



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 2265 OF 2012

GODFREY MAKINDU CLAIMANT

VERSUS

TRANS BUSINESS MACHINES LIMITED..... RESPONDENT

JUDGEMENT

The judgement herein related to a claim dated 8th November 2012 filed by the claimant on 9th November 2012 for unlawful termination, failure to pay earned commissions and failure to pay benefits by the respondent Trans Business Machines Limited (TBM). The respondent/TBM filed their response dated 21st January 2013, and filed on 29th January 2013 together with their counter-claim and admitted that the claimant was their employee but terminated him due to dishonest conduct breaching his contract and as a result they claim against the claimant allowances he received but engaged in other business. On 8th February 2013 the claimant filed his reply to the counter-claim and denies owing the respondents any sums and further reiterates his claims. In evidence the claimant gave his sworn statement whereas the respondent called two witnesses Mr. Henry Maina and Davies mwaura Maina. At the close of the hearing both parties filed their written submissions dated 15th May 2013 and 4th April 2013 for the claimant and respondent respectively.

In the claim the claimant states that by a letter dated 10th May 2010, the respondents employed him as a Marketing Executive on the terms contained in a letter dated 10th may 2010 and he proceeded to give his services to the respondent until 11th April 2012 when without notice and in breach of his rights summarily dismissed him without paying him his benefits and commissions earned all amounting to kshs.32, 000,000.00. That his termination was unlawful in that he was not given notice or a chance to defend himself, he was not paid his earned commissions and rules of natural justice were not observed. He therefore claims;

1. *Earned commissions at kshs.32, 000,000/=*
2. *12 months salary as compensation at Kshs.179, 000/=,*
3. *2 months salary in lieu on leave at Kshs.358, 000/=*
4. *One month salary in lieu of notice at kshs.179, 000/=*

Total being kshs.34, 685,000/=

He also claims costs and interest from the suit amount.

The claimant also in his defence to the counter-claim stated that he was never confirmed to his position

despite his outstanding performance and as per his agreement with the respondent he surpassed his target and on average brought in business worth Kshs.96, 000,000/= and that he never breached his contract and his claims are legitimate and due as set out in the claim. He denies claims that he breached the terms of his employment and that he never diverted business to third parties or applied respondents resources unlawfully to the advantage of third parties and does not owe the respondent kshs.622,143/= as claimed.

In evidence the claimant stated that once he was employed by the respondent, it was agreed that he would earn a monthly salary of kshs.160, 000/=, fuel allowance of kshs.15, 000/= and airtime of kshs.4, 000/= each month together with commissions on accounts that he handled. That he was paid commissions for the accounts he had;

First account was with Diamond Trust bank and as the business manager he supplied goods worth 10 million out of which he was entitled a commission of 15% with the order being on 9th March 2011 and his commission was due on collection in April 2011 with due consideration to variables and delays in installations;

Second account was with Kenya Pipeline in which he delivered services worth Kshs.28, 939,355/= and he was entitled to a commission at 15% as the account manager, all amounting to kshs.651, 135.48;

Third account was with Cooperative Bank, he sold goods worth Kshs.350,747,595/= and as the account manager he was entitled to 15% commission at Kshs.29, 234,064.70;

4th account with AFCO where he delivered desk tops, lap tops and computers worth kshs.2, 550,000/= and his commission at 15% was kshs.57, 375/=;

5th Account with Ministry of Finance where he sold servers at kshs.30, 500,000/= and his commission at 15% was kshs.675, 112/=;

6th was another account with Ministry of Finance Deposit Protection Fund, he supplied servers at kshs.44, 693,823.65 and his commission at 15% was kshs.105, 610.98;

7th Account with KRA in 2012 where he supplied software at Kshs.71, 400,000/= and his commission at 30% was 3,213,000/=;

8th Account with Coca Cola, where he supplied IBM computers at kshs.3, 400,000/= and his commission was Kshs.102, 000/=; and

9th Account with NSSF where he supplied servers, storage and switches and other software at kshs.355, 067,156/= and his commission was Kshs.10, 652,014/=.

