REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1557 OF 2014

KENNY KINAKO…………………………………CLAIMANT

VERSUS

RINGIER KENYA LIMITED……………....…..RESPONDENT

JUDGEMENT

1. The issue in dispute is the wrongful/unfair termination of employment

2. The Claimant was employed by the Respondent, a limited liability company registered in Kenya and with registered offices in Nairobi. On 10th October 2011 the Claimant was employed as the Business Development manager East Africa. The terms and conditions of employment were discussed during the interview. The terms of service were amended on 22nd January 2013 when the Claimant was given the position of VP Classifieds. On 17th May 2013 the terms were also reviewed to reflect the acquisition of shares by the Claimant in Ringier Africa, another entity from the Respondent. At the time, the Claimant was earning kshs.600, 000.00 with other benefits per month.

3. The claim is that the Claimant worked diligently and earned respect from clients. This was until unprecedented rivalry emerged from the Claimant senior, Julian Artope (Julian) who commenced harassment and victimisation and letter dated 15th May 2015 which required the Claimant to answer to various allegations. Julian told the Claimant that he would frustrate him until he resigned from his position or he be expelled.

4. The Respondent allegedly invited the Claimant to a meeting on 17th January 2014 through a letter dated 14th May 2014 for a disciplinary hearing but the Claimant got a hand delivered letter from Julian on 15th May 2014. On 16th May 2014 Julian emailed the Claimant alleging that he failed to attend disciplinary hearing.

5. In March 2014, Julian sent the Claimant to work in Ghana without a work permit. The Claimant insisted that he needed to have such permit to be allowed to work in Ghana. The Claimant was arrested and detained at immigration offices in Accra, Ghana for lack of a work permit. This left the Claimant humiliated, traumatised and demoralised.

6. The claim is also that on 15th May 2014, Julian sent an email to all Respondent employees information them that since the Claimant was under evaluation they should not stop sharing business information with him. The Claimant had no prior information that this employment was under review and he was not copied to the email sent to other employees of the Respondent. The Claimant continued to report to work but was not allocated any duties and was left out of office communications. The Claimant

was therefore cut-off any communication while at work which was meant to traumatise him, reduce him to a subject of ridicule by colleagues, customers and his family. The Claimant was shunned and avoided by colleagues at work, he lost his self-esteem and the email shared was malicious and ill-motivated. These actions were meant to effect a summary dismissal by its implications.

7. On 22nd May 2014 the Claimant was invited by Julian to a meeting to discuss performance improvement plans (PIP) and that the Respondent was considering terminating his employment. The meeting was preconceived to terminate the claimant's employment as there had been no previous hearing and the PIP was only a scheme to further frustrate him. The Claimant was victimised and sacrificed by Julian. On 16th June 2014 the Respondent summarily dismissed the Claimant from his employment without justification. The termination was on the grounds of conflict of interest where he was accused of involvement with Versatel Systems Limited and careless performance of work which grounds and reasons were not substantiated. Versatel Systems Limited was a dormant company without doing any business and known to the Respondent prior to the employment of the Claimant. The grounds for careless work performance were not correct as the Claimant was diligent in his work.

8. At the hearing held on 9th June 2014, the Respondent other employees refused to attend or accompany the Claimant and the Respondent did not do anything to have the claimant's rights protected. The respondent's legal representative remained present at the hearing and took minutes which did not reflect the meeting proceedings. The Claimant lodged an appeal but it was rejected.

9. The claim is for a declaration that the termination was unlawful and unfair; this resulted in a wrongful dismissal. The Claimant is seeking reinstatement or redeployment without loss of benefits. The Claimant is also seeking unpaid salaries from June 2014 to date or terminal dues of 3 months' notice and compensation. The Claimant is also seeking exemplary damages; interests; costs and any other orders the Court may deem fit.

10. In evidence, the Claimant testified that he was employed by the Respondent and issued with a contract of employment. His work was to help with business set up and start up in East Africa for 9 months when he was moved to classifieds section. With the East Africa business secured, the Respondent was expanding to the Africa region where the Claimant was given new roles and moved to become the VP Classifieds. The Claimant was sent to Ghana for work but he did not have a work permit, he was arrested, he paid a fine and returned to Kenya.

11. The Claimant also testified that the felt frustrated by his work colleague Julian. Similar complaints were made by other workmates against Julian such as Cedric Nzomo, Ben Maina and James Githere. They all complained to Robin at the head office in Switzerland when they all did a letter sent in October 2013. There was no response. They copied their boss Julian who did not respond as well. The Claimant and his colleagues had noted negative changes by Julian and directions to go and work in Ghana without a work permit was such instance of frustrations. The 3 colleagues who complained against Julian have all left the Respondent. After the Claimant came back from Ghana, he was called for an appraisal meeting and he was put on a PIP with milestones and timelines. The Claimant however noted that the matters set out in the PIP required work by 8 people as there had been a similar programme done by a team in Switzerland which he was involved and was aware of the people behind it. There was no feedback. In response the Claimant was called for a disciplinary hearing on 9th June 2014 but no employee was willing to accompany him at the hearing as they had been directed not to share any information with the Claimant. Such an email was not copied to the Claimant. The other employees were informed that the claimant's employment was under review, these were his juniors and none were willing to be present. At the hearing the respondent's advocate was present, he took minutes and when the Claimant complained that the proceedings were not properly recorded, he was ignored. The other substantive issues addressed at the hearing and forming part of the reasons for dismissal were not correct as the Respondent was well aware of the existence of Versatel System Limited at the time of employment. The Claimant was not involved with another employer developing a property guide as no evidence to this effect was produced.

