



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 1343 OF 2010

BETWEEN

CHARLES MUTHAMA
CLAIMANT

VERSUS

WANANCHI GROUP [K] LIMITED
RESPONDENT

Rika J

CC. Leah Muthaka

Mr. Kidemi

Mr. Wainaina instructed by Kinyua Mwaniki & Wainaina Advocates for the Claimant

Mr. Kiprop instructed by Murgor & Murgor Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. Charles Muthama initiated this Claim against his Former Employer Wananchi Group [K] Limited, through a Statement of Claim received in Court on 25th November 2010. He filed a Reply to the Statement of Response on 25th November 2010, and a List of Documents on 16th September 2011. The Respondent filed its Statement of Response on 18th November 2010 and a List of Documents on 11th October 2011.
2. The Claimant gave evidence on 21st March 2013, led by his Advocate Mr. Wainaina, and in the presence of the Advocate for the Respondent Mr. Kiprop. Further hearing was scheduled with the consent of the Advocates, for 20th June 2013. On this date Mr. Wainaina appeared with two more Witnesses for the Claimant, ready for the hearing, while Mr. Abuor held brief for Mr. Kiprop. Mr. Abuor informed the Court that Mr. Kiprop had lost his only child and was emotionally disturbed, and could not attend Court. The two Advocates present agreed to adjourn the hearing to 2nd October 2013.

3. There was no attendance on the part of the Respondent on 2nd October 2013. The Claimant called his last Witness, Immigration Officer Mr. Alfred Omangi, who testified paving the way for the closure of the Claimant's case. The Court ordered the proceedings closed, directed the Claimant to file his Closing Submissions within 21 days, and intended to read the Award on 6th December 2013. Due to pressure of work, it was not possible to deliver on that promise, and the Court apologizes to the Parties for the delay.

4. The Claimant's position is that he was employed by the Respondent, with effect from 1st October 2008 as the Human Resources and Training Manager. He was given a letter of employment, and his starting salary was Kshs. 415, 000 gross- per month. He was however paid Kshs.460,000 per month, as the starting salary. The salary was reviewed to Kshs. 560,000 later, upon a favourable appraisal of the Claimant's performance.

5. His contract was terminated by the Respondent on 23rd August 2010. Leading to the termination, the Claimant was subjected to cruel, degrading and inhuman treatment, and was constantly insulted, intimidated, abused and humiliated by one of the Respondent's Director Richard Bell. The mistreatment was discriminatory and bordered on racism.

6. Immediately before termination, Richard Bell came to the office armed with a gun. He placed the gun on the table, with the aim of threatening, harassing and intimidating the Claimant. This caused the Claimant apprehension on his life, distress and mental anguish. The Claimant complained about Bell's behaviour, but rather than take action against Bell, the Respondent chose to terminate the Claimant's contract of employment.

7. There was no justification to the Respondent's decision and the Claimant was not given a hearing as entitled to, under Section 41 of the Employment Act 2007. He was forced to sign a resignation letter on the date of termination, on the promise that he would be paid three months' salary as notice pay, and be paid salary for the month of August 2010. Termination letter was signed by Peter Reinartz, a Belgian National who served as Managing Director of the Respondent, and who did not have a work permit to work in Kenya at the time of signing of the termination letter. Termination was not valid.

8. The Claimant prays for:-

- a) A declaration that termination was wrongful, null and void;
- b) Damages for unfair termination, amended to the equivalent of 12 months' gross salary at Kshs. 6,720,000;
- c) Costs; Interest; and any other relief the Court may find it suitable to grant.

The Claimant initially included a prayer for reinstatement, which he later withdrew in his testimony, explaining that the working environment at the Respondent has deteriorated, and he would not be comfortable working there again.

