



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2296 OF 2017.

LINDA OLWENY.....CLAIMANT

VERSUS

SANLAM GENERAL INSURANCE LIMITED.....RESPONDENT

JUDGMENT

Issue in dispute: Unlawful/Unfair termination/Terminal dues

1. By a Memorandum of Claim dated 17th November 2017 the Claimant, Linda Olweny, sought the following from the Respondent, Sanlam General Insurance Limited:-

- a) **An admission by the Respondent of liability for unlawful termination of the Claimant's services.**
- b) **A Certificate of service for services rendered by the Claimant to the Respondent.**
- c) **Terminal dues owed to the Claimant of Kshs. 3,979,057.73**
- d) **An order for the payment of Kshs. 2,628,288/= to the Claimant as compensation for unfair termination of employment.**
- e) **Damages for deprivation of terminal dues.**
- f) **Payments in relation to Claimants' pension contribution**
- g) **Costs of the suits.**
- h) **Interest on (b) (c) (d) (e)**
- i) **Any other relief the Honourable Court may deem fit to grant.**

2. The Claimant filed together with memorandum of claim a verifying affidavit dated 17th November 2017, filed list of witnesses 17th November 2017, Claimant's list of documents dated 17th November 2017, witness statement by the Claimant dated 17th November 2017, the bundle of documents exhibits 1-14.

3. The Respondent entered appearance and filed response dated 19th March 2018, list of witnesses dated 4th January 2019, list of documents dated 4th January 2019 and the bundles of documents exhibits 1-28, witness statement of Caroline Laichena dated 4th January 2019, further witness statement of Gladys Muema dated 16th July 2019 together with Respondent's supplementary list of documents dated 16th July 2021.

4. The case was heard inter parties on the 5th August 2021 with the Claimant testifying on her own and the Respondent calling 2 witnesses. The Claimant was represented by Mr. Opiyo instructed by the law firm of Ochieng Opiyo Advocates. Mr. Leshan instructed by the law firm of Daly & Inamdar Advocates represented the Respondent. The Claimant's submissions with authorities are dated 24th August 2021. The submissions and list of authorities filed for the Respondent are dated 19th September 2021.

