Keiser v Makupa Transit Shade Limited (Cause 47 of 2020)
[2023] KEELRC 3448 (KLR) (18 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3448 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE 47 OF 2020

M MBARŨ, J

DECEMBER 18, 2023

BETWEEN

DENNIS KEISER ..... CLAIMANT

AND

MAKUPA TRANSIT SHADE LIMITED ..... RESPONDENT

JUDGMENT

1. The claimant is an adult and the respondent is a limited liability company registered in Kenya.

2. On 1st March 2018 the respondent employed the claimant as the chief executive officer (CEO) at gross salary of $25,000 per month. The claimant worked for the respondent as well as a group of 8 other Kenyan entities associated with the respondent and was also coordinating 3 other international companies in the British Virgin Islands and one in Mauritius all of which are beneficially owned by the directors of the respondent.

3. On 21 November 2019 the claimant called for a meeting for the purpose of discussing the 2020 budget and action plans but the respondent's director and majority shareholder Mr Twalib Ali Mbarak Hatayan directed the claimant to hand over all his duties and properties of the respondent and directed to go home. These orders and directions were made in the presence of another director/minority shareholder of the respondent Mr Abdiwahid Haji Yerrow and the human resource and administration manager Ms. Sarah Chatwin.

4. On 22 November 2019 the claimant received a message from a client of the respondent informing him that clients and business associates, had received communication from the respondent to the effect that the claimant and four other employees of the respondent were no longer in its service with immediate effect. That they were no longer authorised to enter into any transaction for or on behalf of the group of companies. This message was sent to not less than one thousand (1000) people. It was understood to mean that the claimant had committed untoward acts as a result of which his employment had

been terminated. The claimant's reputation, integrity in business circles and chances of regaining employment in the industries in which the respondent's group of companies operate has been severely diminished.

5. On 16 December 2019 the respondent sent an email letter to the claimant summarily terminating his employment.

6. The claim is that the claimant had been diligent in his duties as CEO and handled complex and sensitive matters of the respondent with an annual turnover of approximately $60,000,000. At no time was he issued with notice on any misconduct. Termination of employment was therefore wrongful, unfair and with malice. The malice is that the respondent made false and unsubstantiated allegations that the claimant was operating his own businesses using the respondent's funds and that he signed cheques to assist Davmat Company Limited in operating their businesses and portrayed them as being a sister company to the respondent which was false. The respondent also falsely accused the claimant in the letter terminating his employment that he had failed to perform and meet the agreed targets resulting in company losses of about Kshs. 180,000,000 in the year 2019. There were malicious accusations made against the claimant by the respondent that he had approved flight expenses for the chief financial officer's son and girlfriend at $655 which was his discretion to approve. The respondent also made spurious allegations that he had failed to follow the director's request to purchase fish at the rate of Ksh.60 per kilogram but went ahead to purchase them at the rate of Ksh.120 per kilogram without seeking approval yet the fish were purchased in accordance with the established procedures.

7. Other malicious acts committed against the claimant were that the respondent humiliated him at the meeting held on 21 November 2019 by compelling him to hand over its property including the motor vehicle allocated and ordering him to go home. There were libellous messages sent to over 1000 people including clients and business associates meant to damage the claimant's reputation and character to the general public, business associates and potential clients. All these were done without allowing the claimant the right to a hearing or adhering to the law and procedures with regard to termination of employment leading to wrongful termination of employment.

8. The claimant is seeking payment of his terminal dues as follows;

    a. Full salary for November 2019 $25,000;

    b. 3 months' notice pay under clause 14.6.7 of the employment contract $75,000;

    c. 6 months' pay under clause 14.6.4 of the employment contract $150,000;

    d. Damages for unfair termination of employment at 12 months' salary $300,000;

    e. General damages for emotional trauma, distress and inconveniences;

    f. General damages for libel;

    g. Costs and interests on the awards.

9. The claimant filed his witness statement dated 12 August 2020 and also testified in support of his case that he was employed by the respondent as CEO where he performed exceptionally well and on the 8 group of companies, the collective turnover was approximately $60 million. As the CEO, he was required to exercise objective judgment and discretion in all matters within the scope of his position. As a result, the company made profits in the year 2018 and 2019.