9. Muthama explained he is a Human Resource Professional with over 20 years' experience. He is a former Police Officer. He is currently employed by Audit Firm Deloitte Touché. He worked for the Respondent from 1st September 2008 to September 2010. By the time he left, he was the Group Human Resources and Training Manager. His last salary was Kshs. 560,000 all- inclusive. The Respondent runs ZUKU, a Cable TV and Internet based business. He set off as the Human Resources Trainer. Morale was vibrant and working environment buoyant.

10. In April 2010, there was a change in the Management. Richard Bell, a Director of the Respondent, was appointed its Interim Projects Manager. His role was not explained. Suddenly the environment changed, with staff harassment and discrimination getting a foothold. Many White People were recruited. Bell is a White Kenyan.

11. Muthama was asked by Bell to provide him with a catalogue of the Respondent's staff and departments. When he forwarded the catalogue, Bell termed his work as '*Silly, Stupid, Incompetent, and African.*' He carried a gun to the office, and asked the Claimant if he should use his gun, for the Claimant to understand what Bell was saying. This happened at the Respondent's Offices at Wilson Business Park. The Claimant lodged a complaint against Bell at Langata Police Station. Muthama was convinced Bell was involved in a criminal offence and violated the Kenyan Labour Laws by threatening an Employee by use of a gun. He gave the Occurrence Book Number under which the report was received at Langata Police Station as 15/29/9/2010. He does not know if Police took any action.

12. There was overt discrimination. The Claimant was in charge of recruitment. The Financial Programming Manager Ms. Bekker who was an Expatriate sent the Claimant an e-mail, advising him she had traced a Programming Financial Controller to work for the Respondent. Muthama was not aware the Respondent was looking for a Programming Financial Controller. He advised Bekker it would have been prudent to advertise the vacancy if necessary. This communication passed on 21st June 2010. Bell responded to the Claimant calling him silly and stupid. Bell copied his derogatory e-mail against the Claimant to all White Expatriate Employees. The Claimant reported the incident to the Respondent's CEO Mr. Fannell but nothing was done.

13. The following day, Bell called staff to a meeting which was attended by only about 50% of the staff. He used abusive language, claiming Kenyans could not move forward without a firm hand. He asked the Claimant to write warning letters to the staff. Muthama investigated the involved staff and found no reason to write the warning letters. He declined to write warning letters. Bell had virtually taken over from the CEO Fannell, an African American.

14. The Claimant was detailed to design the Respondent's Organogram. He already had the details required and a register. Bell required the Chart in a specific way. The Claimant did as Bell wished. On forwarding the product to Bell, Bell drew a gun at the Claimant. He told the Claimant he should have included the staff in Tanzania. Bell was very unhappy, but did not tell the Claimant what the fault, with the document generated by the Claimant was.

15. Bell demanded the Claimant includes fresh information in the Chart, including the salaries and grades of each Employee. The Claimant obliged. Bell was furious with the new document, because the Claimant had included the salaries of the CEO and the Management Staff. He kept changing the goal posts, making the Claimant's work considerably difficult. Finally it was determined that the project be abandoned. The CEO Fannell was fired. A new Managing Director, Belgian Peter Reinartz was appointed.

16. Reinartz advised the Claimant that the Chart was too complicated and the Claimant only needed to forward a List of the Employees, signed by their Line Managers. On 23rd August 2010, the Claimant briefed Reinartz about the Human Resource issues. Reinartz called the Claimant to a meeting the same day at 2.00 p.m. At the Office, the MD called the Chief Operations Officer Mr. Suhayl Esmailjee. The Claimant started to give his report. At some point Reinartz interjected, "*this is not enough!*" The Claimant answered, "*this is what you asked me to do!*" The new MD retorted, "*I am sorry Charles, we have to ask you to leave the company.*"

17. He was issued a letter dated 23rd August 2010, titled 'Employment' which terminated his contract of employment. Termination became effective on the spot. Reinartz had the letter even at the time the meeting started. The Claimant refused to sign the letter because he was not aware of its contents.