Claimant's Evidence

5. The hearing of the Claim proceeded inter partes on the 5/8/2021. The Claimant duly sworn in adopted her witness statement dated 17th November 2017 as evidence in examination in chief and produced documents exhibits 1-14 in Claimant's list of documents dated 17th November 2017 as her evidence.
6. The Claimant testified that she joined Gateway on the 3rd November 2014 as deputy head of Legal. That around April 2015 Gateway was acquired by Sanlam, the Respondent and she continued as deputy head of legal. That she was later promoted as assistant of legal.
7. That she has seen the defence and would wish to clarify a few issues in the defence memorandum. That in Paragraph 5 of the defence, the claim quoted therein was not part of the 8 matters of which they found her to have acted negligently. In any event she responded to the claim. There was a delay in setting the judgment which mistake was not hers but of the finance. There is no evidence of loss as a result of auctioneers in the matter. The issues in paragraph 6 were as a result of department being understaffed and that she raised the issues in several management meetings including the manager. That no staff were brought into the department.
8. In response to paragraph 11 she testified that the issues of understaffing were raised in various management meetings. The minutes under custody of Respondent. That she raised the issue at the disciplinary hearings and also at Appeal. It was the role of the HR to ensure the department was working smoothly to ensure operations were smooth.
9. That in response to paragraph 14 (b) of the defence in notification of disciplinary hearing 8 files were brought, however, only 6 were correct on the list. The other 2 availed were wrong files. That she indicated the same in her response. That there was nothing she could have done on the 2 files and any responsibility was to respond to the allegations raised.
10. That in response to paragraph 15 she has seen the review report by the Respondent. The review is not by Respondent (attached to Respondent's List No 21-28). The reviews are by Anthony who was not employee of the Respondent. That she did not have a session with him to discuss the issues. That the list is strange as she saw the review first time when the lawyer served.
11. In response to paragraph 18 she testified that only 6 files were availed, the other 2 were erroneous and she informed disciplinary committee accordingly. That in response to paragraph 21 (a) following instructions to settle out of court, she said there was no negligence on failure to defend because of instructions to settle matters out of court.
12. During cross examination, the Claimant told the court she can confirm she is an advocate an officer of the court, Para 6 of defence Claimant says department was understaffed. No documents before court. The minutes are under custody of Respondent.
13. Upon being referred to the minutes of disciplinary hearing at Page 23-38 of the Respondent's document, she said it showed they were signed by her and others. That she is unable to get where she raised issue of staff required in the department- at page 32-1 she raised challenges at management committee meetings. That there is no direct reference to staff. That among the 8 files brought only 6 related to matters in the disciplinary. That she is not sure she requested for the 2 files. That there is no document to show she requested for the files.
14. In response to paragraph 15 of statement of defence, the Claimant testified that she is not aware of Anthony engagement as a consultant. That she has not worked with Anthony before. She confirmed that there is nothing wrong with having an external consultant. That she was entitled to give her point of view hence should have been consulted in the review.
15. That in response to Paragraph 21 to defence the Claimant confirmed that has not placed evidence to show company was struggling with financial problems. That in her list of documents no 5 she has notification of redundancy which is an indication that Gateway was being taken over due to the challenges it was undergoing. That it is a presumption of financial challenges to be deduced from the fact of redundancy. That she had the mandate given officially and memo on that is with the company as a record. At page 13 of Respondent's document is the meeting of the January 2015. That the Agenda of meeting concerns performance of the then deputy head of legal, the Claimant. The Claimant told the court that she does not agree with alleged performance issues as she was not part of the meeting. That the document is undated and therefore she cannot authenticate it.
16. At Page 15 of Respondent's documents is memo dated 10th May 2016 on case of negligence by Claimant. That this was issue of payment which was outside her jurisdiction. The Claimant confirmed that she did not give feedback requested in the memo.
17. On being shown Page 16 of Respondent's documents is cautionary letter to Claimant she stated that it showed areas where it was said she was underperforming. That she does not have evidence of response to the cautionary letter of 13th May 2016 but areas of concern are noted. The Claimant confirms that 4 months after cautionary letter she received notification of disciplinary hearing listing, the date and venue of the hearing. That the hearing was rescheduled at the request of Claimant for more time to respond.
18. The Claimant confirmed that at Page 19 of Respondent's bundle is a letter dated 28th October 2016 to the effect that she was late for the disciplinary hearing. That the disciplinary hearing was rescheduled to 4th November 2016. The Claimant on being referred to page 23 of the Respondent's list of documents said that it is minutes of the disciplinary hearing. She said that she was called and signed as having collected.
19. The Claimant confirmed that the 1st claim at page 17 claim 100/089/9004147/2013/09 is a case in Eldoret CM No 533/2015. She confirmed that 2 firms were appointed in the matter. That it is not true that neither counsel entered an appearance. Default judgment was entered. That default judgment was entered but advice came that she was sent on leave. That a declaratory suit was filed but she is not aware as she was already on leave and did not go back. Upon being referred to Page 47 Paragraph 9 of the Respondent document she said she could not verify. She refers to the Response of 28/10/2016.

20. Upon being referred to page 49 of the Respondent's bundle of documents, the Claimant said that the proclamation was done whilst she was on leave on 7th October 2016. The Claimant confirmed that there was no letter sending her on leave. That the head of operations called her to her office on the 24th September 2016 and notified her to proceed on leave. That she took her handbag and left. That there was nothing written to send her on leave. She confirmed that in Paragraph 10 of the claim it is not stated that she was sent on leave. She stated that she went on leave but did not apply.

21. On the 2nd claim by Respondent in notification of disciplinary hearing, she said that she can confirm but not sure of CM Embu Case No 305/2015. She could not confirm if there was a default judgment. That according to her response there was a default judgment as at the time she was sent on leave.

22. On the 3rd claim in response CM MSA 441/2000. If insurer at the time of loss is bound to pay. That it was not true that there were 2 different firms appointed to act in the matter to both advise the insurer to pay. That there was a confirmation if they insured as an agent. That the insured must have a policy number.

23. That advocates are appointed to give opinions and guidance. Upon being asked whether the Claimant needed counsel to advice if one is insured, she said the system would tell if one is covered. On whether the defendants in 3rd claim should have paid, she said that the insured representative or agent authorised by the insurer is bound to pay. That in the particular case the Respondent did not have order and as per her order she advised them to pay.

24. On the 4th claim, Kericho 329/2015, there was a default judgment of 3.5 m approx. Asked why she did not instruct an advocate the Claimant said the file was not availed to her hence she had no answer. On being referred to page 55 of Respondent's bundle on a number of files. She confirms that no advocates were appointed in the matters. That she had instructions to settle out of court. Because of delay to authorise amount by seniors no advocate was appointed. Claimant admits there was default judgement which they tried negotiating but there was delay in approvals.

25. Upon being referred to Page 39 of Respondent bundle containing the termination letter dated 21/12/2016, Claimant admits reasons of termination given and that terminal dues at page 40 deals with pension contributions and informs on the right to Appeal in 5 days of work. On being referred to page 41 of Respondent's bundle of documents the Claimant said the appeal came out of time, but she stated that it was 5 working days and within time. The Claimant confirms that the Appeal was heard.

