



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 537 OF 2016

BETWEEN

SAMUEL NYESO MASHA.....CLAIMANT

VERSUS

1. SILVER HOLDINGS LIMITED

2. HERITAGE HOTELS t/a VOYAGER BEACH RESORT.....RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Wanja & Kibe Advocates for the Claimant

K'Bahati & Company, Advocates for the Respondents

JUDGMENT

1. The Claimant filed his Statement of Claim on 8th July 2016. He describes the Respondents as limited liability companies. The 1st Respondent recruits and manages Employees on behalf of the 2nd Respondent. The 2nd Respondent runs hotels and lodges across Kenya.

2. The Claimant avers he was employed by the 1st Respondent as a Purchasing Officer through a letter dated 17th July 2013. The effective date of employment was 15th September 2013. His first monthly salary was Kshs. 80,000. There were other allowances. His insistence on adherence to proper procurement procedures, by all Employees, was met with resistance by other Managers in the finance unit. He soldiered on and became Procurement Manager on 1st October 2015, on a monthly salary of Kshs. 108,000. Senior Managers commenced a deliberate process of witch-hunt against the Claimant. He was ridiculed, insulted and threatened with dismissal by Senior Managers. Matters came to a peak when the Claimant reported Senior Managers to 2nd Respondent's Chief Executive Officer for their involvement in procurement malpractices. The Claimant received a letter dated 30th May 2016 from the 1st Respondent, stating that the 1st Respondent was considering terminating the Claimant's contract. He was required to appear before the Management on 31st May 2016. He was not given a chance to defend himself. He was served with a termination letter dated 2nd June 2016. Termination was immediate. He was issued a Certificate of Service and a Clearance Certificate. He was not paid terminal benefits.

3. He prays the Court to grant Judgment in his favour against the Respondents for:-

- a) Reinstatement, or that the decision by the Respondents is reduced to normal termination.
- b) Declaration that the Respondents subjected the Claimant to unfair labour practices, discriminatory, unlawful and unconstitutional conduct.
- c) 12 months' salary in compensation for unfair termination at Kshs. 1,296,000.
- d) 12 months' allowances at Kshs. 8,000 monthly, amounting to Kshs. 96,000.
- e) 12 months' meal allowances at Kshs. 8,000, amounting to Kshs. 96,000.

f) 12 months' airtime allowance at Kshs. 3,000 monthly, amounting to Kshs. 36,000.

g) Interest and penalties on CBA loan at Kshs. 250,000.

h) Damages.

i) Costs.

j) Interest.

k) Any other or further relief the Court may deem fit and just to grant.

4. The 1st Respondent filed its Statement of Response on 1st August 2016. It is denied that the 1st Respondent employs and manages Employees for the 2nd Respondent. It is admitted the Claimant was employed by the 1st Respondent as a Purchasing Officer, on monthly salary of Kshs. 80,000, as outlined in the Statement of Claim. It is not disputed that the Claimant was later promoted as Procurement Manager, on a consolidated salary of Kshs. 108,000. The 2nd Respondent did not employ the Claimant or terminate his contract of employment. Termination by the 1st Respondent was fair and lawful. The other Employees did not resist any procurement reforms as alleged by the Claimant. It was the Claimant who was engaged in flouting of procurement procedures. He gave wrong quotations; he gave exaggerated prices; gave wrong purchase orders; delayed purchasing makuti until the onset of the rainy season to the detriment of Respondents' business; he failed to factor in cost of labour and material; and he altered quotations, increasing prices. There was no witch-hunt by other staff against the Claimant. The 1st Respondent gave to the Claimant a letter dated 30th May 2016. Reasons justifying termination were communicated to the Claimant in this letter. He was asked to meet Management the following day. He was advised on his right to be accompanied to the meeting by another Employee of his choice. The 1st Respondent complied with Section 41 of the Employment Act fully. The 1st Respondent concedes it terminated the Claimant's contract on 2nd June 2016. He was paid terminal benefits including:-

- 1 month salary in lieu of notice at Kshs. 108,000.
- Salary for 2 days worked in June 2016 at Kshs. 7,200.
- 17 days of annual leave due as at the date of termination at Kshs. 61,200.
- Pro-rata leave travelling allowance of 17 days at Kshs. 5,230.
- 10 off-duty days at Kshs. 36,000.

