



**Waite v Lets Go Travel Limited (Cause 1748 of 2016)
[2022] KEELRC 1163 (KLR) (27 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1163 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1748 OF 2016**

J RIKA, J

MAY 27, 2022

BETWEEN

ANGELICA WARUNGU WAITE CLAIMANT

AND

LETS GO TRAVEL LIMITED RESPONDENT

JUDGMENT

1. The Claimant filed her Statement of Claim on 29th August 2016.
2. She states, she was employed by the Respondent in the year 2001 in an undisclosed junior position. She rose through the ranks, to the position of Business Development Manager
3. She states, on 17th June 2016, the Respondent terminated her contract with immediate effect.
4. The letter raised unsubstantiated claims against the Claimant. She was never given an opportunity to defend herself, in a disciplinary hearing. The allegations were baseless.
5. The Respondent offered terminal benefits, but did not take into account the number of years served; pending leave days; and compensation for loss of employment.
6. She states, there was no valid reason to justify termination. Termination was unfair, under Section 41 and 45 of the *Employment Act*.
7. She prays for Judgment against the Respondent for: -
 - a. Declaration that termination was substantively and procedurally unfair.
 - b. 12 months' salary in compensation for unfair termination at Kshs. 3,240,000.
 - c. Gratuity at the rate of 1-month salary for each complete year of service at Kshs. 4,050,000.
 - d. Certificate of Service.



- e. Costs.
 - f. Any other suitable relief.
8. The Respondent filed its Statement of Response on 20th September 2016. It is conceded that the Claimant was Respondent's Business Development Manager. She acted against the interests of the Respondent, in carrying out her role. She set up a rival company known as Advantage Travel Limited, and diverted Respondent's business to her company. She solicited business from the Respondent's customers, in breach of her terms of employment. She was given an opportunity to be heard, after service of the termination letter. She was invited for a disciplinary hearing, but chose to ignore the invitation and waived her right of hearing. She was summarily dismissed for gross misconduct. She was paid all terminal dues. She did not exit on redundancy, to claim gratuity. She was not owed any leave days on exit. Certificate of Service was issued. The Respondent prays the Court to dismiss the Claim with costs.
 9. The Claimant gave evidence on 8th December 2021 and 9th February 2022, when she rested her case. Allan John Dickson, Respondent's Managing Director, and Accounts Manager Monica Wambui Kirimi, both gave evidence 9th February 2022, closing the hearing. The dispute was last mentioned on 30th March 2022, when Parties confirmed filing and exchange of Closing Submissions.
 10. The Claimant restated and adopted the contents of her Statements of Claim and Witness, in her evidence before the Court. She described herself as a Tours Consultant. She did tenders and clients' visits for the Respondent, among other duties. The Respondent had service level agreements, a template used when the Respondent was looking for customers. The agreement was within reach of any Staff, when looking of customers.
 11. She took leave in 2016, to take care of her daughter. She was away for 2 ½ weeks. Upon return on 17th June 2016, she was called by the Managing Director to Artcafe in Karen, Nairobi. She found him with other Management Staff. She was told that she had been running her own business, parallel to the Respondent's. She was told that she had been fired. She went back to the office and packed her belongings. She balanced her accounts and was told there was no shortfall. She left, and was advised not to return. No reason was given to her, to justify dismissal. She had worked for over 15 years. To be dismissed at a cafeteria, was demeaning.
 12. She registered her own company before termination. She had gone through torture. She was always met with hostility at Respondent's Head Office. She had pointed out some malpractices at the workplace to the Managing Director. She registered her company in May 2016, and started operations in August 2016, long after she had left employment.
 13. Cross-examined, the Claimant told the Court that she supervised more than 2 Employees. One of them was Stephen Obare. The Claimant did not think that Obare still worked for the Respondent. She did not know why he was sacked. A letter exhibited by the Respondent, from the Registrar of Companies, shows that the Claimant, registered her company, Advantage Travel Limited, with Stephen Obare. The Claimant's duties included development of strategy; customer engagement; and exploration of new markets. She did not engage in her own business while in employment. There is a facebook printout, dated 7th June 2016, advertising Advantage Travel Limited. It is not true that the Claimant solicited for business for Advantage Travel Limited, while still an Employee of the Respondent. The contents of the printout are not true. It was not illegal to register Advantage Travel Limited. She was not aware that Obare admitted theft.



