



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 561 OF 2018**

**ZIPPORAH NYAMBURA MAINA.....CLAIMANT**

**VERSUS**

**KENYA ASSOCIATION OF MANUFACTURERS.....RESPONDENT**

**JUDGEMENT**

1. The claimant avers in her claim that she was employed by the respondent on or about 11<sup>th</sup> August, 2003 until 6<sup>th</sup> October, 2017, when she was dismissed from employment. That she served with due diligence, commitment and due honesty. The claimant terms her dismissal as unlawful, irregular, and premature. Through her claim, she further states that she was not given adequate notice, fair hearing and that her termination was without valid reasons. Consequently, she prays for the sum of Kshs 845,157.96 being notice pay and compensatory damages on account of unlawful termination.

2. Opposing the claim, the respondent has contended that it had a valid and fair reason to dismiss the claimant. The respondent points out three reasons that allegedly led to the claimant's termination. Firstly, is that on 13<sup>th</sup> August 2015, she was issued with a warning letter on account of negligence in the performance of her duty in that she bungled a due diligence exercise; secondly, on 20<sup>th</sup> August 2015, she was issued with yet another warning over various enumerated acts of negligence; and that lastly, on 13<sup>th</sup> June 2017, she was notified and reminded that the incidences of delays in delivery of assigned tasks, poor quality of delivery as well as breaches of protocol over delays of assigned tasks, poor quality of delivery would result in prompt action against her in the event of any lapses in the areas identified. The respondent further states that the claimant was subjected to a fair process prior to her termination.

3. The matter proceeded for hearing on 16<sup>th</sup> November, 2021 and both sides called oral evidence.

**Claimant's case**

4. At the commencement of the hearing, the claimant relied on her witness statement and the bundle of documents filed together with the Claim. She asked the court to adopt the same as part of her evidence in chief. She also adopted a supplementary list of documents dated 4<sup>th</sup> November 2021. All the documents filed were admitted as exhibits before court.

5. The claimant told court that she was initially employed by the respondent on 11<sup>th</sup> August, 2003, as an Accounts Assistant and subsequently rose to the rank of Finance Manager, a position she was holding at the time of her termination. The claimant further testified that prior to her termination, she had never had any disciplinary issues and that her tribulations only commenced following a change in the respondent's leadership. That subsequently, she received warning letters in 2014 and 2015 but which had lapsed by the time she was being terminated from employment.

6. It was also the claimant's testimony that in 2016 and 2017, she was not given any targets but admitted that there were workplans in place. She further stated that she was appraised during the time and she scored exemplarily. She further denied breaching protocols in respect of an organized team building activity, noting that firstly, there was no indication that attendance was mandatory and that secondly, she informed the Human Resource department to exempt the finance team, as they had scheduled audits to undertake.

7. As regards the DANIDA audit, she averred that the same was due on 30<sup>th</sup> June, 2017, and that she prepared the same and delivered on time. The claimant further told court that she responded to the allegations of negligence and was invited to a disciplinary hearing, which she attended. In summing up her testimony, she stated that she has suffered as a result of her dismissal from employment as her career was ruined. She also admitted receiving her notice pay and unpaid leave, thus stated that her claim was now limited to reinstatement and compensatory damages.

8. In cross examination, the claimant confirmed that she was in charge of coordinating the audit of the funds for the DANIDA project amongst others. She also admitted that vide an email of 28<sup>th</sup> August 2014, one Ms. Elizabeth Matioli from the Danish embassy had enquired about the audit report which was due by 30<sup>th</sup> June, 2014. That her response to Ms. Elizabeth was that the grant amount was yet to be fully

utilized. She further admitted that in August 2016, a team from DANIDA conducted a monitoring visit and one of the issues addressed was the timelines of subsequent audits. She further acknowledged receiving a reminder in April 2017 in regards to the 2016 audit, and giving an assurance to Ms. Elizabeth that the audit would be completed on schedule. The claimant further confirmed that the disbursements were tied to the audits and that a complete audit report is a final audit report.

9. In re-exam, the claimant stated that despite the allegation of underperformance being dropped, she was never issued with a communication to that effect and that she has never been given a certificate of service.

