



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 118 OF 2012

[Originally Cause Number 497 of 2011 in the Industrial Court at Nairobi]

BETWEEN

TRANSPORT AND ALLIED WORKERS UNION CLAIMANT

VERSUS

COMARCO PROPERTIES [EPZ] LIMITED..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Nasib Makuwa Industrial Relations Officer, for the Claimant

Mr. Sitonik and Mr. Ndegwa Advocates instructed by Ghalia & Ghalia, Advocates for the Respondent

ISSUE IN DISPUTE: NON-PAYMENT OF TERMINAL BENEFITS AND COMMISSION

AWARD

[Rule 27 [1] (a) of the Industrial Court [Procedure] Rules 2010]

1. The Claimant filed its Statement of Claim on 4th April 2011. The Claimant represents Workers engaged in motor and transport industries. The Respondent is a registered Company, engaged in transportation of drilling rigs and other construction equipment by road and sea. It is alleged by the Claimant that its Member, the Grievant herein Onesmus Njimia Mureithi, was employed by the Respondent on 23rd February 1982 as Contracts Logistics Manager. He earned Kshs. 5,000 at the beginning. The Company was then known as Divecon and changed its name over the years to Consolidated Marine Contractors, Kenya Maritime Contractors, before assuming the present name Comarco Properties [EPZ] Limited. The Grievant rose to become what was designated as Executive Director, on 1st July 2006, earning Kshs. 160,000 per month.

2. The Claimant states his contract was terminated in December 2008. The Parties agreed that after termination, the Grievant would serve the Respondent on consultancy, earning 2% of the gross value of any contract secured for the Respondent by the Grievant.

3. Mr. Mureithi claims he secured a contract in the Lamu Project for the Respondent, worth Kshs. 213,594,123, but was not paid his 2% commission. He similarly was not paid his full terminal dues on leaving the Respondent. He therefore seeks for Award against the Respondent for:-

- a. Service pay at 15 days' for every completed year of service at Kshs. 1,820,000 less Kshs. 616,348 paid = Kshs. 1,203,652;
- b. 42 unutilized days of annual leave at Kshs. 196,000;
- c. 2% commission for securing the Lamu Project contract for the Respondent at Kshs. 4,271,882.50.

4. These figures were amended in a subsequent Supplementary Statement of Claim, filed on 6th December 2011, to include:-

- a. 1 month salary in lieu of notice at Kshs. 160,000;
- b. Service pay at Kshs. 3,680,000;
- c. Annual leave days at Kshs. 320,000;
- d. Commission at Kshs. 4,271,882.50; and
- e. Leave arrears at Kshs. 100,330.

In total, the Claimant seeks the sum of Kshs. 8,532,212.50 from the Respondent in terminal dues and commission. The prayer for full terminal dues is made in alternative to reinstatement. The Claimant states that the Grievant's contract was unfairly terminated.

5. The Respondent filed its Statement of Response on 19th December 2011. It concedes- the description of the Parties; that the Grievant was employed by the Respondent then known as Divecon Limited, on 23rd February 1982; he worked as Contracts Logistics Manager; he earned Kshs. 5,000 per month; he became a Director of the Company on 1st July 2006; and earned a monthly salary of Kshs. 160,000. These facts are not denied.

6. The Respondent however denies that the Grievant's contract was terminated; he retired voluntarily, upon which he was paid all his terminal dues. He accepted the sum paid to him in terminal dues, acknowledged payment and discharged the Respondent from further obligation. The Respondent denies it offered the Grievant any consultancy work after retirement. It is not true that he was offered 2% of the value of any contract he secured for the Respondent. The claim is fictitious. He was paid Kshs. 616,348 and Kshs. 2,000,000 separately in cash, as terminal dues, signed acknowledgment and discharged the Respondent. His Claim has no foundation and should be dismissed with costs to the Respondent.