Total...Kshs. 217,630

The 1st Respondent prays the Court to dismiss the Claim with costs.

5. The 2nd Respondent filed its Statement of Response on 1st August 2016. Its position is that the Claimant was not its Employee. He was employed by the 1st Respondent as shown in the letter of appointment dated 17th July 2013, and termination letter dated 2nd June 2016. There was no contract between the Claimant and the 2nd Respondent. The 2nd Respondent prays that the Claim is dismissed with costs to the 2nd Respondent.

6. The Claimant gave evidence, and closed his case, on 24th July 2018. The Human Resource Manager of the 1st Respondent, Louis Wesutsa Nambiro, gave evidence for the Respondents on the same date as the Claimant, bringing the hearing to an end. The Cause was last mentioned in Court on 20th September 2018 when the Parties confirmed filing of their Closing Submissions.

7. The Claimant confirmed details of his employment with the Respondents. He was told in the letter dated 30th May 2016, that the Respondents were considering terminating his contract of employment. He received the letter on the same date. He was called to a disciplinary meeting on the day after. There was no one to take minutes at the disciplinary hearing. The Respondents do not have any disciplinary manual. The Claimant replied to the allegations contained in the letter informing him that the Respondents contemplated terminating his contract. He was paid terminal dues at Kshs. 206,000. He was not paid any damages for unfair termination.

8. Cross-examined, the Claimant told the Court commencement date was 1st October 2013. He reported on that date. The letter of 30th May 2016 gave reasons why Respondents considered termination. He was notified about the meeting of 31st May 2016. There was a meeting on 31st May 2016. The letter of termination followed after this. The contract could be terminated through notice. The Claimant was paid notice equivalent of 1 month salary. He received Kshs. 206,000 in his Bank Account. He received Certificate of Service. He had good working relationship with Colleagues. He had misunderstanding with the Finance Officer and the Group Operations Manager. He had a problem also with Farida Abdallah. He had a meeting with her, and recorded conversation between the two. The Claimant wrote an e-mail complaining about his Colleagues. The Officers he disagreed with were his seniors. It was possible to continue working in this environment. He also had a problem with a junior Employee called Alice. He complained against Alice to his Line Manager. The Line Manager blamed the Claimant for the misunderstanding between the Claimant and Alice. The Claimant did not inflate fees payable to service providers. He did not change the amount of Kshs. 90,000 shown at Respondents' documents page 43, to an inflated sum of Kshs. 128,000. Payable fees was negotiated and agreed between the Respondents and the Service Providers. There were complaints against the Claimant about wrong issuance of LPO. The Respondents also complained against the Claimant about delayed procurement of makuti. Group Procurement Manager Shaban Yusuf wrote e-mail complaining that the Claimant was the source of bad blood at the workplace. Tobias and Charles were junior Employees. They complained about how the Claimant handled them. The Claimant was promoted and congratulated by the Group Manager. There was no bad blood shown against the Claimant by the Group Manager. The Claimant conceded his letter of appointment, and the letter of termination, were issued by the 1st Respondent. The 1st Respondent paid his salary. The 2nd Respondent was not involved in the employment of the

Claimant. Redirected, the Claimant told the Court he was employed by the 1st Respondent, but worked at the 2nd Respondent Beach Resort. His annual leave forms, issued in the name of Voyager Beach Resort. The Claimant was victimized by Shaban after he raised concerns about a junior Employee. Farida was part of the disciplinary panel. The Claimant did not expect fairness from her. The Claimant did not have anything against Alice based on her gender. Tobias and Charles did not lodge any formal complaint. The Claimant agreed there were wrong LPOs issued by him. Errors could occur. If there was an oversight, it could be corrected. LPOs were approved by multiple Managers. The Claimant did not inflate fees payable to service providers. It had not been agreed that the figure of Kshs. 128,000 be revised to Kshs. 90,000. The Claimant did not inflate figures. He would present quotation, review and bring down the figure.

