REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 146 OF 2013

BENSON K. NGUTI ….....CLAIMANT

VERSUS

KENFREIGHT [E.A] LIMITED ….....RESPONDENT

J U D G M E N T

INTRODUCTION

The claimant has sued the respondent alleging that he was unfairly dismissed from his employment on 26/11/2010. The gist of the suit is that the claimant's employment of 14 years was terminated by the respondent without any justifiable reason and and without being accorded any hearing. He also accused the respondent of racial discrimination for dismissing him in order to replace him with a Belgian national.

The respondent has denied liability in respect of both the alleged unfair termination and racial discrimination. The gist of the defence case is that the dismissal was not on disciplinary grounds but a normal termination through service of one month notice as provided for under the employment contract. It is further defence case that the claimant was not entitled to any accrued employment due on termination but still, the respondent granted him ex-gratia payment.

The case was heard on 16/9/2013, 1/10/2013 and 2/12/2013 when the claimant testified as CW1 and the respondent called Bernard Ochieng Ogaja and Paul Bletterman as RW1 and RW2 respectively. The parties agreed to admit as exhibits documents filed before the close of the claimants case. That led to all the respondent's documents filed on 25/9/2013 and 30/9/2013 being struck off for being filed without leave after the claimant's case.

CLAIMANT'S CASE

CW1 testified that he was first employed by Ocean freight East Africa Limited the holding company of the respondent from 6/8/1992 and later seconded to the respondent on 5/8/1996 as the Finance manager. He was later promoted to be the General Manager in addition to being also appointed member of the Board of Directors. He worked without any problems earning a monthly salary of ksh.676,362 until he was terminated on 26/11/2010.

CW1 explained that his problems with the respondent's MD (RW2) started when the claimant declined to sign some documents for suspicious payments presented to him by the MD. On 17/11/2010 there was a Board meeting where fuel consumption by trucks was discussed. On 18/11/2010 Mr. Kevin approached CW1 and asked him to resign from the company which sounded funny to the CW1 considering that it was

only a day after the Board meeting which did not discuss him or accuse him of any thing wrong.

CW1 referred to the minutes of the Board to demonstrate that he was never the subject of the discussion at the said Board meeting and that the business of the meeting was not a disciplinary hearing. He also explained that the meeting with Kevin was also not a disciplinary process since Kevin was not his senior nor was he answerable to Kevin but to the MD only. He further explained that the disciplinary process for him would only be done by the Board member including the chairman and the MD.

CW1 contended that his termination was unfair and that is why he brought this suit. On 20/11/ 2010 CW1 received an email while on off duty taking his wife to hospital for an operation. The email asked him to return the company car the following day. CW1 however returned it on 22/11/2010 but he was kept at the gate by the security personnel for 15 minutes before being escorted to the office. At the office he was told to hand over the car and telephone. On 24/11/2010 after being kept in darkness, CW1 wrote a letter asking for a hearing. The letter was never responded to but instead he received the letter dated 26/11/2010 terminating his employment. Thereafter CW1 received letter dated 8/12/2010 tabulating his terminal dues including service pay at the rate of 15 days per year of service as opposed to the respondent's custom paying 2 months pay per year of service to directors. He cited the case of Mr. Mwandengu and Mr. Kayakih who left before him to illustrate that on termination Directors are paid 2 months pay of service on termination.

On cross examination by the defence counsel CW1 confirmed that he was not given one month notice but salary in lieu of notice. He admitted that as the General Manager he was in charge of everything in the operation including fuel consumption by the trucks. He admitted that there was exchange of correspondences about operation of trucks including the one dated 5/2/2010, 12/4/2010 and 22/4/2010 to which he respondent to well.

He explained that the Board meeting held on 17/11/2010 discussed accounts and operations of the company. He contended that the minutes of the Board indicated that CW1 was newly appointed to take care of the fleet as he was not dealing with transport before. He maintained that although no new contract was signed, he had ceased from being a mere financial manager after he was appointed a director. He considered the payment of ksh.3,258,245 as being based on the original letter of appointment and did not reflect his new status of a director.