18. No disciplinary process was instituted against the Claimant. Suhayl just sat in the room quietly. The Claimant was directed to hand over to Suhayl and leave the Respondent's premises. Muthama handed over to Suhayl and to his Assistant Rachel Gichimu. As the Claimant was handing over, he received a call from Reinartz asking him to proceed to his Office once again. There, Muthama found Reinartz with another letter of the same date – 23rd August 2010- titled 'Resignation.'

19. The Claimant did not author the letter but was required by the MD to sign it. Muthama was told if he signed, he would receive more than was offered under the termination letter. The two letters were issued

within a span of forty five minutes. In the first letter, he was told he would be paid three months' salary in lieu of notice. In the second, he was to be paid in addition, outstanding leave days and salary for August 2010. The Claimant signed the letter of 'resignation' because he believed it did not have any impact on the manner of his exit.

20. The Claimant testified he did not sign the resignation letter voluntarily. He even wrote to the Respondent's Board of Directors on 6th October 2010, bringing this to its attention. The Board Chairman replied on 8th October 2010, saying the Claimant's contract was not illegally terminated by the Respondent; he resigned on 23rd August 2010. He also stated that the Company had a reason to terminate. The reply stated the Claimant was given an opportunity to defend himself in the presence of Reinartz and Suhayl. It is the evidence of Muthama that Bell remained in the background, instructing the other Officers on the execution of the termination decision.

21. Muthama first met Reinartz on 8th August 2010. The Claimant reported to Reinartz on 18th August 2010. The MD told him all he needed was a simple report on the staff. There was an agreement this report be given on 23rd August 2010. He instead was slammed with the two letters on 23rd August 2010 when he went to present the Report to the MD. Muthama believed the letter dated 23rd August 2010 titled 'Employment,' was authored by Bell. He never saw Reinartz sign the letter. Reinartz did not have a work permit at the time. He was working in Kenya illegally.

23. The Claimant was unable to secure comparable jobs after termination. His family broke apart, and self esteem ruptured. He eventually was employed by Deloitte at a monthly salary of Kshs. 340,000, while at the Respondent he was taking home Kshs. 560,000. In between he worked for Transnational Bank Limited on a contract, at Kshs. 300,000 per month. Termination was traumatic. The Claimant prays the Court to allow the Claim.

24. Cross-examined, he stated that annual review of salaries was common. He was required to have a proper Register of Staff and a complete Organizational Chart. When Bell asked for the document, Muthama gave him a Staff List. It was not a failure on the part of the Claimant. The Chart was there, but not in the format demanded by Bell. Bell wrote an e-mail to the Claimant on 12th July 2010, instructing the Claimant that he should have accurate and functional records including Organizational Chart; Head Count; and Job Descriptions for all positions. The Claimant said he would complete the Chart by Monday 19th July 2010.

25. The e-mail referring to the Claimant as silly was racist. There were about 340 African Employees; 20 Indians; 12 Filipinos; and about 10 Caucasians, employed by the Respondent. The Claimant was in Middle Management. He conceded the number of Africans working at the Respondent did not suggest racism was rife at the Respondent.

26. The Claimant stated he reported the gun threat to the Police in August 2010. He also filed a Civil Claim against Bell at the High Court on defamation and gun threats. The Claimant raised the grievances narrated to the Court while still in employment. They were not afterthoughts. Raising the issue of Peter's work permit was part of the Claimant's civil duty. Muthama did not report the gun threats to the Police immediately, because he was fearful of Bell.

27. In the Separation Checklist and Leaver's Form signed by the Claimant on 23rd August 2010, he gave the reason for leaving as 'resignation.' He signed the document. He was paid Kshs. 1,680,000 in notice pay. He was paid Kshs. 426,666 as leave pay. He filed the Claim after these payments.