9. Louis Wesutsa Nambiro told the Court the correct letter of appointment, is the one contained in Respondents' documents. The Claimant did not have good relationship with Colleagues. Junior Employees reported to Group Procurement Manager Shaban, that they were being harassed by the Claimant. Senior staff too had issues with the Claimant. The Claimant was not a team player. He was changed from his previous section, to work with Farida. He was unable to work with her. The 1st Respondent gave the Claimant a letter stating the ground upon which the 1st Respondent intended to terminate Claimant's contract. He was advised to attend disciplinary hearing on 31st May 2016. He was advised on his right to attend hearing accompanied. He opted to attend unaccompanied. He was heard. He also replied to the letter from the 1st Respondent dated 30th May 2016 via e-mail. His oral representation was considered. A decision was made to terminate his contract. Terminal benefits were tabulated and paid. The Claimant did not fault computation. The 1st Respondent did not summarily dismiss the Claimant; he was taken through a normal termination process, and paid terminal dues.

10. The reasons for termination are stated in the letter of termination. There were problems with LPOs. At page 49 of Respondent's documents, there is LPO for goods priced at Kshs. 914,729. Page 52 contains the correct LPO, for the goods, priced at Kshs. 18,977. At page 50, the Claimant gave the price of goods at Kshs. 368,880. The items are shown in the LPO at page 53, to cost Kshs. 1,855. This was money the Respondents stood to lose. At page 51, the Claimant gave the total cost of items at Kshs. 212,182. The items were quoted at Kshs. 4,732 at page 54. The Claimant made incorrect LPOs. The Claimant delayed in procuring makuti. El-Nino rains were approaching. By the time the Claimant procured makuti, the guests had arrived, and found leaking roofs.

11. At page 43 of Respondents' documents, the Claimant quoted service provider fee at Kshs. 128,000. At page 47, the fee was quoted at Kshs. 90,000. The Claimant did not negotiate the fee down as claimed. The first amount is what he presented for the Respondent to sign. Farida misplaced her copy of the original document presented by the Claimant. The Claimant was asked to present a soft copy. The soft copy gave a fee of Kshs. 90,000. The Claimant deliberately inflated the fee. These irregularities were repeated.

12. The Claimant was cautioned and warned in writing as shown at page 18 and 19 of Respondent's documents. The Claimant was not employed by the 2nd Respondent. The 2nd Respondent did not terminate Claimant's contract.

13. Cross-examined, Nambiro told the Court that the Employer did not sign copies of the letter of employment issued the Claimant. The leave application forms are authentic, and in the name of Voyager Beach Resort. The name of the 2nd Respondent does not appear in the forms by error. The Claimant had problems with Co-Employees. The Employees were not Witnesses in the proceedings herein. Farida sat in the disciplinary panel. The letter of termination refers to competence. The Respondents have disciplinary policy. No document on this policy was exhibited before the Court. There are checks and balances in LPOs. They were to be signed by Finance Officer, Manager and CEO. Any Officer could refuse to sign if there were errors. No money was lost. The Claimant was heard on LPOs. There were no minutes capturing such a hearing. Alice resigned, after developing ulcers due to harassment from the Claimant. There were internal mechanisms for handling grievances. These were employed. Quotations are approved by Financial Controller. If there is impropriety, it is investigated. Redirected, Nambiro told the Court that the Claimant's contract was terminated lawfully and fairly. There was bad blood between him, and other Employees. He did not have a contract with Voyager Beach Resort.

The Court Finds:-

14. The **first issue** that the Court must rule on is whether the Claimant was an Employee of the 2nd Respondent, or an Employee of the 1st Respondent to the exclusion of the 2nd Respondent.

