



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1276 OF 2017**

(Before Hon. Lady Justice Hellen S. Wasilwa on 12<sup>th</sup> March, 2020)

**MARIE CLAIRE BISAMAZA.....CLAIMANT**

**VERSUS**

**REGIONAL CENTRE ON SMALL ARMS**

**IN THE GREAT LAKES REGION,**

**THE HORN OF AFRICA AND**

**BOARDERING STATES (RECSA) .....RESPONDENT**

**JUDGEMENT**

1. The Claimant is a civil engineer. Prior to the termination of her services, she was an employee of the Respondent. The Respondent is a body corporate conducting its business in Nairobi.
2. The Claimant filed this suit on 7/7/2017 to challenge the termination of her employment contract. The Respondent entered appearance in the matter but failed to file a response.

**The Claimant's Case**

3. The Claimant avers that she was employed in August 2011. Her contract was renewed on 1/1/2017 for a period of 6 months' for the position of Project Coordinator for the African Union Project. She avers that her period of employment was further extended until 28/2/2018.
4. The Claimant avers that on 11/5/2017 she was invited to a disciplinary hearing for failure to obey lawful and reasonable instructions given by a supervisor and deliberate falsification of records and documents. She appeared before the Respondent's disciplinary committee on 17/5/2017. On 7/6/2017 she was issued with the summary dismissal letter dated 23/5/2017.
5. The Claimant avers that she communicated her intention to appeal against the decision vide the letter of 8/6/2017. However, the Respondent did not respond to the same.
6. The Claimant further avers that the Respondent has failed to reinstate her to her position as AU-EU Project Coordinator despite demands from the European Union and African Union delegation to Kenya.

7. It is the Claimant's position that the disciplinary proceedings and the summary dismissal violated the provisions of the Revised RECSA Staff Manual, 2016. In particular, clause 9.2.6.1 which provides that a unit director of the employee being disciplined should not be part of the committee unless the director has not carried out investigations; and clause 9.2.6.2 which provides for appeals against the decision of the disciplinary committee to dismiss an employee.

8. She therefore seeks the following remedies:-

- a. A declaration that the termination of the Claimant's employment was unlawful, irregular, null and void.***
- b. An order of reinstatement to the position of AU-EU Project Coordinator.***
- c. Payment of salary and/or any benefits for the month of May.***
- d. General damages of breach of contract.***

***In the alternative-***

***a. Special damages: Euro 116,000.00 particularized as below:-***

***i. Unpaid salary for the month of May in the sum of Euro 8,000.00.***

***ii. One months' salary in lieu of notice in the sum of Euro 8,000.00.***

***iii. Leave (2 ½ days each month [Euro 8,000.00 x 25 x 10 months) amounting to Euro 20,000.00.***

***iv. Damages for breach of contract (10 months' salary Euro 8,000.00 x 10) amounting to Euro 80,000.00.***

***b. General damages for breach of contract.***

***c. Costs of the claim.***

***d. Interests in (i), (ii) and (iii) above at court rates.***

9. Due to the Respondent's failure to file a defence, the matter proceeded for formal proof.

10. The Claimant adopted her witness statement dated 6/7/2017 and the bundle of documents filed on 7/7/2017, as her evidence in chief. In her statement, she stated that she appeared before the disciplinary committee on 17/5/2017 though she was to proceed on leave the following day.

11. She stated that the committee consisted of the Director of Planning and Coordination, the Director of Institutional Development, the Administration Officer, the Secretary to the Executive Officer and the Director of Administration and Finance; who was the complainant and also sat as a proxy appointed by the Executive Secretary of the Respondent hence a violation of clause 9.2.6.1 of the Revised RECSA manual.

12. She further stated that she informed the disciplinary committee that she would be proceeding on leave on 18/5/2017 and the chair informed her that she would be notified of the committee's decision on 5/6/2017. However, when she resumed work on 7/6/2017, she was summoned to a surprise meeting chaired by the Director of Administration and Finance and thereafter handed her summary dismissal letter.

13. At the formal proof hearing, she testified that she lived in Canada and had a Master's degree from the University of Montreal as well as a Leadership Certificate. It was her testimony that on 11/5/2017, she

requested for 30 days leave for purposes of her wedding, but was only given 11 days, which she accepted.

14. She urged the Court to declare the Respondent's decision unlawful therefore void. She prayed for damages.

15. Thereafter, the Claimant filed her written submissions on 16/1/2020.

### **The Claimant's Submissions**

16. The Claimant submits that her summary dismissal was unlawful, irregular, and therefore void. Further, her dismissal on the ground that she had not submitted copies of her credentials was baseless, frivolous, vexatious and offended the provisions of Section 44 (4) of the Employment Act since it is an uncontroverted fact that the Respondent has always had copies of her academic credentials.

17. She relies on the case of **Omega Enterprises (Kenya) Limited vs. Kenya Tourist Development Corporation Limited & 2 Others [1998] eKLR** where the Court opined that a void act is a nullity and cannot be set aside and every proceeding founded on it is incurably bad.

18. The Claimant submits that she has demonstrated that the disciplinary process did not meet the threshold set out in clauses 9.2.6.1, 9.2.6.2 and 9.2.6.3 of the Revised RECSA Staff Manual 2016. For instance, she appeared before a committee that was comprised of 7 members instead of 3 and her appeal was never heard or determined.

19. She submits that she is entitled to the reliefs sought because the Respondent's failure to hear and determine her appeal violated her non-derogable right under articles 25 and 50 of the Constitution. She relies on the Court of Appeal case of **JMK vs. MWK & Another [2015] eKLR** where it was held that the right to be heard is a valued right therefore, a party's right should not be affected before they are heard.

20. It is submitted that her right to fair administrative action as under Article 47 was violated as she was never issued with copies of the decision despite requesting for the same. She relies on the case of **Judicial Service Commission vs. Mbalu Mutava & Another [2014] eKLR** where the Court of Appeal held that the fair administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47 (1) to the principle of constitutionality rather than the doctrine of ultra vires from which administrative law under the common law was developed.

21. The Claimant submits that the Respondent admitted at paragraph 21 of the Affidavit of Philip Ouma sworn on 19/7/2017, that her salary for May and June had not been paid. She therefore urges this court to award the same.

22. It is submitted that pursuant to her contract dated 1/1/2017, the Claimant is entitled to an award for one months' salary in lieu of notice, as it is not in dispute that the Respondent did not issue the Claimant with any notice prior to the termination of her employment. She relies on the case of **Package Insurance Brokers Limited vs. Simon Gitau Gichuru [2019] eKLR** where the Claimant was awarded the same, the Court having found that he was entitled.

23. The Claimant submits that she is entitled to damages for breach of contract as stipulated in Section 49 (1) (c) of the Employment Act since she has proved that her summary dismissal violated her employment contract, the Revised RECSA Staff Manual 2016 hence unlawful and irregular. She relies on the case of **Unilever Tea Kenya Limited vs. John Kememia Gitau [2017] eKLR** where the Court of Appeal reiterated its position in the case of **Joseph Ileli Kikumbi vs. Central Bank of Kenya [2012] eKLR** that where there was breach of contract the measure of compensation, indemnity, general or special damages is the loss the employee would incur during the stipulated period of the termination clause.

24. Finally, she submits that by dint of Section 12 (3) (vi) of the Employment and Labour Relations Court Act, this Court has the discretion to award her general damages for breach of contract as she has suffered

hardship as a result of the said breach.

25. I have examined all the evidence and submissions before me. The Claimant's case is that she was unfairly dismissed. The reasons for this contention is that she appeared before a disciplinary committee composed of 7 members instead of 3 contrary to Clauses 9.2.6.1, 9.2.6.2, and 9.2.6.3 of the revised RECSA Staff Manual.

