REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 734 OF 2015

BETWEEN

EDWIN JEMBE MWAMUYE ……. CLAIMANT

VERSUS

MOMBASA CANVAS LIMITED ……..…….. RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Otieno Asewe & Company Advocates for the Claimant

Muturi Gakuo & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 25th September 2015. He states he was employed by the Respondent Company as a Messenger, on 1st February 2011. His contract was terminated by the Respondent on 1st February 2011. He earned a monthly salary of Kshs. 13,101 as of this date. The Respondent alleged the Claimant was involved in an act of gross misconduct. He disputes he was involved in such an act, and seeks the following orders against the Respondent:-

a) 1 month salary in lieu of notice at Kshs. 13,101.

b) Annual leave pay for 4 years worked, at 27 days per year, computed at Kshs. 54,419.

c) 15 days' salary for every year of service at Kshs. 30,232.

d) 12 months' salary in compensation for unfair termination at Kshs 157,212.

Total ……..…Kshs. 254,964

e) A declaration that termination was unfair.

f) Costs and interest.

g) Any other suitable relief.

2. The Respondent filed its Statement of Response, on 16th October 2015. It is agreed the Claimant was employed by the Respondent on terms and conditions of employment, stated in the Claim. His contract was terminated by the Respondent. He was suspected of selling Respondent Company's information to Respondent's rivals. He did this through one Mwangangi, an ex-Employee of the Respondent. He does not merit notice pay and compensation, his contract having been terminated for gross misconduct. He does not merit service pay under clauses 7[b] and 20 of the CBA between the Respondent, and Tailors and Textiles Union, having been dismissed for gross misconduct. The Claim has no merit. The Respondent prays the Court to dismiss the Claim, with costs to the Respondent.

3. The Claimant gave evidence on 13th September 2016, as did Respondent's Sales Representative Sameer Noor, bringing the hearing to a close.

Claimant's Case.

4. The Claimant restated the contents of his Statement of Claim, in his evidence before the Court. He was dismissed ostensibly on the ground that he passed on information about the Respondent to a former Employee of the Respondent, who worked for Respondent's Competitor.

5. Cross-examined, the Claimant testified his letter of employment bound him to work for the Respondent, well and truly. He was to retain trust reposed in him by the Respondent. He was not to reveal confidential information. The Respondent would be justified in terminating Claimant's contract, if he revealed such information. His position was that such a decision would nevertheless, have to follow the law.

6. He was familiar with Respondent's ex-Employee Mwangangi. Mwangangi was a tailor, who made seat covers. He had his own yard at Bombolulu, and later worked for Rainbow Ventures Limited. The Claimant was not aware Rainbow engaged in the same canvas business as the Respondent.

7. The Claimant was told by the Respondent that Mwangangi had called the Claimant through Claimant's mobile phone. He was told the Respondent suspected the Claimant was selling trade secrets to Mwangangi. The Director asked the Claimant to call Mwangangi, in the presence of the Director. It is not true that the Claimant declined to call. He made the call, and Mwangangi told him, he would like the Claimant to meet him. The Respondent states in the Statement of Response that the Claimant got nervous, when he was told Mwangangi had called him. The Respondent states the Claimant was heard mentioning Respondent's Customer's name to Mwangangi. The Claimant did not state in his Witness Statement filed in Court, that he called Mwangangi, when asked to do so by the Respondent's Director. He was summarily dismissed by the Respondent within 5 minutes of being summoned to Respondent's Office. The Claimant told the Court on redirection that paragraph 5 of the Statement of Response agreed with the Claimant's assertion that he called Mwangangi, when asked to do so.

Respondent's Case.

8. Noor told the Court his Company makes tarpaulins for trucks and shades for private homes. The Claimant worked for the Respondent for 3 ½ years.

