Wang'ombe v Mawingu Networks Limited (Cause E048 of 2022)
[2024] KEELRC 126 (KLR) (30 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 126 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E048 OF 2022

ON MAKAU, J

JANUARY 30, 2024

BETWEEN

DAVID WANG'OMBE ..... CLAIMANT

AND

MAWINGU NETWORKS LIMITED ..... RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent in 2016 and worked until 10th June, 2022 when his employment was terminated for gross misconduct. He then brought this suit seeking the following reliefs:

    a. USD 22,500 being three (3) months' salary in lieu of notice;

    b. USD 90,000 being twelve (12) months' salary for unfair/wrongful termination.

    c. USD 27,225 salary reimbursement for pay cut from March, 2020 to May, 2022.

    d. USD 60,000 being salary reimbursement for pay cut from February, 2021 to May, 2022.

    e. USD 2,667 for salary reimbursement for pay cut from 1st June to 10th June, 2022.

    f. Interest on (a) –(e) above at court rates from the date of filing suit until payment in full.

    g. A declaration that the claimant is entitled to 2% shares in the Respondent Company through the Employee Stock Purchase scheme.

    h. An order directing the Respondent to supply to the Respondent with respect to the shares vested to him, the following information within seven (7) days from the date of making this Order:-Summary Plan DescriptionSummary Annual Report for the years 2019, 2020, 2021 and 2022.Individual benefit statement

i. General damages for discrimination, economic hardship and unfair labour practices against the claimant.

j. Certificate of service.

k. Costs of this suit.

2. The respondent denied liability and prayed for the suit to be dismissed with costs.

Factual background

3. The claimant's case is that he was employed by the respondent in 2016 as a Network Manager based in Nanyuki and due to his diligent performance he was promoted on 1st January 2019 to the position of Chief Technology Officer. His gross salary became USD 7500 per month and he would also receive 2% of the company stock through the Employee Stock Option Plan (ESOP) over four years from the date of appointment.

4. At the advent of the Covid-19 Pandemic in March 2020, the claimant was required by respondent's Chief Executive Officer (CEO), to take a salary cut of 20% in line with all the other senior staff of the company plus a further USD 1000 (13%) cut without any reason and through undue influence. His total salary cut became 33%, higher than the most senior executive in the company by 8%. As a result of the said salary cuts, he could no longer meet all his financial obligations and therefore he requested to work from Nairobi where his family lives.

5. In December 2020, he was required to take a further pay cut of 21%, raising the total salary cut to 54%. The request for the salary cuts were made by the respondent on the basis that the company was undergoing a financial crisis as a result of Covid-19 Pandemic. However, as the claimant came to know later, the respondent never made any losses during the Covid-19 Pandemic. On the contrary, the company grew three folds during the Pandemic as evidenced by a video clips in which the respondent's CEO, Mr.Ramji confirmed the same.

6. In September 2021, the respondent appointed a new CEO and in November, 2021 he required all the employees to start working from the office on some days. The claimant requested the company to review the temporary terms and facilitate his travel and accommodation cost. Correspondence on the same are in page 265A-270Z of the claimant's bundle of documents. It is this time when his line manager revealed to him that he was the only employee who took a 54% pay cut.

7. As a result of the surprise information, he demanded for an explanation for requiring him to take a 54% pay cut and no other employee. No explanation was given. In the meanwhile, the new CEO told him that the company no longer required the services of Chief Technology Officer and proposed to offer a new role whose salary was equivalent to the 46% salary he was getting. He declined because the role was the same as Chief Technology Officer.

8. On 1st December 2021, the respondent served him with a termination letter indicating the reason as inability to meet his expected pay increase. The claimant protested that he did not ask for any salary increase but a reinstatement of what he was entitled to be paid under his employment contract. As a result, the respondent rescinded the termination notice.

9. The matter of reinstatement of salary and working from Nanyuki was however not resolved as can be seen from the correspondences between the claimant and the line manager and the Board chairman (page 303-314 of claimant's bundle). On 19th January 2022 the line manager and the Board chairman made it clear to the claimant that the only position available was the proposed junior position at the 46% salary he was getting. However, when the claimant requested for a formal letter, none was issued to

him and instead, the Board chairman called him for a one-on-one meeting where he asked the claimant to state the terms for a mutual separation.

10. The claimant did so on 16th March 2022 and negotiations ensued but as at the end of April 2022, no settlement was reached (see correspondence in page 315-327 of the claimant's bundle). The chairman then warned the claimant that if he declined the terms of mutual separation as proposed by the respondent, he risked termination of his job and loss of his vested stock shares.

11. In May 2022, after the failure to reach mutual separation, the claimant was required to start working from the office. The claimant raised the issue of salary cut again as the reason he was unable to work from the office. The Line Manager warned him that failure to comply with his directive would lead to disciplinary action.

12. He failed to comply, and a show cause notice was issued to him on 10th May 2022. He responded on 11th May 2022. He was thereafter invited to a disciplinary hearing on 2nd June 2022 before a committee where he reiterated the challenge of living on a 46% gross salary. By a letter dated 10th June 2022, his employment was terminated.

13. In the claimant's view, the termination was unfair and unlawful. He contended that the disciplinary hearing was a cosmetic exercise to mask a pre-determined decision. The reason for his opinion are that:

    a. In December 2021, the respondent attempted to unlawfully terminate his employment but rescinded the notice upon his protest.

    b. The respondent declined to give a formal letter for the proposed junior position upon request.

    c. The Board chairman openly told him that the only option left for the claimant was to leave the company.

    d. In April 2022, the respondent was actively recruiting a Chief Technology Officer.

14. It is the claimant's case that the said conduct by the employer amounted to constructive dismissal. He relied on the said video clips from media and reports from the Communication Authority to prove that the respondent grew in business during the Covid-19 Pandemic 3-4 times. Consequently, he contended that he is entitled to compensatory damages, salary in lieu of notice, general damages and certificate of service.

15. In addition, he contended that his promotion to Chief Technology Officer in 2019 came with an offer of a 2% stock option under ESOP to vest in him in four years (48 months). The offer was equal to 0.5% stock per year (see page 2-5 of the claimant's bundle). It is his case that by email dated 12th November 2021, the CEO indicated that he would ensure that the vesting of shares was done and well documented. However, after the termination of employment, the respondent denied ever offering him any shares and/or having any shares vested on him. He prayed for an order that he is entitled to a vesting of 2% shares in full since the termination was unlawful.

16. During cross examination the claimant admitted that he was requested, and consented to a salary cut of USD 1000 from USD 7500 to USD 6500 and a further cut of 20% based on information that the business was doing badly in finances. He accepted the new terms without seeing financial reports of the company since he had no option as the executive management had made the decision. He further admitted that, as a management staff he was privy to some information of the company except financial information.

17. He contended that he was to work "for half time for half pay" which was not clear to him. The new terms were to last until series B investment which was about six months. Series B was basically capital

injection for expansion. He admitted that he was required to resume work in Nanyuki office but he refused due to the financial difficulties caused by salary cuts. He also admitted that he was issued with a show cause letter and later heard by a committee before termination. His grievances were also heard and feedback given.

18. As regards the ESOP, he admitted that the rules governing the stock shares requires that an employee has to be invited to acquire the shares. He admitted that he never received any letter inviting him to acquire shares before the dismissal from the company. He confirmed that Rule 4.2 requires an employee to pay for the allocated units. He admitted that he never paid for any units during his employment.

19. The respondent's case on the other hand is that it effected salary cuts to the claimant from March to December 2020 at 33% and thereafter at 54% up to May 2022. The salary cuts were decided by the company and the claimant voluntarily consented to the terms. To mitigate the salary cuts, the claimant was only to work half of the time. The salary cuts were due to the harsh economic times during Covid-19 pandemic. The salary cuts applied across the employees and not on the claimant selectively.

20. It is further respondent's case that sometimes in 2022, the claimant was directed by his line manager to work from the office together with all the other staff since the company was starting to pick up its operations. However, the claimant continuously failed to show up for work, which amounted to gross misconduct. On 28th April 2022, he was issued with a notice to report to work in Nanyuki office and continue working half the time but still refused and he was served with a show cause notice on 10th May 2022. He responded on 11th May 2022 and he was invited to a disciplinary hearing on 2nd June 2022.

21. The respondent contended that the claimant was informed of the charges and he was given an opportunity to air his grievances and present his evidence during the disciplinary hearing. The explanation by the claimant were considered but they were found to be without merit and on 10th June 2022, he was served with a dismissal letter for continuously absenting himself from his place of work.

22. The respondent denied that the termination was unlawful and unfair. It also denied that the alleged constructive dismissal of the claimant. It maintained that the termination was on account of claimant's insubordination and continuous absenteeism from his place of work. It further maintained that a fair procedure was followed.

23. As regards the claim for company shares, the respondent contended that the ESOP requires that an employee must be given an award letter by the company as a condition precedent. It averred that the claimant was never given such invitation letter and as such he was never offered any shares. Further, the respondents' Share Ownership Scheme Rules provides that an employee whose services are terminated forfeits all units, whether vested or not. (see page 59-74 of the respondent's bundle). Consequently, it maintained that the claimant is not entitled to its ESOP.

24. During cross examination, respondent's CEO who testified as RW1 admitted that he wrote an email to the claimant stating that the company was experiencing financial stress due to Covid-19 pandemic. However, he failed to produce financial statement (Audit Reports) for the period of the pandemic to justify the salary cut for the claimant.

25. RW1 further admitted that internet companies file returns with Communication Authority every month. Referring to CCA Report (page 83-259 of claimant's bundle) RW1 confirmed that between January and March, 2020 internet subscription dropped by 0.7% but between April and June, 2020 demand for internet continued to grow from 40 million to 41 million people. In July-September 2020 internet subscription grew to 43.5 million subscriptions.

26. He further admitted an online media report (page 257 of the claimant's bundle) showing that the respondent had 1.4% of the total data subscription from the market representing more than 6000 homes in 15 counties. He admitted that the report showed a growth of 50% in 2021while in the video clip, he indicated that the respondent had grown 3-4 times during the Covid-19 pandemic. He admitted that he had no interview in which he indicated that the company was in financial stress.

27. RW1 confirmed that his predecessor Mr. Oliver confirmed that the claimant was working full time during covid-19 period while on reduced pay. He admitted that the claimant wrote to him that he had problem meeting his bills due to the 54% salary cut and requested for review of his salary cut to 20% in order for him to report back to the office. RW1 stated that he gave the claimant the option of working from Monday to Wednesday at Nanyuki for USD 3500 or sign a mutual separation agreement but he declined both.

28. He was then offered another position but he declined. However, RW1 could not remember the terms of new role. He only confirmed that the company has not yet employed any other Chief Technology Officer. He maintained that the claimant's grievance on the salary cuts was heard by a committee which found that the claimant consented to the same.

29. As regards the ESOP, RW1 admitted that his predecessor Mr.Oliver had written to the claimant confirming 2% shares. He further admitted that the claimant was not made aware of the shares scheme rules and he was not notified in writing that his share allocation was subject to the said rules.

30. In re-examination, RW1 contended that the quarterly reports by CCA (page 128,129 and 153 of claimant's bundle) apply to anyone with mobile network operation or any one with licence within the CCA. He clarified that the said reports do not give financial outlook of service providers and contended that the respondent was losing between Kshs.10-12 million per month as at October 2021 when he became the CEO. He contended that the CCA statistics Reports (page 257 of the claimant's bundle) indicated that respondent had 15000 subscribers equaling to 1.4% of the market. However, he clarified that the subscriber base is not proportionate to profitability because some subscribers pay very little.

31. He clarified that when an employee is given an allocation of shares, the vesting takes place annually on the anniversary of his appointment. The vesting happens when the employee is issued with an invitation letter to participate. However, in this case the claimant was never issued with invitation letter and he never requested for the same.

Claimant's submissions

32. The claimant submitted that the termination of his employment was not based on a valid reason. He submitted that the burden of proof of the reason was on the employer to prove that he failed to obey a proper command issued by the CEO.

33. He submitted that his response to the show cause latter, confirmed that the was willing to report back to work physically but the financial situation occasioned by the salary cuts could not allow him. Further, that he had raised grievance on the temporary contract which had not been addressed. He maintained that the decision to recall him to the office did not address the salary cut which was done in consideration that he was working from home. He therefore submitted that reduction of his salary to 46% rendered it impossible for him to resume work in the office.

34. For emphasis he cited the case of Kennedy Mutua Mwangangi v Madison Insurance Company (K) Ltd (2020) eKLR where the court held that reduction of the claimant's salary to almost a half placed him under circumstances that were intolerable and could not be expected to undertake his duties. It was

further held that the said conduct by the employer essentially repudiated the terms and condition of employment since the salary deduction was done unilaterally.

35. The claimant further submitted that the termination of his contract was premediated as can be evidenced by the correspondences between him and the respondent. He maintained that he was dismissed for demanding a review of his salary cut from 54% to 20% to enable him resume work physically in the office. He submitted therefore that his dismissal on ground of failing to obey a proper command from his supervisor was a scapegoat to justify a predetermined termination.

36. As regards the salary cut, he submitted that the same was based on misrepresentation, coercion and undue influence. He submitted that before an employer reduces the salary of his employee, he must first consult the employee, and there must be a valid reason for a salary cut.

37. The claimant submitted that he accepted a further salary cut on 26th January 2021 upon misrepresentation by the respondent that the company was undergoing a financial stress due to Covid-19 pandemic. However, he later learned that the company had grown three folds as a result of the increased demand for internet access during the pandemic. He further learned that its customer base grew by 50% between 2021 and 2022.

38. It was submitted that the alleged loss of Kshs.12,000,000.00 per month was not substantiated since the respondent did not produce any audited accounts to prove the same. The claimant maintained that his consent for salary cuts were obtained through misrepresentation and concealment of material facts, and therefore the same was invalid in law. For emphasis he cited the case of Omondi Justus Ranga'nga & 28 others v Kenya Commercial Bank Ltd (U.R) where the court held that the consent given by the employee for a fixed term contract without knowledge of an existing CBA rendered the fixed term contract invalid.

39. The claimant, further submitted that his salary cut was discriminatory since he was the only employee made to take a 54% salary cut. He prayed for General damages of Kshs.5,000,000.00 because no reason was given to justify the discriminatory salary cut against him. He fortified the claim by citing Omondi Justus Ranga'nga case, supra.

40. As regards the claim for shares under ESOP, the claimant submitted that ESOP is an employee benefit plan that gives employees an ownership stake in the company. The stake may be acquired by either payment of cash or monetized through working for the company for a specific period. The basic tenets of a contract, that is offer, acceptance and consideration apply to ESOPs. He submitted that an offer was made to him by the respondent through email dated 13th April, 2022 (page 5 of his bundle of documents); and also by promotion letter (email 1st November 2018 page 6 of the claimant's bundle). The offer was for 0.5% per year for 4 years equaling to 2%.

41. He further submitted that he accepted the offer by taking up the promotion as Chief Technology Officer of the respondent with effect from 4th November 2018. Finally, he submitted that he provided the consideration by working in the said position until May 2022 when he was dismissed unfairly having worked for three and half years. Consequently, he urged the court to compel the respondent to meet the terms of its bargain.

42. He urged the court to dismiss the allegation that he never met the conditions precedent for getting any shares in the company. He submitted that such conditions were never made known to him. He maintained that all that was required of him was to accept the job and work. He cited an email dated 10th November 2021 whereby the CEO informed him that the shares for that year had vested and all what was remaining was a letter from the company confirming that the shares had vested. He cited section 120 of the *Evidence Act* to submit that the respondent is estopped from denying that position.

43. For emphasis, he cited the case of Carol Construction Engineers Ltd & another v National Bank of Kenya (2020) eKLR which set out elements to be met for estoppel to apply. He further relied on the case of Papius Kirogothi Muhindi v Equity Bank Ltd & 4 others (2017) eKLR, where the court upheld a claim for ESOP and the doctrine of estoppel under section 120 of the *Evidence Act*.

44. The claimant further submitted that he is entitled to the company shares because the respondent treated him as eligible for the shares and never brought to his attention the rules governing the ESOP. In the circumstances he maintained that the said rules cannot apply to him retrospectively. For emphasis, he relied on Samuel Gachie Kamiti v Equity Bank Ltd & 6 others (2018) eKLR. In the end he prayed for the suit to be allowed as prayed.

45. With respect to the respondent's objection to production of the Statistics Sector Reports by the Communication Authority (page 36-254 of his bundle), for not being certified as per section 80 of the *Evidence Act*, the claimant submitted that the documents are not produced as copies but as computer print outs from the Authority's Official Website. He further submitted that, by a letter dated 13th April 2022, the Authority confirmed that the reports were published in its Website. He further relied on a Certificate of Records by Kelvin Richu dated 17th November 2022 which confirmed that the reports were downloaded and printed from the website. Consequently, in his view, the print outs produced are considered as primary evidence under section 65 of the *Evidence Act*.

46. Besides, the claimant submitted that the respondent will not be prejudiced if the documents are admitted as evidence because the respondent's Advocate had the opportunity to cross examine the claimant and tests its veracity. He also referred to the documents during re-examination of the respondent's witness (RW1). Consequently, the claimant urged the court to reject the objection for lacking basis and proceed to admit the said documents as evidence.

Respondent's submissions

47. The respondent submitted that the Statistics Sector Report (page 36-254 of the Claimant's bundle) are inadmissible since they are public documents within the meaning of section 79 of the *Evidence Act*. That such documents are only admissible if produced as original or certified copy of the original. Since the said documents are not originals, the respondent submitted that they offend section 80 of the Act. It argued that a letter from the Authority cannot support section 80 and 81 of the Act that require certification of copies of public documents.

48. The respondent denied that the downloaded copies of the reports are originals within the meaning of section 65 of the Act. For emphasis, it relied on the case of Hezekiah Oira v Patrick Quarcoo (2017) eKLR.

49. The respondent further submitted that the production of the said documents will be prejudicial to it if admitted as evidence. The reports contain a disclaimer that the Communication Authority cannot vouch for their accuracy. Consequently, the respondent urged the court to expunge the documents from the court record.

50. As regards the claim for unfair termination of employment, the respondent submitted that the claimant was indeed dismissed summarily on 10th June 2022 for a valid reason and in accordance with a fair procedure. It contended that due to advent of Covid-19, the respondent's employees were required to work remotely. In November 2021, the company started engaging staff to resume work in the office physically. On 31st January 2022 a formal notice was sent to all the employees directing them to commence working from the office from 1st February, 2022.

51. The claimant never returned until 28th April 2022 when he was served with a notice requiring him to resume work from the office on 4th May 2022 but again he failed to do so. He was served with a show cause but still failed to report back to the office in Nanyuki demanding reinstatement of the salary to pre-covid time. Consequently, the respondent submitted that the refusal to obey the command to resume work from office amounted to a valid reason for terminating his employment. Several precedents were cited including Bernard Ndungu Mbugua v Nairobi Water & Sewerage Co.Ltd (2019) eKLR.

52. The respondent submitted that the claimant was fully aware that the reduction of USD 1000 from his salary was not to be reinstated considering the email dated 28th May 2020 in page 18 of his bundle). Further, the new salary arrangement was to remain until certain conditions were met including series B funding. Besides the Senior Management Team had met and decided to extend the salary cuts after it reviewed the company's situation during Covid-19 pandemic.

53. In view of the foregoing matters, the respondent submitted that the dismissal of the claim was justified because he disobeyed a proper command from his superior, and secondly absconded work contrary to section 44 (4)(e) of the *Employment Act*.

54. As regards procedural fairness, the respondent submitted that section 41 of the *Employment Act* was followed and the claimant has not impugned the procedure followed. Reliance was placed on the case of Kenya Ports Authority v Fadhili Juma Kisuwa (2017) eKLR. Accordingly, the respondent submitted that the dismissal of the claim was substantively and procedurally fair.

55. As regards the issue of salary cuts, the respondent submitted that the same was justified. It contended that the Covid-19 adversely affected businesses in Kenya including the respondent which had the options of either reducing staff or implement salary cuts in order to remain in operation. The respondent invited the court to take judicial notice that the pandemic did not spare work places and it made it hard for the employers and employees to meet mutual obligations. It cited the case of Moses Kamau & 6 others v Signature Holdings (EA) Ltd (2020) eKLR where the court acknowledged the ravages and economic impact of Covid-19.

56. It was submitted that the claimant acknowledged and supported the resolution for salary cut by his email dated 20th November (page 270 A of his bundle). He further consented to salary reduction of USD 1000 and further temporary arrangement to reduce his salary to USD 3500. The respondent submitted that the interviews of Mr.Farouk Ramji in the video clips produced by the claimant did not indicate that the company made profits. That the business growth stated by the CEO was in terms of subscriber base which does not translate to immediate profit. The respondent clarified that it declared a profit for the first time in its history in June 2022 after the claimant's dismissal.

57. The respondent relied on the case of Ibrahim Kamasi Amoni v Kenital Solar Limited (2018) eKLR, 748 Air Services Ltd v Theuri Munyi (2017) eKLR and Joseph Wanjohi Wambugu v Paws Africa Safaris Limited (2018) eKLR to support its submissions on the salary cut.

58. As regards the alleged discrimination of the claimant in the said salary cuts, the respondent submitted that the claimant's grievance on that was heard and determined by the Grievance Committee which found that the claimant did not give evidence to substantiate the allegation. Further that, the salary cuts applied across bound to other employees and therefore not selective to the claimant. It also found that the claimant was requested and he consented to all the pay cuts and the amendments to his employment terms.

