



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 708 OF 2015**

**SAMUEL JUSTUS OGWENO.....CLAIMANT**

**VERSUS**

**SAROVA WHITESANDS BEACH RESORT.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The claimant was employed by the respondent as a Senior Sales Accountant Manager until 20.5.2015 when he was summarily dismissed by the respondent. It is the claimant’s case that the termination was unfair and he has brought this suit claiming Kshs.7,275,948 made up as follows:

- a. One month salary in lieu of notice .....266,473
- b. 12 months salary compensation for unfair termination.....3,197,676
- c. 21 accrued leave days .....186,531
- d. 2 months unpaid commission .....360,000
- e. (i) 8 years pays per year .....1,360,622
- ii. 8 years House Allowance at 18 days pay per year.....1,842,510

7,275,948

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2. The respondent admits that she had employed the claimant upto 20.5.2015 when she summarily dismissed him but she denied that the dismissal was unfair as alleged the in suit. It is therefore defence case that the termination was fair because the claimant had committed gross misconduct and it was done after allowing a fair procedure. She counterclaimed against the claimant for breach of contract and for the loss of sales revenue.

3. The suit was heard on 16.10.2017 and 18.10.2017 when the claimant testified as Cw1 and the respondent called her HR Manager Mr. Timothy Gikonyo Waweru as Rw1. Thereafter the counsel for both parties filed written submissions.

**Claimants Case**

4. Cw1 tested that he joined the respondent on 4.2.1994 and rose to the rank of Senior Sales Account Manager. On 18.5.2015 at 12.00 pm,Cw1 was out of office doing his sales when his former partner, Miss Diana Amanyi, with whom he had cohabited for 8 years as husband and wife sent an email to him and copied to four senior officials of the respondent. He explained that the email was maliciously done with the intention of putting him with trouble with his employer in revenge for the acromial separation. No sooner did the General Manager receive the email than he called Cw1 to the office. Cw1 arrived at the office at 4 pm where he found the General Manager Mr. Raji Varad and Rw1. Rw1 then told the Cw1 to respond to the email by Miss Diana and copy to them before going home and he complied at 5.41 p.m.

5. Cw1 worked as usual on 19.5.2015 but on 20.5.2015 he worked until 9.00 a.m. when the General Manager called him to his office where he found Rw1 and Joy Morai who was the Sales and Marketing Manager. The General Manager told him that the company had decided to dismiss him and then gave him a summary dismissal letter. He contended that the dismissal was unfair because the reason cited was not valid because he never gave data in sales contracts to Miss Diana Amayi and in addition maintained that the data was his personal property and not obtained from the respondent. He further denied ever diverting any business from the respondent to competitors. In addition, Cw1 contended that he was never accorded any disciplinary hearing. He further explained that during his 21 years of service, he was never served with any warning but several commendations for wonderful service. Finally, he contended that despite clearance with the company after dismissal, he was not paid the terminal dues outlined in the dismissal letter.

6. On cross examination, Cw1 stated that he started as a unionisable employee for 8 years before he was promoted to management position of Senior Sales Account Manager; that during the course of his duty he contacted potential customers and kept their contacts; that he was also able to know the prices for the respondent's services and communicated them to customer; that he had authority to negotiate discounts upto 10% of the set prices; and that he was not barred from sharing the said information with third parties or comparing with other hotels. He however did not produce any written authority to support the foregoing, and instead he contended that the information was his personal property and it was not given to him by the respondent.

7. On being shown SMS texts from phone screen shots, Cw1 admitted that he had no written proof that the respondent was fully booked as alleged by the SMS attributed to him by his estranged female partner. He however contended that he was in a position to know when the hotel was full. He further admitted that one of the hotels where Diana's email alleged that business was diverted was Pride Inn, however he clarified that, that hotel is different from the one he went to work after the dismissal. He however admitted that after dismissal he joined Flamingo Beach Resort in June 2015 and later joined Pride Inn in February 2016.

8. Cw1 also admitted that he is a member of Kambi SACCO from where he took a loan of Kshs.750,000 and when he left the respondent, he authorized the SACCO to recover part of the loan from his Kshs.500,000 shares and he undertook to pay the balance. On being shown a document he signed called "User acknowledgment of Responsibility", Cw1 contended; that the said document only bound him while serving in the Finance Department between 1994 and 2007; that the said document was warning him against sharing his password and leaving computer open in order to avoid fraud; that unlike in Sales Department, financial information was confidential; and that because the sales department information was freely showed and even posted on the hotel's website, the user acknowledgment of Responsibility was not applicable to him in the Sales Department.