12. The Claimant also testified that in defence, the Respondent has submitted that they did not employ him. However, he signed a contract of employment with the Respondent Munyutu Waigi the Respondent

country manager and was witnessed by Joy Junie the Finance manager. The contract was issued by under Ringier Africa but the agreement is between the Claimant and Respondent officer. On 6th February 2014 the contract was amended changing salary; bonuses; and extending notice period and Julian singed for the Respondent. The appraisal forms were done under the name of the Respondent and notes that the Respondent was a department of Ringier Africa. The due salaries were paid by the Respondent and not any other entity. When the Claimant appealed against his termination, it was rejected through a letter issued by Catherine Kyambi, an employee of the Respondent.

Defence

13. The Respondent in defence deny that they did not have an employment contract with the Claimant and the contract referred to was with Ringier Africa AG, a company incorporated in Switzerland which has various subsidiary companies in various countries within Africa – Ghana, Nigeria, Senegal. In August 2011, Ringier Africa AG placed an advertisement online calling on any person interested in its Business Development manager to send application. The claioamtn applied to Ringier Africa AG and was employed. As such, there was no privity of contract between the Claimant and the Respondent to infer employment. The only link is that the Claimant was based at the Respondent premises and was paid through the Respondent. The Respondent was separate and distinct from Ringier Africa AG, and they are wrongly sued herein.

14. Even where the Court finds that there was an employment relationship between the parties, the terms of employment were well agreed between the Claimant and Ringier Africa AG in the employment contract dated 10th October 2011. Such employment was regulated by the code of conduct 2011 and the standing orders 2013 as well as the human resource manual 2014. The Claimant was bound not to engage in any other business of any kind while in the employment of the Respondent. The Claimant was bound to devote his full time to Ringier Africa AG business and its subsidiaries and was prohibited from the use Ringier Africa AG property for personal gain or to engage in any activity that interfered with his work performance with Ringier Africa AG. The Claimant had a fiduciary duty to act for Ringier Africa AG in good faith and avoid conflict of interest.

15. The defence is that the Claimant deliberately and fundamentally breached his contract of employment with the Respondent by running a company Versatel Systems limited which Ringier Africa AG and the Respondent had good reasons to believe was in direct competition with their business. The Claimant also was careless and improperly performed his duties. While the Claimant was in the employment of the Respondent he;

Remained a majority shareholder, director and chief executive officer of Versatel Systems limited;

Versatel Systems Limited was actively engaged in competitive business with the respondent;

The Claimant was engaged in active recruitment of staff for Versatel Systems Limited;

Employment contracts of Versatel Systems Limited and Ringier Africa AG and Respondent employment contracts were the same; and

Versatel Systems limited had similar business plans as those of the Respondent and Ringier Africa AG.

16. There was evidence to support the Respondent in its findings. The Respondent did a company search for Versatel Systems limited on 26th May 2014; they obtained a contract for Nicholas Wafula Simiyu dated 31st January 2013; calls in various websites to interested persons to apply for employment with Versatel Systems Limited; various websites linking the Claimant to Versatel Systems Limited; letter dated 4th November 2013 from the Claimant to Safaricom (K) limited seeking reactivation of Versatel Systems Limited pay bill number to enable it receive payments for services rendered to its client; and print-out of presentations by Versatel Systems limited with elements of presentations made by the

Respondent in 2013.

17. The above evidence and findings were supported by the facts that the Claimant declined in his work performance from January 2014. In an effort to make his performance better on 6th February 2014 his salary was increased and a bonus of Kshs.165,000.00 was paid, an annual bonus of kshs.570,000.00 was to be paid if Ringier Africa AG business achieved set targets. His performance did not improve despite the incentives. On 10th April 2014 the Respondent scheduled a performance appraisal with the Claimant so as to review his performance. At the meeting various aspects of his poor performance were highlighted which lead to a PIP with weekly reviews from the director, Ringier Africa AG and other officers offering support to the Claimant. On 12th May 2014 the Claimant handed over his PIP report and the deliverables and upon assessment by Julian, Stefan Haeflinger they discovered that the Claimant had failed to achieve each objective of the PIP; some sections were plagiarised; the report was incomplete; and the Claimant failed to take account of the feedback given to him during the PIP period. The claimant's performance from January to April 2014 remained poor and it was highly probable that this decline could be attributed to his involvement with Versatel Systems Limited and therefore he had no time or attention to work due for Ringier Africa AG.

18. The defence is also that the Claimant refused to attend a disciplinary hearing scheduled for 16th May 2014 despite notice sent to him. Another notice was sent and hearing held on 9th June 2014 where Julian set out the matters subject of the hearing requiring the Claimant to respond. The Claimant denied involvement with Versatel Systems limited; he refused to answer to the search details over the company records; and despite the Claimant being given 3 days to peruse the records, he did not give any response. The Claimant insisted that he was of good performance but the PIP results speak contrary to good performance of his duties.

19. The Respondent thus took into account all matters set out against the Claimant at the disciplinary hearing and took the decision to dismiss him from their employment. All terminal dues were paid and a Certificate of Service issued.