### **Respondent's case**

10. The respondent tendered oral evidence through Mr. Dalmás Okendo, who testified as RW1. He also adopted his witness statement and documents filed on behalf of the respondent to constitute part of his evidence in chief. The bundle of documents filed on 10<sup>th</sup> September, 2021 and the supplementary list of documents dated 12<sup>th</sup> November, 2021 were all produced as exhibits before court.

11. RW1 stated that he was the claimant's immediate supervisor. That the claimant had clearly defined roles as per her contract of employment and that she had overall responsibility and oversight of the finance and accounting functions within the respondent organisation. As regards the audit function, she was to co-ordinate and ensure that the audits were concluded and submitted within schedule. That prior to 2017, the claimant was good at her work with a few lapses which included non-adherence to timelines. That some of the lapses included loss of financial documents by staff working under her.

12. In respect of the DANIDA project, RW1 told court that it was the respondent's biggest funding partners at the material time. That the claimant was responsible for coordinating the audit of the project's funds. That Ms. Elizabeth Matioli, from the Danish Embassy had consistently raised the issues regarding audit timelines by the respondent. RW1 further stated that in January 2017, he requested the claimant to prepare an audit schedule for the year 2017 but by 23<sup>rd</sup> June, 2017 the schedule was not ready hence prompting him to remind the claimant as much vide his letter his letter of 23<sup>rd</sup> June, 2017. It was his testimony that the audit schedule would have assisted by anticipating any challenges, which would have then been sorted out in good time.

13. It was also RW1's testimony that the claimant undertook to submit the final audit report not later than June, 2017 but never did so. He explained that a final audit is a report that is signed by all parties to the audit, that is the auditor and auditee. That Ms. Elizabeth had notified the claimant that the audit report submitted on 30<sup>th</sup> June, 2017 by a Mr. Walter Opiyo, was not the final report and as such, had requested for the final and duly signed hard copies of the same.

14. RW1 further stated that the final report was signed on 26<sup>th</sup> July 2017, by the external auditors and the respondent's management. That owing to the delay in submission of the final audit report, the Danish embassy suspended further disbursements to the respondent. It was also his testimony that the claimant was issued with a notice to show cause on account of the serious lapses on her part and that she was given an opportunity to defend herself prior to her termination from employment.

15. In cross examination, RW1 stated that he could not recall whether the claimant had had any disciplinary issues before he joined the respondent organisation. That he had worked with the claimant for a few months before issuing her with a warning letter. He further stated that the audit schedules were to form part of the work plan but was only received two days to the deadline so it was not of any help as most audits were due by then.

### **Submissions**

16. The claimant reiterated the facts contained in her pleadings and witness statement, and submitted that she suffered unfair termination in the hands of the respondent. To fortify her case, she placed reliance on the cases of **Samuel Nguru Mutonya vs National Bank of Kenya Ltd**, **Thomas Mwita vs Kenya Commercial Bank** and **Kcnfreight (EA) Ltd vs Benson K. Nguti**.

17. In its submissions, the respondent urged that there was overwhelming evidence and proof that the claimant was negligent in the performance of her work hence there was genuine and valid grounds to terminate her employment. It buttressed its submissions on the case of **British Leyland UK Ltd vs Swift (1981) IRLR 91** and **RV. Arthurs ex parte Port Arthur Ship building Co. (1967) 2 OLR 342**. The respondent further urged the court to find that it had substantially complied with the mandatory provisions of the law as it had afforded the claimant the maximum extent of procedural justice. On this score, it placed reliance on the case of the **Judicial Service Commission vs Gladys Boss Shollei & Another (2014) eKLR**.

### **Analysis and determination**

18. Flowing from the pleadings, evidence and submissions on record, the court is being called upon to determine the following questions;

- a) **Whether the respondent had just cause to terminate the claimant's employment?**
- b) **Whether the claimant was accorded a fair hearing prior to her termination from employment?**
- c) **Is the claimant entitled to the reliefs sought?**

### **Whether the respondent had just cause to terminate the claimant's employment?**

19. The starting point in determining this issue is section 43 and 45 (2) (a) and (b) of the Employment Act (Act), which requires an employer

to prove the reasons for an employee's termination, failure to which the termination is deemed unfair. Further the employer is obliged to prove that the reason for the termination is valid, fair and is related to the employee's conduct, capacity or compatibility; or based on its operational requirements. In this regard, the burden of proof rests on the employer. This position has been restated by the Court of Appeal, time and again hence I will not belabour. But I will sample a few. In the case of **Chairman Board of Directors (National Water Conservation and Pipeline Corporation) vs Meshack M. Saboke & 2 others, Nairobi Civil Appeal No. 241 of 2015**, it was held as follows;

