



**Direct Pay Limited v Kihuha & another (Cause 783 & 741 of 2019  
(Consolidated)) [2024] KEELRC 2834 (KLR) (15 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2834 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 783 & 741 OF 2019 (CONSOLIDATED)**

**B ONGAYA, J  
NOVEMBER 15, 2024**

**BETWEEN**

**DIRECT PAY LIMITED ..... PLAINTIFF**

**AND**

**MICHAEL GICHUHI KIHUHA ..... 1<sup>ST</sup> DEFENDANT**

**CATHERINE WANGUI KINYUA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. In Cause 783 of 2019, the plaintiff filed the plaint dated 21.08.2019 through LJA Associates LLP seeking the following orders:
  - a. A permanent injunction restraining the defendants by themselves, their agents and servants from using and disclosing the plaintiff's proprietary or confidential information.
  - b. Damages for breach of contract against the 1<sup>st</sup> defendant.
  - c. Costs and interest of the suit.
2. The plaintiff averred that it had at all times previously employed the defendants as Systems Manager and Head of Operations respectively. The plaintiff is a payments facilitator that provides online payment solutions for companies within Kenya. Its system allows a merchant to offer services and goods online to be paid for by a customer through credit cards, Mpesa and other forms of mobile money.
3. The plaintiff pleaded that an express term of contract between it and the 1<sup>st</sup> defendant was that in order to protect the plaintiff's proprietary information, the 1<sup>st</sup> defendant would:
  - a. use the proprietary information only for the purpose of carrying on the plaintiff's business strictly in accordance with the agreement;



- b. during the continuance of the employment and at all times thereafter, without any limit of time, maintain strictly secret and confidential and not disclose or divulge any proprietary information directly or indirectly to any person, firm or company without the plaintiff's prior written consent; and,
  - c. not make copies of the proprietary information or otherwise disseminate the proprietary information without the plaintiff's written consent.
4. The plaintiff's case was that on or about 22.07.2019, an anomaly was detected in its System Department whereby funds were sent to two companies – Didier Company Limited and Jafamu Company Limited, who were not among its merchants. It thus conducted investigations that identified the 1<sup>st</sup> defendant as the employee who had credited, managed and later deleted nine (9) unauthorized payments for Kshs. 7,404,337/= to the said two companies. It was also discovered that the 1<sup>st</sup> defendant had shared sensitive, classified and technical proprietary information of the plaintiff to the 2<sup>nd</sup> defendant vide emails dated 07.02.2019, 11.02.2019 and 17.07.2019. Considering that the 2<sup>nd</sup> defendant was no longer an employee of the plaintiff at the time when the said information was shared to her and was therefore a third party, the 1<sup>st</sup> defendant's act was in clear contravention of his employment contract, a breach of fundamental duty of fidelity and confidentiality, and gross misconduct.
5. It was the plaintiff's averment that the obligation of mutual trust, confidence, good faith and fidelity, imposed on the 1<sup>st</sup> defendant an implied contractual obligation to keep confidential the information obtained from his employer during and after employment.
6. The plaintiff further pleaded that the sharing of its proprietary information was a conspiracy between the 1<sup>st</sup> and 2<sup>nd</sup> defendants to defraud and steal the information to be shared with its competitors to its detriment. That by virtue of the defendants' actions, it has suffered loss.
7. The 1<sup>st</sup> defendant's statement of response is dated 04.03.2020 and filed through Kinyanjui, Kirimi and Company Advocates. He maintained that he adhered to his employment contract and denied that he shared the plaintiff's sensitive information or was involved in a conspiracy as alleged. He averred that he was called for a mock disciplinary hearing for alleged malpractices and was denied an opportunity to present his defence. He further denied that the plaintiff had suffered loss as a result of his actions or at all and prayed that the plaintiff's claim be dismissed with costs.
8. The 2<sup>nd</sup> defendant's statement of response is dated 02.10.2020 and filed through Wangai Wanjuhi Advocates. She averred that the emails relied upon by the plaintiff failed to disclose any proprietary information regarding its business and operation, and the plaintiff also failed to attach the email dated 07.02.2019. She asserted that the suit is scandalous, frivolous and vexatious against her and should be dismissed with costs to the 2<sup>nd</sup> defendant.
9. In Cause 741 of 2019, the claimant filed the memorandum of claim dated 31.10.2019 through Kinyanjui, Kirimi and Company Advocates. He prays for:
  - a. An order of permanent injunction directed to the respondent to stop further malicious and defamatory publications, statements, printings, utterances, affidavits, postings, adverts, and or in any manner negatively mentioning or referring to the claimant henceforth.
  - b. General damages for libel.
  - c. Damages on the footing of aggravated and exemplary damage.



- d. Damages for unfair, illegal and unlawful termination of employment.
  - e. An apology to the claimant and retraction in an article given prominence in three media stations and newspapers of wide circulation in Kenya.
  - f. Kshs. 55,000 being balance of terminal dues illegally deducted.
  - g. Kshs. 201,417.00 being one month's notice.
  - h. Payment in lieu of 5 leave days amounting to Kshs. 40,283.40.
  - i. Costs of the suit.
  - j. Any other relief as the Court may deem fit to grant.
10. The claimant's case was that the respondent employed him as Operations Manager with effect from 12.03.2018. His terms of employment were such that he would receive a net salary of Kshs. 180,000 per month, termination was by giving one month's notice in writing and he was entitled to 21 days paid leave (holiday). He was thereafter promoted to Systems Manager due to his exemplary performance.
  11. The claimant pleaded that on 02.07.2019, he tendered his resignation from employment by giving the requisite one-month's notice and was to work until 31.07.2019. The respondent in its response on 03.07.2019 accepted his resignation but offered to release him by 01.08.2019 and further wrongfully tabulated dues he did not agree to. On 24.07.2019, he received a letter asking him to show cause for alleged malpractices in the respondent company, to which he replied on 25.07.2019. He was then called for a mock disciplinary hearing on 26.07.2019 but was denied an opportunity to present his defence and any evidence of having committed any offence. On the said 26.07.2019, he was also asked to clear with the company, was then arrested immediately thereafter in the presence of all employees, and taken to Kilimani Police Station.
  12. It was the claimant's averment that on 31.07.2019, the respondent gave him a letter of dismissal completely ignoring his resignation and thereby wrongfully, unfairly and illegally terminated his employment. Furthermore, the respondent refused to pay him one-month notice, leave days, his last salary in full, and thereafter made illegal deductions from his pay purporting to be monies for replacing a phone and laptop bag.
  13. The claimant further averred that in all his replies and answers to the purported disciplinary hearing, he totally disassociated himself with the said offences. However, the respondent continues to harass and burden him by filing a multiplicity of suits to taint his name, among them Nairobi High Court Commercial E258 of 2019 and Nairobi Chief Magistrates Civil Suit (Commercial) No. 733 of 2019. The respondent has also continued acts of defamation and gross assassination of the claimant's character by swearing statements and affidavits calling him a thief, making it impossible for him to progress his career in the IT industry. Additionally, the respondent has failed to render an apology and stop the harassment.
  14. The respondent filed the memorandum of response dated 04.12.2019 through LJA Associates LLP. It asserted that the claimant's dismissal was procedurally fair and that he breached a fundamental obligation arising from his contract of employment, to warrant summary dismissal. It denied the claimant's alleged good performance as asserted in his claim.
  15. The respondent's case was that the claimant's resignation notice was to end on 26.07.2019 after which he was to proceed for four (4) days leave. The claimant undertook an irregular transfer of funds to two companies that were not the respondent's merchants and thereafter purported to delete the



- records reflecting the payments. The act was evidence that the claimant had tendered his resignation on 02.07.2019 in anticipation of the irregular transactions made between 29.06.2019 and 22.07.2019. The claimant had evidently planned to enrich himself with the respondent's funds
16. The respondent pleaded that on 23.07.2019, it consequently sent the claimant on suspension for seven (7) days to allow for investigations into the matter. Thereafter before his disciplinary hearing, he was informed that the issues raised in the notice to show cause would be the subject of discussion and further informed those who would be in attendance. The claimant opted not to bring any representation for the meeting despite having been informed of the entitlement. In the end, the respondent deliberated on the charges made against the claimant and his response thereto, held that he had not given a justified, valid and satisfactory explanation, and recommended summary dismissal.
  17. The respondent averred that all the claimant's terminal dues were duly paid less Kshs. 55,000/= being monies deducted for a laptop bag issued to him but lost and for a new phone issued to him but damaged beyond repair.
  18. The parties in both Cause 783 of 2019 and Cause 741 of 2019 tendered their evidence before Court and filed their respective submissions.
  19. To answer the 1<sup>st</sup> issue for determination the Court returns that Direct Pay Limited (hereafter - the employer) was in an employment relationship with Michael Gichuhi Kihuha (hereafter - the employee). The evidence is that Cathrine Wangui Kinyua (hereafter - the former employee) had served and left the employer's employment at all material times.
  20. The 2<sup>nd</sup> issue for determination is whether the termination of the employee's contract of service was unfair. The employer says that the employee resigned from employment and there was no termination at all. The employee says that after he offered to resign and the respondent accepted the offer, before the agreement to separate took effect the respondent terminated him by way of dismissal and unfairly so. On 02.07.2019, the employee wrote to the employer stating that he was resigning from his position as systems manager for DPO group. He stated that his last day at work would be on 31.07.2019. He thanked the employer for the period he had served. On 03.07.2019 the employer wrote to the employee acknowledging receipt of the letter dated 02.07.2019 and accepting the resignation effective 02.07.2019 and that the employee's last day at work would be 01.08.2019. the acceptance letter further stated that the leave days earned and not taken were 4.5 working days so that the employee would proceed to annual leave on 26.07.2019 at 12.30am. the acceptance letter stated the terminal dues to include salary for days worked up to 01.08.2019 less monies owed to the employer. On 23.07.2019 the employer suspended the employee pending investigations on matters touching on the employee's professional conduct while performing his duties as the Systems Manager. The suspension was for 7 days effective 23.07.2019 and on full pay pending conclusion of the investigations. On 24.07.2019, the employer issued the letter to show cause stating that between 26.06.2019 and 22.07.2019 the employee was involved in unauthorised funds settlement to two unidentified merchants and their bank statements (9 settlements in total) which were particularised in the letter and amounting to Kshs.7, 404, 337.00. The letter stated that before each settlement the employee credited each merchant's account with the DPO System without permission, and on the day of settlement and after settlement was processed and funds were transferred to the unidentified bank account, the employee deleted from the DPO System the relevant settlement records in order to hind his activities. The letter levelled a second misconduct thus, "Further, between February and July 2019, you sent by way of electronic mail information that you knew by virtue of your role as Systems Manager to be confidential to one Catherine Kinyua, a former employee of DPO Group without approval from the company." The letter stated that the employer preferred a disciplinary action and the employee was to show cause by 4pm on 25.07.2019 and failing action would be taken against him without further reference to the employee. The employee responded



to the letter to show cause in writing on 24.07.2019. He denied both allegations and that he was serving his one month notice up to 26.07.2019 and thereafter take his 4.0 leave days up to 01.08.2019. The employee was invited to a disciplinary hearing on 26.07.2019 and he accepted to attend and opted not to be accompanied with any representative. The record of the hearing proceedings is filed. The record of the hearing shows the employee admitted sharing with the former employee, by way of four emails, not the content of the respondent's internal policies but their format. The record shows that when pressed, he admitted sharing with the former employee the respondent's policy (and not format) forwarded by the email of 17.07.2019 at 2.50pm and that he had willingly send the information without the former employee requesting for the same. He also stated that he did not think that the policies were unique to DPO group. The record also shows that the meeting found that by all probability, the employee was culpable of involvement in the first levelled misconduct of deleting settlement transactions on the system – as his authorised company ID had been used to delete the transactions from the employer's system. While the employee was acquitted in the ensuing and related criminal proceedings, it appears to the Court that as at dismissal, the reasons for dismissal existed as valid and fair as had been levelled.

