

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. E650 OF 2022

(Before Hon. Lady Justice Agnes Kitiku Nzei)

CATHERINE WAMBUI GATEBICLAIMANT

VERSUS

SAVANNAH BRANDS COMPANY LTDRESPONDENT

JUDGMENT

1. Vide a Memorandum of Claim dated 15th September, 2022 and subsequently amended on 28th March, 2023, the Claimant sued the Respondent seeking the following reliefs:-
 - (a) *A declaration that the decision by the Respondent to summarily dismiss the Claimant was substantively and procedurally unfair.*
 - (b) *A declaration that the Respondent breached the Claimant's fundamental rights as enshrined in the Bill of rights, in particular her right to fair hearing, fair labour practices, fair administrative action,*

human dignity not to be subjected to servitude and protection from cruel treatment.

- (c) A declaration that the Respondent's action to summon [the Claimant] to show cause pursuant to a letter date 10th August, 2022 was illegal, unlawful, actuated by malice and intended to sack her and to form a basis for sacking her.*
- (d) General damages for breach of the Claimant's fundamental rights under the Constitution, in particular the rights to fair hearing, fair administrative action, right to fair labour practices, human dignity, not to be subjected to servitude and protection from cruel treatment.*
- (e) General damages for wrongful dismissal, pain and suffering.*
- (f) Reinstatement of the Claimant to her position without loss of benefits, seniority and emoluments. Upon reinstatement, the Respondent to pay the Claimant her back salaries.*
- (g) In the **alternative** to prayer (f) above, the Court awards the Claimant maximum compensation*

totalling Kshs.3,571,044/= (297,587 x 12), and 1 month notice pay totalling Kshs.297,587/=.

- (h) An order directing the Respondent to pay the Claimant her withheld salary for September 2022 totalling Kshs.297,587/=.*
- (i) An order directing the Respondent to pay the Claimant her bonus totalling Kshs.106,225/=.*
- (j) An order directing the Respondent to pay the Claimant her unpaid leave totalling Kshs.165,855.16 (9,919.57 x 16.72 days).*
- (k) Costs of the entire suit with interest from the date of filing the suit till payment in full.*
- (l) Any other reliefs that the Court may deem just and expedient.*

2. The Claimant pleaded:-

- (a) that by a letter of appointment dated **21st February, 2022**, the Respondent employed the Claimant to the position of Customer and Trade Marketing Manager at a gross monthly salary of **Kshs.297,587/=**.*

- (b) that the Claimant's duties, according to the job description issued to her, included:- Trade Market Strategy, Brand Execution and Visibility, Channel Segmentation, Strategy and Category Development; Brand Activations and Executions; and Relationship Building.
- (c) that the Claimant faithfully and diligently rendered her duties, a position confirmed by a performance review on **21st July, 2022** whereby the CEO and the Claimant's line manager heaped praise on the Claimant for her stellar performance, transformational leadership, innovative approaches and setting systems and standards.
- (d) that much to the Claimant's surprise, the Respondent issued her with a show cause letter on **10th August, 2022**, making several accusations, and asking the Claimant to respond to the letter **within 24 hours**.
- (e) that vide her letter dated **16th August, 2022**, the Claimant **asked the Respondent to furnish her with the minutes of a meeting held on 8th July, 2022**.

- (f) that the show cause letter accused the Claimant of being behind **the alteration of a contract entered into between the Respondent and Ashakis and failure to perform her duties**, leading to a complaint by one of the Respondent's clients (**Account No. 7**).
- (g) that vide her (aforementioned) letter **dated 16th August, 2022, the Claimant sought to be furnished with copies of the alleged altered contract, minutes of an alleged meeting held by the Respondent on 8th July, 2022 and the complaint, which documents the Respondent never furnished.**
- (h) that **some** of the allegations contained in the show cause letter **did not fall under the Claimant's job description.**
- (i) that vide a letter dated **19th September, 2022,** the Claimant **reminded** the Respondent to furnish her with the documents requested for vide her letter dated **16th August, 2022,** as well as a copy of her performance review **conducted on 21st**

July, 2022 whereby her performance had been rated exceptional.

