



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 200 OF 2011

WILBERFORCE OJIAMBO OUNDO.....CLAIMANT

VS

REGENT MANAGEMENT LIMITED.....RESPONDENT

AWARD

Introduction

1. Wilberforce Ojiambo Oundo, the Claimant in this case was the Chief Executive Officer of the Respondent, Regent Management Limited. He filed a Statement of Claim on 15th February 2011 seeking damages for unfair termination of employment and accrued dues. The Respondent filed a Statement of Response and Counterclaim on 9th March 2011 which was amended on 14th May 2011. The Claimant's Reply to the Respondent's Statement of Response was filed on 20th April 2011 and amended on 17th October 2012.

2. The matter was heard between 26th March and 9th July 2013, with Mr. Oundo appearing for the Claimant and Mr. Naeku for the Respondent. The Claimant testified on his own behalf and Messrs Daniel Kiprotich Cheruiyot, Geoffrey Rotich, Nimrod Kipyego Kurgat and Bernard Okoth Ambasa testified for the Respondent.

The Claimant's Case

3. The Claimant was employed by the Respondent on 15th August 1999 and held various positions rising through the ranks to the position of Chief Executive Officer. The Claimant was also a director of Regent Management Limited and a number of Associated Companies as well as a Trustee of the Respondent's Pension Scheme. As Chief Executive Officer, the Claimant was on a three (3) year contract running from 1st January 2008 to 31st December 2010, with a gross monthly salary of Kshs. 331,310. The Claimant was also entitled to 30 days' annual leave and gratuity at the rate of 20% of his basic salary.

4. On 17th August 2010, the Chairman of the Respondent's Board of Directors, Chris Kisire summoned the Claimant to his office and demanded that the Claimant resigns from his position of Director of Regent Management Limited and its Associated Companies. Upon declining to resign, the Claimant was issued with a suspension letter suspending him for a period of 30 days. He was then handed over to Criminal Investigation Department (CID) Officers on allegations of stealing by an officer of a company.

5. On 3rd September 2010, while the Claimant was still on suspension, the Respondent published a public notice in the Daily Nation Newspaper to the effect that the Claimant

was not authorised to transact any business on behalf of the Respondent or its Associated Companies.

6. On 19th September 2010 as his suspension period was drawing to a close, the Claimant wrote to the Respondent seeking direction on the status of his employment. The Claimant also asked to be paid his salary for the month of August 2010 and reimbursement of his entertainment expenses for the month of July 2010.

7. By letter dated 14th September 2010, which was delivered to the Claimant's residence on 22nd September 2010, the Respondent gave the Claimant 14 days to show cause why disciplinary action should not be taken against him. The letter also summoned the Claimant to a disciplinary hearing at the Respondent's offices on 29th October 2010.

8. On 28th September 2010, the Claimant through his Advocates wrote to the Respondent asking to be supplied with the charges leveled against him and details of the composition of the Disciplinary Panel. The Claimant also asked to be allowed legal representation at the disciplinary hearing.

9. By letter dated 26th October 2010, which was delivered at the Claimant's residence on 28th October 2010, the Respondent supplied the Claimant with a list of 9 counts and over 20 sub-counts, being the subject of the disciplinary hearing scheduled for the following day, 29th October 2010. The disciplinary hearing did not proceed on 29th October 2010 due to disagreement on the composition of the Disciplinary Panel, lack of adequate preparation time for the Claimant and the Claimant's demand to be supplied with supporting documents.

10. On 1st November 2010, the Respondent wrote to the Claimant rescheduling the disciplinary hearing to 8th November 2010 at 2.30 pm at the Respondent's offices. By this letter, the Respondent notified the Claimant that the documents he had requested for would be available for the Claimant's reference at the Board Chairman's office on 3rd November 2010 between 8.00 am and 5.00pm.