26. On page 41 concerning grounds of appeal, she states that procedure on termination is not ground of appeal and she did not challenge the termination procedure on appeal. She also says she did not challenge terminal dues given. That she was only paid salary for January but not September. She said one months' salary in lieu of Notice of Ksh 219,024/=. She said she does not agree she has been paid for 2 months' notice.

27. On the issue of leave days, she said she is entitled to 21 days leave. That she was sent on compulsory leave and that she is still asking for leave days as stated. That the Respondent's Supplementary list confirms she was paid salary claim for 10 days but cannot recall.

28. That the 4th prayer is for medical cover she enjoyed when she was an employee. The medical costs were incurred early March and letter of appeal hearing was late February. She also prayed for costs as she says she was terminated unfairly.

29. On the re-examination, the Claimant said that the claims appearing on the letters (cautionary) did not form part of the disciplinary or basis of termination. That she offered exemplary leadership despite the challenges. That she was promoted after 6 months, later on she was confirmed as the head of legal and promoted as head of claims because of management skills. She said that she would not have been promoted if skills had issues. That the financial challenges of the company can be seen the Claimant's list of documents no 4. That the Respondent's documents show 2 files not availed.

30. On the procedure used to terminate her employment, the Claimant stated that there was no basis at all for termination, there was no loss, actual or demonstrated. She said she has filed the case for an independent judgment.

31. On leave, the Claimant said that she did not apply for leave. Carolyne Laichena called to her office and ordered that she hand over everything she had and said that she proceeds for leave she had not taken and the same has not been paid. She said that there were challenges on the issue of understaffing.

Respondent 's evidence

32. RW1, Carolyne Laichena was sworn in and adopted her statement 4th January 2019 as her evidence in Chief. Respondent's list of documents dated the 4th of January 2019 was relied upon as evidence. Respondent's supplementary list of documents dated the 16/7/2021 was produced as evidence of Respondent. She said she did not send the Claimant on compulsory leave. She also said that the Company did not authorise the Claimant not to file defence. That negotiation is part of process but defence not precluded if you agree you compromise case by filing consent.

33. Upon cross examination RW1 said she was employed on the 1st September 2016 in capacity of head of operations. That she was a direct supervisor to the Claimant. She said she was not aware of who the Claimant was reporting to before her appointment. That the appointment letter of the Claimant indicates she was reporting to the CEO.

34. That in 2016 there was a rebrand and she was appointed as head of operations and Claimant's department was now under her. She said the head of claim sought approval of CEO to settle. That she never asked the Claimant to handover. That ordinarily if Claimant was leaving

handover would be done to her and she did not know who the Claimant handed over to.

35. RW1 said she was at the disciplinary hearing. That having worked with the Claimant before she understood her work. She said a couple of times auctioneers would come to their offices owing to the negligence of the Claimant. She said that negligence resulted to financial loss. That there were payments made as the result of failure to file defence. She referred to Respondents documents the Auctioneers letter at Page 49 and 50 both of 7th October 2016 (and the Advocate's letter dated 3rd August 2016 at Page 65 which complained of the Claimant's unprofessional conduct. That the Claimant proceeded on leave on the 24th September 2016 though she cannot confirm so. That auctioneer letter is dated 7th October 2016. The witness stated that the auctioneer is at the last stage of the execution of the decree dated 23/9/2016.

36. RW1 said that there were other issues raised by Judith Onyango who was Claimant's predecessor. The Claimant was in engagement with employer ever since time of Judith Onyango the former supervisor. The same issues kept emerging and they were never addressed on the side of the Claimant. She said the Respondent did not rely upon Anthony's report to terminate the Claimant. That performance issues were noted earlier. That the hearing was based on the review report where the company felt the Claimant mismanaged her role.

37. Upon re-exam RW1 stated that the Claimant was given hearing on the 27th October 2018 and on the 4th November 2018. She said that the issues of negligence arose after Claimant's promotion. She said that the Claimant did not question the authenticity of the review report at the hearing and appeal. The Claimant has not challenged the authenticity of the review report in the pleadings, issue brought up at cross-exam.

38. RW 2 Gladys Muema gave sworn evidence. She adopted her witness statement dated 16th July 2021 as her evidence in Chief. The documents dated the 4th July 2021 was relied upon as part of her evidence alongside the supplementary list of documents of 16th July, 2021.

39. Upon cross-examination RW2 said that she is the senior legal officer of the Company. That she was employed on the 4th March 2015 as the legal officer. She did not work closely with the Claimant. That she did not participate in the disciplinary proceedings. RW2 said the HR policy on termination is attached but there was no request to attach the entire policy. That the policy provides ways of disciplinary warning, 2nd warning and final. If company deems fit it can have hearing or dismiss employee without notice.

