



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1268 OF 2012

FEISAL AHMEDCLAIMANT

VERSUS

NOKIA INTERNATIONALRESPONDENT

Ms. Githinji for Claimant.

Ms. Mbuvi for Respondent.

JUDGMENT

The suit is premised on alleged unlawful and unfair termination of the employment of the Claimant.

The Claimant seeks the following reliefs;

- a. *Payment of terminal benefits (special damages) in respect of;*
 - i. *One month salary in lieu of notice;*
 - ii. *Housing allowance over 12 months; and*
 - iii. *Unpaid annual incentives all totaling Kshs.2,072,505/=.*
- b. *Maximum compensation of twelve (12) months salary for unfair termination in the sum of Kshs.6,010,04/=.*
- c. *Damages of Kenya Shillings 5 million for malicious termination.*
- d. *Damages of Kenya Shillings 10,252,335/60 for illegal and wrongful dismissal calculated as the lost income over (1) year from Airtel Networks Kenya Limited, by virtue of being head hunted by the Respondent.*
- e. *Issuance of Certificate of service.*
- f. *Costs of the suit.*
- g. *Interest on (a), (b), (c), (d) and (f).*

The Respondent by its response dated 3rd October, 2012, disputes the claims and denies that the Claimant

is entitled to any of the reliefs sought.

Settled issues.

From the outset, the court notes that prayer (e) has been overtaken by events as the Certificate of Service was issued through the Claimant's advocate on 30th October, 2012. Furthermore, the terminal benefits due to the Claimant including one month's salary in lieu of notice, payment in lieu of leave; sales incentive and arrears and travel allowance were deposited in his bank account on 31st March, 2012.

Claims that are ill conceived from outset.

a. Housing allowance.

It is clear from the contract of employment and in particular clause 1.4 and the Respondent's country policy clause 3.2 that the Claimant received a consolidated salary that included housing allowance. The claim for payment of a separate item to cater for housing allowance is therefore without basis and same is dismissed.

b. Unpaid annual incentive.

It is also clear from the evidence before court that payment of annual bonus depended on Claimant's performance. That the Claimant was paid bonus for the first half of 2011 and the bonus for the second half of the year was paid with terminal dues. This claim has not been established and same is also dismissed.

The real issues for determination in this suit are:-

- (i) Whether the Respondent, with the knowledge that it had no sustainable employment opportunity for the Claimant maliciously and unfairly lured him from the employ of Airtel Kenya Ltd to his loss and detriment.
- (ii) Whether the Claimant's employment was unfairly, maliciously and unlawfully terminated;
- (iii) Whether the Claimant is entitled to any of the reliefs sought;

Issue I

It is not in dispute that the Claimant was employed by the Respondent from 4th April, 2011 as a General Manager for East and Southern Africa upon being headhunted from his former employer, Airtel Networks Kenya Limited where he had been working for the last eleven years, his last position being the Regional Manager, Coast Region earning a basic salary of Kshs.249,039/= and enumerated allowances.

It is also not in dispute that the Claimant served the Respondent for a period of seven (7) months only, until 7th December, 2011 when his employment was terminated following a restructuring exercise of the East African Business Unit of the Respondent. He was therefore retrenched.

It is the Claimant's case that at the time the Respondent headhunted him from Airtel Networks Kenya Limited, the restructuring exercise of the Respondent globally was underway and that the Respondent knew or ought to have known that it had no genuine employment opportunity for the Claimant and that the Respondent maliciously and with intention to lure him from a stable employment misrepresented facts to the Claimant leading to his quitting his employment of eleven (11) years only to be retrenched a few months down the line to the Claimant's loss and detriment. The Claimant seeks damages in respect thereof.

The particulars of employment of the Claimant by Airtel Networks Kenya Limited from the year

2000 to 2011 and his gross annual salary at the time he left to join the Respondent in the sum of Kshs.854,363/80 is pleaded in paragraphs 3 and 4 of the Memorandum of claim and the contract of employment and the payslip were produced before court.

