



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 50 OF 2013

JOHN KIMEMIA GITAU.....CLAIMANT

-VERSUS-

UNILEVER TEA KENYA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 5th July, 2013)

JUDGMENT

The claimant **John Kimemia Gitau** filed the memorandum of claim on 20.02.2013 through R.M. Mugo & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. **Special damages of Kshs.36,955,531.60.**
- b. **General damages.**
- c. **Exemplary damages.**
- d. **Legal costs.**
- e. **Interest on above until payment in full.**
- f. **An order that the claimant be issued with the certificate of service.**
- g. **An order that the claimant be issued with the certificate of clearance.**
- h. **Any other relief as the honourable court will deem just and fit to grant.**

The respondent **Unilever Tea Kenya Limited** filed the reply to the memorandum of claim on 22.03.2013 through Kaplan & Stratton Advocates and prayed that the claimant's claim be dismissed with costs. The claimant's reply to the respondent's defence was filed on 22.04.2013. The case was heard on 29.05.2013. The claimant gave evidence to support his case and the respondent's witnesses were the respondent's Assistant Human Resource business partner Philegona Omolo (RW1) and Benjamin Komen, the respondent's accountant (RW2).

The claimant was employed by the respondent (then known as Brooke Bond Kenya Limited) on 1.07.1986 on probationary terms as a computer operator trainee at the respondent's Nairobi station. After six months of successful probationary service, the claimant was confirmed in appointment as a computer operator by the letter dated 16.02.1987 at folio 4 of the memorandum of claim. The claimant served diligently earning promotions and salary increments. The claimant worked for the respondent for 20 complete years of service from 1.07.1986 to 23.02.2007. The claimant's service was subject to the respondent's terms and conditions of service as provided for in the handbook being appendix 5 on the memorandum of claim at folio 37 to 46.

The claimant was deployed in Nairobi from the date of employment till 2000 when he was redeployed to Kericho at a time the respondent was undertaking a retrenchment exercise. The claimant was reluctant to go on redeployment in view of the tribal clashes in Kericho in 1997 and 1992. The claimant's family was

also based in Nairobi and thus he was not keen to go on transfer to Nakuru. He was in the process of seeking alternative employment and to leave under the retrenchment process. However, his director persuaded him to go on redeployment by promising to assign him a secure house and increasing his salary. The communication was verbal.

The redeployment was effected on 21.11.2000 as per the claimant's pay slips at folio 47 and 48 on the memorandum of claim showing that the salary was never increased as promised verbally. However, the claimant was assigned a good house of his choice in Kericho as promised. The house was near the road and the claimant took it to be his benefit in lieu of salary increment because he was not going to pay rent.

Appendix 8 at folio 49 of the memorandum of claim shows that the respondent increased salaries for all staff in the general salary review effective 1.04.2001. The claimant was summoned by the respondent's Human Resource Officer who conveyed that the claimant's salary was too high for his grade and the claimant had to make a choice between receiving the house allowance referred to as the urban differential and giving up the respondent's allocated house. Alternatively, the claimant was asked by the Human Resource Officer to leave the employment because his salary was not sustainable at the grade he held. The claimant's boss, the IT manager followed the discussion but no agreement was arrived at. That was in May or April 2002 and the communication was verbal.

The annual increments were due in April 2002 and staff received the relevant increment letters but the claimant did not receive his letter. Instead, his pay slip for April 2002 at folio 51 appendix 9 on the memorandum of claim shows that the claimant's basic salary had reduced from Kshs.86,081/= to Kshs.75,432/= as compared to his March 2002 pay slip at same folio. Upon complaining, the Human Resource Officer advised the claimant to resign if he was unhappy. The claimant's immediate boss, the IT manager Wycliffe Mutonyi advised the claimant that if he persisted, the respondent would fire him because the claimant's department did not have the members of the Kericho local community and the management would readily dismiss him. The claimant was not from the community.

Prior to 2003, the claimant was in charge of a wide range of duties including the IT support, help desk management, sun system ledger and purchase order, projects and supervising staff. In 2003 to 2005, new staff joined the department and the claimant's duties were shared out. The claimant complained about unoccupied time and nevertheless, he was not considered in the 2003 retrenchment process.

In 2005, there were computer disposals to staff and applications were invited by e-mail. Bidders were both employees and outsiders. The claimant testified that staff would inform the outsiders of the invitation. The letter appendix 11 at folio 53 on the memorandum of claim informed the claimant that he had won 95 items as he had quoted at Kshs.21,077/= as per attached list. He was to present the original of the letter to the IT Manager who was to make arrangements to release the assets to the claimant.

In 2006, the claimant received the notice to show cause dated 15.12.2006 at folio 58 of the memorandum of claim. The letter addressed to the claimant stated as follows:

“RE: IT Tenders 2005/2006

As you are aware, the company has been investigating suspected irregularities / breaches of the CoBP involving disposal of old / redundant IT assets that were put on tender / auction early this year.

You will also recall the discussions of 27 October 2006 with the investigation panel appointed to look into the suspected irregularities. You will recall further that in the cause of those investigations / discussions, you were unable to satisfactorily explain the following;

- 1. Why as a member of the IT department (insider in this matter), you compromised your integrity and violated the tender process.**
- 2. You took over, in addition to yours, bulk offers from external individuals (Kiare and Wanjiru) and other employees and in the process, you, selected items before your offer and**

- R. Wanjiru's were paid for, hence paying for fewer items than offered.**
- 3. How it transpired that offers made to Kiarie and a Wanjiru (both known and close to you) were for items which had either not attracted any bids or had been offered but not collected. The bids were certainly made with the help of an insider.**
 - 4. Why you collected some items you had not bided for e.g. Printer (SG86m 1 D14G and a Photocopier 7880008 originally offered to other people.**
 - 5. Why you did not collect all the items you paid for in your offer letter but collected 10 key boards vide D/Note No. 35656 of 3 Mar 2006 without paying for them.**
 - 6. Why you collected 3 monitors which were neither in your offer list nor on the tender list.**

The investigations have now been completed and there is sufficient evidence that you violated the CoBP and this violation amounts to serious offence against the company.

I now need you to show cause why disciplinary action should not be taken against you for the breach.

Your response should reach the undersigned by 19 December 2006. Failure to respond by the said date, the company may consider taking any appropriate action.

Yours sincerely,

Signed

David Osamba

Information Technology Director"

The claimant replied to the show cause letter by his letter dated 18.12.2006 being appendix 13 at folio 59 on the memorandum of claim. He concluded that he had acted in good faith and never intended to breach the CoBP and the investigations ignored some lead to the problem at hand. The respondent issued the termination letter to the claimant dated 23.02.2007 conveying that the claimant's explanation in his replying letter had not been accepted and he was guilty of collecting IT-items he had not tendered for or were not on the tender list. The termination letter stated that there was sufficient evidence that he had violated various aspects of the respondent's Code of Business Principles (CoBP) and there was no other option but to terminate the claimant's services with effect from the date of the letter, 23.02.2007. The terms of the termination included:

1. Normal salary up to and including 23.02.2007.
2. Three months notice pay in lieu of serving the notice.
3. Pension Fund benefits in accordance with the rules of the scheme and the company contributions to be withheld until attainment of the retirement age as per the new law governing pensions.
4. Payment to be effected after clearing with the company in the usual way.

The claimant followed up the termination letter with his letters of 7.03.2007 and 6.03.2007 at folios 64 and 65 of the memorandum of claim respectively. He complained as follows:

1. The termination did not provide for any appeal option.
2. His explanations against the allegations leveled against him were true and comprehensive.
3. The investigating team was not impartial as they were keen on his sacking.
4. He was keen to buy the company residential house he was occupying.
5. Investigation team never asked questions about the reasons for termination as stated in termination letter and interrogation sessions were abrupt without prior preparation.
6. Crucial persons were never interrogated.

The management replied to the claimant's letters by the letter of 27.03.2007 at folio 66 of memorandum of claim being appendix 16 and upholding the termination of 23.02.2007. The claimant testified that the

top management was not aware of his dismissal and the disciplinary proceedings because by the letter dated 12.04.2006 at folio 67 being appendix 17 on the claim (long after the dismissal) conveying a special cash award as a token of appreciation for good work in 2006, the respondent's managing director wrote to thank the claimant. The claimant wrote an appeal against termination to the managing director but no response was received.

A demand letter by the claimant's advocates was done and subsequently the claimant filed the dispute in court. In August 2007, the claimant received a notice to vacate the company house. It was a precondition to vacate before terminal dues were paid. The claimant had cleared with all departments except the Human Resource department responsible for the housing. It was unfair, according to the claimant, to be required to vacate before the terminal dues had been paid. The company had offered to sell the house to the claimant and the ensuing dispute is at the time of the hearing of this case pending in the Environment and Land Court case No. 651 of 2007 at Nairobi. The claimant having not cleared with the Human Resource department, he has not been paid the terminal dues.

The claimant testified that he never converted to the rural supplement under which his salary was to reduce in view of free respondent's housing. He stated that his was a special case under the verbal promises upon the deployment from Nairobi to Kericho. The transfer letter at folio 34 on the memorandum of claim showed that the claimant was to remain on urban settlement for 3 months from the date of moving to Kericho and then convert to the rural supplement providing for free respondent's housing but in which event, the respondent's case was that he would relinquish the urban differential. He moved on 01.01.2001 but never converted to rural supplement terms and as per RW1, the rural supplement was effected 3 months later to replace the urban differential. The respondent relied on the audit report of preliminary investigations at folio 1 to 4 on reply to memorandum of claim.

Folio 27 on reply to the memorandum of claim is the Code of Business Principles. The respondent's case was that the claimant breached the provisions on conflict of interest by participating in the process yet he was a bidder as well as his relative Joseph Kiarie and his wife Wanjiru also as bidders.

The parties filed written submissions. The issues for determination are as follows:

- 1. Whether the claimant validly and lawfully reduced or varied the claimant's pay.**
- 2. Whether due process was followed in view of the disciplinary action and termination.**
- 3. Whether the claimant breached the provisions of the respondent's Code of Business Practice on conflict of interest.**
- 4. Whether the claimant is entitled to the remedies as prayed for.**

On the first issue, the respondent has submitted that the claimant's contract of employment at clause 7 incorporated the respondent's handbook on terms and conditions of service. The manual in clauses 1 and 2 at folio 41-42 on the memorandum of claim is clear that for staff in urban areas, the respondent would not provide housing but pay a housing benefit called urban differential. Upon deployment to Kericho in November 2000, the claimant was informed that he would remain on urban differential for 3 months only and the rural supplement would thereafter apply.

The respondent submitted that the terms of engagement were in writing and the verbal lobbying by the claimant to be retained on both urban differential and the rural supplement had no contractual grounding. For the claimant, it was submitted that the salary was reduced without any agreement and without explanation. The court has considered the submissions and finds that the claimant was bound by the respondent's terms on urban differential and the rural supplement. The court finds that the variation in the claimant's salary was consistent with the respondent's policies and in the opinion of the court they were fair arrangements as they were agreed between the parties. The court finds the variation was lawful, valid and could not be validly varied by a doubtful oral agreement known as lobbying between the respondent's senior management official and the claimant in contravention of the written standing agreement and policies.

The second issue, is whether the claimant followed the due process in terminating the claimant in view of

the disciplinary case and the termination. The facts on this point are clear. The respondent's preliminary report disclosed alleged improper conduct on the part of the claimant. The claimant received the show cause letter and replied. The written response was considered and the termination decision made and conveyed to the claimant. The handbook provides for a right to appeal against the disciplinary action. The claimant appealed against his termination but the appeal has not been decided by the respondent.

For the claimant, it was submitted that rules of natural justice were breached and the appeal was never determined. Hence, the process was unfair. The respondent submitted that the termination was in accordance with clause 4 of the claimant's contract of employment and section 16 of the repealed Employment Act, chapter 226, Laws of Kenya which provided that either party can terminate a contract of service by giving a pay in lieu of notice period. Further, the disciplinary procedure did not require giving of notice before termination.

The court has considered the respective submissions and finds that the termination was unlawful to the extent that the claimant's appeal was never considered and determined by the respondent. In so far as the cause of action accrued before the Constitution of Kenya 2010 and the Employment Act, 2007, the court finds that whereas a hearing was not accorded to the claimant, the same was not the binding law at the dismissal. Nevertheless, as already found, the termination was unlawful because contractual terms as per the handbook, the agreed appeal process that would have enhanced the justice in the administrative disciplinary action was not afforded to the claimant and the termination was unlawful.

The court has considered the requests for appeal and review addressed to the respondent by the claimant. The claimant raised serious points in self-exculpation but which remained unanswered. The court finds that it was unfair and clearly unconsidered decision making for the respondent to have dismissed the claimant's written points in exculpation without substantive and particularized findings as to demonstrate that the respondent had directed its mind to the case as expected. The respondent, in the opinion of the court, breached its own policy that disciplinary action aims at correcting rather than punishing. In the circumstances of this case, it is the court's opinion that the termination was ungrounded and in any event, not proportionate to the alleged misconduct as it imposed an excessive punishment.

The next issue is whether the claimant breached the provisions of the respondent's Code of Business Practice on conflict of interest. The code provided that all respondent's employees are expected to avoid personal activities and financial interests which could conflict with their responsibilities to the company. The code further states that the respondent's employees must not seek gain for themselves or others through misuse of their positions. The preliminary report recommended questioning of staff to establish if the code had been breached.

The court has considered the material on record and finds that the claimant did not breach the code. Firstly, the respondent did not cite the specific provisions of the code allegedly breached and the relevant particulars to establish the breach. Secondly, the preliminary report was categorical that the tender applications were not registered as they were received. In the opinion of the court, it would be difficult to pin down the claimant on wrong-doing in absence of such crucial record that was vital to establish whether the bidders included the claimant's relative and wife as alleged. Finally, it is not disputed that the tender process was open to all staff without exceptions and the court holds that where all persons involved in decision making are interested parties and that fact is known, there cannot be offensive conflict of interest; such situation being one of the exceptions to the rule against conflict of interest in decision making.

The final issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes the following findings:

1. The court finds that the claimant is not entitled to the NSSF and NHIF deductions as prayed for because the same being statutory deductions the respondent is liable to deduct and remit to the relevant agencies.
2. The respondent did not dispute the claim for 13 leave days for 2006-2007 and the court finds that the claimant is entitled to **Kshs.67, 173.60** as prayed for.

3. Three months pay in lieu of termination notice is not disputed and the court finds that the claimant is entitled to **Kshs.465,048/=** as prayed for.
4. The claimant is not entitled to salary reduction as claimed because the court has found that the policies on urban differential and rural supplement applied as agreed between the parties.
5. The claimant has prayed for loss of future earnings in view of the expectation to retire at the age of 60 years. The claimant submitted that he was at the time of the hearing engaged in business and he had been jobless for 1-2 years before he commenced the personal business. The court has noted the claimant's efforts to mitigate the sudden unlawful termination of his employment and considers that **Kshs.775,080/=** being five gross monthly salaries will meet the ends of justice as a reasonable pay for the unlawful termination leading to the claimant's joblessness for about 2 years. In making this finding, the court has considered that the claimant was also entitled to terminal dues by way of the contributed pension dues that partly served to mitigate his joblessness consequential to the termination.
6. The court finds that the claim for general and exemplary damages is not justified and the same is declined.
7. The claimant is entitled to the certificate of service and clearance certificate as the rights of the parties as regards the house in dispute shall be resolved by the court in the pending case and is now outside the authority of the respondent's human resource department.

The preliminary issue for determination in this case was about the applicable law. The parties were in agreement in their submissions that the applicable law was the Employment Act, Chapter 226 Laws of Kenya now repealed. The court finds as much. Thus, the suit was not time barred under section 90 of the Employment Act, 2007.

In conclusion, judgment is entered for the claimant against the respondent for orders:

- a. The termination of the claimant's employment by the respondent was unlawful.
- b. The respondent to pay the claimant **Kshs.1,307,301.60** by 1.9.2013 failing which interest to run from the date of this judgment till full payment.
- c. The claimant to deliver to the claimant the certificate of service and the clearance certificate by 1.09.2013.
- d. The respondent to pay the costs of this case.

Signed, dated and delivered in court at **Nakuru** this **Friday, 5th July, 2013.**

BYRAM ONGAYA

JUDGE