



REPUBLIC OF KENYA

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

CAUSE 125 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 28th May, 2020)

RUTH ADHIAMBO APINDICLAIMANT

VERSUS

UNILEVER KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein filed a Statement of Claim dated 2nd February, 2015 and filed in Court on 4th February, 2015 claiming unfair, malicious and unlawful termination of her Contract of employment with the Respondent herein and the unlawful withholding of her Pension by the Respondent.
2. The Claimant avers that she was employed by the Respondent herein, a limited liability company on 1st February, 2011 in the position of a Buying Assistant – IP, Kenya earning Kshs. 1,089,100/- per annum.
3. She further stated that she was initially placed on probation for a period of six months and that upon completion of the probation period and her satisfactory performance the Respondent confirmed her to her position.
4. The Claimant further avers that on 1st May, 2013 she was promoted further and her salary increased to Kshs. 2,385,354/- and fuel allowance of Kshs. 377,148/- per annum. She further stated that as a term of service she was required to join the Union East Africa Pension Fund, a requirement she complied with on 1st October, 2011.
5. The Claimant stated that she performed her duties diligently and to the Respondent's satisfaction until 28th October, 2014 when the Respondent without any reasonable or lawful cause suspended her services on account of what it termed as a serious allegation of violation of its Code of Business Principles.
6. The Claimant confirmed that the suspension was to run for a period of two (2) weeks with effect from 28th October, 2014 and was expected to end on 11th November, 2014 to purportedly pave way for further investigations. She further confirmed that she was advised not to visit the Respondent's premises unless with express authority from the Respondent's GTM Manager.
7. The Claimant further stated that upon receipt of her suspension letter she was further directed to surrender all company properties in her possession including the company laptop and access card to the Respondent and her log in password was disabled hence she was unable to access the system.
8. The Claimant averred that she subsequently received a letter dated 18th November, 2014 albeit via email on 20th November, 2014 to show cause why disciplinary action should not be taken against her for breaching the Respondent's Code of Business Principles. The letter set out her alleged violations and she was expected to respond to the same by 21st November, 2014.
9. The Claimant maintained that the allegations set out in the Respondent's Show Cause Letter and Suspension letter were vague and therefore difficult for her to know the exact nature of the charges against her for her to mount a good defence.
10. She further maintained that she was also expected to respond to the NTSC without having access to her records of all transactions, tenders, emails and letters due to the fact that she could not access the Respondent's System. The Claimant nonetheless responded to the NTSC on 21st November, 2014.

11. The Claimant further averred that on 25th November, 2014 the Respondent summoned her for a disciplinary hearing that was slated for 27th November, 2014. The Claimant confirmed that the hearing did proceed on the said date but maintained that the same was conducted in an unlawful and unfair manner.

12. It is the Claimant's position that she was later summoned to the Respondent's premises on the pretext that she was required to have a meeting with the Respondent's management and also confirm and sign the minutes of the disciplinary hearing. However, she was instead served with a letter of summary dismissal with immediate effect on account of the alleged gross misconduct in violation of the Respondent's Code of Business Principles.

13. The Claimant maintained that her termination by the Respondent was wrongful, unlawful and in complete violation of her rights as enshrined in the Constitution of Kenya, 2010 in particular Article 50 of the Constitution.

14. Aggrieved by the decision to terminate her services the Claimant filed the instant Claim seeking the following reliefs:-

1. A declaration that the Respondent unfairly, wrongfully and unlawfully terminated her Contract of Employment.

2. Release of the Claimant's Pension.

3. Three months' salary in lieu of notice amounting to Kshs. 701, 339.85/-.

4. Salary arrears for days worked in the month of December 2014 amounting to Kshs. 67,871.60/-.

5. 18 accrued leave days at the time of termination amounting to the sum of Kshs. 140, 267.97/-.

6. Twelve (12) months' salary for unlawful and unfair dismissal amounting to Kshs. 2,805,359.40/-

7. Costs of this suit.

8. Interest on the amounts awarded above.

9. Such other and further orders that this Honourable Court deems just and expedient to grant.

15. The Respondent in its Amended Memorandum of Defence and Counter Claim filed in Court on 25th November, 2017 admitted having engaged the Claimant in the manner alleged in her Memorandum of Claim.