20. The Respondent contests that they did not engineer any arrest of the Claimant while he was in Ghana and if he was arrested, he did not suffer any trauma as alleged. On 15th May 2014 Julian sent an email to all the respondent's heads of department requesting them to limit the sharing of information with the Claimant. The email was not sent to all members of staff. That this was a business decision logical in the circumstances. On 22nd May 2014 the claioamtn was invited for disciplinary hearing. The termination of employment was lawful, justified and the reasons have been substantiated. The claim should be dismissed with costs.

21. In evidence, the Respondent filed witness statements for Julian Artope, Susan Mburu and Joy Junie. In Court Julian and Susan Mburu testified for the Respondent.

Susan Mburu testified that she is the Human Resource Manager of the Respondent, a limited liability company registered in Kenya. The Respondent is a subsidiary of Ringier Africa AG a company incorporated in Switzerland. Employment commenced since October 2014. The Respondent Company is distinct from Ringier Africa AG. The Respondent conducts business in Kenya only while Ringier Africa AG has business in the Africa region; the Respondent has separate management from Ringier Africa AG; and the Respondent has its own employees separate from Ringier Africa AG employees. The Claimant was an employee of Ringier Africa AG as stated in the letter of employment. That the positions held by the Claimant and his responsibilities were not available within the Respondent but with Ringier Africa AG. That the Claimant was reporting to Ringier Africa AG officers and not the Respondent – as Business Development Manager, East Africa he was reporting to Stefanie Holm and as VP Classifieds he was reporting to Julian who reviewed and appraised his performance. The budget allocation for the Claimant was by Ringier Africa AG and not the Respondent and all expenses that he incurred by the Respondent were reimbursed by Ringier Africa AG. Termination of employment was effected by Ringier Africa AG and the Respondent is wrongly sued, the Claimant should be dismissed with costs.

22. Ms Mburu also testified that at the disciplinary hearing, present was Catherine Kyambi the human resource for the Respondent who was giving Ringier Africa AG support as she was the only employee with human resource knowledge as the Claimant employer had no such employee.

23. On the respondents Further List of Documents filed on 3rd July 2015 at page 8 is a profit and loss account details which list Munyutu Waigi; Christabel; Stacey, Tony, Kevin – all as Respondent employees and such is seeking reimbursements.

24. Ms Mburu also testified that when the Claimant was called for the disciplinary hearing, he complained that the proceedings recorded by MacOduor Advocate were not accurate. It was also not clarified why an external advocate was present at the hearing. The Claimant was not allowed to attend with his advocates. The disciplinary hearing had some flaws.

25. The second witness for the Respondent was Julian Artope, director with Ringier Africa AG since 1st June 2012. That the Claimant was employed by Ringier Africa AG who is not a party to these proceedings. The witness worked with the Claimant at Ringier Africa AG, as one of the most senior employees. Ringier Africa AG Africa covered the Africa region unlike the Respondent. The Claimant was sent for work in different countries and cannot therefore testify he was working for the Respondent as they have no such roles to cover the region other than in Kenya.

26. Julian also testified that he supervised the Claimant and had an input in his work. He appraised the Claimant and at all material time, the employer was Ringier Africa AG and not the Respondent. Termination of employment was by Ringier Africa AG and not the Respondent. In the letter amending the claimant's terms of employment, he was appointed as having stock rights in Ringier Africa AG as its employee. Such a scheme was only available to employee. The Respondent and Ringier Africa AG had each clear structures and registration, one registered in Kenya and the other in Switzerland and therefore distinct entities.

27. Julian also testified that in January 2014 the Claimant decline din his work performance due to conflict of interest as he was running a his company in competition with the Respondent. The clamant was put on a PIP but he failed to improve, he was called for a disciplinary hearing and failed to attend. He was called for a second hearing and he had also failed to address matters and objective set out in the PIP despite being given support by various officers of Ringier Africa AG. As set out in the defence, when the Claimant got the PIP, he plagiarised materials from other sites; he failed to complete allocated tasks and overall, he failed to do his work properly ending in poor performance of his duties.

28. At the disciplinary hearing were Catherine Kyambi, Samson MacOduor, the Claimant and Julian. In most cases where the Claimant was asked to comment he refused to give any information. He refused to sign the minutes and asked for more time to confirm details with regard to his activities with Versatel Systems Limited. Upon dismissal, the Claimant was paid all his terminal dues and has nothing to claim against the Respondent or Ringier Africa AG.

29. In cross-examination, the witness testified that the contract of employment for the Claimant was with Ringier Africa AG but the contract is signed by Respondent officer. On 4th October 2013 the Claimant was issued with an agreement noting the employer was the Respondent and the Claimant was the employee. The Claimant resigned as VP-Classified and there was a letter amending the employment contract of 10th October 2011 which confirm employment was with the Respondent. The amendment clarify the terms of employment. At the disciplinary hearing, the minutes are under the Respondent, they are verbatim, simplistic and contain various errors but overall are accurate. The minutes were taken by MacOduor advocate but he has not signed.

Submissions

30. The Claimant submit that he was an employee of the Respondent vide letter of appointment dated 10th October 2011 executed by Munyutu Waigi for the Respondent. Such authority to execute the

document cannot be negated by evidence that the Respondent country manager was the only person to sign documents for another legal entity Ringier Africa AG. Both entities were distinct as Susan Mburu testified and reiterated in the statement of defence. Various other documents confirm the employer was the Respondent especially the confirmation letter dated 2nd December 2011 and the letter dated 4th October 2013 amending the employment terms. This was not an error as suggested by Respondent witnesses. Such 'error' if at all exist are countered by other documents issued to the Claimant by the employer, being the respondent; letters bear the Respondent logo; amendment of contract is by the respondent; and salaries, NSS and NHIF dues were paid and remitted by the Respondent. Such averments and records cannot be negated by the fact of being written on a template. The contents are clear and unambiguous and confirm the employment of the Claimant was with the respondent.