40. RW2 said the disciplinary committee has a chairperson who constitutes committee who is the CEO. In this case it was the HR, 2 other top executives. That in the Claimant's case the CEO and Group HR was in attendance. She said the members of the 1st committee are not in attendance in the Ground Appeals. Paragraph 6 of the statement by witness RW2 informs promotion of the Claimant.

41. RW2 said that in Paragraph 9 of the statement the concerns of Onyango are raised. Issues of lateness and absenteeism from work are not in the disciplinary process. This is raised in Paragraph 9 to prove there were other issues with Claimant. The witness said she has raised the issues of money loss. RW2 states that she was demonstrating they suffered a loss. She said this is based on the reports submitted during disciplinary hearing. On the auctioneers' documents attached, she said the auctioneer's document is more of a demand and must not have been paid.

42. On the actual loss suffered, RW2 stated that there is no challenge on the actual loss suffered in the pleadings. That the loss was basis for the termination according to counsel. The witness stated that she is not sure of date files given to Claimant on the files given to the Claimant on the 27th /10/2016. She said the letter was for 21st October 2016 and 28th October 2016. The witness said that she was not able to attend and to give fair hearing, the session was moved to 4th November 2016.

43. RW2 said that the Claimant was required to appear on the 28th October 2016 but did not appear as she was late. RW2 stated that the files she availed on the 21st October 2016 when she got letter and may be 27th October was the second time the files were availed.

44. That on the 25th May 2016, the Respondent issued letter of redundancy addressed to the Claimant notifying her of the intended redundancy. She said the Claimant was issued with certificate of service when she was clearing. She said that the notice period was not paid. The witness said the Claimant's contract indicated she is entitled to 2 months' pay for summary dismissal. That clause 10 states her (Claimant) employment is subject to HR policy and in any event of contradiction between contract and policy the policy supersedes the contract.

45. The witness referred to letter by defence counsel contained in the supplementary list of documents filed on the 16th July 2021 at Page 5 which is dated the 7th July 2021 which in her view confirms the 3 months' notice. RW2 stated that the Claimant had a total of 3 months' notice in good faith. The cheque forwarding was rejected and returned by counsel for the Claimant on ground that the Claimant was not open to engaging in any form of negotiation. She reiterated that the certificate of service was issued when Claimant was clearing. RW2 said the second certificate was a correction. That the certificate was mentioned in defence but not annexed. She said the corrected one was shared on the email. She said the Claimant sent other person named Hawkins Mutisya to collect documents on behalf of Claimant.

46. Upon re-exam RW2 stated that the constitution of the disciplinary committee has not been challenged by the Claimant before. She said that the Claimant did not at the disciplinary hearing request for cheques as evidence of the losses neither has there been requests for documents from the Claimant setting out the losses. The witness said that at the hearing the Claimant did not complain of time for hearing. That the hearing was postponed affording the Claimant more time.

47. RW2 said that at Page 46 of Respondent's document is the certificate of service issued. She said the letter of appointment read head of claims whilst after restructuring it was senior claims analyst which was also given the same title at the disciplinary. She reiterated that the Claimant's agent collected the documents as stated.

48. RW2 closed by saying that the Claimant did not complain of the certificate and that the Respondent Company had sought to settle out of

court issues if any, but the Claimant was uncooperative.

Issues for Determination

49. The Claimant in written submissions raised the following as issues for determination: -

- a. Whether the due procedure was followed by the Respondent in dismissing and/ or terminating the Claimant's employment.
- b. Whether the Claimant was unfairly dismissed and/or there was unlawful termination of the Claimant from her employment by the Respondent
- c. Whether the Claimant is entitled to the reliefs sought

The Respondent in submissions raised the issues to be:-

- a. Whether the claimant's termination from employment was fair and lawful
- b. Whether the Claimant was subjected to discrimination, harassment and unfair labour practices
- c. Whether the Claimant is entitled to the reliefs sought
- d. Who bears the cost of the claim?

After carefully analyzing the parties' list of issues, the parties' written submissions and the parties' respective cases it did appear to this court that the issues that had really been placed before it for determination were as follows: -

- i. Whether the Claimant unfairly terminated from her employment by the Respondent
- ii. Whether Claimant is entitled to reliefs sought.

Legal analysis and findings

Whether the Claimant unfairly terminated from her employment by the Respondent

50. The Employment Act section 41 provides for procedural fairness in termination of employment contract as follows:-

'(1) subject to section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language he understands , the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

Notwithstanding any other provision of this part, an employer shall before terminating the employment of employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representation's which the employee may on the grounds of misconduct or poor performance, and the person, if any , chosen by the employee within subsection (1)make'.

