



**Bajaber v Planning Systems Services Limited (Cause E871 of 2021)
[2024] KEELRC 1462 (KLR) (14 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1462 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E871 OF 2021**

J RIKA, J

JUNE 14, 2024

BETWEEN

TAIB ABDULHADI SHEIKHAHMED TAIB BAJABER CLAIMANT

AND

PLANNING SYSTEMS SERVICES LIMITED RESPONDENT

RULING

1. The Respondent filed an Application dated 21st November 2023.
2. The orders sought are that the documents appearing from page 7-13 of the Claimant's documents, marked as exhibit 'TAS 20', be expunged from the record; the Respondent is granted leave to file supplementary documents; and its bundle dated 23rd November 2023 is deemed to be duly filed and served.
3. The Claimant intends to exhibit annual leave records of his former colleagues, Vicky Awiti, David Mugo and Mumo Musava, to support his claim for workplace discrimination.
4. His colleagues have filed Witness Statements and Affidavits, protesting the use of their personal data by the Claimant, in pursuit of his Claim.
5. The Respondent's Application is based on this protest. It submits that this evidence cannot be admitted, because it is in violation of the data subjects' right to privacy and protection of data, under the *Constitution* and the *Data Protection Act* 2019, respectively. The data subjects are not party to the Claim, and have not authorised exhibition by the Claimant, of their private data.
6. Further, it is submitted by the Respondent that production of the documents is in breach of the Claimant's duty of confidentiality, under the Respondent's Code of Conduct, contained in the Staff Handbook. Admission of the documents would violate the Respondent's right to a fair hearing.



7. The supplementary documents proposed to be produced by the Respondent, are its Staff Policy Handbook, and a document comprising bank instructions, showing that the Claimant was paid a sum of Kshs. 150,589 by the Respondent, in settlement of his dues.
8. The Claimant relies on his Replying Affidavit, sworn on 4th December 2023. He submits that the Staff Policy Handbook was available to the Respondent from the outset. There is no reason why it was not filed alongside the other documents by the Respondent. The Claim was scheduled for hearing on 13th October 2023 after being certified ready for hearing. Introduction of the supplementary documents would prejudice the Claimant. The alleged payment of Kshs. 150, 559 by the Respondent to him, was reversed to the Respondent's bank account.
9. On use of the documents belonging to his former colleagues, the Claimant states that the documents are admissible, and the Court is entitled to receive the documents, under Section 107 of the Evidence Act.
10. The documents are important for the Claimant to establish his claim for workplace discrimination.
11. Parties agreed to argue the Application through written submissions, which they confirmed to have filed and exchanged, at the last appearance before the Court, on 9th February 2024.

The Court Finds: -

12. The objection by the Respondent, to production of the annual leave records of the Claimant's former colleagues, Vicky Awiti, David Mugo and Mumo Musava, the data subjects, is not in the view of the Court, well-founded.
13. In claims where an Employee alleges discrimination at the workplace, he is required to give evidence of comparators, to show that he was treated differently from the comparators.
14. Without comparators' evidence, what would discrimination be founded upon?
15. Such evidence would necessarily include the preferential and different treatment, preferential and different terms and conditions of employment, availed to the comparators, viewed against the inferior treatment and/or terms and conditions of employment, imposed on the Claimant by the Respondent.
16. While the Respondent is in the position of a data collector or data processor, other than the duty to protect the data subjects' information, the Respondent as an Employer, has the responsibility under Section 3 [3] of the Employment and Labour Relations Court Act, to assist the Court in furthering the principle objects of the Act.
17. The Data Protection Act 2019, does not prohibit use of comparators' data, for purposes of establishing discrimination at the workplace. The Act seeks to protect such data from being used for purposes that are prejudicial or harmful to the data subjects. The Act recognizes that personal data can be used for legitimate purposes, such as, in the enforcement of the law.
18. The Act requires under Section 25 that data is processed lawfully, fairly and in a transparent manner. Section 26 [a] entitles a data subject to be informed of the use to which their personal data is to be put. The data subjects herein, were no doubt informed by the Respondent that their personnel data is proposed to be used by the Claimant in his evidence before the Court, to establish his prayer for discrimination. They filed Witness Statements and Affidavits, disclosing their knowledge of their data use by the Claimant, in pursuing his claim.



19. The Court does not see how the exhibition of the data subjects' annual leave records, would prejudice their interests. Their security and safety is not prejudiced by the exhibition of their annual leave records, before the Court. This data is merely being supplied to the Court for comparative purposes, which is integral in determining claims for workplace discrimination. It is a legitimate purpose. The Court is legally and constitutionally mandated to enforce the law against workplace discrimination, and grant pecuniary damages in remedy for such discrimination. The specific mandate on discrimination protection is derived from Section 5[1] of the [Employment Act](#) and Article 27 of [Constitution](#).
20. The data sought to be protected appears to the Court, in a form that is incapable of occasioning the data subjects prejudice or harm, or capable of placing their Employer, the data processor and collector, at the risk of any legal action from any source. It is data in the form of annual leave records of certain Managers, for purposes of comparing with those of the Claimant, to determine if discrimination occurred. Where personal data has been accessed or acquired by unauthorized person, and there is real risk of harm to the data subject, Section 43 [1] requires the data controller to notify the Data Commissioner, within 72 hours of becoming aware of such breach.
21. The Respondent has not told the Court if there was any report made to the Data Commissioner, if indeed the Claimant accessed the data in question without authorisation. There was no complaint lodged by the Respondent or its Managers, about breach of personal data. This is perhaps because there was no real risk of any harm to the data subjects.
22. The Act identifies various forms of data, and the Court does not think that all forms, in enforcing protection, should be treated similarly.
23. In issue is not exhibition of the data subjects' biometric data, which would include physical, physiological, or behavioural characterization including blood typing, fingerprinting, DNA analysis, earlobe geometry, retinal scanning and voice recognition. It is not health data related to the data subjects' physical or mental status. In issue is not what the Act describes as sensitive personal data. It is merely data, confined to the data subjects' annual leave records.
24. The data subjects' annual leave records are not in the nature of biometric data that would for instance, be used by the Claimant, to rob their bank accounts. It is not DNA data that would be used by the Claimant, to establish that the data subjects are blood relations of the Claimant, and owe him some form of obligations in family law. The data is not intended to prejudice, harm or create any mischief against, the subjects. Although contracts of employment are between an Employer and an Employee, there are common standards of employment contemplated by the law, contract and/or policy at the workplace, which makes it necessary for production of other Employees' terms and conditions of service before a Court of Law, for comparative purposes, in considering and determining if an Employer has adhered to these minimum and common standards of employment required by the law. The principle of equal remuneration for work of equal value, and the laws surrounding gender, race and tribal discrimination at the workplace, for instance, would not be workable, without bringing before the Court, comparators' employment data.
25. Consent of the data subject, is not necessary under Section 30 [1] [b] [ii] of the [Data Protection Act](#), for compliance with any legal obligation, to which the data controller is subject. Employers have an obligation to comply with workplace anti-discrimination laws, both under [Constitution](#) and [Employment Act](#). Use of comparator information, in legal proceedings to enforce this obligation, does not require to be preceded by mandatory consent of the comparators, the data subjects.
26. Section 30[1] [b] [vii] of the [Act](#), is also clear that consent is not necessary, for the legitimate interests pursued by the data collector or the data processor, by a third party to whom the data is disclosed,



except if the processing is unwarranted in any particular case, having regard to the harm and prejudice to the rights and freedoms or legitimate interests of the data subject. Section 45 [c] [i] permits the use of personal data where it is necessary for establishment, exercise or defence of a legal claim. Protection is exempted under Section 51 [2] where disclosure [or use] of personal data is required by, or under any written law, or by an order of the Court.

27. The data subjects have filed Witness Statements and Affidavits and are not strangers to the Claim. They are intended to be Witnesses for the Respondent. They have not shown that they would be prejudiced or harmed, by the Claimant's use of their annual leave records in the discrimination Claim. If there is any inaccurate or false data attributed to them, they will have the opportunity in their oral evidence, to discount the data.
28. The data subjects disclose in their Witness Statements that they have other evidence, intended to be adduced before the Court, in support of the case for the Respondent. Vicky Awiti discloses that she is the Respondent's Human Resource Administrator, and refers to the Claimant's own employment records, such as the letter of employment and job description, in her Witness Statement.
29. Mumo Musava discloses that he was the Respondent's Managing Director. He refers to the Claimant's personnel records. He explains the position of the Respondent in detail. The data subjects are principal officers of the Respondent. They cannot claim that their own data is intended to be used by the Claimant improperly and unlawfully, on the ground that they are not parties to the Claim.
30. They are not total strangers to the Claim; they are Witnesses for the Respondent, current and previous principal officers of the Respondent, with adequate opportunity, to dispute the documents relating to their annual leave. Their evidence can hardly be severed from that of their Organization, the Respondent herein.
31. The Respondent also argues that the Claimant obtained the data subjects' annual leave record, in breach of the Claimant's duty of confidentiality, under the Respondent's Code of Conduct, contained in the Staff Handbook.
32. The Court does not think that this a correct position. The Claimant complains that the Respondent maintained a discriminatory culture on leave entitlement, enforcing the leave procedure with regard to him alone, while exempting the other Employees from this procedure. He relies on the Respondent's Staff Handbook on Workspace Platform.
33. The evidence he relies on, taken from his colleagues' leave records, is intended to establish discrimination. This evidence is mainly based on the Staff Handbook, and can hardly be classified as confidential information.
34. Confidentiality clauses at the workplace aim to protect the business from improper use of such information as relates to business secrets. It is also noted that in this Court's decision in *Leland I Salano v. Intercontinental Hotel* [2013] e-KLR, it was held that confidential information, acquired by an Employee in the course of his service, could be used by an Employee after his service has ceased, unless the information is classified as a trade secret, or was so confidential, that it required the same protection as a trade secret.
35. The Court referred to New Jersey Supreme Court Case [Appellate Division] between *Quinlan v. Curtis-Wright Corporation* 204 NJ [2010], in the *Salano Case*. Joyce Quinlan filed a Claim for sex discrimination against her Employer. She relied on more than 1,800 documents, some containing confidential personnel information, in support of her Claim. She exhibited a copy of her former male colleague's employment evaluation, which indicated that her colleague had performed abysmally, but was promoted ahead of Quinlan. The Court relied on the documents of comparators in upholding



the Claim for sex discrimination, notwithstanding the wide allegations from the legal fraternity, that admission of the documents in evidence, amounted to “court-sanctioned theft.”

36. Like in the case of *Salano*, the Respondent herein has not established that the data subjects’ annual leave records were confidential and were obtained illegally. There is no allusion to any trade secrets the Claimant stole. There is no evidence that access to the annual leave records was restricted, and no evidence of passwords, imposing such restriction. Like the data subjects, the Claimant was in a senior management role, as Design Lead. It would not be unexpected of him, to have broad human resource information about the Organization he served, from his senior management position. The Court does not agree that the Claimant acted in breach of his duty of confidentiality, by bringing relevant evidence for use by the Court, in determining if discrimination at the workplace, has taken place.
37. To disregard the data subjects’ documents would deprive the Claimant of comparators’ evidence, and disable him, in establishing his prayer for discrimination.
38. The prayer for expunging of the data subjects’ documents, Vicky Awiti, David Mugo and Mumo Musava, is declined.
39. Rule 14 of the *Employment and Labour Relations Court [Procedure] Rules, 2016*, allows a party who has not filed a document to be relied on at the hearing, as part of the pleadings, to make sufficient copies of each document for the Court and file and serve the other party, at least 14 days before the hearing, or such a shorter period as the Court may direct.
40. The Rule also empowers the Court to allow filing of supplementary bundle of documents, after the closure of the pleadings.
41. The Staff Handbook is a basic workplace instrument, which defined the Claimant’s relationship with the Respondent. It is hard to see how the Claimant is prejudiced by its production. He indeed has referred to this document, in his Statement of Claim. He claims he was discriminated against by the Respondent. The Staff Handbook espouses the principles of fair and equitable treatment of all Employees. The Claimant’s objection to its introduction appears to the Court to be rather irrational.
42. If the sum of Kshs. 150, 559 paid to the Claimant by the Respondent, in accordance with the bank instructions proposed to be exhibited as part of the supplementary bundle of documents by the Respondent, was reversed in favour of the Respondent, the Claimant will have the opportunity to establish reversal and non-settlement, in his evidence. There is no persuasive reason, to keep away from the Court, evidence of the payment.

It is ordered: -

- a. Prayer [1] of the Application filed by the Respondent, dated 21st November 2023, seeking to strike out the Claimant’s documents appearing at page 7 to 13 of the Claimant’s documents marked ‘TAS -20,’ is declined.
- b. Prayers [2] and [3] of the Application seeking leave to file the supplementary bundle of documents dated 21st November 2023, and deeming the bundle as duly filed and served, are granted.
- c. Costs in the cause.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 14TH DAY OF JUNE 2024.

JAMES RIKA



JUDGE

