



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. E523 OF 2020

BETWEEN

TIBBS VINCENT ROBERT.....CLAIMANT

VERSUS

SGS KENYA LIMITED.....RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

Arwa & Change, Advocates LLP for the Claimants

Obura & Company, Advocates for the Respondent

JUDGMENT

1. British National, Tibbs Vincent Robert, lodged this Claim against his former Employer, SGS Kenya Limited, on 11th September 2020.
2. The Respondent was involved in Electronic Cargo Tracking System [ECTS] Services, a real time tracking solution for transit cargo.
3. The Claimant was employed by the Respondent as ECTS Regional Manager, on 1st January 2013. He worked for 7 years, until 1st July 2020 when he received a notice of termination from the Respondent. Notice took effect on 30th September 2020.
4. He states, the letter was silent on the reason for termination, which in fact was redundancy. He earned a gross monthly salary of Kshs. 2,196,121 by the time of termination.
5. His prayers against the Respondent are: -
 - a. Declaration that termination is unfair and unlawful.
 - b. Declaration that the letter of termination dated 1st July 2020 is unconstitutional, therefore null and void.
 - c. Award of general damages to the Claimant for violation of his constitutional right not to be discriminated against as set out in Article 27 [5] of the Constitution of Kenya and the right to fair labour practices as set out in Article 41 of the Constitution of Kenya.
 - d. 12 months' salary in compensation for unfair termination at Kshs. 26,353,459.
 - e. Severance pay at the rate of 15 days' salary for each complete years of service at Kshs. 7,686,425.

- f. Annual leave at Kshs. 838, 010.
- g. Certificate of Service to issue.
- h. Any other suitable order.
- i. Interest from the date of termination.
- j. Costs of the Claim.

6. The Respondent's Statement of Response is dated 9th October 2020. It is conceded that the Claimant was employed by the Respondent on the date and position pleaded in his Claim. He was employed as an expatriate, with markedly different terms, from those of the locals. His position was not declared redundant. Redundancy is a creation of the Claimant. The Respondent merely exercised the right to terminate the contract, through notice of 3 months. There was no need to give the Claimant reason. At the time the Claim was filed, Claimant's terminal benefits had not been worked out. It is not therefore true that the Respondent declined or neglected to pay the Claimant terminal benefits. The claim for discrimination is premature, the Claim having been filed prematurely. The Respondent denies that it acted in any breach of the Claimant's statutory and constitutional rights.

7. The Claimant gave evidence and rested his case on 11th March 2021. Respondent's Human Resource Manager, Nelly Wanjiku Indimuli gave evidence on 8th October 2021, closing the hearing. Parties confirmed filing and exchange of their Closing Submissions at the last appearance in Court, on 16th December 2021. Judgment was reserved for 25th March 2022, but is ready for delivery on the date shown at the end of the Judgment.

Claimant's case.

8. The Claimant adopted his Witness Statement and Documents, exhibits 1-15. He explained that the Respondent has its head office in Geneva, Switzerland. There are affiliates, which are independent of the head office. He worked in SGS Nigeria, then SGS Kenya. He came to Kenya in 2012 and was offered the contract in 2013. He was ECTS East African Regional Manager.

9. The applicable law under his contract was the Kenyan law. Business was doing poorly in Kenya. The Respondent decided to transfer its business to a local entity. The Claimant was advised there would be a redundancy process through e-mail. Redundancy Notice is at page 19 of the Claimant's documents, and is dated 3rd June 2020. The Claimant was instructed to inform the other Employees. There were 9 permanent Employees. 8 were offered alternative roles. The Claimant alone, was excluded.

10. He was advised that expatriate policy would apply to him. He did not know what this policy was. He was never shown this expatriate policy. He never was told, why he was excluded. Laws of the host country applied in computation of severance pay. Other 8 Employees were given alternative positions within the Respondent. The Claimant was issued a letter from the head office and told to sign. No reason was given to justify termination.

11. He was barred from talking to other Employees or to the contractors of the Respondent. He was asked to forego his severance. Termination was handled poorly. No reason was given.

12. There were other instances of discrimination. The Claimant was made to refund half of his bonus. Expatriates were given allowances to furnish their houses. They were given allowances for their Children's school fees. They were given expatriation allowance at the end of service. The Claimant was denied all these. He was evicted by his landlord, until the Respondent paid arrears of rent on eviction date.

13. On cross-examination, the Claimant told the Court that he was still working at the time he lodged the Claim. He worked up to 30th September 2020. He was paid salary for September 2020. There were no arrears of salary.

14. His gross monthly salary was Kshs. 2,196,121. The net salary was about Kshs. 1.2 million. He was in mid-management, at the level of departmental head. Originally, his role was confined to Kenya. He was promoted to cover Tanzania, operating from Kenya. He accepted the contracts of 2013 and 2017. He would not say that they were negotiated documents. He accepted the terms and conditions therein. The Respondent could terminate by giving 3 months' notice. He was issued 3 months' notice, which he served.

15. He handed over to a different company on behalf of SGS. Correct rules were not followed. Even if he was given notice, the law was not followed. He was treated differently and denied severance. He was not dismissed for gross misconduct. He was referred to expatriate policy. There was no expatriate policy. There was long-term policy, but not expatriate policy. Expatriate policy had been cancelled. The Claimant was not aware that he was the highest earning Employee.

16. He had written e-mail saying he would prepare list of Employees to be released by the Respondent. These were short-term Employees. They were leaving at the end of their contracts, not leaving on redundancy.

17. The Claimant was issued a letter on his exit, to sign and return to the Respondent. He declined because the proposals were not acceptable to him. His contract had a secrecy clause. He asked for clarification on the proposals made by the Respondent. There was no clarification.

18. It is not entirely true that the Claimant's department was verticalized, with decisions of strategic nature coming from Geneva. In operations, he reported to Kenya, while Geneva negotiated deals, and passed on suppliers to the Claimant.

19. The Claimant found out that he had been denied furniture allowance, when he was leaving. Those who had been availed this allowance were asked to hand over furniture at the end of their service. The Claimant did not have documents to support furniture allowance.
20. He was asked to refund part-bonus because it was alleged he was paid wrongly.
21. He is married to a Kenyan Lady. He has a Stepchild, who he has not legally adopted. He did not have a guardianship order over the Child. He did not have an order for custody. He wanted the Respondent to cater for the Child's school fees. The Claimant stated that the Child was his family member, and a dependent. The Claimant explained that it would be rash of him to adopt a Child, in order to get a small allowance. He was asked to choose a service provider to repatriate his goods. He did not choose one.
22. The house lease was between the Respondent and the landlord. The Claimant was not evicted. He explained that the Respondent would pay the rent in arrears. The landlord did not distress for rent. He was aware that the Respondent had deposited rent of 2 months. Monthly rent was Kshs. 185,000 or thereabouts. He was harassed, with the landlord threatening to evict him.
23. Redirected, the Claimant told the Court that his contract had a secrecy clause. His department was being shut down, and there would be no need for a secrecy clause. His last contract did not mention expatriate policy. No such policy was exhibited before the Court. There were Employees with furniture benefit. Clause 10 on termination did not apply to redundancy.

Respondent's case.

24. Nelly Wanjiku Indimuli has worked for the Respondent since April 2017, in the position of Human Resource Manager. She told the Court she is familiar with the Claimant, and the Claim lodged in Court by the Claimant.
25. She confirmed that the Claimant was employed by the Respondent as pleaded in the Statement of Claim. She adopted as her evidence-in-chief, her Witness Statement and documents filed by the Respondent.
26. There were several discussions between the Parties, before termination. The Claimant stated he had received information about reorganization. He asked to be issued 3 months' notice of termination. Notice issued based on the Claimant's request.
27. He made request through phone calls and in writing. He wrote email asking when redundancy would be confirmed, stressing that he was entitled to 3 months' notice. He did not have notice at the time. Request came from the Claimant.
28. The letter of termination refers to discussions between the Parties. The Claimant asked for notice and relocation allowance. The Respondent does not declare redundancies without discussions. The Claimant did not leave on redundancy.
29. He filed the Claim while still in employment. He served notice period of 3 months. He asked for both notice and redundancy package. The Respondent wrote to him, explaining the difference. He was a Regional Manager, and in the driver's seat. The Respondent could not just declare his position redundant.
30. ECTS was in the process of closure. It had not closed. Some Employees were released. The process was in phases. Fresh roles were being created. The Claimant was needed until the end of the project. The Respondent still has regulator engagement, and equipment that needs to be moved. The Claimant was issued notice because of his insistence.
31. He was asked to refund half-bonus which had been paid by error. Refund was for expatriates who had been over-paid. There was no discrimination. The Claimant did not complain at the point of refund.
32. There was no discrimination with regard to housing. Employees were given the option of furnished or un-furnished accommodation. Indimuli was not aware of the choice made by the Claimant.
33. The school fees allowance depended on the parentage of the Child. The Respondent needed birth certificate or adoption papers. He did not present any of these. He would have received this benefit, if he presented the documents.
34. He was not evicted from his house. Tenancy agreement was between the Respondent and the landlord.
35. The Respondent was to cater for the cost of repatriation. The contract provided for this. He was given 3 service providers by the Respondent to choose from. He did not make his choice.
36. Verticalized reporting meant that the business was run from Geneva, but the local office assisted. Everything in the Region was handled from here. The Claimant's contract was regulated from both ends- Geneva and Nairobi. The Respondent offered to pay the Claimant all his terminal dues, but unfortunately, he did not sign and return the acceptance letter. The Respondent has not withheld his dues. Certificate of Service has been supplied to the Claimant.
37. Indimuli told the Court on cross-examination that she has practiced human resource management for 18 years. She had worked for the Respondent for 4 years and 8 months.
38. The contract had a clause on termination. The clause cannot be invoked without reason. There must be a reason.
39. Paragraph 8 of the Statement of Response, states that the Respondent was not required to give reason.

40. The Claimant requested to be exited. He requested for termination. This is not captured in the Statements of Response and Witness, filed by the Respondent.

41. At page 43-44 of the Claimant's documents is a list of Employees contained in an e-mail from the Claimant to the Respondent. These were Employees to exit on redundancy. The list includes the Claimant. Indimuli explained there were permanent and contracted Employees. The Claimant was permanent. At the end of the project, they would be released. Others would be redeployed. A third category would remain for purposes of winding up the project.

42. At page 135 of the Claimant's documents, is a tabulation of exit packages prepared by Indimuli with respect to the terminal / redundancy benefits payable. The Claimant was included, with comments by Indimuli made, indicating that expatriate policy would apply to him. The matter was still under discussion and notice had not issued. Expatriate policy is the same as International Assignment Policy, exhibited by the Claimant.

43. The Policy provided for severance pay. Severance depended on the contract and the law of the host country. The Claimant asked when redundancy would become effective. He was not requesting to leave. ECTS was shutting down. Indimuli did not agree that all Employees would exit. The Respondent followed redundancy procedure, for others whose jobs ended. Redundancy benefits were paid. She maintained however, that termination with regard to the Claimant's contract, was because he asked for it. It is not correct that the Claimant was discriminated. He was offered expatriation services. It is true that some Employees received furniture allowance. He was to make an option. He opted for unfurnished accommodation. The Claimant was entitled to school fees for his Children. The Respondent issued the Claimant a letter, barring him from contacting various persons. Indimuli did not know if these persons included supermarkets. The letter was not in violation of the Claimant's freedom of association.

44. Redirected, Indimuli told the Court that the Respondent looked at various scenarios, before issuing letter of termination. Not all Employees left on redundancy. There were Employees on fixed-term contracts which had matured. Others were redeployed, while another group was to remain behind and oversee remainder of the project.

45. The issues as understood by the Court are: -

- Whether the Claimant was subjected to discrimination.
- Whether termination was procedurally and substantively fair.
- Whether the Claimant merits the remedies sought.

The Court Finds: -

46. There are facts which are not contested. They include that, the Claimant was employed by the Respondent, as ECTS Regional Manager; he executed his first contract on 1st January 2013, and the second one on 6th June 2017; the contracts were subject to the laws of Kenya; his last gross monthly salary was Kshs. 2,196,121; the Respondent issued the Claimant notice of 3 months, to expire on 30th September 2020; the Claimant served the notice period; and left employment at the end of the notice.

47. It is also observed that the Respondent did not give the Claimant a reason or reasons justifying termination. In its Pleadings, paragraph 8 of the Statement of Response, the Respondent states, there was no need to give reason or reasons, justifying termination. In her evidence, Respondent's Witness, Indimuli, restated that there was no need to give reason or reasons justifying termination, adding that it was the Claimant who requested for notice of termination.

Discrimination.

48. The Claimant states he was discriminated on various grounds, and seeks general damages under the Constitution. These grounds include the fact that he was not treated equally with the other Employees, whose positions had been earmarked for redundancy. The Court would wish to look at discrimination on redundancy, in the context of redundancy and unfair termination laws, separate from other complaints on discrimination, alleged to have occurred during, and at the end of employment.

49. Furniture allowance is not supported by the 2 contracts executed by the Claimant. The International Long-term Assignment Policy, which was part of the Claimant's contract, similarly has no provision for furniture allowance. Clauses 7.4.6.1 and 7.4.6.2 provide for costs of transportation of a limited amount of personal effects, where the Assignee opted to live in a furnished residence; and cost of shipment of personal belongings and household goods, where the Assignee opted to live in unfurnished residence. Neither the contract nor the policy, provide for furniture allowance. The Claimant has not demonstrated that such allowance was paid to other expatriates.

50. The Claimant resided in a house whose lease agreement, was concluded between the Respondent and the landlord. There is no evidence that the Claimant was evicted, or threatened with eviction by the landlord. The lease agreement was between his Employer and the landlord. There is no evidence that the Respondent declined to pay rent, to arm-twist the Claimant into accepting the terms of termination proposed by the Respondent, and give up on his terminal benefits, rights and freedoms.

51. The secrecy clause was contained in the contract. The Court does not see in what way, it violated the Claimant's constitutional rights. Even though ECTS was shutting down, it was not inconceivable that the Claimant would expose business information to 3rd Parties upon his departure. The Claimant agreed to keep Respondent's business secrets confidential, upon his exit. These post-termination clauses are commonplace, in contracts involving Employees who hold positions of confidentiality. As the ECTS Manager, there is no doubt that the Claimant was privy to business information which required to be protected at all times. The secrecy clause was contractual and did not amount to discrimination.

52. School fees for the Claimant's children was regulated under clause 7.6.6 of the International Long-term Assignment Policy. The clause refers to 'dependent' Children. The Claimant was married to a Kenyan Lady who had a Child, not sired by the Claimant. The Respondent insisted that the Claimant would only access the school fees benefit for his Stepchild, once he availed adoption documents. The Claimant, while assuming parental responsibility, did not wish to adopt. There is no such requirement in the International Long-term Assignment Policy. The High Court of Kenya held in ***NSA & Another v. Cabinet Secretary for Ministry of Interior and Coordination of National Government & Another [2019] e-KLR***, that a Parent's responsibility to their Child is mandatory under the Constitution. The Claimant had parental responsibility in meeting his Stepchild's school fees, and the Respondent ought not to have insisted on production of adoption documents, because the law does not demand for adoption, for parental responsibility to accrue. The current law in Kenya does not make demands such as the Respondent made on the Claimant, and neither does the International Long-term Assignment Policy. The Claimant supplied his marriage certificate and the Stepchild's birth certificate. There was no legal requirement that he adopts the Stepchild, and supplies the Respondent with adoption documents for parental responsibility to accrue. It was unnecessary for the Respondent to refer the Claimant to its Advocate Mr. Obura, as shown on the e-mails exhibited by the Parties, for advice on adoption and fostering of the Claimant's Stepchild. The Child did not have to be adopted or fostered, to become a dependent of the Claimant. The Claimant probably ended up meeting his parental responsibility on payment of school fees, with no chance of reimbursement from the Respondent. He had been informed from Geneva that this benefit would be paid. Other Employees covered under the International Long-term Assignment Policy received school fees benefit. The Claimant and his family were placed at a disadvantage. This was discriminatory and an unfair labour practice.

53. The Court would agree that on this score, the Claimant was discriminated, by being denied a benefit due to him under the Respondent's Policy.

54. There is no evidence that recall of half-bonus paid to the Claimant in error, amounted to discrimination. Refund affected other expatriates. This was a justifiable disgorgement, affecting other expatriates. It was explained that payment of bonuses for expatriates was not a decision made in Nairobi, but in Geneva. The Claimant was given a repayment schedule. Section 19 [1] [e] of the Employment Act, 2007 allows an Employer to deduct from an Employee's wages any amount paid to the Employee in error, in excess of the amount due to the Employee

55. Clause 7.7 of the International Long-term Assignment Policy regulated repatriation. Repatriation costs including costs of shipment/insurance of household goods and cost of travel for the Expatriate and his family would be paid by the Employer. The Claimant alleges he was discriminated against because the Respondent did not pay these costs. On cross-examination however, he conceded that the Respondent asked him to choose from a pool of 3 service-providers, who he wished to repatriate him. He did not. He was not denied the benefit by the Respondent.

56. The Court declares that the Respondent discriminated against the Claimant, by the Respondent placing the school fees benefit, beyond the reach of the Claimant.

57. The claim for damages on discrimination was not presented prematurely. Notice of redundancy issued in June 2020. Denial of the school fees benefit was a continuous violation. The Claimant filed the Claim early, given that he was a foreigner, who was serving the notice period, and was aware that his contract was at an end. There is correspondence between the Respondent and the Claimant's landlord, showing that the Respondent had surrendered the house, in which the Claimant resided. It was known that the Respondent had declined to embrace redundancy process and pay the Claimant redundancy package, instead placing its entire faith in the 3 month-notice of termination issued to the Claimant. There would be no reason, and it would have in fact been unwise, for the Claimant to wait, for his notice to expire, to bring this Claim. He was after all an Employee without permanent residency in Kenya.

58. The Claimant was subjected by the Respondent to conditions which were outside the contract, policy and law, which regulated the Parties. He and his family were deprived the benefit of school fees. The Court would accede to his prayer for damages. An assessment equivalent to his monthly basic salary would suffice. ***The Claimant is granted general damages for discrimination under prayer 4 of the Claim, at Kshs. 1, 200,000.***

Unfair termination.

59. There is unequivocal concession in the Statement of Response, and in the evidence of the Respondent, that the Respondent did not offer any reason or reasons, to justify termination.

60. The Respondent's Witness rightly agreed on cross-examination, that termination clause, could not be invoked without reason. She confirmed that reason or reasons, had to be given.

61. From the outset, the Court is satisfied that termination was not based on valid reason or reasons, under Section 43 and 45 of the Employment Act, and was therefore substantively unfair.

62. From a procedural perspective, it is clear that at heart of termination was a redundancy process. The Respondent opted to divert focus from redundancy, arguing that termination was based on the termination clause, and that the Claimant's position was not declared redundant.

63. There is evidence however that at heart was a redundancy process, and that the Respondent had an obligation, to follow the statutory path, prescribed by Section 40 of the Employment Act.

64. Evidence of redundancy is shown in the computation of redundancy benefits, prepared by Indimuli, exhibited at page 135 of the Claimant's documents. 6 permanent Employees, 3 contracted Employees, and 1 Expatriate, the Claimant herein, were listed as ripe for exit through redundancy. Indimuli computed the Employee's redundancy pay.

65. At page 43 of the Claimant's documents is a list of Employees earmarked for redundancy. The Claimant was on the list. Indimuli

explained that the ECTS project was winding up. It was in the process of closure. The Claimant agreed with Indimuli in his own evidence, explaining that the business was doing poorly in Kenya, and that the Respondent had made a decision to transfer the business to a local entity. There is no shortage of evidence that the Respondent was encountered with a genuine redundancy situation. It should have therefore avoided other justifications, and stuck with the applicable law on redundancy.

66. The Respondent's Witness agreed on cross-examination that the Claimant did not ask to leave employment, but requested to know when redundancy would become effective. It was for the Respondent to give clear advice to the Claimant, on the date when redundancy took effect. The Respondent instead, created unnecessary discourse about the Expatriate Policy, and about the Claimant having demanded for termination.

67. The Respondent appeared to think that by referring the Claimant to Expatriate Policy or the International Long-term Assignment Policy, the Respondent would be freed from the legal burden imposed by the Employment Act, 2007, on redundancy procedure and benefits.

68. The Claimant's contract was subject to the law of Kenya. Section 40 of the Employment Act ought to have been adhered to, full throttle, with regard to the Claimant and others. He was not paid severance package. The Respondent, while advancing the view that it did not intend to declare the Claimant's role redundant, did not offer the Claimant any reassurance that he would be one among the category on Employees who were to remain, for purposes of winding up the project. He was not offered an alternative role regionally or back in Switzerland. The Respondent preferred to place entire faith in the termination clause, closing its eyes to the reality of the redundancy process.

69. It is correct that the Claimant was treated unfairly and contrary to Section 40, 43 and 45 of the Employment Act. He was discriminated against in the process of redundancy, on the ground that he was out of the reach of the Employment Act 2007, and governed by some unclarified Expatriate Policy.

70. The International Long-term Assignment Policy, like the Employment Act, accorded the Claimant severance pay. Clause 7.8.1 states that the laws of the host country will apply, when calculating severance pay.

Remedies.

71. It is declared that the Respondent violated the Claimant's statutory and constitutional rights under Section 5 of the Employment Act, and Articles 27 [5] and 41 of the Constitution of Kenya, on discrimination and fair labour practices.

72. The Claimant is awarded general damages for these violations at Kshs 1,200,000.

73. It is declared that termination was unfair for want of substantive justification and fair procedure.

74. The Claimant had worked for the Respondent from 1st January 2013 to 30th September 2020, when the Respondent terminated his contract. He worked for 7 years, and 8 months. His record was clean. There are no letters of warning. His role had been expanded to include Tanzania. There are no adverse records on performance and discipline. His responsibilities were regional. His docket was specialized. He did not play a part, in the decision to terminate his contract. The contract was term-indefinite and the Claimant expected to go on working, were it not for the decision to by the Respondent, to terminate his contract prematurely. He was paid nothing on termination. The Respondent Witness told the Court that it did not intend to terminate his contract, that his services were still needed in winding up the project. As a Regional Manager, it was open to the Head Office to offer the Claimant alternative role, regionally or at the Head Office. Instead, the Claimant was left to his own devices in foreign territory.

75. He merits and is awarded maximum compensation for unfair termination allowable under the Employment Act, equivalent of his 12 months' gross salary at Kshs. 26,353,452.

76. Severance pay is regulated under Section 40 [1] [f] of the Employment Act. It provides that severance shall be paid at the rate of not less than 15 days' salary for each completed year of service. The Claimant had 7 complete years of service, which based on his monthly salary and a minimum **of 15 days' salary, for 7 years, would result in, and the Claimant is granted severance pay at Kshs. 7,686,423.**

77. The prayer for pending annual leave days, was conceded in the computation of redundancy packages, prepared by Indimuli, at page 135 of the Claimant's bundle, at Kshs. 838,010. **Outstanding annual leave is allowed at Kshs. 838,010.**

78. Certificate of Service has been released to the Claimant.

79. **Costs to the Claimant.**

80. **Interest allowed at court rates, from the date of Judgment, till payment is made in full.**

IN SUM, IT IS ORDERED: -

a. It is declared that the Respondent violated the Claimant's statutory and constitutional rights under Section 5 of the Employment Act, and Articles 27[5] and 41 of the Constitution, on discrimination and fair labour practices.

b. The Claimant is awarded general damages for these violations at Kshs. 1,200,000.

c. It is declared that termination was unfair for want of substantive justification and fair procedure.

d. The Claimant is awarded equivalent of 12 months' salary in compensation for unfair termination at Kshs. 26,353,452.

e. He is allowed the prayer for severance pay at Kshs. 7,686,423.

f. The prayer for annual leave is allowed at Kshs. 838,010.

g. The total monetary claim is allowed at Kshs. 36,077,885.

h. Costs to the Claimant.

i. Interest allowed at court rates, from the date of this Judgment, till payment is made in full.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER THE JUDICIARY AND
MINISTRY OF HEALTH COVID-19 GUIDELINES, THIS 25TH DAY OF FEBRUARY 2022.**

James Rika

Judge