10. On 15 November 2019 the majority shareholder of the respondent Mr Twalib Ali Mbarak Hatayan posted a message on a group WhatsApp chat group, TH2G Fresh Foods (from one of the group of

companies) which had the core management and procurement teams for fish with a message that fish was no longer to be bought for more than Ksh.60 per kilogram. However, the usual custom of fish purchase in the area was that;

a. Fish purchases form fishermen at the coastline and islands of Lamu, Kiunga and Kiwayu would be purchases at agreed prices if the fish met the required standards.

b. Once agreement to sell is achieved, the agents would arrange for the fish to be received by the company's operations divisions at designated points such as Mkokoni and Mokowe.

c. The fish is received at designated points for processing.

d. The processing involves quality checks, cleaning, sorting and refrigeration.

e. The fishermen are then paid at agreed prices.

11. The claimant testified that on 15 November 2019 at 8:17pm a message was posted on the WhatsApp chat that at Mkokoni they had received various types of fish at 365Kg. This was celebrated because it was a breakthrough but the director's message to change the terms on which the fish had been acquired came as a surprise and nobody in the chat group replied to him.

12. On Monday, another message was posted that Mkokoni had received another consignment of 1.402 tones.

13. The next Monday, 17 November 2019 the claimant confirmed these purchases and the that procedures had been followed but in a discussion with Mr Twalib, he was able to explain that the process of purchasing fish had been followed at prevailing market rates and the commitment to buy at ksh.120 per kilogram had not been made by the time the fish consignment was received by the respondent and another similar purchase had been made a week earlier. However, Mr Twalib issued instructions that further purchases should be at Ksh.60 per kilogram.

14. The claimant had scheduled a meeting on 21 November to discuss the 2020 budget and action plans but while at the meeting, Mr Twalib compelled him to hand over his duties, company property including the motor vehicle he had been allocated and to immediately leave the premises to which he complied.

15. The claimant testified that he was humiliated at the meeting, he had no prior notice of these events and Mr Twalib continued to grill him over the events with regard to the purchase of fish despite the fact these had been discussed extensively. He was then directed to leave and go home.

16. On 22 November 2019 the claimant received a message from a WhatsApp group from a client of the company which directed them not to transact any business with the claimant and the words used were commonly understood to mean that the claimant had been 'fired' from his employment for dishonest or lack of integrity of character and this was libellous and has damaged his prospects of getting new business in the sector.

17. On 16 December 2019 the respondent issued the claimant with a letter terminating his employment on the grounds which included the events leading to the purchase of fish. This was 4 weeks after the unfair dismissal on 21 November 2019 during which period the respondent continued to post libellous messages of the claimant and the claims remedies sought should be allowed with costs.

18. The claimant testified that he was alleged to have been in conflict of interest with Davmat Limited but such allegations are without proof since he is not a director or shareholder of such company and no evidence was called to link the claimant with the company with regard to any untoward conduct.

Response and counter-claim

19. In response, the respondent filed Statement of Response and Counter-claim on the grounds that the claimant was employed on 1st March 2018 through a contract dated 23 November 2017 with terms and conditions governed under the contract and Standing Orders issued by the directors of the respondent from time to time.

20. Termination of employment followed the due process in accordance with the employment contract. Parties had clearly agreed that termination of employment could be summarily terminated if the claimant, as the employee was guilty of misconduct or committed fraud. The claimant committed acts of conflict of interest.

21. On the alleged libellous matters, if any emails were sent, the target audience were the clients of the respondent with whom the claimant was dealing with and these messages were sent out to inform them that he was no longer the CEO of the respondent. The information passed along in a standard email without alluding to the reasons of termination of employment.

22. The response is also that the claimant as the CEO was in charge of all company operations including finances. After the audit reports for the years 2017, 2018 and 2019 were compared by the directors, they noticed that the company was haemorrhaging funds and the losses were all attributed to the claimant's initiative claimed to be value addition business meant to increase business revenue. Such initiatives were a guise that were created to defraud the respondent since the audit report revealed that there was zero revenue from it.

23. The respondent acted within the provisions of the employment contract which allowed summary dismissal in a situation where it feared that due to the powers accorded to the claimant as CEO, he was in a position to cause the company further losses if he had been allowed to be present in the company premises during the separation process. There was no malice as alleged and the claimant failed to offer any leadership during his tenure as CEO.

24. The claimant acted in conflict of interest and caused the company losses and is not entitled to the notice pay as this was a case of summary dismissal, the claimant was already paid for November 2019 and he has not proved the damage to his reputation.

Counter-claim

25. In counter-claim, the respondent's case is that the claimant is indebted to the respondent for Kshs. 185,297,469 for loss of revenue due to mismanagement of the company affairs which resulted in a huge loss in 2018/2019 financial period.

26. The claimant came in as CEO when the company was flourishing and he introduced the Value Additional Business (VAB) initiative which was tabled before the board for assessment and projection in regard to profitability and application. The claimant misused the office of CEO and bypassed the standard operating procedures of the company and issued directives and mismanaged funds which he was not authorised to issue and as a result, the company lost Kshs. 12,974,761.07 which amount the respondent is claiming.

27. The claimant was aware that he was not allowed to make executive decisions without prior approval of the directors. Following an audit investigation, the respondent discovered that the claimant caused the respondent loss of funds as a result of his direct actions and omissions.

28. The counter-claim is for the following;

a. Compensation for mismanaged funds at Kshs. 12,974,791.07

b. General damages for breach of contract.

c. If the claimant's claim is allowed, the same to be set off with the amount of the counter-claim.

d. Payment of costs.

29. In evidence, the respondent called Abdiwahid Haji Yerrow the managing director of the respondent companies. He testified that the claimant was an employee of the respondent under a written contract from 1st March 2018 but in November 2019, it was brought to his attention that the claimant, under his initiative of VAB, he allowed others working under his directions to cause the respondent to pay off debts incurred by a company named Davmat Limited. This diversion of finances from the respondent's account led to huge losses. The respondent was forced to lay off staff and make salary reduction to all other employees of the company. The directive to pass off the company by the name Davmat Limited as one of the sister companies of the respondent was well known by the claimant as the CEO. He authorised payments without consulting the directors. The claimant knew that this company was not related to the respondent which was in breach of his employment contract.

30. Mr Yerrow testified that the claimant exposed the respondent to huge losses particularly in authorising payments that were above his approval purview. Upon finding these acts of gross misconduct, the respondent decided to act quickly to avert further losses and safeguard the affairs of the company because the claimant was authorised to handle financial matters and directly talk to clients. If he had not been stopped, he would have sabotaged the respondent and out of control if he knew he was under investigations for gross misconduct. If he had been allowed to continue in service, there would have been huge losses.

31. After the respondent noticed various irregularities in the finances, an audit was called and the results were clear that the claimant was deliberately causing the respondent financial losses. He never reported to the directors. The audit demonstrated that the claimant was in breach of his employment contract and this justified his summary dismissal.

32. The respondent called Kepha Moregu who carried out the audit. He testified that his terms of reference were to look at the 2018 to 2019 financial years with regard to revenue and change of assets and to investigate the trend. The company was having financial challenges and ballooning of debtors and services paid in cash or on credit. There was a decline in the bank balances and the respondent had to seek funds externally to support operations. He noted a decrease in cash flows from the year 2018 to 2019 attributed to decline and management inefficiency and failure by the claimant's value added model of business.

33. Moregu testified that the claimant was found to have made unauthorised payments with regard to travel expenses. He exceeded the allowed limits. Under clause 4.2 of his contract, expenses incurred in the course of his employment and on behalf of the respondent were to be reimbursed. However, there were no authorisations by the Board for him or other employees to spend money beyond the allowed limited. The expenses are therefore deemed personal and hence recoverable at the end of his employment. Clause 5.7.3 (b) of the contract prohibited the claimant from incurring expenses of alcohol but he went ahead and claimed and was reimbursed such expenses through his bank account. As the CEO, the claimant was required to show a high degree of integrity, which he failed to discharge, leading to financial losses to the company. The unauthorised expenses above the allowed $10,000 amounted to Kshs. 1,018,660.62 incurred as follows;

May 2018, Kshs. 360,418.80;

June 2018 Kshs. 774,349.92;

July 2018 Kshs. 78,745;

August 2018 Kshs. 56,360;

September 2018 Kshs. 42,307;

October 2018 Kshs. 91,314.50;

November 2018 Kshs. 201,290.40;

December 2018 Kshs. 433,875

Total reimbursed Kshs. 2,038,660.62

Less provision of $10,000x112 Kshs. 1,020,000

Over spent and recoverable Kshs. 1,018,660.62.

For the year 2019, total reimbursed is Kshs. 3,747,549.45

Less provision of $10,000x102 Kshs. 1,020,000

Over spent and recoverable Kshs. 2,727,549.45.

34. The claimant was found to have allowed Davmat Limited to transact business as a sister company of the respondent leading to financial losses to the respondent. He introduced a business model that was not working to the benefit of the respondent but to third parties. The business model was favourable to third parties and as the CEO, the claimant ought to have noticed the degree of decline in revenue and assets losses which was high. He should have noted and raised these matters with the directors.

35. In the audit, there were recommendations for change of cheque signatories and the approval process to include a director. All payments to be processed through a requisition from the chief finance officer, the CEO before treasury could write the cheque with supporting documents. Upon the audit, the losses incurred by the respondent were attributed to the claimant as the CEO. A proper team should have been in place to avoid such financial losses.

36. At the end of employment, the claimant had unrepaid advance outstanding. These advance payments were made on an understanding that there would be recovered within the same month and subject to tax procedures. These included;

28 March 2019 salary advance Kshs. 20,000;

19 June 2019 unpaid advance Kshs. 163,232;

30 June 2019 air fare Kshs. 195,647;

30 June 2019 air fare Kshs. 323,189

30 June 2019 salary advance Kshs. 50,177;

11 July 2019 reversal air fare Kshs. 261,678

19 August 2019 salary advance Kshs. 261,678;

30 August 2019 salary advance Kshs. 261,678;

1st October 2019 air fare Kshs. 275,179;

1st October 2019 air fare Kshs. 287,219.

Total Kshs. 2,252,354.

37. On cross-examination, Moregu testified that the audit was carried out after the claimant had left his employment and was not called to respond to any matters thereof. The findings were submitted to the respondent directly.

38. The respondent also called Vincent Mwancha the chief finance officer. In November 2019 he was called by the chairman to take over the position due to cash flow problems. The claimant had already been dismissed, the respondent was facing business and financial losses and could not pay salaries. He started his employment on 1st December 2019. The respondent wanted a forensic audit and he recommended the auditors. At the time, the respondent could not afford to pay salary and they offered employees a 60% pay cut and some refused and opted to leave employment. The respondent issued a redundancy notice and copied the labour office. All these matters arose following the financial losses during the claimant's tenure as CEO.

39. Mwancha testified that he took over his employment with the respondent after the claimant had left. He noted that there were many debtors, container deposits that were outstanding. There records were not brought to the attention of the claimant before his employment was terminated.

40. In reply to the counter-claim, the claimant's case is that at no point was he called by the respondent or its directors to respond to any matters. No question in the manner he was running company affairs was brought to his attention. No show cause notice issued over any matter or a hearing to make any representation on the audit report. He undertook his duties with the approval of the respondent at all material time and the counter-claim is without merit and should be dismissed with costs.

41. At the close of the hearing, the parties filed written submissions which are analysed and the issues which emerge for determination are whether there was unfair termination of employment; whether the remedies sought should issue; and whether the counter-claim is with merit.

Determination

42. Termination of employment is wrongful and or unfair where the employer fails to follow the contract terms and conditions or the lawful provisions with regard to termination of employment. Unfair termination or wrongful dismissal of employment is addressed under Section 47(5) of the *Employment Act*, 2007 (the Act) which provides that;

> For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

43. In the case of Charles Wanjala Watima v Nyali Golf & Country Club Ltd [2013] eKLR the court held that whereas at common law an employer could dismiss the employee after notice or payment in lieu thereof, the current trajectory is fundamentally different. An employer cannot dismiss an employee at will. Even where good cause exists, due process is mandatory. To act contrary, the employer is at risk of having to pay him a large sum should the court find the dismissal was unfair.

44. Even where the employee commits gross misconduct, the law requires the employer to hear the employee on his representations. Upon alleged gross misconduct, pursuant to Section 44(4) and 41(2)

of the Act, the employer is allowed to issue short notice to allow the employee attend and give his representations. Section 41(2) of the Act requires that;

> 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". (Our emphasis).

45. Even though an employment contract allows for summary dismissal for gross misconduct, this must be read together with the Act which regulates employment. Section 44 of the Act allow summary dismissal but its provisions must be considered along with Section 41 and cannot be considered in isolation regardless of the nature and gravity of the alleged misconduct imputed on an employee as held in Maasai Mara University v William Morogo Muto & 3 others, Civil Appeal No. 33 of 2016.

46. The rationale is that, before termination of employment, Sections 44 and 41 of the Act directs the employer to adhere to four key elements that is;

    a. An explanation of the grounds of termination of employment in a language understood by the employee;

    b. The reason for which the employer is considering termination of employment;

    c. Entitlement of an employee to have a representative of his choice when the explanation of grounds of terminations of employment is being made;

    d. Hearing and considering any representation made by the employee and the representative chosen by the employee.

47. These elements are mandatory. They are secured in law. Without adhering to the same, termination of employment is unfair pursuant to Section 45 of the Act.

48. Mr Yerrow for the respondent was emphatic that, the claimant had been employed at a huge salary of Ksh.2.5 million per month but he did not improve the business and to avoid further losses, the respondent opted to summarily dismiss him. To avert any business losses, there was no hearing or notice issued.

49. This evidence was corroborated by Mr Mwancha who was employed after the claimant was sent away from 1st December 2019 to take over duties of chief finance officer. His main duty was to initiate an audit. At this point, no letter or written notice had issued to the claimant with regard to termination of employment. Mr Yerrow, and indeed the respondent knew, the claimant's employment had been terminated.

50. In essence, the elements outlined above in the case of Maasai Mara University case cited above, were not adhered to. The respondent failed to demonstrate the elements outlined above. The response filed was that the employment contract allowed the respondent to dismiss the claimant from his employment after realisation there were acts of misconduct.

51. As addressed above, the claimant was under a written contract which allowed termination of employment upon notice which was not done. The respondent, under the mistaken belief that they had a right to terminate employment at will, orally directed the claimant to go home on 21st November 2019 and only later, on 17 December 2019 was the written notice issued. Within the intervening period, notice had been issued to clients, other employees and business contacts that the claimant

was no longer in the service of the respondent. That they should not transact any business with the claimant.

52. The respondent as the employer had the prerogative to remove the claimant from the shop floor to allow for investigations and indeed conduct a forensic audit with regard to his performance. This prerogative allowed for suspension, interdiction or forced leave upon conditions to allow for the removal of the claimant from his office for the purpose of an audit. Upon the findings, allow the claimant to show cause and a hearing to allow him to respond to any matter of misconduct or gross misconduct. In the case of *Mutwol v Moi University (Civil Appeal 118 of 2019)* [2022] KECA 537 (KLR) (28 April 2022) (Judgment) the Court of Appeal held that;

> ... there is no law that prohibits the placement of an employee on compulsory leave. It is our further view that it was necessary to have the appellant sent on compulsory leave to enable the respondent to carry out meaningful investigation. It is not possible for an employer to carry out effective investigations against an employee who, in spite of accusations of wrong doing, continues to occupy her/his office. In any case, looking at the circumstances of this matter, the appellant was informed and understood that she was being placed on compulsory leave to allow for investigations and she was given the opportunity to show cause why disciplinary action should not be taken against her. We do not find any good grounds to impugn the decision of the respondent which in our view was fair, reasonable and justifiable.

53. Substantive fairness demanded that, upon the respondent finding that the claimant was or was suspected of having committed gross misconduct, to allow him the due process, where the suspicions were of the nature requiring a forensic audit, interim removal from office was allowed. This would have allowed the respondent to carry out investigations and upon which, issue a notice to show cause to allow the claimant the opportunity to respond. According to Mr Yerrow, the damage committed was so gross that on 21st November 2019, they had to order the claimant to leave his office. No notice issued with regard to his employment until 17 December 2019. The notice was a summary dismissal. There was no effort to hear the claimant on any matter. The interim period was used to notify third parties that the claimant was no longer in the service of the respondent. He was the last to receive notice of summary dismissal.

64. This resulted in wrongful termination of employment for lack of the respondent respecting the very basic document regulating employment, the employment contract. The explanation that the respondent required to address the situation quickly to avoid damage to its business and hence directed the claimant out of his employment and office, such compounded the unfairness of the matter. The verbal notice on 21st November 2019 was not acted on until 17 December 2019. This lapse was not justified.

55. It is not the position held as CEO that mattered. The law required the claimant be accorded the due process and a hearing however short the notice as held in *Oyombe v Eco Bank Limited (Civil Appeal 185 of 2017)* [2022] KECA 540 (KLR).

56. At the time the claimant was directed to exit his employment on 21 November 2019, no written notice had issued giving him reasons leading to such a sanction. This amounted to substantive unfairness. Later, the respondent issued notice dated 17 December 2019 devoid of any hearing and after the fact of termination of employment. This was total abuse of the law and due process.

57. On the findings that there was both procedural and substantive unfairness, the claimant is entitled to notice pay at one month gross salary in terms of clause 14.6.7 of the employment contract as a term agreed upon by the parties all at $25,000.

58. Compensation is due under the provisions of Section 45 read together with Section 49 of the Act. The claimant was under a contract and served well from 1st March 2018 until 17 December 2019 when he received notice terminating his employment. Compensation is due for unfair termination of his employment and one month gross salary is hereby found appropriate at $25,000.

59. Despite the respondent sending the claimant away on 21 November 2019 notice terminating employment only issued on 17 December 2019. Full salary for November 2019 is due together with 21 days in December 2019. These amounts to 30 days all at $25,000.

60. On the claim under clause 14.6.4 of the employment contract, parties agreed that;

> Provided that in case of termination by the Company without good reasons (except for gross misconduct) the Employee shall be entitled to six (6) month's salary, plus bonus pro rata if applicable, plus allowances and other benefits or statutory entitlements whichever is higher.

61. This benefit secured under the contract, on the findings that there was no procedural and subjection fairness, payment of 6 months at $25,000 is due all at $150,000.

62. On the claim for damages for libel, emotional trauma and distress where the respondent published matter of the claimant to other persons in the business in a social media platform, whereas the employer should protect its business through a lockout, summary dismissal of the employee or termination of employment as lawfully entitled to, to go ahead and share employment details to impress on the readers and viewers of the same that employment had terminated due to misconduct or gross misconduct, even where employment was not formerly terminated, this is malicious. Therefore, where an employer uses work records or the employment relationship to bring into public ridicule of the employee and leading to defamatory matter, the court has jurisdiction to deal and address firmly as held in Mercy Kawira Mithika v Kenya Women Micro-Finance Bank PLC [2021] eKLR that;

> In Employment Law defamation takes place when the Employer publicizes or causes to be publicized, statements which stigmatize the Employee. The manner of dismissal and the negative publicity attached to the Petitioner had the potential to damage his employability..... in employment relations, defamation is based on the old tort of defamation but with a new spin: the employee's injured or damaged employability and not merely the personal stigmatization must be compensated.

63. Where the intention of the employer in sharing such information of the employee is to lock him out of possible employment, such then exacerbates the defamation and affects the employability of the employee. In the case of Naqvi Syed Omar v Paramount Bank Limited & Another [2015] eKLR the Petitioner relied on the court in addressing a similar matter held that;

> ... where an employee's attractiveness to potential employees is damaged or diminished as a result of the actions of the employer in the process of termination, the court may grant damages to compensate the lost employability.

64. Even before the respondent could issue the letter terminating the claimant's employment, a message was circulated to the effect that;

> Dear All,

> We wish to inform you that the following individuals are no longer employees of our group of companies with immediate effect.
>
> Dennis Keiser ...
>
> ....
>
> They are therefore no longer authorised to enter into any transaction for or on behalf of Makupa Transit Shade Ltd, Boss Freight Terminal ...

65. The effort to justify the sharing this communication and exit of the claimant from the service of the respondent was not a protective measure. This was shared even before the respondent could issue the notice terminating employment, meaning they were out to damage his employability without any plausible reasons. It was meant to injure his employability in the sector. Such damage was not justified and he is entitled to damages.

66. In awarding damages, the court in Royal Media Services Limited t/a Citizen TV & another v Alfred Amayio Maiko [2021] eKLR held that Kshs. 5,000,000 was appropriate upon a finding there was defamation of the plaintiff. In the case of The Nairobi Star Publication Limited v Elizabeth Atieno Oyoo Civil Appeal No. 52 of 2017 where the court awarded the plaintiff a sum of Kshs. 5,000,000 in general damages. In Nation Media Group Limited v George Nthenge Civil Appeal No. 64 of 2013 [2017] eKLR, the Court of Appeal upheld an award of Kshs. 5,000,000 as compensation for defamatory words published against the respondent.

67. This then is a general trend where publication is done on a media that has wide circulation. The respondent published defamatory matters against the claimant is a WhatsApp chat group with over 1,000 members and largely affected his future employability in his sector of trade. However, the claimant did not state he applied for jobs and was not successful hence an award of Kshs. 50,000 is hereby found appropriate.

68. The claim being successful, costs are awarded

69. On the counter-claim, the respondent's case is that the claimant introduced the VAB initiative after he tabled his proposal which was presented to the Board for proper assessment and projection in regard to profitability and application. I take it, the respondent's board is comprised of persons with interests in the sectors under the coverage of the group of companies who have business acumen to discern ideas presented before them and hence approved the VAB initiative presented to them by the claimant for profitability and application. They cannot turn around and then accuse the claimant of presenting the initiative under fraud. The Board held a supervisory role over the claimant and had the sole mandate to decline the VAB initiative before application. Blaming the claimant will not suffice.

70. The audit report was carried out in the absence of the claimant, he was not called to show cause over any matter with regard to the audit, his work performance or any issue of misconduct or gross misconduct. Upon the Audit/investigation, the claimant was not called to respond to any issue. Had the intention been to keep the claimant out of office so as to conduct the audit and other investigations, the respondent as the employer had the prerogative to lock him out of the shop floor or suspend him to allow for investigations. Upon the audit, the claimant ought to have been invited to a hearing to defend himself. The audit report issued after exit from employment.

71. Objectively, the total counterclaimed amount is 12,974,791.07. From the audit report, the direct implication of the claimant is noted as relating to recoverable money treated as reimbursable expenses at Kshs. 1,018,662.62 for the year 2018 and Kshs. 2,727,549.45 for the year 2019 total being Kshs. 3,749,212.07.

72. For unrepaid salary advances, an amount of Kshs. 2,252,354.

73. Overall, a sum of Kshs. 5,998,566.07.

74. The total counterclaimed amount is far removed from the overall amounts assessed under the audit report.

75. Without the due process, the counter-claim must fail.

76. However, pursuant to Section 19(1)(h) of the Act, the employer is allowed to recover monies advanced to the employee for good cause and which remains unpaid at the end of employment; (h) an amount due and payable by the employee under and in accordance with the terms of an agreement in writing, by way of repayment or part repayment of a loan of money made to him by the employer, not exceeding fifty percent of the wages payable to that employee after the deduction of all such other amounts as may be due from him under this section; and

77. upon the audit, the findings that the claimant spent over Kshs. 3,746,209 in unauthorised expenses and above the $10,000 limit, such matters were never brought to his attention to address while in employment. From May to December 2018, no matter of unauthorised expenses as alleged were addressed with the claimant. Further, in the year 2019, similar claims only arose after exit from employment. such denied the claimant access to records, statements and other facilities he requested to have so as to respond and exonerate himself.

78. With regard to salary advances and air far expenses incurred by the claimant, under the definition of Section 19(1) of the Act as outlined above, without any evidence of having repaid such monies, these are lawfully due. in response to the counterclaim, the claimant does not address these advances in salary and expenses on airfare. These are recoverable in law all at Kshs. 2,252,354.

79. On the claim for costs, the claim successful, the counterclaim successful to the extent of the recoverable salary advances at Kshs. 2,252,354, each party to bear own costs.

80. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;

    a. Termination of employment was without due process and was unfair;

    b. Compensation awarded $25,000;

    c. Notice pay $150,000;

    d. Unpaid salaries $25,000;

    e. General damages for defamation Kshs. 50,000;

    f. Amounts above shall be converted to the contract currency (United States Dollars applicable as of the date of judgment;And

    g. The counter-claim is allowed for recovery of Kshs. 2,252,354 in salary advances;

    h. The counterclaim award shall be offset from the awards under (b) to (d) above; and

    i. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18TH DAY OF DECEMBER 2023.

M. MBARŨ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....