REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 449 OF 2015

MOHAMMED KHAMIS HEMED.....CLAIMANT

- VERSUS -

ALMASI BEVERAGES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 17th May, 2019)

JUDGMENT

The claimant filed the memorandum of claim on 23.03.2015 through Lubulellah & Associates Advocates. The claimant prayed for judgment against the respondent for:

a) A declaration that the purported dismissal of the claimant from the first respondent's employment is unlawful, wrongful, unconstitutional and irregular.

b) A declaration that the treatment of the claimant at the respondent's work place was inhuman, cruel, and irregular.

c) Special damages for wrongful dismissal equivalent to the claimant's 1 year salary plus car allowance of Kshs.10, 260, 000.00.

d) Special damages of Kshs. 855, 000.00 per month for the remainder of the claimant's working life for loss of earning.

e) General damages for breach of Articles 28, 29. 30, 41, 47, and 50 of the Constitution of Kenya pursuant to Articles 23, 24, and Article 2 of the Constitution of Kenya.

f) General damages for breach of the employment contract and unfair dismissal.

g) An order directing the respondent to issue the claimant with a certificate of service.

h) Interest on prayer 3, 4, 5 and 6.

i) Cost of the suit.

j) Any other relief or order the Court may deem appropriate to award.

The respondent filed the memorandum of response on 16.06.2015 through the Federation of Kenya Employers. The respondent prayed that the termination was lawful and fair and the claimant's suit should be dismissed with costs. The claimant filed the reply to response on 17.07.2015.

There is no dispute that the parties were in employment contract.

By the letter dated 14.11.2011 the Coca Cola Central, East & West Africa Limited employed the claimant to the position of Senior Operations Marketing Manager, Nairobi and Coastal. By the letter dated 30.04.2013 Coca Cola Central, East & West Africa Limited seconded the claimant to the respondent for six months effective 01.05.2013 to 31.10.2013. The letter stated that the secondment was in recognition of the claimant's strength as identified in market or commercial execution and capability building versus system influence which the role on secondment largely required. On end of secondment the letter stated, "**At the expiration of the secondment and subject to your performance, you will either be absorbed by ALMASI as an employee. Should you be unable to secure a substantive role with the**

bottler, we will explore separation options under existing company policy."

The secondment was extended by the letter dated 25.11.2013. The extension was to 31.12.2013 and the rest of the terms of service remained.

The secondment appears to have lapsed on 31.12.2013 and by the letter dated 01.01.2014 the respondent appointed the claimant to the position of Sales Manager effective 01.01.2014 and he was to report to the Chief Executive Officer. The basic consolidated monthly salary was Kshs. 795, 000.00 plus a car allowance of Kshs. 60,000.00. The appointment was from 01.01.2014 with an end date of 31.12.2015.

The claimant issued the email of 20.11.2014 at 9.02pm addressed to John Simba , Chairman of the respondent's Nominations and Governance Committee. The email was copied to bjohnson@coca-cola.com , pnjonjo@coca-cola.com , kogamba@coca-cola.com , nmrutu@coca-cola.com , Joyce Macharia, and Beatrice Ochieng. The email was titled "**Formal Complaint Against The Acting C.E.O Of Almasi Beverages – Joyce Macharia**" The email stated that the complaint was against the acting C.E.O Joyce Macharia's work place unprofessional and inhumane dealings with employees. The email further stated and contained numerous complaints against Joyce including the following:

a) Humiliating the claimant before staff working under the claimant.

b) Disenfranchising the claimant from his core roles as commercial head and seeing his roles delegated to staff who directly report to the claimant.

c) Failure to authorise the claimant's travel plans to the bottlers condemning the claimant to an office job without portfolio.

d) Twice threatening to fire the claimant from work and once being before staff who report to the claimant.

e) In a performance review meeting she clearly came out to band the claimant with the outgoing C.E.O Richard Wooding as having introduced a failing sales structure which separated the roles of distribution and retail. The claimant challenged her that collective responsibility dictated that she reckons the fact that she was part of the Almasi Ex-Co team that recommended the system to the board which duly approved the same. Further it was the same structure that had delivered +12% growth versus the previous year +1% above budget. The claimant had discussed the issue with the acting C.E.O at her office and the claimant had decided to work towards sustaining the +12% growth above the budget as he had steered.

f) The acting CEO had displayed a tendency to pass the buck on key objective issues and divert failure to the claimant. She distorted factual issues while inferring and preferring her versions and views, effectively ridiculing the claimant in front of the staff who reported to the claimant directly.

g) Dehumanizing working conditions and ethics particulars of which were stated under the headings of un-godly working hours, un-ethical work place treatment such as requiring married members of staff to work late in the night thereby undermining work-life balance,

The email concluded that the claimant was confident that the chairman's office would address the grievances and prayed that due process of validating the concerns will transparently be employed.