The *Court of Appeal in Postal Corporation of Kenya v Andrew K. Tanui (2019)* where the court pronounced itself on procedural fairness as herein under:-

'...four elements must thus be discernable for the procedure to pass muster:

- i. An explanation of the grounds of termination in a language understood by the employee;**
- ii. The reason for which the employer is considering termination**
- iii. Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made and**
- iv. Hearing and considering any representations made by the employee and the person chosen by the employee...'**

The Claimant, an advocate and who was a former head of claims section of the Respondent, told the court that she was issued with notification of hearing dated 21st October 2016 (CW exhibit no. 5). The letter in summary invites the Claimant for disciplinary hearing on 28th October 2016 at 11 am (rescheduled at her request) at the 3rd Floor Board Room. The meeting to be conducted under disciplinary procedures to consider the following allegations: 'you were negligent in handling the matters below, leading the business unit's exposure to reputational and financial loss (Kes. 1,761,596 already incurred and Kes, 12, 814,307 potential loss). The claim file numbers are listed thereunder with the reasons why the Claimant is to blame. The letter further states the purpose of the disciplinary session and lists the

persons to sit at the panel. The letter states that the Claimant will be given opportunity to ask questions and present evidence. That the Claimant has a right to be accompanied by colleague and that she is responsible for securing the person's attendance and gives the terms of the witness attendance. The court finds that the letter complies with the requirement of section 41 of the Employment Act.

The Claimant told the court that she submitted her response to the notice dated 28th October 2016 and produced the same as evidence in court. (CW exhibit 6). The court noted that in 2 of the files the Claimant stated they were not availed.

The Claimant told the court she attended the hearing and produced the minutes of the disciplinary proceedings dated 4th November 2016 (CW exhibit 7) which indicates persons present including the Claimant where it is recorded the Claimant said she would be alone and the record indicates the Claimant was heard.

The Claimant produced the termination letter following the disciplinary hearing dated 21st December 2016 (CW exhibit 8) which gives the reasons for the termination. The Claimant appealed unsuccessfully and produced the feedback on appeal (CW exhibit 9)

Exfacie the termination process complied with all the steps summarised by the court of appeal in the ***Postal Corporation of Kenya v Andrew K. Tanui (2019)***.

The Claimant stated that she brought the case for independent assessment stating the dismissal was unfair as the termination was without any proof of any wrongdoing on her part. At the hearing the Claimant stated that she could not respond to two files that were not availed for perusal. At the disciplinary hearing it is recorded in the minutes that she perused the files in the office and did not raise the issue of the two files not being the correct ones. At the hearing she raised the issue of understaffing being to blame and stated that she had raised the issue in management meetings and at the hearing. A perusal of the minutes under staffing did not come out and even in the statement of the witness. During cross examination the Claimant told the court she was not sure whether she requested for the two files. The Claimant raised issues of financial challenges of the Respondent to blame for late settlement of claims relying on redundancy notice. The court notes that this is not a sufficient defence to justify the failure of the Claimant to execute her duties which had little to do with finances among them being double appointment of advocates, failure to ensure defence is filed notwithstanding the alleged instructions to settle among other reasons established at the disciplinary hearing as per the minutes. The Claimant as an advocate and Head of claims department of the Respondent and failed to ensure defences are filed leading to default judgments. The court agrees with authority cited by the Respondent of court of appeal in ***Moses Kogo v Nyamogo Advocates (2004)*** where it was held that '***an advocate is not liable for any reasonable error of judgment or for ignorance of some obscure point of law, but is liable for an act of gross negligence or ignorance of elementary matters of law constantly arising in practice***'. The evidence produced of proclamation by auctioneers in some of the matters handled by the Claimant is evidence of possible loss whether or not the payment had already been done. Negotiations may not lead to settlement hence any prudent advocate files defence just in case. At the hearing evidence was led that similar issues had been raised by the CEO in memo dated 10th May 2016 on case of negligence by Claimant's department costing the company money of which she did not give feedback. In court the Claimant told the court the payment was outside her jurisdiction. The Claimant was also issued with a cautionary letter on her performance of which she did not respond to. At cross examination the Claimant told the court the issues in cautionary letter were different from those at the termination. A look at the cautionary letter indicates the issues are related to the issues of performance as head of claims raised at the disciplinary. The Claimant told the court she was promoted due to her performance. Evidence was led to fact that the majority of issues raised towards her termination arose while in the promoted position. The Respondent submits that the acts or omissions did not occur over the two weeks or so when the Claimant was away on leave from 24th September 2016 as she claims. That the acts or omissions began as early as December 2015 which was the month of her appointment as head of claims and occurred throughout the 1 year tenure as Head of Claims. RW1 referred to Respondents documents being the Auctioneers letter at Page 49 and 50 both of 7th October 2016 and the Advocate's letter dated 3rd August 2016 at Page 65 which complained of the Claimant's unprofessional conduct. The Respondent witness stated that the auctioneer is at the last stage of the execution of the decree dated 23/9/2016. When the decree was issued the Claimant was in office having proceeded on leave on the 24th September 2016. The Court agrees with the Respondent having examined the evidence by both parties that the acts or omissions did not just occur over the period when the Claimant was away on leave from 24th September 2016.