- (j) that via a letter dated **20th September, 2022**, the Respondent forwarded to the Claimant a Performance Improvement Plan **dated 31st August, 2022**, a contract entered into between the Respondent and Dizaza Holdings (Ashakis) and a copy of a screen shot.
- (k) that the Respondent **did not forward to the Claimant copies of the alleged altered contract and the alleged complaint by Account No. 7**; that the screenshot copy forwarded to the Claimant and purported to be the complaint **had no date or details** of the complaint, thus casting doubts on its authenticity.
- (l) that instead of furnishing the Claimant with the performance review of 21st July, 2022, the Respondent supplied a copy of a Performance Improvement Plan (PIP) for 31st August, 2022, **which had no relevance to the Claimant's dismissal.**

- (m) that instead of furnishing the documents requested for, the Respondent convened a **disciplinary** hearing on **22nd September, 2022**, which the Claimant attended. That the Claimant's request to the disciplinary panel that she be furnished with the aforesaid documents was harshly declined.
- (n) that the person chairing the disciplinary panel (**Jeremiah Njuguna**) harshly told the Claimant;
"We are proceeding with this disciplinary meeting whether you are here or not. Just walk out; just walk out."
- (o) that the Claimant was left with **no option** but to depart from the meeting room.
- (p) that on 22nd September, the Claimant received a letter informing her that the disciplinary hearing **had proceeded in her absence**, to which she responded requesting that the decision be reconsidered, but to no avail.
- (q) that the Claimant was summarily dismissed **vide a letter dated 27th September, 2022**.

3. The Respondent defended the suit vide an amended Memorandum of Response dated 16th January, 2024. The Respondent pleaded, ***inter-alia:-***

(a) *that the Claimant was employed by the Respondent and placed on probation for 6 months, and was subsequently confirmed into her position **vide a letter dated 31st May, 2022**, and that the terms of her employment and earning were/are provided for in the contract of employment **dated 21st February, 2022**.*

(b) *that in addition to the Claimant's duties and responsibilities set out in the job description annexed to the Employment Contract, the Claimant was required **to execute any such additional duties in accordance with instructions and all lawful directions of the Head Commercial and CEO, and was required to perform as per the job description and KPIs given as at the time of employment as modified from time to time by the Respondent.***

- (c) that although the Claimant's performance was satisfactory during the July 2021 performance review, there were performance gaps noted in the discharge of duties by the Claimant; after which she was placed on Performance Improvement Plan **effective August 2022.**
- (d) that the Claimant was issued with a show cause letter on **10th August, 2022; and was called upon to respond to two broad allegations of misconduct against her.**
- (e) that the Claimant responded to the show cause letter vide a response **dated 16th August, 2022** and protested the short period within which to respond, but nevertheless responded to the substance of the show cause letter; and at the same time **requested to be furnished with various documentations**, including minutes of a management meeting held on 8th July, 2022. That the Claimant did not ask for more time to respond.
- (f) that the Respondent clarified that the meeting of 8th July, 2022 had not been documented by way of minutes, hence no minutes were supplied.

- (g) *that the allegations raised in the show cause letter **fell within the Claimant's job description; as well as duties allocated and assigned to the Claimant as per clause 15 of the employment contract which allowed the Respondent to allocate the Claimant additional duties other than those prescribed in the written job description.***
- (h) *that all documents requested for by the Claimant were duly availed, and where none was availed for non-availability, the same was explained to the Claimant.*
- (i) *that vide a letter dated **6th September, 2022**, the Claimant was invited to attend a disciplinary hearing on **7th September, 2022**, upon which she protested the short notice and requested for 14 days to prepare and procure a witness to accompany her to the meeting; which request the Respondent acceded to vide a letter dated **6th September, 2022** and rescheduled the disciplinary hearing to **20th September, 2022**.*

- (j) that the Claimant was, vide the Respondent's said letter dated 6th September, 2022, **effectively suspended from duty pending the outcome of the disciplinary hearing.**
- (k) that despite the Respondent's letter dated 16th September, 2022 asking the Claimant to confirm her attendance to the hearing on 20th September, 2022, the Claimant waited until the last hour to request to be furnished with documents.
- (l) that vide a letter **dated 20th September, 2022**, the Respondent informed the Claimant **that there were no records for the meeting of 8th July, 2022, and furnished her with the alleged altered Ashakis Contract and a copy of a complaint by a Client (Account No. 7); and a copy of the Performance Review conducted on 21st July, 2022.**
- (m) that in the same communication (of 20th September, 2022), the disciplinary hearing was **rescheduled by a further 48 hours, to 22nd September, 2022 at 11.00 a.m.**

- (n) that on **22nd September, 2022 at 10.56 a.m**, 4 minutes to the time scheduled for the disciplinary hearing, the Claimant addressed yet another email to the Respondent **raising further concerns regarding the furnished documents**, and demanded that she be supplied with the documents.
- (o) that **the hearing proceeded on 22nd September, 2022**, and that the Claimant's Advocate, who had accompanied her to the hearing, sought permission to address the disciplinary panel, which was granted. That the Advocate raised a number of objections, **but an application for adjournment was declined and the meeting proceeded in the Claimant's absence**.
- (p) that upon deliberations, a decision was taken **to terminate the Claimant's services vide a summary dismissal letter dated 27th September, 2022**. That the Claimant was afforded every opportunity to attend the proceedings, but failed to take advantage of the

opportunity to address her concerns for consideration by the panel.

- (q) that payment of the Claimant's terminal dues **was subject to clearance with the Respondent, which the Claimant is yet to finalise. That the Respondent is ready and willing to pay the Claimant's terminal dues upon her clearance with the Respondent as advised in the termination letter.**
- (r) that the Claimant's termination was not premised on her performance **per se, but specific instances of misconduct which she was called upon to respond to.** That the fact that the Claimant demonstrated impeccable performance did not insulate her from being held to account over allegations of misconduct.
- (s) that **claims for days worked, unpaid leave days and bonus payments sought by the Claimant are not contested, and are subject to clearance by the Claimant.**

4. Both parties also filed written witness statements and lists and bundles of evidential documents.
5. Trial opened before **Hon. Dr. Jacob Gakeri, J**, before whom the Claimant's case was heard and closed, and the Respondent's 1st witness testified. The Respondent's **2nd witness** testified before me, and was cross-examined and re-examined.
6. According to the Court's typed and certified proceedings, the Claimant adopted her filed witness statement as her testimony, and produced in evidence her filed documents. Cross-examined, the Claimant testified, ***inter-alia:-***
 - (a) that ***the disciplinary process was flawed; as she received a show cause letter on 10th August, 2022 requiring her to respond in 24 hours, and had no option but to respond. That disciplinary hearing eventually took place on 22nd September after she requested for additional time to prepare; but the documents requested for by the Claimant were never availed.***

- (b) that the Claimant opted to leave the meeting and the disciplinary hearing proceeded in her absence. That she opted to leave **because the documents that she had requested for had not been provided by the Respondent.**
- (c) that an **original contract** had been availed, **but not the one complained about**, and that what was furnished could not be authenticated.

7. The Respondent's 1st witness, according to the Court's typed and certified record, adopted her filed witness statement and produced in evidence the documents filed by the Respondent. Cross-examined, the witness testified; **inter-alia:-**

- (a) that **the Claimant was dismissed in 2022 for failure to reconcile accounts on WCR.** That **Velma** was the Head of Trade **and was incharge of reconciliation of events;** and that **Chris** was the Procurement Manager.
- (b) that **Velma** was **not** issued with a notice to show cause **for failure to reconcile accounts.**

- (c) that the amounts in the summary dismissal letter are different from those in her witness statement.
- (d) that **the Respondent had not received a complaint from a client (Ashaki), and that there was an internal investigation that had not been shared with the Claimant.**
- (e) that the Respondent had produced the original contract **and not the altered one**, which had been sent elsewhere.
- (f) that the Claimant was the head of the marketing team, **and could be allocated a budget to perform her duties. That there was no policy on requirement of approval for overspent.**
- (g) that the Respondent's email dated 20th September, 2022 was done **after** the show cause letter.

8. The Respondent's 2nd witness, **Kennedy Ngugi (RW-2)**, adopted her filed witness statement dated 16th January, 2023 as her testimony. Cross-examined, the witness testified, **inter-alia:-**

- (a) that there was an allegation **that the Claimant exceeded the approved budget.**
- (b) that as on 19th September, 2022, after the show cause to the Claimant, the witness (**RW-2**) did **not** have a written email from **Account No. 7**, that the complaint was **verbal.**
- (c) that as on **20th September, 2022**, the documents requested for by the Claimant, according to emails by Christine and Caroline, **had not been retrieved.** That **RW-2** advised that the documents be shared.
- (d) that although some documents were enclosed to an email dated **20th September, 2022**, the Claimant wrote an email **on 22nd September, 2022 (at 10.55)** stating that **the altered Ashaki's contract had not yet been availed.** That no written complain is shown to have been attached.