**“In light of the above provision, termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination are themselves not fair. Section 43 of the Employment Act deals with proof of reasons for termination placing the burden on the employer to prove the reasons for termination failure to which termination is deemed unfair within the meaning of section 45.”**

20. Further, in the case of **Pius Machafu Isindu vs Lavington Security Guards Limited [2017] eKLR**, the Court of Appeal had this to say;

**“There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions.”**

21. Evidently, the reasons for which the claimant was terminated from employment was in respect of negligence. This is discernable from her letter of termination which reads in part:

*“I regret to hereby communicate the organization's decision to terminate your services effective 6<sup>th</sup> October, 2017. This is pursuant to identified critical incidences of underperformance and negligence of duty on your part which have persisted for some considerable period in the past. The underperformance and/or lapses in critical areas of your work have been subject of grave concern and have been variously brought to your attention verbally and/or through letters served to you. Concerns were raised on your performance, especially with regard to management of the finance function culminating to a disciplinary hearing convened on September 20, 2017. During the hearing, it emerged that previous cautions to you, including vide letters dated 17<sup>th</sup> October, 2016, 15<sup>th</sup> May, 2017 and 23<sup>rd</sup> June, 2017, against carrying out your responsibilities in a negligent manner had not been treated seriously.*

*The management observed that serious lapses continued to occur in some of your critical work targets that have serious consequences to KAM work as well as KAM relationship with some of its key partners. The Coordination of most of the audits –both statutory and project audits have been noted to be poor with most falling behind schedule. The latest case in point being the audit of the Green Growth and employment Creation project supported by the Danish Embassy. A close review of correspondences and documents relevant to the matter revealed that:*

- 1. In August 2016 a team from the Embassy of Denmark conducted a financial monitoring visit where the issue of delayed audits was raised and an assurance given by yourself on behalf of KAM that there would be no delays going forward;*
- 2. You had six (6) months from December 2016 to coordinate and ensure timely submission of the audit report to the Embassy;*
- 3. On 13<sup>th</sup> April you received an email reminder on the audit from the Embassy;*
- 4. You responded on the same 13<sup>th</sup> April indicating you were done with internal reviews and fieldwork was to be completed the following week;*
- 5. On 31<sup>st</sup> July, we received a letter from the Embassy of Denmark in Nairobi raising concerns on this delay and withholding project funds due to the delay;*
- 6. The same letter from the Embassy indicted KAM for perpetual delays with audits right from 2013;*
- 7. On 24<sup>th</sup> January this year, your supervisor required that you develop an audit schedule for all 2017 audits that could have helped in proper planning for and coordination of the audits. It was only after numerous verbal reminders and a letter to you dated 23<sup>rd</sup> June 2017 that this was finally availed on 29<sup>th</sup> June 2017. This failure to obey lawful instructions amounted to insubordination on your part. The absence of the schedule to guide coordination also saw several other audits lag behind schedule and/or be done under pressure of time,*

*In your written response to the show cause letter dated September 14, 2017 you opted to steer clear of the issues raised. When the same issues were put to you during the disciplinary hearing you admitted culpability for the botched audits while citing difficult suppliers and sticky directives on providers contracting. It was however noted that if such challenges existed, they would have been dealt with well if proper and timely planning had been instituted through an audit schedule...”*

22. The claimant has denied the accusations of negligence and stated that she submitted the DANIDA audit report on time and the delay was occasioned by PKF, who were the respondent's external auditors at the time.

