



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 60 OF 2014

IAN EDWARDS.....CLAIMANT

VERSUS

BYTES TECHNOLOGY GROUP KENYA LIMITED.....RESPONDENT

JUDGEMENT

1. By a memorandum of claim filed on 23rd January, 2014, the claimant pleads among others that he was employed by the respondent as the Business Development Director on 3rd November, 2010 dated 23rd May 2013. His roles included setting up and running the company's' business in Kenya. He was to generate business opportunities which were to be forwarded to the respondent's head office and followed through.
2. According to him the respondent's head office in South Africa was to invest resources in the Kenyan office and he was for that purpose instructed by the respondent to identify suitable offices, recruit personnel and begin marketing the company's products in advance of the promised investment. He further averred that the respondent instructed him to make certain payments out of his personal resources on promise that they would be reimbursed. The respondent did not reimburse the expenses. Following repeated requests for support, the respondent's head office incorporated the respondent company on 21st October, 2011 some eleven months after he was employed. The respondent however failed and or refused to invest any resources in setting up the Kenya office.
3. On or about the month of October, 2012 the claimant emailed the respondent's head office in South Africa advising them that they would need to downgrade this sales targets until such time as the head office allocated resources towards setting up credible operation in Kenya. In response Mr Colin Evans, Operations Director, Africa Region contacted the claimant via telephone and advised him that his employment was summarily terminated. The claimant protested against the arbitrary termination of his employment and was advised to remain in office and await a visit to the country by senior officers from the company's head office allegedly to discuss the challenges being faced by the Kenya operation.
4. On 22nd November, 2012 three officers from the respondent's head office visited the claimant to have the meeting instead he was ambushed and advised that his employment had ben summarily terminated and a termination letter was produced and he was asked to sign for it immediately in order for his terminal due to be processed. According to the claimant the procedure taken by the resp0ndent in terminating his employment was unlawful as it failed to comply with the procedure under the Employment Act. The claimant therefore averred that he suffered injury as a result and is entitled to damages for unlawful termination of employment.

5. The respondent refuted the claimants claim and averred in the main that the claimant accepted employment as a business development director and as such was tasked with the responsibility of generating sales and causing the Kenya business to become profitable. The consideration of performing his duties the respondent agree to pay the claimant an annual gross salary of USD 149,000 all inclusive. The claimant was further allocated a motor vehicle registration number KBP 515B as a benefit which he was entitled to use while in employment but return the same upon termination of his service. Concerning commissions, the respondent pleaded that payment of commission or incentive was within the sole discretion of the respondent's Board of Directors and was dependent upon actual sales.

6. According to the respondent the claimant never made any sales to earn commission. According to the respondent the setting up of the Kenya office and recruitment of employees was solely dependent on availability of funds and the claimant's performance in achieving the same. Regarding claim of payments made on behalf of the respondent by the claimant the respondent pleaded that no such payment was made and if it was done, the claimant was required to claim refund by providing proof of the expenses but he did not do so.

7. The respondent further pleaded that being situated in South Africa it heavily relied on the claimant to establish, grow and expand its footprints in Kenya through his alleged vast experience in business in Kenya. Contrary to expectations, the claimant turned out to be slow and incompetent in producing business plans and forecast reports for the region despite several requests. Further reports submitted by the claimant were inaccurate and inadequate. According to the respondent, the act of writing and requesting for a downgrade was an acknowledgement that the claimant was not meeting his targets and his performance poor.

8. On 26th October, 2012 the respondent through its Operations Director Africa region telephoned the claimant and advised him that the respondent was considering terminating his employment and in that regard the respondent's representatives would be travelling to Kenya for a meeting to discuss his employment. At the said meeting the claimant was advised that the respondent was considering terminating his services on account of his consistent poor performance. The issue was discussed and according to the respondent, the claimant admitted that his performance was poor. The respondent thereafter took the decision to terminate the claimant's services on grounds of poor performance. According to the respondent therefore, it had justifiable ground to terminate the claimant's services. Upon termination, the respondent calculated and paid the claimant his terminal dues less PAYE for the period the claimant was in respondent's employment failed to pay tax from his salary which was paid inclusive of tax.

9. In his oral evidence in court the claimant chose to adopt his previously recorded statement and further averred that his claim for USD 52,000/= had not been settled. He admitted that he still held the respondent's car. He denied that he was aware that the delegation from South Africa was coming to discuss his termination. According to him, he was told the meeting was for moving forward and not about his termination. He further denied that he asked for downgrading of his targets. According to the claimant he asked for downgrading of his focus. He admitted receiving USD 45,464 which he assumed was three months salary and expenses. In January he received a further sum of USD 5,553. He further admitted still holding the respondent's two cars but stated no one had gone to collect them from him.