9. Having considered the pleadings filed and evidence adduced, issues that fall for determination, in my view, are as follows:-

- (a) Whether termination of the Claimant's employment by the Respondent was unfair.**
- (b) Whether the Claimant is entitled to the reliefs sought.**

10. On the first issue, the charges of misconduct levelled against the Claimant by the Respondent as set out in the show cause letter dated **10th August, 2022** included:-

- (i) alteration of an agreement entered with Ashakis on 20th June, 2022 whereby the Respondent would supply Ashakis with a product at the WRC event from 23rd to 26th June, 2022.**
- (ii) exceeding an approved spending budget for procuring transport and marketing material, leading to an overspent of Kshs.1,077,784/=.**
- (iii) failing to do a proper ROI, which led to a loss of Kshs.479,291/=, and that the Claimant bore responsibility for any loss or failures arising therefrom.**

11. It is worthy noting that the Respondent's 1st witness (**RW-1**) testified that reconciliation of events and procurements fell under the dockets of other persons, **Velma** and **Chris** respectively.
12. Although the Respondent pleaded that the Claimant could, **pursuant to Clause 15 of her employment contract**, be given **additional duties**, nothing was presented in evidence to show that the Claimant had been assigned the roles referred to in the show cause letter.
13. An employee's job description is an important aspect of his or her employment contract. It is one of the particulars that **must** be stated in an employment contract pursuant to **Section 10(1)(c) of the Employment Act**. Where an employee's contract of employment gives the employee's job description; any change in the stated particulars of the job description **must be done by the employer in writing**, and in consultation with the employee. **Section 10(5) of the Employment Act** provides as follows:-

“(5) Where any matter stipulated in subsection

(i) changes, the employer shall, in

consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.”

14. The foregoing provision of the statute is **couched in mandatory terms**, and is meant **to prevent injustices** against employees in cases where they may be accused of doing or failing to do something which it was **never** their contractual obligation to do.
15. In the present case, **procurement, accounting and reconciliation of accounts were not shown to have been** in the Claimant’s job description, and the Claimant was not shown to have been lawfully and contractually assigned **in writing** such duties. Further, **no** statements of accounts were presented in evidence demonstrating the alleged overspents and losses stated in the show cause letter. Further, no evidence on the alleged authorised budget limits was produced. **RW-1** testified that the Respondent had **no** policy on requirement of approval for overspent.

16. Further, **the agreement alleged to have been altered by the Claimant was never produced in evidence**, and no evidence was given to show that any alleged alterations thereon were effected by the Claimant, and wrongfully so.
17. The alleged complaint against the Claimant by a client of the Respondent **(Account No. 7)** was **not** produced in evidence, and the complaining client was not called to testify in Court. Defence witnesses testified that **no written complaint** was received by the Respondent.
18. The Respondent failed to establish or to prove the **validity** of the reasons on the basis of which it terminated the Claimant's employment. Section 43(1) of the Employment Act, 2007 provides as follows:-
- “(1) In any claim arising out of a termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”***

19. **Section 45(2)(a) & (c) of the Employment Act** provide that a termination of employment by an employer **is unfair if the employer fails to prove that the reason for the termination is valid, and that the employment was terminated in accordance with fair procedure.**
20. Under **Section 45(4)(a) of the Employment Act**, a termination of employment shall be unfair where it is found that in all circumstances of the case, the employer did **not** act in accordance with justice and equity in terminating the employment of the employee.
21. It is clear from the foregoing statutory provisions that for termination of employment to pass **the fairness test**, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination, while procedural fairness addresses the procedure adopted by the employer in effecting the termination. **(Walter Ogal Anuro - vs - Teachers Service Commission [2013] eKLR).**

22. On procedural fairness, it is clear from the evidence adduced by both parties that the Claimant was **not accorded a fair hearing** regarding the accusations levelled against her by the Respondent (her employer). It was a common ground that the Claimant was on **10th August, 2022** issued with a show cause letter that required her to respond to the accusations made therein within 24 hours. It was further a common ground that the said show cause letter **did not enclose any documents** forming the basis of the accusations stated in the show cause letter, including an agreement that the Claimant was alleged to have **altered** and **a complaint** allegedly made against the Claimant by a client of the Respondent known as **Account No. 7**.

23. Indeed, the Respondent's witnesses testified (under cross-examination), that the said documents **were never availed to the Claimant, despite requests by her for the same**. That the documents shown to have been sent to the Claimant **on 20th September, 2022, a day before the rescheduled date of the disciplinary hearing on 22nd September, 2022, did not include the aforesaid documents**.

