



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 259 OF 2012

BETWEEN

LABAN AWANDO KANYO.....
CLAIMANT

VERSUS

SUSAN LARSEN T/A

UTAMADUNI CRAFT CENTRE
RESPONDENT

Rika

J

CC. Leah
Muthaka

*Mr. Achilla instructed by Achilla T.O. & Company Advocates for the
Claimant*

*Mr. Litoro instructed by Kaplan & Stratton Advocates for the
Respondent*

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL
TERMINATION

AWARD

1. The Claimant filed his Statement of Claim on 21st February 2012 and a Reply to the Amended Statement of Reply on 23rd May 2012. The Respondent filed a Statement of Reply on 16th March 2012 and the Amended Statement of Reply on 9th May 2012.
2. Kanyo testified and closed his case on 29th November 2012. Larsen and her witness/employee Gitau Mwanja testified on 28th January 2013 when the Respondent' case closed. The matter was last mentioned on 27th March 2013, when Parties confirmed filing of their Final Arguments, and were advised by the Court Award would be given on Notice.

3. The Claimant's position is that he was employed by the Respondent Susan Larsen, as a Workshop Carpenter and Designer, rose through the ranks to become the Workshop Manager. The Respondent Susan Larsen, according to the Claimant, is a proprietor and director of several companies in Kenya. Kanyo worked under several of these companies. The Respondent traded under the names Siafu Limited, Horsebox Limited, Friends of Africa Limited, Promaco Limited and Utamaduni Craft Centre. The Respondent was in the business of making toys and furniture, operating from the Karen area in Nairobi.

4. There was no letter of employment issued to the Claimant. He initially worked under contract, on a rate of Kshs. 150 per month. Every time the Respondent changed her business name, she issued the Claimant with a fresh contract of employment. He was issued a letter employing him as the Supervisor, with effect from 1st April 2005, earning Kshs. 15,000 per month. He testified that the letter was written and signed by Mrs. Larsen. He was advised he would be stationed at Siafu Workshop. The Workshop was then under Horsebox Limited.

5. He had a good relationship with his employer. He served for 20 years. One morning in June 2009, Mrs. Larsen came with a letter terminating the Claimant's contract of employment. This happened in her house. The letter of summary dismissal, dated 16th June 2009 reads:

“ Dear Laban,

It is with regret we find ourselves forced to serve you with this notice of instant and summary dismissal, since it has come to our notice that without authority, you have been hiring tools/ assets belonging to our business against a fee which was not paid into the business, but was retained by you personally.....

Some time ago, you entered the Larsen house and removed the salary packet belonging to Esther and only returned it to her when told that someone had witnessed you entering the house.....

In the period March/April 2009 when you were working in the house, some personal possessions went missing and have never been traced.”

6. In the Daily Nation Newspaper of 18th March 2010, Mrs. Larsen placed a Public Notice, stating:

“We wish to advise all our esteemed customers and the public in general that the person whose details appear above ceased to be an employee of Friends of Africa ltd, Siafu ltd and Promaco ltd with effect from 16th June 2009. He is not authorized to transact, represent, or receive payments on behalf of our company.”

7. Kanyo told the Court that he supervised about 16 employees working for Larsen. He did not supervise her domestic employees. She laid off her employees, one after the other, with the Claimant being the last out. He was asked to sign the letter of termination. He refused to do so because it contained allegations that were not true. It was alleged he had taken jewellery and a purse from the Larsens. It was a false allegation. She ran the business with her family. Her son called in the Police who searched the Claimant's house; the Officers of the law unearthed nothing. They arrested the Claimant and charged him in Court. The first charge sheet alleged that the Claimant had on 4th March 2009, stolen one bedroom mirror; one dinning plate; five wall pictures; and three small dinning plates, all valued at Kshs. 40,000, the property of Susan Larsen. The charge was later amended to read that the Claimant stole gold rings; jewellery; one bedroom mirror; one plate; five wall pictures; and three small plates, the property of Susan Larsen, all valued at Kshs. 500,000. The Claimant was also charged with the alternative offence of handling stolen goods. He was acquitted of both charges.