He contended that although the email dated 20/11/2010 stated that the board was considering his case, CW1 was never called before the Board for hearing or accusation. He clarified that he was directed to deal with transport alongside the MD on 26/9/2010. He further clarified that there was no recommendation for his termination by the Board meeting on 17/11/2010.

DEFENCE CASE

RW1 is the HR and Administration Manager for the respondent. He confirmed that CW1 was employed by the respondent on 5/9/1996 and later on 1/1/2006 he was appointed as a Director. RW1 explained that from January 2010 till the time of termination, CW1 exchanged memos with the MD in which the MD was complaining about the CW1's performance. RW1 confirmed that the Board met on 17/11/2010 and thereafter the MD met CW1 separately. According to RW1 complaints were raised against the claimant during he said Board meeting including inefficiency, negligence, loss of USD 280,000 per year in fuel, and incompetence. According to RW1 the foregoing were the reasons that led to CW1's termination of employment.

RW1 was involved in the handing over of company property by the claimant. RW1 never witnessed the claimant being handled differently from other employees. According to RW1 Directors are paid their terminal dues according to their appointment letter. He maintained that CW1 was paid all his terminal dues according to the letter dated 8/12/2010.

On cross examination by the claimant's counsel, RW1 confirmed that he has never been a director of the respondent and he does not know the deliberations by the Board. RW1 further confirmed that he did not

participate in the recruitment and disciplinary process of his seniors including the claimant. He also did not participate in the determination of the dues of his seniors as they exited the company. RW1 confirmed that as the General Manager the claimant was number 2 only to the MD in the company. RW1 confirmed that he was never involved in the termination of the claimant. He confirmed from the minutes of the Board dated 17/11/2010 that CW1 started dealing with transport in September 2010 and became privy to the transport problem only in September and October 2010. CW1 was previously in charge of Clearing and Forwarding. RW1 confirmed that there was a lot of problems with transport even before CW1 became in charge.

RW1 confirmed that the report blamed the workshop manager Mr. Wilhem Rodriques for negligence. He also confirmed that Mr. Maina was the operations manager in charge of allocating transport. RW1 further confirmed that Fatuma Omar was the Commercial Manager dealing with marketing and negotiating terms of contracts including the cost involved. He confirmed that Fatuma was reporting to the MD directly on the marketing matters and not to the claimant. RW1 referred to page 4 of the said minutes to confirm that CW1 had complained about a curtail in the transport sector. He also confirmed from the minutes that no resolution was made to the effect that CW1 was guilty of negligence, inefficiency or incompetence or at all, nor was there any resolution made recommending for the suspension of the claimant or his dismissal.

RW1 however confirmed that the Board specifically dealt with the drivers in the resolutions. He also confirmed that the board did not make any proposal on any action to be taken regarding the claimants performance. RW1 confirmed that the company had made a proposal on the subcontracted trucks. Referring to bullet 2 on page 5 of the minutes, it was agreed that the Operations Manager was to start reporting to the General Manager (CW1) on the final allocations to the fleet.

According to RW1 it was the drivers who were defrauding the fuel as per the minutes. RW1 confirmed that Mr. Raul Derudder, a Belgian replaced CW1. He also confirmed that the MD was also a Belgian. RW1 confirmed that during the tenure of RW2, there has been great turnover of senior management staff but he denied that Kenyans have been most affected by the said turn over.

RW2 is the Group Manager and the CEO of the respondent. He confirmed that CW1 was a Director and also the General Manger for the respondent. RW1 stated that CW1 was terminated on 30/11/2010 after a discussion on 17/11/2010 by the Board of Directors of the respondent. He referred to page 5 of the Board Minutes bullet 4 which empowered Mr. Furley to review the fuel matter with the management to a conclusive decision.

