REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

(BIMA TOWERS)

CAUSE NO. 247 OF 2013

DAVID GICHANA OMUYA.....CLAIMANT

v

MOMBASA MAIZE MILLERS LTD.....RESPONDENT

JUDGMENT

1. David Gichana Omuya (Claimant) was employed by Mombasa Maize Millers Ltd (Respondent) as an in-house lawyer in October 2002. He served the Respondent until June 2006 when he left to seek greener pastures.

2. By a letter of appointment dated 2 April 2007, the Respondent engaged the Claimant for the second time as a company lawyer with effect from 1 March 2007. The letter of appointment set out the terms and conditions of employment.

3. Through a letter dated 6 June 2011, the Respondent notified the Claimant that it was terminating his services in the following terms

> Following your discussions with the undersigned on 6th June 2011 where it was made clear to you that due to prevailing circumstances, the Company has lost confidence in your way of working and it has been decided to terminate your services forthwith.
>
> However you will receive all your terminal dues as follows:-
>
> 1. One month notice pay Kshs 77,662.00
>
> 2. Salary upto 6.6.2011 Kshs 14,935.00
>
> 3. Leave earned upto 6.6.2011 Kshs 188,180.00
>
> 4. Severance pay @ 15 days per year Kshs 179,220.00
>
> **TOTAL** **Kshs 459,997.00**.

4. The Claimant did not agree with the termination and on 7 August 2013 he lodged a Memorandum of Claim stating the issue in dispute as *non–payment of salary in lieu of notice and compensation for unlawful termination of employment.* The basis of claim was that the termination was unlawful because it was without any reason and so he prayed for a declaration that the termination was unlawful, two months pay in lieu of notice and compensation.

5. The Respondent was served and it filed a Response on 29 August 2013. The Cause was heard on 10 December 2013 and was adjourned to 19 December 2013 to enable the Respondent call a second witness. On 19 December 2013 the witness did not attend Court and the Respondent closed its case.

Claimant's case

6. In examination in chief, the Claimant testified that he is a partner in the firm of Hezron Gekonde & Co. Advocates and that he was employed by the Respondent in October 2002 and he left in June 2006 to seek greener pastures.

7. In March 2007 the Respondent recalled him and reemployed him as a Legal Adviser. His responsibilities included advising the Respondent's sister companies. He stated that he offered his services diligently.

8. On the termination, the Claimant stated that on 6 June 2011 he reported to work as usual and at around 9.30 am he was called by Mr. Munir Thabit (in charge of Respondent's Accounts department) who issued him with a termination letter and directed him to leave the office within 30 minutes.

9. The Claimant also stated that he sought to speak to Mr. Mohamed Islam, the Respondent's Managing Director over the reasons for the termination and the said Managing Director informed him that the decision had been taken by one Mr. Abdulways Islam, and the decision was final.

10. The Claimant sought audience with Mr. Abdulways but he directed him to leave when he met him. The said Abdulways humiliated him by ransacking him at the reception while he was leaving.

11. Regarding final dues, the Claimant testified that he was paid one month pay in lieu of notice instead of two months, salary upto 6 June 2011, accrued leave and severance pay. He confirmed receipt of the final dues less deductions/loans outstanding.

12. In cross examination, the Claimant stated that he was not issued with a written contract and when shown a letter of appointment dated 2 April 2007 (in the Respondent's Bundle of documents), stated he never signed the said letter.

13. The termination, according to the Claimant was at will, which is contrary to section 41 of the Employment Act.

Respondent's case

14. In the Reply to the Memorandum of Claim, the Respondent merely denied reemploying the Claimant in March 2007; maliciously terminating his services without any reason; that the Claimant was entitled to two months pay in lieu of notice or compensation or that it had refused to pay the Claimant his final dues.

15. The Respondent called one witness, Stanslous Baya, its Human Resources Officer. The witness stated that he joined the Respondent in 2009 while the Claimant was employed on 1 March 2007 and the Claimant's letter of appointment was in his file, though the Claimant had not signed it.

16. The letter of appointment provided for termination by giving one month notice or pay in lieu of notice, and that the Claimant was paid one month salary in lieu of notice and other dues.

17. On the Claimant's termination, the witness testified that he was not aware of the circumstances

leading to the Claimant's termination.

18. The Claimant filed his written submissions on 8 January 2014, while the Respondent's submissions were filed on 1 February 2014.

Issues for determination

19. From the pleadings, testimonies, documents and submissions, the issues for determination are clear cut. These are whether the termination was unlawful and if so, appropriate relief. In the course of the discussion, some relevant legal issues will be addressed.

Whether the termination was unlawful

Procedural fairness

20. Section 41 of the Employment Act requires an employer to notify and explain to an employee in a language the employee understands of the reasons it is considering for terminating the services of the employee. The employer is also under an obligation to hear and consider any representations which the employee may make before taking the decision to terminate an employee.

21. During the process the employee is entitled to have a fellow employee present and if a union member, a shop floor union representative.

22. The requirements of section 41 of the Act have long pedigree in administrative/public law and are usually referred to as the rule of natural justice. In employment law and practice, it is called procedural fairness.

23. This Court has had occasion to examine what complying with procedural fairness requires in Mombasa Cause No. 64 of 2012, *Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd.* In that case I opined that

> 60. Section 41 of the Employment Act, 2007 has now made procedural fairness part of the employment contract in Kenya. Prior to the enactment of the Act, the right to a hearing was not part of the employment contract unless it was expressly incorporated into the contract by agreement/staff manuals or policies of the parties or through regulations for public entities.
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> 61. An employer was free generally to dismiss for a bad reason or a good reason but on notice or payment in lieu of notice. The employer could even dismiss for no reason at all. There was no obligation to notify or listen to any representations by the employee.
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> 62. The law was very harsh on employees. I believe this could have been one of the factors which led to incorporating what has long been referred to in administrative law as the rules of natural justice and embodied in the Latin maxim *audi alteram partem rule* into the employment contract. Whatever the reasons, the Employment Act, 2007 has fundamentally changed the employment relationship in Kenya.
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> 63. And what does section 41 of the Act require. The first observation is that the responsibility established is upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity, it is the employer to demonstrate to the Court that it has observed the dictates of procedural fairness.
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> 64. The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

> 65. Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.
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> 66. Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.

24. Compliance with the procedural fairness outlined in section 41 of the Employment Act is not a mechanical rote process where an employer is expected to keep a check list. The essentials are to notify an employee of the charges or reasons being contemplated to terminate his services in a language the employee understands, giving him an opportunity to prepare and respond to the charges either in person or colleague/ union representative or considering his representations.

25. The Respondent has failed to demonstrate that it notified the Claimant of the charges/reasons for termination or that he was offered an opportunity to prepare and respond before the termination on 6 June 2011.

26. The Respondent has not met the threshold expected of an employer under section 41 of the Employment Act, and to my mind therefore the termination of the Claimant was procedurally unfair.

Substantive fairness

27. Section 43 of the Employment Act has placed a statutory obligation upon an employer to prove the reasons for terminating the services of an employee. Section 45 of the Act on the other hand requires an employer to prove that the reason(s) for termination are valid and fair reasons.

28. The Response filed by the Respondent consisted of mere or bare denials. Again this Court has had the opportunity to address this type of pleading before the Industrial Court. In Mombasa Cause No. 196 of 2013, *Meshack Kiio Ikulume v Prime Fuels Kenya Ltd*, I held that

The practice of mere denials and putting Claimant's to strict proof is not the practice or procedure of or applicable in the Industrial Court. This is borne out by the statutory obligation placed upon employers in sections such as the one referred to and sections 43, 45 and 47 of the Act in claims for unfair termination.

29. In Mombasa Cause No. 159 of 2013, *Reuben Mwamboga v Bahnhof Bar & Restaurant*, this Court reasoned thus

> 17. Section 45(2) of the Employment Act expects an employer to prove that the reasons for termination are valid and fair reasons. The Respondent's pleading/Response did not attempt to justify or prove the validity or fairness of the reasons for dismissing the Claimant.
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> 18. In fact the type of Response filed by the Respondent cannot and does not meet the threshold expected of a pleading in the Industrial Court.
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> 19. The Employment Act has explicitly set out the legal burden an employer should discharge. In this regard the content and form of a Response must adhere to what the Act expects an employer to discharge. Bare denials and putting Claimants' to strict proof will not just do.

30. Rule 13 of the Industrial Court (Procedure) Rules, 2010 is clear on what a Respondent should set out in a Response. The Respondent did not clearly set out the facts and grounds it sought to rely on to prove the reasons for the termination.

31. The termination letter talked of loss of confidence. This was not elaborated in the Response or oral

testimony. The Respondents' witness' testimony was that he was not aware of the circumstances under which the Claimant's services were terminated. The second witness who was privy to the termination did not attend Court despite issue of summons.

33. In its submissions, the Respondent suggests that the Court should break new ground and develop jurisprudence by expositing on the rights/privileges of employers because the Employment Act is silent on the rights of employers.

34. The Respondent even urged that the Court should take recourse to the repealed Employment Act. Further, the Respondent seems to suggest that an employer can terminate the services of an employee without giving any reasons/grounds provided the employee is given notice or paid in lieu of notice.

35. The authority cited by the Respondent for the above propositions is *Ridge v Baldwin* (1963) 2 All ER 66 at page 71 that the law regarding master and servant is not in doubt. There cannot be specific performance of a contract of a service and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by contract he must pay damages for breach of contract.

36. The position being projected by the Respondent is not the correct legal position even in England. It used to be the position under the common law, but it has since been changed by statute in England. This is clear from the decision of the English Court of Appeal in *Western Excavating (ECC) Ltd v Sharp* (1977) EWCA Civ 2 that

> Until recently, an ordinary servant had no security of tenure. He could be dismissed on a month's notice or a month's salary in lieu of notice…..
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> So, whereas at common law an employer could dismiss a man on a month's notice or a month's wages in lieu, nowadays an employer cannot dismiss a man even on good notice, except at the risk of having to pay him a large sum should the Industrial Tribunal find that the dismissal was unfair (as per Lord Denning MR).

37. In my humble view, the legal position expressed in the *Western Excavating* case is in accord with the correct legal position obtaining in Kenya after the commencement of the Employment Act, 2007. That is the import of sections 35, 41, 43, 45 and 47(5) of the Act

38. The ordinary worker in Kenya now has security of tenure and cannot be dismissed at will. The employer must justify the grounds and the prove the reasons and that the reasons are valid and fair and in accord with justice and equity, or the employer risks paying appropriate and just compensation or even facing an order of reinstatement.

39. I have also previously attempted to address this question. It is not a novel question anymore. In Mombasa Cause No. 110 of 2013, *Alphonce Sulpice Mzenge v Mombasa Air Safari Ltd*, I held that

> 26. Prior to the Employment Act, 2007 an employer could dismiss an employee for a bad reason or no reason at all, provided it was on notice. That has now changed. Section 45 of the Employment Act has made serious inroads in regard to dismissals. An employer is under an obligation to prove the existence of good and valid reasons for dismissal even if he gives notice.
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> 27. The employer is also under an obligation to hear the employee before dismissing him. An employee is entitled to be heard before dismissal because the dismissal will adversely affect his rights and source of livelihood. The ordinary employee now has security of tenure. There has been a fundamental shift in the employment relationship in Kenya.

40. I believe I have discussed enough on this subject. My finding is that the Respondent has failed to prove the reason(s) outlined in the letter of termination and that the reason(s) were valid and fair reasons.

Appropriate relief

Two months pay in lieu of Notice

41. The measure of what would be appropriate notice period or pay in lieu of notice has been the subject of various decisions. The principles are mainly three. One is contractual, in that if the contract entered into by the parties have set a notice period, the damages would be measured in terms of the agreed period. The period may also be agreed in a Collective Bargaining Agreement.

42. Two, statute may provide a notice period such as has been provided for in section 35 of the Employment Act. Various Regulation of Wages Orders have also provided notice period for the different sectors of industry. Statute, in this type of cases outlines only irreducible minimums.

43. Lastly, where no notice period is provided for the Courts have been wont to determine what would be reasonable in the circumstances of the case.

45. The Claimant denied signing the letter of appointment exhibited by the Respondent. The letter provided for one month notice or pay in lieu of notice. But the Claimant has not really made a case why he should be awarded the equivalent of two month's pay in lieu of notice.

46. I would award him the equivalent of one month's pay in lieu of notice because he was being paid by the month. However, the Claimant admitted that he was paid one month pay in lieu of notice and therefore this head of relief is declined.

Compensation

47. The equivalent of not more than twelve months gross wages is one of the primary remedies where the Court reaches a finding of unfair termination.

48. The award is discretionary and the Court is enjoined to consider any, some or all of the thirteen factors enumerated in section 49(4) of the Employment Act.

49. A party seeking compensation should ordinarily place before Court such material as they consider relevant for the determination of compensation. This was not done directly in this case.

50. The Claimant had served the Respondent for four years in the second contract. He was paid some Kshs 459,997/-. Further, the Claimant, an Advocate of the High Court of Kenya had reasonable opportunity to secure alternative employment, which appears to have materialised, though the Court was not informed of how long it took him to secure the alternative employment.

51. The Claimant seeks the maximum twelve months compensation which he puts at Kshs 931,944/- based on his monthly pay of Kshs 77,662/-.

52. The Claimant cites the decision in Mombasa Cause No. 146 of 2012, *Alphonce Maghanga Mwachanya v Operation 680 Ltd.* The *Mwachanya* case is distinguishable from the present case in that the Claimant had a fixed term contract which had twenty three more months to run before expiry.

53. Putting into consideration the factors mentioned in the preceeding paragraphs and the legal expenses reasonably incurred as a result of the termination, the Court is of the view that the equivalent of six months compensation would be just in the circumstances of this case. The same is assessed in the sum of Kshs 465,972/-.

General damages for wrongful termination

54. The Claimant did not lay out any contractual or statutory basis for this head of relief as distinct from the compensation the Court is empowered to award under section 49(1)(c) of the Employment Act,

and it is dismissed.

Conclusion and Orders

55. In conclusion, the Court finds and declares that the termination of the Claimant was unfair and awards him

(a) Six months compensation **Kshs 465,972/-**

56. The claim for two months pay in lieu of notice is declined.

57. The claim for general damages for wrongful termination is dismissed.

58. Each party to bear its costs.

Delivered, dated and signed in open Court in Mombasa on this 11th day of April 2014.

Radido Stephen

Judge

Appearances

Mr. Omuya practicing in the firm of Hezron Gekonde & Co. Advocates for himself

Joshua Mumia instructed by Joshua Bunyori Mumia Advocates for Respondent