



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO.1437 OF 2012

(Before D.K.N. Marete)

GEORGE KARIUKI NGUGI.....1ST CLAIMANT

TIRUS GITHIMBA MUNENE.....2ND CLAIMANT

FRANCIS NDUNGU NGUGI.....3RD CLAIMANT

Versus

BROLAZ EAST AFRICA LIMITED.....RESPONDENT

JUDGEMENT

These matters were originated individually by Memoranda of Claims dated 21st August, 2012 and filed on the following day. The issues in dispute therein as exemplified in Cause No. 1437 of 2012 are cited as;

1. *Wrongful dismissal of the Claimant(s) by the Respondent.*
2. *Failure by the Respondent to follow due process in terminating its contract of employment with the claimant.*
3. *Failure by the Respondent to pay the claimant's terminal benefits.*
4. *Failure by the Respondent to remit deducted PAYE to the Kenya Revenue Authority for the year 2011.*
5. *Failure/Refusal by the Respondent to issue the claimant with a certificate of service after termination of his employment.*

On 28th August 2012, Cause No. 1338 of 2012 came for hearing before Lady Justice Monica Mbaru and on instigation of the parties the three matters were consolidated with orders that the same be heard and determined under Cause No. 1436 of 2012. It must be admitted that these suits arise under similar circumstances and involve somewhat similar facts and the same employer.

The respondent, vide their different Memoranda of Defence all dated 13th September, 2012 opposes the claims and prays that the same be dismissed with costs.

The 1st Claimant's case is that he was employed by the respondent as a Divisional Manager Operations from 22nd November, 2007 by an employment contract executed *inter-parties*. His salary was Kshs. 140,000.00 as set out in the said contract.

The claimant's further case is that on 17th April 2012 the respondent through its Managing Director arbitrarily, wrongfully and without reason whatsoever summarily terminated employment with the Claimant purportedly on grounds of abuse of office and fraud. These allegations were flimsy, baseless and intended to justify a summary dismissal at a time when the respondent was actually undergoing a downsizing and retrenchment exercise in which the claimant's position was about to be declared redundant. This also involved his co-claimants in these cases.

The claimant also contends and submits that the dismissal and or termination of employment was in bad faith and designed to ensure that the respondent did not pay the claimant's terminal benefits inclusive of severance pay on redundancy.

It is the claimant's case that the respondent thereon went on to downsizing and restructuring process in which many positions in the establishment were rendered redundant. Other issues arising out of the claimant's case are that the respondent had failed to remit his income tax deductions for the year 2011 to the Kenya Revenue Authority. His salary at the time of dismissal was Kshs. 270,200.00. He prays for;

- a. *A declaration that the Claimant's summary dismissal was unlawful, null and void and actually amounted to constructive redundancy.*
- b. *Severance pay.....Kshs.9,006 x 15 x4 = Kshs.540,360*
- c. *12 months salary as compensation for unlawful dismissal..... 270,200 x12 =Kshs.3,242,400*
- d. *One month's salary in lieu of notice.....Kshs.270,200*
- e. *Unremitted PAYE tax for the year 2011.*
- f. *Interest on (b) (c) and (d) until payment in full.*
- g. *General damages*
- h. *Costs of the suit.*

The 2nd claimant's case is that he was employed by the respondent as a Computer Aided Design (CAD) on a fixed term contract effective from 1st July 2005 to 31st December, 2005 of a salary of Kshs. 70,000.00 gross per month. This contract was extended from time to time until the 1st January 2008 when the respondent confirmed the claimant's appointment and extended the contract for an unlimited time.

The claimant's further case is that on 11th April, 2012 the respondent arbitrarily, wrongfully and without reason whatsoever summarily terminated the employment of the claimant purportedly on grounds of committing fraud and also tarnishing the respondent's image. It is the claimant's contention that these allegations of fraud were flimsy, baseless and continued to justify a summary dismissal at a time the respondent was undergoing a downsizing and retrenchment exercise where the claimant's position was about to be declared redundant. Two other senior officers of long service fell prey to this scheme and lost their jobs without payment of terminal benefits inclusive of severance pay on redundancy.

The claimant further contends and submits that his termination was in bad faith with the sole motive of denying him payment of terminal benefits inclusive of terminal pay on redundancy as aforesaid. He further contends and submits that despite diligence service to the respondent, where he had not had any disciplinary issues he was summoned to an ordinary meeting where he was ambushed with flimsy and unsubstantiated allegations. Indeed no notice of termination was issued to him and neither was he

subjected to appropriate disciplinary process as required by law. He submits and contends that he was not issued with a certificate of service and further that he had had a trouble free stint of employment with no disciplinary hitches, or at all.

The claimant further brings out a case of an intended cessation of the operations of the respondent which is demonstrated by her (respondent's) issue of a notice through an internal memorandum indicating that most positions in the company would be declared redundant and that a retrenchment exercise would be conducted on 7th September, 2012. This also went out to the respondent's clientèle on the intention to clear pending works with a view to winding up operations in this country. All other indications point at this.

The claimant further submits that at the time of termination of his employment, his salary was Kshs.130,977.00 and that thereon, he has discovered that the respondent failed to remit his P.A.Y.E to the Kenya Revenue Authority in 2011. The claimant pleads special and general damages besides terminal benefits and a certificate of costs. He therefore prays for;

- a. *A declaration that the Claimant's summary dismissal was unlawful, null and void and actually amounted to constructive redundancy.*
- b. *Severance pay.....Kshs.4,465/= x 15 x6 = Kshs.392,850*
- c. *12 months salary as compensation for unlawful dismissal..... 130,977 x12 =Kshs.1,571,724/=*
- d. *One month's salary in lieu of notice.....Kshs.130,977*
- e. *Unremitted PAYE tax for the year 2011.*
- f. *Interest on (b) (c) and (d) until payment in full.*
- g. *General damages*
- h. *Costs of the suit.*

The 3rd claimant, Francis Ndungu Ngugi's case occurs under similar circumstances as the other two. He was employed as a driver and his last salary was Kshs. 87,119.00 at termination. He prays for;

- a. *A declaration that the Claimant's summary dismissal was unlawful, null and void and actually amounted to constructive redundancy.*
- b. *Severance pay.....Kshs.2,904/= x 15 x7 = Kshs.304,920*
- c. *12 months salary as compensation for unlawful dismissal..... 87,119 x12 =Kshs.1,045,428/=*
- d. *One month's salary in lieu of notice.....Kshs.87,119*
- e. *Unremitted PAYE tax for the year 2011.*
- f. *Interest on (b) (c) and (d) until payment in full.*
- g. *General damages.*
- h. *Costs of the suit.*

The respondent's case in opposition to the claims is that in the year 2011, she discovered the following activities in regards to the claimants;

3.1 Tirus Githumba Munene

3.1.1 Abuse of the claimant's position as a Computer Aided Designer technician by fraudulently claiming for expenses not incurred;

3.1.2 Failure to disclose to the supervisor financial short falls in the course of his assignments;

3.1.3 Making excessive claims for security costs while on a project assignment in Isiolo;

3.1.4 Delays in reimbursing monies owed to Votex Limited, a contractor subcontracted by the Respondent and making personal financial arrangements with the respondent's finances bringing disrepute to the respondent in the eyes of its contractors.

3. George Kariuki Ngugi

3.2.1 Abuse of his position as operations manager for soliciting for money from respondent's site supervisors in return for their employment retention;

3.2.2 Encouraging of site supervisors to employ ghost workers on site to facilitate the embezzlement of the respondent's funds;

3.2.3 Engaging in diverse fraudulent activities against the respondent and intimidating supervisors under him;

3.2.4 Misuse of the Respondent's property and engaging in business that in conflict and direct competition with the claimant's responsibilities.

3. Francis Ndung'u Ngugi

3.3.1 Abuse of his position as field manager for soliciting for money from respondent's site supervisors in return for their employment retention;

3.3.2 Encouraging of site supervisors to employ ghost workers on site to facilitate the embezzlement of the respondent's funds;

3.3.3 Engaging in diverse fraudulent activities against the respondent and intimidating supervisors under him;

3.3.4 Misuse of the respondent's property and engaging in business that are in conflict and direct competition with the claimant's responsibilities.

On the 1st Claimant case, the respondent admits that he was employed on 22nd November, 2007 as a Divisional Manager Operations. At the time of his dismissal he had a consolidated salary of Kshs. 205,200.00.

It is the respondent's submissions that on 21st and 23rd March, 2012 she received an anonymous email communication stating that the claimant and Francis, also a claimant in this case had been telling site supervisors to hire many fake casuals and send them the money through mobile service transfer (Mpesa). Further, the anonymous email revealed that the claimant's private company was engaged in business that is direct conflict with the claimant's responsibility and also in direct competition with the respondent business. Following the emails the respondent conducted investigations and various witnesses voluntarily informed the respondent of the malpractices of the claimant. This also involved Francis Ngugi, the 3rd claimant. The claimant on 11th April, 2012 was suspended on pay and invited to a disciplinary hearing scheduled for 17th April, 2012. In this letter of invitation he was informed of the charges against him as follows;

- *Intimidating site supervisors by soliciting money from them during site construction.*
- *Encouraging the employment of ghost workers on site to facilitate kickbacks.*
- *Undermining the profitability of the company by conducting fraudulent activities.*
- *Engaging in outside business activities in contravention of conflict of interest clause as per his contract of employment.*

At the disciplinary proceedings, the claimant was given copies of the witness statements and afforded time to go through them and respond appropriately wherein he denied all the charges. His presentations were considered. He could not exonerate himself from all the charges and was therefore dismissed from employment after due consideration of his case, response and available evidence.

The 2nd claimant, Tirus Githimba Munene was employed by the respondent on 1st July 2005 as a Computer Aided Technician. At the time of dismissal his salary was Kshs. 130,977.00. In the respondent case the claimant's case is that while conducting investigating in the ongoing projects and expenditure incurred thereof, she received a complaint from Votex Limited regarding some Kshs. 3,500 owing to them from the 2nd claimant. Votex Limited was a company subcontracted by the respondent. It complained that the issue bordered on theft and lack of integrity on the part of the 2nd claimant. At a meeting on 17th February, 2012 on the subject the claimant was present but he still owed this amount.

On 26th March, 2012 at 959 hours the 2nd claimant was invited to attend a disciplinary hearing on the following day at 800 hours. Further on the analysis of the expense claims submitted by the claimant showed that he had claimed a total of Kshs. 5500 for his work at Mithini, Kirindini and Muriri sites. Following these discoveries the claimant was given adequate opportunity to explain himself at the disciplinary meeting on 27th March, 2012.

At the hearing, the 2nd claimant admitted that he had requested for Kshs.4700 from Mr. Joseph of Votex due to a deficit in his imprest as a consequence of been awarded extra work and sites to cover while on external assignment. The respondent was not able to issue a further imprest for the extra sites despite the request by the claimants. The borrowing was on an agreement for reimbursement and he considered this a personal loan *inter-parties*. He had in any event refunded an amount of Kshs.3500 and the remaining balance was Kshs.1200.

On 11th November, 2012 the 2nd claimant was summarily dismissed from employment for committing fraud in his expense claims and tarnishing the good name of the respondent by failing to maintain a sound working relationship with Votex, their sub-contractor. These reasons were clearly spelt out in the letter of dismissal therefore founding a case of lawful dismissal.

The 3rd claimant, Francis Ndungu Ngugi was employed by the respondent on 24th September, 2004 as a driver. At the time of dismissal he was serving as a Field Manager and his salary was Kshs. 87,119.00. On 21st to 23rd March, 2012 the circumstances relating to the 1st claimant on the issue of hiring fake casuals and demanding kickbacks fraudulently was also reported on him. On 12th April, 2012 the claimant was suspended and the letter of suspension cited the grounds as in his co-claimant's case. The 3rd claimant was invited for disciplinary proceedings and treated the same manner as the 1st claimant. He was not able to exonerate himself and was therefore summarily dismissed. The reasons for the claimants dismissal were clearly set out in the letter of dismissal as follows;

1. *abuse of his position as Field Manager for soliciting for money from Respondent's Site supervisors in return for their employment and retention;*
2. *encouraging of site supervisors to employ ghost workers on site to facilitate the embezzlement of the respondent's funds*
3. *engaging in diverse fraudulent activities against the respondent and intimidating the supervisors*

under him;

- 4. misuse of the respondent's property and engaging in business that were in conflict and competition with the claimant's responsibilities towards the respondent.*

The respondent defends the dismissal and submits that this is lawful as it is a consequence of gross misconduct on the part of the claimant.