59. The respondent submitted that the claimant has also failed to tender evidence before the court to substantiate the alleged discrimination as required by section 5 (3) of the *Employment Act*. It submitted that the claimant has not given particulars of the senior managers who were treated differently from him in terms of salary cuts and directive to resume working from the office at Nanyuki.

60. As regards the claim for 2% shares under the Employee Share Ownership Scheme (ESOS), the respondent submitted that the claimant is not entitled to the same because first the claimant did not participate in it; and second the ESOS is separate and independent from the respondent. The ESOS has rules which prescribe the procedure for allocating/vesting of units in the Trust at a consideration, payment for units, the consequence of an adverse termination and with certificate (see rule 3, 4,6 and 9 page 59-71 of the respondent's bundle).

61. It is the respondent's case that the claimant admitted being a stranger to the ESOS Rules and therefore is not a beneficiary of the ESOS which he never participated in. For emphasis, it relied on the case of Papius Kirogothi Muhindi v Equity Bank Ltd, supra to urge that the claim for allocation for shares can only be addressed by the Trustee and not the respondent company.

62. In view of the matters above, the respondent submitted that the claimant is not entitled to the relief sought and prayed for the suit to be dismissed with costs.

DIVISION - Issues for determination

63. Having considered the pleadings, evidence and submissions, the issues that fall for determination are: -

a. Whether the termination of the claimant's employment was unfair and unlawful.

b. Whether the claimant's salary cut was unjustified and discriminatory.

c. Whether the claimant is entitled to company shares under the ESOP.

d. Whether the reliefs sought are merited.

Unfair termination

64. Section 45 of the *Employment Act* provides that: -

> "(1) No employer shall terminate the employment of an employee unfairly.
>
> (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 employee's conduct, capacity or compatibility, or
>
> ii. Based on the operational requirements of the employer; and
>
> c. That the employment was terminated in accordance with fair procedure."

65. As regards the reason for termination, section 43 of the *Employment Act* 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.
>
> (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee."

66. In this case the reasons for termination as per the termination letter were insubordination and absence from work. Paragraph six of the letter stated as follows: -

> " The details of your behavior are as follows: -
>
> a. You have, periodically and repeatedly during the period between 4th May 2022 and 9th June 2022 failed to obey a proper command issued by the Chief Executive officer.
>
> b. Despite several requests, you continuously absented yourself from the place appointed for the performance of your duties.
>
> c. Your behavior of failing to obey a proper command issued by the Chief Executive Officer qualifies as insubordination."

67. The above misconduct entitles an employer to summarily dismiss his employee from service. There is no doubt that the CEO of the respondent directed the claimant like the other employees of the company, to resume work from the office after the Covid-19 pandemic was put under control. It is also a fact that the claimant raised a grievance in connection with his salary cut of 54% which made it difficult to resume work at Nanyuki office. He sought for the salary cut to be reviewed to 20% but the employer seemed resolute that his salary cut would remain.

68. In fact, the employer was keen on the claimant exiting the company if he did not wish to work for the 46% of his due salary. The claimant had already discovered that he was the only one subjected to such huge salary cut. He also learned later that the company was doing very well in business during the Covid-19 pandemic as many customers sought internet access. The questions that beg for answers are whether in the circumstances, the CEO's directive to resume work in the office was a proper command, and whether the failure by the claimant to comply amounted to insubordination and absenteeism from work.

69. The claimant has not tendered evidence to prove that the CEO issued the directive without authority from the company. He acknowledged in evidence that the CEO was his line manager. The command to resume working from the office, after the earlier command to work remotely, was a proper command in my view. The claimant was bound to comply with the command and if he had any grievances, raise through the procedure provided. In the alternative, he could have resigned and then sue for constructive dismissal. He had no right to disobey until his grievance was addressed favorably. Consequently, I see no difficulty in holding that the claimant's conduct fall within the four corners of section 44(4) (a) and (e) of the *Employment Act* and the employer was justified in dismissing him summarily.

70. Section 44 (4) provides that:

> "(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-
>
> (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
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> (b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;
>
> (c) an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;
>
> (d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;
>
> (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;
>
> (f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or
>
> (g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property."

71. As regards the procedural fairness, section 41 of the *Employment Act* provides that: -

> "(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make."

72. In this case, the claimant was served with a show cause letter warning him of disciplinary action for insubordination. He responded and thereafter he was invited to a disciplinary hearing. He attended the hearing and he was heard. His representations were considered and then a dismissal letter was issued to him. In my view, the facts of the case clearly show that the claimant was accorded a hearing as contemplated under section 41 of the Act.

