



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 769 of 2012**

**SOPHIA WANJIKU NGUGI ..... CLAIMANT**

**VERSUS**

**SAIDA ALI, KATHAMBI KINOTI, NELLY KAMAU (AS TRUSTEES OF YOUNG  
WOMEN'S LEADERSHIP INSTITUTE) ..... RESPONDENT**

**J U D G E M E N T**

By a statement of claim filed in Court on 20th May, 2012, the claimant states that she was employed by the respondent initially as a Program Coordinator and later as Executive Director vide a contract dated 22nd November, 2010.

The claimant avers in her statement of claim that she worked for the respondent until 24th February, 2011 when the respondent without any lawful cause, summarily dismissed her from employment. She contends that her dismissal was wrongful and unfair as it was grounded on reasons that she avers were untrue, unfair and invalid. She further contends that her dismissal was contrary to procedural requirements and natural justice.

The claimant avers that despite her wrongful dismissal the respondent has neglected to pay or settle her terminal dues. As a result, the claimant sought the Court's intervention to order the respondent to pay her terminal dues tabulated as follows:

- i. Kshs. 468,000 being her terminal dues for three years of service calculated at the rate of 1 month for every year worked;
- i. Kshs. 312,000 being two months salary in lieu of notice;
- i. Damages for unlawful and unfair dismissal

The respondents on the other hand refuted the claimant's contention and avered in their memo of response that they were justified in dismissing the claimant since she breached several clauses in her employment contract and Employee Handbook issued by the respondent. The respondent further contends that the claimant's dismissal was procedural, fair and carried out in accordance with the law.

At the trial both sides maintained their respective positions with the claimant maintaining that her dismissal was wrongful and unfair and that she was entitled to compensation for wrongful termination as a result. The respondent on the other hand through Ms Gathumbi Kinoti maintained that they were justified in terminating the claimant's contract.

According to her, several concerns had been raised by the Board of Trustees over the fact that the claimant was raising and presenting for signature by the Chair, cheques in excess of Kshs. 350,000/- which was beyond her mandate. One incident in point was a cheque for Kshs. 819,000 issued in favour of AAR on account of renewal of medical cover. Further the Claimant was accused of inaccurately capturing the minutes of Board meetings and was generally rude and unwilling to receive instructions from the Board and the Trustees. The sum total of these accusations were according to Kathambi giving the organization bad publicity and warranted summary termination of the claimant's contract of employment.

In the written submission filed by the Claimant's counsel Mr. Kinyanjui, he reiterated his client's position that the termination was wrongful and unfair. On the unfairness of procedure, Counsel submitted that his client became aware of the charges of gross misconduct for the first time on 1st February, 2011 when she received an email from one of the Trustees informing her that the Board of Trustees had passed a vote of no confidence over her. According to Counsel, the email in issue only invited her to a joint meeting with the Board of Directors in which there was supposed to be a discussion on their no confidence motion. It was Counsel's submission that the grounds given for passing a no confidence vote were not only sparse but lacked details or particulars to enable his client prepare a response.

Regarding the meeting of the 10th February, 2011, Counsel submitted that this was in the form of an advisory meeting and no indication was given that the termination of his client's employment was one of the issues to be considered. According to Counsel therefore, his client was as it were ambushed with the details and particulars of allegations over her conduct which she was not familiar with or those that would have required time to prepare a reply.

Further Counsel submitted that the meeting in question lacked quorum and was inconclusive as most of the participants left midway. His client was thus surprised that she was handed suspension for two weeks at the conclusion of the meeting.

Indeed, according to Counsel his client wrote to the Chairperson on the 16th February, 2011 raising the issue of unfairness of procedure adopted and further questioning the legality of the no confidence vote. This letter was responded to by the Chair of Board of Directors promising to address the issues raised by the claimant over the letter of suspension but this was never to be as she was eventually summarily dismissed by a letter dated 24th February, 2011.

Concerning the disciplinary procedure that ought to have been adopted prior to terminating the Claimant, counsel submitted that the respondent's Employment Handbook produced as annexure 3, required that a termination process should follow a progressive disciplinary mechanism which required that the claimant be given three written warnings before termination and that termination would only occur after three written warnings. According to Counsel, his client never during her employment received any warning letter from the respondent.

Counsel further submitted that the disciplinary procedure adopted by the respondent including the passing of the no confidence vote, suspension and the joint meeting of the Board of Trustees and Directors was outside the disciplinary process provided by the Handbook.

The respondent's Counsel, Mr. Njeru on his part defended his client's decision to summarily dismiss the claimant contending that she breached several clauses contained in both the employment contract and the Employee Handbook and thus the Trust had no option but to summarily dismiss her for gross misconduct.

According to Counsel, the claimant admitted to deliberately misrepresenting the proceedings of the Board meeting on 8th July, 2010; continually signing cheques in excess of Kshs. 350,000/- without obtaining prior written approval of the Chairperson of the Trust's Board; being rude towards the Trustees on several occasions and exhibiting poor communication skills which compromised the external image of the Trust.

According to Counsel, the email of 1st February, 2011 notified the claimant that the Board of Trustees would be holding a meeting to discuss the motion of no confidence against her and that she would be given an opportunity to explain her conduct and show cause why she should not be summarily dismissed.

According, to Counsel, the claimant ought to have raised questions regarding the email when she received it and that she voluntarily appeared before the Board on 10th February, 2011 when her conduct was to be discussed and given an opportunity to defend herself. The unsigned minutes of the meeting in question were produced in Court at the trial and Counsel for the claimant vehemently objected to their production arguing that since they had not been signed, they could not be said to be a true reflection of what took place at the meeting of 10th February, 2011.

Regarding quorum and constitution of the meeting, Counsel submitted that the meeting was properly attended by the Trustees as well as members of the Board two of whom participated via “Skype”. According to Counsel, after hearing the claimant's response, the Trust was of the view that the Claimant's response did not sufficiently address the allegations made against her and that she had failed to explain and justify her misconduct.

Counsel in the ultimate submitted that the dismissal of the claimant was therefore carried out in accordance with the law in that the claimant was given an opportunity to respond to the allegations of misconduct made against her but she failed to sufficiently do so hence the summary dismissal.

Having attempted to set out the facts both as pleaded and testified during the hearing, the questions the Court have to address in order to reach a determination of this dispute are: *first did the Board of Trustees follow the laid down procedures in the Employees Handbook while terminating the claimant's contract?; second were the reasons given for termination meet the threshold for summary dismissal? If the answer to these questions are in the negative, what are the consequences for such termination?*

To begin however, the respondent Counsel raised the question of the proper party before Court. According to Counsel the claimant's employer was Young Women's Leadership Institute (YWLI) and therefore ought to have been the one named as the respondent. The respondent however did not take as preliminary the the issue of non-suit for it to be determined *in limine* on proponderance of evidence hence the Court will not delve into the matter and will instead take the position that the parties named have been sued not in their personal capacities but as Trustees of YWLI and any order made by the Court will be enforceable not as against them personally but as Trustees of YWLI. Further, apart from mere allegations in the pleadings, no evidence was adduced by the respondents to demonstrate that they were neither the correct parties nor the Trustees of YWLI.

That having been said, the question of unfair termination of employment is covered under section 45(1) of the Employment Act which provides that no employer shall terminate the employment of an employee unfairly. Subsection (2) of the said section provides that a termination of employment by an employer would be unfair if the employer fails to prove that the reason for the termination is valid; that the reason for the termination is a fair reason related to the employees conduct, capacity or compatibility; or based on the operational requirements of the employer; and that the employment was terminated in accordance with fair procedure.

As stated in the case of **Dinnah Musindarwezo vs African Women's Development and Communication Network (FEMNET) ICK Cause No. 1390 of 2012 (unreported)**, the absence of the conjunction “or” in subsections 2(a) and (b) gives the implication that subsections 2(a),(b) and (c) must all be met before any conclusion can be reached that the termination was fair. That is to say an employer must not only show that the reason for termination is valid but must also demonstrate that the reason for termination is a fair reason related to the employees conduct, capacity or compatibility and that the employment was terminated in accordance with fair procedure. Any other interpretation would yield absurd results since reason for termination may be valid but unfair in terms of procedure followed or when one considers the employees conduct or any other circumstance that yielded the reasons for termination.

Under section 45(4) of the Act, a termination of employment shall be unfair for the purposes of Part VI of the Act where it is found out that in all the circumstances of the case, the employer did not act in accordance with **justice and equity** in terminating the employment of the employee. The terms just and equitable are broad terms and cover an array of facts and circumstances that invariably include situations

and events outside those enumerated in the Act but would warrant dismissal under the principle of ejusdem generis.

Back to the relevant facts of this case, the claimant was employed initially as a Program Coordinator and later promoted to Executive Director. Her contract provided among others that it will in addition to terms spelt in the contract itself, be governed by the YWLI's Employee Handbook and that she was expected to comply with the policies contained in the said Handbook. Page 32 of the Employee handbook provides that in the event of a conflict or unacceptable job performance, YWLI is committed to working with staff and resolving issues or misunderstandings. It further provides that staff are encouraged to try and work out the issues.

The Handbook further provided that:

“... in the event progressive discipline is warranted, the following procedure will be followed:

1st warning-the employee and the Executive Director or her designate will meet and discuss. A memo is prepared documenting the reason(s) for the verbal warning.

A copy of the memo outlining the verbal warning is provided to the employee with a confidential copy placed on the employee's personnel file.

2nd Warning- the employee and Executive Director or her designate will again meet and discuss in-depth the reason(s) for the concern with recommendations for resolution.

A copy of the written warning is provided to the employee with a confidential copy placed in the employees personal file.

3rd Warning- If the concern continues then a final written warning will be prepared by the Executive Director and given to the employee and the Executive Committee of the Board. Termination of employment may be the next step.

The Board members and the management committee will be informed of every step of these actions and be consulted accordingly especially where issues related to integrity and credibility of the organization are at stake.

In the event termination of employment is the only option, the employee concerned will be given notice in accordance with his or her contract of employment. In the case of the claimant, her contract provided for two months notice or payment in lieu thereof. However if the employee is dismissed for gross misconduct, the employee shall not be entitled to any notice nor payment in lieu of notice.

Section 44(3) of the Employment Act provides that subject to the provisions of the 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.

Section 44(4) provides that any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in the section, constitute justifiable or lawful grounds for the dismissal if:—

(a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

(b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;

(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;

(d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;

(e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in

authority over him by his employer.

(f) in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not

within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or

(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.

The question whether the misconduct is sufficiently grave to warrant summary dismissal is tested on the premise that the conduct of the employee is so grave as to amount to repudiation of the employment contract itself. That is to say a reasonable person looking at the conduct of the employee concerned would reach no other conclusion but that the act is inconsistent with the continuance of employer-employee relationship. Most of the situations listed under section 44(4) of the Employment Act are the most common examples of conduct that are so gross that they attack the very root of the contractual relationship itself however as stated under that section, their listing does not prevent an employer from summarily dismissing an employee for any other cause that the employer thinks constitutes gross misconduct nor does it prevent an employee from disputing any other ground for dismissal.

However the fact that a particular conduct is expressly stated to constitute gross misconduct and to warrant summary dismissal does not mean that a dismissal on that ground is automatically fair under statute,, since disciplinary rules cannot oust the jurisdiction of the Industrial Court to look into the overall merits of a dismissal.

The email dated 1st February, 2011 addressed to the claimant informed that the Council of Trustees had no confidence in her as the Executive Director of YWLI. It further informed her that there would be a special board-trustee meeting later in the month to discuss the motion of no confidence. She was informed that the meeting shall provide her space to be heard and after the meeting she would be notified of the decision reached.

The email listed without any elaboration the reasons why the Council of Trustees had no confidence in the claimant. It contained no attachment or reference to any material or incident that brought about the no confidence motion. It merely informed the claimant that a meeting will be called latter in the month in which the motion would be discussed and that she would be provided with an opportunity to be heard. The Court takes the view that a motion of no confidence is a very serious issue as it questions the integrity, competence and personality of the individual subject to it besides, provision of a charge and evidence in support of the charges is an essential element of fair trial or hearing and well settled principle of natural justice. In the circumstances the claimant ought to have been given together with the email concerned, more information to enable her prepare herself for the meeting scheduled later in the month to discuss the motion. A mere listing of grounds why the no confidence motion was arrived at was not enough.

As was stated in *Dinnah's case* cited above, the right to fair hearing is one of the fundamental principles of natural justice and fundamental to fair procedure. It is underpinned by the principle that both sides should be heard. The right to fair hearing has been used by courts as a basis on which to build a kind of

fair administrative procedure comparable to due process of law. Bodies entrusted with legal power cannot validly exercise such power without first hearing the person who would suffer by the exercise of that power. Where natural justice is violated it is no justification that the decision was in fact correct.

Lord Denning in the case of Abbot vs. Sullivan (1952) 1 KB 189 at p198 observes:

**“... bodies which exercise a monopoly in important sphere of human activity with power of depriving a man of his livelihood must act in accordance with elementary rules of justice. They must not condemn a man without giving an opportunity to be heard in his own defence and any agreement or practice to the contrary would be invalid.**

The claimant was at the mercy of the Council of Trustees and the loss of confidence in her resulted in loss of her employment ultimately. She ought therefore to have been accorded a reasonable opportunity to prepare and answer to charges against her. And reasonable opportunity here not only includes providing her with a list of charges against her but also evidence or facts in support of those allegations.

