



**REPUBLIC OF KENYA**

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

**CAUSE NO 334 OF 2017**

**RUTH NYAMOKAMI.....CLAIMANT**

**VS**

**HABO GROUP OF COMPANIES.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant’s claim brought by way of a Memorandum of Claim dated and filed in court on 26<sup>th</sup> April 2017 is for damages for unlawful termination of employment and payment of terminal dues.
2. The Respondent defends itself by a Memorandum of Response dated 7<sup>th</sup> February 2018 and filed in court on 8<sup>th</sup> February 2018.
3. At the trial, the Claimant testified on his own behalf and the Respondent chose not to call any witness. Both parties filed written submissions.

**The Claimant’s Case**

4. The Claimant states that she was engaged by the Respondent as an Office Assistant on 28<sup>th</sup> April 2004. She claims to have risen through the ranks to the position of Personal Assistant to the Chief Executive Officer, earning a monthly salary of Kshs. 55,000.
5. The Claimant avers that she worked for the Respondent until 16<sup>th</sup> October 2015, when her employment was unlawfully terminated.
6. The Claimant therefore claims the following from the Respondent:

- a) One month’s salary in lieu of notice.....Kshs. 55,000
- b) Severance pay.....302,500
- c) SACCO contributions.....64,100
- d) Pension scheme/in house savings.....46,200
- e) Unpaid leave (118 days).....216,333
- f) 16 days worked in October.....29,333
- g) Damages for unlawful termination.....660,000
- h) Costs plus interest

**The Respondent’s Case**

7. In its Memorandum of Response dated 7<sup>th</sup> February 2018 and filed in court on 8<sup>th</sup> February 2018, the Respondent denies having employed the Claimant and puts her to strict proof.

8. The Respondent urges the Court to find that the Claimant was incompetent and thus caused her employer great financial loss. The Respondent refers to letter dated 16<sup>th</sup> October 2015 as proof of this.

9. The Respondent further avers that the allegations made in the Memorandum of Claim are full of falsehoods and the documents relied upon by the Claimant are forgeries as they are from different legal entities independent of one another.

### **Findings and Determination**

10. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case of unlawful termination of employment;
- b) Whether the Claimant is entitled to the remedies sought.

### **Unlawful Termination?**

11. The Claimant filed a termination letter dated 16<sup>th</sup> October 2015 addressed to her by the Respondent as follows:

*“Dear Ruth,*

#### **TERMINATION OF EMPLOYMENT**

*We refer to the above subject.*

*The management has evaluated your performance finds your performance below expectation.*

*The management has therefore made a decision to terminate your services with effect from 16<sup>th</sup> October 2015.*

*Subject to recovery of any money owed to the company your final dues will be paid as follows*

- 1. 30 days pay in lieu of notice*
- 2. Days worked in the month of October 2015*
- 3. In-house savings during your tenure*
- 4. Leave earned but not taken*
- 5. Severance pay*
- 6. Pension savings during your Tenure*

*Attached is the clearance form which is required to have been signed by all the relevant offices and present to HR office before we can start preparing your final dues.*

*Yours faithfully,*

**HABO GROUP OF COMPANIES LIMITED**

*(signed)*

*Judith Shikanda*

**GROUP HUMAN RESOURCES MANAGER”**

12. In its Memorandum of Response, the Respondent acknowledges the termination letter dated 16<sup>th</sup> October 2015 and the Claimant’s employment and mode of termination are therefore not in dispute. A clearance form attached to this letter also confirms the Claimant’s employment period of 11 years and 7 months, running from 15<sup>th</sup> April 2004 to 16<sup>th</sup> October 2015.

13. According to the termination letter, the Claimant’s employment was terminated on account of poor performance. While this is one of the grounds on which an employer may terminate the employment of an employee, it must be proved.

14. Jurisprudence on the procedure to be adopted before sending an employee home on account of poor performance is now firmly grounded.

15. In Jane *Samba Mukala v Oltukai Lodge Limited [2013] eKLR* it was held that an employer alleging poor performance against an employee must show that the employee was made aware of the expected performance standards and targets, with any shortcomings being pointed out and a reasonable opportunity to improve allowed. This position was affirmed in the more recent decision in *Alois Makau Maluvu v Cititrust Kenya Limited [2018] eKLR*.

16. Apart from the allegations contained in the letter of termination dated 16<sup>th</sup> October 2015, there was nothing laid before the Court to show any previous notice of poor performance drawn to the Claimant's attention.

17. Moreover, there was no benchmark upon which the Claimant's performance could have been gauged nor was there any evidence of a performance appraisal.

18. The allegation of poor performance made in the letter of termination was thus unsubstantiated and is rejected.

19. In the result, I find and hold that the Respondent terminated the Claimant's employment without valid reason and in violation of due procedure. The Claimant is therefore entitled to compensation.

#### **Remedies**

20. Consequently, I award the Claimant twelve (12) months' salary in compensation. In arriving at this award, I have considered the Claimant's long service as well as the Respondent's unlawful conduct in terminating the employment relationship.

21. In the termination letter issued to the Claimant on 16<sup>th</sup> October 2015, the Respondent sets out the following as final dues payable to the Claimant:

- a) 30 days' pay in lieu of notice;
- b) Days worked in the month of October 2015;
- c) In-house savings;
- d) Leave earned but not taken;
- e) Severance pay;
- f) Pension savings.

22. In a terminal benefits form issued to the Claimant, which the Respondent did not contest, the actual amounts payable are tabulated. These are the exact amounts the Claimant claims under these heads.

23. In the final submissions filed on behalf of the Respondent on 15<sup>th</sup> December 2020, a suggestion was made that the Claimant had received the enumerated terminal benefits and had discharged the Respondent from any further liability.

24. Having examined the terminal benefits form, the only thing to say is that all the Claimant did was to accept the tabulation contained therein. If indeed the Respondent had paid these dues to the Claimant, there ought to have been documentary evidence in the Respondent's custody. No such evidence was tendered before the Court and the suggestion that the Claimant was paid her terminal dues was neither supported nor substantiated.

25. The only finding to make therefore is that these benefits are due and payable.

#### **Remedies**

26. In the end, I enter judgment in favour of the Claimant as follows:

- a) 12 months' salary in compensation.....Kshs. 660,000
- b) 1 month's salary in lieu of notice.....55,000
- c) Severance pay for 11 years.....302,500
- d) SACCO dues.....64,100
- e) In house savings/pension.....46,200
- f) Leave earned but not taken (118 days).....216,333

g) 16 days worked in October 2015.....29,333

**Total.....1,373,466**

27. This amount will attract interest at court rates from the date of judgment until payment in full.

28. The Respondent will bear the costs of this case.

29. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 11<sup>TH</sup> DAY OF FEBRUARY 2021**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Kitonga for the Claimant

Miss Kerubo for the Respondent