21. At the hearing, the employee testified that he had signed the employment contract with a confidentiality clause. Confirming he had breached the clause he testified thus, "...I signed contract with confidentiality clause. At top – non-disclosure clause. Consent was required to disseminate any propriety information. I was never given authority to disseminate information. I sent as Operations Manager and not Systems Manager...."
22. The employer issued the dismissal letter dated 31.07.2019 and upon the particulars of the two alleged misconducts.
23. The Court has taken into account all the evidence including the testimonies by the employee in Court at the hearing, record of disciplinary hearing, and the record of the deleted settlement transactions and returns that the employer's dismissal of the employee was not unfair. The employer has shown that due process of a notice and a hearing under section 41 of the *Employment Act*, 2007 was complied with. The evidence also shows that the reasons for dismissal existed as at the date of the dismissal as valid per section 43 of the Act. Further, the reasons were fair that they related to the employees misconduct that breached the contract of service and the employer's operational requirements. The employee's alleged unfair dismissal will collapse. While making that finding the Court returns that the effective termination of the contract was by the dismissal letter and not by resignation as was urged for the employer. It should be obvious that as at the disciplinary proceeding and dismissal, while parties had agreed upon terms of separation by resignation, the same had not crystalized because the employee was still in employment until 01.08.2019. The Court finds that the prayers by the employee for compensation for unfair termination must fail. On the other hand, the employer has established that the employee breached the confidentiality clause by sharing the employer's policies and other information by a thord party, the former employee.
24. The Court returns that the former employee only received the information as sent by the employee and the former employee is not culpable of breach of the confidentiality clause, which applied only while she was in employer's service. The critical finding is that she did not breach the contractual confidentiality clause and the submissions made for her in that respect are upheld. Nevertheless, the Court considers that she was a necessary party and will bear her own costs of the suits.
25. By the foregoing findings, it should be obvious that the employee has not been defamed by the employer, because, an accurate publication of his misconduct to third parties would not amount to defamation or libel as was alleged and urged for him. As submitted for the employer there has been no established particulars of the defamatory words and their publication.



26. The employer has not by evidence and submissions established the measure of the general damages as claimed and prayed for. By the employer's own submissions it is stated that in Milimani CMCR No. 1434 of 2019 the employee's co accused was convicted for stealing of Kshs.6, 471, 607.00 being part of the amounts in the settlement transactions that were deleted and further that Kshs.937,730.00 in the unauthorised access to the system. It appears that there is no established basis to grant the general damages.
27. The employee is entitled to Kshs.55, 000.00 deducted from his final payments on account of replacing a phone and laptop. The employer's witness failed to show that indeed such loss was attributable to the employee and the witness had no evidence of existence of ownership and value of the two items.
28. While the employer has prayed that the employee and former employee be restrained from disclosing or further disclosing the employer's proprietary or confidential information, the employer has not specified the information by pleading the particulars and by evidence proving such information that would be subject of the injunction. Granting the prayer would present a difficulty in the Court supervising the order. The prayer is declined as ambiguous and want in particulars.
29. The Court has considered parties' margins of success and each to bear own costs of the suits.

In conclusion, the suits are hereby determined with orders:

1. Direct pay limited to pay Michael Gichuhi Kihuha Kshs. 55,000.00 by 15.12.2024 failing interest to be payable thereon at court rates from the date he filed his suit until full payment.
2. Each party to bear own costs of the suits.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 15<sup>TH</sup> NOVEMBER 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