The Court having found that the Claimant was not given a reasonable opportunity to prepare her defence, the meeting of 10th February, 2011 in which the respondents purported to discuss further the no confidence motion was as a result of an unfair administrative procedure. In any event the minutes that purported to capture the deliberations at the said meeting were neither signed nor confirmed in order for the Court to regard them as a true record of the proceedings at the said meeting.

Back to the question of summary dismissal, as stated above, to dismiss an employee summarily, the conduct must be such that it would no longer be tenable to retain employer-employee relationship. The employee's conduct must be such that it amounts to repudiation of the contract of employment itself. Looking at the accusations against the claimant the Court is not convinced that they were so gross as to amount to gross misconduct warranting summary dismissal. If the accusations contained in the email dated 1st February, 2011 are anything to go by, they are accusations that could have been dealt with progressively in accordance with the respondent's Employee Handbook. For instance the question of misrepresentation of proceedings, poor communication skills, inability to take feedback and inability to acknowledge and respect authority are issues that could have been dealt with through warning letters and discussions on how to improve work and work relationship. In any case no evidence was tendered before Court to demonstrate incidents when the claimant perpetrated any of the wrongs she had been accused of. Besides they are matters that can form part of the claimant's appraisal and if found wanting, terminated in the usual way. On the question of exceeding her limit on cheques, it is not clear if a renewal of an existing commitment was a new commitment hence requiring approval of the Chair. In any case the Chair had the choice to decline signing any cheque which was in excess of the claimant's authorised limit. No evidence of any cheque in excess of the claimant's limit was tendered in court to vouch for this accusation.

The accusations against the claimant contained in the email of 1st February, 2011 that culminated in her summary dismissal are in the Court's view not issues that amount to gross misconduct to warrant summary dismissal. In this regard the Court comes to the conclusion that the claimant was wrongfully and unfairly dismissed.

On the question of wrongful termination the Court deems that the termination was done without the two months notice as stipulated in the claimant's contract of employment and orders that the respondent pays her two month's salary as at the time of termination, in lieu of notice which has been pleaded as Kshs. 312,000/-

Regarding service pay, section 35(5) of the Employment Act stipulates that:

“...An employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

However under subsection (6) the section does not apply where an employee is a member

- (a) a registered pension or provident fund scheme under the Retirement Benefits Act;
- (b) a gratuity or service pay scheme established under a collective agreement;
- (i) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and (d) the National Social Security Fund.

At the trial no evidence was led to the effect that the claimant's was excluded from making a claim for service pay by virtue of any of the provisions of section 35(6) of the Employment Act set out above. In the circumstances the court allows her claim for service pay at the rate of 1 month's pay for each completed year of service which has been pleaded at Kshs.468,000/-.

The Court reaches the conclusion that the respondent in terminating the claimant's employment failed to follow not only its Employees Handbook, but also failed to follow rules of natural justice and fair administrative procedure. Section 45 of the Employment Act prohibits unfair termination of employees contracts and where that occurs section 49(1)(c) gives the Court discretion to award up to the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal. In this regard the Court takes into account the fact that the respondent is presently employed. She has therefore taken steps to mitigate her loss however the Court is alive to the fact that getting employment is not an easy task especially under her circumstances where she was summarily dismissed. On the other hand the respondent reserve the right to dismiss any employee who is in breach of his or her contract of employment. In this case the respondent reserves the right to dismiss the claimant however in the process of exercising this right, they made a few missteps that rendered their action unlawful and unfair. In this regard the Court awards the claimant 5 months salary as reasonable compensation for wrongful termination which works out to Kshs.780,000.

In conclusion the Court awards the claimant the sum Kshs.1,560,000/- made out as follows:

		<b>Kshs.</b>
1.	Two month's salary in lieu of notice	312,000
2.		
3.	Service pay	468,000
4.	3. Damages for wrongful termination	<u>780,000</u>
		<b>1,560,000</b>
		=====

This amount shall be subject to statutory deductions.

It is so ordered.

Dated at Nyeri this 30th day of January, 2013.

**Abuodha J. N.**  
**Judge**

Delivered this 20th day of February, 2013.

**Delivered in open Court in the presence of ..... for the Claimant and  
..... for the Respondent.**

**Linnet Ndolo**

**Judge**