The respondent defends the summary dismissals as lawful (for their legality and relation to the parties employment contracts and avers that this is supported by the law as provided at Section 44 (4) (c) and (g) of the Employment Act, 2007.

The respondent further contends and submits that the claimants were involved in malpractices of fraudulent claims to the substantial detriment of the respondent for their gain as evidenced in appendices of documents annexed as appendix 2 (a-f) of the defence. The respondent further submits to a case of tarnishing of her reputation by some irregular financial dealings with Votex limited, their client by the 2nd claimant.

The claimants were dismissed on grounds of gross misconduct. The claimants were duly informed of the disciplinary meeting but failed to offer adequate defence and was thus summarily dismissed from service. The respondent also deny allegations of the claimant's respondents intervention to move out of Kenya and disputes proof of the same by the claimant. A case for redundancy was made and notified to the staff months after the dismissal of the claimant and therefore the futility of this claim.

The respondent also denies nonpayment of the terminal benefits of the claimants and submits that these were made in addition to drawing certificates of service with the claimants have since refused to collect. The respondent in the penultimate denies liability in terms of the claim and submits that the termination of the employment of the claimant was in the circumstances lawful.

The matter was heard until the 27th January, 2014 when the parties agreed on a disposal of the issues by way of written submissions. The issues for determination therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Has the respondent failed to remit the claimant's income tax deductions and if so, where are these owed?
4. Who bears the costs of this cause?

The 1st issue for determination is whether the termination of the employment of the claimants was unfair, wrongful and unlawful. The claimants in their evidence in chief reiterate their case as per their pleadings. They further deny they had committed any fraud as accused by the respondent. They also denied having been issued with a certificate of service as alluded by the respondent.

George Kariuki Ngugi, DW2 on 27th January, 2014 testified and also reiterated his case as per his pleadings. His position is that his dismissal was groundless, the same having been prompted by false accusations by the respondent.

The 3rd claimant, Francis Ndungu Ngugi would not testify due to a technicality. He had sat in court doing the testimonies of the other claimants and therefore the parties agreed on an absention of his evidence and determination of the matter on the weight of written submissions.

In their written submissions, the claimants posit that the termination of the employment of the claimant offends Section 44 (2) of the employment Act, 2007 in that no notice on adequate notice was issued to the claimants informing them of their dismissal. The claimants evidence is that he was neither issued with a notice and neither was he paid a salary in lieu thereof. This is as hereunder;

44.(2) *Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.*

The claimant further submits that the respondent also flouted the provisions of Section 41 Employment Act, 2007 as follows;

41. Notification and hearing before termination on grounds of misconduct

(I) Subject to Section 42 (I), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(II) Notwithstanding any other provisions of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (I), make.

This is supported by the nature and timing of invitations to the so called disciplinary meeting. The following issues arise out of the 2nd claimant dismissal;

- 1. The invitation to the meeting was sent to the Claimant via an email (see Appendix 5 of the Respondents defence) on March 26th 2012, at 4.53pm which is an insufficient notice of seven minutes before the claimant's work day ended.*
- 2. The email does not disclose that this is a disciplinary meeting that could cost the claimant his job and that he was expected to defend himself accordingly.*
- 3. The email does not disclose the reason for which the respondent was considering terminating the claimant's employment.*
- 4. The email did not inform the claimant that he was entitled to have another employee or a shop floor union representative of his choice present during this explanation.*
- 5. The email did not contain notice of the charges facing the claimant to enable him prepare (overnight) for the alleged disciplinary hearing.*
- 6. The meeting of 27th March 2012 could not have been a disciplinary meeting as it did not contain the deliberations and subsequent conclusion for termination in the minutes produced by the respondent as Appendix 3a.*
- 7. The reasons given for the claimant's summary dismissal as carried in the letter of summary dismissal dated 11th April 2012 were not put to the claimant at the alleged disciplinary hearing of 27th March 2012 as evidenced by the minutes graciously produced by the respondent as Appendix 3a.*

The claimants further submit that these dismissals were a camouflage for downsizing and retrenchment wherein their positions should indeed have been declared redundant. This was backed by documents adduced by the claimants and marked TGK 4, TGM 5 and TGM 6 also annexed by the other claimants.

The claimants also sought to rely on the authority of **Gladys Boss Shollei Vs. JSC 2014 eKLR** where the court observed as follows;

“The disciplinary process is Quasi-criminal in nature and must have the following basic elements that were lacking in the present case;

- 1. a complaint and charge setting out the offence and the particular provisions of the law broken;*
- 2. particulars of the offence;*
- 3. names and statement of complainants; and*
- 4. sufficient time for the accused to prepare adequately and be allowed to gain access to all*

exculpatory evidence.

That none of the above was provided to the CRJ, therefore the allegations as they stood were embarrassing, cannot possibly be addressed in two (2) days provided by the JSC to ventilate the matter. Accordingly, the whole procedure was in contravention of Articles 27(I), 35(I) (b), 47 (I) and 50(I) & 2 and 236(b) of the Constitution in that it had contravened the petitioner's right to fair administrative action, that is expeditious, efficient, lawful, reasonable and procedurally fair.

Furthermore, the petitioner had been denied the right to a fair hearing by resolving the dispute at hand; "by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body." (emphasis mine); in that she was not presumed innocent until proved guilty, had to access to essential information and had been denied adequate time to prepare for her defence."

I find in favour and associate with the respondent case in this cause. This matter tilts in favour of the respondent for various reasons. Firstly, the claimants, who were in the employment of the respondent in various capacities and terms were all suspected of gross misconduct in terms of their employment contracts. This was as a consequence of complaints by a subcontractor and also findings of irregular and fraudulent claims for reimbursement of expenses incurred in the course of work by the 2nd claimant and also misconduct on the part of the other claimants which was reported to the respondent via anonymous emails. Investigations were launched and this was proved right.

The claimants were all notified of the intention to treat them to disciplinary proceedings on various dates and these indeed took place. It is the respondent's evidence and submission that the claimant's did not go far in rebutting the massive evidence on their gross misconduct and therefore the subsequent dismissals. The claimants merely deny the charges of gross misconduct but do not in any way exonerate their positions. Instead, they plead and support a case of intended restructuring, downsizing and redundancy which in their argument was the excuse for their unlawful termination of employment. This could be true but the big question is, *do the claimants controvert their individual cases of gross misconduct which could have grounded the respondent?* The answer is no.

This now answers the question of transgression of the constitution and the Employment Act, 2007. I find full compliance with Section 41, 42 and 44 of the said Act in so far as the issue of notice, hearing and dismissal are concerned. There is no element of unfair termination as envisaged by Section 45 of the said Act in the circumstances. The respondent addressed and complied with the law and procedure to the hilt and I so find. I therefore find that the termination of the employment of the claimants was lawful.

The second issue for determination is whether the claimants are entitled to the relief sought. They are not. The claimants have lost their case for unfair, wrongful and unlawful termination of employment. They therefore cannot win a case for relief sought in the circumstances.

The 3rd issue for determination is whether the respondent failed to remit the claimants income tax deduction for the year 2011 and if so, where these are owing. The claimants contend and submit to a non remission of tax deducted from them to the Kenya Revenue Authority in 2011. Notable is the fact that despite a denial of the same there is no evidence of such non remission. The respondent elaborately submits that they have no issue of tax balances with Kenya Revenue Authority. This is not rebutted by the claimants. This claim also fails for want of proof. We therefore need not labour on where these are owing in the circumstances.

The 4th and last issue for determination is as to who bears the costs of this cause. This matter was massive and contested. Costs were certainly incurred by the parties. The circumstance of the case dictate that the losing party bears the costs of the case. Costs shall therefore be borne by the claimants.

In conclusion, I dismiss these causes with costs to the respondent.

Delivered, dated and signed this 5th day of December, 2014.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Gachugi instructed by J. K. Kibicho & Company Advocates for the claimants.
2. Ms Oyombe instructed by the Federation of Kenya Employers for the respondent.