8. The Claimant prays the Court to find termination of his contract of employment to have been unfair and unlawful; he is paid service pay at 15 days' salary for each year completed in service at Kshs 450,000; 3 months' salary in lieu of notice at Kshs. 45,000; damages for wrongful termination; costs; and interest.

9. On cross-examination, the Claimant testified that he was employed by Mrs. Larsen in 1989. He did not have in Court a contract of 1989. Paragraph 5 of the Statement of Claim, states that Larsen, gave Kanyo different contracts. She kept custody of these contracts. He worked for Siafu Limited. Larsen kept changing names. She signed herself as the Managing Director. The Workshop was in Larsen's residence. He was answerable to her. A letter written by Larsen on 23rd July 1999 with regard to staff medical services at St Odillias Dispensary was signed by Larsen on the letterhead of Horsebox Limited. She signed as Managing Director. Kanyo worked under Horsebox from 1989. Mrs Larsen kept changing. The Claimant could not ask her why she kept doing so. He has sued Mrs. Larsen because she was the Managing Director. The letter dismissing the Claimant issued under the letterhead of Utamaduni Crafts Centre.

10. The letter summarily dismissing the Claimant gave him reasons for the decision. He earned Kshs. 15,000 as at the time of dismissal. It was at the rate of Kshs. 500 per day. Termination clause in the contract stated no notice was necessary in dismissal for gross misconduct. Theft is an act of gross misconduct. Mr. and Mrs. Larsen are both directors of the various companies. The Claimant sued Mrs. Larsen because it was her, who employed him. He testified that the companies were just a face. He knew Mr. Omondi was renovating the Larsens house in 2009. He was constructing an extension to the house. He had access to tools. He was an independent contractor. The Claimant did not recall Omondi complaining to Mrs. Larsen, that the Claimant had charged him for using the tools. The Kshs. 495,000 represents his dues. He did not give evidence of his monthly rate of pay prior to the contract of 2005. He emphasized on redirection that all companies belonged to Mrs. Larsen. The Claimant could not control how she ran her businesses. Utamaduni Centre and Crafts Centre were not shown to be limited liability companies. He had properly sued Mrs. Larsen. Kanyo urges the Court to grant the Claim.

12. The Respondent states that she has improperly been sued. The Claimant was employed by Friends of Africa Limited on 1st April 2005, in the position of a Supervisor, in the company's workshop known as Utamaduni Crafts Centre. The Respondent Susan Larsen was at all times an employee and/or agent of the company, and all acts carried out by her in relation to the issues in dispute, were carried out in her capacity as an employee and/or agent.

13. Susan Larsen told the Court that she is the Managing Director of Friends of Africa Limited and Siafu Limited. The two companies sell crafts to tourists. Christian Larsen is her co-director. Kanyo worked for the two companies. He started in 2005. Susan Larsen signed the contract as the Managing Director of Friends of Africa Limited. She had known the Claimant before 2005 when he worked for Horsebox limited. This company also dealt in crafts. He then worked on casual basis.

14. Larsen testified she has never traded as Utamaduni Craft Centre, as stated in the Statement of Claim. Utamaduni is just a trade name. The Workshop was at her residence in Karen. The companies made toys and wooden crafts. Horsebox operated before 2005 and Friends of Africa after 2005.

15. Kanyo was summarily dismissed on 16th June 2009. Items were stolen from Larsen and from her employees. Kanyo was implicated. He hired out Respondent's tools without Larsen's consent. He did not remit the money collected to Larsen after hiring out her tools. Omondi told Larsen he could not continue working because the Claimant had taken back the tools. While overseeing work that was being done on Larsen's house windows, he took away a fellow employee's salary and was seen doing so by the Guard Mr. Gitau. He only returned the salary when the lady employee started crying.

16. He was summoned to a disciplinary meeting and asked to defend himself. The panel was composed of Mr. and Mrs. Larsen and Mr. Mwai the Manager. The witness reported theft of her goods to the Police. Police arrested the Claimant. He was charged, tried and acquitted on a technicality. The Respondent summarily dismissed him, and placed a Public Notice in the Newspaper to alert the Public that Kanyo was no longer an employee of the Respondent's companies. It is not correct that the Claimant was not given a hearing. Service pay is not due. The Respondent paid N.S.S.F contributions for its staff. The contract provided for termination, upon giving of one month notice or salary in lieu of notice.

17. On cross-examination, the witness testified that she signed the letter of appointment. She was to pay

the Claimant Kshs. 15,000 per month. The letter does not show the company Friends of Africa Limited anywhere. The letter of summary dismissal is signed by Mrs. Larsen. She signed as Managing Director of the Friends of Africa Limited. The Public Notice referred to 3 companies- Friends of Africa ltd; Siafu ltd; and Promaco ltd. Kanyo was employed by the Friends of Africa, but was assigned work in the other companies. Utamaduni is a trading name. The Claimant worked for Friends of Africa ltd for 4 years. Larsen could not remember for how long he worked for Horsebox Ltd. He did carpentry work in the Larsen house. The contract states his place of work would be Siafu Workshop. This was a Workshop within Friends of Africa ltd. Employees of the Workshop are employees of the company. She has registration certificates of the different entities, but could not avail these to the Court.

18. The Claimant was charged at the Kibera Chief Magistrate's Court in Nairobi. Larsen explained that the Arresting Officer disappeared mysteriously. Larsen agreed the Workshop was also called Utamaduni. Siafu and Utamaduni are the same Workshop. Utamaduni is not a limited liability company. The disciplinary committee had three people- two directors and one manager. Disciplinary proceedings were recorded. The record was not availed to the Court. The Claimant was given the chance to be accompanied to the disciplinary hearing by a colleague of his choice. He was not so accompanied. He responded to the accusations against him; this was not done in writing. Redirected, Susan Larsen clarified that the Workshop is at her home. It is called either Siafu or Utamaduni. She did not think it necessary to exhibit certificates of company registration.

19. Gitau Mwanja works for Susan Larsen in her compound. This is his 11th year in employment. Kanyo worked for Larsen at her Workshop within her residence, as a carpenter. He saw Kanyo come out of the Larsen house. There was an employee called Esther. She complained that Kanyo had taken her salary. Mwanja did not know what followed. Kanyo no longer works there.

Mwanja did not go to the house. Employees, other than Esther and Anne who served as Housekeepers, were not allowed in the house. On cross-examination, the witness testified that he did not see the Claimant steal any money. He was not a witness in the criminal proceedings at the Magistrate's Court. He was employed by the Larsens after the Claimant was employed. He was casual at the beginning, but could not recall when he was converted as a permanent employee. He never saw Laban Kanyo work in the house. He was employed, and paid his salary by Mrs. Larsen. He testified further on redirection that he did not work in the Workshop; he used to cut grass and wash vehicles. Kanyo was restricted in the Workshop. Mwanja did not know about the criminal proceedings. The Respondent prays for dismissal of the Claim.

The Court Finds and Awards:-

20. The Claimant was employed by companies and entities associated with Susan Larsen, right from 4th September 1989. This dispute shows the problems employees face, in unearthing the legal personalities of their employers, for purposes of protection and enforcement of labour rights.

21. Susan Larsen conceded she and her husband operate a Workshop within their residence at Karen, making and selling toys, wooden crafts and furniture. She issued the Claimant a written contract of employment dated 1st April 2005. It is signed by Susan Larsen, as Managing Director. The contract does not reveal she signed as Managing Director of which company.

22. She explained in her evidence that the Claimant was employed in 2005 by Friends of Africa ltd. He worked for Horsebox ltd before 2005, but Larsen could not say how far back the Claimant worked for Horsebox ltd. There were other companies- Siafu ltd and Promaco ltd. According to Larsen the Claimant was employed by Friends of Africa after 2005, but could be assigned work at these other companies.

23. To add to the Claimant's confusion as to who his legal employer was, there were other entities within this layer of business permutations. There was Utamaduni Crafts Centre. Susan Larsen initially denied ever trading as Utamaduni, but on cross-examination, agreed that her Workshop was called Utamaduni and also Siafu. The entities and the physical human beings behind these entities, all reside within the Larsen Home at Karen. In the contract of employment given to the Claimant, he was advised his place of

work would be Siafu Workshop. On 23rd July 1999, Larsen wrote a letter to St. Odillias Dispensary, identifying certain employees, among them Laban Kanyo, as working for her at Windy Ridge.

24. It would be impossible for the Claimant to know with exactitude which legal entity to bring to this Court, for purposes of correcting what he believes to be an employment wrong. It would be utterly foolish of the Court to find that the wrong Respondent has been sued. This Court has in the past suggested that the doctrine of legal separateness is of limited utility in employment and labour relations, where employers frequently devise multi-layered legal and business entities, all with the objective of avoiding regulatory burdens such as labour standards and taxation.

25. Employer-legal forms may not coincide with the employer- business forms. There is frequently a mismatch between the enterprise's control structures, and the legal structures through which the enterprise is sought to be regulated. The business form of the enterprise reflects the market strategy taken by it. The form adopted aims at the most cost effective accommodation, between the enterprises business needs and the regulatory requirements to which it is subject. [*See AD Chandler- Strategy and Structure: Chapters in the History of the American Industrial Enterprise, Cambridge Mass: MIT Press, 1962*]

26. Susan Larsen and her family set up an enterprise manufacturing toys, wood crafts and furniture. It is a business that has been going on for a considerable period, within the Larsen home. The names of the employer have kept changing as convenient to the Larsens. The business activity undertaken by these companies and the place of business whether called Windy Lodge, Siafu or Utamaduni, have not changed. Importantly, the person with the decisional control, the one who could hire, instruct employees in the performance of their duties, and fire employees from the date Kanyo joined on 4th September 1989, remained Susan Larsen. Other persons, mainly her family members, are not shown to have signed any single communication, or made any decision with regard to the issue in dispute. The business carried out at the Workshop, by whichever name, was under the control of Susan Larsen.

27. In her Statement of Reply, she alleged that she was not the employer, but an employee/and or agent of her companies. The Employment Act 2007, the Labour Relations Act 2007 and the Industrial Court Act 2011 all acknowledge in their interpretation sections [2] that an agent or manager of a company can be deemed to be an employer. The submission that Susan Larsen was a different legal personality from her companies and business entities, and not an employer has no support under our labour and employment legislations. The Court finds that she has been properly brought to Court. Kanyo was her employee, and she was his employer, from 4th September 1989.

28. Did she terminate the Claimant's contract for valid reason or reasons, in accordance with Section 43 and 45 of the Employment Act 2007? Was termination carried out fairly, in accordance with the minimum statutory disciplinary procedure? Is the Claimant entitled to a declaration that termination was unlawful and unfair; service and notice pay of Kshs. 495,000; damages; costs; and interest?

29. There were allegations made that a Mason contracted by Mrs. Larsen named Omondi, complained that Kanyo had hired out tools belonging to Mrs. Larsen to him, and demanded for money from Omondi. The money was paid, but was never reinvested in the business. The gentlemen Omondi was not called by the Respondent to give substantiation of his allegations. A letter dated 14th May 2009 alleged to have been written by Omondi to Larsen, was instead attached to the Respondent's Amended Statement of Response. Omondi appears in the letter to complain about his general work relationship with the Claimant. Omondi complained about being frustrated by the Claimant in his work. There is no letter asking the Claimant to explain the wide ranging complaints against the Claimant made by Omondi. It would have been prudent for the Respondent to call Omondi so that his allegations against the Claimant could be tested through cross-examination. There was no explanation why Omondi was not even called at the disciplinary hearing, if indeed such a hearing took place, so that his evidence and that of the Claimant on the subject of hiring out of Larsens' tools, could properly be evaluated. This ground in the letter of summary dismissal was not adequately supported by the Respondent in substantive justification.

30. The second ground was that some time ago, the Claimant entered the Larsens House and stole the salary belonging to a fellow employee Esther. There was no date assigned to the offence, just a plain

some time ago. Esther herself was not called as a witness. In her place was called the Guard who is still serving the Larsens, and whose evidence was that he witnessed the Claimant come out of the Larsen house. Larsen herself, and even the letter by Omondi, stated that the Claimant had been given the green light by the Larsen to move in and out of their house as a supervisor. Omondi referred to him as the Foreman. The Guard Gitau Mwanja testified employees, except the two Housekeepers Esther and Anne, were not allowed to go into the house. This was obviously not corroborative of the statements made by the Claimant, Omondi and Larsen, on ingress and egress of the Larsens' house. The effect of this is that the Court did not find Gitau Mwanja as a credible witness. He says he heard Esther complain that the Claimant took her money. He did not know what became of the money. He did not see the Claimant take this money. This witness appeared unsure about his testimony. There was no explanation by the Respondent why as in the case of Omondi, Esther was not called to give evidence.

31. The third ground in justifying summary dismissal was that some personal things went missing from the Larsen's house. The items were not identified in the letter of summary dismissal, but were the subject of the criminal proceedings which culminated in the acquittal of the Claimant. The Criminal Court found the evidence against the Claimant contradictory and full of gaps. The Investigating Officer testified in the criminal proceedings that he never saw any inventory of items recovered from the house of the accused person. There was evidence in that Court that a search carried out did not result in any recovery of items from the house of the accused. It was again said that subsequent searches resulted in recovery of items. The trial Court was perplexed why an earlier search would yield no items, while a subsequent one did. Although the criminal process is quite different, and its outcome not binding on this Court in determination of the issues in dispute, little evidence of stolen jewellery and other items was given in the dispute at hand. Susan Larsen said nothing about stolen items being recovered in the Claimant's house. The Claimant explained at the criminal trial that his former employer had initiated the criminal case, to intimidate the Claimant against pursuing his employment claim. The Magistrates' Court found the Claimant's explanation for his prosecution believable. The Criminal Court stated further, "*the complainant [Larsen] did admit that she never paid the accused his dues. Her explanation was that he just walked out and never went back. That explanation is not entirely satisfactory, for a person who had worked for about 20 years, to just walk out and not claim his dues, particularly considering the fact that he has not been in employment since then.*" The Industrial Court finds no reason to conclude that loss of jewellery and other items took place, or was a loss attributable to the Claimant. Gitau Mwanja who served as the Security Guard in fact said nothing to this Court about the missing jewellery. How would the employee who has worked for Larsen for 11 years in the security docket not be involved in the tracking of lost family jewellery? In the end, the Court was not persuaded that this was a valid ground to warrant summary dismissal. Termination of the Claimant's contract of employment was therefore entirely without substantive justification, unfair and the Claimant is entitled to compensation.

32. Was the Claimant availed a fair procedure? The record does not have any formal charges made against the employee by the employer, no letter of warning or letter asking the Claimant to show cause why disciplinary action should not be taken against him. Section 41 of the Employment Act 2007 requires that the employee is given charges in a language understood by the employee. He should be given the opportunity to answer the charges, and be allowed the company of a work colleague or trade union representative at the hearing. There were no written transcripts of any disciplinary proceedings carried out by the Respondent, produced before the Court. Susan Larsen, her Husband and one Manager constituted the disciplinary panel. How could the family whose jewellery had allegedly been stolen by the Claimant, compose the disciplinary panel, objectively hear and give a fair and just employment decision in the circumstances? The Claimant was not heard in accordance with the minimum statutory disciplinary procedure. Termination was on account of procedure unfair, and remediable through compensation.

33. There was evidence contained in a letter written to National Social Security Fund by Larsen, that the Claimant was subscribed to the Fund. The letter is dated 15th April 2005. He is not eligible to receive additional social security payments, under section 35 [6] of the Employment Act 2007. His claim for 15 days' salary for each of the 20 years worked has no legal justification. He is not entitled to double social security payment under the Employment Act 2007. The Court finds that he was entitled to notice or 1 month salary in lieu of notice. **He is granted Kshs. 15,000 as notice pay.** Termination as explained above was unfair on both substantive and procedural grounds. **The Claimant is granted 6 months' salary at**

Kshs. 90,000. Parties shall meet for their own costs of the dispute. The Prayer for interest is declined. IT IS ORDERED-:

[a] Termination of the claimant's contract of employment was unfair;

[b] The respondent shall pay to the claimant Kshs. 105,000 in notice pay and compensation;

[c] The full amount shall be paid within 30 days of the delivery of this Award; and

[d] Costs and interest declined.

Dated and delivered at Nairobi this 18th day of September 2013

James Rika

Judge