16. The Respondent maintained that the Claimant's employment was governed by its Corporate Policy, its Code of Business Principles and its policy on cell phone use. It is the Respondent's contention that the Claimant's conduct in the course of her employment violated its Code of Business principles specifically those regulations against:-

i. Obtaining actual personal gain by accepting bribes or favours from service providers in return for business benefit to such service providers.

ii. Abused her position to coerce/pressure suppliers to provide her with gifts/gain and

iii. Conducted herself in an antitrust and unethical manner during the conduct of her duties.

17. The Respondent averred that in order to ascertain the veracity of the allegations levelled against the Claimant and to pave way for investigations it did suspend the Claimant vide its letter dated 28th October, 2014 for a period of two (2) weeks with full pay. The Respondent further averred that subsequent to its investigations it did issue the Claimant with a NTSC letter on the 18th November, 2014.

18. The Respondent confirmed having received a response from the Claimant on the NTSC on 21st November, 2014 and subsequently invited her to a disciplinary hearing on 27th November, 2014 before proceeding to terminate her services.

19. The Respondent maintained that the Claimant's dismissal was lawful, procedural and justified. It further maintained that the Claimant was not prevented from obtaining the necessary information that would assist her defence as no request for the same was made to it.

20. The Respondent further maintained that the Claimant was accorded a fair hearing prior to her termination and that all her dues were paid at the time of her separation. It is on this basis that the Respondent maintained that the instant Claim is without basis, is misconceived, false and is an abuse to the Court process.

21. The Respondent in its Counter Claim maintained that the Claimant is indebted to it for a sum of Kshs. 1,871,908.75/- being the balance of a car loan which the Respondent agreed to underwrite which amount remains unpaid to date.

22. The Respondent urged this Honourable Court to dismiss the same with costs to the Respondent as the Claimant is not entitled to the reliefs sought therein and instead enter Judgment in its favour in the following terms:

i. The Outstanding loan amount of Kshs. 1,871,908.75/- plus interest accrued up to the date of payment.

ii. Interest on i) above at Court's rates from the date of filing this suit until payment in full.

iii. Costs of this Suit.

iv. Any other just and equitable relief as this Honourable Court may deem appropriate.

23. The matter thereafter proceeded for hearing on 24/6/2019, 16/9/2019 and 2/12/2019 when the Claimant called two witnesses and the Respondent called on witness to testify on its behalf.

Claimant's Case

24. The Claimant's case proceeded on 24/6/2019 and 16/9/2019 with the Claimant testifying as CW1. She sought and was allowed to have her witness statement dated 16/5/2019 and filed in Court on 20/5/2019 adopted as her evidence in chief. She also sought to rely on the list and bundle of documents filed alongside the Memorandum of Claim.

25. In her statement, the Claimant reiterated the averments made in the Memorandum of Claim. In brief, CW1 confirmed that she was engaged by the Respondent herein on 1st February, 2011 and was later confirmed to permanent employment on 1st May, 2013. She further averred that she performed her duties diligently and to the Respondent's satisfaction.

26. CW1 averred that her services were unfairly terminated following her suspension from duty in the year 2014. She further confirmed having received a NTSC letter and that she was taken through a disciplinary hearing prior to her termination.

27. CW1 testified that the charges levelled against her was going against the code of Business Principle. She further stated that she sought clarification from the Respondent on the exact code she had violated but did not receive any response from the Respondent.

28. CW1 maintained that her termination was wrongful and unfair and therefore urged this Honourable Court to allow her Claim as prayed.

29. On cross-examination, CW1 confirmed that at the time of her dismissal she was the Assistant Procurement Manager. She further confirmed that she had agreed to be bound the Respondent's Policy, the Code of Business Principles, the cell phone policy as well as her employment contract.

30. CW1 further confirmed that she was suspended on the alleged account of violation Code of Business Principles and that the said letter of suspension indicated that she was prohibited from accessing the Respondent's premises and that her personal phone was also taken from her. She indicated that she made a request for her personal phone to be returned but admitted not having any evidence to ascertain this position.

31. She further testified that the time she was required to respond to the NTSC was too short and that the allegations were too broad in nature and thus it was difficult for her to respond appropriately to the allegations levelled against her.

32. CW1 further confirmed that in her pleadings she made no mention of the Voluntary Separation only mentioning the same in her witness statement. She further stated that she had no evidence to show that she had been offered any PIP or Voluntary Separation Package by the Respondent.

33. CW1 further confirmed that she was indeed given an opportunity to respond to the charges at the disciplinary hearing and at which time she was also allowed access to her laptop.

34. CW1 confirmed having received payment of her dues upto 9th December, 2014. She still demanded payment of dues to the last day of service. CW1 further confirmed that her termination was on the ground of gross misconduct and that she was unable to clear with the Respondent as her line manager was in South Africa.

35. CW1 further admitted being indebted to the Respondent for the car loan whose amount is Kshs. 1, 871, 908.75/- and that she would pay the amount when she is in a position to pay it.

36. On re-examination, CW1 maintained that she had requested to access her laptop for purposes of responding to the NTSC but was not allowed. She confirmed that the only access to the laptop that she was given was during the disciplinary hearing. She further maintained that her dismissal was on malicious grounds.

37. CW1 further stated that she requested for the investigation report but none was furnished to her and that no evidence was shared with her on the allegations of receiving bribes.

38. CW2, **Wilson Kimani** a previous employee of the Respondent until 2015 testified on 16/9/2019, similarly he sought and was allowed to have his witness statement filed in Court on 12/9/2019 adopted as his evidence in chief. In his statement CW2 stated that in the month of August 2014 the Respondent's Vice President Mack Engel announced that due to poor performance the Company was offering Voluntary Separation for various members of staff.

39. He further maintained that at that time there were a lot of rumours that some members of staff were to be laid off. He further maintained

that his name and that of the Claimant was mentioned among those who would be affected.

40. CW2 averred that as a result of the uncertainty there was massive exodus of members of staff some even through Voluntary Separation. CW2 further averred that hearings at the Respondent were conducted in an illegal and unfair manner and without witnesses to corroborate and/or rebut the allegations levelled against targeted employees. He further maintained that the findings of such hearings were based on anonymity and false information.

41. CW2 stated that many of the Respondent's members of staff were dismissed illegally and unlawfully as none of them were given an opportunity to defend themselves.

42. On cross-examination, CW2 stated that the issues of poor performance were made verbally by the Respondent's management as well as Voluntary Separation.

43. CW2 further confirmed that it was on that basis that he tendered his resignation from the Respondent on 5/12/2015 voluntarily. He however admitted not having any evidence in Court to support this assertion this not being his case.

Respondent's Case

44. The Respondent's case was heard on 2/12/2019 when RW1, Mary Nyagi, Human Resource Services Manager of the Respondent sought and was allowed to adopt her witness statement filed in Court on 18/1/2019 as her evidence in chief.

45. RW1 confirmed that the Claimant was engaged in the manner stated in her Memorandum of Claim. She also confirmed that the Claimant's services were terminated on 9/12/2014. RW1 further confirmed that the Claimant was suspended in October 2014 on allegation of violation to provisions of the Code of Business Principles.

46. RW1 further testified that the Claimant was accorded a fair hearing prior to her termination. She further stated that the Claimant did not ask for any documents to facilitate her mount her defence. She however confirmed that she (the Claimant) had sought to be furnished with the investigation report, which report was never furnished to her for purposes of protecting the identity of the whistle blower.

47. RW1 further testified that following the disciplinary hearing, the Claimant was found culpable and her employment terminated. RW1 averred that contrary to the Claimant's assertion she did not raise any concerns of not understanding the charges levelled against her as evidenced by the disciplinary hearing minutes. RW1 maintained that the Claimant was summarily dismissed and that the reasons for her dismissal were properly communicated.

48. RW1 confirmed that the Claimant's December, 2014 salary plus her leave days were duly paid at the time of her separation with the Respondent. RW1 confirmed that she (the Claimant) at the time of separation had a pending car loan of Kshs. 1,871,908.75/- which amount remains unpaid.

49. On cross-examination, RW1 explained that an employee who repeatedly portrays poor performance was put on PIP. She stated that the Claimant's performance was good and therefore no need of placing her on PIP.

50. On further cross-examination RW1 stated that the investigations in this matter were carried out by Salama Fikira Company and that, she was not aware of any issues that may have existed between the Claimant and the said company. She further confirmed that the Respondent did not take any statement from the Claimant.

51. RW1 testified that she did not take part in the disciplinary hearing but confirmed that the minutes of the hearing confirmed that there was no evidence adduced to support the assertion by one Beatrice (the whistle blower) that she had given Kshs. 200,000/-.

