



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 851 of 2009

Dr. Mwangi Ngumo

Claimant

v

Kenya Institute of Management

Respondent

AWARD

Background

1. On 23 December 2009, Dr. Mwangi Ngumo (the Claimant) filed a Memorandum against Kenya Institute of Management (the Respondent) and issue in dispute was stated as the *unlawful and wrongful termination of employment of services* of Dr. Mwangi Ngumo. The Respondent filed its Memorandum of Reply on 4 February 2010.
2. Thereafter the proceedings went on at what I can only describe as a leisurely trot until 28 September 2010 when Justice Chemmutut heard the parties and indicated that he would issue an award on notice. However that was never to be, because some two years later Justice Chemmutut ceased being a Judge of the Industrial Court before he could pronounce the award.
3. On 3 October 2012, both parties' representatives appeared before me and they signalled their agreement to my proceeding to prepare an award based on the pleadings, proceedings taken before Justice Chemmutut and written submissions. The written submissions were filed and highlighted on 23 November 2012 and I reserved the delivery of award to 14 December 2012.

The facts

4. The facts of the case are rather straight forward and mostly not disputed. The Claimant served with the Respondent for about 18 years in various capacities culminating in being the Executive Director.
5. On his retirement from the Respondent, the Respondent through a letter dated 24 March 2009 appointed the Claimant to the position of Director, KIM Foundation on a fixed term contract of 2 years on conditions which are stipulated in the Appointment letter. The appointment was stated to be effective from 1 September 2009. The Claimant accepted the appointment on 24 March 2009.
6. On 10 September 2009, barely a week after the appointment took effect, the Respondent's Chairman, Dr. Reuben Mutiso wrote to the Claimant informing him that the appointment was being terminated and that he would be paid three months notice based on his last pay. The letter made reference to mutual agreement to terminate the contract.
7. The Claimant was not amused and on 4 November 2009, it wrote back to the Respondent disputing

mutual agreement to terminate the contract, lamenting that the termination letter though dated 10 September 2009 was only handed over to him on 3 November 2009 and that he had not been paid salary for September and October 2009.

8. As a consequence, the Claimant moved to Court seeking compensation/damages in the sum of Kshs 19,068,231.20 for unlawful, wrongful and unfair termination and unpaid salary for September and October 2009. The compensation/damages, it was submitted was for the 24 months balance or period of the contract.

9. To my mind there are two issues for determination and these are whether the termination of the services of the Claimant was unlawful and wrongful and if the answer is in the affirmative, what would be the appropriate remedy (ies) for a prematurely terminated fixed term contract.

Whether the Claimant's termination was unlawful and wrongful

10. As I have already stated, it is not in dispute that the Respondent entered into a two year fixed term contract with the Claimant and that the said contract was terminated barely two weeks after its commencement through a letter dated 10 September 2009. What is in dispute is when and how the decision to terminate the contract was communicated to the Claimant.

11. According to the termination letter, the termination was by mutual consent and the Claimant was to be paid three months pay in lieu of Notice. The Claimant in his letter dated 4 November 2009 vehemently denied that there was a mutual agreement to terminate the contract. According to him the decision to terminate his services was taken by the Respondent's Special Council meeting of 27 August 2009 at the Laico Regency Hotel and that he was not invited to that meeting. Unfortunately, though the Memorandum of Claim indicated that the minutes of this meeting were annexed, the same were not annexed.

12. Be that as it may, the Respondent did not controvert this assertion by the Claimant and I take it as a fact that the termination of the Claimant was as a result of the Special Council meeting of 27 August 2009 and that the Claimant was not invited to that meeting.

13. Section 41(1) and (2) of the Employment Act, 2007 are quite clear that an employer before terminating the services of an employee or summarily dismissing him/her should grant the employee a hearing and consider any representations which the employee may make. I make note that the requirement to notify and hear the employee under the mentioned section relate to termination or dismissal arising from ***misconduct, poor performance or physical incapacity***. And of course I am alive to the fact that the termination of the Claimant's services was not based on ***misconduct, poor performance or physical incapacity***.

14. Indeed the letter did not explicitly set out the reasons for the dismissal. The reason for the dismissal according to the Respondent was that the proposed KIM Foundation, which the Claimant was appointed as Director was still born and never saw light of day as a juristic or legal person.

15. In my considered view, the requirement to notify and give a hearing to an employee before taking the decision to terminate is so cardinal that it would not serve the interests of justice, equity and fairness to fail to consider it the instant case. In all fairness and justice the Claimant was entitled to a hearing before the decision to terminate his employment was taken and I therefore hold that the termination did not accord with the procedural requirements and was unprocedurally unfair.

16. The letter of termination did not also explicitly set out the substantive reasons for the termination. But in its Memorandum of Reply, the Respondent attempted to lay out the reasons. These reasons included the ground that the contract of employment was void because the KIM Foundation was not in existence; was irregular because it did not accord with the requirements of the Employment Act and that the contract of employment is unenforceable because there is no foundation, board of trustees or management.

17. I will examine each of the reasons given in turn but before doing so, I believe it is in order for me to

make reference to some relevant provisions in the Employment Act. Section 43 of the Employment Act places a legal obligation upon an employer to prove the reason(s) for termination of an employment contract and on failing to so prove the termination would be deemed unfair within the meaning of section 45 of the Employment Act. Section 45 on its part requires an employer to prove that the reasons for the termination are valid and fair and are based on the employee's *conduct, capacity or compatibility or on the employers operational requirements* and lastly that *fair procedure was followed*.

Was (is) the contract of employment dated 24 March 2009 void?

18.The Respondent pleaded and submitted that the contract under which the Claimant was appointed as Director of KIM Foundation was (is) void because the KIM Foundation never existed and that the Respondents Chairman lacked the capacity to sign the contract.

19.It is trite law of contract that an entity not in existence cannot enter into contracts or legally enforceable contracts.

20.But in the instance case, this argument cannot hold water. The contract of 24 March 2009 in which the Claimant was appointed as Director of KIM Foundation was entered into between Kenya Institute of Management (the Respondent) and Mwangi Ngumo (the Claimant).It has not been suggested that either the Respondent or Claimant lacked the legal capacity to enter into the contract.

21.Indeed, it is KIM Foundation which lacked the capacity to enter into any legally enforceable contract because at the material time it was not a legal/juristic person.

22.The contract itself, it appears was drawn by the Respondent. And if it was not drawn by the Respondent it has not been shown or argued that the Respondent entered into it under duress or coercion. I do agree with the Claimant that any ambiguities in the contract should be construed against the party who drew the contract and that party is the Respondent. This is what has been referred to as the ***contra proferentem rule*** and which was applied in the case of *Horne Coupar v Velletta & Co.* 2010 BCSC 483, relied on by the Claimant.

23.Similarly the contract placed upon the Claimant four core responsibilities and these were to ensure:

5.1.1 *the International Centre for Leadership and Development (ICLAD)*

5.1.2 *the Centre for policy analysis and Research (CePAR);*

were in operation;

5.1.3 *spearhead efforts for drafting and consensus-building of the proposed Managers Bill in readiness for tabling in the 10th parliament, and*

5.1.4 *To establish and become the founding Director of the KIM Foundation*

24.The responsibility to establish and become the founding Director of KIM Foundation was just one out of four core responsibilities placed upon the Claimant and even if I were to accept the argument of the Respondent that the Foundation was not in existence, the question would still remain whether the three other duties which had been put on the shoulders of the Claimant could not be performed and were frustrated as well.

25.The Respondent further submitted that the contract was void because there was no consideration since it did not set out the salary and benefits due to the Claimant. However, Clause 7 of the Letter of Appointment specifies that the salary and benefits of the Claimant would remain as then approved. The effect of the Clause is clear that the Claimant would move with his salary and benefits as Executive Director of the Respondent to his new appointment. At the time of signing of this new contract, the Claimant was still in the employment of the Respondent and his retirement was only approved by the

Respondent's Council meeting of 8 May 2009 and the Respondent cannot be heard to argue that the Claimant had retired effective 31 December 2008.

26. I do reject the contention of the Respondent that the contract was void. Even if one of the four responsibilities of the Claimant was legally frustrated by the still birth of the Foundation, though the Respondent was not ready to use the term frustration, three other duties remained which the Claimant could have carried out. The Respondent did not argue that the four responsibilities were all inclusive and if and how they were linked to the establishment of the Foundation.