The particulars of headhunting by the claimant and the offer of a better package that lured the Claimant from Airtel are pleaded in paragraphs 5, 6, 7 and 8 of the Memorandum of claim.

The Respondent did not only offer a better remuneration on permanent and pensionable basis but to hasten the process of recruitment compensated the Claimant in lieu of service of two (2) months notice with Airtel. All the relocation expenses of the Claimant and his family from Mombasa to Nairobi were met by the Respondent. Correspondence by way of emails between the Claimant and the Respondent on these matters were produced in court.

On 7th December, 2011, the Claimant states that he learnt of the intention to retrench him through a third party. As at the time he had not received any written communication from the Respondent on the matter.

The Claimant has pleaded particulars of malice in paragraphs 19, 20, 21 and 22 of the Statement of Claim and testified under oath on the matter.

The Claimant avers and testified that the Respondent failed to disclose to the Claimant at the time it offered him what appeared to be a better job with the promise of a higher salary and a career extending to six countries in the region up to retirement age that it had the intention to carry out a restructuring of the staff in East Africa, a decision which the Claimant subsequently learnt was reached in April, 2011 before his appointment.

The Claimant produced a true copy of an email correspondence from the Global Chief Executive Officer of the Respondent dated 29th September, 2011 to that effect.

The Claimant testified further that the Respondent's intention was merely to use him during the transition and discard him as it proceeded to do a few months down the line.

That the Respondent failed to relocate him back to Mombasa upon termination and did not follow its own policies and Kenya's legislation in the manner it treated him especially because no direct communication nor consultation was made with him. That no genuine alternatives were offered to him to ameliorate his loss and pain.

Furthermore, the Labour Officer was not notified in writing prior to effecting the redundancy and due regard was not given to seniority in time and to the skill, ability and reliability of the Claimant prior to effecting the redundancy. He was also not paid one month's salary in lieu of notice at the time of retrenchment.

The Claimant prays the court to find that the termination was unfair as it was unprocedural, and contrary to dictates of justice and equity in that he was not given opportunity to be heard nor was he given a Certificate of service as is required by law upon termination. As a result, the Claimant states that he suffered loss and damage and claims damages in the sum of Kshs.5million in respect of the termination and Kshs.10,252,335/60 being equivalent of lost income for one (1) year from Airtel Networks Kenya Limited.

Respondent's response on this matter

The Respondent admits paragraphs 6, 7, 8, 9 and 10 of the Memorandum of claim detailing how it recruited the Claimant from Airtel and the superior terms it offered the Claimant in paragraphs 3 and 4 of the Statement of response.

The Respondent however avers and testified before court that the contract of employment under clause

2.1 provided that the contract would remain in force until terminated by either party in accordance with the terms of the contract and in particular clause 7.2 provided for termination on account of redundancy.

That on 16th November, 2012, it met the Claimant for a one on one discussion on the intended redundancy and during the said meeting the Claimant was given notice of intention to terminate his contract on account of redundancy. The Claimant was subsequently declared redundant because the position he occupied was abolished.

The Respondent further states that open forums were held with all affected staff to discuss their concerns and ways of minimising the effects of the intended redundancy in particular alternative jobs were sought for them and

opportunities were offered to start business.

Under what was referred to as the Bridge Program all affected employees including the Claimant were granted a grace period from 1st January, 2012 upto 29th February, 2012, during which the employees did not report to work but still received their salaries.

By a letter dated 5th March, 2012, the Claimant's contract of employment was terminated on account of redundancy. He was given one month's notice. The letter was produced in court.

That on 1st March, 2012 a notice to the Provincial Labour Office, Nairobi area was sent giving details of the six (6) employees including the Claimant who the Respondent intended to retrench. The letter was also produced.

That the Claimant was paid his full entitlements in the sum of Kshs.1,369,518/85 which included one month salary and benefits, STIP 2h2011, (Bonus); thirteen (13) days outstanding leave and severance pay calculated at fifteen (15) days for each completed year of service less tax. The money was deposited in the Claimant's account.

The Respondent produced supplementary documentations showing that communication was made to all staff on the three (3) steps to be followed in the nomination process of employees affected by the redundancy into new roles with the organisation and the various measures taken by the Respondent to minimize the loss suffered by those declared redundant and were not lucky to get employment in other capacities.

Further documentation was produced by the Respondent to show that indeed, as at the time, the Claimant was recruited, there was intention to restructure the organization globally but there was no initiative yet to restructure the East African Business Unit. It was not until the 7th December, 2012, when actual communication regarding the restructuring of East African Business Unit was communicated and the details of the Bridge Program and process. The options offered included assistance to;

1. Find a job within Nokia.
2. Find a job outside of Nokia.
3. Start a new business.
4. Learn something new.
5. Create your own path.

The court has carefully considered the competing evidence regarding the matter and has come to the conclusion that though at the time the Claimant was recruited by the Respondent, Nokia was restructuring globally, there was no indication yet, that the exercise would affect the East African Business Unit.

The court understands the anguish suffered by the Claimant upon learning of the possibility to lose his job hardly a year after he had been headhunted from an employer of longstanding. However, the court is not persuaded that the Respondent consciously went into that recruitment exercise with malicious intention to

use and discard the Claimant as alleged or at all.

Furthermore, the court is satisfied that, at the time of the said recruitment, the East African Business Unit was not guilty of material non-disclosure as it had no prior information nor could it accurately predict the global trend the restructuring exercise would take.

The court is satisfied that the Claimant being a senior manager and well experienced in the industry exercised his judgment and was in fact in a position to exercise his judgment diligently pursuant to which he consciously made a decision to move to greener pastures.

The misfortune that befell him is not uncommon in the globalised business world and one has responsibility to conduct due diligence on a prospective employer to minimize prospects of making false employment steps. In other words, employees be aware.

The loss suffered by the Claimant can only be described as an opportunity cost, well within the contemplation of the Claimant, when he took up the new offer with what he perceived to be a better employer.

This loss cannot be visited on the Respondent who in good faith recruitment an employee it required at the time.

The claim for damages based on malice and lost income in terms of prayers c and d are thus dismissed for want of proof.

Issue 2.

The only outstanding issue is whether the retrenchment of the Claimant was unlawful and unfair taking all the circumstances of the case into account.

The evidence before court clearly show that the Respondent complied with the provisions of **Section 40** of the Employment Act, 2007 in that;

A notice was sent to the employee in writing and the Labour Officer stating the extent of, and the reasons for the intended redundancy not less than a month prior to the intended date of termination on account of redundancy. The evidence before court shows that on 1st March, 2012, a written notice was sent to the Provincial Labour Office Nairobi area and was copied to the six (6) affected employees including the Claimant.

Further, evidence indicates that the Claimant was well aware and participated in the Bridge Program as at 21st October, 2011 when email correspondence was sent to all staff of the East African Business Unit on the intended restructuring exercise and the options available to the affected employees.

The court is also satisfied that all terminal benefits in terms of the contract of employment and **Section 40** of the Act, including leave pay, salary and allowance for days worked and severance pay at the rate of not less than fifteen (15) days pay for the period worked were duly paid.

The Claimant has in the circumstances failed to prove particulars of malice, unlawfulness or unfair treatment in the manner the redundancy was effected.

The consequence of the above findings by the court is that the suit is dismissed in its entirety.

Considering the circumstances of the recruitment and the unforeseen events that led to the premature termination of the Claimant on grounds of redundancy, the court is reluctant to visit the costs of the suit on the Claimant. Each party will bear its own costs.

Dated and delivered at Nairobi this 28th day of January, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE