REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 4 of 2012

SOSPETER KIOKO MUNGUTI.....CLAIMANT

VERSUS

NESTLE KENYA LIMITED.....RESPONDENT

JUDGEMENT

The claimant has sued the respondent claiming relief for wrongful dismissal from his employment on 21.7.2009 and he prays for the following orders:-

1. Reinstatement to his job without loss of benefits.
2. Salary arrears for the entire period he has been out of employment.
3. In the alternative, an order for payment of all his lawful termination dues.
4. Maximum compensation of twelve months salary.
5. Costs and interests.

The respondent has denied liability in her defence alleging that the dismissal was justified on grounds that the claimant was guilty of negligence and improper performance of duty and further that the procedure followed to dismiss him was fair.

The case was heard on 7.9.2010, 24.10.2011, 29.5.2012, 8.10.2012, 9.10.2012, 11.10.2012, 16.11.2012 and 28.11.2012. The claimant testified as the CW1 while the respondent was represented by Daniel Ochieng Onyiego and Michael Holstein as RW1 and RW2 respectively.

The claimant told the court that he was employed by the respondent on 5.7.1996 as purchasing coordinator and rose through various ranks until 1.10.2008 when his services were terminated by the respondent while serving as the Supplies Chain Manager. His duties were in charge of 5 departments, namely procurement, customer service, demand supply planning, material handling (warehousing) and import and Export functions.

That he performed his duties so well that he was given good commendations during a period's of appraisals which saw him promoted and his earnings increased from Kshs. 40,000/= per month to maximum Kshs.291,540 plus other benefits like fuel allowance of Kshs. 30,000, car allowance of Kshs. 85,000 and medical scheme cover.

That he enjoyed a cordial relationship with his employer before he was released to go to Angola vide letter dated 5.11.2008 (Appendix 2) to work in Nestle Angola for a period of 24 – 36 months.

The new salary was USD 60,000/= payable on monthly basis of 12 equal installments plus

allowances. That the company was to take care of the relocation cost. The Corporate Expatriate Policy (Respondent NKL1) is the document that governed his remuneration.

That the new appointment took effect on 1.11.2008 but he arrived in Angola on 12.11.2008 on which date he was given another contract of employment dated 12.11.2008 written in Portuguese language (exhibited as page 33 in the memorandum of claim). That the contract was given by the Nestle Angola's country Manager Patricio Astolfi.

That on 10.3.2009 while in Angola, he was called to attend a meeting at

Nairobi. That he arrived on 12.3.2009 and went to the office on 13.3.2009 where he found a team of investigators comprising two respondent's staff members and a stranger. That he was only asked to record a statement on an alleged query on payment of duty, which he obliged. That on 13.3.2009 he was also made to record a statement with the police instead before going back to Angola.

That from 2.4.2009 he remained in office until 6.7.2009 when he received a Notice to Show Cause, exhibit at page 36 of the Claim. The charges were that he recruited Clearing Agents who were fraudulent. The letter also invited him to attend a disciplinary hearing on 8.7.2009 with a colleague of his choice.

That he responded to the letter but no hearing was done. He was nevertheless dismissed with effect from 21.7.2009 vide letter dated 17.7.2009 (exhibit C - appendix 4).

According to him the termination was malicious because by the time he left for Angola he had no pending issues with the respondent. That he suffered loss due to the termination in terms of salary and allowances for the remainder of his contract with Nestle Angola. He also alleges loss of prospective yearly increments at the rate of 15% until retirement at the age of 60 years.

He insisted that as at the time of dismissal, he was still employee of Nestle Angola and reporting to the Nestle Equatorial Africa Region and not Nestle Kenya.

That he had left the respondent and was not aware she had lost any money through Clearing Agents.

On cross-examination, he admitted that one can work as an expatriate in another country. He also admitted that the appraisals on him were done before the fraud had been detected.

He however contented that before he left for Angola, he had been cleared and paid his final dues as per email dated 14.11.2008 (NKL4). He confirmed that the (NKL4) did not indicated termination dues. He also admitted that the letter NKL1 did not portray that his services with the Respondent had ended.

He confirmed that the Regional Audit Report (SKM4) recommended for open tendering of Clearing and Forwarding Agents. That as the Supply Chain Manager he was to head the exercise. That a tender evaluation committee from the procurement department set up the evaluation criteria. The same department did the evaluation exercise as per NKL2.

He further told the court that under the tender guidelines, it was not a requirement to obtain Performance Bond nor was Insurance Cover needed because the service was on a case to case basis after receiving shipment documents. He also contented that the committee checked the financial comparability from books of accounts and also checked expertise and experience from testimonials from other persons.

He confirmed that he was present in the tender awarding meeting on 22.1.2008 as the boss. That Kevin and Hannington (Kevin) and Eston Cargo Links Ltd (Eston) were the lowest bidders considering all the factors not just the Agency fees. That tendering was competitive and only 4 Agents were selected. That the evaluation team checked all the matters during evaluation and only gave a report to the claimant a report and he had no obligation to re-evaluate the report. He confirmed that he was not a member of the tender evaluation committee and he did not influence its decision.

He admitted that he never called the referees for Kelvin during the evaluation to avoid interfering with the scores. He however confirmed that he warned the team to be very careful when dealing with clearing agents because of sensitive issues of taxes and a lot of money and cargo values involved. He further admitted that before evaluation, Kevin was not visited because it was not a criteria to visit bidders before evaluation. He however contended that visits were on schedule. That the exercise was the first from the respondent and it was guided by the standards set by the procurement Department. That he guided the department in setting the requirement and according to him some bidders met the standards while others did not. That more factors were considered then the ones appearing on the minutes (SKM3).

He denied knowledge of the fact that Kevin had wound up. He also denied that the buck in the tendering process stopped with him by contenting that even the managing Director (MD) of the respondent and the Regional Head at South Africa were involved in the hierarchy of Administrative structure. That the tender award minutes were prepared by the strategic Buyer and he (claimant) approved and copied to the MD. That the final word on the tender exercise rested with the MD and the Regional Audit Team. That the MD approved awards before the claimant released the letters of award. That according to him, he signed an appointment letter containing tariffs for the work and there was no need of a formal contract because it was a private sector tender.

On further cross examination, he admitted that he was one of the signatories to approve payments and that he was duty bound to check before signing the approval. That he admitted having signed on a tax transmission in favour of Eston dated 12.6.2007.

RW1 is the HR Manager Nestle Equatorial Africa Region Ltd (EAR) in charge of Compensation and Benefits with office at Nairobi. He confirmed that the claimant was employed by the respondent on 15.7.1996 and worked until 5.11.2008 when he was transferred as an expatriate to Nestle Angola which is one of the countries under the EAR. That by such transfer he did not end his services with the respondent.

He explained the concept of Expatriate as contemplated under the Corporate Expatriation Policy (NKL-1) and especially what he called Regional Based Expatriate (RBE). That under the expatriation assignment the claimant was to remain an employee of the respondent (the transferring country). The respondent was to continue covering his pension plan while away in Angola (host country). That the appointment letter NKL1 dated 5.11.2008 indicated that the expatriate was to return to his home country or be reassigned by his country.

He clarified that performance bonus was not automatic but at the discretion of the management depending on certain criteria. That a reference salary, referred to was not payable at all but only hypothetical salary for purposes paying certain allowances and pension. He explained that the claimant's package in Angola was an increment of 43% from the Kenya package.

He confirmed that as at the time of the claimant's last appraisal in April 2008 the issue of clearing Agents had not been raised. He referred to the notice to show cause and suits filed to say that the respondent suffered loss for which she had sued.

He confirmed that the claimant responded to the notice to show cause on 7.7.2009 and that there was also a disciplinary hearing on 8.7.2009.

On the orders sought, he denied that the claimant is entitled to the 2½ years salary because he had not worked for it and it is not provided for in the contract. He also denied the claim for allowances citing the Corporate Expatriation Policy which provided that the allowances prayed for were only payable when the expatriate was in Angola (host country). That after dismissal he lost all the benefits for an expatriate. He objected to the reinstatement of the claimant contenting that there was no vacancy and also that the relationship between the two parties had broken down.

He also objected the claim from 12 months salary contenting that the dismissal was justified in that there was a good reason for it, that is, he failed to play his role well to avoid the loss suffered by the

respondent.

He ended by insisting that the respondent had the full mandate to dismiss the claimant because he was still her employee and the wrong done had nothing to do with the Nestle Angola.

On cross examination RW1 admitted that he was employed by EAR and not respondent. He also confirmed that Nestle Angola is a different entity from the respondent.

Regarding the contract letter dated 12.11.2008 by Nestle Angola Limited he confirmed that claimant was given a new contract with new terms but did not affect the status of the claimant as an employee of the respondent.

That the transfer was subject to obtaining work permit in Angola, but he never the less traveled and stayed in Angola up to March 2009 on a business VISA.

He insisted that claimant did not get work permit because in Angola it takes 6 months to be processed. He was however required to be in Angola because it was to be easy to get work permit while there.

He confirmed that the claimant was recalled to Kenya by letter dated 21.3.2009 and he was to remain in Kenya pending investigations. That the letter was copied to Nestle Angola Lda. That apart from the claimant other persons were questioned. That the investigations were occasioned by a letter from KRA dated 10.2.2009 alleging forgery of forms declared by Clearing Agents.

On the issue of the recruitment of Agents, he denied that it was through a competitive process. He contented that the tender guidelines were not followed in recruitment exercise. He however was of the view that the evaluation of bidders was done by Tender Evaluation Committee to which the claimant was a member. That the same committee did evaluation and award of tenders but there are no minutes to show how evaluation was done on bidders and how scores were awarded. He also confirmed that no bidder complained against the evaluation exercise.

On the issue of service Level Agreement (SLA), he confirmed that the minutes said there was to be SLA but the same was never made for all the four agents selected. He explained that SLA was a formal contract setting out responsibilities for the parties. According to him the SLA was to be prepared by the tender committee and signed by the MD. That no SLA had been made as at the time claimant left for Angola but services were being rendered by the Agents and were paid.

On being shown the tax transmission dated 12.6.2007, he admitted that the same was done long before the appointment for agents in issue. He confirmed that quality checks was done by different persons from the one who authorized payments. Still on the said tax transmission, he confirmed that the payment was not irregular but the VAT ought not to have been paid because the item was zero-rated.

He confirmed that the respondent had sued the agents and the claimant to recover the money.

On the termination letter dated 17.7.2009, he confirmed that the decision to terminate must have been reached before that letter was written. He contended that termination was by Nestle Kenya because the contract with Nestle Angola had not taken effect for want of work permit. According to him, the responsibility to get work permit was for Nestle Kenya, Nestle Angola and the claimant. He confirmed that the claimant did not fail to secure the permit because it was at the discretion of Angola government. That the Nestle Angola letter given was only to assist in getting the permit. That the letter for termination was never copied to nestle Angola.

RW2 told the court that he joined the Respondent on 7.1.2008 as regional security manager for Sub Saharan Region and left on 22.10.2010.

That KRA Audit was done on the respondent in 2009 which revealed discrepancies starting 2006 to January 2009. That the discrepancies involved declaration forms made by Keston and Kevin on the

respondents imports. That the imports were undervalued. That after the KRA report the respondent made a report to the police (CID) that she had been defrauded by the two Agents. That the Rw2 did internal investigation as the Security Manager through a private investigator a Mr. Harrif Khan to establish how the fraud happened and why it happened.That when he left the investigation was still on going.

That he collected documentary evidence and recorded statements from employees who were involved in the procurement, finance and management. In total he interviewed between 10 – 12 people. That the Supply Chain Department is the one which dealt with the recruitment of clearing agents. That some of the people interviewed were from outside Kenya including the claimant from Angola where he was working, former manager Nestle Kenya Mr. Peter Hanns from Ghana and Mr. Henrique Gil a former regional finance controller. That Mr. Kioko was interviewed on 13.3.2009, 27.4.2009 and 20.5.2009 by the RW2 and Mr. Khan.

That KRA had indicated that the declaration for us had discrepancy through falsification or alteration by the clearing agents. According to him the claimant was not involved in the fraud.

That he also investigated how the Agents were recruited. The claimant as the Supply Chain Manager was supposed to prepare the tender procedures and recruit Agents through open tendering. Referring to the tender guideline NKL2 he told the court that Kevin and Eston were not the lowest bidders as indicated in the tender awarding minutes 3 of the tender committee.

He went further to say that in the investigations he discovered that the testimonies by New KCC in favour of Kevin was signed by an unqualified person. He also discovered that the said agent had not dealt with milk powder but machinery.

That the claimant confirmed in his statement dated 13.3.2009 that he had delegated the tendering duty to Mr. Muthiani with instruction that he does due diligence, but he never verified whether the due diligence was done.

Referring to the tax transmission dated 12.6.2007 in favor of Eston, he confirmed that a zero-rated item was charged VAT. He contented that the claimant had the duty to check to ensure that duty was not paid. That the charge in the notice to show cause were put to him on 20.5.2009 when the claimant recorded his statement.

The RW2 maintained that the respondent suffered loss as a result of the fraudulent Agents on board. Surprisingly, he ended by confirming that the tender awarding minutes showed score system based on costs.

On cross-examination, he confirmed that the claimant went to work in Angola. He confirmed that the KRA letter was received by the respondent while the claimant was in Angola. That the letter raised two issues firstly, fraudulent declaration of customs and secondly, tariff miscalculations. That none of the tendered agents was mentioned by KRA letter. That it is after investigation that he discovered two out of the four were involved in the fraud. That the report of the two agents came from KRA. He could not however produce the KRA'S report in court.

According to him he did not request for the recalling of the claimant. That the claimant must have been recalled for other reasons by somebody else.

He further confirmed that wrote his investigations report but he also could not produce it in court. He also confirmed that Price Cooper Water House prepared a report to verify the KRA report. That the private investigator also prepared his report but all the said reports were not available for production in court.

On further cross-examination he confirmed that the respondent filed case HCCC 431 of 2009 and HCC 432 of 2009 but never joined the claimant as defendant. He also confirmed that the police did not charge the claimant after the interviews.

On the tender awarding minutes, on page 6 of the reply to defence, he confirmed that they were not minutes for tender evaluation but only for award tenders. That he also confirmed that exhibit NKL2 for the defence were guidelines for filling tender documents. That the guidelines did not provide for site visit to verify the letters of reference.

On being shown the tender evaluation sheet for preliminary stage in the defence exhibits, he confirmed that evaluation was done through ticking and told the court that he believed that the tender evaluation minutes were in the custody of the respondent.

On the issue of the charge of the failure to do due diligence by failing to visit the bidders yet not provided with the tender guidelines, he contended that common sense required one to act more than within the guidelines. He also confirmed that awarding tender to the reputable agents was not a criteria in the guidelines.

According to RW2, the MD was the final person to determine who was to be awarded tender. That he believed that the MD appointed the Agents because at the end of the day they were on board. He also confirmed that the MD was responsible for signing of the SLA for the terms.

He further confirmed that the tax transmission document dated 12.6.2007 was drawn by the agents to the attention of Mr. Semanayo and Mr. Ndolo. It was charging VAT from zero-rated item and it was paid by the finance department on the advice of the supply chain department. He confirmed that the said payment was done in 2007 before claimant left for Angola.

He confirmed that the erroneously paid tax is recoverable from KRA.

On re-examination, the RW2 changed his story to say that during the investigations, KRA named the guilty agents verbally. He confirmed that the agents tenders were two big one and two small ones and it is the smaller ones which did the fraud.

After the close of the hearing, both M/S Guserwa for the claimant and Mrs Opiyo filed written submissions for which the court is very grateful. I have carefully perused all the filed memoranda by the two parties and the submissions by the two learned counsel.

The issues for determination are the following:-

1. Whether as at 17.7.2009, the claimant was still employed by the respondent and whether this court has jurisdiction entertain this cause.
2. Whether the termination of the claimant's employment by the respondent on 21.7.2009 was wrongful and unfair and who has the burden of proof.
3. Whether the relief sought by the claimant ought to be granted.

The answer to the first issue lies in the letter of transfer by the respondent dated 5.11.2008, letter of offer by Nestle Angola Limidata dated 12.11.2008 and the Corporate Expatriation Policy (CEP) July 2008 edition, which was produced as exhibit NKL1 by the defence.

The letter dated 5.11.2008 spelt out the status of the claimant while in Angola as “Regional Expatriate (RBE)” from Nestle Kenya. That the assignment was to take 24 to 36 months after completion of which the claimant was to return was to return to his home country or be re-assigned by item.

The letter of offer dated 12.11.2008 by Nestle Angola Limited as translated by the two parties from Portuguese to English describe the status of the claimant as an “Expatriate” for a duration of 3 years starting from 1.1.2009.

The CEP at page 4 defines expatriation as an assignment to expected to last twelve months or more and when an employment link to the Home Market remains. The country to which the employee is transferred to is called the host country of assignment.

The CEP at page 17 indicates that the expatriate remains linked to his home country employer through pension schemes and other social security benefits. At page 25 the CEP also provide for link through long service Awards benefits which can only be given at the home country. At page 27 the CEP provides that in case of termination of the employment contract by the country of consignment through dismissal, the same can only be done after consultation with the home country.

The foregoing provisions in the CEP and the terms referred to from the contract and transfer letter clearly show that the claimant with or without meeting the mandatory condition of work permit in Angola, there remained a link between him and the respondent. The doctrine of separate corporate personality notwithstanding, it is my considered finding that the claimant was still an employee for the respondent on 17.7.2009 when the latter dismissed him with effect from 21.7.2009.

I do not have any jurisdiction to interfere with the terms of contract in said letters and the CEP which were agreed upon by the parties voluntarily and with the clear intention of being bound thereby. I am convinced by the evidence by RW1 that the claimant's employment with the respondent never came to an end as a result of expatriation assignment to Nestle Angola Limitada. Consequently, the claimant's averments and submissions that the respondent was not his employer and therefore lacked the mandate to terminate his employment him are dismissed.

The effect of my foregoing findings is that the employment dispute between the parties herein is brought into ambit of the labour law in Kenya for determination on the merits. To that extent, I dismiss the respondent”s submissions that this court lacks jurisdiction to entertain the suit because of the claimant's misconceived position that there existed no employment relationship between himself and the respondent as from November 2008. In my view, the employment relationship between the two is a matter of fact from the documentary evidence adduced by both parties and the court is enjoined to make a decision on it in the face of the opposing submissions. The suit is therefore before the proper forum and between the right parties.

As regards the second issue of unfair/wrongful termination, I have evaluated the pleadings and the evidence adduced against the relevant statute law and the precedents cited by the learned counsel.

Section 45(1) provides thatno employer shall terminate the employment of anemployeeunfairly. A termination is considered unfair under section 45(2)

“If the employer fails to prove:-

(a) ***That the reason for the termination is valid.***

(b) ***That the reason for termination is fair reasons:-***

i) related to the employee's conduct, capacity or capability; or

ii) based on the operational requirements of the employer; and

(c) ***That the employment was terminated in accordance with fair procedure”.***

Section 43(2) of the employment Act defines reason or reasons for termination of a contract of employment as

“The matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee”.

Fair reason for termination or the other hand is not defined by the employment but section 45(2) (b) above, provides that a fair reason must be related to the employee's conduct, capacity or capability; or based on the operational requirements of the employer. Fair reason(s) for termination do not include those

nine reasins listed under section 46 of the Act which are not fair for purposes of terminating a contract of employment.

Fair procedure has also not been clearly defined but can be deciphered from section 45(4)(b) and (5) to mean just and equitable procedure. In deciding whether the procedure was just and equitable, the court is enjoined by section 45(5) to consider;

a) The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of the decision and the handling of any appeal against the decision,

b) The conduct and the capability of the employee upto the date of the decision,

c) the extent to which the employer compiled with any statutory requirements connected with the termination including issues of certificate under section 51 and the procedural requirements under section 41,

d) The previous practice of the employer in dealing with the type of circumstances which led to the termination and

e) The existence of any previous warning letters issued to the employee.

Section 41 of the Act provides that, before terminating the employment of an employee, on grounds of misconduct, poor performance or physical incapacity, the employer shall 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 the explanation.

Under section 41(2), the Act in mandatory terms, demands that before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4), the employer shall hear and consider any representations which the employee and/or the person chosen under sub section(1) may make on the grounds of misconduct or poor performance.

The question in my mind , then, is, have the parties to this dispute discharged there respective burdens of proof?

The burden of proof on the part of an employee in a dispute of this nature as per section47(5), is to prove that an unfair termination or unlawful dismissal has occurred.

On the other hand, the said section 47(5) loads the burden of justifying the grounds for the termination or dismissal on the employer. In addition, section 43 (1) puts more burden on the employer to prove the reason for termination and where he fails to do so the termination is deemed to have been unfair within the meaning of section 45 of the Act. Of course under section 45 (2) as earlier quoted puts on the employer the burden of proving that the termination was fair considering all the aforesaid three factors.

The Act does not state the decree of proof, but the matters being of a civil nature, the decree of proof should be one of balance of probability.

The claimant has on his part pleaded and testified that the termination was unlawful , without notice, reasonable cause and justification.

In his evidence concerning the charge of negligent performance the claimant has persistently denied and demanded proof. He has contended that he did his work properly and diligently since 1996 a fact which has seen him positively appraised by the respondent. That he has enjoyed promotions and salary increments to an extent of being appointed an expatriate. He contented that the termination was unfair because he was never showed the reports on the investigation of the alleged fraud.

He further contented that he did his best in preparing the guidelines for tendering exercise which led to recruitment of the four clearing Agents. He also contented that he did due diligence to ensure that the best agents were recruited in an open manner and the respondent's witnesses confirmed that non of the bidders complained. He argues that having followed the recruitment guidelines he could not have reasonably foreseen that the recruited Agents would in future become fraudulent.

He denied that he was ever aware of any loss to the respondent and that the cases in court were never concluded. That view was corroborated by RW 2 who could not produce any evidence from investigators reports by various players showing that the claimant caused the alleged loss which is still a matter before the High Court.

As regards the tax transmission form dated 12.6.2007, the claimant proved that the same was not prepared by him, but by the Agent and it was addressed to other people who made the approvals. He also proved that the said transaction was older than the exercise of recruitment of Agents in 2008 which led to the disciplinary action against him.

On the procedure, the claimant has alleged that he was not given a hearing on 8.7.2009 as invited. To that extent the provisions of section 41 were not followed. The respondent has not adduced any proceedings of the disciplinary hearing if at all hearing took place.

I am alive to the fact that fair hearing does not only mean oral hearing, but in the employment matters, the legislature under section 41 of the Employment Act did provide for a mandatory oral hearing. The claimant contents that he was also not paid all his dues which he now claims under the suit.

Consequently, and on a balance of probability, I am persuaded that the claimant discharge his burden of proof under section 47(5) read together with section 45(2) especially that he complied with all the operational requirements available and even did what was within his capacity to pioneer open tendering system for the respondent.

On the other hand, the respondent in discharging her statutory burden of proof, was required firstly to prove that the claimant discharged his duties negligently. Secondly,she was supposed to prove reasonable grounds upon which she believed that the claimant acted negligently. Lastly she was supposed to prove that she had done reasonable investigation in the circumstances to establish them the said negligence. Negligence connotes existence of a duty of care, breach of the duty care and loss as consequence of breach of duty of care. In employment scenario, negligence arise were there exists a duty to act in particular way as provided under the terms of the employment contract or employer's policies and the employee fails to comply therewith. The yard stick of measuring negligent conduct has always been reasonableness of the person's responsiveness or foreseability of the consequential loss.

In my view the respondent has failed to prove that the claimant negligently performed his duties as provide under terms of his employment contract or any of his employers laid down policies especially regarding open tendering for Clearing Agents. The evidence adduced by both RW1 and RW2 show that the respondent did not have in place any guidelines for procuring services or at all through open tendering until the claimant was requested to prepare them and adhere to them. Secondly the RW1 and RW2 testified that the claimant and his tender committee followed the said guide lines in inviting bidders for the tenders and also in evaluating and awarding them. The records of such exercise are in the custody of the respondent part of which was produced in court as exhibits. That non of the bidders complained about the exercise.

In my view the claimant was not negligent in any way. His evidence that he did his best is not challenged by a competent witness for the respondent . It is cardinal principle of law that body corporate can only act or be represented by duly authorized officers of such entities. In the case neither the MD nor his representative nor officer from the Supply Chain departments testified against the claimant. According to the claimant, he did his best in the whole exercise of the recruitment of the clearing Agents and he did not foresee that the said agents would in future become fraudulent.

The evidence of the RW1 did not prove either the validity of the reason or fairness of the reason for termination. In his testimony under oath he confirmed that he is not employed by the respondent which is a different person from EAR which is his employer. That he was not the Head of Human Resource who dealt with the claimant case and in his testimony he did not disclose whether he was in any manner involved in the case. Consequently much of what he told the court was in my view inadmissible hearsay.

The competent witness who could have discharged the burden of proof required in this case is the person(s) who handled the disciplinary case that culminated in the termination of the claimant's employment. The author of the show cause letter and the notice for termination Mr. Singh or any other authorized officer of the respondent should have been called to testify on the validity and fairness of the reason for termination and the fairness of the procedure followed but not the RW1.

In my view, RW1 was only an expert witness who only helped the court to understand the concept of expatriation assignments which is his area of service in the EAR, a different entity from the respondent.

As regards the RW2 who led the investigations into the alleged fraud by the material Agents, his evidence was clear that he had no concern with the claimant.

He in fact did not summon him for any investigations over the alleged fraud. He was summoned by other person(s) who did not testify in this case. The evidence the RW2 who was the officer in charge of Risk Management for the respondent shows that the claimant did not feature in the scandal. Otherwise, he could have asked for him to come to his office for an interview. According to him the tender guideline were adhered to in recruiting clearing agents and the records were in the custody of the respondent.

His further evidence was that the matter was investigated by several people including himself but the reports thereof were not in his possession to be produced as exhibits. To make the matter worse, he told the court that he left the respondent in year 2010 while the investigation on the fraud was still on going.

He also told the court that the respondent had filed two suits against the alleged fraudulent Agents but the suit were still pending in court. Similarly, he confirmed that no one was charged with any criminal case of fraud by the police.

All the forgoing lead to one conclusion that the alleged fraud and loss of funds through the alleged claimant's negligent performance of duty is still not proved. That means that the termination of the employment was done before proof the alleged negligence.

As regards the exercise of recruiting the clearing agents, the respondent has not proved any individual breach of obligation or duty by the claimant. The claimant testified that he was in charge of five departments including the procurement department which was involved in the tender evaluation and awards. That he had no veto vote over the decision of the tender committee of the Procurement Department.

The claimant further told the court that after receiving the tender awards he reported to the MD who was final approving officer. That fact was corroborated by the RW2 in his testimony and was not controverted by the MD or any other officer of the respondent. It follows therefore that the exercise of tender award was not by one person and that indeed the buck stopped elsewhere not with the claimant. The question in my mind is, why does the procurement process become negligent when dealing with two of the four agents recruited? In my view the whole process should be looked at globally and not in isolation.

In that regard, it cannot be judged that the claimant was negligent. In my view the claimant should probably be judged as having lacked the necessary competence to do better guidelines than what he had prepared.

The position would have been different if the employer had provided the guidelines for tenders and the claimant neglected to comply deliberately or through lack of due diligence. To that extent this case

differs from the British precedent of Dunn & another vs AAH Limited (2010) EWCA Civ 183 cited by the defence in which the claimant had deliberately ignored a policy guideline by the employer on Risk management.

On the issue of the tax transmission dated 12.6.2007 on zero-rated item, the evidence on record showed that the transaction was older than the alleged conduct which led to the termination. It was before the last appraisal and salary increment for the claimant. It is therefore an after thought. In any event, according to RW2, the approval was by other persons and any loss incurred was recoverable from KRA. In addition, there is no evidence of whether any disciplinary action was taken on persons to whom it was addressed. Instead the respondent casually blames the claimant after the present dispute of recruitment of Agent arose.

In my view there is no culpable negligence attributable to the claimant in respect of the said document. He was the last to sign for authorization of payment after other senior officer employed to verify such claims had signed their approval.

In any case there is no evidence that the said document caused any loss of money because in the plaints exhibited, the said transaction is not included. To that extent, I find that the respondent has failed to prove on a balance of probability the reason for termination of the claimant's employment under section 43(1) of the employment Act. She has also failed to prove that the reason for termination was fair as per section 45 (2) (b).

The foregoing finding is fortified by the evidence of the RW2 and the fact that the respondent did not call a competent witness to prove that at the time of termination he genuinely believed that the claimant had negligently performed his duties. If such evidence was on board then, the court would have evaluated it against the yard stick of what a reasonable employer in the same circumstances would have done to the claimant. It is not enough for an employer to just state in pleadings that the employee performed his duty negligently. He must prove that any other reasonable employer in the circumstances would have likewise terminated the employment.

On the issue of fair procedure, I wish to repeat my earlier observation that the respondent did not call any competent witness to prove that the disciplinary hearing scheduled for 8.7.2009 actually took place. Even if the said Mr. Singh was not available to testify, somebody with authority from the respondent should have produced the proceedings of the said hearing as an exhibit. None was produced and as such the respondent has not proved that she complied with the mandatory procedures under section 41 of the Act.

I believe that fair hearing ordinarily does not mean oral hearing, however the said section 41 of the Act does not leave any options to the employer. Consequently, and in view of all my observations above, I find that the termination of the claimants employment was not justifiable and was unfair within the meaning of section 45 of the Employment Act 2007. In my view the uniqueness of the provisions of the Employment Law in Kenya and the status of this court has forced me not to be entirely persuaded by the foreign precedents cited by the learned counsel on this issue.

Lastly I now deal with the issue of the reliefs sought by the claimant as earlier enumerated above. Section 49 and 50 of the said Act is the law to consider to determine whether the reliefs sought by the claimant ought to be granted. The said Section 49 provides for pay in lieu of notice,accrued wages and other loss consequential to the dismissal and a maximum of 12 months gross salary.

In dealing with the prayer for reinstatement I have considered the period between the time of termination and now which over three years. Section 12 of the Industrial court Act contemplates that reinstatement can only be ordered only within a period of three year of dismissal. I will therefore not order reinstatement.

I will also not grant the prayer for salary and benefits for the period of dismissal and the terminal dues under paragraph 8 of the claim for lack of any lawful justification. I will also not grant the prayer for

notice pay or salary arrears because the last payslip for the claimant which was for payment of terminal benefits in July 2009 indicates that he was paid salary in lieu of Notice and all other accrued benefits including salary arrears.

I will however grant the prayer for twelve (12) months gross salary for wrongful and unfair termination of the claimant's employment. This amount is to be based on the claimants contract before leaving for Angola because as indicated clearly by RW1, the Expatriation contract had not taken effect at the time of his dismissal because the claimant had not yet obtained a Work Permit. The respondent's letter dated 9.4.2008 indicates that the basic salary for the claimant was reviewed to ksh 291,540 per month plus allowances. The allowances are][for car at ksh 85000 and fuel at kshs 30000 making the gross salary kshs 406,540.

Consequently it is my decision that the termination of the claimant's employment was wrongful and unfair and the respondent is ordered to pay the former kshs. 406,540 x 12 months which equals to kshs. 4,878,480.00. The claimant will also have costs and interest.

Orders accordingly.

Signed, **Dated** and **Delivered** on the 22nd day of February 2013.

Onesmus N. Makau
JUDGE