73. Having been satisfied by the evidence that there existed valid reasons and that a fair procedure was followed, I proceed to hold that the dismissal was fair within the meaning of section 45 of the *Employment Act*.

Discriminatory and unjustified salary cut

74. The claimant contended that he consented to salary cut of 54% based on information given to him by the respondent that the company was in financial down turn. The salary cuts were due to Covid-19 Pandemic which led employees being made to work remotely. The claimant later discovered that no other employee was made to take 54% salary cut. He also discovered from the Reports obtained from the Communication Authority, and media clips that the respondent grew in business during Covid-19 pandemic. The evidence was produced by the claimant and acknowledged by the RW1 under oath.

75. The only challenge raised was that the evidence is not admissible for want of certificate that the reports are true copies of the original. The claimant contended that the documents were not produced as copies from the original but as print outs from the official website of the regulator which amounts to primary evidence under section 65 of the *Evidence Act*.

76. This case is different from the case of Hezekaih Oira v Patrick Quarco cited by the respondent because in the said case the objection was in respect of correspondences and minutes of meetings. Such documents fall within the meaning of public document under section 80 of the *Evidence Act* which would require to be certified and/or sealed by the public officer having the custody of the documents.

77. The world is evolving pretty fast and therefore the information obtained from the official Website once printed by a member of the public may not be treated as secondary evidence if the same has not been tampered with. In this case, Mr.Richu Gathungu gave a certificate of records confirming that he visited the Communication Authority of Kenya Website https://www.ca.ke/customers/industry-statistics/statistics/ from where he downloaded and printed out the Authority's Statistics Sector Reports which are the subject of the objection. The website has not been disputed.

78. In that respect the question for accuracy of electronic evidence shifts the evidence from section 80 to section 106B of the *Evidence Act*. The certificate by Mr.Richu has not been contested and therefore I find that the Sector Reports obtained from the Regulators official website are admissible for purposes of determining whether or not the respondent's business dwindled during the period of the Covid-19 pandemic between March 2020 and June 2022 when the claimant was dismissed.

79. Having said that, I note that RW1 admitted in his ecidence that the respondent's customer base grew exponentially but sought to clarify that growth in customer base did not mean growth in profit. He contended that some customers were not big consumers. However, he never produced any audited

books of accounts or financial statement to prove that the business was making losses up to Kshs.12 million every month.

80. I have considered the evidence adduced that the company grew in customer base due to demand for internet access during the covid-19 pandemic, and the admission by the respondent that it posted a profit in the year 2022 after dismissal of the claimant. It is obvious from the evidence that the respondent did not suffer serious financial stress as to warrant a salary cut of 54% of its all employees' gross salary. The evidence on record also shows that, it is only the claimant who was made to take that huge salary cut.

81. He contended that the salary cuts were accepted through undue influence and misrepresentation. I have separated the salary cuts into two. The first one was requested by the company vide an email dated 28th May 2020, by the then CEO Mr.Oliver. It was for USD 1000 with no expectation of reinstatement after the crisis plus a further 20% which applied to the other staff. The CEO disclosed that he was also taking a 25% salary cut.

82. The claimant gave his consent vide an email dated 2nd June 2020. In my view the changes to the contract based on the above information was proper in law. There was an express request backed by a full disclosure. There is no evidence of misrepresentation or undue influence seen in the email by Mr.Oliver. There is also no evidence that the express consent given by the claimant four days after the request was due to undue influence or coercion. Consequently, the first salary cut arising from the said agreement was lawful and binding on the parties.

83. However, with regard to the second salary cut, a letter dated 26/1/2021 was addressed to the claimant by Mr.Oliver, the CEO referenced "NEW ENGAGEMENT TERMS." It reduced claimant's salary to USD 3500 and the ESOP allocation halved. The letter required the claimant to sign on it as a confirmation that he had agreed.

84. The letter referred to telephone conversation where the new terms were discussed. The claimant never signed the letter to confirm agreement. His evidence that he was misled with respect to the company's financial position has not been rebutted. Unlike the first salary cut in June 2020, the second one was not backed by full disclosure. The claimant was made to believe that the company was in financial stress and that all the other managers were taking over 50% salary cut.