#### **Defence Case**

9. Rw1 testified that the claimant was employed by the respondent as the Manager of the accounts of customers; that he was entrusted with the names of customers, and their contact addresses; that he was also entrusted with the marketing strategies, price lists and trade secrets; that without authority from employer, he copied the said information, trade secrets, marketing strategies and secret formulas of the employer and gave to Miss Diana Amayi, a Sales Officer for Nyal Beach Hotel, a business competitor; that the said offence was revealed by Miss Diana Amayi personally through her email to the claimant dated 18.5.2015 to which she attached a schedule of customer information given to her by the claimant; and that the said offence was confirmed by the screenshots sent from the claimant's mobile phone number 0723634669.

10. Rw1 further testified; that the claimant also engaged in industrial sabotage by colluding with the said Diana Amayi in diverting customers and business to his employers competitors; that the claimant used to quote unreasonably high prices for the respondent's products and advise Diana, Susan and other third parties to offer lower prices on behalf of the competitors to the same customers and that way the respondent lost huge business to Nyal Beach Hotel, and that Diana Amayi was declared the best sales person of the year by the rival hotel.

11. Rw1 further testified that the claimant stole the respondent's letterheads and gave them to third parties without the respondent's knowledge; that the letter heads and other stationeries were used by the third parties to impersonate the officers of the respondent and obtained benefits; that one of the said beneficiaries was Susan who obtained letterhead from the claimant to forge a recommendation letter and which she used to land in a big job in a hotel in Zanzibar.

12. Rw1 further testified that on 18.5.2015, the claimant was invited to a meeting to discuss the said offence of breach of confidentiality and the industrial espionage; that at the meeting the claimant was given sufficient material which the employer had in support of the offence and the losses occasioned by the offence, plus a show cause letter to reply in 2 (two) days' time or be dismissed; that the claimant responded on the same day citing malice and personal vendetta by Diana Amayi following an acrimonious separation from their cohabitation; that after considering the response by the claimant, the management formed the opinion that the claimant had breached the fundamental duty of fidelity and confidentiality and that he could no longer be trusted to continue working for the respondent. As a result the claimant was dismissed by the letter dated 20.5.2015 but with all his lawful dues after returning all the employee's property and especially the flash disk and other devices for storing classified information plus uniforms, bondages security cards and codes.

13. Rw1, however, testified that the claimant declined to clear with the respondent after securing another job with Flamingo Beach Hotel only 7 days after the dismissal by the respondent. He further explained that as a result of the failure to clear with the respondent by returning the said property, the claimant has since not been paid the dues set out in the termination letter. He however explained that the gratuity for 8 years served as a unionized staff is based on a gross pay of Kshs.35,000 while the other dues are to be based on his last salary of Kshs.72,008 plus House Allowance of Kshs.12,945.

14. On the counterclaim, Rw1 contended that the claimant like any other employee who were given computers, he was not allowed to share information without prior authority from the General Manager. He further contended that there are specific hotels that do business with the respondent like Travellers Beach Hotel and the Voyager and not Swahili Beach, Pride Inn, Flamingo Beach Hotel and Nyal Beach Hotel where the claimant was diverting business to. He maintained that wherever there was need of relocating guests, priority was given to the said hotels which used to reciprocate business with. He further maintained that the claimant admitted to giving Diana Amayi, business leads and quotations which caused the respondent to lose business to her competitors. He contended that the claim for loss of business is based on the

rate of Kshs.13,900 per person per night plus Kshs.3,600 conference package per person per day. He concluded by stating that the bed occupancy was not good during the time the business was being diverted.

15. On cross examination Rw1 maintained that the claimant has not yet cleared with each department of the respondent and specifically he has not returned company card, company medical card and uniform. He contended that Diana Amayi wrote email on 18.5.2015 at 12 noon and immediately the management received it they called the claimant who was away from the hotel to return; that he claimant came after one hour for a hearing but he offered to write his explanation. However, Rw1 admitted that there were no minutes for the alleged hearing and that indeed the claimant was never served with any show cause letter. He concluded by admitting that he had no written evidence of the hotels who were reciprocating with the respondent by sending business.

### **Analysis and Determination**

16. There is no dispute that the claimant was employed by the respondent from 1994 to 20.5.2015 when he was summarily dismissed. The issues for determination framed by the parties are summarized as follows:

- a. Whether the dismissal was substantively and procedurally fair.
- b. Whether the reliefs sought by the suit and the counter claim should be granted.

