Chisom v Taxify Kenya Limited (Cause 357 of 2019)
[2023] KEELRC 1959 (KLR) (10 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1959 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 357 OF 2019

NZIOKI WA MAKAU, J

JULY 10, 2023

BETWEEN

CHRISTIAN ANOKE CHISOM ..... CLAIMANT

AND

TAXIFY KENYA LIMITED ..... RESPONDENT

JUDGMENT

1. The claimant instituted this claim through a memorandum of claim dated May 28, 2019 and prayed for judgment and relief against the respondent for:

    a. Declaration that the claimant's termination was unfair and unjust;

    b. 12 months gross salary as compensation for the unfair termination being the sum of Kshs 5,676,000/-;

    c. Payment for the 29 annual leave days unspent as at the termination date being a sum of Kshs 457,238/-;

    d. Payment of one month's salary at the sum of Kshs 473,180/- on account of the requisite one month's pay *in lieu* of notice;

    e. Severance pay at the sum of Kshs 473,180/-;

    f. Payment of the sum of Kshs 2,561,400/- being the value of the vested shares the claimant lost on account of the unfair termination;

    g. Unpaid house allowance at 15% of the claimant's basic payment being the sum of Kshs 1,424,250/-;

    h. Interest on b) to g) above at court rates from the date of the unfair termination;

i. Costs of this suit.

2. The claimant averred that the respondent offered him employment on or about July 25, 2016, which he accepted and because was setting up operations in the country, his contract of employment was executed on December 20, 2017. That he was appointed to the position of Supply Team Lead, which position he held until the respondent maliciously and unfairly terminated his employment. it was the claimant's case that he was an exemplary employee whose performance earned him high scores in reviews and substantial increases in salary.

3. He averred that while at the office sometimes on January 30, 2019, the respondent's Regional Manager, Mr Shivachi, informed him that his employment had been terminated with immediate effect for poor performance in his role as a manager and for personally benefitting from giving work to a supplier. That this took him aback as he had not been informed of any disciplinary inquiry facing him and he felt targeted by Mr Shivachi with whom they had a frosty working relationship owing to a previous incident. According to the claimant, he refused to sign two documents given to him by Mr Shivachi, one that was to acknowledge the termination and the other a notice of suspension. That later in the day, the HR Manager called to inform him that he would receive the suspension letter on email. That after reading through the suspension letter, he realised there was an elaborate unlawful scheme by the Regional Manager, HR Manager and Expansion Manager to deprive him the lawful protection of the terms of his contract and unlawfully terminate his employment. He acknowledged that the suspension letter advised that he was suspended with full pay and would be under investigation.

4. He further averred that subsequent to his receipt of the suspension letter, on February 28, 2019 he received a notification to attend a disciplinary enquiry on March 11, 2019 at 11:00 hours, to respond to allegations of gross misconduct and poor work performance as a manager. That he then received two show cause letters via email on March 7, 2019, requiring him to show cause why disciplinary action should not be taken against him on the aforementioned allegations and also communicating the adjournment of the scheduled disciplinary hearing to allow him time to respond. That he later received a third show cause letter via email on April 18, 2019 requiring him to show cause why disciplinary action should not be taken against him on account of allegations that he committed a data breach by sharing the Respondent's data with a third party.

5. It was the claimant's averment that in response to all the said show cause letters, he wrote emails asking to be provided with further details of the allegations together with any evidence the respondent sought to rely on. That however, the respondent's managers ignored and or rejected his requests. He contended that the respondent also refused his several requests for access to his work email and computer to enable him prepare a suitable defence and finally informed him that his emails had been deleted. He averred that despite his objections, the respondent proceeded to convene a disciplinary hearing on April 30, 2019 and resolved, in a record time of less than two hours, that his employment be terminated with immediate effect. That in the unsigned letter of termination provided to him after the hearing, he was informed that his employment had been terminated for misconduct in accordance with section 44(4)(g) of the *Employment Act* 2007.

6. The claimant's case was that the respondent initiated disciplinary proceedings against him after already deciding to terminate his employment and that the proceedings were solely meant to sanitise the apparent illegalities in procedure. That with malicious intent, the respondent kept changing the description of the charges levelled against him. That it also had served him with his Performance Appraisal Report at 5:55pm on April 29, 2019 and forced him to respond to the same at the hearing on the following day without affording him time to prepare a suitable response. According to the claimant, he was only informed on April 26, 2019 of the meeting of April 30, 2019 and thus did not have enough

time to prepare. Moreover, there was no evidence to neither justify the conclusion that he was guilty of gross misconduct nor that any of his actions had disclosed grounds to warrant dismissal under section 44(4)(g) of the *Employment Act*.