24. The Respondent's 2nd witness (**RW-2**) testified that there was an investigation report which was **not** shared with the Claimant. It was a common ground that the Claimant walked out of the disciplinary hearing **after the Respondent failed to furnish her with the documents that she had been requesting for from the Respondent.** Email correspondences on requests for the documents were produced in evidence.
25. Failure by the Respondent to furnish the Claimant with documents relating to charges levelled against her by the Respondent, which documents the Claimant needed to enable her to prepare for a scheduled disciplinary hearing, **rendered the disciplinary process and the resultant termination of employment procedurally unfair.** The Respondent was **not** shown to have acted in accordance with justice and equity. The Claimant was **not** given a fair hearing prior to termination of her employment.

26. It was stated as follows in the case of **Mwangi Stephen Muriithi - vs - National Land Commission & 3 Others [2018] eKLR:-**

“31. Having perused the documents placed before this Court, I am convinced that the Petitioner was neither furnished with the details of the complaint before the 1st Respondent nor granted access to the critical documents before the 1st Respondent. I find that in the circumstances of this case, it would be unfair then to expect or conclude that in the absence of such critical information, the Petitioner was granted a fair hearing as envisaged under Article 50 of the Constitution. In this respect, I agree with the finding of Mativo, J in the case of *Sceneries Limited - vs - National Land Commission [2017] eKLR.*”

27. In view of all the foregoing, I return a finding that termination of the Claimant’s employment by the

Respondent was **substantively and procedurally unfair**; and I so declare.

28. On the second issue, and having made a finding that termination of the Claimant's employment was unfair, I award the Claimant **the equivalent of five (5) months' salary being compensation (damages)** for unfair termination of employment. According to the pleadings filed and the evidence on record, the Claimant's gross monthly salary at the time of termination was **Kshs.297,587/=**. The equivalent of five (5) months salary is **Kshs.1,487,935/=**, which I award the Claimant.

29. I decline to grant prayers (b) & (d) in the amended memorandum of claim, **which are founded directly on the Constitution**, despite the Employment Act 2007 being the primary legislation giving effect to the Constitution on matters employment. The Court of Appeal stated as follows in the case of **Summaya Athman Hassan - vs - Paul Masinde Simidi & Another [2019] eKLR:-**

“. . . The 1st Respondent filed a petition directly relying on the provisions of the Constitution for

enforcement of contractual rights governed by the Employment Act without seeking a declaration of invalidity of the provisions of the Employment Act or alleging that the remedies provided therein are inadequate. The petition did not raise any question of the interpretation or application of the Constitution. We adopt and uphold the general principle in the persuasive authority in BARBARA DE KLERK (Supra) that where legislation has been enacted to give effect to a constitutional right, it is not permissible for a litigant to found a cause of action directly on the Constitution without challenging the legislation in question . . .”

30. The claim for general damages for wrongful suspension, pain and suffering cannot be allowed, in view of the award of compensation for unfair termination already made herein.
31. The prayer for reinstatement cannot be allowed as it is now over 3 years since the Claimant’s employment was

terminated. Section 12 of the Employment and Labour Relations Court Act is called in aid.

32. The claim for **Kshs.297,587/=** being unpaid salary for September 2022 is allowed. The Claimant's employment was terminated on 27th September, 2022, and her salary for that month is not shown to have been paid. This claim is not denied by the Respondent.
33. The claim for 1 month salary in lieu of notice is allowed pursuant to **Section 35(1)(c) of the Employment Act**, and the Claimant is awarded **Kshs.297,587/=** in that regard. This claim is admitted by the Respondent.
34. The claim for **Kshs.106,225/= being the Claimant's bonus pay** is admitted in the Respondent's Amended Response to Claim, and is allowed.
35. The claim for **Kshs.165,855.16** being payment for unpaid leave days is admitted by the Respondent, and is allowed.

36. In sum, and having considered written submissions filed on behalf of both parties herein, Judgment is hereby entered for the Claimant against the Respondent as follows:-

(a) Compensation for unfair termination of employment

Kshs.1,487,935/=.

(b) Unpaid salary for the month of September 2022

Kshs.297,587/=.

(c) One month salary in lieu of notice

Kshs.297,587/=.

(d) Bonus pay

Kshs.106,225/=.

(e) Unpaid leave days

Kshs.165,855.16/=.

Total

Kshs.2,355,189.16/=.

37. The awarded sum shall be subject to Pay as You Earn **(PAYE)** pursuant to Section 49(2) of the Employment Act.

38. The Claimant is awarded interest on the awarded sum, to be calculated at Court rates from the date of this Judgment.

39. The Claimant is awarded costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS

6TH DAY OF FEBRUARY 2026

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Mbeche for the Claimant

Mr. Amalemba for the Respondent

ORIGINAL