28. Bell's e-mail stated, "*this is silly.*" It was not true that he was criticizing the process, not the person. He was insulting the Claimant. It was the Claimant's role to facilitate work permits for expatriates. He was to oversee the processing. It was incorrect to say the expatriates failed to get the permits because of the Claimant's inefficiency. He had advised the expatriates none of them would be able to work without the permits. It was true the Claimant reported the matter to immigration, only after he left employment. Among other of his former Employers, he had only sued Tetra Pak Limited from Lausanne and from

Kenya.

29. Redirected, the Claimant stated he had completed the Organizational Chart, but was hampered by the new demands made by Bell on the design. Salaries were reviewed upwards depending on performance. He was entitled to due process in a disciplinary hearing. This was ignored. He does not dispute the payments already received from the Respondent, neither is he reclaiming these. He facilitated expatriates to obtain permits. He did not sabotage anyone in procurement of work permits. He reported discrimination to his superiors. He is pursuing constitutional remedies at the High Court. The Leaver's Checklist indicated the Claimant left on resignation. The actual reason was termination.

30. Alfred Omani testified he works at the Immigration Department, Nyayo House, in Nairobi. He is the Chief Immigration Officer, attached to the Investigation and Prosecution Section. Part of his duties is to liaise with other State Organs, in matters of immigration.

31. He had the records of Peter Reinartz, Managing Director of Wananchi Group. Reinartz is a Belgian National. He applied for an Entry Permit as Managing Director. The application is dated 13th August 2010. The Permit Committee deliberated on 1st February 2011. Approval was made on 2nd February 2011. The Notification of approval issued on 7th December 2011. Payment for the Permit was received on 25th February 2011, and Permit issued. It allowed Reinartz to work in Kenya. Prior to issue, he could not work in Kenya. He did not have the authority to write the letter of termination dated 23rd August 2010. It is an offence under the Immigration Act to do this. The Claimant asks the Court to uphold the Claim.

32. The Respondent as stated at the outset did not adduce any evidence at the hearing of the dispute. It did however file a comprehensive Statement of Response and List of Documents, which the Court has an obligation to evaluate.

33. It admits the Claimant was its Employee in the given position, and last earned a monthly gross salary of Kshs. 560,000. He was paid Kshs.415,000, not Kshs.460,000 per month as the starting salary. The Respondent did not subject the Claimant to threats, intimidation, insults, discrimination or other forms of inhuman and degrading treatment. No racist utterances were directed by the Respondent at the Claimant. He resigned voluntarily from Wananchi Group on 23rd August 2010. The Respondent states Mr. Bell did not threaten the Claimant with a gun or at all, and the allegations are the subject matter of the High Court Case which is pending. The Claimant's contract was not terminated by the Respondent; he voluntarily resigned.

34. The Respondent appointed Richard Bell as an Executive Member of the Board, to lead in the process of overseeing and managing the affairs of the Company in a process to restructure systems and improve profits and customer satisfaction. Among the Departments required to restructure was the Human Resource, then headed by Muthama.

35. Bell sought accurate and functional records from the Claimant, to enable him discharge his mandate. The Claimant did not have the information and was given more time by Bell to prepare. Bell was extremely courteous in his request, but received shallow and evasive response from the Claimant. At this time, the Claimant did not allege he was being harassed or racially abused.

36. On 18th August 2010, the Claimant was called to a meeting with Senior Management Officers and Directors, but was still not able to supply the Managing Director with the Organizational Chart. He was then asked at the meeting to show cause, why his employment should not be terminated.

37. The Respondent subsequently wrote to the Claimant on 23rd August 2010 expressing its dissatisfaction with the Claimant, and stating its intention to terminate his contract of employment with immediate effect. The Claimant pleaded with the Respondent to withdraw the letter of termination and he is allowed to resign. He negotiated to be paid three months' salary in lieu of notice together with the salary for days worked in August 2010. The Respondent accepted the proposal. The Claimant resigned and was paid his dues. He resigned voluntarily.

38. The Claimant maliciously published certain electronic mails to the Respondent's Partners in breach of an agreement binding him to observe confidentiality after termination. The Respondent was injured by the circulation of the malicious e-mails, and would claim damages for the injury suffered.