The various forms of letters of appointment, exhibited by the Parties are on the letterhead of Silver Holdings Limited, the 1st Respondent herein. The letters indicate the Claimant would be stationed at Voyager Beach Resort, which is described as 'the unit.' This unit of the 1st Respondent is named as the 2nd Respondent in the Claim. The Leave Application Forms on record, issued to the Claimant in the name of the 2nd Respondent. The two Respondents are part of the same enterprise. They could be separately registered as limited liability companies, but are part of the same hotel business, which employed the Claimant. The Court has ruled in the past that Employees cannot be expected to know the legal or business forms, their Employers adopt. Employees do not go about enquiring, upon recruitment, what legal or business forms their Employers carry on their activities. Employers adopt multiple layers of legal and business forms to avoid regulatory burdens. The Claimant well-advisedly joined the 2 Respondents, as either of them, could be called to shoulder employment liability. One issued the letter of employment and the letter of termination. The other comprised the physical place where the Claimant discharged his role; the entity which controlled his work schedule, such as in regulating Claimant's annual leave entitlement. Claimant's pay slip is issued in the names of the two Respondents. The Muster Rolls bear the stamp of Voyager Beach Resort. The Service Provider Agreements exhibited by the Respondents, and the LPOs, all refer to Heritage Hotels Limited - Voyager Beach Resort. The Respondents are properly sued. Any, or both of them, were Employers of the Claimant.

15. The Claimant was employed as a Purchasing Officer, with the commencement date given as 15th September 2013, or 1st October 2013. It is not disputed that he later became Procurement Manager, earning a monthly salary of Kshs. 108,000. He held this position until 2nd June 2016, when the 1st Respondent terminated his contract of employment.

16. **The second and third issues** which the Court proposes to deal with together are, whether termination was substantively fair, and whether it was procedurally fair, as required under Sections 41, 43 and 45 of the Employment Act 2007.

17. The letter of termination in general terms, justifies termination, on the grounds given by the law on summary dismissal, under Section 44[4] of the Employment Act. The grounds are that:-

- i. The Claimant carelessly and improperly performed his work.
- ii. It was the Claimant's duty to perform his work, which he willfully neglected to perform.
- iii. The Claimant used abusive and insulting language to his Head of Department, and Group Operations Manager, who were persons placed in authority by the Company over the Claimant.
- iv. The Claimant knowingly failed and refused to obey lawful and proper commands which were within the scope of his duty to obey, issued by persons placed in authority by the Company over the Claimant.

18. Although the Claimant states in his evidence that he was victimized by Colleagues, for introducing strict adherence to procurement procedures at the workplace, evidence adduced by the Respondents demonstrates it was the Claimant, who did not discharge his role as Procurement Manager carefully and properly.

19. This is clear in particular from the LPOs exhibited by the Respondents. At page 49 of Respondents' documents, there is LPO, where total cost of goods, is quoted at Kshs. 914,729. At page 52, the cost is shown at a total of Kshs. 18,977. The Claimant prepared and signed LPO at page 50 of Respondents' documents showing the total price for goods at Kshs. 368,880. This is corrected at page 53 to reflect total cost at Kshs. 1,855. This trend is likewise captured at page 51. The Claimant prepared LPO at Kshs. 212,182, which is corrected at page 54 to give total cost at Kshs. 4,732.

20. The Claimant explained that LPOs were to be signed and approved by other Officers. His word was not final. This explanation begs the question whether the Claimant, in preparing these LPOs, performed his duty carefully and properly. He gave larger quantities of required items in the LPOs, and inflated the final figures. He signed the LPOs. It is wrong to say that even if he prepared LPOs carelessly and improperly, the LPOs could be corrected by other Officers. This is more so, considering the Claimant's position that he was reforming procurement function at the Respondent, and that every other Officer, junior and senior, resisted such reform and victimized the Claimant. It is equally wrong to advance the argument that no money was lost by the Respondent as a result of careless and improper performance of his role. The Respondent was exposed to risk of loss of money. An Employee does not perform his duty carelessly and improperly, only when his Employer suffers actual loss, as a result of such carelessness and impropriety.

21. Beyond the LPOs, the Claimant was shown to have acted carelessly and improperly, with regard to the Service Provider Agreements. The first Agreement was for a monthly fee of Kshs. 128,000. The Claimant as the Procurement Manager did not deny the details he gave in this initial Agreement. This is what he presented to Farida for signing. She misplaced her copy and asked the Claimant to forward a soft copy. He forwarded a copy showing a fee of Kshs. 90,000. The Claimant did not persuade the Court that he negotiated the fee down. He would not have presented the initial copy to Farida for signing, if he was still negotiating the fee.