7. In the upshot, the claimant averred that his employment was terminated without affording him an opportunity to be heard and for baseless allegations. That he had been suspended only because he refused to acknowledge the unfair termination and not because there was any legitimate ground to put him on suspension. That the respondent's managers sought to conduct investigations with the sole aim of sanitising the unlawful and unfair termination of his employment. That the unfair termination had caused him to suffer great financial loss and untold mental anguish, stress and trauma as he was denied the benefit of the assured salary he was to earn for the remainder of his contract. That he also lost the value of unspent leave days and his reputation was in the end in tatters as the respondent made sure to announce publicly the allegations levelled against him.

8. In response, the respondent filed a memorandum of defence and counterclaim dated November 21, 2019 denying that the claimant was maliciously and unfairly terminated from his employment. That the claimant's performance had been unsatisfactory prior to his suspension and it had been discovered that he had engaged in misconduct as detailed in the notice of suspension dated January 31, 2019. That concerned about the claimant's future prospects, it chose to give him the options of either exiting the company on a mutual separation agreement or face disciplinary proceedings with an unfavourable outcome for him. That when the claimant chose to go on with the disciplinary proceedings, he was accordingly presented with the said notice of suspension that denoted the reasons for the same pending investigations into the issues. That the claimant however declined to sign the letter in acknowledgement of receipt.

9. The respondent's case was that the claimant's allegations that his termination was attributable to an alleged frosty relationship between him and its regional manager owing to a previous incident between them is diversionary and in bad taste as it seeks to derail and influence this court's decision for an unmerited payment by the respondent. It averred that the purpose of the notice of suspension was to serve as due notice to the claimant of a disciplinary inquiry against him. That the claimant was subsequently afforded an opportunity to be heard by way of response to the show cause letters delivered to him on various dates and at the disciplinary hearing held on April 30, 2019. That the claimant was also given access to materials that would assist him prepare his defence and ample time for the same, as a total of three months elapsed between his suspension and the date of the disciplinary hearing.

10. The respondent thus denied that the claimant has suffered loss and damage or that he is entitled to compensation for unfair termination. It averred that the claimant was guilty of gross misconduct and poor performance, which grounds were duly communicated to him and that it acted in accordance with justice and equity in terminating him. For gross misconduct, the respondent contended that its investigations had determined that an employee named Gideon Elema disclosed the confidential drivers and vehicle data to a company called Kcarl Limited, acting under the instructions of the claimant who had procured the services of Kcarl without authorization. That this was a direct breach of the respondent's data protection and procurement regulations and by extension, the claimant's employment contract. For poor performance, it averred that it had informed the claimant that his performance was below the targets according to the KPIs but he declined to take responsibility and opted to blame the Regional Manager.

11. It was the respondent's averment that the claimant had been suspected of receiving some personal benefit from the procurement of audit services from Kcarl Limited. That this allegation could however not be established as it could not infer evidence of the same having occurred. That notably, the same was

not among the reasons for terminating the claimant's employment as had been alleged by the claimant in his claim.

12. In the counterclaim, the respondent averred that the claimant grossly breached the obligation of fidelity, good faith and confidence relating to the employer employee relationship. Additionally, the Claimant had taken up employment with its competitor, Little Cab, contrary to the Trust and Confidence Agreement entered between them dated 6th November 2017, which breach attracts a contractual payment equal to six months' wages and compensation for damages arising from the breach as provided therein. That it had informed the Claimant to cease and desist from working with Little Cab and to pay it the said contractual penalty but he declined to adhere to the demand and notice. It further averred that the Claimant had also been defaming it by posting defamatory videos on social media. The Respondent, (the Claimant in the Counterclaim) thus prayed for Judgment against the Claimant/Respondent for:

    a. The Respondent's original claim be dismissed with costs together with interest thereon for such period and at such rate as the Court may determine.

    b. A declaration that the Respondent has committed breach of the Employment Contract, the Trust and Confidence Agreement and the Claimant's Data Protection and Procurement Regulations.

    c. The Claimant be awarded Kshs. 2,838,108/- being 6 months of the Respondent's wages prior to termination of his employment with the Claimant.

    d. An Order directing the Respondent immediately cease his employment with Little Cab and an injunction restraining the Claimant from undertaking employment Little Cab or any other of the Respondent's competitors for a period 12 months.

    e. An injunction restraining the Respondent from defaming the Claimant.

    f. The Claimant be awarded General Damages for breach of the Employment Contract, Trust and Confidence Agreement and the Claimant's Data Protection and Procurement Regulations.

    g. The Claimant be awarded General Damages for defamation.

    h. Interest on the above amounts at commercial rate from the date of termination of the Respondent from the employ of the Claimant/Applicant.

    i. Costs of and incidental to this Claim with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.

13. The Respondent also filed a witness statement made on 31st October 2019 by Candice de Goede, who asserted that the Claimant's hearing on 30th April 2019 was before a Panel comprising the then Regional Manager, the Respondent's Kenyan Counsel and herself. That when the Claimant was given an opportunity to have a representative present, he chose to have Ms. Lorraine Ajiambo (the Head of Policy) present via phone link. She stated that the Claimant's explanations at the disciplinary hearing

amounted to mere denials and shifting of responsibility and blame and that they thus decided to summarily terminate his employment.

14. In his Reply to the Defence and Counterclaim, the Claimant denied that he did not achieve his KPIs or that a notification was sent to him in that regard. With respect to the Counterclaim, he averred that the Respondent had clearly admitted in its Defence that it was its employee Gideon Elema who had disclosed the information and not the Claimant. He denied ever signing the Trust and Confidence Agreement as alleged and averred that the said agreement does not therefore apply to him. That he was thus under no obligation to pay contractual penalty nor fail to seek employment with the Respondent's competitors. That in any event, the Respondent had not shown that he had used the confidential informed acquired while in its employ to the advantage of its competitor. The Claimant's contention was that the Respondent's pursuit of the Counterclaim was meant to intimidate him into withdrawing the Claim herein. In addition, that this Court lacked jurisdiction to entertain the Respondent's Counterclaim for being a matter preserved exclusively for the High Court under section 2 of the *Contracts in restraint of Trade Act*, Cap 24 Laws of Kenya. The Claimant prayed for the Counterclaim to be dismissed with costs to him.

15. The Claimant thereafter filed a Witness Statement made on 2nd March 2020 by Alex Mwaura who stated that sometimes in January 2019, a need arose for the Respondent to verify with the NTSA the compliance status of the drivers and motor vehicles on its ride hailing platform. That Mr. Shivachi being the overall boss, his suggestion to have Kcarl Limited handle the verification process sailed through and the same was undertaken and completed successfully. Mr. Mwaura further stated that he had never heard of any complaint that Kcarl Limited had breached confidentiality and occasioned loss to the Respondent.

16. The Claimant also filed a Supplementary Witness Statement made on 12th March 2020 by Wangui Nderitu, a director of Kcarl Limited. Ms. Nderitu asserted that they had executed a Non-Disclosure Agreement (NDA) in August 2018 to protect the Respondent's information in their custody or what they had access to. That since then, Kcarl Limited was bound by the NDA and could not at any time breach any confidentiality with the data it acquired from the Respondent. She clarified that at no time did the Claimant ever give them instructions on how to access, copy or manage the Respondent's data and that the only role he played was to give them instructions to undertake the task. She confirmed that when they received instructions from one Gideon Ekeno on how to proceed and copy the data, the Claimant was not working for the Respondent as he was on suspension.

17. Evidence

    The Claimant (CW1), confirmed on cross-examination that he did not have a termination letter prior to the suspension letter. He also confirmed that the benefit of a house allowance was not indicated in his employment contract, which provided a gross amount subject to statutory deductions. Further, that he had not filed any documents to prove the 29 unspent leave days that he sought. He clarified that the claim for value for vested shares was because he was part of the Employee Stock Ownership Plan allocated some units of shares but had not filed evidence of the same in court. CW1 confirmed that he worked for Little Cab for two years starting June 2019 and thereafter secured employment in Nigeria.

18. The second witness for the Claimant was Mr. Alex Mwaura (CW2). He testified that the Respondent had a non-compete agreement that had elements of data privacy and also asserted that Kcarl Limited had an engagement with the Respondent by the time he was joining the Respondent in 2017. In re-examination, he asserted that he signed a Trust and Confidence Agreement which he believed was a requirement for all employees to sign but was not aware whether the Claimant signed the same. The third witness for the Claimant was Ms. Wangui Nderitu (CW3). She testified that they engaged the

Respondent since September 2016 until March or April 2019. She clarified that there was no specific NDA signed in regard to those instructions they received in 2019 for verification of drivers and vehicles.

19. The Respondent's witness was Ms. Cecilia Wanjiru Maina (RW1). She relied on her statement dated 23rd February 2023 and stated under cross-examination that she had records showing that the Claimant signed the Trust and Confidence Agreement.

20. **Claimant's Submissions**

On the issue of whether the termination was unfair, the Claimant cited the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR in which the Court of Appeal held that in matters of summary dismissal for breach of employment contract, employers have a legal duty to inter alia prove the reasons for termination/dismissal per section 43; prove the reasons are valid and fair per section 45; prove that the grounds are justified per section 47(5); and that a mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. It was the Claimant's submission that he had pleaded how the Respondent decided to terminate his employment on 31st January 2019 and then decided to go on a fishing expedition to sanitize its unlawful actions and justify his dismissal.

21. Further, that the Respondent neither produced in court the alleged Data Protection Regulations nor a report showing the Claimant's poor performance as alleged. That he was never issued with performance appraisal documents detailing whether or not his performance was below the targets according to the KPIs. On this submission, the Claimant relied on the case of Jane Samba Mukala v Ol Tukai Lodge Limited [2013] eKLR as was quoted in Bernard Kiiru Mwangi v Faulu Microfinance Bank Limited [2020] eKLR wherein the court observed as follows:

> "a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.
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> b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.
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> c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
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> d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee."

22. The Claimant submitted that termination of his contract was both substantively and procedurally unfair as it failed to follow the mandatory provisions as provided under sections 41 and 43 of the *Employment Act*, 2007 and as affirmed in the case of Walter Ogal Anuro v Teachers Service Commission

[2013] eKLR. He further submitted that having proved that his dismissal was unfair and wrongful, he was indeed entitled to the remedies sought as provided under section 49 as read with section 50 of the *Employment Act*. He relied on the decision of the Court in Nisha Nileshbhai Bhavsar v Kensalt Limited [2022] eKLR in which Rika J. awarded the claimant an equivalent of 12 months' salary in compensation for unfair termination. Further, that he was entitled to one month's salary in lieu of notice as provided for section 36 of the *Employment Act* and to 29 unspent leave days as provided under section 28(1)(b) of the Act. That under section 35(l)(c) and (4) of the *Employment Act*, an employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed, which provision entitled him to severance pay. For the prayer on house allowance, it refers to section 31(1) of the Act which requires an employer to provide an employee with reasonable housing accommodation or pay to the employee sufficient sum as rent for them to obtain reasonable accommodation. That he claims house allowance since his Contract of Employment did not provide for basic accommodation.

23. In regard to the Counterclaim, the Claimant cited the case of Hoswell Mbugua Njuguna t/a Fischer and Fischer Marketing Concepts v Equity Bank Limited & another [2017] eKLR in which the Court of Appeal quoted Lord Goff of Chieveley in Attorney General v Guardian Newspapers Ltd (No. 2) [1988] 3 All ER 545 that:

> " I realize that, in the vast majority of cases, in particular those concerned with trade secrets, the duty of confidence will arise from a transaction or relationship between the parties, often a contract, in which event the duty may arise by reason of either an express or an implied term of that contract. It is in such cases as these that the expressions "confider" and "confidant" are perhaps most aptly employed. But it is well-settled that a duty of confidence may arise in equity independently of such cases; and I have expressed the circumstances in which the duty arises in broad terms, not merely to embrace those cases where a third party receives information from a person who is under a duty of confidence in respect of it, knowing that it has been disclosed by that person to him in breach of his duty of confidence, but also to include certain situations, beloved of law teachers, where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by. I also have in mind the situations where secrets of importance to national security come into the possession of members of the public ..."

24. It was the Claimant's submission that as he was already on suspension when the said assignment being handled by Kcarl Limited was ongoing, he could not have participated in the matters giving rise to the allegations by the Respondent in its Counterclaim. That he thus did not in any way whatsoever contravene any provisions on confidentiality and relying on the sentiments of the Honourable Judge in the Guardian Newspapers Ltd case, he did not in any way breach his duty of confidence. On the allegation of defamation as raised in the Counterclaim, it was the Claimant's submission that the Respondent did not tender any evidence or proof on the alleged claim of defamation and that the allegation was therefore a mere statement that cannot be verified. He submitted that the Court ought to move away from the Respondent's callous attempt to enrich itself in raising such baseless claims and hence dismiss the said prayers with cost. The Claimant cited the case of Jean Njeri Kamau v Association of Action Aid International & 2 others [2020] eKLR in which Mwongo J. held that:

> " Essentially, and in summary of the propositions in the authorities cited, the law provides that the following matters must be proved for a finding of defamation to hold:

1) That there was a statement of fact. For defamation to have occurred somebody must have made the statement that is alleged to be defamatory. To be considered defamatory, the statement must concern a matter of fact not simply an opinion.

2) That the statement must have been a published statement.

3) The statement must be shown to have caused injury.

4) The statement must be shown to have been false.

5) The statement must be shown to be not privileged.

6) The defendant was legally at fault.

25. The Claimant submitted that no injury or loss has been suffered by the Respondent in any way to warrant an award of damages as sought in its Counterclaim. Additionally, as a general rule, general damages are not recoverable in cases of alleged breach of contract, which position was set out in the Court of Appeal decision in Kenya Tourism Development Corporation v Sundowner Lodge Ltd [2018] eKLR. That therefore, a claimant for general damages for breach of contract, who does not prove that he suffered loss, is all the same entitled to damages though nominal. He cited Anson's Law of Contract, 28th Edition at pg. 589 and 590 wherein the law is stated to be that:

> " Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal."

26. **Respondent's Submissions**

The Respondent submitted that the Claimant's Claim was premised primarily on the purport that his employment was terminated due to an incident that took place during the Respondent's retreat in Mombasa. The Claimant had alleged that the Respondent's Regional Manager assaulted his girlfriend, also an employee, named Sophiah Leloon and that the Regional Manager had fired him in retaliation after he reported the incident. It was the Respondent's submission that it refuted this claim by annexing in its List of Documents an Investigation Report that found the said allegations were false and revealed that the alleged victim had fallen down while drank. Moreover, the purport by the Claimant that he was terminated on 30th January 2019 is also preposterous as he admitted he was terminated vide a termination letter dated 30th April 2019 and not 30th January 2019. That it was worth noting that all Notices to Show Cause against the Claimant were sent to him after 30th January 2019 and in his response to the said letters, he never at once stated that he had already been terminated on 30th January 2019 or that the Regional Manager had terminated his employment. That the Claimant had thus been misleading this Court.

27. The Respondent submitted that it had demonstrated in its pleadings how it followed due process in terminating the Claimant's employment pursuant to section 41 of the *Employment Act*. Furthermore, that a fair hearing in an employment disciplinary proceeding is a crucial right that ensures employees have the opportunity to defend themselves against allegations of misconduct. That however, having a fair hearing does not guarantee exoneration. That in this case, the fact the Claimant was given a fair hearing and the Respondent diligently responded to his inquiries, showed that the disciplinary process was transparent, unbiased and fair. It cited the case of Mathew Lucy Cherusa v Poverelle Sisters

of Belgamo T/A Blessed Louis Palazzalo Health Centre [2013] eKLR wherein the Court quoted in approval the case of Jackson Butiya v Eastern Produce Limited (Industrial Court Cause No. 335 of 2011) in which the Court held that:

> " An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say, "I refused to talk with those people and therefore I was not heard, order them to pay me." It is not the role of the Court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law."

28. It further submitted that the Claimant's termination was justified for breaching the Respondent's data privacy regulations and company operational policy with regard to contracting for work. That sections 45 and 47 of the *Employment Act* provide a detailed guide on what constitutes a valid reason for termination of an employee. That the Court of Appeal in the case of Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR said that the standard of proof is on a balance of probability, not beyond reasonable doubt and that all the employer is required to prove are the reasons it "genuinely believed to exist," causing it to terminate the employee's services. It was the Respondent's submission that the Claimant's act to disclose confidential information without express authorization further amounted to gross misconduct and contributed to its decision to terminate the Claimant's employment. That the immense deterioration of the Claimant's performance also warranted his termination from employment.

29. The Respondent submitted that having found that the Claimant's employment was terminated lawfully, the prayers for a declaration that his termination was unfair and unjust and for compensation ought to be dismissed. That it had annexed the Claimant's pay slip for the month of April 2019 in its additional list of documents before court showing that he was paid his unspent annual leave of Kshs. 337,870/-. It further submitted that the prayer for payment in lieu of notice is devoid of merit as all the notices to show cause issued to the Claimant were sufficient notice to him. For the claim of the value of vested shares, the Respondent submitted there was no evidence either in the form of share certificate, share transfer forms and C.R 12 issued by the Registrar of Companies to prove and/or confirm that the Claimant has any shares of any form in the Respondent. Furthermore, that there was no provision in the Claimant's employment contract to confirm or establish that he was entitled to any shares as an employee of the Respondent and or under what scheme he had vested shares. That the Claimant had not honoured the requirements of section 107 of the *Evidence Act*, which demands that he proves his claims if he desires the Court to find in his favour. On the prayer for severance pay, the Respondent submitted that the Claimant had not only misinterpreted the meaning and applicability of severance pay but had also misapprehended how severance pay is calculated. That severance pay is provided under section 40(1)(g) of the *Employment Act* as a benefit an employee who has been declared redundant. In the instant case, the Claimant was never declared redundant but was terminated and that even if he was to ask for service pay, he would still not be entitled to the same as he was a member of NSSF and the Respondent dutifully paid all fees due to that statutory body. On this submission, he relied on the case of Hassanath Wanjiku v Vanela House of Coffees [2018] eKLR.

30. As regards the claim for house allowance, the Respondent submitted that clause 4.1 of the Claimant's Employment Contract provided for the payment of dues plus benefits, which benefits do not include house allowance. That clause 4.2 thereof provided that the salary and other payments payable to the employee was the gross amount and shall accordingly be paid subject to the deduction of all income, taxes and other deductions. It was the Respondent's submission that the Claimant never complained about house allowance during the subsistence of his contract because he knew he was receiving a consolidated salary as under clause 4.2 of his employment contract.

31. In reference to its Counterclaim, the Respondent submitted that the Trust and Confidence Agreement (TCA) dated 6th November 2017 was supplementary to the employment contract entered into between the Claimant and the Respondent and that the same formed part of the terms and conditions of employment as provided under paragraph 4.6 of the TCA. That based on evidence that the Claimant engaged in employment with the Respondent's Competitor before the expiry of 12 (twelve) months from the date of termination of his contract, the Claimant breached paragraph 1.1 of the TCA and was liable to pay it as under paragraph 1.4 thereof. Lastly, the Respondent respectfully requested this Court to denounce the Claimant for his unethical conduct and condemn him to pay the costs incurred by the Respondent as a result of this prolonged legal dispute. It relied on the case of Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR in which the Court stated that costs are meant to compensate the successful party for the trouble taken in prosecuting or defending the case and not to penalize the losing party.

32. The Claimant was terminated on 30th April 2019. There was no evidence of prior termination. The Respondent terminated the Claimant on allegations of gross misconduct and the sharing of confidential information with a third party as well as alleged breaches of confidentiality. The Respondent admits that the sharing of information was on instruction by it and the information was shared by another employee. It was demonstrated that the sharing of the information was for business purposes and was done by Mr. Gideon Elema. The Respondent did not attach any documents to show the Claimant had poor performance and no evidence was led to suggest there was any iota of truth in the allegations of poor performance. From the series of emails sent in March and April 2019, it would seem the Respondent was looking for reason to dismiss having made up its mind to so. There was no effort to allow the Claimant room to prepare his defence at the disciplinary hearing and to his credit managed to discredit the Respondent's narration of the cause of termination as he availed witnesses who confirmed the Claimant did not breach any confidentiality in respect to the Respondent's data. This is ample proof that there was no basis for the termination and the disciplinary hearings were meant to sanitise a pre-determined position. It is unclear whether the animus was as a result of the incident in Mombasa where an alleged assault took place involving one of the Respondent's managers or whether there was something more. In any event, the Claimant was terminated and the process found to be unfair by this Court and for which he is entitled to relief but limited to 6 months only. The Claimant is not entitled to claim any severance pay. The Respondent is correct in asserting that the Claimant had not been declared redundant therefore disentitling him to the sum claimed under the head for severance pay. The Claimant was paid a salary exclusive of house allowance and as such is entitled to claim 15% of the basic pay as house allowance. He however is only entitled to a sum for one year since he ought to have sought the unpaid house allowance within 1 year and previous years are therefore excluded. As the Respondent's counterclaim was not proved, it is hereby dismissed albeit with no order as to costs.

33. The Claimant is entitled to the following reliefs:-

    a. Declaration that the Claimant's termination was unfair and unjust;

    b. 6 months gross salary as compensation for the unfair termination being the sum of Kshs. 2,839,080/-;

    c. One month's salary in lieu of notice – Kshs. 473,180/-;

    d. Unpaid House Allowance at 15% of the Claimant's basic payment for 12 months being the sum of Kshs. 851,724/-;

e. Interest on the sums in b), c) and d) above at court rates from the date of judgment till payment in full;

f. Costs of this suit.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JULY 2023

NZIOKI wa MAKAU

JUDGE