23. From the record, the following uncontested facts are evident;

- i. *The claimant was in charge of coordinating the audit function/process within the respondent organisation;*
- ii. *Ms. Elizabeth from the Danish Embassy in her email of 28<sup>th</sup> August, 2014, inquired from the claimant the status of an audit report which was due by 30<sup>th</sup> June, 2014;*
- iii. *The claimant responded vide her email of 28<sup>th</sup> August, 2014 stating that she had held onto the audit as the grant was yet to fully utilized;*
- iv. *The audit due was in respect of 2011, 2012 up to December, 2013;*
- v. *The claimant was advised by Ms. Elizabeth that audits are annual and not tied to full expenditure of the grant;*
- vi. *Through an email of 1<sup>st</sup> September, 2014, a Ms. Mary reported that as per the claimant's confirmation, the audit was to be ready by the end of September, 2014;*
- vii. *As at 23<sup>rd</sup> September, 2014, the same was not ready as the claimant had requested for information as regards the disbursements from the Danish Embassy;*
- viii. *Vide an email of 13<sup>th</sup> April, 2017, Ms. Elizabeth reminded the respondent through its Chief Executive Officer (CEO), that the audit report in respect of 2016 was due by 30<sup>th</sup> April, 2017;*
- ix. *The said information was cascaded to the claimant vide email of 18<sup>th</sup> April, 2017;*
- x. *The claimant in her email of 13<sup>th</sup> April, 2017 noted that the audited accounts were to be submitted not later than June, 2017 as opposed to 30<sup>th</sup> April, 2017 but all in all she promised that she was done with internal reviews and was to conclude with the filed work in the coming week;*
- xi. *The email of 18<sup>th</sup> April, 2017, from Ms. Elizabeth noted that the claimant was right in regards to the timelines but added that the same (timelines) would be enforced strictly hence delays will not be acceptable and that submission of audits would be dependent on the disbursements;*
- xii. *The respondent's Mr. Walter Opiyo submitted amongst other documents, an audit report for 2016 to Ms. Elizabeth vide an email of 30<sup>th</sup> June, 2017;*
- xiii. *Ms. Elizabeth acknowledged receipt of the audit report vide an email of 3<sup>rd</sup> July, 2017 but noted that the same was not final. As such, she requested for a soft copy and original hard copy of the same;*
- xiv. *The final audited accounts were approved by the respondent on 26<sup>th</sup> July, 2017; and*
- xv. *On 31<sup>st</sup> July, 2017, the Danish Embassy notified the respondent that it was yet to receive the final audit report for the year 2016, one month after the agreed upon submission deadline. The respondent was further cited for past delays in regards to 3 other audits and consequently through the said letter, the Embassy stopped further disbursements in the interim, pending resolution of the matter.*

24. In order to place the issue into context, it is imperative to consider the claimant's role in all this. As aforesaid, the claimant was the Finance Manager and part of her core duties entailed; ensuring compliance with accounting policies and procedures and accounting standards (governance and statutory compliance); providing accurate and timely management accounting reports and business performance data; and ensuring statutory audits are carried out in a timely and effective manner.

25. In light of the sequence of events presented herein, it is apparent that submission of the audited reports in regards to the funds from the Danish Embassy had become a thorny issue, judging from the email trail exchanged between Ms. Elizabeth Matioli and the claimant.

26. From the record, the claimant had given repeated assurances that the audited accounts would be ready on time. However, what was sent on the date of the deadline was a draft audit report. The claimant admitted during cross examination that a complete audit report is a final audit report. Impliedly, the audit report submitted on 30<sup>th</sup> June, 2017 was not a final report. This was confirmed by the email sent by Ms. Elizabeth from the Danish Embassy on 3<sup>rd</sup> July, 2017.

27. Indeed, the final audited accounts were approved by the respondent on 26<sup>th</sup> July, 2017 but it would appear that the claimant did not transmit the same to the Danish Embassy immediately, thus triggering the letter of 31<sup>st</sup> July, 2017, which halted further disbursements to the respondent.

28. The claimant being the person responsible for coordinating the audit process was largely responsible for the delay in the submission of the audit reports hence the buck stopped with her.

29. As per the testimony of RW1, the Danish Embassy was one of the respondent's biggest financiers. It thus follows that it substantially relied on its funding to sustain its programmes. Further as per the email, from the Danish Embassy, the disbursements from its end, would be pegged on submission of audited final accounts which clearly had fallen behind schedule under the claimant's watch. As a matter of fact, the Danish Embassy eventually halted further disbursements to the respondent on account of the delayed audits. As it would be, this was the straw that broke the camel's back hence the respondent commenced disciplinary action against the claimant.