10. The respondent on its part called Ms Renee Schoemaa who informed the court that she was the respondent's HR Manager. According to her, the respondent needed some business foot prints in Kenya and the claimant was therefore hired for this purpose. He was expected by the respondent to set up and open business opportunities in Kenya and the region. The expectations were not met by the claimant despite contact discussions with the respondent' head office. A decision was therefore made by the respondent to send a delegation to come to Kenya and meet with the claimant. According to her, there was a feeling that the claimant was not the right person to move the business forward. It was her evidence that the Kenya meeting started on discussion on Kenya experience and way forward on business opportunities.

11. The delegation wanted to know what was going on whit the forecasts. According to the witness the

claimant had prior to the termination been issued information on his performance. This according to Ms Renee was discussed with the claimant on telephone. She however conceded that disciplinary issues are not necessarily dealt with on telephone but the circumstances of the claimant made it so. An email could have been sent to the claimant. She stated that she was not aware if the claimant was informed of the discussions about his performance but according to her Kenya office was under discussion at the meeting.

12. Regarding commission the witness stated that the claimant was not drawing my commission because he did not reach the threshold for commission. According to her the claimant did not submit accurate business forecast and plans. In his closing submissions counsel for the claimant Mr Muhindi submitted that the respondent has failed to set out any of the grounds for the termination of the claimant's services for gross misconduct or any other ground that would have entitled it to dismiss the claimant summarily. The respondent's conduct to that extent was therefore unlawful and unfair. Further even if the respondent had grounds to consider termination of the claimant's employment, the provision of section 41 of the Employment Act providing for statutory minimum notification and hearing prior to termination had not been met.

13. In this regard counsel relied on the case of **Mary Chemweno Kiptui Vs Kenya Pipeline Company Ltd 2014 eKLR.** According to counsel, the respondent initially attempted to terminate the claimant's employment over telephone but when the propriety of such termination was raised, the respondent retreated and ambushed the claimant at a meeting that had been called to discuss the development of respondent's business in Kenya. Mr Muhindi further submitted that the respondent did not provide any documentary evidence whatsoever to controvert the claimant's account of the manner of termination. No notice to show cause, written warning or even an e-mail was submitted to the court that showed the claimant's performance was anything other than exemplary throughout his employment.

14. Ms Muringu for the respondent on her part submitted that the claimant was aware that from October 2012 he had failed to meet his targets for the business in Kenya. It was also clear that from 26th October, 2012 upto to January, 2013 when the claimant eventually agreed to leave office, he had adequate notice that his performance and that of the business was under scrutiny. Counsel refuted that the claimant was arbitrarily terminated. He had enough notice of such intention and was given a hearing at the meeting of 22nd November, 2012, he made representations which were considered and found to be unsatisfactory thus rendering his separation inevitable.

15. Concerning the claim for reimbursement of USD 83,138.26 allegedly paid on behalf of the respondent, Counsel submitted that it was agreed that the claimant would source for a car and use his funds to purchase a vehicle locally for a Mr Williams and get a refund upon proof of payment. The claimant claimed to have spent USD 52,900 on the car purchase but never submitted the invoice or receipts to confirm the actual price of the vehicle. The lack of documentation notwithstanding, the respondent refunded the claimant the said USD 52,506. With regard to the claim for USD 14,118.43 on account of work permit and relocation costs, counsel submitted that the claimant failed to submit the necessary documentation for reimbursement but the expense was part of the amount settled in the claimant's terminal package.

16. Regarding deductions from his terminal dues on account of tax, counsel submitted that the claimant was the sole senior representative of the respondent in Kenya and it was expected of him to ensure the respondent complied with all local legislation more so in relation to remission of PAYE which the claimant was liable to pay under the Income Tax Act. Regarding the 2% commission, Ms Miringu submitted that though the claimant's contract provided for payment of commission, this was at the discretion of the respondent's board of directors and further depended on actual sales. However, counsel submitted that the claimant made negligible sales which were not profitable to the Kenyan business. These sales were way below the threshold required to earn my commission.

17. Having summarized the issues as pleaded, testified to in oral evidence by the parties and closing submission by counsel it emerges that the claimant's services according to the respondent were terminated on account of poor performance and that in terminating his services the respondent complied not only with his contract but the provisions of the Employment Act. The claimant on his part has refuted

both the reasons for termination of his services and denied that the process followed in the termination complied with the Employment Act.

18. Section 43(1) of the Employment Act provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45 of the Act. Section 43 (2) further provides that the reason or reasons for termination of a contract are matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of an employee. The claimant's services were according to the respondent terminated on account of poor performance and incompetence. However, no termination letter was exhibited by the respondent to show that these were the grounds for terminating the claimants' services. The respondent only produced a termination of employment relationship agreement which however was not signed by the claimant.