14. Continuing with her evidence on cross-examination, the Claimant told the Court that she was not Obare's supervisor. Advantage was not in existence at the time the Claimant was dismissed. She did not lure customers to Advantage. Service level agreement was editable. It was just a template, within the reach of all staff. Obare forwarded this template to his own e-mail address. He was already a partner to the Claimant, by the time he forwarded Respondent's trade information, to his own e-mail address. The Claimant was highly valued by the Respondent. She was given commendations. She did not exhibit commendation letters. She was not given an opportunity to defend the allegations against her. She was made to sign the letter of dismissal. She was not allowed to say anything. She collected her terminal dues cheque 2 weeks after dismissal. She banked it. By law, an Employee is bound to receive gratuity. Redirected, the Claimant told the Court that nothing in her contract, barred her from setting up her own company.
15. Dickson adopted his 2 Witness Statements on record. He emphasized that the Claimant was bound by her contract, to uphold business ethics. She went against this, by operating her own rival business. She was in charge of Respondent's business operations at Karen. She was summoned for a meeting. Obare was also summoned. They were shown documents relating to their business. They were required to explain. They did not. It was necessary to have the letters of termination ready, because the Claimant and Obare, had become business competitors to the Respondent. They were accorded adequate opportunity to defend themselves. The Karen office was small. The Respondent opted to hold the meeting at the more expansive and very serene Artcafe across the road. Other meetings had taken place at the Artcafe. The Respondent did not harass the Claimant. Creation of a business rival affected Respondent's business. Its customers would ask how come that they were being asked to turn to Advantage Travel Limited? Obare accepted liability, and accepted separation. He did not sue the Respondent. The Claimant was issued her Certificate of Service. Her prayers are without merit.
16. Cross-examined, Dickson told the Court that the employment contract did not specifically state that the Claimant could not set up her own company. The letter of termination was issued after the meeting. Paragraph 9 of the Statement of Response states that it was after the meeting. The paragraph is erroneous. The Claimant worked with Obare to solicit business. Dickson did not agree that the name on facebook, could have been registered by any other person. The meeting at Artcafe was not recorded in minutes. The Respondent is a small organization, and does not record all its meetings. At least 20 clients were lost to the Respondent. He did not have details of loss.
17. Redirected, he told the Court that the Claimant was bound not to undermine Respondent's business. The letter of termination was handed to the Claimant, at the end of the meeting.
18. Monica corroborated the evidence of her boss Dickson. She was present at Artcafe. Cross-examined, she told the Court that she is not the Human Resource Manager, but attended the meeting as the Accounts Manager. Redirected, she told the Court that it was not unusual, not to have minutes, at Respondent's meetings. Attendees would ordinarily only record action points. It was the practice.
19. The issues are, as traditionally is with Claims for unfair termination, whether the Claimant's contract was terminated following a valid reason or reasons; whether procedure was fair; and whether she merits the remedies claimed. The relevant law governing these issues, is contained in Sections 41, 43, 45 and 47[5] of the *Employment Act*.

The Court Finds: -

20. The Claimant was employed by the Respondent Tours and Travel Company, as a junior Employee, in 2001. She worked for 15 years, until 17th June 2016, when the Respondent terminated her contract. She



held the position of Business Development Manager, as at the time of termination. Her last monthly salary was Kshs. 270,000 as shown in her pay slips.

21. The letter of termination states that the Respondent had come to learn, that the Claimant had been acting contrary to the interests of the Respondent, by incorporating her own travel and tours business, and by diverting business from the Respondent to her new outfit. Her actions were in direct conflict with her job description.
22. The Claimant was called alongside her colleague Stephen Obare to Artcafe, where she was confronted by Management led by Director Dickson, with documents showing that the Claimant had established a rival business.
23. The documents exhibited by the Respondent include a letter from Assistant Registrar of Companies, dated 15th June 2016, addressed to Advantage Travel Limited, showing that the company was registered on 10th February 2016, a clear 4 months, before the Claimant's contract was terminated. There was an e-mail forwarded by Obare to his e-mail address, at Advantage, which worryingly, attached Respondent's business documents, some which were characterized as template by the Claimant. They include Nature Conservancy in Africa document; Service Level Agreement; and DD-ULGT Presentation Document. The e-mail is dated 11th June 2016. Then there is a facebook advertisement dated 14th June 2016, where Advantage Travel Limited offered to the world perfect holidays, at some of the lowest market prices available.
24. These documents are more than adequate to establish that the Claimant had set up her own business, jointly with her former colleague Obare, to rival the Respondent.
25. Her argument that she was not barred from doing so by her contract, is mind-boggling. Even were it to be accepted from the outset that there was no express contractual clause, barring the Claimant from competing in the same market with her Employer, there are always duties of an Employee, which are implied by the law. They include: obedience to and cooperation with the Employer; using care and skill in the performance of functions; and exhibiting fidelity and good faith to the Employer. Without express terms in the law or contract prohibiting the Claimant from running her own business parallel to that of the Respondent, she would still be bound by the implied terms of her contract.
26. Her job description states that, she was responsible for overall success of the Respondent. She was required to proactively grow corporate and leisure accounts managed by the Respondent, and to oversee penetration of products and services with existing clients. She was to build credibility, loyalty and relationships. She was to actively solicit business for the Respondent. She was to oversee branch operations at Karen Office. These are among the express duties, in her contract of employment. Her role as Business Development Manager was explicit.
27. How would she discharge this role, while operating a business in competition with the Respondent? How would she dedicate her time at the Respondent's Karen Office which she oversaw, while she had opened her own office at the Stables, also in Karen?
28. It was not necessary for the Respondent to prove beyond reasonable doubt, that it had lost business to the Claimant's company Advantage Travel Limited; it is sufficient that the Claimant is shown to have set up a business to rival her Employer. Section 43 of the *Employment Act* states that the reason, or reasons for termination of a contract of employment, are the matters that the Employer, at the time of termination of the contract, genuinely believed to exist, and which caused the Employer to terminate the services of the Employee. The Respondent had valid reasons to justify termination. It was telling that the Respondent's partner even stole the Respondent's trade information, in readiness to setting up



- and developing of the rival business. The Claimant and her colleague opted to develop their own outfit, while still employed by the Respondent, completely trashing their duty of fidelity to their Employer.
29. There is not a shred of doubt that the advertisements made through facebook, related to Advantage Travel Limited, registered by the Claimant and Obare, as confirmed in the letter of the Assistant Registrar of Companies. It is not true that the company could have been registered, or advertisements placed, by any other persons.
 30. The Court is satisfied that termination was fair in substance.
 31. Was procedure fair? There was nothing irregular about holding of a meeting at Artcafe. Section 41 of the *Employment Act* does not bind Employers to conduct disciplinary proceedings only at their workplaces. Not every Employer is big enough, to have boardroom facilities. So long as the minimum statutory procedural requirements are met, the venue is not a relevant factor in determining whether termination was unfair.
 32. That said, the Respondent does not appear to have observed the basic standards of fairness in dismissing the Claimant.
 33. The letter of termination, as pleaded in the Statement of Response, preceded the meeting. Dickson went to the meeting with the letter of termination in hand. Paragraph 9 of the Statement of Response is not in error. It certainly is not a minor typographical error, as the Respondent's Advocate put it, when she sought amendment after the hearing had closed. It is noted that in his evidence-in-chief, Dickson explained that it was necessary to have the letters of termination ready, because the Claimant and Obare, had turned into competitors. The letters were prepared before the Claimant and her colleague were required to respond. The change in position, on when the letter of termination was handed to the Claimant, only happened on cross-examination and redirection. Dickson had already explained in his evidence-in-chief, that it was necessary to have the letters of termination ready, because the Claimant and Obare, had turned into competitors.
 34. There was no letter to show cause, issued to the Claimant. There is no record of an invitation to a disciplinary hearing. There was no hearing recorded through minutes. It is not shown that the Claimant was presented with any charges, prior to the Artcafe meeting. The Claimant does not seem to have been advised on her right to appear at the forum, if it was indeed a disciplinary forum, with a colleague of her choice.
 35. Procedure was flawed, and not in conformity with Section 41 of the *Employment Act*.
 36. Termination was unfair, on account of defects in the procedure.
 37. The Claimant had worked for 15 years. She was largely at fault, for the decision made by the Respondent, to end the employment relationship. She placed herself in direct competition with her Employer's business. She complains about harassment at the workplace, but the Court does not give much weight to this diversionary evidence. She did not expect to go on working for the Respondent. She had set herself up, to compete with the Respondent, from as early as February 2016. The flaw in the termination process was procedural.
 38. She is granted equivalent of 3 ½ months' salary in compensation for unfair termination at Kshs. 945,000.
 39. There is no support for the prayer for gratuity. It is not in the contract of employment, the law or workplace policy.
 40. Certificate of Service issued.



41. No order on the costs.

In Sum, it is Ordered: -

- a. It is declared that termination was procedurally infirm and therefore unfair.
- b. The Respondent shall pay to the Claimant equivalent of 3 ½ months' salary in compensation for unfair termination, at Kshs. 945,000.
- c. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 27TH DAY OF MAY 2022.

JAMES RIKA

JUDGE