11. The Claimant then wrote to the Respondent on 4th November 2010 asking to be supplied with certified copies of the following documents:

- a) Human Resource Manual;
- b) Standard Operation Procedures;
- c) Departmental and Branch Mandates for the Years 2008 and 2009;
- d) Strategic Plan as revised in 2009;
- e) Job Evaluation for the Year 2008;
- f) Approved Budgets for the Years 2008, 2009 and 2010;
- g) Management Accounts as at July 2010;
- h) Audited Accounts for the Years 2007, 2008, 2009 and
- i) Forensic Audit Report by Kimani Kerrets & Co duly signed and sealed.

12. The Claimant took issue with the Respondent's instruction that the Claimant could only peruse the documents at the office of the Respondent's Chairman given his experience the last time he had been to this office where he was arrested.

13. It would appear that the Disciplinary Panel met in the absence of the Claimant and on 11th November 2010, the Respondent wrote to the Claimant notifying him that the Disciplinary Panel had recommended that he be summarily dismissed. The Respondent gave the Claimant seven (7) days within which to contest this decision.

14. On 16th November 2010, the Claimant lodged an appeal against his dismissal citing *inter alia* the Respondent's failure to supply him with the documents he had asked for vide his letter dated 4th November 2010. The Claimant's appeal was declined by letter dated 22nd November 2010 and his dismissal upheld.

15. The Claimant contended that the Respondent's failure to supply him with the supporting documents requested for in his letter dated 4th November 2010 constructively prevented him from preparing his defence during the disciplinary hearing. This, according to the Claimant, was in contravention of the Respondent's Human Resource Policy Manual, 2010.

The Claimant claims the following:

- a) Kshs. 419,659 being the value of the remaining term of the Claimant's contract of employment (23rd November -31st December 2010);
- b) Kshs. 1,236,890 being unpaid salary from August 2010 to the date of summary dismissal (22nd November 2010);
- c) Kshs. 17,000 being refund of entertainment expenses incurred in the course of duty in July 2010;
- d) Kshs. 552,183.33 being pay in lieu of 50 days' leave;
- e) Kshs. 117,936 being leave allowance for 16 days leave taken in August 2010;
- f) Kshs. 2,385,432 being 3 years' gratuity (1st January 2008 to 31st December 2010) at 20% of payroll salary;
- g) General damages for breach of contract;
- h) General damages for mental suffering and anguish;
- i) General damages for loss of career and expected earnings and
- j) Any other relief the Court may deem just to grant.

16. In the Claimant's written submissions filed on 13th August 2013, the following additional claims were made:

- a) Kshs. 993,000 being 3 months' salary in lieu of notice;
- b) Kshs. 3,975,720 being 12 months' salary in compensation for unfair termination.

The Respondent's Case

17. In its Statement of Response and Counterclaim the Respondent stated that there was a pending criminal case in which the Claimant was charged with two counts of stealing by an officer of a company contrary to Section 282 of the Penal Code. The Respondent further

stated that the termination of the Claimant's employment was fair and justifiable on grounds of gross misconduct and negligence of duty. In particular, the Claimant had approved an irregular cash payment of Kshs. 5 Million from a client's account which was not properly accounted for.

18. The Respondent also took issue with letter dated 17th February 2010 vide which the Claimant had awarded himself a salary increment. Further, the Respondent stated that the Claimant had made irregular contact with the Kenya Ports Authority and Lake Victoria North Water Services in respect of consultancy services tenders for which the Respondent had bid. In addition, it was the Respondent's contention that the Claimant had misled the Board of Directors during its meeting held on 24th June 2010 with regard to the nature of an agreement involving Southend Plaza Limited and Southend Motors Limited.

19. With regard to the issue of the Claimant's directorship in Regent Management Limited and its Associated Companies, the Respondent stated that this was within the scope of the Claimant's employment.

