



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 223 OF 2019

[CONSOLIDATED WITH PETITION NO. 6 OF 2020]

BETWEEN

1. GLORIA MELI MUSAU

2. MOSES MWANGIPETITIONERS

VERSUS

MICROSOFT EAST AFRICA LIMITED.....RESPONDENT

RULING

1. The Petitioners are former Employees of the Respondent. They resigned from their employment.
2. They allege that they were denied bonus payments on account of their race.
3. They petition the Court to declare that they were discriminated on account of race; they are paid withheld bonuses; and are paid damages for discrimination, and breach of contract.
4. They filed an Application dated 2nd November 2020 asking the Court to compel Respondent's Human Resource Manager to produce before the Court under oath, the following documents: -
 - a. Certified copies of pay slips with respect to Priscilla Geldenhuys, Dale Isklander and Wahid Fathi for July, August and September, for the period when they were paid performance bonuses.
 - b. Certified copies of performance results from the Respondent's Microsoft MINT system for the Petitioners and the other 3 Employees named above.
 - c. The above-mentioned documents above be submitted to the Court to examine the rewards paid in the pay slips, *vis a vis* the results of the performance assessment that determined the rewards outcome, and analyse them against the work done.
 - d. In the interest of the right to privacy of the 3 Employees who are not party to the Petition, the documents mentioned above be certified confidential and be sealed for the eyes of the Court and any other interested Party to preserve their confidentiality.
 - e. The above documents be produced by the Respondent within 14 days, or such other time as the Court may determine, failure to which the Reply filed by the Respondent herein be struck out with costs.
 - f. Costs in the cause.
5. The Application is founded on the Affidavits of the Petitioners sworn on 2nd November 2020.
6. The Respondent relies on Grounds of Opposition dated 16th February 2021. It states, that the Petitioners are on a fishing expedition. The documents sought are private and confidential. The other Employees are not party to the Petition. It would be improper for the Court to order

disclosure of third parties' private and confidential information. The Respondent would be exposed to litigation for contravening the Data Protection Act, 2019.

7. Parties agreed on 8th April 2021, to have the Application considered and determined on the strength of the record. The Ruling was scheduled to be delivered on 17th November 2021 but is ready for delivery on the date indicated below.

The Court Finds: -

8. All Employees - the Petitioners and the 3 other Employees whose payslips are sought by the Petitioners - executed individual contracts of employment with the Respondent.

9. The payslips of those other Employees, reflect remuneration agreed individually between them and the Respondent.

10. The contracts were not collectively negotiated and concluded. Terms and conditions of employment were specific to individuals.

11. The Court agrees that the other Employees' payslips are private and confidential. They are legally protected under the Data Protection Act, 2019. Once they are brought to Court, whether in a sealed or open envelope, they become part of the court record, which is a public record. Their contents will be subject to public contestation during the hearing. Questions will be asked based on the contents of pay slips of Employees who are neither Parties nor Witnesses in the Petition. Payslips issue pursuant to the law and reflect the remunerative terms of the individual contract. An order for their production is likely to pave way for calls for production of the contracts, pursuant to which they are issued. It is correct that the Respondent would be exposed to the risk of litigation by the 3 Employees, under the Data Protection Act, 2019.

12. The Court understands bonus payment to be payable at the discretion of an Employer. It is for the Petitioners to lead evidence, showing that they were entitled to bonuses, and that they met the conditions for payment of bonuses. If they say they were treated unequally, it is for them to bring evidence of unequal treatment. They should not rely on the assistance of the Court, in gathering evidence of comparators. There is no legal justification whatsoever, for an order striking out the Response, in event private and confidential employment records are not availed by the Respondent to the Petitioners. They can prosecute their Petition without infringing the confidentiality and privacy of their former colleagues, and without placing the Respondent on a collision path with the Data Protection laws.

IT IS ORDERED: -

a. The Application dated 2nd November 2020 filed by the Petitioners is declined.

b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 9TH DAY OF NOVEMBER, 2021

JAMES RIKA

JUDGE