31. The Claimant also submit that the process of termination was not lawful. A credible performance appraisal process must be participatory with parties sharing comments and where the employer is left out, such cannot pass as held in **Jane Wairimu Muchira versus Mugo waweru and Associates [2012] eklr.** also before termination on the grounds of poor performance, the employee must be given a hearing as under section 41 of the Employment Act as held in the case of **Jane Samba Mkala versus Ol Tukai Lodge limited [2013] eKLR.** In this case, the Respondent allowed Julian to come up with a PIP that was not participatory. Such was to set up the PIP for failure when issued to the Claimant. The Respondent should have set a reasonable timeframe to give the Claimant an opportunity to improve within 2 to 3 months as held in **Kenya Science Research internal Technical and Allied workers union versus kinyanjui and Magnate Ventured Ltd, Cause No.273 of 2010.**

32. At the disciplinary hearing, the Claimant was not given sufficient time to defend himself. The minutes do not reflect what transpired at the hearing and the Claimant protested to this fact. As such, the proceedings were only choreographed for his termination.

33. The Claimant submit that there was bad faith in his termination of employment. The disciplinary hearing notice dated 14th May 2014 was inviting the Claimant to a hearing for 17th January 2014 a day way past. The Certificate of Service issued deliberately changes the dates of employment to 2nd December 2011. The Respondent have submitted an organogram that is not correct. The P&L account document does not give correct information. The Respondent witnesses admitted to various documents having errors and the wrong template being in use. Such evidence and documents are only submitted in bad faith, with malice and meant to defeat the course of justice. The Claimant is entitled to exemplary damages in this case

34. The Claimant also submit that the remedies set out in the memorandum of claim are due. The summary dismissal was not justified. The Claimant is seeking reinstatement and in the alternative he should be paid terminal dues of compensation, damages, salaries due from June 2014 to date and costs of the suit.

The Respondent on their part submit that the Claimant has introduced new prayers in their submissions, that of 3 months' notice pay and issuance of a certificate of service that had not been pleaded before. As such, such claims cannot be introduced at this stage. Such should not be granted.

35. The Respondent submit that the Claimant was employed by Ringier Africa AG as set out in the employment contract. The first clause of the employment contract states that the employer was *Ringier Africa* and at clause 8 further emphasis is given that the Claimant was *engaged by Ringier Africa.* Such an entity was distinct from the Respondent. Ringier Africa AG being registered in Switzerland and limited by shares had "AG" abbreviation similar to "LIMITED" for a company register by shares in Kenya. As such, there is no difference between Ringier Africa AG and Ringier Africa. Employment exists where there is agreement; there is an element of control and where there are no provisions inconsistent with the contract of service as held in **Ready Mixed Concrete (South East) Ltd versus Ministry of Pensions and National Insurance [1968] 2 QB 497.** In this case, the only contract of employment that exist is the one between Ringier Africa AG and the Claimant.

36. The Respondent also submit that the employment contract does not make them a party to it. In its

specific terms and provisions the contract is between the Claimant and Ringier Africa AG a distinct entity. Such a contract cannot be re-written to make changes that affect the Respondent as against Ringier Africa AG. As held in Salomon versus A Salomon and Co. Ltd [1897] AC, a subsidiary company is a distinct from its parent company and the obligations and liabilities of the parent company cannot be attributed to it.

37. The Respondent also submit that even in a case where Ringier Africa AG was the Respondent in this case, they followed due process in the termination of the clamant. The Claimant was in breach of clause 8 of his contract of employment where he engaged in competitive business with the employer; he carelessly performed his duties and when invited to a disciplinary hearing, he failed to give a satisfactory defence. The reasons for tarnation were justified. Fair procedure was followed. The claims against the Respondent cannot succeed and should be dismissed with costs.

Determination

Who employed the claimant?

Whether there were valid reasons for termination of claimant's employment;

Whether in effecting dismissal the Respondent followed due procedure;

Whether the Claimant is entitled to any remedies

38. With regard to the employment of the Claimant, I will start with the letter of termination of employment. The letter dated 16th June 2014 is issued under the letter head of Ringier Africa AG and singed by Julian Artope, Director Ringier Africa. The Claimant lodged an appeal on 19th June 2014 sent to Julian and Catherine Kyambi. The reply rejecting the appeal was instant on the same date communicated by Catherine Kyambi noting;

> *We refer you to the termination letter dated 16th June 2014 which reflects the position of Ringier Kenya Limited as regards your employment. We wish you all the best in you[r] future endeavours.*

39. Ms Kyambi sent her email rejecting the appeal from Catherine.kyambi@ringier.co.ke a domain of the Respondent. Julian is copied to this email at julian.artope@ringier.ch a domain of Ringier Africa AG.

40. These details of termination compared to the documents of employment stand out. By a letter dated 10th October 2011, the Claimant was offered employment by the Respondent officer to work *with* Ringier Africa. The letter is signed by Munyutu Waigi, Ringier Kenya Country Manager. An appendix was attached to this letter setting the employment objectives for the Claimant thus;

- *Launch pigiame Rwanda and Uganda in 2011 plus Tanzania and Ethiopia in 2012*
- *Launch market places in Kenya and roll it out to all East African countries in 2012*

41. The Claimant appointment as Business Development Manager, East Africa and the set objectives are in tandem. His work was further regulated with a condition of the contract that while the Claimant was working with Ringier Africa, he was not to engage with any other entity.

42. On 2nd December 2011 the Claimant was confirmed in his employment vide letter issued by Stephanie hold. The Claimant was to *work closely and seek guidance from* Munyutu Waigi. The letter by Stephanie Holm is under the letterhead of *Ringier* with directions that the Claimant would be guided by the Country Director for *Ringier Kenya.*

43. Subsequent to these letters, on 22nd January 2013 the Claimant was issued with a letter amending his contract under the letterhead of the Respondent and signed by Julian, *Head Business Development, and Ringier Africa*.

44. Also on 4th October 2013, 2 years later to be precise there was an agreement between the parties herein [Respondent as 'employer' and Claimant as 'employee']. None of the parties gave evidence or background to this *Agreement.* Clause A suggests a 'resignation' of the employee on 6th August 2013. Clause D rescinded the termination and agreed as follows;

> *Based on discussions held between the parties since the execution of the Termination Agreement, the parties have agreed to rescind the Termination Agreement. As a result, the Employment Contract continue to be in force without any changes to the current terms and conditions as if the Termination Agreement had never been signed.*

45. The *Agreement* is signed by Julian for Ringier Africa AG and the claimant.

46. Subsequent to the above, on 6th February 2014, Julian as General Manager, Africa for *Ringier* issued the Claimant with an amendment to his contract. He wrote the following;

> *The Employment Contract dated 10th October 2011 between Ringier Kenya Ltd hereinafter ("company") and Kenny Kinako ("employee") refers. Whereas the company wishes to continue the employee's employment and whereas in consideration for the employee's continued employment the parties wish to modify certain provisions of the employment contract. …*

47. Where there was any error, mistake, or need to vary and review the employment contract, the Respondent and Ringier Africa AG, had the chance then. The insistence herein under the *Agreement* and under the *Amendment to Employment Contract* on 6th February 2014 is an affirmation as to the intentions of the parties. The *employer* at all material times was the Respondent.

48. Following the principles set out in the case of **Salomon versus A Salomon**, a company is responsible for all its liabilities even where it is a subsidiary. As such, a company being distinct on its own right cannot engage and confer responsibility on its subsidiary or parent company. Each is a distinct entity that bear responsibility and liability as a distinct entity. As such, the Respondent had no authority from Ringier Africa AG to confer employment upon the Claimant on their behalf when they issued letter of employment to the Claimant for work with Ringier Africa AG, unless there was clear intention to do so. Upon the Respondent hiring the Claimant, he performed his duties as assigned by the employer. Ringier Africa AG Africa being a distinct entity had capacity to hire and issue employment contract. They also had capacity to benefit from the labours of the Claimant who was dully paid by the Respondent and did everything that went with his job as required.

49. Julian commenced employment in Kenya with Ringier Africa AG on 1st June 2012. The Claimant was employed vide letter dated 10th October 2011 and was effectively confirmed on 2nd December 2011. As such, the Claimant was the first in time in his position unlike Julian who came later on. There is therefore evidence from the shop floor that Julian may not have had access to key information with regard to the claimant's employment with the Respondent. Such related to interview records for the claimant's position and matters that may have been put into account with such employment. The criteria applied to hire the Claimant must however put into account the skills required for the job, the relevant work experience and the capacity to undertake the job noting the clear knowledge in the field and networking that it required. Without this background knowledge, Julian lacked the capacity to given evidence with regard to the employment of the Claimant, whether by the Respondent or Ringier Africa AG as he contested was the employer and not the respondent.

50. Statutory dues to KRA, NSSF and NHIF are legally payable by an employer. In this case, the Respondent paid such statutory dues for the Claimant. these dues are regulate din law and the returns made are specific giving instructions to every employer of what deductions to remit and where this was done by the Respondent without an indication of the fact that Ringier Africa AG was the supposed employer, such is unlawful as where Ringier Africa AG indeed was the employer and is not remitting taxes due, such invite an investigation by the Labour Officer and other tax agencies.

51. The end of it, the Respondent issued the employment contract and did everything lawful with regard to the employment of the Claimant. Whether the Claimant was placed with Ringier Africa AG upon his employment, such was for the employer, the Respondent to regulate. Termination was effected with the knowledge of the Respondent as its human resource officer was present at the disciplinary hearing, the appeal lodged was rejected by the Respondent officer. As such, the actions of Julian with respect to the claimant's employment cannot apply to justify employment with any other entity. I find there was an employment relationship between the parties herein.

52. I must add that the claimant's contract of employment was amended to make him a shareholder of Ringier Africa AG. Such was done by Julian on 6th February 2014. This was under the letterhead of *Ringier* and not *Ringier Africa AG.* This interchange of names even where the addition of "AG" was indicated to mean "LIMITED" does not assist in extricating the Respondent from its employment relationship with the Claimant. In this regard, where the Respondent acted contrary to Ringier Africa AG interests as alleged at paragraph 47 of the defence, they have not done anything to address it. As a subsidiary of Ringier Africa AG, the Respondent should then have joined Ringier Africa AG herein as a co-Respondent or interested party to be allocated blame, liability or for them to set out their intentions in the close link they encouraged with the Claimant when they issued key employment documents to him. The fact of Ringier Africa AG representative officer appearance in Court as the witness for both entities as confirmed in Court, confirms the finding that the Claimant was an employee of the Respondent.

53. In the witness statement of Susan Mburu, paragraph 5(b) and (c) she states that the Respondent had separate and distinct management and employees from Ringier Africa AG. However, the letter of appointment issued to the Claimant is signed by an employee of the Respondent. Salaries were paid by the Respondent. In the Further List of Documents filed by the Respondent on 3rd July 2015, these were documents filed after the Claimant had largely given his evidence on 23rd June 2015. As such the Respondent had sufficient time to reorganise their defence. Simple facts emerge from this record; at page 12 is the *P&L* spreadsheet with account details. These are expenses for January to June. It notes various employees and costs for this period;

> *Kenny – VP classifieds [claimant]*
>
> *Cedric – VP Content*
>
> *Ben _ former VP ecommerce*
>
> *Tony – SEM*
>
> …

54. These are expenses allegedly sent by Joy Junie to Katharina Elena. The mail to Katharina has no attachment to it. It is not clear whether the *P&L* document at page 12 is the intended document referenced by Joy Junie in her email. That aside, page 8 of the Respondent list of documents is an organogram. Various senior positions are set out. 'Joy' is head of Finance. The Claimant is VP Classifieds while Ben Maina is VP Group-Buying. There is Munyutu Waigi as Country Manager, Kenya. If the logic of the organogram is to apply, I take it that all Ringier Africa AG employees noted in the P&L list were employees of Ringier Africa AG who incurred expenses that were to be reinfused otherwise there would be no logical reason for Joy Junie to share account and Respondent P&L with another employer. The list note Ben as former VP ecommerce while the organogram notes him as VP-Group Buying; Cedric is noted at VP-Content but his position is 'TBD' in the organogram; <u>Munyutu Waigi is listed as chairman of board</u>; various other positions are listed in the P&L but not placed in the organogram. What then was the purpose of the P&L? The persons/roles noted in the P&L are not reflected under the Respondent organogram at page 7 of the list of documents or in the Ringier Africa AG list.

55. As noted above, the list was filed after the Claimant had testified, the question of his employment with the Respondent was challenged and the least the Respondent of Ringier Africa AG could do is to give a correct schedule of P&L or the respective organograms for the Court to see where the Claimant

was placed in each entity if at all. Where Munyutu Waigi was an employee/chairman of the Respondent as a company distinct and separate from Ringier Africa AG, he is also listed together with the Claimant, Joy and Cedric. These records do not in themselves speak to an employer(s) distinct and separate from each other. Where such distinction existed, there are records of company search for Versatel Systems Limited, the Respondent or Ringier Africa AG should have equally submitted their documents of registration to confirm any differences is at all such exists for purposes of establishing who had employed the claimant.

56. On the second issue on the validity of the reasons for termination, I make reference to section 41 of the Employment Act;

> ***41.*** *(1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. [Emphasis added].*

57. The subject of poor performance of an employee is a serious matter. Such requires thorough investigations before an employer can use such a reason as the basis for termination. The rationale is that an employee is hired for being competent for the job and upon confirmation, such an employee has been put to the test and passed. Where an employee works for long periods and suddenly declines in their performance, the root cause must be established. In **Tharratt versus Volume Injection products (pty) Ltd [2005, 6 BALR 625]** an employee who was dismissed during the probation period for poor performance was found to have been unfairly terminated as the employer failed to investigate the cause of the poor performance. One best practice is as set out in the case in **Jane Wairimu Muchira versus Mugo waweru and Associates,** setting a performance appraisal process that is participatory to ensure an effective support to a poor performing employee. Such support is to be given with the clear knowledge of the employee that he requires to improve on his performance and gives his commitment to the agreed upon objectives, deliverable and purpose of the performance appraisal. The human resource policy or manual must anticipate such a process and set out modalities for it. This is to avoid the appraisal system for poor performance, incapacity or misconduct being subjective. See **POOROOSOTUM BHEEKHOO versus Linksoft Group, Cause No.1232 of 2014;**

> *where an employee is confirmed into full employment upon successful completion of the probation period, it is taken that the employer has assessed, appraised and appreciated the skill and competences of the employee into their business. It cannot therefore be found to be true that soon after confirmation and successful completion of probation, the employer cites poor performance.*

58. In the above case, the Court relied on the decision of **Fredrick Owegi versus CIC Life Assurance, Cause no. 1001 of 2013,** that;

> *… Where the question regard to an employee performance,* ***an employer must demonstrate that the employee was aware of the applicable standards of performance, efforts were in place to support such an employee and time was given to allow such an employee to make improvements with constant reviews.*** *It is not just enough to say that an employee is of poor performance. There must be a demonstration that the employer did more in this regard to bring such a non-performing employee to the status required by an employer. [Emphasis added].*

59. Internal disciplinary proceedings where an employee is to be given a hearing should be in good faith. It should not be held with a predetermined decision as this would be a sham. The steps set out under section 41 of the Employment Act are meant to ensure that the employee who is or is alleged to be of poor performance is given a hearing at the shop floor. That is the best place where all conditions are best for an employer to hear the employee in their defence as all evidence can be sourced at the work place. The practice by the Respondent to use a PIP in supporting the Claimant in his performance is a good practice. Such should be emulated as with it, the employee has clear targets and deliverables within a set time frame. However such should be commenced in good faith and ensure the active participation of the

employee since he is the one to take and own the PIP and deliver on it. It cannot be for the employer to write the PIP and issue to the employee. The employee already has a contract of employment on which he should be delivering upon. The PIP is only meant to support the employee to give at his optimum which may have deteriorated due to a variety of reasons.

60. In this regard, the letter dated 10th April 2014 to the Claimant gave emphasis that;

> *Therefore as discussed we want to put on a performance improvement plant for the next one month, these to be individually achieved targets have been set as follows.*

61. Such was a good idea but poorly executed. The Claimant is noted to have been at a meeting where his performance was discussed. He should have been made to agree to the PIP by signing to it as confirmation that he understood what he was required to do within the timelines set or if he felt that the tasks were too heavy for one person, he should have been given a fair chance to agree. Such is important, as once the PIP was put in motion, it had consequences. Unfortunately, this was the respondents ideas that the Claimant was required to follow. It had no difference whatsoever from the regular tasks given to the Claimant to perform. He could finish or fail to finish. The end result, a return to poor performance. The next steps are also relevant to highlight;

> The PIP timeframe was to end on 11th May 2014.
>
> On 13th May 2014 Julian gave the Claimant feedback on the PIP noting various anomalies and irregularities.
>
> On 14th May 2014, Julian invited the Claimant to disciplinary hearing for 17th January 2014, which was an obvious error.
>
> To this end, on 15th May 2014 the Claimant protested harassment and unfair treatment by Julian to the Respondent. There is no response to this end.
>
> On 15th May 2014, the same day the Claimant lodged his complaint against Julian, the following email was sent by Julian to Kevin Kibiero;
>
> David Mwamburi;
>
> Linda Moraa;
>
> James Gathere;
>
> Joy Junie;
>
> Catherine Kyambi;
>
> Ced Nzomo;
>
> Leonard Stiegeler; and
>
> Tim Kollmann;
>
>> *As we are currently evaluating potential steps with regards to the employment contract of Kenny Kinako, I kindly would ask you to refrain from sharing business information with him for now. If there are any questions regarding this, I can clarify.*

62. I have gone back to the Respondent organogram, the listed persons above are not listed as to their positions as at 15th May 2014. Similarly under Ringier Africa AG, such persons do not exist. The

addresses to the above persons interchange between <…. ringier.co.ke> or <… ringier.ch>. The implication of this is that as at 15th May 2014, the Respondent had arrived at a decision to review the employment contract of the Claimant. By sharing this email with a variety of persons, leaving out the Claimant, this was effectively shutting the Claimant out of the employment space. What remained was a matter of course.

63. Section 41 of the Employment Act comes back to reverberate here. where Respondent as the employer polluted the environment with negative comments about him by giving directions to all other employees save for the Claimant that he should not be given any information and proceeds to send an email to all else save for the Claimant, such I find to be with the single purpose to blackout the Claimant, this set in motion negative energy to other colleagues that they should shun and avoid him, all with the single motive to ensure that the Claimant does not get any witness at the disciplinary hearing.

64. The Respondent has not denied matters set out by the Claimant on malice. In actual sense, this was totally ignored in defence and in evidence. Submissions focused on the alleged malice being of no effect to the Claimant and that it had no bearing so as to cause him any trauma, ridicule or to be shunned. However, even where there was a defence, to send an email to employees directing them to shun their colleague and stop sharing information with him, I find such to be malicious and unfair labour practice. Where the Respondent had evidence that the Claimant was in conflict of interest against their business that he was busy moonlighting, there were options of summary dismissal or termination setting out the reasons of conflict of interest. To keep the Claimant in employment, share an email to all else save for him and to direct that he should not be allocated with work, such is reducing the Claimant into a subject of ridicule, humiliation and subjecting him to torture, such is inhuman and degrading treatment which are specifically prohibited under the Constitution. Such malice should not be visited upon any employee in a democratic society such as ours.

65. Paragraph 54 (b) of the defence, Julian admits to having sent an email to all respondents head of departments. See **Petition No.63 of 2014, Peris Nyambura Kimani versus Dalbit Group Limited**, sharing of information separate from the subject employee is a violation of fair labour practice under article 41 of the Constitution. In this case, the sharing of information adverse to the Claimant to a varied of employee without his knowledge and then invite him for a disciplinary hearing was malicious and the hearing a sham. I find such malice had no justification in this case, it was not necessary for the Respondent to act in this manner. There existed legal alternatives at the disposal of the Respondent save for the malicious acts against the Claimant. Such unfair labour practice set in motion a termination that cannot find justification under any law. To delve into the reasons for termination would therefore be only academic.

66. Fair procedure in this case was compromised at the point when the Respondent noted the poor performance of the Claimant. Julian testified that in January 2014 he observed the Claimant was not undertaking his duties with care and attention. He gave a PIP in April 2014. There is feedback to the PIP followed with a call to a disciplinary hearing. The hearing was scheduled for 9th June 2014 vide letter dated 22nd May 2015. As noted above, by 15th May 2014, no employee of the Respondent was supposed to share information with the Claimant. In the midst of such malice, the disciplinary hearing was a matter of course. Of concern is the insistence by the Respondent that the Claimant failed to attend the first disciplinary hearing. such a hearing had been set on a date by error and instead of withdrawing such notice upon realisation that 17th of January 2014 was a date way past, this is repeated to the Claimant in the hearing notice of vide letter dated 22nd May 2014. The internal hearing contemplated under section 41 of the Employment Act should be undertaken in good fair by giving an employee a fair chance to be heard. Where the employer has internal disciplinary rules and procedures, the employee should have this in advance so as to familiarise himself with its contents and abide as appropriate.

67. In this case, I find the Respondent had the benefit of legal counsel at the disciplinary hearing. At this point, the Claimant has instructed his advocates noting the unfair practices ongoing against him. Internal disciplinary proceedings in their nature are between and employer and employee or the union. External persons are not required at this point as all the evidence is available within the shop floor. At the

hearing all what is required is for the employer to be satisfied that there exists a reasonable ground to terminate an employee or give such an employee an appropriate sanction commensurate with the misconduct. Such internal matters are not conducted in a similar manner as in a Court setting, rules of procedure do not apply, all what is required to ensure the employee is given a fair hearing in the presence of another employee of his choice or their union representative. See **BIFU versus Co-operative Bank of Kenya Limited, Cause No1982 of 2013.** Such proceeding are to be conducted in the language the employee understands best. The scenario therefore is to ensure an informal process where the employee is comfortable to express himself. However, where the employer takes the option of inviting an external advocate at the disciplinary hearing, similar benefit should be accorded to the employee.

68. Ultimately, the process was already eschewed to defeat justice for the Claimant. Whatever misconduct was committed, the Respondent set in motion malicious means to bring the same to the claimant's attention. This should not have been. The minute the Respondent got information about the Claimant moonlighting, such should have been addressed with firmness and finality as his contract of employment had contemplated such measures. To wait and built on the case, trust and confidence was eroded and eventually lost. By the time of the disciplinary hearing on 9th June 2014, the die was cast. Whatever remained of the employment relationship as at 15th May 2014, the email circulated to Respondent employees made sure the Claimant was cut off completely. By remaining in the employment of the Respondent, things could only escalate to their worst. Such led to unfair termination of the Claimant.

Remedies

69. The Claimant is seeking reinstatement. On the finding that trust and confidence between the parties was lost, it would only harm the Claimant to be returned to such an environment. The order for reinstatement is also given only in exceptional cases as noted in the case of **Mary Chemweno Kiptui versus Kenya Pipeline Co. Ltd, Cause No.435 of 2013.** I also did not find the Claimant keen on this aspect. He did not give emphasis to this remedy. Such will not be awarded.

70. The Claimant has in the alternative claimed for due salaries from June 2014 to date. However salaries are only paid for time worked for. A salary is only payable upon giving labour. The Claimant has not been in the service of the Respondent since June 2014. No salaries are payable and shall not be awarded.

71. The Claimant has claimed for exemplary damages. In clear cases of malice that lead to termination of employment without any justification, the best remedy would be a reinstatement. But noting the above findings, Exemplary damages are due as held in the case of **Peter Kamwi versus Standard group cause no.176 of 2015.** In awarding exemplary damages herein I have put into account various cases where the Court made similar awards noting the circumstances of each case especially malicious conduct that lead to termination of employment. In **Thomas Mwita versus KCB, Cause No.464 of 2012** the Court held that the contract had to be brought into account factors to be considered before the employee was terminated. Such were ignored by the employer as they wanted the employee out of employment through all means possible. I also take into account the finding of the Court in the case of **Henry Musemate Murwa versus PSC & AG, Cause no. 546 of 2011** where in awarding exemplary damages and not general damages the Court held that the breaches suffered were of the nature that there was malice as against breach of the employment contract. In the case of **Mary Mutanu Mwende versus Ayuda Ninos de Africa-Kenya (Anidan-Kenya), Cause No.50 of 2012** the Court awarded the Claimant loss of income/salary and not general damages. Therefore, even without awarding reinstatement taking into account that the Claimant should not have been dismissed in the first instance, malice is apparent. The Court shall award based on the provisions under section 12(3) (viii) of the Employment and Labour Relations Court Act to;

> (viii) ***any other appropriate relief as the Court may deem fit to grant.***

72. Exemplary damages awarded at kshs.7, 200. 000.00.

73. Upon the Court finding that there was no due process, and this amounted to unfair labour practice, compensation is due under section 49 of the Employment Act. Putting into account that there is no reinstatement, the Court shall award compensation at 6 months gross salary of Kshs.600,000.00 all being Kshs.3,600,000.00.

74. The Claimant is also seeking for the Court to award as appropriate and under this power, notice pay is awarded at 3 months gross salary together with and order that the Respondent should issue the Claimant with an appropriate Certificate of service as under section 51 of the Employment Act putting into account the entire duration of service.

Judgement is hereby entered for the Claimant against the Respondent in the following terms;

a. **I declare the termination of the Claimant was unfair;**
    i. **Compensation is awarded at kshs.3,600,000.00;**
    ii. **Exemplary damages awarded at kshs.7,200,000.00;**
    iii. **Notice pay Kshs.1,800,000.00;**
b. **Dues above are subject to the provisions of section 49(2) of the Employment Act;**
c. **The Respondent to unconditionally issue the Claimant with an appropriate Certificate of Service; and**
d. **Costs of the suit to the Claimant.**

ORDERS ACCORDINGLY.

DELIVERED IN OPEN COURT AT NAIROBI THIS 7TH DAY OF APRIL 2016.

M. MBARU

JUDGE

In the presence of

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…………………………………………