7. The Grievant testified on 1st December 2011, before the dispute was transferred from Nairobi to Mombasa. The Parties agreed on transfer, to have the matter heard afresh. The hearing in Nairobi took place before Hon. Justice I.E.K Mukunya who has since left service. The Grievant opted not to testify afresh. His Representative Mr. Nasib Makuwa instead opted to make Submissions on the 25th July 2013, bringing the Grievant's case to a close. The Respondent testified through its Managing Director James Amwayi, who testified on 3rd March 2014, and through the Assistant to the Executive Director Nuru Suleiman Hamed who testified and brought the hearing to a close, on the 14th November 2014. Parties confirmed the filing of their Closing Submissions on the 15th December 2014 and were advised by the Court the Award would be delivered on the 20th March 2015.

8. Mr. Makuwa submits that the Grievant was employed in 1982 as borne out in the Claim. His employment terms and history were restated, as contained in the Statement of Claim. There was

agreement between the Grievant and the Respondent that he would retire at the end of the year 2008. He retired at the age of 57 years. It was agreed he would go on doing consultancy agency work for the Respondent. He would earn commission of 2% for any contract he secured on behalf of the Respondent.

9. Mr. Mureithi took retirement on those terms. He secured a contract for the Respondent worth Kshs. 213,959, 123.70. He was not paid his commission as contracted. He did not take annual leave for 2 years during his employment. Mr. Makuwa submits the Grievant should be paid all his entitlement as per the Employment Act 2007.

10. Mr. Amwayi testified he is the Managing Director of the Respondent Company. The Grievant worked for Kenya Marine Contractors Limited. The Respondent was not his Employer in 2008. The Grievant served both the Respondent and Kenya Marine Contractors, but from January 2009, was to serve the Respondent only, on commission basis.

11. The Respondent was involved in the rehabilitation of Lamu Terminal Jetty. It was a Government of Kenya Project. The tender was awarded to the Respondent after a competitive bid. It was a public exercise, with bids invited over the National Dailies. Amwayi was sent by his Company to buy the tender documents. Tendering was done on 8th December 2008, while the Grievant was serving both Kenya Marine Contractors and the Respondent. The two Companies operated from the same premises.

12. The Permanent Secretary in the concerned Ministry wrote to the Respondent on 3rd February 2009, accepting the Respondent's tender. Amwayi and the other Directors signed the tender. The technical team which worked in the tender process included the Accountant Mr. David Kaburia; the Grievant did not participate.

13. Amwayi participated in the opening of the bids at the Ministry's Head Office in Nairobi. The Grievant was not involved in the technical or financial bid. He did nothing in procurement of the bid. An appeal was lodged by competitors at the Public Procurement Review Board, against the awarding of the tender to the Respondent. After review, the Respondent was again successful. The contract was signed between the Respondent and the Government of Kenya. The Grievant was not involved.

14. The Witness denied that he attended a meeting between him and the Grievant where they negotiated commissions. The 2 Companies were not sister Companies. Amwayi did not have any shares in the Respondent.

15. Nuru Suleiman Hamed testified that the Companies are subsidiaries of Comarco Limited. They have a common management. Peter John Phillips is the Executive Chairman, and Simon Fraser Phillips the Managing Director. Hamed worked with Mureithi in the same premises. She worked for Kenya Marine Contractors as of 2008. She worked as the Human Resource Manager, administering employment contracts.

16. The Grievant retired voluntarily. It was a mutually agreed separation. The Claimant signed the retirement letter accepting the decision. He was paid Kshs. 2,000,000 comprising his leave dues and service pay. Hamed took the money in cash to Simon's Office where it was handed over to the Grievant. He received the money, signed acknowledgement and discharge. His contract was not terminated; he voluntarily retired. The Respondent's Policy placed mandatory retirement age at 55. His Claim has no basis.

17. The Witness agreed in cross-examination that the Grievant's letter of appointment did not have a retirement clause. This however is the Company Policy. She was not there when the Grievant was employed. She found him in employment. The letter appointing Mureithi as Executive Director did not show retirement age. The Grievant insisted on being paid in cash. She was not aware if he was paid Kshs. 1.4 million. He signed acknowledging receipt. The amount is not stated in the acknowledgement document. She stated she expected to retire at the age of 55.

