



REPUBLIC OF KENYA  
IN THE INDUSTRIAL COURT AT NAIROBI  
CAUSE NUMBER 961 OF 2011

**BETWEEN**

ZACHARY MBUGUA MAINA .....  
CLAIMANT

**VERSUS**

MEDECINS SANS FRONTIERES, SWITZERLAND..... RESPONDENT

*Rika J*

*Cc. Leah Muthaka*

*Ms. Guserwa instructed by M/S J.A. Guserwa & Company Advocates for the Claimant*

*Ms. Mbabu instructed by Hamilton Harrison & Mathews Advocates for the Respondent*

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION OF EMPLOYMENT

AWARD

1. The Claimant filed the Statement of Claim on 17<sup>th</sup> June 2011 and a Supplementary Statement on 27<sup>th</sup> September 2011. The Respondent filed its Statement of Reply on 24<sup>th</sup> August 2011. The Claimant gave evidence and closed his case on 22<sup>nd</sup> November 2012, while the Respondent testified through the Medecins Sans Frontieres [MSF] Swiss SUKA General Manager Mr. Wanteu Theodard on the same date, bringing the entire hearing to a close.
2. The matter was last mentioned in Court on 11<sup>th</sup> March 2013, when the Parties confirmed the filing of their Final Arguments, and were notified the decision of the Court would be delivered upon notice.
3. The Claimant states he was employed by the Respondent an International Non-Profit Humanitarian Organization, as its Assistant Logistician on 22<sup>nd</sup> June 1998. He served for 13 years. On 25<sup>th</sup> February 2011, he was issued with a notice of redundancy. There was no prior notification or justification. At the time of termination, he had become the Head of Technical and Logistic Activity, Nairobi Branch, earning a monthly basic salary of Kshs. 179,365. He alleges termination was unfair, malicious and unlawful and prays for the following remedies:-

- a. Reinstatement without loss of benefits;

- b. Salary arrears for the entire period the Claimant has been out of employment;
- c. Damages for wrongful and/or unlawful termination;
- d. Maximum compensation at 12 months' salary for unfair termination; and
- e. Costs, with interest.

4. The Respondent answers that termination was not unfair. The Respondent's Head Office in Geneva took a decision to integrate the operations of the Respondent's Supplies Department, in which the Claimant was working, within a single unit known as the Kenya Supply Unit [KSU]. Positions in the Respondent's Supplies Department ceased to exist. The Claimant was served with a 30 day notice of termination on account of redundancy dated 25<sup>th</sup> February 2011. Notice took effect on 25<sup>th</sup> March 2011. The Respondent paid the Claimant terminal benefits of Kshs. 2,224,530 through the Claimant's Account with the Standard Chartered.

5. The Claimant testified he was initially employed on a 3 year contract on 22<sup>nd</sup> June 1998. He went on to work for about 13 years. He had a clean record. On 17<sup>th</sup> November 2010, he was suspended by the Respondent. It was alleged that he had obtained a reward from a Supplier, in order to award the Supplier a tender for supply of transport services.

6. He did not receive, while serving suspension, any report of investigation carried out in relation to the allegation made against him. On 25<sup>th</sup> February 2011, he was called on the phone by the General Manager and the Human Resources Manager. He was asked to meet them at a Restaurant along Argwings Kodhek Road in Nairobi. He availed himself there, and without any form of discussion, was handed a notice of the Respondent's intention to terminate his contract of employment.

7. He was advised that his Office was closing down and his position had been declared redundant. He contacted his lawyer for legal assistance. After some weeks, he found some money had been sent to his Bank Account by the Respondent. He did not go back to work after the suspension.

8. The General Manager later called him. He was given what was termed by the General Manager as an amicable settlement. He was given this offer of Kshs. 3,617,510 on 30<sup>th</sup> November 2010. He declined the offer. In a second meeting of 20<sup>th</sup> December 2010 he was given another offer of Kshs. 2,219,330 which he declined. He was not told why the Respondent did not want him back. He later found Kshs. 2,224,530 deposited in his Bank Account. Details of the payment were not availed to him.

9. The Respondent went on to hire two employees Wahiba Sentissi and Moses Lopur, to perform the Claimant's duties. The position was not redundant. There was no genuine redundancy, and the Respondent merely wanted to rid itself of the Claimant. Maina testified he has encountered hardships after termination. He has young children to bring up, and it has been difficult getting alternative employment, owing to the unresolved corruption allegations made against him by the Respondent. His career was ended abruptly. Suspension was never lifted. He asks the Court to uphold the Claim.

10. He testified on cross-examination that he worked for SUKA Regional Supply Centre. He was aware the Respondent was merging its Supply Centres under one roof. He had heard about integration. No employee was to lose his job. He had been told orally by the Respondent's Management that there would be continuity of service. He did not know at the time of testifying, if SUKA was still operational. He was aware his former colleagues were still working. He was not able to name these colleagues.

11. He was not given other reasons for termination other than redundancy. He was the Centre Manager, the most senior employee. Under him, there was a Procurement Officer. There was no Storekeeper. The Claimant did not know if Moses Lopur was employed as the Storekeeper. The Claimant's functions were split. Moses handled stocks-management, a function previously in the Claimant's docket. Sentissi handled supplies.

12. The Claimant attended 3 or 4 meetings relating to the integration of supplies, sometime in 2010. There was no timeframe for integration. He was not able to say if the two employees were paid from the

supplies budget. The Respondent communicated some grounds to the Claimant to justify termination. He received money from the Respondent, but did not ask the details of the payment. His Advocate sought the details. He received a total of Kshs. 2,224,530. He received full pay while on suspension. He rejected the offer of Kshs. 3,617,510. He has applied for alternative employment with many potential employers, but none has come back to him. He assumed the no-response from the potential employers, was as a result of the termination. He confirmed he received Kshs. 2,224,530, and agreed that if he had been dismissed from employment, this amount would not have been made available to him.

13. He testified further on re-examination that the demand letter written by his Advocates was not replied to. The payment made to him did not mention severance pay. He was not aware if SUKA closed in Nairobi in December 2011. He would have gladly worked until closure. SUKA was a department of the Respondent, with a budget controlled by the General Manager. The Claimant looked forward to having the suspension lifted. He has not been cleared of the allegations made against him by the Respondent.

14. Wanteu Theodard testified he was the Claimant's immediate Supervisor. Wanteu was overall Manager of 3 Branches of the Respondent. Maina headed Nairobi Branch. The Respondent made a decision to merge all the Supplies Centres. Medecins Sans Frontieres Switzerland, France, Belgium and Spain- all were involved in their respective supplies. The decision to merge was made in 2008, and was to be implemented in 2009.

15. This decision was not carried out immediately. Wanteu joined the Respondent in 2010, and was mandated by the Respondent to implement the decision by end of 2010. It was an economic decision. Wanteu was not able to meet the deadline. The process was delayed by certain problems. Wanteu was receiving instructions from Geneva in Switzerland. The Kenya Supply Unit did not fulfill its role. There were crises in Somalia and the Horn of Africa which delayed integration. All employees would be affected. 3 local employees- Maina, Paul and Moses- would be affected.

16. Maina was the first to go. This was owing to the cost consideration. His salary was 52% of the total SUKA wage bill. Wanteu assumed the role of management. Moses was employed as a Storekeeper. His duties were different from Maina's and he was paid less. Sentissi was recruited in February 2011 and attached to Wanteu as a Deputy to hasten the merger process. Her duties involved auditing of the structures, which was different from the role exercised by Maina.

17. Wanteu met Maina and consulted on the integration process. It was indeed Maina who hosted Wanteu here in Nairobi. Maina knew about the processes. Even if Maina was not on suspension, it would have been necessary to have Sentissi. Moses and Sentissi did not receive their salaries from SUKA budget. The Respondent intended to have the redundancy process finalized by March 2011. Maina was issued Notice on 25<sup>th</sup> February 2011. Termination would be effective 25<sup>th</sup> March 2011. The Respondent expected the Claimant would go to its Offices and collect his payment. He did not do so, and the Respondent deposited the money in the Claimant's Account. The payment schedule gave the breakdown of what was received by the Claimant. He did not at any time seek clarification on this schedule.

18. He had been implicated in receiving bribes from Air Transport Companies to award them contracts. Wanteu is not an air transport expert and therefore referred the matter to Geneva for further investigations. He was offered Kshs.3.6 million initially. The Claimant asked that he be allowed 2 days to reflect. He called Wanteu and accepted the offer. He was advised there was a correction, lowering the figure to Kshs.2.2 million. He rejected this. The error in the first figure was arithmetical. Moses, Paul and Sentissi are no longer working. SUKA closed down. There is no other severance pay that is due to the Claimant. Wanteu asked the Court to consider what the Respondent has already paid to the Claimant, in event any further amount should be deemed due.

19. He stated on cross-examination that there is nothing owing to the Claimant. Severance pay was not specifically mentioned in the payment schedule. Other items such as notice pay were specifically mentioned. The bulk of the payment, at Kshs. 2,887, 773, related to 'other allowance.' The letter of termination did not refer to any payment schedule. The General Manager took the Claimant to a restaurant to discuss redundancy, because the Claimant was not comfortable with the Office. There was

no formal notice given to the Claimant by the Respondent prior to 25<sup>th</sup> February 2011.