The respondent's Chief Human Resource Officer one Beatrice Ochieng addressed to the claimant the notice to show-cause dated 04.12.2014. The notice referred to the claimant's complaint to the Nominations, Governance and Remuneration Committee Chairman dated 20.11.2014 whereby the claimant had copied the same to third parties without using the respondent's internal structure to raise any grievances as he may have wished. He was to show –cause within 2 days why disciplinary action would not be taken against him. The claimant received the letter on 04.12.2014. The claimant replied by his email of 08.12.2014 at 11.45pm. The claimant noted that the accusation was that he had failed to invoke the respondent's internal structures to raise his grievances. To that he replied that the respondent did not have any grievance policies in place for him to have referred to and adopted. In absence of any policies as a point of reference, he sought the guidance from Beatrice Ochieng on how to channel the grievances and Beatrice had advised him to address the grievances to the Chairman, Nominations and Governance. The claimant denied that he had copied the email to third parties because all the persons he copied were interested parties as custodians of the Coca-Cola Brand Trademark in the Central, East and West Africa business unit. As persons working for the regional Coca-Cola enterprise, the claimant stated they needed to know the issues real time because they portend destructive publicity for the revered Coca-Cola brand.

The claimant concluded, "**The Supplier Guiding Principles apply to bottlers and are aligned with the Coca-Cola expectations and commitments of the policy. The Coca-Cola Company respects human rights and is committed to identify, prevent and mitigate adverse human rights issues as and when they happen. Coca-Cola creates work places in which open and honest communications among all employees are valued and respected. Since all these are contained in the 2014 updated Human Rights Policy of The Coca-Cola Company, then can never be third parties but interested parties.**"

By the letter dated 09.12.2014 the respondent invited the claimant for a disciplinary hearing scheduled for 11.12.2014 and the letter advised the claimant about the right to choose a representative being an employee of the respondent to accompany him to the hearing if he wished to do so. The hearing was scheduled for 11.12.2014. The respondent's case is that out of caution, they requested Dr. Julius Kiboi to take a full medical examination of the claimant and to file a report not limited to full medical report on the employee; the age of the back injury if any; the employee's fitness to attend a disciplinary hearing process; and the employee's fitness to work. The respondent states that, the purpose of the full medical examination and report was to ensure that the claimant was medically fit to for the disciplinary hearing. The doctor submitted the report and in view of that report, the hearing was rescheduled to 15.01.2015 and the claimant was heard accordingly. The claimant was suspended from duty on 16.07.2015 pending deliberation and determination of his case. The deliberations took place and by the letter dated 23.01.2015 the claimant's employment with the respondent was terminated effective 23.01.2015. the letter referred to the

disciplinary hearing and stated thus, "**The Board, after much deliberation, has decided to, WITHOUT PREJUDICE, terminate your services with the company in accordance to clause 4 of your employment contract with effect from 26th January 2015.**" The letter stated that the claimant would be paid 2 months gross salary in lieu of notice per his contract of service. Clause 4 on confirmation and period of service stated, "**On successful completion of the probationary period, your confirmation will be in writing. Upon confirmation, termination of service will be by two (2) month's notice by either party or two months' salary in lieu of notice except in the case of gross misconduct or criminal conviction in which case the Company shall have the discretionary right to terminate your services forthwith.**"

The Court has considered the pleadings, the evidence, and the submissions on record. The Court determines the issues in dispute as follows.

The **1st issue** for determination is whether the termination of the claimant's employment was unfair. The claimant was given a show-cause notice, he replied, he was invited for disciplinary hearing and was subsequently terminated from employment. The Court finds that in terms of those formal prescriptions the respondent appears to have set out to comply with section 41 of the Employment Act, 2007 on notice and hearing. Nevertheless, as will be found later in the judgment, the procedure leading to the termination of the contract of service was not fair when the disciplinary process aborted mysteriously and the respondent proceeded to terminate the claimant under clause 4 of the letter of appointment.

After subjecting the claimant to the disciplinary process, the respondent without a finding on the allegations as were levelled against the claimant in the show-cause notice turned around and purported to terminate the claimant from employment under clause 4 of the letter of appointment by paying 2 months' gross salaries as was stated in the clause. The Court finds that the reason for termination, namely under clause 4, was not genuine because it was inconsistent with the disciplinary proceedings that had been preferred, initiated and continued against the claimant up to disciplinary hearing and then aborted as manifested in the reason for termination in the letter of normal termination.

The Court holds that it was unfair for the respondent to commence and continue disciplinary proceedings against the claimant and then fail to conclude the same by making findings in view of the allegations that had been levelled against the claimant. The Court returns that it was not open for the respondent to unilaterally abandon the disciplinary process and if it was desired to do so then an appropriate agreement between the parties was necessary in that regard to validate the shifting to termination under clause 4 in the letter of appointment. Thus in that regard the present case is distinguishable from **Reuben Boro –Versus- P.M. Kamau and 10 Others [2018]eKLR,** where the Court stated, "**The Court has considered the flow of events. It is clear that the claimant attended the disciplinary hearing and a dismissal letter was drafted. The claimant did not vividly give an account of how he received the dismissal letter and the Court returns that the account by RW was credible. The Court returns that the claimant having been faced with a dismissal decision, he opted and offered to resign. The respondent accepted the resignation. The Court returns that the contract of service was terminated by way of a resignation agreement which essentially amounted to a valid soft landing on the part of the claimant. The claimant cannot validly argue that the decision to dismiss which was not formerly conveyed to him rendered the resignation agreement irrelevant. The Court finds that parties were entitled to negotiate and arrive at valid and lawful agreements at any stage of their interaction or at any time. The claimant has not denied voluntarily signing the resignation letter and the respondents have not denied voluntarily accepting the resignation letter. The parties were bound accordingly and the allegations of unfair termination or dismissal will fail.**"

The Court has considered its opinion against the principle of soft landing in **Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013 at Nakuru [2013]eKLR** where in the judgment it was stated thus, **"The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer's discretion, it is the court's considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination."**

In this case, the Court returns that terminating the claimant under clause 4 by paying in lieu of notice was clearly unfair as the disciplinary process was abandoned in unexplained circumstances. To that extent the reason for termination as stated in the letter of normal termination was unfair and deceptive as it was not genuine as envisaged in sections 43 and 45 of the Employment Act, 2007. Further, to that extent, the procedure leading to the termination cannot be said to have been fair as envisaged in section 45(2) (c) of the Act.

The Court returns that under section 46 (h) it is not a fair reason to terminate a contract of employment on account of an employee's initiation or proposed initiation of a complaint or other proceedings against the employer except where the complaint is shown to be irresponsible and without foundation. The claimant raised complaints against the acting C.E.O and the respondent did not rebut the same. Further the claimant's case that the persons he copied the email on the grievances were not third parties but interested parties with a right to be informed on the basis of the need to know principle was not challenged at all. Further the claimant's case that the respondent had no grievance or complaint management and handling policy was not challenged and the respondent did not challenge the claimant's evidence that he had written the email to the chairman in line with the guidance offered by Beatrice Ochieng. Accordingly the Court returns that the claimant has established that he had valid grievances or complaint within the effect of section 46(h) of the Act and the same could not constitute a fair reason for removal of the claimant from employment. In any event the Court returns that at the disciplinary hearing it was not shown that the allegations as levelled against the claimant had been established or that his written reply was not sufficiently exculpating. The Court further holds that it was unfair labour practice for the respondent to have failed to accord the claimant and other employees a genuine grievance handling procedure.

The Court follows the holding in **Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR** thus, **"To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail**

to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust."

To answer the 1st issue for determination the Court returns that the termination was unfair both in substance or merits as well as in procedure. The Court returns accordingly.

The **2nd issue** for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

a) The claimant prays for a declaration that the purported dismissal of the claimant from the first respondent's employment is unlawful, wrongful, unconstitutional and irregular. The Court has found as much and the declaration will issue.

b) The claimant prayed for a declaration that the treatment of the claimant at the respondent's work place was inhuman, cruel, and irregular. The Court has found that the particulars of grievances as set out in the email to the Chairman remained unchallenged and the Court returns that the complaints as set out amounted to inhuman, cruel and irregular treatment. The declaration will therefore issue.

c) The claimant prayed for damages for wrongful dismissal equivalent to the claimant's 1 year salary plus car allowance of Kshs.10, 260, 000.00. The claimant's monthly gross pay was Kshs.855, 000.00. The Court has considered the factors in section 49 of the Act. The claimant wished to continue in employment. He did not contribute to his termination in any manner. He had about 12 months to serve prior to lapsing of his 2 year fixed term contract and he expected to serve for the 12 months. The Court has considered the aggravating factor that the disciplinary process aborted mysteriously. The Court has considered that for a considerable period of time the claimant was on sick leave with full pay. In the circumstances and to balance justice for the parties the claimant is awarded 10 months' gross pay under section 49 of the A ct making **Kshs. 8,550,000.00**.

d) The claimant prayed for special damages of Kshs. 855, 000.00 per month for the remainder of the claimant's working life for loss of earning. The Court considers that the award under section 49 of the Act meets the ends of justice sufficiently as in awarding the same the Court took into account the unexpired term of the 2 year contract. The prayer will fail.

e) General damages for breach of Articles 28, 29. 30, 41, 47, and 50 of the Constitution of Kenya pursuant to Articles 23, 24, and Article 2 of the Constitution of Kenya. The Court finds that the claimant has established that the respondent's acting C.E.O harassed and humiliated him before the staff working under the claimant which violated the claimant's right to human dignity under Article 28 of the Constitution. The respondent subjected the claimant to forced full medical examination and the full medical report was presented to the respondent beyond a mere medical certificate of fitness or lack of fitness to follow the disciplinary hearing. Without any justification, the respondent asked for and received a full medical report about the claimant's health including the age of the back injury, if any. The Court finds that such amounted to infringement of the claimant's privacy as protected in Article 31 of the Constitution. As submitted for the claimant, the particulars of the grievances in the email of complaints against the C.E.O and then the humiliating compulsory full medical examination and report amounted to violation of the claimant's right to inherent human dignity and the right to have that dignity respected and protected; and it also amounted to violation of the right not to be treated or punished in a cruel, inhuman or degrading manner as per Article 29(f) of the Constitution. The Court finds that the violations amounted to infringement of Article 41(1) on fair labour practices. The respondent submitted that the rights had not been violated but the Court has found otherwise. The Court further finds that the violation of the rights and freedoms in the course of the employment relationship amounted to a separate heading of claims as was claimed and prayed for the claimant. The Court finds that the claimant was entitled to urge the claims on violation of constitutional rights and freedoms in the memorandum of claim and persuasively, the Court has found that to have been consistent with rule 7(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 thus, "(**3) Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court.**" It was submitted for the claimant that in **Mundia Njeru Gateria –Versus- Embu County Government & 5 Others [2015]eKLR,** the Court awarded Kshs. 5, 000, 000.00 for violation of the fundamental rights and freedoms of the petitioner as protected in Articles 27(1), 28, 41(1), 47, and 50(1) of the Constitution. The Court has considered the submission and awards the claimant **Kshs. 5, 000,000.00**. While making that award the Court has considered that the claimant genuinely made the grievance to the respondent and, the respondent for unexplained reasons failed to handle and manage the grievances as was expected.

f) The Court finds that the claimant is entitled to a certificate of service and the respondent has submitted as much.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1) The declaration that the purported dismissal of the claimant from the respondent's employment was unlawful, wrongful, unconstitutional and irregular.

2) The declaration that the treatment of the claimant at the respondent's work place was inhuman, cruel, and irregular.

3) The respondent to pay the claimant the sum of **Kshs. 8,550,000.00** (less PAYE) plus a sum of **Kshs. 5, 000, 000.00** by 01.08.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.

4) The respondent to deliver the certificate of service per section 51 of the Employment Act, 2007 by 01.06.2019.

5) The respondent to pay the claimant's costs of the suit.

Signed, dated and **delivered** in court at **Nairobi** this **Friday 17th May, 2019.**

BYRAM ONGAYA

JUDGE