18. The Claimant submits that the Grievant merits Award in terms set out in the Claim. It is submitted

that the Respondent locked out the Grievant from the Workplace, thereby unfairly terminating his contract of employment. The Respondent declined to pay him his commission dues after deploying him to a Sister Company Comarco Construction Company Limited. The work on commission basis was ratified by the Respondent's Board of Directors in a meeting of 23rd October 2008. His position of Executive Director was not substantive. The Grievant had no decisional powers at the enterprise. The Grievant did not agree to retire, and his contract was silent on retirement age. He was shoved out by the Respondent. His contract was unfairly terminated. There was e-mail communication passing between the Grievant and Peter Phillips indicating the Grievant participated in the tendering of the Lamu Jetty Project. The only terminal dues paid to the Grievant, which he acknowledged, was a sum of Kshs. 616,348 covering the period 2005 to 2008. His years of service from 1982 to 2004 were not considered. The execution of the discharge voucher does not absolve the Respondent from meeting the Grievant's dues. The Claimant urges the Court to allow the Claim.

19. The Respondent submits the following issues fall to be answered by the Court in determining the dispute between the Parties:-

- a. Whether the Grievant's contract of employment was terminated by the Respondent;
- b. Whether the Grievant is owed any terminal dues by the Respondent; and,
- c. Whether the Grievant is entitled to any commission.

20. The Respondent did not terminate the Claimant's contract; he retired voluntarily. This was conceded by Mr. Makuwa, in his oral Submissions before the Court. It is confirmed by the record of the meeting between the Parties held on 23rd October 2003, as well as in the letters and e-mail exchanged between the Parties. The Grievant was paid all his dues, acknowledged receipt and discharged the Respondent from further obligation. He concedes receiving Kshs. 616,348 in terminal dues. It was confirmed by Hamed that he was paid a further amount of Kshs. 2,000,000 over and above the first amount of Kshs. 616,348. The Financial Records presented by the Respondent confirmed this position. He cannot seek payment of any dues from the Respondent for the period 1992 to 2008 from the Respondent. He was employed by the Respondent only from 1st June 2006. Before that he was an Employee of Divecon. The commission agreement was to take effect after the Grievant retired on 1st January 2009. By 16th December 2008, the Ministry of Works had evaluated the bids. The tender in any case was governed by the Public Procurement and Disposal Act Number 3 of 2005. Section 38 [1] prohibits the influencing of public tenders by any persons. Persons, Agents or their Employees are prohibited by this law from engaging in corrupt practices in any procurement proceedings. Lastly the Respondent submits that the commission agreement was between the Grievant and an entity known as Comarco Construction Limited, which is not Party to this Claim. The Claim should be dismissed with costs to the Respondent.

The Court Finds:-

21. The issues for determination are fairly stated in the Submissions of the Respondent, at paragraph 19 above. There were some preliminary issues raised at the outset of the proceedings, relating to the validity of the Claim. It was argued by the Respondent that the Grievant was an Executive Director, is not unionisable, and cannot therefore be represented by the Claimant Union.

22. The Court directed Parties to join this preliminary point with the merits. There is little in the evidence and submissions of the Parties, to show that the point was taken up as directed by the Court. The Claimant however submitted that although given the title 'Executive Director,' the Grievant was not in a decisional role. He did not have the authority to hire and fire, so as to be excluded from unionization, under the Industrial Relations Charter. The Grievant himself testified at the first hearing in Nairobi that he was a Member of the Claimant Union from the year 2010.

23. The court is satisfied that despite the title given to the Claimant, he was not in a decisional role; he could not hire, fire, or discipline other Employees; and was a paid up Member of the Claimant Union. The Claimant Union, in a letter to the Respondent's Advocates dated 22nd March 2012, attached the Grievant's receipt issued by the Claimant on payment of membership fees of Kshs. 500 dated 25th June

2010, and also attached the membership card issued to the Grievant by the Claimant Union. Mureithi was employed as the Contracts Logistics Manager. Simon Phillips seems to have at first retired the Grievant in a letter dated 19th January 2004, on the basis of Company re-organization. At the time, the Grievant was referred to as a 'Director.' It is not clear when he became a 'Director.' He was re-employed as the 'Executive Director.' These were titles which explained nothing of the decisional or supervisory role of the Grievant within the enterprise.