That in some of these accounts payments were made, some are incomplete like the one with KRA had issues with regard to Parliamentary Committee that raised concerns and thus could not be completed as it required outside help and had not been paid but should have been paid as of the time the claimant was in court. The claimant further stated that in his letter of appointment, there were percentages outlined but the respondent changed these rates for which the claimant agreed with. He was with respondent for 2 years, he earned his monthly salary and there are records that indicate he worked on the 9 accounts outlined above.

That on the contract with KPA the quotation was done to the Managing Director as the direct contact but as the responsible officer the claimant was the account manager. in every quarter each account manager was entitled to a statement from the finance officer who provided the claimant with a record of the accounts he was running; which accounts he knew well as he also interacted with these clients at workshops and lunches for which he claimed for the expenses and each month he got an entertainment allowance as the one running the accounts and needed these face-to-face meetings. He also claimed for

mileage and airtime, which the respondents gave him upon submission of receipts for these meetings.

The claimant further stated that he was dismissed for alleged misconduct and he understood this to mean that he did not devote his time to TBM but denied this as mere accusations as he was diligently serving the respondent's interests. That he is aware of Infomark where he is a director since 2009 before he joined the respondent which is a company that sells Siemens, HP printers, servers, and anything else that a client may need. That Infomark has directors and to confirm that he was diligent and served the respondents well, he never diverted business to Infomark. That he did not steal any business from TBM to any third party as alleged in the defence and any such allegations are only meant to shroud his good performance and for the respondents to avoid paying his dues.

That he had a monthly benchmark of 8 million and since sales are a cycle he would sometimes fail to reach this target but by the time he left he had done 1.2 billion worth of business in 2 years and on average he had 80 to 90 million a month. That he never got an earning letter, he was reviewed but was never confirmed. He was to be reviewed in September 2011 but he was short of the 8 million targets and from the company practice, nobody had achieved this target before and therefore the respondent should pay his commissions.

That his dismissal was inhumane, he was not given a hearing and was never confirmed. That he worked on all the 9 accounts that he had, he went out to meet clients, he entertained them and brought new accounts to the respondents and he was never appreciated for it.

On cross-examination the claimant confirmed that when he got his letter of employment, he read and understood it in how it spelt out the mode of payment with regard to commissions and how they would be earned and he had a monthly target of 8 million a month and commissions were to be paid upon reaching this target. That he was paid his commissions up to September 2011 which related to what was due to him at the time and a reflection that he had achieved his target and for the year he was paid Kshs.275576.99.

That he worked for a year without a review or any letter indicating that he had a shortfall. That there was a meeting regarding to ISO requirements but the director flew out of the country. He admitted that he had a meeting with the Managing Director once who insisted that figures were important and he needed to see sales go up. That he achieved his target in some quarters but others were low but by December 2011 he had met his target. That his letter of appointment had specific details on commissions but since IT is complex and based on variables like delivery dates he should be paid his commissions.

The claimant admitted that under his letter of appointment commissions were due at 10% for payments done within 30 days, 3% for payments done within 60 days, 2% for payments made in 90 days and none after that. That he was paid yearly for his commissions after each quarterly review for 24 million. He further confirmed that from the 9 accounts cited the Diamond Trust bank account had not been paid and this was only done in May 2011 and that the commissions were to be shared between 3 employees but he refused as he was the sole account manager and commission should not have been shared. That the Ministry of Finance account was not settled in 30 days but that there are 2 payments pending. The KPC account was in 2012 with an LPO issued and by the time the claimant left no payment had been paid. That even the other accounts had not all been settled. That the NSSF account was awarded after he had left the respondent but he had done most of the work on it and was entitled to commissions due.

On the other hand the respondent stated that they had an express contract with the claimant where he was to devote his time faithfully to promote their business but he engaged in dishonest activities and never met his set targets as set and agreed between them. That they terminated his contract over breach as the claimant was guilty of gross misconduct and fundamentally breached his contract of service. That the claimant was placed under probation for more than 6 months and was never confirmed as his performance was below expectations and by a letter dated 29th July 2011 after holding several meetings he was warned of his poor performance and later an investigation carried out and it was discovered that he was engaged in other employment with a private company, Infomark Business Technologies Limited of which he was a Director. That this private company was running similar business as the respondent and that the claimant was using the respondents to get clients for his private company benefit.

