



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1355 OF 2012

BETWEEN

STEPHEN NJOROGE KIGOCHI CLAIMANT

VERSUS

DR. MARTIN NJOROGE WANYOIKE 1ST RESPONDENT

PRIMECARE HEART CLINIC LIMITED.....2ND RESPONDENT

Rika J

CC. Edward Kidemi

Mr. Kiriimi instructed by Kinyanjui, Kiriimi & Company Advocates for the Claimant

Mr. Kaka instructed by Kaka Kamau & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. The Claimant filed his Statement of Claim on 8th August 2012. The Respondents filed their joint Statement of Reply on 15th August 2012. The Claimant and the 1st Respondent gave their evidence on 26th June 2013 when the hearing closed. The dispute was last mentioned in Court on 27th February 2014 when Parties confirmed the filing of their Closing Submissions and were advised Award would be delivered on the 27th May 2014. The Court was not sitting on this date, and was compelled to reschedule delivery of the Award to today.

2. The Claimant's position is that Dr. Martin Wanyoike, the 1st Respondent herein, was the Chief Executive Officer of Primecare Heart Clinic, named as the 2nd Respondent. The Respondents employed the Claimant as the Administration and Finance Manager at the Clinic, through a letter of appointment dated 21st March 2011. The Claimant was entitled to a consolidated monthly salary of Kshs. 100,000, and monthly fuel allowance of up to a maximum of Kshs. 15,000. Prior to this, the Claimant worked as a Financial Accountant for another Firm. He was enticed by the 1st Respondent to leave his former Employer. On 20th December 2011, the Respondents advised the Claimant they were restructuring, and would require the Claimant to take his pending annual leave days, with the details of the restructuring to be communicated to the Claimant at the end of December 2011. On the 29th December 2011, the Respondents issued the Claimant a notice of termination. Termination was effective from 1st January

2012. This is the origin of this dispute.

3. The Claimant avers termination was unfair and unlawful. He was not given reason for termination. He was denied fair procedure. The Respondents paid to him, which the Claimant received on a without prejudice basis, Kshs. 106,947, purporting the payment to be the final dues. The Claimant holds the assertion by the Respondents that they were restructuring, was a ploy aimed at kicking the Claimant out of employment. He seeks the following Orders against the Respondents:-

- a. Certificate of service be issued to the Claimant.
- b. Payment of Kshs. 82,800 comprising 18 days of unused annual leave.
- c. Payment of Kshs. 43,125 in accrued annual leave allowance.
- d. Payment of Kshs. 15,000 in fuel allowance for the notice period.
- e. 12 months' salary in compensation for unfair termination, calculated at Kshs. 1,380,000.

The total sum claimed is Kshs. 1,520,925 less Kshs. 106,947 already paid = Kshs. **1,413,978**. The Claimant asks the Court to grant such other sums as may be found due, costs and interest.

4. The 1st Respondent holds himself to be a stranger to the Claim. The 2nd Respondent concedes it employed the Claimant in the position of Administration and Finance Manager, as shown in the letter of employment dated 21st March 2011. The Claimant took annual leave on 20th December 2011. This was to facilitate restructuring of the 2nd Respondent. It was discovered during the period of leave, that the Claimant's continued employment was untenable. He was issued the notice of termination dated 29th December 2011. Termination took effect on 1st January 2012. Termination was fair, and based on restructuring. On 14th January 2012 the Respondents computed the Claimant's final dues at a net payment of Kshs. 106,947. The Claimant had suggested that he is paid Kshs. 315,000 without any tax imposed on the amount, or Kshs. 480,000 with the taxation. He was paid the sum of Kshs. 106,947. He never claimed the amount he now craves in this Court. The Respondents urge the Court to dismiss the Claim with costs to the Respondents.

5. The Claimant testified Dr. Wanyoike signed his employment letter. The Claimant undertook debt collection. He was not placed on probation. His work was good and spoke for itself. The relationship between the Claimant and Dr. Wanyoike was cordial, the two gentlemen having studied at the same High School, Starehe Boys' Centre and School, in Nairobi. He was told by Dr. Wanyoike he would make more money at the Respondents', than he made at his former Employer Juanco Investments Limited.