24. This membership allows the Grievant to have limited benefits of trade union representation. The Constitution of Kenya does not bar anyone from being a member of any Trade Union, but where persons who are otherwise deemed to be managerial staff join Trade Unions, there are certain rights they cannot access, such as the right to collectively bargain or to be collectively represented by the Trade Union. Individual legal representation in Court however, does not touch on the role of the Trade Union as a sole collective bargaining agent. The Grievant was a paid-up member of the Claimant Union. All the law requires for a Trade Union Official to represent an Employee, is that the Employee is a Member of the particular Trade Union. The Grievant has shown he was a Member of the Claimant Union and his position in the Respondent, in any event, was not a decisional position. It must be noted also, that Trade Unions have a broader role in representation of Workers, a role that goes beyond the simplistic dichotomization of Workers as being Unionisable or Non-Unionisable. The Grievant's right and freedom of association allowed him to have membership of the Claimant Union, and to enjoy the limited benefit of legal representation in Court. The Claim is properly in Court.

25. The other preliminary points on jurisdiction of the Court, the applicable law and retroactive rights were not mentioned anywhere in the evidence or submissions of the Parties. The Court shall therefore treat these as abandoned, except as may be relevant to specific issues discussed in the following paragraphs.

26. The Grievant was employed initially on 23rd February 1982, as Contracts Logistics Manager. His contract shows he was employed by a Company called Divecon. Although the Respondent through its Witness Amwayi and, in its Closing Submissions, attempted to draw the line on the different legal personalities which employed the Grievant, it was explained by Nuru Hamed that all the various Companies were subsidiaries of Comarco Limited. The discharge voucher which the Grievant is said to have signed on payment of terminal dues referred to Comarco Properties [EPZ] Limited; Kenya Marine Contractors [EPZ] Limited; and any other Companies within the Comarco Group of Companies. In its Response to the Claim, the Respondent conceded the description and history of the various Companies as stated in the Claim. It is therefore not proper that the Respondent should urge the Court to find that the Grievant had separate Employers from 1982 to 2008. Nuru Hamed testified these are subsidiaries with a common management. The Claimant was employed by Divecon, one of the predecessors of Comarco Properties [EPZ] Limited, the Respondent herein, which was one of the last Companies in the Group, which the Grievant worked for.

27. Was his contract terminated by the Respondent? Mr. Makuwa submitted in Court on 25th July 2013 that, "*there was an agreement between the Grievant and the Respondent that he would retire at the end of 2008.*" He also stated in the same submissions that, "*the Grievant was forced to retire at the age of 57.*" The Grievant himself while testifying at the initial hearing alleged he was suspended from employment through an e-mail sent to him on 5th February 2009.

28. These various positions given by the Grievant and the Claimant were inconsistent. The Court finds the first submission by the Mr. Makuwa, and the evidence and submission of the Respondent on mutually agreed retirement, to be the correct position. The Memorandum of Discussions of Comarco Construction Limited of 23rd October 2008 where the Grievant was present, is clear GM [Mureithi], was to stay with the Respondent until the end of 2008, thereafter move to CCL [Comarco Construction Limited] as a consultant with income derived on a commission basis only. The Grievant did not protest anything in this arrangement. James Amwayi for instance raised concerns on changes affecting his new terms of engagement with the Group of Companies, which concerns are recorded to have been addressed. The e-mail of Peter Phillips to the Grievant dated 18th November 2008, makes it clear the Parties agreed

Mureithi would retire at the end of 2008, after which he would act as a consultant earning a commission of 2% of the gross of any contracts he secured for the Company. Furthermore, the Grievant went on to receive terminal benefits, conceded at Kshs. 616,348. It cannot be that an Employee who has received terminal benefits is under suspension. There was no evidence from the Grievant of a forced retirement. The argument on retirement age was completely irrelevant. There was no law or policy which demanded that the Grievant retires at a specific age. There is no mandatory retirement age for private sector Employees; it is left for Employers and Employees to agree on the retirement age in the contracts of employment or workplace policies. Retirement however, was consensual, rendering the submission on what age the Grievant was, or ought to have been on retirement, completely irrelevant. He is not entitled to reinstatement, having retired consensually.

29. Is he entitled to further terminal benefits? The Respondent was not clear on payments made out to the Grievant. The Employment Act 2007 requires that an Employee is availed by the Employer a clear Statement of Pay. The Statement of Pay availed to the Grievant indicates the following items were paid to him:-

- Basic Pay of Kshs. 117,339;
- Car allowance of Kshs. 23,000;
- Redundancy allowance of Kshs. 176,000; and
- Others of Kshs. 300,000

Total.... Kshs. 616,348

30. This is the amount acknowledged by the Grievant. The items listed in the Statement of Pay above do not meet the threshold of a clear Statement of Pay under Section 20 of the Employment Act 2007. What is an Employee to understand by an item referred to as 'Others?' And what is redundancy allowance? What was this unusual allowance being paid for?

31. The Acknowledgment and Discharge allegedly signed by the Grievant on 1st January 2009, states that the Grievant " *accept this amount in full and final settlement in respect of any outstanding salary, dues, benefits etc whatsoever which may be from Comarco Properties [EPZ] Limited, Kenya Marine Contractors [EPZ] Limited and any other Companies within the Comarco Group of Companies.*" The amount is not shown, and details of the payment are unknown. This Acknowledgement does not disclose payment of any terminal benefits for which the Respondent and its sister Companies could be discharged of future obligations.

32. The Claimant explained the sum of Kshs. 616,348 paid to him represented the period 2005 to 2008. This seems to have support in the submission of the Respondent that the Grievant was employed by the Respondent from 1st July 2006. What became of the Grievant's creditable years, from 23rd February 1982 to 2004? It was for the Respondent in any case, to explain to the Grievant and the Court the details of payments made.

33. There was evidence by Nuru Hamed that the Grievant was paid Kshs. 2,000,000 over and above the benefits of Kshs. 616,348. Details of this payment are as murky as murky can get. The Respondent states the money was paid in cash. The Grievant does not acknowledge this. An Accounting Document [TAS system] internally generated by the Respondent was availed to the Court, showing an item indicated as 'Final Dues GM,' debit Kshs. 2,000,000. When cross-examined by Mr. Billing at the first hearing, the Grievant denied receiving Kshs. 1.4 million from the Respondent. The suggestion by the Respondent was that it paid to the Grievant Kshs. 1.4 million.

34. Nuru Hamed testified that the Grievant was paid Kshs. 2 million in cash as a 'thank you', service pay, and annual leave pay. Hamed arranged for the writing and signing of the cheque by Simon. It was not clear which this cheque was. Money in cash, according to Hamed was handed over to her by another Employee Albert. She kept custody of the Kshs. 2 million. When Mureithi went to the Office to collect his terminal dues, the money was handed over to Simon, and paid in cash to the Grievant. The Grievant signed in acknowledgement. Hamed testified she was not aware if the Grievant was paid Kshs. 1.4

million.

35. The evidence of the Respondent on this payment is unsatisfactory. The amount is inconsistently stated at Kshs. 1.4 million and Kshs. 2 million. It is not a payment which was acknowledged. Details of the payment are not given, with Nuru Hamed referring to an item characterized as a 'thank you.' It was not clear to the Court why the first amount of Kshs. 616,348 should be captured in a Statement of Pay, while the larger amount of Kshs. 2 million or Kshs. 1.4 million is shrouded in mystery. Why would the Grievant acknowledge receipt of the first amount, and not the second? Why would a Company pay a huge amount of cash money in terminal benefits to a departing Employee, and fail to state the sum in the Acknowledgment? Why the inconsistency in the amount of this cash payment? Where the terms of an employment contract, which includes the terms of disengagement from employment are ambiguous, the law is that the Court must accept the position that favours the Employee, the Employer being the author of the terms of engagement and disengagement.

36. The Court is satisfied that the Grievant was deprived of service pay for the period 1982 to 2004. This is a period of 22 years. It is not clear to the Court where the Grievant derived the rate of 1 month salary for every completed year of service from. The Court shall allow him service pay at the minimal rate of 15 days' salary for each of the 22 years completed in service. Applying the monthly rate of Kshs. 160,000 which should have applied for the entire service period [1982 to 2008] the Court computes the balance of service pay at Kshs. 160,000 divide by 26 working days = Kshs. 6,153.80 x 15 days = Kshs. 92,307.70 x 22 years = **Kshs. 2,030,769. The Grievant is granted service pay, for 22 years of service, in the sum of Kshs. 2,030,769.**