19. The agreement focused on the fiscal as well as post-separation conduct by the parties but never gave any reason for the separation. According to the respondent's witness Ms Renee, the claimant was recruited on the basis of his experience in the relevant area and on account of his representation that he had vast business experience in Kenya. His appointment was in writing through a contract of employment dated 3rd November, 2010. According to the claimant which was confirmed by the respondent his position in Kenya was the respondent's Business Development Director and in that capacity his role was to generate business opportunities which were to be forwarded to the respondent's office and followed through.

20. According to the respondent the claimant failed in performing those tasks and according to Ms Renee there was a feeling by the respondent's top management in South Africa that the claimant was not the right person for the assignment and a decision was made to terminate his services. A decision was therefore reached to send a delegation to Kenya purposely to terminate the claimant's services. There is however no document on record filed by the respondent to show how the decision that the claimant was not the right person for the job was reached. Further despite Ms Renee's testimony that the respondent was in constant communication with the claimant on the issue of his performance no document or correspondence was exhibited in that regard.

21. Further, the respondent's witness Ms Renee stated that a delegation was sent to Kenya which she was part of, to discuss the issue of the claimant's separation from his employment yet no correspondence was exhibited that was sent to the claimant as an advance notice of such intention as require by section 41(1) and (2) of the Employment Act. The court further noted that no minutes or memorandum of a meeting were filed to support the claim that the claimant's dismissal was discussed at the Kenya meeting. In contrast the claimant denied that the Kenya meeting was to discuss his dismissal.

22. According to him, the Kenya meeting was to discuss way forward and appreciate the concerns he had previously raised with Mr Edwards, the respondent's Operations Director, and funding of the Kenya office. At page 86 of the claimant's bundle of documents, it is exhibited a lengthy email dated 12th November, 2012 from the claimant to one Mario Meyer in which the claimant lamented over his challenges in setting up the Kenya office. In this email, it would appear that the claimant perceived the respondent was more concerned with the results than supporting the establishment and growth of the Kenya office. The claimant to put his woes more poignantly accuses the respondent of **"give us the chicken, forget the egg"** attitude. This scathing email was never responded to or reacted to by the respondent's witness in court.

23. The claimant was hired on 3rd November, 2010 and terminated on 22nd November, 2012 on grounds of poor performance. The court has considered the entire dispute and position taken by the respective parties and it would seem to me that two years was a very short time to register a company in a foreign market, set up its operations and put it to profitability against a backdrop where an employee who was a foreign national as well and had to on most occasions spend his own money on behalf of the respondent. No good reason or reason at all was advanced by the respondent why it was not prepared to make available adequate resources at the disposal of the claimant and yet it badly needed a footprint in Kenya

and the region.

24. Considering the evidentiary burden cast upon parties in employment claims, the court is not persuaded that the respondent has discharged the burden of proof placed upon it by section 42(1) of the Employment Act with the consequence that the claimant's services were unfairly terminated within the meaning of section 45 of the Act. Concerning terminal dues, the claimant sought an award of USD 49,774 as terminal dues, USD 83,138.26 together with interest at court rates as reimbursement for expenses incurred on behalf of the respondent among others.

25. The respondent on the other hand has stated that it fully settled the claimant's claim upon termination of his services. That is to say a sum of USD 51,026 net of income tax was paid to the claimant. This has been admitted but according to him this was not the full settlement. The court has reviewed and considered the details of the payment and is persuaded that they constitute what was justly payable to the claimant as his benefits upon termination. The claimant did not produce any document to show he was tax exempt or the respondent was responsible for payment of tax on his behalf. His claim of not being responsible for tax is therefore rejected. Further the claimant's claim for USD 83,138.26 was not supported by any document hence rejected as well.

26. Concerning the counterclaim, the court will disallow this claim as well as no evidence was led to prove that if the motor vehicle in question was hired out it could have yielded the income claimed. Besides the respondent did not demonstrate to the court any effort it made to repossess the vehicles in question from the claimant and whether the claimant resisted any such attempt. The court however orders that the vehicles in question if they be still in possession of the claimant be returned forthwith to the respondent in good and mechanical condition subject to normal wear and tear in default the respondent shall have the right to recover the same or monetary value thereof from the claimant.

27. In conclusion the court finds and orders as follows:

- a. The termination of the claimant services was unfair within the meaning of section 45 of the Employment Act.
- b. The respondent shall pay the claimant USD 86,912 being seven months salary as compensation for unfair termination of services.
- c. The sum in (b) above shall be subject to taxes and statutory deductions.
- d. Each party to bear their own costs.

28. It is so ordered.

Dated at Nairobi this 17th day of February, 2017

Abuodha J. N.

Judge

Delivered this 17th day of February, 2017

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for Claimant

.....for Respondent

Abuodha Jorum Nelson

Judge