Was (is) the contract of 24 March 2009 irregular

27. I must confess that I found this submission by the Respondent odd. Section 9(2) of the Employment Act has placed an obligation upon an employer to draw up a written contract of service. I assume the Respondent did draw up the contract in the instant case. It now seeks to run away from the contract on the basis that it was not done in compliance with the requirements of the Employment Act. In fact, the Respondent has not been candid enough to specify the provisions of the Employment Act which were not complied with when it drew the contract or give particulars of form which it argues makes it irregular. The Respondent did not bother to produce the minutes in which the decision was taken to terminate the contract on the basis that it was irregular. I cannot allow the Respondent to blow cold and hot at the same time. It would be inequitable.

28. I thus reject this ground as a valid reason for the termination of the contract.

Whether the contract is unenforceable

29. The answer to the question of the enforceability does not require any Herculean wisdom. The parties to the contract were Dr. Mwangi Ngumo and the Kenya Institute of Management. The Respondent has not placed any material before me to establish that any or either of the contracting parties was suffering under any legal, mental or physical incapacity to render the contract unenforceable. One of the four objects in respect of which the contract was entered into may have been frustrated but that does not make the contract unenforceable. The frustrated or failed object could have been easily severed from the good objects, if at all it was necessary.

30. In the end result I also do find that the Respondent has failed to prove that the grounds it pleaded and submitted as the reasons for termination were valid or fair and therefore the termination of the contract was substantively unfair. It is incumbent upon me to discuss the appropriate remedy (ies) based on my findings.

Appropriate remedy (ies) for prematurely terminated fixed term contract

31. In its submissions, the Respondent argued that the Claimant was entitled to only 3 months salary in lieu of Notice and that he was paid this sum and nothing more. The Respondent relied on the Court of Appeal decision in *Kenya Revenue Authority v Menginya Salim Murgani, Nairobi Civil Appeal No. 108 of 2010*. The Murgani decision should be understood within its peculiar context and I have had occasion previously to discuss it and the and some of questions it dealt with.

32. Towards this end, I believe it is in order for me to quote what I stated in my decision in Nairobi **Industrial Cause No.697 of 2009, Gilbert Nyabuto Mosome v Standard Ltd** that:

A good start would be the decision of the Court of Appeal in *Nakuru Civil Appeal No.27 of 1992, Rift Valley Textiles Limited v Edward Onyango Oganda*, where the Court held that:

But the appellant appeals to this court because having found and held that the summary dismissal was unlawful, the learned Judge proceeded to award to the respondent twelve months gross salary as general damages and despite the respondent's repeated admission that he had been paid for the three months salary in lieu of notice. Was the Judge entitled in law to do this?.....

With respect to the learned judge, *the rules of natural justice have no application to a simple contract of employment unless the parties themselves have specifically provided in their contract that such rules shall apply. Where a notice period is provided in the contract of employment as was the case here, then an employer need not assign any reason for giving the notice to terminate the contract and if the employer is not obliged to assign a reason, the question of offering to the employee a chance to be heard before giving the notice does not and cannot arise.....as we have said, unless there be a specific provision for the application of the rules of natural justice to a simple contract of employment, those rules are irrelevant and cannot found a cause of action'*(emphasis mine)

A second case which affirmed the jurisprudence in the *Oganda* case is Court of Appeal *Nairobi Civil Appeal No. 108 of 2010, Kenya Revenue Authority v Mengina Salim Murgani*, where it was held that:

'it is for the parties to provide in the contract how such organs should operate and how hearings, if any, are to be conducted. A court of law cannot in our view, import into a written contract of service rules of natural justice and the Constitutional provisions relating to the right of hearing'.

In my considered view the *Oganda* decision was sound jurisprudence during the life of the Employment Act, Cap 226 which was repealed by the Employment Act, 2007 and which commenced on 2 June 2008 and that the decision in the *Murgani* case on the right to hearing before termination was made *per incuriam*.

I say so because it appears that the Court of Appeal did not consider the relevant provisions of the Employment Act, 2007. I am not sure if the attention of the Court was drawn to the Act. The purpose of this Act was to repeal the Employment Act, declare and define the fundamental rights of employees, provide basic conditions of employment amongst others.

The Employment Act, 2007 has radically changed and transformed the relationship between employees and employers in Kenya. It lays the irreducible minimums. One of the irreducible minimums is in section 35 on termination notice. As it were, many contracts of employment have various provisions on how the contracts can be terminated. But the Employment Act has now provided the irreducible minimums in three types of situations. If wages are paid daily, then the contract can be terminated at the close of any day without notice; if the contract is one in which wages are paid at intervals of less than a month, it can be terminated at the end of the period next following the giving of notice in writing and lastly if the contract provides for the payment of wages at periodic intervals of or exceeding a month, then at least 28 days notice must be given or payment thereof in lieu of notice.

33. The only view I can add to the above is that the legal position that the amount of damages awardable was equivalent to the salary which would have been earned during the notice period holds true under the common law and that the statutory framework created by section 49 of the Employment Act, 2007 is now that the Industrial Court is empowered to award damages up to the equivalent of a maximum of twelve months gross salary beside the notice pay. The Respondent therefore is not on sound legal footing to argue that provided the employee is paid the salary in lieu of notice then that is the end of the matter.

Damages equivalent to total salary for remainder of the term of the fixed term contract

34. The Claimant sought damages equal to the total salary he would have earned for the remainder of the fixed term contract. The Claimant relied for this particular claim on the case of *Gunton v Richmond – upon-Thames London Borough Council* (1981) Ch 448 where it was held that: the damages recoverable having regard to the plaintiff's duty to mitigate his damages, are the moneys needed to compensate the plaintiff for his net loss of salary or wages during the period of which the defendant was bound by his contract to employ the plaintiff. In the case of a fixed term contract, the assessment will extend over that fixed term.

35. But before making my determination on this issue I wish to make reference to the holding of the Court of Appeal in the *Oganda* case (supra), where the Court was confronted by a claim for general damages for loss of employment and retirement benefits from date of judgment to attainment of appellant's 60th

birthday and aggravated and general damages for breach off contract. The Court stated:

...apart from that, even if the appellant were able to reopen that matter and supposing that he had shown that his dismissal had not been justified, he would not have been able to get any of the prayers for which he prayed in the plaint. Even though the dismissal may be wrongful, it stands and what flows from the breach of the conditions of service, is damages according to the terms of contract. Those damages would not have been aggravated damages and would not have given him benefits up to his 60th birthday.....the position in the present appeal is exactly the same with that dealt with in the KABUTE case.....and that the learned judge was accordingly wrong in awarding to him his gross salary for twelve months....

36.From the above two authorities it is apparent that the two Court were not drawing water from the same fountain though the principles of common law and breach of contract were at play.

37. But as I stated in the Mosome case (quoted above), the Employment Act, 2007 at section 49 has radically transformed the remedies available for wrongful dismissals and unfair termination. Because of this statutory intervention the Court can make an award of up to twelve months gross pay as damages.

38.I must confess that it is not entirely clear to me whether the twelve months gross pay equivalent is applicable only where the cause of action is based on non-compliance with the statutory provisions or in claims under the common law for breach of contract/wrongful dismissal. The lack of clarity is compounded by the fact that the parties despite the clear provisions of rules 4(e) of the Industrial Court (Procedure) Rules 2010 did not set out the principles or policy, convention or law relied. The parties did not address me on this issue and therefore I will not say any more on it.

39.Relying on the foregoing it is my considered view that an award equivalent to twelve months' gross salary of the Claimant would be sufficient and adequate damages. It was not disputed that the Claimant salary was adjusted to Kshs 668,300/- with effect from January 2009 and I therefore assess the damages at Kshs 8,019,600/-.

40.The Claimant also sought his salary for September and October 2009.This claim was hinged on the fact that his letter of termination was delivered to him on 3 November 2009.

41.Section 35 of the Employment Act requires that the termination notice be in writing and I have no hesitation in finding that the Claimant was notified in writing of his termination when the letter was delivered to him on 3 November 2009 and therefore the Respondent is obliged to pay him for the months of September and October 2009.I do assess this sum as Kshs 1,336,600/-.It was not open to the Respondent to retrospectively purport to terminate the services of the Claimant.

Conclusion and Orders

42.In the final analysis the Claimant succeeds in his Claim and he is awarded

(i)	Twelve months' gross pay as damages	Kshs 8,019,600/-
(ii)	Salary for September/October 2009	Kshs 1,336,600/-
	TOTAL	Kshs 9,356,200/-

43.There is no order as to costs.

Dated and signed in Mombasa on this 14th day of December 2012.

Justice Radido Stephen

Judge of the Industrial Court

Delivered in open Court in Nairobi this 14th day of December 2012.

Justice Nzioki wa Makau

Judge of the Industrial Court

Appearances

Mr. Kairaria instructed by Gitonga Kamiti & Kairaria &

Co. Advocates

For Claimant

Mr. Wakahu Mbugua instructed by Wakahu Mbugua

& Co. Advocates

For Respondent