17. Under section 45(2) of Employment Act, termination of employment contract of an employee is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. A valid and fair reason subsection (2) (a) and (b) is one which relates to the employee's conduct, capacity and compatibility or the employers operational requirements. On the other hand a fair procedure refers to process followed by the employer in reaching the decision to dismiss the employee, communicating the decision to him and handing of any appeal to the decision; the extent to which the employer has complied with any statutory requirement including issuance of certificate of service; the previous practice of the employer is dealing with similar cases; and the existence of any previous warning letters issued to the employee.

### **Reasons for the dismissal**

18. The reasons cited for the summary dismissal of the claimant in the letter dated 20.5.2015 is that he issued company information and material to unauthorized persons as a result of which the respondent suffered substantial detriment. According to the respondent the said issuance of confidential information to unauthorized persons was illegal and a clear case of gross misconduct. The claimant has denied any wrong doing and contended that the information complained of was his own property which he had complied over the years. He denied that it was confidential information and maintained that the information was accessible to all at the respondent's website.

19. After careful consideration of the evidence and the submissions presented to the Court, I find that the respondent has proved on a balance of probability that the claimant indeed shared information on business leads with Diana Amayi which had the probability of causing detriment to respondent. The said Miss Diana Amayi was not an employee of the respondent and the claimant never sought permission from the respondent before sharing the said information to her. The claimant did not contest the screenshots produced by the defence as exhibits which clearly show that he voluntarily gave business leads and contacts to Miss Amayi on diverse dates between the year 2012 and 2013.

20. The screen shots from his mobile phone number 0723634669 are clear evidence that he continuously shared with Miss Diana Amayi telephone, emails and physical address for potential clients and their contract persons even without request. Although no tangible evidence was produced by the defence, the email by Miss Diana Amayi which led to the summary dismissal suggested that the information given by the claimant in 2012 and 2013 tremendously improved on her performance as a sales person in Nyali Beach Hotel, Sunrise, Pride Inn and Swahili Beach Hotel. Although the claimant alleges that the information given was his own property, he has not proved that the worldwide database and Golf Database he gave or allowed Miss Diana to access from his computer was given not to him by the respondent.

21. Under section 43(1) of the Act, the reason for terminating the employment of an employee are those matters which at the time of termination of the contract, genuinely believes to exist, and which causes the employer to terminate the services of the employee. In this case the employer was notified of the claimants conduct of sharing the said business information leads and strategies by Diana Amayi on 18.5.2015 and after considering the same and the written response by the claimant, formed the opinion that the claimant had grossly misconducted himself by sharing the said information with a business competitor which had the potential of diverting business from the respondent to her detriment.

22. I agree with the defence that such misconduct was a betrayal of trust which is a central pillar of employment contract and the respondent was justified in dismissing the claimant from employment. Under section 44(4) of the Act, the employer is entitled to summarily dismiss his employee for careless and improper performance of his work or for committing or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or employer's property.

23. In this case, I am satisfied that the claimant committed very romantic fraud against his employer (respondent) which had the potential of causing loss of business to her. As a result, he managed to sustain an expensive romance with Diana Amayi who constantly addressed him as

'Babes' whenever she sought the business leads from him and appreciated the generosity of his information by referring to him as

"Luv". However as fate would have it, the time to reap what he sowed finally came on 18.5.2015 and 20.5.2015. the respondent had a valid or fair reason for dismissing the claimant from his employment.

## **Procedure followed**

24. Rw1 alleged that Miss Diana Amayi sent email at 12 noon and immediately the claimant was called back to the office from his outside duties. He further alleged that the claimant arrived in an hours time and a disciplinary hearing was conducted where he attended with his immediate boss as his chosen companion to the hearing; that after the hearing, the claimant offered to make his explanation in writing and he was given 2 days to do so; that the claimant made his response to the charges the same day in the evening; and that on 20.5.2015 a decision to dismiss him was reached and summary dismissal letter served on him. The claimant has denied being accorded any fair hearing as required by the law and contended that the dismissal was procedurally unfair. According to him, he was called to the General Manager's office and notified of Diana's email and directed to respond before going home which he did. He further contended that on 20.5.2015 at 9.00 a.m. he was served with dismissal without prior hearing.

25. After carefully consideration of the evidence and submission by both parties, I find on a balance of probability that the respondent has not proved that she followed a fair procedure before terminating the services of the claimant. Firstly, the allegedly disciplinary hearing is not supported by any evidence in writing. No minutes of proceedings were produced as exhibits and even the dismissal letter never referred to any such meeting of 18.5.2015. Secondly, the respondent never produced as exhibit, any letter or other evidence to prove that the claimant was invited to the alleged hearing and notified of his right to chose a fellow employee to accompany him to the hearing. Finally, he was not served with any show cause letter specifying any reason for the intended dismissal but he was only directed to respond to the allegations in the said email. That meeting on 18.5.2015 did not constitute a fair hearing within the meaning of section 41 of the Act.

26. Under the said section, certain requirement must be met for any pre-dismissal hearing of an employee to be deemed as fair. First, the employer must explain to the employee the reason for which termination is being considered. Second, the explanation must be done in language of the employee's understanding. Third, where applicable, another employee or shop floor union representative of the employee's choice must be present during the explanation. Fourth, the employee and his chosen companion must be accorded a chance to make their response to the charges by the employer for consideration before the decision to terminate is reached.

27. In view of the foregoing ingredients of fair hearing, it is my considered opinion that the hearing contemplated by section 41 of the Act is oral unless the employee choses another form of hearing, like through writing. It is my further opinion that if the employee denies that he chose hearing by written correspondence, like in this case, the burden of proof is on the employer, who should have taken all the necessary precautions to prevent such mischief. In this case the respondent did not produce any evidence to prove that the claimant waived his right to a oral hearing and preferred a written defence, it remains my finding that the claimant was not accorded a fair hearing before his dismissal on 20.5.2018 as provided by section 41 and the dismissal was rendered unfair within the meaning of section 45 of the Act.

28. The foregoing holding is fortified by the fact that the claimant was never issued with a certificate of service under section 51 of the Act and was also never paid all his terminal dues after the dismissal. Although Rw1 alleged that the claimant never cleared with the respondent, the claimant contended that he actually did clear with all the departments except the Finance Department because the Finance Manager was absent. The said contention was not contested and I consequently make a finding of fact that the claimant did clearance with all the departments except Finance Department. The certificate produced by the claimant is document number 20 in his bundle does not comply with section 51 aforesaid.

## **Reliefs**

29. Under section 49 of the Act, I award the claimant Kshs.84,953 being one month salary in lieu of notice plus Kshs.254,859 being 3 months' gross pay as compensation or the unfair termination. In awarding the said compensation I have not only considered his long service but also the fact that he contributed to his dismissal through misconduct.

Although no evidence of the actual pay, I have also considered the fact that he secured an alternative pay within short time after dismissal. The said award is based on the fixed gross salary excluding commission on sales which fluctuated.

30. The claim for 21 days' leave, gratuity for 8 years and commission for 2 month were admitted by the respondent vide the dismissal letter and I therefore allow them. Based on the salary of Kshs.84,593, I award him Kshs.68,160.10 for 21 leave days as submitted by the defence. In addition the claimant is awarded Kshs.360,000 being 2 months commission as per the dismissal letter.

31. As regards gratuity, the claimant served for 8 years as a unionsable employee until 2001 when he was promoted to management. Clause 27 of the CBA produced as exhibit provided for payment of gratuity at the rate of 1/3 of gross pay for an employee who served for a period between 5 and not more than 10 years. Gratuity is based on the employees last salary unless otherwise shown by the employer. In this case the employer has not produced any contract to show tht the salary applicable in calculating gratuity is the salary as at 2001 when the claimant ceased to be a unionized employee. I therefore award the claimant gratuity at  $Kshs.84,953 \times \frac{1}{3} \times 8 = 226,541.35$ .

32. The claim for severance pay to however dismissed because the termination was not through redundancy. In total, I award the claimant Kshs.994,513.45 plus costs and interest from the date of filing suit until payment in full. The sum awarded will be paid subject to any applicable statutory deductions. I have noted from the submissions by the defence that the respondent appreciates the claimant's right to salary plus commission for the 20 days worked in May, 2015. The said benefits are not sought in this claim but I believe the respondent is still bound to comply with all statutory obligations including payment of all the salaries due to her current and former employees.

## **Counter claim**

33. Although I have found herein above that the respondent has proved on a balance of probability that, the claimant breached the contract of confidentiality by sharing business leads and allowing Diana Amayi access to respondent's information which had the potential of diverting business to competitors to the respondent's detriment, I nevertheless dismissed the counter claim for lack of evidence. The claim for damages

based on the email by Miss Diana Amayi and the attached screen shots from a mobile phone is not enough to discharge the claim on a balance of probability. There is no evidence to prove that what is reflected in the screen shots would have resulted in actual business to the respondent and that it indeed went to the alleged competitors. I make no order as to costs for the counterclaim.

**Signed and dated and at Nairobi this 11th day of May, 2018.**

**ONESMUS N. MAKAU**

**JUDGE**

**Delivered at Mombasa this 28th day of May, 2018.**

**LINNET NDOLO**

**JUDGE**