20. The Respondent closed operations gradually. Cost was the main consideration, with Maina first to go, because he earned the highest salary. If he was not the highest paid Officer, he would not have been the first to leave. Wanteu agreed with the Claimant's Advocate that Section 40 of the Employment Act 2007 does not give costs as criteria for redundancy selection; it refers to skills and seniority in time among other things. Wanteu did not have any document showing the date SUKA closed. If the Claimant had accepted receipt of Kshs. 3.6 million, he would still have left through redundancy.

21. He was suspended on allegations relating to tender for air transportation services. Wanteu did not find any evidence of the Claimant's involvement. Maina was not contacted by the Respondent to be advised on the findings concerning the allegations. He was not advised about the lifting of the suspension. It was not possible to retain Maina and close together in November 2011. The figure of Kshs. 3.6 million had been computed by a technical person. It is not true that Maina's contract was terminated to create room for employment of Moses and Sentissi. Wanteu testified that the Respondent did not plead a counterclaim of any money from the Claimant.

22. Redirected, he told the Court that the Respondent had indeed stated under paragraph 25 of its Statement that any money paid on termination, should be offset against any Award of compensation for unfair termination. The Claimant could not have been kept in employment up to December 2011. Severance pay was factored in the 'other allowances.' There was a compensatory payment of 12 years worked, at Kshs. 2,062,697. He was paid 1 month salary for every year completed in employment. Wanteu was not the decision maker, and could not therefore, lift the suspension. The Respondent prays for dismissal of the entire claim.

#### *The Court Finds and Awards:-*

23. There is no dispute that the Claimant was an employee of the Respondent. He was recruited as an Assistant Logistician on 22<sup>nd</sup> June 1998. He was suspended on 17<sup>th</sup> November 2010. The letter of suspension stated that the Respondent had on 9<sup>th</sup> November 2010, received information from an Airline Company, that the Claimant had received unauthorized payments from this Company, to facilitate transfer of the Respondent's goods on the Company's flight. There was no follow up of this disciplinary matter, by the Respondent, at least not from within the Claimant's East African Regional Centre. General Manager Mr. Wanteu explained that the matter requires air –transport technical expertise, which was unavailable locally, and he referred the file to the Medecins Sans Frontieres Head Office in Geneva. There is no evidence that Geneva initiated any investigation or disciplinary motion against the Claimant, and at the time the Claimant left, he was still in darkness and under suspension.

24. He left employment over a different reason; redundancy. He was issued the first notice on 25<sup>th</sup> February 2011. It took effect on 25<sup>th</sup> March 2011. At the time of departure, it is not contested that he was heading the Nairobi SUKA Office, and held the title Head of Technique and Logistic Activity. He headed the Nairobi Office, while Wanteu was the overall Regional Boss. It is agreed the Claimant received the sum of Kshs. 2,224,530 net pay, deposited in the Claimant's Bank Account by the Respondent. Initially the Respondent had offered the Claimant the sum of Kshs. 3, 617,510. Wanteu explained that the Claimant called him 2 days after the offer was made, and accepted the offer. When told the figure had been corrected to the lesser amount, he rejected the offer. There is no dispute the Respondent deposited the sum of Kshs. 2,224,530 in the Claimant's Account.

24. Was redundancy a colourable or pretextual termination reason, or was it a valid reason? Secondly, was the procedure adopted by the Respondent fair and in conformity to the minimum termination procedure prescribed under the Employment Act 2007?

25. The answer to the first question, the Court is persuaded, must be that there was a valid termination reason. The Respondent demonstrated in its evidence that there was a genuine redundancy reason. Wanteu explained very clearly, that the Medecins Sans Frontieres Switzerland, France, Spain and

Belgium were to merge their supplies function. It is clear there was a decision made in Geneva Head Office to merge Supplies. The decision was made as early as 2008. The Claimant was aware of the restructuring. He was part of the Management Team. He had informal notice there was restructuring from 2008. Due to the political instability in Somalia and the Greater Horn of Africa, there was delay in the implementation of the decision. At the same time, management prerogatives were being exercised only with the concurrence of Geneva, contributing to the delay.

26. Wanteu was tasked to fulfill this objective by end of 2010. He was not able to do so, and asked for extension from Geneva. The decision was fully implemented when the SUKA Nairobi ceased to exist in November 2011. All the three employees who worked in Nairobi were affected. No one works at SUKA Nairobi today, for the simple reason that there is no SUKA Nairobi today. The Court is satisfied that the Respondent had a genuine reason to order merging of the supplies function. It is not practicable to order that the Claimant is reinstated to his former position; it does not exist, and the entire SUKA outfit at Nairobi is no more. The employment of Moses and Sentissi cannot in the least, be said to have been made, at the expense of the Claimant. They were recruited to facilitate closure, more or less in the mode receiver managers are appointed to facilitate winding up of businesses. They too left by November 2011, when the mission was accomplished. ***Without going into further debate, the prayer for reinstatement is found to be impracticable and therefore not awardable.***

27. Was the decision implemented fairly? Not quite. The Respondent had come up with suspension information on 17<sup>th</sup> November 2010. It was alleged the Claimant was involved in procurement corruption. He was suspended. At the time of suspension, the redundancy situation had been in the air for some time. Whereas that redundancy situation was a genuine situation, the allegation on procurement corruption appears not to have been a genuine disciplinary concern against the Claimant. He was never involved in any investigation on the allegations. He was never charged. The Respondent did not follow this suspicion at all. The Court is persuaded that there was a genuine redundancy situation; however the Respondent conjured a disciplinary situation, not to justify termination, but to hasten the exit of the Claimant in a genuine redundancy situation, in which he was seen as a glaring impediment. The corruption allegation therefore, should properly be seen as a procedural issue, rather than a substantive one.

28. The Claimant was not appraised on any investigations, and outcome of the disciplinary process. The Respondent perhaps thought that there would be no need to follow on the alleged disciplinary offence because the redundancy exit was inevitable anyway. This was a procedural flaw, which the Court cannot overstate or understate.

29. There was no reason why the Respondent should not have concluded its investigations against the Claimant, and either cleared his name or convicted him. Disciplinary processes are not invalidated by the presence of genuine redundancy situations. There was no justification in suspending the Claimant simply to fast-track a process that was deemed to be slow moving. The Respondent had on 20<sup>th</sup> December 2010, drafted 'MUTUAL AGREEMENT ON CONTRACT TERMINATION' which was meant to make the Claimant's exit, a mutual separation. Unfortunately, the Claimant did not buy the idea, and opted to slug it out. The Court was not shown why the Claimant should not have been investigated, disciplined, or if absolved, retained to the winding down of SUKA in November 2011. The Court is nonetheless convinced that the violations by the Respondent were in nature procedural, rather than substantive violations. The termination was unfair on the ground that procedure was deficient. Maina is entitled to minimal compensation.

30. The Court is satisfied that the Claimant was paid adequate, fair and regular severance payment in conformity to Section 40 of the Employment Act 2007. The Respondent is an International NGO, whose labour and employment mother tongue, is removed, though not far-removed, from the language of our Employment Act 2007. The contract says the applicable law is the law of the place. Decisions were however originating from Switzerland, and the language adopted by the Respondent, does not exactly conform to our local tongue. The use of different terms does not however, result in the violation of the minimum Kenyan statutory standards.

31. To elaborate the point, the certificate of service is renamed 'work certificate.' The letter of suspension is characterized as 'suspension information.' Items such as 'amount of seniority,' 'other allowance' or 'compensatory payment 12 years,' are contained in the Respondent's payment schedule. The Respondent does not specifically use 'severance pay' but the Court would be blind to the legal-cultural usage, if it was to find that because no severance pay is categorically stated to have been paid, these 'other allowances' mean nothing. There is evidence that the Claimant received reward and recognition for his service of 13 years. There would be no justification in awarding him more, simply on the misreading of global mother tongues.

32. He was paid his salary for the period under suspension. He cannot claim damages for breach of the contract, and also crave statutory compensation, in a genuine redundancy situation. This Court in any case, has never granted contractual damages and statutory compensation, arising out of the same employment wrong. The principle of *a fair go all round* would be compromised if the Court were to Award damages under every legal regime, for the same employment wrong. There would be no balance between the demands of social justice, and the needs of national economic development.

31. The claims for reinstatement, salary arrears, and damages for wrongful termination must fail. What is the appropriate compensation for the Claimant's procedural violation? The Court notes he has in his pocket a severance sum of Kshs. 2,224,530, which is after tax. His last salary was Kshs. 179,365. The minimum severance he could receive is 15 days' for each year worked, which works out as follows- Kshs. 179,365 divide by a maximum of 26 days =Kshs.6,898 x 15= 103,479x13 =Kshs. 1,345,273. This is the minimum severance pay the Claimant merited under Statute. He was availed compensatory payment of 12 years at Kshs. 2,062,697. Overall, the Respondent paid to the Claimant 'other allowance' of Kshs. 2,887,773. The Court finds the redundancy package was fair. The Claimant has no reason to seek further severance payments, justifying such claim on the difference in the usage of legal terms.

32. Compensation for the procedural lapse is assessed and granted at 4 months' salary at Kshs. 717,460. In doing this the Court has taken into account the amount of severance paid to the Claimant, as required under the Employment Act 2007. It is ordered:-

***[a] Termination was procedurally unfair. The Respondent shall pay the Claimant Kshs. 717,460 in compensation. No order on the costs.***

Dated and delivered at Nairobi this 17<sup>th</sup> day of **September, 2013**

James Rika

Judge