26. She also stated that she filed an appeal which was never considered. She contends that her rights under Article 47 of the Constitution of Kenya and the FAAA 2015 were also not adhered to.

27. The Claimant exhibited RECSA Staff Manual, which runs from page 30 to 154 of her documents. Clause 9.2.6.1 (page 122) deals with the manner of conducting a disciplinary hearing. The said Clause 9.2.6.1 states as follows:-

***“9.2.6.1 Conducting a disciplinary hearing***

***At each stage of the disciplinary process, it is important to adopt the correct procedures and follow the general guidelines detailed below. Confidentiality must be maintained at all times.***

***Any person involved in the disciplinary case who breaches confidentiality, will be liable to disciplinary action.***

***All disciplinary hearings shall be heard by a Disciplinary Committee comprising three members of the management team, but excluding the Unit Director of the employee being disciplined unless the director has not carried out the investigation. The HR and Administration Officer will also attend to provide advice and guidance to the Disciplinary Committee. If the hearing concerns potential dismissal of an employee then the Disciplinary Committee will comprise two Principal Officers or Directors, and the Executive Secretary”.***

28. The threshold on membership of the Disciplinary Committee is set at 3 excluding the Unit Director of the employee being disciplined unless the Director has not carried out investigations. The Human Resource and Administration Officer also attends to provide advice and guidance to the Disciplinary Committee

29. Indeed the provisions of this Clause are couched in mandatory terms that the membership of the Committee shall be 3 with the provisions given.

30. From the evidence of the Claimant, the meeting was constituted by the Director of Planning and Coordination, Director of Institutional Development, Administrative Officer, Secretary to the Executive Officer and Director of Administration and Finance who was the complainant and also sat as a proxy appointed by the Executive Secretary of the Respondent.

31. In the circumstances, the committees' composition was against the express provision of the Respondent's Manual. This also infringes on the provisions of the Fair Administrative Action Act 2015 Section 7(2) (a)(i) & (ii) which provides as follows:-

***2) “A court or tribunal under subsection (1)***

***may review an administrative action or decision, if:-***

***a) the person who made the decision:-***

***i) was not authorized to do so by the empowering provision;***

***ii) acted in excess of jurisdiction or power conferred under any written law;***

32. Section 7(2) (g) also provides:-

***“The administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions.”***

33. In addition to the Disciplinary Committee being wrongly constituted, the Claimant avers that she was denied an opportunity to be heard in appeal. This is also contrary to Section 4(3) (c) of the FAAA which also provides for a right to an appeal.

34. It is therefore my finding that the Claimant was indeed denied her right to a fair administrative action as provided for under Article 47 of the Constitution from which the FAAA 2015 draws its life.

35. Article 47 of the Constitution provides as follows:-

***1) “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***

***2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

***3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall:-***

***a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and***

***b) promote efficient administration”.***

36. In the circumstances, I find the dismissal of the Claimant was unfair and unjustified as envisaged under Section 45(2) of Employment Act 2007 which states as follows:-

***2) “A termination of employment by an employer is unfair if the employer fails to prove:***

***(a) that the reason for the termination is valid;***

***(b) that the reason for the termination is a fair reason:-***

***(i) related to the employee’s conduct, capacity or compatibility; or***

***(ii) based on the operational requirements of the employer; and***

***(c) that the employment was terminated in accordance with fair procedure”.***

37. In terms of remedies, I find for the Claimant and I award her as follows:-

***1. Payment of her salary for May = 8000 Euros***

***2. 1 month salary in lieu of notice = 8000 Euros***

***3. Prorata leave for 10 months at 2.5 days per month =  $25/30 \times 8000 \times 10 = 6667$  Euros***

***4. 8 months’ salary as compensation for unfair termination =  $8 \times 8000 = 64,000$***

**TOTAL = Euros 86,667**

***Less statutory deductions***

***5. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.***

Dated and delivered in open Court this 12<sup>th</sup> day of March, 2020.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Miss Mwachiro for Claimant – Present

Respondents – Absent