6. On 19th December 2011, Dr. Wanyoike invited the Claimant for dinner at Nairobi Club, to discuss salary increments for Respondents' Employees. There was no discussion on such a subject; instead, the Doctor informed the Claimant that the Respondents were restructuring the Business, and the Claimant would be retrenched. Dr. Wanyoike offered to pay to the Claimant the amount of Kshs. 500,000 over and above other terminal dues payable by the 2nd Respondent. The 1st Respondent later sent the Claimant a text by phone, saying he would pay to the Claimant Kshs. 300,000.

7. On 20th December 2011, the Claimant attempted to hand over the office keys to Dr. Wanyoike. The 1st Respondent declined to take the keys, advising the Claimant to instead give the keys to the 1st Respondent's younger brother, an Accountant also named Wanyoike. The following day of 21st December 2011 the Claimant received the letter informing him there was a restructuring exercise going on, and the Claimant should proceed on annual leave, pending further advice. He received a notice of termination on 29th December 2011. Dr. Wanyoike told him restructuring was complete. There was no impropriety attributed to the Claimant.

8. The Claimant handed over office to a Mr. Kiama on 14th January 2012 on the instructions of Dr. Wanyoike. Computation of the Claimant's dues had been readied. The Claimant was required to sign acknowledgement of payment. He did not agree on the computation, and refused to sign. Doctor Wanyoike asked the Claimant to give a computation of what the Claimant expected was payable to him.

The Claimant gave his expected and alternative computation of terminal dues. These are the options shown in the Respondents' annexure 4. Dr. Wanyoike did not agree with the Claimant's proposals, alleging that the Claimant had become a thief. The Respondents later sent a cheque for the sum of Kshs. 106,947 to the Claimant's Advocates, which the Claimant received without prejudice. The items claimed in this dispute remain unsatisfied.

9. The Claimant told the Court he did not receive any warnings or cautions during employment. His performance was never in issue. He was not told why his employment was untenable. Statutory deductions were made on the Claimant's pay by the Respondents. There was no evidence that the Respondents remitted these deducted amounts to the various statutory agencies. The law allowed the Claimant to receive Kshs. 480,000 tax free.

10. Questioned by the Respondents' Advocates, the Claimant testified he sued both Respondents, although the letter of employment was issued to him by the 2nd Respondent, a Limited Liability Company. The provision of fuel was to be utilized through a Petrol Station where the 2nd Respondent had a credit facility. The Claimant worked for a total of 9 months. He was informed there was a restructuring exercise going on. He understood the term restructuring broadly. It could mean abolishment of offices. The 1st Respondent offered to pay to the Claimant Kshs. 500,000, from himself, exclusive of other payments due from the 2nd Respondent. The Claimant did not ask the Doctor to put his offer in writing. In his proposals, the Claimant stated lower figures than what the Doctor offered. He accepted the sum of Kshs. 106, 947 without prejudice. He did not indicate anywhere, that he accepted the money without prejudice. At the time the Claimant gave two alternative modes of settlement, he had in principle, accepted termination. The law allows tax free payment. The Claimant proposed settlement at Kshs. 480,000. He now claims over Kshs. 1,000,000. He had been advised he is entitled to damages. He was not given reason for termination. He would not have filed this Claim, if he was paid what he had proposed to be paid. He apprehended going for his Certificate of Service from the Respondents, as he had been ill-treated on his last visit to the Clinic. He meant to plead for service pay, not leave allowance. The designated Petrol Station was instructed not to allow the Claimant to fuel after he took annual leave. He worked for 9 months, but seeks compensation the equivalent of 12 months' salary. He was paid notice pay and gratuity of 9 months, with the net sum coming to Kshs. 106,947. The letter of employment had a termination clause.

11. The Claimant concluded his evidence with the clarification upon redirection, that the letter of employment did not have the word 'Limited' against the 2nd Respondent's name. It was signed by Dr. Wanyoike. It was a personal letter. There were no documents seen by the Claimant on registration of the 2nd Respondent as a Limited Liability Company. He could not fuel after he left employment. He did not go to work after 20th December 2011. The letter of termination was sent to him via e-mail. He does not dispute payment of Kshs. 106,947. Leave allowance was supposed to be half of the basic pay. There was no claim made for service pay. He received gratuity. The Claimant prays the Court to uphold his Claim.