85. It is well settled principle of contract law that a contract is an agreement entered through mutual consent of the parties. It is also well settled principle that, any contract entered into through misrepresentation or undue influence is voidable or rather vitiated. Therefore, in employment contracts, an employee has a right to reject a contract which is entered into through misrepresentation or undue influence.

86. I gather support from the case of Omondi Justus Rang'ang'a v Kenya Commercial Bank Ltd, supra where the court faulted the employer for causing an employee to sign a fixed term contract and concealed the fact that there existed a CBA providing for favorable terms. Mbaru J held:

> "Where the employer then proceeds to issue a fixed term contract and blind-siders the employee on the terms and conditions negotiated under a CBA for the cadre of the employee and despite any consent given by the employee placed under such circumstances is direct fraud, it is misrepresentation of facts of existence of the CBA regulating employment...
>
> The lack of knowledge of existing CBA negates the consent given at the points of signing each contract..."

87. Although the above case dealt with a slightly different situation, I still find it relevant to this case because the principle of law emerging is that consent by employee is negated by concealment of material fact by the employer. In the instant case, the employer secured the claimant's consent to excessive salary cut through misrepresentation of facts and concealment of facts as highlighted above. The consent in respect of the second salary cut was therefore fraudulently obtained and it exposed him to different treatment from the rest of the managers of the company.

Shares under ESOP

88. The claimant contended that his promotion to Chief Technology Officer on 4th November 2018 came with an offer of 2% company stock in employer's stock option plan over 4 years. He served for about three and half years before the summary dismissal. Therefore, he claimed 3.5% stake in the company.

89. The respondent admits that the claimant's promotion came with the benefit of 2% of the company stock in the ESOP. However, it contended that the ESOP is governed by the Scheme Rules which regulate the procedure of allocating/vesting of units in the Trust at a consideration, payment for units, the consequence of termination and unit certificates. The claimant contended that he was a stranger to the said scheme rules and admitted the requirements set out in the rules were not met by him as at the time of exiting. He confirmed that he neither received any invitation letter nor paid for any units in the trust as required under Rule 3 and 4 of the Rules.

90. In view of the foregoing, no units in the ESOP had vested in the claimant before his dismissal although he was entitled under the contract of service. Besides, by dint of Rule 6(3), he forfeited the units even before vesting due to his summary dismissal for willful misconduct. Whether or not he knew about the rules, I see no effect on the outcomes because the bottom line is Rule 6(3) which provided for forfeiture of all the units in the event of a termination for misconduct.

91. For the foregoing reason, I don't think that the case of Papius Kirogothi Muhindi, supra would aid the claimant at all. Accordingly, I find that the claimant forfeited all his right to vesting of the shares in the respondent company.

Reliefs sought

92. In view of the finding that the dismissal of the claimant was fair and within the law, I find that he is not entitled to salary in lieu of notice and compensation for unfair termination under section 49 of the *Employment Act*. However, he is entitled to salary arrears in respect of the purported salary cut above 33% of his rightful salary of USD 7500 is consented to in writing on 2nd June 2020. The unlawful deduction contained in the letter dated 26th January, 2021 took effect on 1st February 2021 and continued until 10th June 2022 when he was dismissed.

93. The rightful salary after the 33% deduction from USD 7500 was USD 5025. From 1st February 2021 it was reduced to USD 3500, a difference of USD 1525 per month. He is therefore awarded a sum of USD 1525 x 16.3 months=USD 24857.5.

94. Having found that he was subjected to different treatment by being deducted up to 54% of his salary while other managers got 25% salary cut like Mr.Oliver himself, without any justification, I find that he is entitled to general damages. I award him USD 10,000 considering that I have ordered for payment of the salary which had been cut in a discriminatory manner.

95. The claim for certificate of service is granted.

Conclusion

96. I have found that the dismissal of the claimant from employment was fair and lawful. I have further found that he is not entitled to damages for unfair termination. I have also found that he is not entitled to claim for vesting of shares under the Employee Stock Purchase Scheme.

97. However, I have found that he is entitled to salary arrears for 16.3 months in respect of the salary cut affected on 1st February, 2021. He is also entitled to general damages for discrimination. Consequently, I enter judgment for him in the following terms: -

a. Salary arrears.....USD 24,857.50

b. USD 34,857.50

General damages.....

c. Costs and interest at court rate from date of the judgment.

USD 10,000.00

d. Certificate of service.

e. Award is subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NYERI THIS 30TH DAY OF JANUARY 2024.

ONESMUS N MAKAU

JUDGE

ORDER

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE