



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CASE NO. 1602 OF 2017**

**MARTHA WANGARI KARIUKI.....CLAIMANT**

**-VERSUS-**

**MULI MUSYOKA.....1<sup>ST</sup> RESPONDENT**

**HAIR HUB TRICHOLOGY CENTRE LIMITED.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant's suit is contained in the Amended Statement of Claim on 6.9.2017 in which she alleged that she due to constant sexual harassment by the 1<sup>st</sup> respondent, who is the 2<sup>nd</sup> respondent's Managing Director, she served him with a termination notice dated 10.4.2017. She further alleged that, by the letter dated 3.5.2017 the respondents waived the notice and told her that her last day at work would be on 30.5.2017. She averred that, the said waiver of notice amounted to a constructive dismissed and therefore she prayed for the following reliefs:

**a. A declaration that the said termination of the Claimant's service and/or employment by the respondent was unlawful, unfair and/or illegal.**

**b. Amount Kshs. 519,192 in terminal dues**

**c. Costs of the suit**

**d. Interest on this claim (b), (c).**

2. The Respondents' defence is contained in the Amended Joint Statement of Response and Counter Claim filed on 28.9.2017. The 1<sup>st</sup> Respondent denied sexually harassing the Claimant and averred that this allegation is an unconscionable attack on his character and reputation. He further averred that the claimant has not disclosed any justifiable cause of action against him in the Amended Claim. Therefore, he prayed for the suit against to be dismissed with costs.

3. The 2<sup>nd</sup> Respondent averred that the Claimant resigned from employment on her own volition by the letter dated 10.4.2017. It further averred that in the run-up to her resignation, the Claimant had become unruly and uncooperative at work and had been engaged in misappropriation of office funds for which it reprimanded but forgave her; and that she got entangled in extra- marriage affair which strained her marriage as well as her personal and professional relationships which led to intervention of her family and its own management to counsel and support her.

4. The 2<sup>nd</sup> respondent further averred that on 21.10.2015 it entered into an agreement with the Claimant to pay for her professional training in consideration of her working for it for a period of 24 months upon completion of the said training. It averred that the Claimant breached the terms of the agreement by resigning from employment before the expiry of the stipulated period and as such she claimed a refund of the proportionate costs of the training.

5. The 2<sup>nd</sup> respondent further averred that the Claimant has since her resignation breached and continues to breach the terms of her contract of employment by advertising and working for a rival firm contrary to Clause 12 of the contract of employment which barred her from working for its competitor within six months after separation.

6. The 2<sup>nd</sup> respondent therefore prayed, by way of counterclaim against the claimant, for the following reliefs:

- a. A declaration that the Claimant did breach and continues to breach her contract of employment with the 2<sup>nd</sup> Respondent by advertising and working with the 2<sup>nd</sup> Respondent's rival firm.**
- b. An Order that the Claimant forthwith ceases and desists from any other acts of breach of her contract of employment with the 2<sup>nd</sup> Respondent.**
- c. General damages for breach of employment contract.**
- d. A declaration that the Claimant did breach the terms of the contract of 21.10.15 between the Claimant and the 2<sup>nd</sup> Respondent by resigning before the expiry of the envisaged 24 months period.**
- e. Kshs. 156,250 being damages for breach of contract of 21.10.15 between the Claimant and the 2<sup>nd</sup> Respondent.**
- f. Interest on (e) above calculated from the date of the Claimant's resignation.**
- g. An order that the Claimant forthwith returns all the 2<sup>nd</sup> Respondent's property in good working order or pay for it.**
- h. Any other or further relief that this Honourable Court may deem fit and just to grant.**
- i. Costs of the counter-claim.**

7. The claimant filed a Reply to the Joint Defence and defence to the Counter-claim, on 22.11.2017, denying knowledge of the alleged agreement for professional training in consideration for the Claimant agreeing to work for the Respondents. She further denied being indebted, to the 2<sup>nd</sup> Respondent, the alleged sum of Kshs. 156,250 in relation to the said training and averred that if there was any such agreement, the same was rendered null and void by the said sexual harassment and the subsequent constructive dismissal.

8. The matter proceeded for hearing where both parties tendered their evidence and thereafter filed written submissions.

#### **Claimant's case**

9. The claimant, testified as Cw1 and stated that she is a school nurse and also operates a part-time business being known as Hair Restoration Aesthetic Clinic. She stated further that she was employed by the 2<sup>nd</sup> Respondent from September 2014 to May 2017 starting with a salary of Kshs. 25,000 per month but it was reviewed upwards to Kshs. 86,532. She stated that she worked until May 2017 she left due to unavoidable circumstances.

10. She testified that in 2016 she was studying trichology which was partly sponsored by the employer and that she would occasionally remain in the office doing her studies via the internet between 5 pm and 7 pm. She told court that the 1<sup>st</sup> Respondent used to remain in the office also and he would make sexual advances especially when she visited the changing room. She further stated that during the same time she was undergoing personal issues which coupled with the sexual harassment made her resign by the letter dated 5.4.2017. She denied being chased away from the office. She averred that when she was sexually harassed, she was only with the 1<sup>st</sup> Respondent in the office.

11. She testified that they thereafter held a meeting with the 1<sup>st</sup> Respondent and Dr. Dindi and agreed that she serves the required 3 months' notice but on 10.5.2017 she was served with a dismissal letter. She contended that she was not paid her salary for the months of April and May 2017 plus the 3 months' salary in lieu of notice.

12. She further testified that in August 2016 the 1<sup>st</sup> Respondent was out of the country and she was the only one seeing the clients; that Eve Karumba, the Office Operations Manager, told her that money was missing from the office and she called them and discussed with them but they denied the theft; that as the leader she took responsibility and paid the money to the company.

13. She denied the 1<sup>st</sup> Respondent's allegations having an affair with an employee and testified that the 1<sup>st</sup> Respondent had correspondences with her husband where he discussed details of her earnings and the days she was present and absent from work. She contended that the information would be passed on to her mother and as a result her work environment became unbearable.

14. She further testified that due to these challenges, she had a miscarriage and took days off work but the boss stated that her sick leave was a sign of disrespect. She contended that the Respondents dismissed her from employment because they feared that she was going to work for a competitor.

15. She admitted that her employer paid 50% of her fees being USD 2400 for her trichology course and contended that it was not her wish to leave the 2<sup>nd</sup> respondent's employment. She also denied ever communicating about the respondent's business on social media and contended that it was another business. She urged the Court to award her the reliefs set out in the claim because she was unlawfully dismissed.

16. Upon cross-examination, she admitted that her resignation letter dated 10.4.2017 stated that the effective date was 1.5.2017; that the reason cited in her resignation letter was personal matters interfering with her work and she never stated that she was sexually harassed; that the respondents accepted her resignation vide the letter dated 3.5.2017 and extended the effective date to 30.5.2017; that she never did clearance with all heads of departments in the company, nor did she return company property despite written request by the employer.

17. She testified that her career grew very well, she was included in the bonus scheme, she was assisted in her studies and she was also registered with the International Association of Trichologists. She admitted that she signed the training bond letter dated 21.10.2015 on 1.11.2015 committing herself to remain an employee of the 2<sup>nd</sup> Respondent for 24 months upon completion of the trichology training. She further admitted that of the 24 months she only served for 9 months and left the company and that she did not pay the company for the 15 outstanding months on her bond.

18. She denied ever working for Nairobi Trichology Centre or any other person after exiting the 2<sup>nd</sup> Respondent except her own clinic. She clarified that she had not produced any sick sheet for her sick off which was the week before her dismissal.

19. On re-examination, she clarified that the 1<sup>st</sup> Respondent initially declined her resignation letter but later accepted it; that the bond she signed stated that she could leave before serving the 24 months period provided she repaid the training money or if the reason for the exit was beyond human control. She contended that she failed to return the company property, which included uniform and an employee name tag because she was told to leave immediately and to return only when going to repay the bond money.

20. Finally, she stated that Clause 4 of her contrary employment provided that she was to work from 1.9.2014 to 31.7. 2015 subject to termination by a notice of 90 days but after the contract lapsed she continued working until 2017 and receiving salary until 2017.

### **Respondent's case**

21. Dr. Keith Dindi, a surgeon at the 2<sup>nd</sup> Respondent testified as Rw1 and adopted his witness statement dated 20.9.2017 as his evidence in chief. In brief, he confirmed that the claimant was employed in 2014 and that she was diligent in her work which prompted the company to promote her steadily to become head of a department; that in 2015, she opted to pursue further studies but she could only raise half the fees and as such she requested the employer to pay the other half on consideration that she would work for the company for at least 24 months after the training; in the course of time some office money she was handling got lost and she paid the same; that thereafter they noticed a few changes in her personality and after some meetings she broke down and stated that her husband had been unfaithful; and that as a result of the said revelation they advised her to take some time off but a few days later her husband requested him to organise a meeting with the 2 of them as he had discovered that the Claimant was unfaithful. Rw1 contended that at that time the Claimant's attitude at work had deteriorated and she resigned in April 2017 but did not clear with the 2<sup>nd</sup> Respondent.

22. On cross-examination, he admitted that the 1<sup>st</sup> Respondent is his brother-in-law and partner in the 2<sup>nd</sup> Respondent. He stated that it was not the norm for them to contact an employee's spouse unless there were issues affecting performance. He denied that he made allegations about the Claimant's extra-marital affairs and contended that he only stated what the Claimant's spouse told him. He denied the allegation of sexual harassment contending that the Claimant was directly under his supervision and she never complained to him about the sexual harassment.

23. He testified that he was unaware that the claimant used to work late but stated that she was free to extend her stay in the office. He admitted that the Claimant resigned on 3.4.2017 and they accepted her resignation by a letter dated 3.5.2017.

24. On re-examination, he testified that there has never been any sexual harassment allegations made to him against the 1<sup>st</sup> Respondent.

25. Mr. Muli Musyoka, the 1<sup>st</sup> Respondent and the MD for the 2<sup>nd</sup> respondent testified as Rw2. He admitted that the claimant was employed by the 2<sup>nd</sup> respondent vide the contract of employment dated 2.10.2014. He testified that under a contract dated 21.10.2015 the Claimant signed a training contract in which the employer paid for her Kshs. 200,000 on consideration that bonded to serve the employer for 2 years after training. He further testified that the Claimant breached the said bond by serving only for 9 months after the training and then resigned.

26. Rw1 testified that he pleaded with the Claimant to stay but she maintained that she had family issues that were forcing her to leave the job; that he gave her a week off to rethink her resignation because they needed her in the company but when she returned, she insisted on her resignation and that she offered to pay the bond money; however, since she had a balance of 16 days leave, he told her to first proceed on leave.

27. Rw1 further contended that, the claimant breached her contract of employment in that firstly, while on leave, she advertised her employer's competitor business yet her contract of service since barred her from joining or advertising a competitor within 6 months of exiting the employment; that secondly she failed to serve 3 months resignation notice; and finally she failed to clear with the company even after being served with a written reminder to go back and clear.

28. He denied ever hearing any complaint, on sexual harassment, against him by the Claimant and contended that she neither raised the matter with him nor did she report the alleged sexual harassment to any authority. He contended that the claimant had personal issues that caused her to resign from her job.

29. On cross-examination, he stated that Eva Karumba left employment in October, 2018. He maintained that the Claimant proceeded on leave after tendering resignation but he did not produce any leave application form to prove that allegation. He stated that there was a loss of 36,000 and after investigations were done the Claimant paid the amount to the company. He contended that the Claimant was okay until the money was lost but thereafter her performance changed drastically. He contended that the reasons for the change in performance was that she had marital issues which was reported to him and Rw1, by her mother and her husband.

30. He testified that the costs of the training was USD 2200 for theory plus USD 2000 for clinical training out of which the employer paid USD 2200 which was the equivalent of Kshs. 200,000. He contended that the outstanding balance under the training bond is Kshs.156,250 which forms part of the counter-claim.

31. He maintained that the relationship with the Claimant was purely professional. He denied being close to the claimant's spouse and referred to a letter by the spouse which he addressed to Rw1 and who shared it with him as the company's MD. He however admitted that he met with the Claimant's mother in his office, and that her husband called him and on both occasions the two complained about the claimant's marital issues.

32. He denied being aware that the Claimant was being left in the office at night and stated that he always left the office at 4 p.m because he played soccer at South B. He further denied ever being left alone with the Claimant in the office on any day and wondered why she chose to make such serious allegations against him. He contended that the claimant was lying about the harassment just as she doing by stating that he dismissed her yet she resigned.

33. He maintained that the claimant breached the contract of employment by working for and advertng a competitor on Facebook after serving the resignation letter but before the termination since she did not pay salary in lieu of notice. He testified the claimant stated on her Facebook page that she had left the 2<sup>nd</sup> Respondent, yet she was still its employee. He also maintained that the Claimant never cleared or returned the property which included scraps, name tags and payment of the bond and stated that once she clears the bond and property they would pay her salary.

34. On re-examination, Rw2 contended the Claimant's mother told him to sack her because she had abused everyone in the family and neglected her obligations, but he refused.

#### **Claimant's submissions**

35. In her submissions, the claimant admitted that her contract of service provided for termination by a notice of 3 months. She further admitted that she signed a bond to serve the 2<sup>nd</sup> respondent for 24 months after completing a training course which was sponsored by the employer. However, she submitted that she was forced to resign before the time agreed due to persistent sexual advances by the 1<sup>st</sup> respondent who used to call her in his office in the pretence of discussions of how she was fairing on privately at home.

36. With respect to the counter-claim, the Claimant submitted that there are only five hair transplant companies like the 2<sup>nd</sup> respondent countrywide, and as such it would be unconstitutional and a deprivation of the Claimant's right to fair labour practice for a contract to have a provision that once an employee leaves her employee she should not work for one of the handful available firms. She cited **LG Electronics Africa Logistics FZE v Charles Kimari [2012] eKLR** that upholding a restraint cause and subjecting the Respondent to unemployment would be unreasonable and contrary to public policy.

37. She submitted that she has proved that she had every intention of continuing to work for 3 months after serving the Respondent her with a notice to terminate employment but the Respondents breached the employment contract by constructive dismissal when it waived the notice and terminated her services before the end of the notice period by the letter dated 3.5.2017.

38. She further submitted that the Respondents have admitted that she entitled to her salaries for April and May 2017 plus terminal dues which are yet to be paid. Therefore, she urged that the bond owed by her should only be computed after the respondents have paid her what is due to her. Finally, she submitted that the counterclaim is only an afterthought and an abuse of the court process and she urged the Court to dismiss it but allow the claim with costs.

#### **Respondents' submissions**

39. The Respondents cited section 6 of the Employment Act and the Sexual Offences Act on sexual harassment and submitted that sexual harassment should not be tolerated at the workplace. They contended that any allegation of sexual harassment should not be made lightly and should be supported by cogent evidence. For emphasis, they relied on **CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd) (1978) eKLR** where the Court held that proof is the foundation of evidence and that until averments are proved, disproved or there is an admission, they are not evidence.

40. They further submitted that the Claimant in her testimony did not disclose any specific details such as dates, timings, location or even how the sexual harassment took place. They further contended that there is no record of her reporting the harassment or anything else to corroborate of her testimony. It was therefore their submission that the claim for sexual harassment against the 1<sup>st</sup> Respondent was not proved and should be dismissed.

41. They submitted that the question for unlawful termination would have to be construed from an assessment whether the resignation was voluntary or if the Claimant was compelled to resign by their actions/omissions. They relied on **Edwin Beiti Kipchumba v National Bank of Kenya Limited [2018]** where the Court held that in constructive dismissal, the employee initiates termination believing to have been fired and the employer is no longer interested in honouring the contract of employment. They argued that for the Claimant to make a case for constructive dismissal, the circumstances around her resignation must meet the threshold set out in the said case.

42. They contended that the allusion, in her resignation letter, of breach of privacy by the 1<sup>st</sup> Respondent and fear for her personal safety have not been corroborated by any evidence. They further contended that the resignation was not necessitated by the 2<sup>nd</sup> Respondent's lack of interest in honouring the terms of the contract of employment thus the court cannot arrive at the conclusion that the claimant's resignation was tantamount to constructive dismissal.

43. They submitted that the Claimant failed to comply with their reminder requiring her to clear in order for her to receive her terminal benefits. They argued that the agreement of 21.10.2015 is valid therefore she is liable for the amount of Kshs. 156,250. They further argued that Clause 12 of the contract of employment contained a restrictive covenant and that the claimant having advertised a rival business on her Facebook page was in breach of the said covenant.

44. They argued that though the Claimant has not demonstrated that she was sexually harassed and contended that no damages should be awarded. However, should the court be inclined to award compensatory damages, they urged it to be guided by sections 49 and 50 of the Employment Act. They relied on **Kiambaa Dairy Farmers Co-operative Society Limited v Rhoda Njeri & 3 Others [2018] eKLR** where the Court held that the statutory maximum of 12 months ought to be reserved for the most egregious cases of abuse where there is disregard of the rights and dignity of an employee.

45. They argued that the refund of Kshs. 156,250/- plus company property sought in the counter-claim have been admitted and prayed for the same to be awarded but the claimant's suit be dismissed with costs.

#### **Issues for determination and analysis**

46. The uncontested facts are that vide a contract of employment the Claimant was employed by the 2<sup>nd</sup> Respondent as a Hair Transplant Technician from 1.9.2014 to 31.7.2015; that despite the lapse of this contract she continued working and receiving salary until she resigned by a letter dated 10.4.2017; that, the 2<sup>nd</sup> Respondent issued her with a letter of acceptance dated 3.5.2017; and in 2016, the claimant was sponsored by the 2<sup>nd</sup> respondent to pursue a training to the tune of USD 2200 and signed a bond that she will work for the 2<sup>nd</sup> respondent for 24 months after the training but she resigned before completing 24 months after the training.

47. The issues for determination are:

- a. Whether the Claimant was sexually harassed by the 1<sup>st</sup> Respondent.*
- b. Whether the Claimant was constructively dismissed or unfairly terminated.*
- c. Whether there was a breach of the restrictive covenant between the parties.*
- d. Whether there was breach of the training bond.*
- e. Whether the Claimant is entitled to the reliefs sought.*
- f. Whether the Respondents are entitled to the reliefs in the counter-claim*

**Was the Claimant sexually harassed by the 1<sup>st</sup> Respondent?**

48. Section 6 of the Employment Act provides:

- (1) An employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker—*
- (a) directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express—*
- (i) promise of preferential treatment in employment;*
  - (ii) threat of detrimental treatment in employment; or*
  - (iii) threat about the present or future employment status of the employee;*
- (b) uses language whether written or spoken of a sexual nature;*
- (c) uses visual material of a sexual nature; or*
- (d) shows physical behaviour of a sexual nature which directly or indirectly subjects the employee to behaviour that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee's employment, job performance, or job satisfaction.*

49. In this case the Claimant alleged that her resignation was necessitated by constant sexual harassment by the 1<sup>st</sup> Respondent. It was her testimony that she used to remain in the office for her online studies between 5 pm and 7 pm and that the 1<sup>st</sup> Respondent would make sexual advances when she went to the changing room. The 1<sup>st</sup> Respondent denied these allegations and stated that he was not aware that the Claimant remained in the office after working hours. He contended that he used to leave office at 4 pm to play football at South B and as such there was no day he was left in the office with the claimant after working hours. Rw1 was the claimant's immediate Supervisor and he testified that he never received any complaint of sexual harassment from her.

50. I have carefully considered the evidence and submissions presented by both sides. The claimant never mentioned sexual harassment in her resignation letter dated 10.5.2017 but she stated that:

“... ”

Dear Muli,

*I would like to take this opportunity to say that making this decision has been difficult, as working at Hair Hub has been such a positive experience and one for which I am grateful. I have gained much here and have enjoyed working with you and my colleagues in the theatre department.*

*However, events in my personal life, which have unfortunately been dragged into the workplace prompt me to make a tough decision. Over the last couple of months details privy to the company such as my salary amount, which days I'm not at the office and other private issues have been shared with third parties...I have to consider my personal safety...* [Emphasis added]

51. The plain meaning of the foregoing excerpt from the resignation letter is that the reason for the claimant's resignation was that events in her personal life had been dragged into her workplace and that her employment information in the custody of the company, including salary and her work schedule, had been shared to third parties and thereby putting her safety to jeopardy. It follows that the reason for her resignation was not sexual harassment by the 1<sup>st</sup> Respondent's otherwise, if that was the case, nothing would have been easier than to state so in the resignation letter.

52. Sexual harassment is traumatising and dehumanising to the victim however these allegations of sexual harassment still need to be proved and it is not sufficient for the employee to only allege that she or he was sexually harassed. The Claimant in her Witness Statement stated that the 1<sup>st</sup> Respondent continually sexually harassed but she did not state when these incidences occurred except stating that it was at the changing room. Consequently, I find and hold that, the claimant has not proved on a balance of probability that she was sexually abused by the 1<sup>st</sup> respondent.

53. In my view the alleged sexually harassed is only an afterthought because in her resignation letter, the claimant expressed her gratitude for the positive experience at Hair Hub and stated that she enjoyed working there with her colleagues.

#### **Was the Claimant was constructively dismissed or she voluntarily resigned?**

54. The Claimant, alleged in her pleadings, evidence and submissions that her resignation was not voluntary and it amounted to constructive dismissal. The Court of Appeal in **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** laid out the test to determine constructive dismissal and further held:

*“...For this reason, we affirm and adopt the contractual test approach. This means that whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment. Whether a particular breach of contract is repudiatory is one of mixed fact and law. (See Pedersen -v- Camden London Borough Council [1981] ICR 674). The criterion for evaluating the employers conduct is objective; the employer's conduct does not have to be intentional or in bad faith before it can be repudiatory (See Office -v- Roberts (1980) IRLR 347). The employee must be able to show that he left in response to the employer's conduct (i.e. causal link must be shown, i.e. the test is causation)...”*

55. In this case the claimant stated in her resignation letter that the reason for her resignation events in her personal life which had been dragged to her workplace, and also because her safety was endangered by sharing of her employment information with third parties including her salary and the days when she was on or off duty. In her evidence she contended that she resigned due to persistent sexual harassment by the 1<sup>st</sup> respondent. I have already made a finding of fact hereinabove that she has not proved the alleged sexual harassment and therefore that is not the reason why she resigned.

56. As regards the alleged sharing of the claimant's confidential information related to her employment work schedules to third parties, as the reason for her resignation, no evidence was adduced to substantiate the same. Although, the defence witnesses admitted that they received calls from the claimant's husband and her mother complaining about her marital issues and abdication of her obligations, there was no admission that they shared her employment information including salary and working schedule with them.

57. In view of the foregoing matters, I find that the claimant has failed to prove on a balance of probability that her resignation was forced on her by the employer's unreasonable conduct which made it hard for her to discharge her contractual obligations or by the breach of her contract of employment. In fact, by her Facebook post made on 3.5.2017, the claimant notified her friends that she had left the 2<sup>nd</sup> respondent. The said post was made the same date the employer wrote to her accepting her resignation letter dated 10.4.2017. Consequently, it is my holding that the claimant resigned from her employment voluntarily due to marital challenges and that did not amount to constructive dismissal as alleged.

#### **Whether there was a breach of the restrictive covenant between the parties.**

58. The Respondents contended that the Claimant breached and continues to breach the terms of her contract of employment by advertising and working with a rival firm. On May 3, the claimant stated on the Facebook that she had left job at the 2<sup>nd</sup> respondent. On May 13 she shared Nairobi Trichology and Hairloss Centre's post on the Facebook which suggested that hairloss treatment should not be too costly. On August 26, she responded to concerns from her Facebook friends or followers as follows:

***“The best would to first for a diagnosis done and then treatment advised. Otherwise, what worked for someone else will not work for her. Follow this link and her an appointment with the right doctor <http://www.hairlosskenya.co.ke>”***

59. On the last two posts the claimant tagged Nairobi Trichology and Hairloss Centre. Consequently, it is clear the message the claimant was

passing to her friends and potential clients interested in hair transplant services is that she had left the 2<sup>nd</sup> respondent and she was now linked to the Nairobi Trichology Centre which is where the services are cheaper.

60. Clause 12 of the Claimant's employment contract provided:

***“Following the termination of this contract whether by us, with or without cause, or through your resignation, you shall, for a period of six months thereafter, within the County of Nairobi refrain from:***

***a. Either directly or indirectly soliciting or attempting to solicit the business of any of our clients or customers for your own benefit or that of any third person or organisation.***

***b. Either directly or indirectly attempting to obtain the withdrawal from our employment any other employee having regard to the same geographic and temporal restrictions.***

***c. Accepting to work as an employee of any individual or organisation which is our direct or indirect competitor in business.”***

61. The Claimant testified that she has never been an employee of Nairobi Trichology Centre and that she has never worked for any other person except her own clinic. Whereas the Claimant's comment on Facebook referred to Nairobi Trichology Centre, there is no evidence to prove that she was indeed employed by the said company. However, the said posts confirm that she was advertising or indirectly soliciting or attempting to solicit the business of any of the 2<sup>nd</sup> respondent's clients or customers for a competitor. The said action by the claimant was happening before the lapse of the six months provided under clause 12 of her contract of service with the 2<sup>nd</sup> respondent.

62. Section 2 of the Contract in Restraint of Trade Act gives this Court the power to declare a provision or covenant or a restrictive clause void if it is not reasonable in the interest of the parties. The basis for the foregoing is obviously that, in a free market, it would be detrimental for an employee to forego getting alternative employment or a source of income in a trade he or she is good at because he or she is barred from working for a competitor. There must therefore be a proper basis for restricting an employee from working for a competitor of his or her former employer. The restriction must also be reasonable to the employee.

63. In **Credit Reference Bureau Holdings Limited v Steven Kunyihya [2017] eKLR** the Court held:

***“Business competition is the essence of free markets. Whereas it would not be right to allow practices that unfairly and unduly open up ones business secrets and market edge to its rivals, it would on the other hand not be right to encourage a practice where in order to survive the competition, such business shackles its employees from obtaining employment with its competitors...Experience and expertise garnered from working for a particular employer cannot be reasonably restrained without stunting such employees career. In order to be enforceable such restraint must seek to restrain the use of only that which is uniquely that employer's secret and not knowledge and skill which can be acquired by learning, experience or development in technology.”***

64. In this case, the claimant was employed by the 2<sup>nd</sup> respondent as a Hair Transplant Technician/Trichologist. The 2<sup>nd</sup> respondent has not established by evidence that nature of the claimant's work involved dealing with confidential or special knowledge that is only privy to it, which if divulged to its competitor by the Claimant would prejudice her business. Consequently, I find that the restrictive clause in her contract of service herein was too broad and not reasonable in the context of a free market, and as such unenforceable.

#### **Whether there was breach of the training bond**

65. The Claimant admitted that she entered into a training bond agreement with the 2<sup>nd</sup> Respondent. The terms of the bond dated 21.10.2015, which she accepted on 7.11.2015, were that the 2<sup>nd</sup> Respondent was committed to take up 50% of her trichology training costs which were expected to be US\$ 2,800 and US\$ 2,200. It further provided that the offer was conditional upon her acceptance to remain as an employee of Hair Hub for the 24 months upon completion of the training and that the failure to complete the training would cause Hair hub to demand for a refund unless the reasons were beyond human control.

66. The claimant admitted during cross examination that she served only for 9 months after the training and resigned from the employment. The court has already made a finding of fact that the resignation was voluntary and therefore not due to reasons beyond human control. The Claimant did not serve the stipulated period in the bonded agreement and she never repaid money for the remaining 15 months. Consequently, I find and hold that she breached the Training bond agreement dated 21.10.2015.

#### **Whether the Claimant is entitled to the reliefs sought.**

67. Having found that the Claimant was not terminated resigned voluntarily from employment I decline to make declaration that the termination of her contract of employment was unfair or unlawful.

68. With respect to her salary for the months of April and May and her service pay, the Respondents stated that they are willing to pay her dues once she clears with the 2<sup>nd</sup> Respondent. The resignation notice indicated that the effective date was 1.5.2017 and by her Facebook post made on 3.5.2017, the claimant notified her friends that she had left the 2<sup>nd</sup> respondent. It follows that the only salary owing to her is for the month of April 2017 since she never worked in May 2017.

69. As regards the claim for three months' salary in lieu of notice, it is common knowledge that the Claimant resigned from employment by

serving a notice of 20 days as opposed to 3 months' notice under Clause 4 of the Contract of employment. She is therefore not entitled to any salary in lieu of notice under Clause 4 of the Contract of Employment and section 36 of the Employment Act.

#### **Whether the Respondents are entitled to the reliefs in the counter-claim**

70. As stated herein above, although the claimant violated the restrictive clause under her contract of employment, the Court has made a finding that the restrictive clause was unreasonable and unenforceable. Consequently, I decline to make a declaration that the claimant was in breach of her contract of employment by advertising and working with a competitor. For the same reasons I decline to stop the claimant from any other act of breaching her contract of employment with the 2<sup>nd</sup> respondent.

71. However, as regards the claim for damages for breach of the contract of employment, I have already made a finding of fact that the claimant breached the contract of service by resigning without giving the requisite notice of three months or paying the 2<sup>nd</sup> respondent 3 months' salary in lieu of notice. The claimant served a notice of 20 days by the letter dated 10.4.2017 and exited the company on 1.5.2017. The 2<sup>nd</sup> respondent did not waive the required notice period of three months and such it is my holding that it is entitled to salary for 70 days period being Kshs. 86532 x 70/30 equalling to Kshs. 201,908.

72. On the other hand, and in view of the matters aforesaid, I make declaration that the Claimant breached the terms of the training bond dated 21.1.0.2015 by resigning before the expiry of the envisaged 24 months period.

73. The 2<sup>nd</sup> Respondent sought damages amounting to Kshs.156,250 which was occasioned to it by the breach of the training bond by the claimant. The training provided that the Hair Hub was to pay US\$ 1400 as her theory training and US\$1100 as her practical training totalling to US\$2500. The 2<sup>nd</sup> Respondent did not state how it arrived at the sum of Kshs. 156,250. I therefore find that the amount owing from the claimant for the 15 months not served was US\$ 2500 x 15/24 equalling to US\$ 1562.50

74. As regards the prayer for order to compel the Claimant to return the 2<sup>nd</sup> Respondent's property in good condition, it is common ground that the claimant admitted that she has not returned the same. Consequently, I grant the said order as prayed for claimant to return the 2<sup>nd</sup> respondent's property in good condition.

#### **Conclusion and disposition**

75. I have found that the claimant has not proved that she sexually harassed by the 1<sup>st</sup> respondent and as such she voluntarily resigned from the 2<sup>nd</sup> respondent. I have further found that she is entitled to salary for April 2017 and no other relief. As regards the counterclaim, I have found that the claimant breached the contract of service by not giving three months notice or paying the employer salary in lieu of notice. Further, I have found that the claimant breached the Training Bond dated 21.10.2015 by resigning the 2<sup>nd</sup> respondent before serving her for the required 24 months after the training which was sponsored by the employer. Finally, I have found that the 2<sup>nd</sup> respondent is entitled to 70 days' salary in lieu of notice, a refund of the bond fees for 15 out of 24 months not served after the training, and a return of the company property which the claimant failed hand over after her resignation. Consequently I grant the following reliefs to each party:

- (a) The claimant's suit against the 1<sup>st</sup> respondent is dismissed with costs.
- (b) Judgment is entered for the claimant against the 2<sup>nd</sup> respondent in the sum of Kshs.86,532 being salary for April 2017.
- (c) Judgment is entered for the 2<sup>nd</sup> respondent against the claimant as follows:
  - (i) Kshs. 201,908 being salary in lieu of notice.
  - (ii) US\$ 1562.50 being bond fees for 15 months.
  - (iii) Return of company property not yet handed over.

76. The Claimant will pay costs to the Respondents because her claim for salary was never disputed and in any event, she is the ultimate loser in these proceedings.

**Dated, signed and delivered at Nairobi this 4<sup>th</sup> day March, 2021.**

**ONESMUS N MAKAU**

**JUDGE**

**ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**