12. Dr. Wanyoike testified he runs a Private Clinic at Nairobi Hospital, under the name Primecare Heart Clinic. He specializes in heart disease. He was introduced to the Claimant by another old boy of Starehe Boys Centre named Sam Karima. He was looking for someone who could do administrative and financial management at the Clinic. The Claimant visited Dr. Wanyoike at the Clinic. He was accompanied by Karima, and terms and conditions of service were agreed upon, culminating in the letter of employment issued to the Claimant dated 21st March 2011.

13. Dr. Wanyoike was looking for a person of high integrity. The Claimant was not up to the expected standards. From the word go, the Claimant had issues. Dr. Wanyoike asked Karima to mentor the Claimant. There was no change. The Doctor discussed the problem with the Claimant. It was concluded that the position was too big for the Claimant's boots. He was issued the notice of retrenchment as a soft landing. He served the Doctor as a Personal Assistant and was paid Kshs. 20,000 per month by the Doctor out of pocket, every month. The Doctor denied that he ever offered the Claimant Kshs. 500,000 on termination. He offered him Kshs. 300,000 from his own pocket, to supplement other terminal benefits payable by the 2nd Respondent. He started demanding for Kshs. 400,000. He had accepted termination by

the time he wrote his proposal for two alternative modes of settlement. Doctor Wanyoike felt disappointed by the Claimant's decision to bring him to Court. He testified he treats heart patients, and his integrity was brought into question by the Claimant's allegations. The Claimant should have sued the 2nd Respondent. The 1st Respondent held he was wrongly joined to the Claim.

14. He agreed on cross-examination that Primecare is his Private Clinic, which he owns with his wife. He holds a certificate of incorporation. The word 'limited' is not in the Clinic's letterhead. He wrote the letter of employment as the CEO. He and his Wife are the Directors of the company. The Doctor did not think it was necessary for the Claimant to undergo probation on employment. There was mutual trust at the beginning. After three months, the Respondents found the Claimant's performance wanting. There were no cautions or warnings issued to the Claimant. The Claimant would come to work late, and failed to enforce work hours for other Employees. He was offered Kshs. 300,000 on 19th December 2011. He was pushing for Kshs. 400,000. The offer of Kshs. 300,000 was unofficial. The Doctor changed his mind about this offer once the Claimant brought unreasonable proposals. He paid Kshs. 20,000 to the Claimant monthly out of pocket, because the Claimant used to carry out personal errands for the Doctor. This was a voluntary payment. This running of errands and payment for the service, did not contradict the Claimant's evidence that the Claimant was a poor performer. He did not keep pace with the Respondents' standards and vision, of the Clinic being the best Clinic in East and Central Africa Region. In the termination letter, the Doctor agreed he stated that the Claimant had assisted in realization of this vision. This however was mere flattery. He was leaving employment, and the Heart Doctor did not wish to break the Claimant's heart. The 1st Respondent provided the Court with statements of taxes and contributions made to the respective statutory bodies from the Employees' salaries. It was not true that he with-held statutory deductions made from the Claimant. The Respondents pray for dismissal of the Claim with costs.

The Court Finds and Awards:-

15. Section 2 of the Employment Act 2007, as well as Sections 2 of the Industrial Court Act 2011 and the Labour Relations Act 2007, uniformly define the term 'Employer' to mean, "*any person, public body, firm, corporation or company, who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm or corporation.*"

16. This definition is broad enough to justify employment claims made by Employees against Employers who take the character of natural and artificial persons. Directors, Managers and Agents of Companies qualify to be described as 'Employers', and can legitimately bear employment liability. The Claimant was employed by Dr. Wanyoike and his Business Primecare Health Centre. The letter of employment issued in the name of Primecare Health Centre. Either of them, or even Dr. Wanyoike's Wife who co-owns the Business, could validly answer to this Claim.

17. This Court has in the past held that it would be difficult for Employees to enforce their employment rights, if the Court was to give a conservative interpretation to the idea of legal separateness. The doctrine of corporate separateness as popularized in the case of *Salomon v. A. Salomon & Co Limited [1987] AC 22*, needs to be cautiously interpreted, within modern employment relationships. As observed by the Industrial Court of Kenya in *Cause Number 2038 of 2011, between Agnes Ogutu v. Ms. Fun An Shop Limited & Manjunath Prabhu, (UR)*, the doctrine of legal separateness has limitations, where contracts of employment are in issue. The Court looks at the economic enterprise, the totality of the business structure, rather than the personality assumed by the Employer. Employees are recruited by known human persons, [in the present case Dr. Wanyoike], and will hardly know the insulating, multiple legal personalities at the bottom of their Employer's businesses. Employees should therefore be given the greatest latitude in bringing all entities described under Section 2 of the laws above, to account for employment wrongs.

18. In this dispute the Claimant correctly joined Dr. Wanyoike and his Clinic as Respondents. It was not even clear from the evidence presented by the Respondents, what form of registration is Primecare Clinic, the certificates of registration having not been availed. It would be unreasonable and unnecessary, for the Court to place the burden of establishing the nature of registration on an Employee. It is sufficient that Dr. Wanyoike, who recruited the Claimant, instructed, controlled and remunerated the Claimant at work,

is the principal Respondent shouldering the burden of righting the perceived employment wrong. The Court finds the Doctor is properly sued.

19. There is common evidence the Claimant was employed on 21st March 2011 as the Administration and Finance Manager. He earned as consolidated salary of Kshs. 100,000 per month and was entitled to fuel allowance of a maximum of Kshs. 15,000. The fuelling was to be done at a Petrol Station where the Respondents retained credit facilities. It is agreed the Claimant left employment on 20th December 2011. The reasons for his exit are contested.

20. Dr. Wanyoike wrote to the Claimant on 20th December 2011 advising that the Respondents were restructuring the business. The Claimant was asked to proceed on annual leave and would be advised about the radical changes made in the management structure, by the end of December 2011. According to the Claimant, he had earlier on 19th December 2011 been told by Dr. Wanyoike at a dinner meeting, that the Claimant would have to leave due to change in the management structure. Dr. Wanyoike in his testimony stated the Claimant turned out to be a man who could not fit in the Clinic's boots, and was below the expected standards of integrity.

21. The Claimant testified he had not received any caution or warnings, and had up to the date he was told he would be retrenched, worked diligently. The testimony of Dr. Wanyoike on the reason for termination was rather mixed up and unconvincing. Retrenchment is not caused by a fault on the part of the Employee. It is not a decision made because an Employee has been found to suffer questionable integrity, or fails to perform. It is not a disciplinary sanction. It cannot be a response or alternative to a disciplinary issue. It could not be a 'soft landing' in the sense communicated to this Court by Dr. Wanyoike. It is a form of termination which is caused by factors not attributable to the Employee. Dr. Wanyoike seemed set on ridding himself of an Employee he had recruited through the Starehe Old Boys' networks. He did not go about the exercise of ridding himself of the Claimant, in the manner contemplated by the Employment Act 2007. He did not follow the redundancy provisions created under Section 40, or the termination provisions under Sections 41, 43 and 45 of the Act. He interchanged the reasons for termination, arguing a case for both retrenchment and disciplinary causes.

22. While the Court finds fault with the termination on both the substantive and procedural requirements, there are others aspects of the employment relationship which must be taken into account. Labour is flexible and not every case, can be resolved through the adoption of judicial precedents. The Claimant was recruited by Dr. Wanyoike through a former school mate of Dr. Wanyoike, Sam Karima. All the involved parties- Dr. Wanyoike, the Claimant and Sam Karima - are old students of Starehe Boys Centre. The Claimant entered the Respondent's workplace through the Starehe family ties. The Doctor, perhaps felt there would be greater mutual trust and confidence between him and the Claimant, given their shared educational background. The Claimant may similarly have felt he had entered a comfort zone. For some reasons, the relationship did not turn out to be as the Parties had intended.

24. The 1st Respondent treated the Claimant as part of the family, entrusting him the tag of Personal Assistant, and paying him a monthly stipend of Kshs. 20,000, outside the normal remuneration payable to the Claimant as an Employee. The Court found in *the Industrial Court Cause Number 908 of 2011 between Njoroge Muigai v. System Integration Limited* (2013) e-KLR, that it is bound, in determining employment disputes, to look at the social dimensions rather than engage in a plain, cold evaluation of the law. This was an employment relationship which given the strong Starehe Boys Centre ties, bordered on a family relationship.

25. Dr. Wanyoike is a leading cardiologist in Kenya and it is perhaps unfortunate that he ended up in this Court. It is unfortunate two old boys of Starehe Boys Centre had this disagreement. This is a dispute that should have been determined by a Council of Elders from the Starehe Community, with the aid of Sam Karima who brought the Parties together in an employment relationship. Kenyans are being encouraged to utilize voluntary settlement mechanisms given under Article 159 [2] of the Constitution.

26. It is observed that the Claimant and Dr. Wanyoike in principle had agreed on termination. This is the

reading of the Court, of the evidence relating to the two proposals made by the Claimant, on the terms of exit. There was an understanding that the relationship was at an end. The Doctor offered to pay to the Claimant from his own pocket, as opposed to the Clinic Account, a sum stated variously to be Kshs. 500,000 or Kshs. 300,000. This again demonstrated a strong Starehe, familial tie underlying the relationship. The Claimant was unfortunately tempted to pursue a larger golden parachute, and Dr. Wanyoike felt compelled to withdraw the offer, paying the Claimant the amount of Kshs. 106,947 as the total exit package. The Court feels both Parties were at fault for not engaging each other more keenly and constructively. The result as suggested elsewhere, may have been different, if there was a facilitated consultation, negotiation, and greater use of good offices.

27. The Court concludes, as in the case of *Njoroge Muigai v. System Integration* quoted above, that it should impose on the Parties a remedy based on the proposals of the Parties, as at the time their dialogue broke down. The Claimant has already received Kshs. 106,947 which represented 1 month salary in lieu of notice and gratuity calculated at half monthly salary for 9 months completed in employment. The proposal to pay the Claimant Kshs. 500,000 on top of other payments made by the Clinic was disputed by Dr. Wanyoike. He conceded he had offered the Claimant a figure of Kshs. 300,000. This was payable in addition to other terminal benefits such as comprised in the amount already in the Claimant's account. In the course of employment, the Claimant was paid an extra sum of Kshs.20,000 monthly. The Claimant worked for 9 months. He did not show his demand for Kshs.480,000 tax free, to have been a reasonable demand. He received gratuity pay, and would have no reason to demand for service pay. His claims for leave pay and leave allowance had no foundation. He was paid 1 month consolidated salary, as notice pay. The Respondents had no obligation to pay him fuel allowance of Kshs.15,000 for the notice period. He was not driving to and from work during this period. The only outstanding issue would be whether the Claimant merits 12 months' salary for unfair termination. Firstly, the Court has faulted the reasons given and procedure adopted by the Respondents in terminating the Claimant's contract. Secondly, it but has also concluded this was a special employment relationship. Thirdly, the Claimant accepted the termination decision in principle, only questioning that decision, after failing to obtain the preferred exit package. In the circumstances, it is not necessary to answer the question whether payment of the statutory compensation is merited. The Court grants the Claimant Kshs. 300,000, separate from the sum of Kshs. 106,947 already received by the Claimant, as adequate settlement. The Parties are encouraged to keep strong their Starehe Brotherhood. It is important that they do not feel shortchanged, that they can re-create their friendship, and move on. In sum-:

[a] Dr. Wanyoike and his Clinic [Respondents], shall within 30 days of the delivery of this Award, pay to the Claimant a total sum of Kshs. 300,000 in full and final settlement of the Claim.

(b) The Respondents to release the Claimant's Certificate of Service to him forthwith.

[d] No order on the costs and interest.

Dated and delivered at Nairobi this 11th day of July 2014

James Rika

Judge