According to RW2 Mr. Furley met with the claimant which prompted him (RW2) to write an email to CW1. RW2 explained that the genesis of the claimants dismissal was certain cases which arose under the management of the claimant including recruitment and some staff members operating little business which interfered with the respondents business. The other issue was allocation of of excess fuel to trucks. The claimant wrote a letter to the Board on 24/11/2010 in connection with the request by Mr. Furley to resign after the Board meeting of 17/11/2010.

According to RW2, the claimant was given hearing twice including one by the Board and the other by Mr. Furley. He maintained that the dismissal was fair because a notice of 30 days was given as per the original employment contract. RW1 referred to the termination letter to clarify that it was not a redundancy. He also contended that under the contract the claimant was not entitled to any dues but the respondent gave him 15 days per year of service totaling to ksh.3,258,245. According to RW2, the respondent lost USD 280,000 per year. RW2 denied that the termination was racially motivated. He contented that the termination was based on facts about CW1's management. RW2 confirmed that he severally wrote to the CW1 asking him to rectify the problems but he failed to heed. He maintained that the dismissal was lawful and the claimant was paid more than what he deserved.

On cross examination by the claimants counsel, RW2 confirmed that it was the respondent's policy to hear an employee before terminating his employment. According to RW2, an employee is first given upto 3 warnings and then invited for a hearing before a decision to terminate is reached. In the case of Directors like the claimant, RW2 confirmed that his case was to be heard by the Board of directors while

for other employees their cases are heard by the HR Manager. RW2 confirmed that Board meeting of 17/11/2010 was not a disciplinary hearing for the claimant and the minutes are not disciplinary proceedings. He further confirmed that Mr. Furley was to review the matters of the CW1 but not to deal with the claimant's discipline.

RW1 confirmed also that the Board meeting was discussing the bad results of the company and its performance and the minutes did not blame the claimant for the poor performance of the company. RW2 confirmed that its the MD who bears the responsibility of the company's performance. RW2 also confirmed that the poor performance of the fleet was before September 2010. He confirmed also that the Transport Manager was in charge of recruiting competent drivers and turnboys. He added that the Technical Manager was overseeing repairs and maintenance of the trucks in the fleet.

On the Board members' reaction to the report, RW2 confirmed that page 4 of the minutes did not mention the claimant or discuss his employment status and no proposals were made against him because it was not a disciplinary hearing for the claimant. RW2 confirmed that the mandate given to Mr. Furley by the Board to make a conclusive decision on the claimant is not documented. RW1 confirmed that the position of the General Manager was taken over by Raul Derudder, a Belgain like himself. RW1 denied instructing workers not to report to CW1 except in areas where CW1 was incompetent.

RW1 confirmed that when he joined the respondent he never found any negative report on the claimant by former MD's. He could not produce any record of the proceedings between the claimant and Mr. Furley. He also confirmed that there was no conclusion that the fraud on the fleet fuel was by the claimant.

After the close of the hearing both parties filed written submissions in support of their respective cases.

ANALYSIS AND DETERMINATION

Upon careful perusal of the pleadings and considerations of evidence and the written submissions filed, two issues arise for determination:

a. **Whether the termination of the claimant's employment was wrongful and unfair.**
b. **Whether the claimant is entitled to the relief sought.**

The gist of the claimant's case is that he was dismissed for alleged misconduct and poor performance of duty which allegedly led to loss of money by the respondent. CW1 contends that the dismissal was rendered unfair because he was never afforded a disciplinary hearing before dismissal on the alleged misconduct and poor performance of duty. He further contends that the termination was unfair because it was motivated by racial discrimination whereby the RW2 wanted to replace him with Belgian national. Lastly the claimant contends that the dismissal was unfair because he was not treated like the other directors on termination.

According to the CW1, all the directors whose services were terminated before his were paid service pay of 2 months salary per year of service. In this case, CW1 and the defence witnesses confirmed that the claimant was only paid 15 days per year of service.