That on 11th April 2012 the respondents summarily dismissed the claimant for breaching his contract for moonlighting and dishonest activities. That he never earned any commissions and his claim for Kshs.32,000,000/= was not dues and was instead overpaid for sales that he never actually made and out of goodwill the respondent paid the claimant for all his days worked before he was terminated.

the claimant breached his contract by failing to be loyal to the respondents customers as the first priority while out in the field, failing to market the respondent exclusively as sales/support hardware and software solution provider, he did not devote his time faithfully to the promotion of respondent business and did not perform well, he failed to work with other colleagues and was engaged in dishonest activities. That he was given warnings but failed to change and noting that the claimant was running private business while using the respondents resources such as airtime, car allowance during office hours when he was meant to be serving them they lodged their counter-claim.

On the other hand in the statement of defence, the respondent's claim is that the claimant breached his contract and stole business from the respondent and engaged in other employment thus causing them to loose clients and business. That while doing this the claimant used respondents resources thus causing them loss and unnecessary costs amounting to kshs.484, 832/= by way of allowances, airtime, fuel allowances, internet and parking fees. That under the contract of employment, the biggest commissions he was entitled to was at 10% of the gross profit of sales made which 30 days yet on several occasions a percentage a=higher than that of 10% was paid to him and thus the respondents does not owe him any money as he was overpaid for some of the commissions issued and now claims the overpayment at Kshs.137, 311/=.

That the respondents now claims a total sum of Kshs.622, 143/= together with costs of the suit.

In evidence Henry Maina Wallace testified that he is the Managing Director of the respondent and familiar with the case and he worked with the claimant for the duration his time with respondent. That since he joined in May 2010 he had a letter of appointment which spelt out his terms and conditions of work. He was to sell software and hardware plus the services that go with it. He had a basic salary with benefits and got commissions for goods and services made. It was agreed that commissions were due based on profit margins and the time it took for the product to be paid for. Once goods were delivered there were 30 days, 60 days, and 90 days all outlined in his letter of appointment. That the claimant is not entitled to any of the commissions claimed in the 9 accounts indicated as all these accounts were not managed solely by him and were TBM clients before he joined and there is no basis for the 15% calculations used. That the profits marker is not supported by any basis as the letter of appointment was very clear. His commissions were to be based on the gross profits and not the cost price and the time the product took to be paid for. That in the claim the claimant has only indicated the selling price and not the costs of the product. That there was a buying price and selling price and thus he was not entitled to any commission from the 9 account.

With regard to the Diamond Trust Bank the claimant was paid a commission which was loss to TBM as there were no profits from the sale. That some commissions were paid in 2010 and 2012 on ex gratia which as the managing Director he authorise even though there was no quarter due as a motivation to the claimant to work harder. That for all their products they are sourced aboard, it takes costs to bring them and if a sale is made and not paid for in 90 days, this becomes a bad deal as there are losses hence no commission is earned.

The claimant was on probation for 6 months and was never confirmed because he did not meet the targets of sales in the first 6 month and had sold nothing and was verbally warned. After another year, a written warning was issued dated 29th July 2011 but his performance did not improve. In December 2012 commissioners were paid covering everything the claimant had sold as ex gratia and not due.

That under the letter of appointment, the claimant was to earn commissions on monthly sales of 8 million which he never met. Those payments would take up to 3 months and this was factored in the 30 days, 60 days and 90 days.

The respondent has counter-claim where they noted that in computing the claimants commissions he was overpaid by 15% which was an error and what was paid at Kshs.275,576/= was more and should refund kshs.137,311/= as his 10% only amounted to kshs.138,265/=. That after he gave the claimant the warning letter dated 29th July 2011 several issues emerged that the claimant was doing extra business by moonlighting using company property. That from his computer it was noted that he had made a quotation to respondent customers and he had a contract delivered while pretending to be working for the respondent. That he quoted using insider information together with other business executives as a private company where he was a director Infomark Limited.

Under the terms of the claimant employment, it was strictly prohibited to moonlight as he was to be devoted to the respondent business. That when he was employed he did not disclose owning a rival company and if he had done this he would never have been hired in the first place. That the circumstances of his dismissal were accidental but turned out good as the respondents computers are networked and when the system went down, the IT officer saw what was going on as from the claimants computer he had quotations and invoices to Infomark Ltd, there were deliveries and payment and it was then discovered that the claimant was moonlighting.

The witness stated that he called the claimant to his office over this issue and he admitted to owning the private company while his contract required him to be honest to the respondent and thus he was summarily dismissed. It was a condition stipulated under his letter of appointment and by moonlighting, he had breached his employment.

That after the dismissal of the claimant, the respondent went to the Registrar of Companies and established that Infomark Ltd was owned by the claimant and his wife and it was a competition to the respondent and this had not been disclosed to them when they hired him. That he did not give any justification for moonlighting and thus terminated him to protect their company.

While the claimant was their Sales Executive, he enjoyed various benefits kshs.16,000/= for transport, parking fees, airtime at kshs.4,000/=, office equipment and a lap top. That these benefits were used for moonlighting purposes and not for the benefit of the respondent and claims these as due to the respondent. That they had a lot of faith in the claimant, ex gratia payments were paid to encourage him and it took the respondent 18 months to discover that he had been moonlighting with them all these time hence the summary dismissal out of disappointment.

The other witness for the respondent was Davies Mwaura Maina, Director Sales and Marketing and a son to the Managing Director, the 1st witness. That he was the team leader where the claimant worked and would oversee all the activities. Claimant was to earn commissions upon meeting his targets just like the other team members and from his 9 listed accounts all these were TBM old clients. That the claim has no basis as the calculated claims are exaggerated and have no support as the claimant was not the account manager. Commissions were based on gross profits and time taken to pay and the nature of the account as in the big accounts several people would be involved and commissions would be based on the team efforts.

The witness further stated that while the claimant was under his supervision, he never realised that he was doing other business since they were all in an open space but sometimes he got calls and would walk out to take them. That for the entire duration of his employment, the claimant never achieved his targets of sales of 8 million per month. As the team leader he made recommendations on the commissions dues and shared among the members who made a contribution. That in the Trust Bank account, the claimant was paid though it was introduced to the respondent by Engineer Anthony Gitonga who saw the business opportunity and asked another colleague and the claimant to take it up but the initial meeting was done by the whole team as a joint effort that involved Anthony, Thaya and the claimant. The 3 worked on the contract but at the point of paying the commission they disagreed as the claimant wanted everything.

That when doing their systems backup, it was discovered that the claimant was engaged in private business through Infomark which was sending a proposal and the references were TBM customers. That this proposal was from the claimant's addressed using TBM resources. The witness did his investigations

to establish who Infomark was and it emerged the claimant was a director and the case was referred to the Managing Director.

From the 9 accounts cited by the claimant, some were paid and others are ongoing;

Diamond Trust Bank was paid;

Cooperative Bank was partially paid;

AFCO was fully paid;

FL staff and DPM were fully paid;

KRA is ongoing;

Coca Cola is ongoing; and

NSSF has just started with implementation as this was awarded after the claimant had left.

That where the claimant had a commission, this was paid to him especially with regard to Diamond Trust Bank and others he was paid without achieving his target.

Assessment

It is now a settled good practice for parties entering into an employment relationship to put the same into writing by spelling out the terms and conditions that they wish to be bound to. This Court will respect each and every term that parties consent to as regards their employment relationship and only seek to implement the terms and conditions entered into voluntarily. The only exception to this rule is that the contract must seek to implement that which is legal and entered into without coercion, misrepresentation or fraud. I note in this case nothing arises out of the contract of employment as regards its terms and conditions and take it that the same was entered into with the consent of both parties.

What was the employment status of the claimant?

Was there a breach of contract? And

What are the entitlements?

With regard to the status of the claimant, I note the letter of appointment dated 10th May 2010, at page two states;

You will be on a 6 months probation period during which time either party can terminate services by giving one day's notice. After confirmation, services can be terminated by either party giving 30 days notice. ...

This was the condition set to the claimant's status with the respondent. Termination was not until 11th April 2012. There is no indication of confirmation and this is equally admitted by the respondents 1st witness. That due to the poor performance of the claimant, they extended his probation period and even after this lapsed, they still did not find it fit enough to confirm his on the reasons that he had failed to meet his targets. This was a grave error to an otherwise well outlined letter of appointment or contract of employment. This action of the respondent with all the reasons outlined in defence offends the provisions of section 42 (2) and (3) of the Employment Act;

(2) A probationary period shall not be more than six months but may be extended for a further period of not more than six months with it the agreement of the employee.

(3) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).

Probation period has a limitation period of 6 months and where on good reasons the same is to be extended, the same has a mandatory provision that the employee must be involved and give his consent. This does envisage a scenario where there would be an appraisal; the weak points are identified and by mutual consent the probation period is intended to allow such an employee work on the weak areas with a clear understanding of what the expectations are. In the absence of such consensus, the employer can terminate the employment at this stage as by extending this probation *suo motto* is a violation of the very law that the employer has failed to exploit with a termination.

The continued employment of the claimant without a confirmation was therefore tantamount to a confirmation of his employment by operation of the law. After the 6 months initially stipulated under his letter of employment, the claimant became a full employee with benefits and all other rights due to an employee under the law.

However, despite the claimant being confirmed as a full time employee, his rights under his employment were guaranteed as under his contract and the same could be terminated upon good cause. The fact that he had his rights secured also created a duty on his part to perform his duties as agreed between him and his employer.

Upon this finding, the claimant has outlined his claim noting that he was owed in commissions, benefits and other entitlements. From the letter of appointment, it outlines how the claimant was to undertake his duties/tasks and had a monthly salary of kshs.160,000.00 and upon good performance he was to earn a commission. This was outlined as;

1. *Your monthly quota is kshs.8 million*
2. *Your commission on software/hardware is-*
 - a. *10% gross profit payment received within 30 days*
 - b. *3% gross profit payments received in 60 days*
 - c. *2% gross profit payments received in 90 days*
 - d. *No commission over 90 days*
3. *Commission on support services (engineering and software contracts) is 3% of the paid amount within 60 days – 1% payment within 120 days. Beyond 120 days – no commission. Please note commission payments is only if you are up to date with your monthly quota*

These were conditions precedent to the claimant earning his commissions. The claim outlined before this court does not meet these conditions. The same is based on a high calculation of 15% of the sale price and no evidence was adduced to enable this Court to go against the express terms of the contract entered into between the parties herein. This contract as outlined in the letter of appointment was accepted by the claimant before he commenced his employment with the respondent, if the terms therein were unachievable, he had the option to opt out after the 6 months of probation, which option he did not take. I have not found any evidence to support the claim that the claimant was able to reach a target of monthly quota of kshs.8 million or that there were software and hardware sales paid within 30 days, 60 days or 90 days for him to claim a commission of 10%, 3% or 2% of the gross profit payments.

The claimant does not state that his monthly pay was denied of him even when he failed to meet the sales target set. The commissions due were an invitation for him to surpass his basic pay and achieve more. There is no evidence before me as this being due. I will not award in this respect.

On this basis, the respondents terminated the claimant by summary dismissal. In law Subsection 44(2) of the Employment Act is relevant here. It provides that no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee was entitled to by any statutory provision or contractual term. Summary dismissal is lawful only where the employer has complied with

the provisions of Section 44 of the Act. Under Subsection 44(3), summary dismissal is tenable only where the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service. Such conduct on the part of the employee is called gross misconduct under the provisions of Section 44(4) of the Act.

If the ground or reasons for removal of an employee amount to gross misconduct, then the employer is entitled to dismiss the employee without giving a notice and a hearing as envisaged under Section 41 of the Act. However, if the reasons for removal are not proved to amount to gross misconduct, then the provisions of Section 41 of the Act will have to apply and the employee is entitled to the full protection of the Section. Thus, disputes of summary dismissal will always be subjected to the test of Section 41 of the Act whenever employees dispute and claim that the circumstances of the case did not give themselves to reasons of gross misconduct.

On the remedies and the counter-claim of the respondents, I will treat these jointly and note that there are few instances where the Employment Act, 2007 allow summary dismissal. As noted above these are the grounds as noted under section 44;

44. (1) Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

This section must be read together with section 44(3) and 44 (4)(g);

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

Under section 44 (4) (g);

(g) An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

Therefore, on good grounds as set out above, an employer can summarily dismiss an employee where there is a fundamental breach to the terms of the contract and where there is good reasons and sufficient grounds that such an employee used or is suspected of having committed and offence to the substantial detriment of the employer or the property. It was the evidence of the 1st and 2nd respondent's witnesses that on several occasions the claimant was warned of his poor performance, there were meetings where this was addressed verbally and a notice was issued on 29th July 2011. However, it was discovered that the claimant was moonlighting and using respondent's property to advance his private business interests.

The 2nd respondent witness stated that he did his own investigations and the claimant's supervisor and realised that he had a company Infomark Limited where he was a director that this company did similar business as the respondent. That this was an accidental discovery after the respondents system went down and while doing backup, they discovered various documents that were evidence to confirm that indeed the claimant was undertaking other business while employed by the respondent. That the business the claimant was doing was in competition with the respondent core business.

The claimant did not contradict this assertions by the respondent and he noted that he had these document sent to him erroneously and admitted that indeed he was a director of Infomark Limited and that at this recruitment he was employed upon full disclosure and due to the fact that he had done similar work as the respondents.

However, from the letter of appointment, I note the following paragraph;

Your duties as agreed by management will be as outlined below:-

1. *Market TBM exclusively as sales/support hardware/software provider*
2. *Market TBM exclusively as a sales/support software solution provider*
3. *Market TBM as a services provider*
4. *Specialise in IBM and get IBM certifications*
5. *Work with sales/engineering/administration to promote TBM image with customers*
6. *Promote sales of engineering support services*

...

You are expected to devote your time faithfully to promotion of TBM and maintain high standard of performance. Any moonlighting or dishonest activities will generate immediate dismissal without benefits.

The claimant was therefore called to the Managing Directors office and the discovery of his moonlighting and material found from his computer addressed with him. He was then summarily dismissed.

As outlined above, this court will not disturb a contract of service that parties freely go into. There were terms and conditions to the contract of the claimant and he was stopped from engaging in moonlighting. This was discovered from documents sourced from his address at the respondent office where he was supposed to be giving his undivided attention. This was a fundamental flaw on his part and the sanction was summary dismissal as under section 44 of the Employment Act.

On a case for summary dismissal, notice pay is not payable and due to the breach of a fundamental part of the employment contract as under section 44 of the Employment Act, no benefits arise.

The claimant had sought payments for two months leave not taken and not paid for. He however, in his evidence, he did not outline as to how this arose. This did not stand out as a claim he was keen to pursue. I will also not go fishing out evidence for him. This will nto be awarded.

On the respondents' counter-claim, I will go back to the terms of the claimant's letter of appointment where he was entitled to a commission based on a 10%, 3% or 2% for sales made and paid within 30 days, 60 days or 90 days respectively. The counter-claim that there was an error in making one such payment calculated as 15% is therefore recoverable as in a counter-claim. I will award the amount of Kshs. 137,311.00.

However in the claim for allowance received by the claimant, it will be impossible to apportion any particular percentage to the respondent noting that these were monies received by the claimant to undertake work allocated by them. If these allowances were used to meet other purposes, the duty rested upon the respondent to monitor and assess the work of their employee to ensure that he performed as under his contract of employment. It was not clarified in pleading or in evidence that these allowances were exclusively used by the claimant for his private business apart from the fact that he was found in possession of documents that established that indeed he was a director of a company that had business similar to the that of the respondent and a competitor. I will not grant this part of the counter-claim.

Noting that the claimant was in breach of his contract of employment, no damages were sought by the respondent and on this basis, I will only grant costs of the suit.

In conclusion, I will dismiss the claim in its entirety and enter judgement for the respondent in terms of the counter-claim in the following terms;

- a. **the sum of Kshs. 137,311.00;**
- b. **Costs of the suit awarded to the respondent.**

Delivered in open court this 16th day of July 2013.

M. Mbaru

Judge

In the presence of

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