22. The Respondents established that the Claimant did not perform his role carefully and properly. He took procurement of goods and services in the wrong direction, exposing the Respondents to financial loss. His default was all the more profound, considering his claim to have been at the forefront of reforming procurement system at the Respondents. Termination was based on valid reasons under Section 43 and 45 of the Employment Act 2007. There are other defaults shown in Claimant's discharge of his procurement role, such as with regard to the procurement of Makuti. But the Court need not explore the breadth and width of every allegation made against the Claimant to find there was justification in terminating his contract of employment.

23. The Claimant was given a detailed letter dated 30th May 2016 by the Respondents, giving reasons why the Respondents considered terminating Claimant's contract. The Claimant gave an equally detailed response through e-mail, on 1st June 2016. He was invited to a disciplinary hearing on 31st May 2016. He was advised about his right to be accompanied to the hearing by another Employee of his choice. He attended the hearing, but opted to go it alone. His complaint about Farida being part of the disciplinary panel holds no weight. The Court has seen no reason to depart from its holding in **Thomas Sila Nzivo v. Bamburi Cement Limited [2014] e-KLR**, that the Employer is, in most cases, the complainant, investigator and the trier of facts. Some workplaces do not have sufficient personnel to guarantee that Officers involved in matters under investigation, are not involved in the same matters when those matters are on trial. All that the Employer is required to do, is to meet the minimum procedural standards of fairness, prescribed under Section 41 and 45 of the Employment Act 2007. Disciplinary proceedings cannot have been unfair on the ground of Farida being part of the disciplinary panel. The Claimant was heard orally on every allegation. He answered most of the allegations via e-mail.

24. Although the Respondents did not state in the letter of termination that the Claimant was found to be incompatible with other Employees, there is evidence that the Claimant did not get along professionally, with Colleagues at work. There were complaints by his juniors as well as seniors. He was the type of an Employee who would secretly record conversations with seniors. He states in his Statement of Claim, [which appears to accord with the position held by the Respondents that the Claimant was incompatible], that other Employees, junior and senior disagreed with the Claimant over his *modus operandi*. In **Dede Esi Annie Amanor Wilks v. Action Aid International [2014] e-KLR**, the Court held that Employers have the right to have harmonious working environment, by weeding out Employees who are eccentrics, discordant, and who fail to fit with their Employer's corporate culture. Recording of conversations secretly between an Employee and his seniors, or even between an Employee and his juniors, seems to this Court quite eccentric. The e-mails exhibited by the Respondents between the Claimant and other Officers, demonstrate the Claimant was not able to work with Colleagues seamlessly. Section 45 [2] [b] [i] of the Employment Act, lists employee incompatibility as one of the valid termination reasons. The Respondent would have been entitled to terminate the Claimant's contract based on incompatibility.

25. The Claimant has not shown that termination was unfair as required under Section 47 [5] of the Employment Act 2007. The Respondents have justified the grounds for termination under this law. Procedure was fair under Section 41 and 45 of the Employment Act 2007.

26. The prayer for compensation for unfair termination has no merit. The Claimant is not entitled to 12 months' unspecified allowances, 12 months' meal allowances and 12 months' airtime allowances as pleaded. He failed completely to support the prayer for interest and penalties on CBA loan at Kshs. 250,000. He has not shown why he should be granted damages, in addition to compensation, in relation to the same act of termination of employment. The prayer for reinstatement is wholly misplaced. The Claimant prays in the alternative that termination is set aside, and be deemed to be normal termination. Legally it is a summary dismissal decision, which is capable of being reduced to normal termination. The Court understands the Claimant to be asking the Court, that summary dismissal is reduced to regular termination. The Claimant was not summarily dismissed. The Respondents have already availed this alternative prayer to the Claimant. He was paid terminal benefits, which included 1 month salary in lieu of notice. He was paid Kshs. 217,630. What would have justifiably been, a summary dismissal decision, was reduced to termination by way of notice. The Claimant already has been availed, what he unclearly pleads as an alternative prayer. He ought to be contented with that.

IT IS ORDERED:-

a) The Claim is rejected.

b) No order on the costs.

Dated and delivered at Mombasa this 23rd day of November, 2018.

James Rika

Judge