On the other hand, the defence pleaded that the termination of the claimant case was not on disciplinary reason but rather an exercise of the respondent's right under the contract of employment to terminate the engagement upon service of 30 days notice or payment of salary in lieu of notice. During evidence however, the RW1 and RW2 confirmed that the reason for discharging the claimant was poor performance. It is the defence case that the claimant was served with warning letters, heard before dismissal and that he was not discriminated either on racial lines or in the payment of the separation dues. According to the defence, the claimant was not entitled to any separation dues under the employment contract but that did not prevent the respondent from paying ksh.3,258,245 *ex-gratia*.

The court has considered the admission by RW1 and RW2 on cross examination that the meeting of the

Board of Directors on 17/11/2010 was never a disciplinary hearing in respect of the alleged inefficiency and poor performance of duty by the claimant. The said witnesses also confirmed that the claimant was never the subject of the said board meeting. The court has also noted the evidence by the RW2 which alleged that the claimant was heard by Mr. Furley, a fellow director on 18/11/2010. The claimant has however denied any alleged disciplinary hearing before Mr. Furley. According to CW1 the said Mr. Furley only asked him to resign. Mr. Furley was not called to testify to shed light on the encounter with the CW1 on 18/11/2010 and no proceedings of the alleged disciplinary hearing were produced in this case.

According to RW2, Mr. Furley verbally informed him of the meeting with CW1 on 18/11/2010. Without any written proceedings or testimony from Mr. Furley, the court treats the CW1's evidence as uncontroverted by the oral hearsay evidence of the RW2. Consequently the court finds on a balance of probability that the claimant was terminated for alleged poor performance of duty without being accorded a disciplinary hearing.

Section 41 of the Employment Act provides that before an employer terminates the employment of an employee on ground of misconduct, poor performance or incapacity the employer must explain to the employee the reason for the intended termination. The said explanation must be in a language of the claimant's understanding and the claimant must be given the option of being accompanied by a fellow worker or shop floor union representative of his choice. The said provision further requires in mandatory terms that the employee and his companion must be accorded an opportunity to air their case in defence before a final decision is made to terminate the employment. In this case there was no such invitation for a disciplinary hearing and none took place. The RW2 confirmed that the disciplinary hearing for an employee who is also a director was supposed to be done by the Board of Directors. In this case, the Board never convened to hear to consider the alleged poor performance by the claimant. The court therefore agrees with the claimant that the termination was wrongful and unfair.

In addition, Section 45(2) (a) and (b) of the Employment Act provides that an employer shall not terminate the employment of an employee except on ground of a fair and valid reason. A fair reason is defined by the said Section 45(2) (a) and (b) as one that relates to the employee's conduct, capacity and compatibility, or based on the operational requirements of the employer. Section 43 (a) and 47(5) of the Employment Act puts on the employer the burden of proving the reason for termination in a claim arising out of the termination of employment as it is herein.

The court's opinion after keen consideration of the evidence adduced by the defence is that the respondent did not discharge the burden of proving and justifying the ground for the termination of the claimant's employment. In fact both defence witnesses admitted on oath that the minutes of the Board dated 17/11/2010 revolved around the drivers of the respondent's trucks. The defence also admitted that the claimant only took over the fleet management in September 2010 after the fraud was discovered. It was also admitted by the defence witnesses that there was a marketing manager who negotiated rates for outsourced transport and that she reported directly to the RW2 and not the claimant. The defence witnesses also admitted that there was another manager in charge of recruitment of fleet drivers and turn boys and not the claimant. In addition the RW2 admitted on oath that as the MD of the respondent was responsible for the overall performance of the company.

This court finds on a balance of probability that the respondent, through the evidence of the RW1 and RW2 did not prove and justify the ground for terminating the claimants employment. In particular the respondent has failed in her evidence to prove to this court the claimant was negligent, inefficient and that he caused loss to the respondent. No finding whether vide in the minutes dated 17/11/2010 or at all demonstrated that the claimant was investigated and found guilty of any wrong doing or having performed his duties poorly. In addition, no evidence was tendered to show that CW1 was evaluated and found to be a poor performer based on rational targets.

