave days.

(b) Kshs.1,171,600 in lieu of two months' notice.

(c) Equivalent of USD 2000 as of May 2011, relocation reimbursement.

(d) Compensation equivalent to 10 months salary Kshs.5,858,000.

(e) Certificate of Service.

(f) Interest on (a), (b), & (c) above is payable at court rates from date of filing suit till payment in full whereas, interest in (d) above is payable from date of the judgment at similar rate till payment in full.

(g) Costs to follow the event.

Dated and Signed in Kisumu this 11th day of May, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 30th day of May, 2018

Maureen Onyango

Judge

Appearances

Mr. Mbaka for Claimant

Mr. Weloba for Respondents

Anne Njung'e – Court Clerk