9. Noor heard Claimant's phone ring, while it was charging. He saw the caller was Mwangangi, an ex-Employee of the Respondent, who had resigned earlier and taken with him some Employees of the Respondent, to set up a business. Mwangangi measured and cut materials before stitching. He interacted directly with Respondent's customers. Business was moving from the Respondent, to Rainbow. The Director asked the Claimant to call Mwangangi in the Director's presence. The Claimant declined. He

was startled to learn Mwangangi had called earlier.

10. Noor told the Court on cross-examination that the Claimant had not asked him to pick his calls. Noor did not invade Claimant's privacy. Every business has competitors. The Claimant had signed a contract to serve the Respondent devotedly. There was no confidentiality clause in the contract. Noor reiterated in concluding his evidence, that the Respondent was suspicious someone was selling its trade secrets to Competitors.

The Court Finds:-

11. The history of the Claimant's employment with the Respondent, his job designation, and terms and conditions of employment, are largely undisputed. It is not disputed the Respondent terminated the Claimant's contract on 19th June 2014.

12. In issue is whether termination was for valid reason, whether the decision was carried out fairly.

13. There is enough evidence that the Claimant kept in touch with his former Co-Employee Mwangangi, after Mwangangi had resigned, and taken away some of the Respondent's Employees, to set up his own business.

14. The Claimant confirmed that Mwangangi had a yard at Bombolulu where he made seat covers. It was also known to the Claimant Mwangangi later joined Rainbow Ventures, who was a business rival of the Respondent.

15. Association between the Claimant and Mwangangi, after Mwangangi had resigned, was not an innocent association. The Respondent lost Employees as a result of Mwangangi's decision to leave the Respondent, start his own business at Bombolulu, and eventually work for Rainbow Ventures. The Claimant followed Mwangangi's career progression, which on its own was not an employment offence. But once the Claimant started calling Mwangangi, and mentioning Respondent's existing Customers to Mwangangi, such conversation would lend credence to Respondent's feeling that the Claimant was being used by Mwangangi to redirect business to Respondent's competitors.

16. The Claimant had signed a contract with the Respondent, binding himself to well and truly serve the Respondent and devote his whole time and ability to the business. He did not act in accordance with this clause, by contacting Mwangangi. Companies have the right to rid themselves of Employees who are disloyal, and who sell trade secrets to competitors.

17. Termination was based on valid ground.

18. There is no evidence that the Claimant was given a hearing as required under Section 41 and 45 of the Employment Act 2007. The letter of summary dismissal dated 19th June 2014 did not mention any disciplinary hearing preceding termination. Procedure was not fair.

19. ***The Respondent shall pay to the Claimant the equivalent of 5 months' salary in compensation for unfair termination at Kshs 65,505***.

20. The prayer for notice pay is declined, there having been valid ground to terminate Claimant's contract.

21. The Claimant did not establish the prayer for service pay. He pleads for service pay in his Statement of Claim, and submits in his Closing Submissions on severance pay. He did not show that he was eligible for payment of service pay under Section 35[6] of the Employment Act 2007, or severance pay under Section 40. He did not bring this prayer within the CBA applicable at his workplace. The item is rejected.

22. The letter of employment granted the Claimant 27 days of annual leave. There is no annual leave record placed before the Court, to contradict the prayer for annual leave pay. The Respondent included an

element of annual leave pay in the last pay slip of June 2014. It was not made clear to the Court over which period that offer was made. It however persuades the Court that the Claimant was at the time of termination, owed annual leave days. ***He is allowed pending annual leave for 4 years at Kshs. 13,101 divide by 26 working days = daily rate of Kshs. 503.88 x 27 days x 4 years = Kshs. Kshs. 54,419.***

23. No order on the costs.

IN SUM, IT IS ORDERED:

a) Termination was based on valid ground, but flawed on fair procedure.

b) The Respondent shall pay to the Claimant the equivalent of 5 months' salary in compensation for unfair termination at Kshs. 65,505; and annual leave pay at Kshs. 54,419- total Kshs. 119,924.

c) No order on the costs.

d) Interest granted at 14% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 16th day of June 2017

James Rika

Judge