Consequently, this court firmly holds the view that the termination of the claimants employment was unfair and wrongful both substantially and procedurally for the reason stated above. This court further holds that the letter dated 26/11/2010 was only a mischief considering that it was written after the email

dated 20/11/2010 which suspended the claimant pending the review of his position by the Board of directors following his alleged meeting with Mr. Furley on 18/11/2010.

In the court's view, the decision to allegedly terminate the contract of employment without any reason pending the consideration of the claimant's case was in bad faith and unfair. It had the effect of defeating the due process contemplated under Section 41, and 45 of the Employment Act. The said provisions of the law contemplates a fair process to be one which is in accordance with justice and equity.

RELIEF SOUGHT

In view of the findings above, the termination of the claimant's employment by the respondent is declared unfair and unlawful as prayed in prayer (a) of the claim. The court however declines to declare the termination a nullity because there is no basis for that. Termination cannot be a nullity unless done *ultra vires.* The court also declines to make an order for reinstatement of the claimant. As correctly submitted by the defence, employment contracts are founded on mutual agreement between willing parties. The court should therefore not ordinarily order reinstatement save in exceptional cases like contracts of employment founded on statutory and constitutional frame work as held by the Court of Appeal in **C.A 20 OF 1994 IN ERIC MAKHOHA VS. UNIVERSITY OF NAIROBI.**

In addition to the foregoing submission, the court finds that Section 49(4) of the employment Act read with Section 12(3) (vii) of the Industrial Court Act, bars the court from making an order for reinstatement as prayed. The later provision only allows reinstatement where the duration from the date of termination is less than three years. The prayer for the earnings accruing between November 2010 and the date of resumption is automatically defeated by the court's finding that reinstatement will not issue.

In the alternative to reinstatement, the court was urged to award all the salary between the date of termination and the retirement age for the claimant at 60 years. No basis was shown for that claim either in the testimonies or policy document or the contract of employment. It is therefore court's finding firstly, that there is no evidence tendered to prove that the retirement age of the claimant was 60 years or at all. In the court's view, the contract was for an indefinite term terminable by one month notice in writing or salary in lieu. Secondly, there is no legal basis under Section 49 of the Employment Act or any other law cited to warrant such a relief of lost earning to an employee after an unfair or wrongful discharge. Such a relief may only arise in certain cases where an employee's ability to work and earn a living is compromised by virtue of incapacity suffered while at the employers employment. That has not been proved to be the basis of the prayer for the future earnings.

The court however awards prayer (e) being 12 months gross salary for the unfair termination in view of the findings and declaration made above that the termination of the claimant's employment was both substantially and procedurally unfair. Section 49(1) (c) empowers the court to make the said award. The court deems fit to award the maximum 12 months salary considering the claimant's rank. It is not reasonably easy for such a senior officer of a company to secure a similar employment within a short time and especially considering the unresolved allegations of poor performance which were pending before the separation. 12 months gross salary at the rate of ksh.676,362 per month totals to ksh.8,116,344/. This award is exclusive of the *ex-gratia* payment of ksh.3,258,245 already made to the claimant.

The claim for terminal dues equivalent to 2 months per year of service is declined for lack of evidence. The same is not provided for in the letter of appointment or other correspondences dealing with salary review and promotions. There was also no allegation made either in pleading or evidence by the claimant to the effect that the respondent was keeping records of any agreement or policy providing for separation dues of 2 months pay per year of service for the directors.

For that reason the court will not make any finding against the respondent with respect to Section 10(7) of the Employment Act which puts on the employer the burden of proving or disproving an alleged term of contract of employment. That prayer is simply not supported by pleadings and evidence.

DISPOSITION

As a consequence of the foregoing analysis, judgment is entered for the claimant against the respondent for ksh.8,116,344 plus costs and interest.

Orders accordingly.

Dated, Signed and delivered this 13th June 2014

O.N. Makau

Judge