39. The Respondent holds that the Claimant left employment of his own volition, fairly and is not entitled to the remedies claimed. The Respondent urges the Court to dismiss the Claim with costs.

The Court Finds and Awards:-

40. The Court agrees with the Respondent that the allegations contained in paragraph seven of the Statement of Claim are the subject matter of another judicial platform. It would not be appropriate for this Court to evaluate the veracity of these allegations against Mr. Bell, as this would prejudice the right of fair hearing of the Parties, at the pending High Court Case. It could also result in conflicting findings of fact by different judicial platforms, which has the effect of eroding public confidence in the Judiciary. This Court shall therefore keep off the evidence relating to Mr. Bell and his gun, and concentrate on the other factual and legal issues raised in this dispute.

41. The Respondent is a registered Company dealing with provision of Cable TV and Internet services. It primarily operates as ZUKU TV and offers digital services. It is agreed the Claimant was employed by the Respondent with effect from 1st October 2008, as the Human Resources and Training Manager. His contract of employment states his initial salary was Kshs. 415,000 per month, this being the gross salary. He stated in his evidence that although this was the starting salary indicated in the contract, he was started off at Kshs. 460,000 all-inclusive. The Respondent denied this was the rate paid to the Claimant, insisting he was paid what is shown in the contract. The Court finds this is not material to the issues in dispute. The last rate is agreed at Kshs. 560,000 all-inclusive per month. The Claimant does not seek any underpayment of salary and the Respondent is not pursuing any refund of overpayment. The dispute over the initial salary is not significant to the Claim. The last pay of Kshs. 560,000 is not disputed, and is the base rate in computation of any compensation that may be found due to the Claimant.

42. The issues for the consideration of the Court may be narrowed down to these:

[a] Whether the Respondent terminated the Claimant's contract of employment, or the Claimant voluntarily resigned?

[b] If the Respondent terminated the contract, was the decision substantively justifiable, made for valid reason and carried out fairly?

[c] And if the answer to [b] is no, does the Claimant merit 12 months' gross salary in compensation for unfair termination; costs; and interest?

43. Termination or voluntary resignation? Termination is a general term, denoting the end of an Employee's duration in employment. It is regulated under Part 6 of the Employment Act 2007, under the head 'Termination and Dismissal.'

44. In the ***Industrial Court Cause Number 886 of 2010 between Julie Topirian Njeru v. Kenya Tourist Board [UR]***, this Court observed that termination may be voluntary, involuntary or consensual. It is voluntary if an Employee resigns. It is involuntary if the Employee is dismissed or his position declared redundant. It is consensual if for instance, the Employee's fixed term contract comes to an end. There may also be the narrower 'termination' where the contract may be terminated in accordance with the termination clause contained in a contract through notice, and as contemplated under Section 35 of the Employment Act 2007. In all forms, the law requires termination should always be based on limited, objective and demonstrable grounds.

45. The first issue involves an enquiry into the two letters dated 23rd August 2010, the first authored and signed by Peter Reinartz the Managing Director of the Respondent, under the reference 'Employment,' and the second by the Claimant Charles Muthama, referenced 'Resignation.' In the first letter, termination

would be deemed to have been initiated by the Respondent, and therefore involuntary. In the second, the termination would be deemed to have been initiated by the Claimant and therefore, voluntary.

46. It is necessary to review the circumstances leading to these competing forms of termination. Two weeks before the letters were written, on 11th July 2010, Mr. Bell wrote to the Claimant an e-mail complaining about the Claimant's performance. *"This e-mail serves as an Official formal written warning that your performance is unsatisfactory,"* wrote Bell. The Claimant replied on the following day stating he was committed to completing the Organizational Chart by Monday 19th July 2010 and lamented that, *" I feel it is overly harsh and unfair to judge my commitments to Wananchi and my performance based on a single task."*

47. Bell's reply was curt and uncompromising. *" I do not intend to debate the warning that has been given to you and expect that your performance going forward will improve accordingly."*

48. Tension appears to have built up between Bell and Muthama from late June 2010, when Hannelie Bekker wrote to the Claimant instructing him that she had identified a suitable candidate for the role of Financial Controller. The Claimant suggested the position be advertised internally. Bell sounded angry when he wrote to the Claimant on 21st June 2010. *"This is silly and constitutes process over common sense. We do not have enough qualified finance people internally to fill the posts we already have... please do as Hannelie has asked and get Salma an offer letter before the end of the week."*

49. The Employer and in particular Mr. Bell would seem from these e-mails to have been angry with the Claimant, and felt there was need for action after the warning of 12th July 2010. He warned the Claimant that he would be monitoring the Claimant's performance closely. The Claimant on his part had expressed the view that he was being judged harshly over a single task. The warnings of 11th/12th July 2010 came against the background of the spat involving the recruitment of Salma.

50. The Claimant's evidence was that Bell was very unhappy with the Claimant. It is confirmed by both sides that on 23rd July 2010, the Claimant attended a meeting in the MD's Office. Suhayl Esmailjee was in attendance. The Claimant was to give a report to the MD, on the simplified Staff Lists signed by Line Managers. The Claimant did not go to the meeting with termination or resignation in mind. It was in this meeting however that the two letters emerged.

51. In the view of the Court, termination was initiated by the Respondent. From the perspective of the Claimant, it was involuntary. He was not called to the meeting on 23rd July 2010, to discuss termination. He had not expressed an intention to voluntarily end his contract, any time before and on 23rd July 2010.

52. The first letter of 23rd July 2010 by Reinartz restated to the Claimant his failures. A conclusion was drawn that the Respondent had lost all trust and confidence in the Claimant's capacity to discharge his role. The letter was explicit. *"We therefore have no choice but to terminate your employment in accordance with the terms of your employment contract dated 9th September 2009. We have no choice but to terminate your employment... Termination will therefore be effective as of today's date."* The Respondent went to the meeting of 23rd July 2010 with the decision to terminate. The Claimant testified and the Court believes him, that Mr. Reinartz already had the letter of termination in hand.

53. The Respondent then appeared to develop cold feet about its decision and as the Claimant was clearing and handing over, Reinartz called him once again. It is then that the letter of resignation appeared. The Claimant was told that he stood to earn better terminal benefits, if he signed the resignation letter. He was convinced that he would earn salary for days worked and outstanding leave days in addition to three months' salary in lieu of notice, promised under the termination letter. He resigned.

54. This was not a voluntary resignation. Termination had already been communicated to the Claimant. He was in the middle of clearing and handing over. He had just been dismissed on the spot and was in no state of mind to weigh the truthfulness of the proposals made to him on the benefits of 'resignation.'

Under his contract Clause 10.1, he was supposed to give the Respondent a termination notice of three months, or pay the Respondent the equivalent of three months' salary in lieu of such notice. He was bound to pay the Respondent three months' salary if he had initiated termination by resignation on 23rd July 2010, without notice to the Respondent. Instead, he was said to have resigned voluntarily, and was offered three months' salary in lieu of notice. The letter to the Claimant from Director Mark Schneider dated 8th October 2010, demonstrated the high degree of the Respondent's confusion over its actions of 23rd August 2010. It states "*your employment was not illegally terminated. You resigned on 23rd August 2010.....*" It goes on to say "*the decision to terminate you was not the decision of an individual, but a decision of the company having made a determination that the tasks given to you over the period of your employment have not been carried out pursuant to the terms of your engagement and that you have been grossly negligent in the performance of your duties.*" The position given by the Respondent is not consistent with the contract authored by the Respondent and signed by the Parties on 10th September 2008. It is not consistent with the Employment Act 2007. The Court finds that the termination of the Claimant's contract of employment was initiated by the Employer. The Claimant was right in feeling in any case, that resigning after termination had taken effect, was an inconsequential act. Signing a letter of resignation after the termination letter issued, had no effect on the termination. It was not a voluntary termination by resignation, initiated by the Claimant. Was termination fair?

55. The Respondent did not give its pleadings any support by way of evidence or submissions. Where there is such an omission, it is always difficult for the Industrial Court to conclude that the Respondent has discharged its burden of justifying termination, as imposed by Section 43 and 45 of the Employment Act 2007.

56. The main complaint by the Respondent, from the pleadings and documents on record, was that the Claimant failed to supply accurate and functional information on the staff of the Respondent. He was required to give to Bell an Organizational Chart; Head Count; and Job Description of all Employees. The Claimant testified he prepared these, but not up to the standards demanded by Bell. He had applied himself fully, and worked well past midnight and even on Sundays to deliver these documents. There was a change in the leadership of the Respondent with the coming of the Belgian Reinartz. Reinartz advised the Claimant to simplify the Charts, but when he did so, he was told he had not complied with instructions to deliver accurate and functional information.

57. The Court does not see this as a valid reason for termination. It was a single task, and it was harsh to judge the Claimant based on a single task. He was first warned on 12th July 2010 by Richard Bell. He was working on the Chart and instructions by Mr. Bell and Mr. Reinartz on the structure of the Chart, seemed at cross-purposes. The Claimant was moving round the clock to deliver on the task. It was harsh and disproportionate to impose on him the sanction of loss of employment. Going back to June 2010, it would seem there were other factors that informed the Respondent's decision, principally Muthama's objection to the recruitment of Salma through single sourcing. The Claimant did not demonstrate adequate workplace common sense, by his objection, in particular given the explanation of Hannelie Bekker that Salma "*comes highly recommended by Richard Bell, who she worked for a few years ago.*" By objecting to the recruitment of an Employee who was familiar to Bell, the Claimant must certainly have upset Bell, who made the resolve to have the Claimant out of the workplace one way or the other. It is not advisable for Employees to appear to challenge every decision made by their Superiors. The reasons given in the letter of termination were therefore not valid termination reasons. There were other unstated factors which influenced the decision. The stated factors on their own, and seen against the conflicting instructions given to the Claimant by two of his Superiors, and his effort at delivering the Chart, were not valid termination reasons. The die appears to have been cast when the Claimant went about questioning Mr. Bell's recruitment instructions. Termination was not based on valid reason.

58. The Court would be rash to conclude that the Claimant was discriminated against on the basis of his skin pigmentation. Wananchi Group employed over 340 Africans and a variety of other Citizens of this World from a variety of cultural and racial backgrounds. There were Filipinos and Indians as well as Caucasians. The Claimant admitted he is himself a Kenyan African, and was in the Middle Management ranks. The communication where Bell told the Claimant "*this is silly and constitutes process over*

common sense,” does not in the view of the Court constitute direct or indirect discrimination based on race. Bell was expressing his anger at the process proposed by the Claimant in filling the position of Financial Controller. It was not a racist anger, but the anger of any Employer who feels undermined by a junior. ‘Silly’ has been variously described in Free Merriam-Webster Dictionary as ‘*not practical or sensible*’ ‘*having or showing lack of thought, understanding or good judgment.*’ The Court views the use of the word in the context of the e-mails between the Claimant and Bell, as directed at the option preferred by the Claimant, for not being practical or sensible, and not being based on thought, understanding and good judgment. This is clear from the feeling expressed by Mr. Bell immediately after the use of the word ‘Silly,’ that the Claimant’s suggestion overlooked there were no suitably qualified Finance Persons at the Respondent who could be internally recruited.

59. The evidence from the Claimant that Mr. Bell suggested Kenya could not move forward without a firm hand, could also not be taken at face value as loaded with racist innuendo. A firm hand could be a Black Hand or White hand. This is a common phrase used by Industry Marshalls and Politicians alike - that Kenya cannot move forward without a firm hand. It cannot be racist because Bell, a Kenyan White, used the phrase to move the business of the Respondent forward. Mr. Euan Fannell who was the CEO before Peter Reinartz was an African American. Listening carefully to the Claimant’s evidence, the Court got the impression that he was playing the race card, to bolster his case of unfair termination. There was no prima facie case shown by the Claimant that he was racially discriminated, so as to require the Respondent to show under Section 5 of the Employment Act 2007, that termination was not based on the alleged racial discrimination. The Claimant had worked for the Respondent and earned a salary increment. He even testified he earned a higher rate initially, than was promised in the contract of employment. The circumstances do not suggest any racial victimization of the Claimant.

60. The procedure in terminating the Claimant’s contract was fundamentally flawed. The attempts by the Respondent to shift the responsibility of terminating the contract to the Claimant through the deceitful letter or resignation, was the most glaring incidence of the lack of a fair procedure. The defect was compounded by the role played by Peter Reinartz. He joined the Respondent and took the functions of the CEO without a work permit. He had no authority to run any business of the Respondent, little less preside over the process through which the Claimant was required to justify his work output, and through which his contract was terminated. The letter of termination dated 23rd August 2010 was signed by an Officer who did not have the basic capacity to work for anyone, anywhere in Kenya.

61. This debilitating incapacity of Mr. Reinartz was confirmed by the Chief Immigration Officer Mr. Alfred Omangi, who produced documents showing the history of the Reinartz’s pursuit of a work permit. The permit was only available to Reinartz on 25th February 2011. The letter of termination issued and was signed by Reinartz before this date. Procedure was obviously flouted by use of an Officer engaged in a criminal enterprise, in issuing a letter of termination.

62. The third reason why the Court finds minimum statutory disciplinary procedure to have been disregarded is because no hearing was granted to the Claimant prior to termination. The Respondent alluded to a meeting of 18th August 2010 between the Claimant and un-named ‘Senior Officers and Directors’ of the Respondent, where the Claimant was asked to show cause why employment should not be terminated. There are no minutes recording what transpired in the meeting, and there is no letter with specific charges, calling on the Claimant to show cause. The letter of termination of 23rd August 2010 did not refer to any disciplinary hearing. There was no evidence that a disciplinary panel was convened, invited the Claimant to a hearing accompanied by a representative of his choice, explained to the Claimant specific charges in a language understood by the Claimant, and gave the Claimant and his representative the opportunity to make any representations as intended by Section 41 of the Employment Act 2007, before the termination decision was made.

63. The upshot is that termination was lacking in both substantive justification and fairness of procedure. The Claimant is entitled to compensation under Section 49 of the Employment Act and Section 15 of the Labour Institutions Act 2007, in force at the time of termination.

64. What should be the level of that compensation? The Court takes the violations against the Claimant to

have been grave, involving substantive as well as procedural violations. The Court has also considered that the Claimant has been able to mitigate his loss of employment by securing a succession of reasonably well paying jobs, albeit not as well paying as the job he had at the Respondent Company. He is currently employed by another Blue Chip Company Deloitte Touché. He has received three months' salary in lieu of notice from the Respondent at Kshs. 1,680,000, and leave pay of Kshs. 426,666. Section 49 [4] of the Employment Act 2007 requires the Court to take into consideration such factors, in determining the appropriate remedy. It is not lost on the Court that the Claimant, contemporaneously with this Claim, initiated another claim at the High Court originating from the same background, with the possibility of securing additional but different remedies against the Respondent and its Officers.

65. Taking into consideration all these factors, the Court grants the Claimant eight months' gross salary at Kshs. 4,480,000 as compensation for unfair termination. The Respondent has shown no alacrity in defending the Claim, and it is proper that the Respondent shall pay the Claimant the costs of the Claim, assessable by the Deputy Registrar of this Court. No order on the Interest.

Dated and delivered at Nairobi this 14th day of March 2014

James Rika

Judge