20. According to the Respondent, the Claimant was suspended on 17th August 2010 to allow for investigations into alleged loss of company assets and financial anomalies which implicated the Claimant. The Respondent pleaded that the public notice published in the Daily Nation Newspaper of 3rd September 2010 was a necessary notification that the Claimant was not authorised to transact any business on behalf of the Respondent and its Associated Companies. The Respondent stated that it had undertaken to pay the Claimant's final dues once the criminal case facing the Claimant was concluded.

21. It was the Respondent's case that the audit investigation conducted by Kimani Kerrets & Co., Certified Public Accountants had concluded that the Claimant was responsible for the loss of Kshs. 5,000,000 as well as over claimed entertainment allowance to the tune of Kshs. 340,397.80 . This, coupled with the Claimant's irregular contact with the Kenya Ports Authority and Lake Victoria North Water Services Board on bids placed by the Respondent as well as the contract involving Southend Plaza Limited and Southend Motors Limited, constituted gross misconduct on the part of the Claimant, rendering him liable to summary dismissal.

22. By way of Counterclaim, the Respondent claims the sum of Kshs. 5,000,000 being money lost by the Respondent between January 2008 and 31st July

2010, through the negligent acts of the Claimant. The Respondent further

claims the sum of Kshs.340,397.80 being excessive and unauthorised entertainment allowance drawn by the Claimant for period between January 2008 and 31st July 2010.

23. The Respondent further claims Kshs. 12,473 being outstanding balance on insurance premium for the Claimant's motor vehicle registration number KAZ 234Z and Kshs. 117,867 being insurance premium for the Claimant's motor vehicle registration number KBJ 961H.

24. Additionally, the Respondent claims Kshs. 2,000 being petty cash unaccounted for by the Claimant. Finally, the Respondent claims Kshs. 4,824,000 representing loss of business from the National Hospital Insurance Fund (NHIF) occasioned by the negligent acts of the Claimant.

Findings and Determination

25. The main issue for determination in this case is whether the termination of the Claimant's employment by way of summary dismissal was justifiable within the law and

the terms and conditions of employment attaching to the Claimant. At the time of dismissal, the Claimant was on a three (3) year contract running from 1st January 2008 and terminating on 31st December 2010. Both parties submitted that this was a fixed term contract. However, since the contract carried an option for renewal, I find that it was a term contract with renewal and termination provisions, which would operate subject to the law.

26. In determining whether a termination of employment is justifiable, the Court is called upon to inquire into both the reason(s) for the termination and the procedure adopted in effecting the termination.

Section 43(1) of the Employment Act, 2007 provides that:

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

27. Section 45 (2) of the Act goes on to provide that:

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employees conduct, capacity or compatibility; or

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

that

(c) That the employment was terminated in accordance with fair

procedure.

28. Section 41 of the Act sets out the conditions precedent to termination of employment on grounds of misconduct (including gross misconduct) poor performance or physical incapacity. In the case of ***Alphonse Machanga Mwachanya Vs Operation 680 Limited [2013] eKLR***, Radido J summarised the legal fairness requirements set out in Section 41 of the Employment Act as follows:

a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;

b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;

c) That the employer has heard and considered any explanations by the employee or their representative;

d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

29. In the Respondent's letter to the Claimant dated 26th October 2010, the Respondent set out nine (9) charges with a number of sub-counts ranging from gross

negligence of duty, flouting standard operating procedures, business sabotage to outright theft. However, from the minutes of the Disciplinary Committee Meeting held on 8th November 2010, there was no evidence that all the charges leveled against the Claimant were addressed.

30. The Forensic Audit Report which was referred to extensively during the trial only addressed the issue of the loss of Kshs. 5 Million from the NHIF Account. Yet, from the proceedings of the Disciplinary Committee meeting held on 8th November 2010, a decision was taken to drop the charge on the loss of Kshs. 5 Million.

31. The Claimant's letter of summary dismissal stated *inter alia*:

“it has been decided by the Board that you be summarily dismissed from employment with immediate effect on grounds of misconduct and negligence of duty among other counts as per the charge sheet sent to you.”

32. Since the Claimant did not defend himself at the Disciplinary Committee level, he sought to answer the charges raised in the charge sheet either in his pleadings or in his testimony. With regard to the letter he had written to himself effecting a salary increment, the Claimant told the Court that as the Secretary to the Board of Directors, he was tasked with implementation of Board decisions and that the salary award was well within his mandate. At any rate, any impropriety on this score was abated upon the Board's approval of the salary increment.

33. In response to the complaint on account of Kenya Ports Authority and the Lake Victoria North Water Services Board, the Claimant maintained that his contact with the two organizations was made in good faith to notify them that he would not be in a position to play the role of Lead Consultant on behalf of the Respondent pursuant to his suspension and the Respondent's public notice that the Claimant was no longer authorised to conduct any business on its behalf.

34. With respect to the agreement involving Southend Plaza Limited and Southend Motors Limited, the Claimant stated that the Respondent's Board had given broad policy approval allowing for partnership to develop properties through a unique project management model.

35. With regard to the claim for excess entertainment allowance, the Claimant told the Court that he was paid his entitlement in accordance with his contract of employment and no queries thereon were raised in the 2008 and 2009 audited accounts.

36. In reply to the Respondent's counterclaim for loss of business from NHIF, the Claimant stated that the property management contract between the Respondent and NHIF had expired before this cause of action arose.

37. From the evidence on record, the prime mover of the termination of the Claimant's employment seems to be the loss of Kshs. 5 Million from the NHIF Account for which the Respondent blamed the Claimant. On his part, the Claimant stated that no gross misconduct and negligence was proved against him and that he was not in any way responsible for the alleged loss of Kshs. 5 Million by the Respondent.

38. It was the Claimant's case that he procedurally approved the payments in issue in exercise of his duties as the Respondent's Chief Executive Officer, after receiving requests from the Respondent's authorised officers. The Claimant denied that his letter dated 1st September 2010 addressed to the Chairman of Sovereign Group amounted to an admission of liability for the alleged loss of funds.

39. From the Forensic Audit, a trail of how these funds left the Respondent's accounts was established and the staff involved in handling the funds were identified as Nicholas Mulwa, the cashier who cashed the cheques and Vincent Ombati who received the cash. There was no evidence either from the Forensic Audit or the Respondent's witnesses that the Claimant ever handled the cash in issue.

40. The accusation against the Claimant was that he approved cash payments in contravention of the Respondent's financial policies and standard operating procedures. These documents were however not availed to the Court and in the course of the trial, it emerged that cash payments were not unusual within the Respondent's operations. This position was confirmed by the Forensic Audit report.

41. During the trial, the Respondent's witnesses sought to create the impression that the Accountants working for the Respondent had no room to decline any payment no matter how irregular. If this was indeed the position, then there were serious systemic corporate governance issues within the operations of the Respondent that could only be assigned to the Board acting in concert.

42. An employer can only demand best practice performance from an employee if the employer has embraced the same standard at the corporate level. It was not lost on the Court that the Forensic Audit report raised issues of incompetence among staff working in the Respondent's Finance Department. In my considered view, this incompetence was not assignable totally to the Claimant who himself was not trained in finance and accounting.

43. On the question of the supervision of the Chief Accountant, the Court formed the opinion that while he would report to the Chief Executive Officer on day to day basis, he would professionally be answerable to some other person either at the Board level or within the Sovereign Group of Companies.

44. For the foregoing reasons, I find that the Respondent failed to establish a valid reason for the termination of the Claimant's employment by way of summary dismissal.

45. I will now examine the procedure adopted by the Respondent in effecting the termination. The Claimant was suspended on 17th August 2010 for a period of 30 days and on 3rd September 2010, while the Claimant was still on suspension, the Respondent published a public notice in the Daily Nation Newspaper to the effect that the Claimant was not authorised to transact any business on behalf of the Respondent and its Associated Companies.

46. The Claimant told the Court that he was unable to fully respond to the counts and sub-counts leveled against him since he had not been supplied with copies of relevant documents he had asked for. The Respondent suspended the Claimant without pay on 17th August 2010 and immediately lodged a criminal complaint against him and then commissioned a forensic audit on 30th August 2010. It seems to me that the handling of the Claimant's case by the Respondent at this stage created an unnecessary overload on the Claimant which militated against a fair hearing.

47. It was the Claimant's case that the public notice published by the Respondent was aimed at portraying him in bad light and damaging his reputation. The Respondent took the view that this Court has no jurisdiction to inquire whether the said public notice was injurious to the Claimant's reputation. The Respondent further stated that the notice did not infer or portray the Claimant as a criminal as alleged nor did it carry any false imputation against the Claimant's reputation.

48. The jurisdiction of the Industrial Court, which is donated by Section 12(1) of the Industrial Court Act covers all manner of disputes emanating from an employment

relationship. In my view, this would include inquiring into any allegations of defamation arising from the employment relationship. In this case however, the Claimant did not plead any particulars of defamation and the Court did not therefore pursue that line.

49. Nevertheless, the timing of the public notice is instructive as it was made during the currency of the Claimant's suspension. The letter of suspension required the Claimant to keep off all the offices of the Company and any dealings with the Company's clients. Since there was no evidence that the Claimant had breached any of these conditions, the Court found the public notice to have been unwarranted and in bad faith.

48. The Claimant himself wrote to the Kenya Ports Authority and Lake Victoria North Water Services on 6th September 2010 withdrawing his participation as a Lead Consultant in respect of consultancies for which the Respondent had bid. The Respondent took issue with this communication and the Claimant responded that it was a necessary professional safeguard. The Court found the Claimant's response reasonable in this regard.

50. From the minutes of the Disciplinary Committee meeting held on 8th November 2010, it appears that there was no concurrence on the mode of effecting the Claimant's separation from the Respondent's employment as between termination and summary dismissal. It is however not in dispute that the Claimant was finally summarily dismissed. Further, although the Disciplinary Committee recommended payment of prorata gratuity to the Claimant, the Respondent elected not to make any payment to the Claimant ostensibly because there was a criminal case pending against the Claimant.

51. The Claimant stayed on suspension without pay until 22nd November 2010 when he was summarily dismissed. The Court noted that by the time the Disciplinary Committee met to consider the Claimant's case on 8th November 2010, the initial suspension period had lapsed and had not been extended. The Disciplinary Committee therefore sought to extend and backdate the suspension on the date the decision to summarily dismiss the Claimant was taken.

52. Although the status of the Respondent's Human Resource Policy Manual (whether draft or approved) was in contention, it was not in doubt that there was some form of a Human Resource Policy Manual within the Respondent Company.

53. Clause 6.26 of the Manual provides that:

“Suspension is not a disciplinary act and does not fall within the stages of the disciplinary procedure. Nor does suspension imply that any misconduct has taken place. It is a neutral act enabling the individual to be released from his/her place of work while receiving full pay, pending an investigation of the allegations made.”

54. In this respect, the Respondent's Human Resource Policy Manual captures the position on suspension accurately. An employee on suspension remains innocent until proved otherwise. In addition, such an employee has a legitimate expectation that they will at the very least be given an opportunity to respond to any adverse findings arising out of the investigation.

55. Nevertheless and in spite of the provisions of the Respondent's Human Resource Policy Manual and the Claimant's contract of employment, the Respondent kept the Claimant on suspension without pay for over three (3) months because there was a criminal case pending against the Claimant.

56. In the case of ***Hezekiel Oira Vs Kenya Broadcasting Corporation & Another [2013] eKLR*** this Court held that the sequencing of internal disciplinary proceedings before

conclusion of criminal proceedings facing the Claimant did not of itself invalidate the disciplinary proceedings.

57. It follows therefore that just like an employer is not required to await the outcome of a criminal trial before taking disciplinary action against an employee, the employee's rights cannot be held in abeyance pending the outcome of a criminal trial. An employer who initiates disciplinary action against an employee cannot be allowed to abdicate its responsibility to complete the disciplinary process because of the pendency of criminal proceedings.

58. I therefore find that the Respondent's action in withholding the Claimant's salary pending the outcome of the criminal case, which was contrary to an express provision in the Claimant's employment contract, was unjustifiable and had the effect of tainting the entire disciplinary process.

59. In taking its decision on the Claimant's employment, the Respondent relied heavily on the forensic audit report yet as confirmed by Nimrod Kipyego Kurgat, a partner at Kimani Kerrets & Co who conducted the audit, the Claimant was not interviewed. The logical conclusion is that the Claimant had

no opportunity to respond to any adverse findings arising out of the Forensic Audit.

60. Overall I find the termination of the Claimant's employment by way of summary dismissal to have been unfair within the meaning of Section 45 of the Employment Act and award him 12 months' salary in compensation. To grant the claim for the value of the remaining term of the Claimant's contract of employment would amount to an order for specific performance, a relief granted in very exceptional circumstances, which have not been made out in this case. This claim therefore fails and is dismissed.

61. Having established that the Claimant's summary dismissal was not justifiable, I award him three (3) month's salary in lieu of notice. The claim for unpaid salary from August 2010 to the date of summary dismissal also succeeds and is allowed. The Respondent did not provide any leave records as required under Sections 10 and 74 of the Employment Act, 2007 to disprove the Claimant's claim for leave. I therefore invoke Section 10(7) of the Act and allow the Claimant's claim for pay in lieu of 50 days' leave.

62. The Disciplinary Committee recommended payment of prorata gratuity to the Claimant and the Respondent did not advance any reason for withholding the Claimant's gratuity. The claim for gratuity therefore succeeds and is allowed. The claims for refund of entertainment expenses, leave allowance and general damages for breach of contract, mental suffering and anguish and loss of career and expected earnings were not proved and are dismissed.

63. Save for gratuity which is expressly pegged on the Claimant's basic salary, the rest of the Award will be based on the Claimant's gross salary as at the time he

left the Respondent's employment.

64. The Court therefore makes an Award in favour of the Claimant's as follows:

a) 12 months' salary in compensation for unfair termination.....
Kshs. 3,975,720

b) 3 months' salary in lieu of notice..... 993,930

c) Salary for August-22nd November 2010(3 months and 22

days).....	1,236,890
d) Pay in lieu of 50 days' leave.....	552,183
e) Prorata gratuity at 20% of basic salary (35 months).....	<u>1,375,920</u>
Total.....	<u>Kshs.8,134,643</u>

The Respondent's Counterclaim

65. I will now address the Respondent's counterclaim. In view of the findings of the Court on the culpability of the Claimant with regard to the loss of Kshs. 5 Million from the NHIF Account, the Respondent's counterclaim for the sum of Kshs. 5,000,000 being money lost by the Respondent and Kshs. 4,824,000 representing loss of business from NHIF fails and is dismissed. The counterclaims for the sum of Kshs. 340,397.80 being excessive and unauthorised entertainment allowance drawn by the Claimant and Kshs. 2,000 being petty cash unaccounted for were not proved and therefore fail.

66. The counter claims for Kshs. 12,473 being outstanding balance on insurance premium for the Claimant's motor vehicle registration number KAZ 234Z and Kshs. 117,867 being insurance premium for the Claimant's motor vehicle registration number KBJ 961H were proved and are recoverable from the Claimant's Award.

67. I award the costs of this case to the Claimant and make no order for interest.

This Award is subject to statutory deductions in accordance with Section 49(2) of the Employment Act, 2007.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF DECEMBER 2013

LINNET NDOLO

JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*