30. What is apparent from the foregoing is that the claimant by her actions and/or omissions cost the respondent a major financier. In the circumstances, what action would a reasonable employer undertake?

31. The answer to this question can be found in the case of **CFC Stanbic Bank Limited vs Danson Mwashako Mwakuwona [2015] eKLR** where the Court of Appeal in assessing the reasonableness of a decision taken by an employer, considered the following passage from the *Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol. 16(1B) para 642*: -

*"...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair."*

32. By her own admission, the claimant had experience spanning close to 14 years dealing with issues of finance and accounting. As such, she was not a novice and was expected to be more diligent in the performance of her work. She owed a duty of care to the respondent to undertake her work with utmost care and diligence. Evidently, she failed in this undertaking, thus resulting in stoppage of disbursements from the Danish Embassy which happened to be one of the respondent's major financiers at the time.

33. Further, the claimant did not dispute the fact that her immediate supervisor RW1, had requested her to prepare an audit schedule well in advance so as to assist in the planning of the audits for the year. Yet again, she failed to deliver as expected.

34. It is also notable that the claimant attempted to redirect the blame to the external auditors. Be that as it may, she did not mention the same in her response to the notice to show cause nor her Appeal. Further, she did not adduce any evidence to demonstrate this assertion. The court therefore deems the same as an excuse and an afterthought.

35. Based on the circumstances of the instant case, any reasonable employer would have arrived at the same decision arrived at the respondent herein. Accordingly, the court finds that the respondent had a valid and fair reason to terminate the employment of the claimant.

36. In arriving at this determination, I am also guided by the holding in the South African case of **Nampak Corrugated Wadeville vs Khoza (1998) ZALAC 24** where the Labour Appeal Court expressed itself thus;

**"A court should, therefore not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable"**

37. Having found as much, I now turn to consider whether the respondent accorded the claimant a fair hearing prior to terminating her from its employment.

#### **Whether the claimant was accorded a fair hearing prior to her termination from employment?**

38. Pursuant to **Section 45(2) (c)** of the Act, an employer is required to undertake an employee's termination in line with fair procedure. Closely tied to this provision is **section 41(1)** of the Act, which enumerates specific requirements in regards to fair procedure. It entails notifying the employee of the allegations he or she is required to respond to, and thereafter granting him the opportunity to make representations in response to the said allegations.

39. In the instant case, it is not in dispute that the claimant was issued with a notice to show cause which detailed the allegations leveled against her. The claimant responded to the show cause letter vide her response of 14<sup>th</sup> September, 2017, through which she attempted to explain the reasons for the delays in the preparation and submission of the audit reports.

40. Vide an email of 18<sup>th</sup> September, 2017, the claimant was notified by RW1 that her explanation to the show cause letter was not satisfactory hence was advised of the need for her to appear for a hearing session in order to allow management make a further determination in regards to her case. She was later advised vide another email that the disciplinary panel would be convening to hear her case. The date, time and venue of the hearing was also communicated through the same email, through which she was also reminded to submit the name of the nominee who would be sitting with her at the hearing. The claimant admitted in her testimony that indeed, she appeared before the disciplinary panel which in the end, recommended her termination from employment.

41. From the record, the claimant appealed the decision to terminate her employment. The said appeal was considered and in a detailed response, the claimant was notified that the allegation in respect of underperformance had been vacated but the decision to terminate her employment on account of negligence, was sustained.

42. Against this background, the court is persuaded that the spirit of section 41 of the Act was fulfilled hence returns that the claimant was accorded a fair hearing prior to termination from employment.

**Conclusion**

43. The total sum of the foregoing is that the court finds that the respondent had a valid and fair reason to terminate the claimant's employment and that in so doing, accorded her a fair hearing.

44. In the circumstances, her termination cannot be said to have been unfair and unlawful, hence the claim falls.

45. As a consequence, the claim is dismissed in its entirety with no orders as to costs.

46. Be that as it may, since the employment relationship has been admitted, the claimant is entitled to a Certificate of Service pursuant to section 51(1) of the Employment Act.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MARCH, 2022.**

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**STELLA RUTTO**

**JUDGE**

**APPEARANCE:**

**FOR THE CLAIMANT MS. GUSERWA**

**FOR THE RESPONDENT MR. OGEMBO**

**COURT ASSISTANT BARILLE SORA**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**