37. The Claimant did not establish the claims for notice pay; leave pay; and traveling allowance. The retirement was consensual and the Grievant had notice from the date the Parties met on 23rd October 2008 that the Grievant would leave at the end of that year. There was absolutely no evidence worthy of belief given by the Claimant and the Grievant, on leave pay and traveling allowance. In the original Statement of Claim, the Claimant alleges the Grievant did not take annual leave for 2 years. The years are not specified. In his e-mail to Phillips dated 19th February 2009, the Grievant states he had worked for 26 years without leave. Other than service pay for the period which was not considered by the Respondent, the Court finds the Grievant does not deserve additional terminal dues.

38. The last question is whether the Grievant merits the commission payment. The commission was discussed in the meeting of 23rd October 2008. It involved the re-activation of Comarco Construction Limited [CCL]. Amwayi would move from Kenya Marine Contractors to the reactivated Company as the Managing Director. The MD would be entitled to 25% of the net profit for each contract undertaken by the Construction arm.

39. The Grievant was to move with Amwayi to the Construction Company. He was to retire from the Comarco Property Limited [CPL] at the end of 2008. Amwayi was to negotiate with Mureithi a percentage *'gross of each contract i.e. 1 or 2% of GM's [Mureithi's] input in sealing any contracts... GM [Mureithi] stays with CPL until end of 2008, thereafter to move to CCL as consultant with income derived on commission basis only.'* The commission agreement post-retirement seems to have been sealed as evidenced in the email of 18th November 2008 from Peter Phillips to the Grievant which made reference to commission of 2%.

40. The Grievant asserts he gave his input in sealing a contract with the Ministry of Works for the rehabilitation of the New Lamu Jetty. The value of the contract at Kshs. 213,594,123.70 is not disputed. On 20th January 2009 he exchanged e-mail communication with Phillips and Amwayi on the subject. He writes animatedly:

'Yaa... the letter has landed but the totals were undeclared by Kshs. 6,273,765... but the MD is confirming the totaling error thereto. We must however stick to our quoted figures of Kshs. 213,594,123.70 to avoid retendering. Hope MD will work accordingly to finish the job as he has always done... Praise God.'

41. The Respondent refutes the claim for commission. Its position is that the tender preceded the commission agreement. The tender had been evaluated by 16th December 2008. Considerable tender processes took place before the Grievant retired. The tender was subject to the Public Procurement and Disposal Act, which bars bidders and interested Persons from corrupt practices aimed at influencing award of the tender. It was further argued as part of the preliminary objection which the Respondent did not pursue in the main hearing, that the Court lacks jurisdiction to consider the claim for commission, as this does not fall within the employment and labour jurisdiction under Section 12 of the Industrial Court Act 2011.

42. The Court has jurisdiction and the claim for commission is properly an employment issue. The commission agreement was based on terms of retirement of the Grievant from one sister Company, to the other. A term of retirement is an employment issue and enforceable as such. The Grievant went on working from the Respondent's premises. He accepted retirement on the basis of the terms of engagement promised after retirement. It was not a new commercial arrangement; it was the continuation of an employment relationship, much in the mould of re-organization which had happened earlier in 2005, when the Grievant was retired, then rehired as 'Executive Director'. The use of the terms 'consultant' 'commission' 'retirement' etc were used loosely much like the term 'Executive Director' to cloud an Employer – Employee relationship, and the attendant employment obligations. Both Amwayi and Mureithi would draw income for their services, based on the value added to the Group of Companies. They continued to work from the same premises, under the control of Phillips and Simon. Employment relationships are dynamic, and the Court must be careful not to be misled by use of such terms as 'consultant' and 'commission' etc. The Grievant merely left his regular employment to take up another form of employment, in an employment place with a history of re-organization, and remaking of employment contracts. The commission arrangement was based on terms of retirement, which is an employment issue falling within the jurisdiction of the Court.