The Claimant submits that she was subjected to inhumane and unfair treatment, that the files the Claimant was accused of mishandling were only availed to her a day to the hearing and further two of them were not correct. The court notes that the issue of inhumane treatment was not raised in the claim nor in the appeal against the termination. The Respondent did not have opportunity to respond to the pleadings on the allegation of inhumane treatment. During cross examination the Claimant admitted she had not challenged the procedure for her termination in the appeal. The court is guided by the authority cited by the Respondent in submissions of Court of Appeal in ***Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others (2014)*** where that court quoted with approval Sir Jacob in '***The Present importance of pleadings***' (published 1960) which interalia states that, '***... for the sake of certainty and finality each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made..***' Secondly the court finds that the record of the minutes states that the Claimant perused the files in the office and failed to notify of wrong file or request for the 2 correct files. Further the court notes that the hearing was postponed at the request of the Claimant hence adequate opportunity to prepare for the hearing. The submission that the Claimant being asked to proceed on leave was with malicious intention again is not pleaded and no evidence was led on the same. In paragraph 2 of the Claimant in her statement filed in court and dated 17th November 2017 states:- 'on 24th September I proceeded on leave and handed over everything that was pending on my table together with all office equipment and tools to one Ms. Patricia and this information was copied to one Ms. Carol Laichena (Operations Manager) and George Kuria (CEO)'. This is repeated in the Claim save to add 'the Claimant resumed work in October 2016 and this was the genesis of her misfortunes.' Parties are bound by their pleadings and no malicious intention is pleaded. The Claimant submits that calling a witness would not help her case at the disciplinary meeting and the said witness would be a formality as they would not be allowed to say anything and that led her to not calling any witness at the disciplinary hearing. Again this issue is not pleaded. The court notes that the letter dated 28th October 2016 (CW exhibit 6) indicates the person accompanying her may act as a witness and address the meeting. The court finds the Claimant's submission on the issue to be misleading. The Claimant submits that no specific charges had been levelled against her save for the mishandling of the 8 files of which only 6 correct ones were provided for her scrutiny and of which she adequately responded to. To buttress her submissions the Claimant cites the authority in ***County Assembly of Kisumu and 2 others v Kisumu County Assembly Service Board and 6 others (2015)eKLR and Ole Pejeta Ranching Limited v David Wanjau Muhoro(2017)eKLR*** and states that the court of appeal in these two precedents held that where the employee is not specifically told of all charges facing them then it would be unfair to subject them to a

disciplinary hearing without informing them of the charges and further cites *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology (2014) eKLR* which the court has considered. The Claimant submits that the appeals committee failed to consider the appeal on merits and relies the case of *Mary Chemweno Kiptui v Kenya Pipeline company limited where the court created obligation /burden on the employer to provide proof and reasons for terminating which the reasons are assessed by court to determine validity.* The court also considered the authority of *Judith Onyango Brenda v Sanlam General Insurance Limited (2020)eKLR* and *Kenfreight(EA) v Benson K. Nguti (2016)eKLR*. The court finds the notification letter disclosed specific charges of which the Claimant responded to. On the appeal the decision was conveyed to the Claimant (Page 43 of the Respondent's bundle of documents dated 4th January 2019). The court also found the Claimant had adequate time to prepare for the hearing including time to notify that 2 of the files were the wrong ones before the hearing and request for the files to be availed. The hearing having been postponed she had time to request for the 2 correct files. The Court perused the notice of hearing, the response by Claimant, the hearing minutes and the letter of termination, the appeal feedback and minutes and is satisfied on the reasons for the termination of the Claimant's employment are justified.

In conclusion the court having weighed the evidence of both parties finds that the procedure for termination of the employment of the Claimant by the Respondent was fair and lawful.

51. Whether Claimant is entitled to reliefs sought.

a. Claim for an admission by the Respondent of liability for unlawful termination of the Claimant's services. This is not a valid order for the court to grant.

b. Claim for a Certificate of service for services rendered by the Claimant to the Respondent. The certificate of service is a right of the employee on termination of service notwithstanding the reason for the termination under section 51 of the Employment Act. The Claimant submits that she was not issued with the certificate of service but the Respondent just attempted to do so on 10th June 2021 vide an email of even date produced in the Respondent's supplementary list of documents. RW2 states in her statement paragraph 62 and in her testimony in court that a certificate of service dated 31st December 2016 was prepared by the Respondent for collection by the Claimant and was collected on her behalf by her representative (Respondent's document no. 17 at page 46). RW2 told the court while pursuing out of court settlement they realised an error in the certificate being the position given of head of claims. She said the letter of appointment read head of claims whilst after restructuring it was senior claims analyst which was also given the same title at the disciplinary proceedings. RW2 reiterated that the Claimant's agent Hawkins Mutisya collected the documents including the certificate of service as stated. The Claimant submits she was denied of career opportunities for which the Respondent should be held responsible for. No evidence was led on this submission. The Court finds the Claimant was issued with certificate of service. There was no evidence placed in court for the alleged loss of opportunities for lack of certificate of service. The claim is dismissed.

c. Claim for Terminal dues owed to the Claimant of Kshs. 3,979,057.73. particulars being :-

i. Claim for Three months' pay in lieu of notice total Kshs. 657,072. The Respondent submits that pay in lieu of notice is not grantable as the termination was by way of summary dismissal. The Claimant's employment contract dated 30th October 2014 clause 8 provides that the services may be terminated by either party giving three months' notice or three months' pay in lieu of notice and that the services may also be terminated summarily or for lawful cause amounting to gross misconduct. The letter by Respondent being notification for disciplinary hearing states in part.. ' if found guilty of misconduct we may decide to issue you with a warning , first or final written warning or dismiss you with notice or payment in lieu of notice. If you are found guilty of gross misconduct or gross negligence you may be dismissed without notice or payment in lieu of notice '.

The Respondent in the letter of termination of employment of the Claimant dated 21st December 2016 states in part that the Claimant would be paid 1 month's salary in lieu of notice. The Claimant submits that she was not paid notice as per letter of employment. The Respondent submits the Claimant's employment was terminated by way of summary dismissal as she was not given prior notice of termination and this was under clause 8 of her employment contract. The Respondent submits that notice pay is not payable in instances of summary dismissal and where in it is paid the payment is exgratia and relies on the case of ELRC (Nairobi) Cause No. 950 of 2012. The court is not persuaded by this decision to apply in the instant case. Section 44(2) requires notice or pay in lieu for summary dismissal. In this case the employment contract dated 30th October 2014 clause 8 provides that the services of the Claimant may be terminated by either party giving three months' notice or three months' pay in lieu of notice and that the services may also be terminated summarily or for lawful cause amounting to gross misconduct. The human resources manual cannot defeat terms of contract signed by the parties. The contract are agreed between the parties and it would be unjust to rely on the manual to defeat the agreed terms. It is a fact this was summary dismissal. The Claimant was entitled to 3 months' notice pay as per her terms of contract. Evidence on record is that she was terminated with immediate effect on the 21st December 2021. There is evidence that the Claimant was paid full salary in January 2017 tantamount to one month's notice. According to RW2 the Claimant was also paid Kshs. 219,024/ via cheque issued on 24th October 2017 collected from the Respondent's office by one Mr. Harrison send by Ochieng Opiyo Advocates (Respondent list of documents dated 4th January 2019 exhibit no. 16 at page 45) . This position was not controverted by the Claimant in pleadings. The agent of the Claimant received the cheque. That makes 2 months' notice. RW2 told the court on 7th July 2021 they issued the Claimant with a further cheque of Kshs 158,533/ as a further month's pay which was rejected by the Claimant and returned back by her advocates stating their client was not open to negotiations (exhibit no. 4,5 and 7 of Respondent's supplementary list dated 16th July 2021.)

The Respondent states that the Claimant was overpaid by Kshs. 70,652.90 in December 2016 as she only worked 21days but was paid full salary (exhibit no.3 of Respondent's supplementary list dated 16th July 2021).

The court finds that the Claimant was paid two months' notice pay being payment of full salary in January 2017 and in September 2017 cheque for full salary received by Harrison of the Claimant's advocates on record(Doc no.16 at page 45 of the respondent documents) and that she was overpaid salary in December 2016 by Kshs. 70,652.90/- The Claimant was entitled to 3 months' notice pay. Notice pay of 1 month is due for payment. The Claimant is awarded one month notice pay less Kshs. 70,652.90/- **thus Kshs. 148,371.10/-**

ii. **On Claim for 10 days remaining in the month of December after termination of contract –Kshs. 219,024/24x10 =kshs. 91260.** The Claimant was paid full salary for the month of December 2016 as per the produced payslip (exhibit 3 of Respondent’s supplementary list dated 16th July 2021) thus the claim is baseless and is dismissed.

iii. **On claim for Leave days (Kshs. 219,024/24 x 21x1=kshs. 191,646.** The Claimant in her statement paragraph 2 states that on 24th September 2016 I proceeded on leave and handed over everything that was pending on my table... she does not state it was compulsory leave. In paragraph 10 of the claim it is stated in part.. ‘ the Claimant went on leave on 24/09/2016 and before she proceeded to go on leave , she had endeavoured to hand over pending assignments ... that she resumed work in October 2016 and this is was the genesis of her misfortunes.’ This is a demonstration that the Claimant had proceeded on annual leave but she fails to disclose the actual date she resumed work. The court then looks at the Respondent position on the leave. RW2 Gladys Muema at paragrph 54 of her statement she states, ‘ *the fact of the matter is that the Claimant had ten (10) leave days outstanding at the end of 2015 which she carried into year 2016. In the year 2016 she was entitled to twenty one(21) leave days, which added to the ones carried over entitled her to a total of thirty-one(31) leave days.*

In paragraphs 55 and 56 of the statement RW2 states that out of the 31 leave days the claimant took 20 days of leave in the year 2016 leaving a balance of 11 days. The Respondent admits they ought to have paid her a sum of Kshs. 114,726.86 for the 11 leave days. The Court finds the Respondent candid on the issue of leave days and believes the evidence of RW2 as true as the Claimant did not even claim for the 2015 leave days. **The court finds that the Claimant is entitled to pay of a sum of Kshs. 114,726.86 for the 11 leave days.**

iv. **Medical cover for purposes of maternity.** The court notes that the Claimant Employment contract was terminated vide letter dated dated 21st December 2016. That the maternity costs were incurred from march 2017 way after termination of the employment and the appeal feedback. The Respondent submits that the medical cover lapsed on the termination of contract of employment and it is worth noting the medical receipts adduced by the Claimant the person indicated as patient who incurred the medical expenses is a person Christiana Danielle Ashers is unknown to the Respondent contractually or otherwise. Indeed it is strange that the Claimant would produce receipts of medical costs of a stranger to the former employer. Nevertheless, the Claimant also produced medical bills in her name all from march onwards. The court finds that there was no employer employee relationship as at time of incurring the medical costs for the Respondent to extend medical cover to the claimant. The claim is dismissed.

v. **Claim for Damages for deprivation of terminal dues-** the Respondent submits that the claim is not grantable as the Claimant’s due terminal dues were paid in full and also because as a matter of fact , the Claimant has been overpaid. The court finds that it has no powers to grant any damages not provided for under the Employment law. Interest would suffice to compensate the Claimant. Interest at court rates from date of filing claim are granted on the due terminal dues for leave and notice pay.

vi. **On claim for Payments in relation to Claimants’ pension contribution –** Both the Claimant and the Respondent did not submit on this claim. No evidence was led on this claim. Pension is payable by the trustees of the pension scheme not the employer. There is no cause of action proved against the Respondent on this claim. The claim is dismissed.

CONCLUSION AND DISPOSITION

1. I have found that the termination of the employment of the Claimant by the Respondent was fair and lawful. I have found that the Claimant is entitled to unpaid terminal dues for leave of 11 days. I also found the Claimant was entitled to 3 months notice pay. However, I also found that the Claimant was paid amount equivalent of 2 months notice pay. I have awarded the extra 1 month Notice pay less salary amount overpaid in December 2016 salary. I now enter judgment as follows:-

a. **Notice pay- The Claimant is awarded the outstanding notice pay for one month less overpaid salary in December 2016 amounting to Kshs. 70,652.90/- thus Notice pay of Kshs. 148,371.10/- awarded.**

b. **Leave pay of a sum of Kshs. 114,726.86 for 11 leave days not taken.**

Award amount in (a) and (b) above subject to statutory deductions

c. **I award Interest on the award sum at court rate from the date of filing suit until payment in full.**

d. **Costs of this suit shall be borne by the Respondent.**

WRITTEN AND DATED THIS 11TH DAY OF NOVEMBER 2021 AT BUNGOMA

J.W. KELI

JUDGE

DELIVERED AND DATED 16TH DAY OF NOVEMBER, 2021 AT NAIROBI

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JUDGE

In the presence of :-

Miss Kaguchi for Claimant holding brief for Mr. Opiyo

No appearance for Respondent