43. It was not clear from the documents availed to the Court if the commission was payable to the Grievant for securing the contract or for his input in sealing of the contract. The first position would entail his sourcing and placing in the hands of the Respondent such contracts. The second would seem to the Court to merely involve the Claimant's participation in enabling the Respondent secure tenders. The meeting of 23rd October 2008 suggested the Grievant would receive commission for his input, in sealing any contracts. It was not that he had to source and place in the hands of the Respondent such contracts. The e-mail of 18th November 2008 from Peter Phillips to the Grievant alludes to securing of contracts, which would mean the Claimant sourced and placed in the hands of the Respondent, commercial contracts with third Parties.

44. The Grievant gave his input in securing the Lamu Jetty Project as borne out in his e-mail communication to Phillips of 20th January 2009. He gave technical advice. He was in communication over the Project with Phillips and Amwayi. The question is not whether the tender was evaluated before the Grievant retired; the question would be whether he gave his input to the process, in accordance with the agreement of the Parties of 23rd October 2008. The Court is persuaded he gave such input. In the e-mail of Phillips to Golf Mike dated 5th February 2009, Phillips advises the Grievant that “ *you are now retired and you should not do anything in connection with the Lamu Jetty or Eres until you meet the Board in the week beginning 23rd February [2009] to discuss your future role with us...*”

45. This communication supports the view that the Grievant had something to do with the Lamu Project. Phillips would not be barring him from further involvement, if the Grievant had not given his input. The Grievant had been recruited in 1982 as the Contracts Logistics Manager. His role was to guide the Group in contracting. His title changed in the course of time, but in the view of the Court, the role conferred on him through the commission agreement was essentially the same role, albeit under changed circumstances, which he was playing on employment in 1982: providing the Group with leadership in its securing and implementation of contracts from third Parties. In the view of the Court, the Respondent acted contrary to the terms of the Grievant's retirement, perhaps to keep him away from making his rightful claim for the Lamu Project commission.

46. Why would the Respondent Board reconvene to determine the Grievant's future role with the Respondent? Had that not been agreed on 23rd October 2008? There is in fact no evidence of the proposed meeting of 23rd February 2009 having taken place. Instead, the Respondent locked the Grievant out of his office. It completely disregarded the Employee's terms of retirement. He could no longer work from the premises. He was mortified by the Security Guards, and denied entry. His future was left dangling in the wind. All this in the view of the Court was aimed at dispossessing the Grievant his rightful claim for the commission, his only source of income as per the terms of the retirement agreement.

47. There was nothing shown by the Respondent that the commission agreement breached the anti-corruption laws contained in the Public Procurement and Disposal Act. The Grievant's role was not to corrupt anyone in securing the tenders; the Court understood the commission agreement as requiring the Grievant to pursue tenders within the confines of the law, not to give anyone Chickens, in securing of tenders. The Respondent would not be asking the Grievant to retire; give his input in securing of tenders; or secure tenders for the Respondent, if in his discharge of that new role; the Grievant was required to engage in corruption. Such a reading of the retirement agreement, would cast the Respondent as the author of the corruption. He was not contracted to illegally influence third Parties in awarding of their tenders. This argument was thrown into the mix to buttress the case for non-payment of the commission.

48. The Court is convinced the commission is payable as per the terms of the Grievant's retirement. It was not clear however, whether the Grievant was to secure contracts wholly on his own for the Respondent, or merely give his input regardless of the sourcing of the tenders. The Parties had suggested he earns either 1% or 2% of the gross contract value. In the absence of conclusive evidence on the terms of the commission agreement, the Court is of the view that 1% of the value of the contract for the rehabilitation of the Lamu Jetty would be sufficient redress to the Grievant. ***The Respondent shall pay to the Grievant commission at 1% of Kshs. 213,594,123.70, calculated at Kshs. 2,135,941.***

In Sum, IT IS ORDERED:-

[a] The Grievant retired voluntarily from regular employment on 31st December 2008.

[b] The prayer for re-instatement is declined.

[c] The Grievant shall be paid by the Respondent service pay for a period of 22 years, computed at Kshs. 2,030,769.

[d] The Grievant shall be paid by the Respondent commission in accordance with the terms of the retirement agreement, computed at Kshs. 2,135,941.

[e] The total sum of Kshs. 4,166,710 shall be paid to the Grievant by the Respondent through the Claimant Union within 30 days of the delivery of this Award.

[f] No order on the costs and interest.

Dated and delivered at Mombasa this 20th day of March 2015

James Rika

Judge