52. She further confirmed that the statement of Beatrice was also not shared with the Claimant prior to her disciplinary hearing. RW1 could not also confirm whether the Claimant was given an opportunity to read through the minutes of the disciplinary hearing as she signed the same on a different day.

53. RW1 further maintained that the Claimant is still indebted to the Respondent for the car loan and that the car was never repossessed by the Respondent. RW1 urged the Court to allow their Counter claim as prayed and dismiss the claim as drawn.

54. Parties thereafter filed and exchanged their written submissions to the Claim.

Submissions by the Parties

55. The Claimant submitted that she was a victim witch-hunt, malice and bad faith for exposing some unethical fellow senior employees who were doing business with the Respondent contrary to the Principles enshrined in the Respondent's policies.

56. She further submitted that her termination was unfair and unlawful as the charges levelled against her were vague and failed to describe with any level of certainty what exact offences she was responding to. The Claimant further maintained that there was never investigations carried out and that there was bad blood between herself and Salama Fikiria, the firm that allegedly conducted the said investigations and therefore the process was not fair ab-initio.

57. The Claimant further submitted that she had a right to a fair hearing, which she was not accorded to by the Respondent herein. To

buttress this argument the Claimant cited the case of **David Wanjau Muhoro Vs Ol Pajeta Ranching Limited (2014)** where the Court held that the principle of fair hearing requires the Employee to be given sufficient opportunity to prepare. The Court went on to state that this entails:-

First, the right to sufficient time, between the date of service of the show cause notice and date of hearing, to prepare for the hearing, second, the right to fully understand the charges. General charges such as 'dishonesty', 'fraud' and 'fraudulent activities' are vague and offer the Employee no opportunity to respond intelligibly. Lastly, the employee has a right to documentation. The employees must be given the documents the employer intends to rely on at the hearing.

58. The Claimant further submitted that she was entitled to be furnished with the necessary documentation for her to adequately prepare for her defence before the commencement of the disciplinary hearing. For emphasis the Claimant cited the case of **Rebecca Ann Maina & 2 Others Vs Jomo Kenyatta University of Agriculture and Technology (2014) eKLR** where the Court held that an employee is entitled to documents in the possession of the employer which would assist them in preparing their defence.

59. She further submitted that the fact that the Respondent admits having not recorded her statement with respect to her alleged offences is clear that if any investigations were done the same were shambolic, null and void. The Claimant maintained that the same were a mockery of modern investigation skills, procedure and principles and urged this Court to disregard the same.

60. The Claimant further submitted that the charges as presented and prosecuted against her failed to meet the threshold required to sustain them as provided under the provisions of Section 43 (1) of the Employment Act, 2007.

61. The Claimant maintained that her summary dismissal was in the circumstances unfair, wrong and unlawful as it was contrary to the provisions of Section 41 of the Employment Act, 2007. For emphasis, the Claimant cited and relied on the decision in the case of **Banking Insurance & Finance Union (Kenya) Vs Co-operative Bank of Kenya (2015) eKLR** where it was held that an employer must give reasons for dismissal, which reasons must be valid and fair. The Court further held that Section 41 of the Employment Act requires an employer to give a fair and honest chance to be heard.

62. The Claimant submitted that the allegations levelled against her being vague she was not able to defend herself. She further maintained that the Respondent proceeded to summarily dismiss her with insufficient evidence and cause. In conclusion the Claimant urged this Honourable Court to find that her summary dismissal was unfair, wrong and unlawful.

63. The Claimant further submitted that her hearing was not fair and relied on the authority of **Mary Chemweno Kiptui Vs Kenya Pipeline Company Limited (2014) eKLR** where the Court held that an employee must be informed of the charges against them, given adequate time to submit a defence and thereafter accorded a fair hearing prior to their termination.

64. The Claimant further submitted that she was never given the minutes of the disciplinary hearing for signing and instead was asked to avail herself at the Respondent's Company on 9th December, 2014 when she was handed her summary dismissal letter after which she was rushed through the said minutes to enable her append her signature to the same. She maintained that this was an unfair practice and relied on the case of **Howard Andrew Nyerere Vs Kenya Airways Limited (2014) eKLR** where the Court held that at the conclusion of the hearing process, minutes arising from the disciplinary process ought to be signed off as soon as possible. It is prudent if the minutes are availed to the employee to read, sign and confirm that indeed, the minutes reflect a true record of the proceedings.

65. The Claimant further submitted that the Counter claim dated 23rd November, 2017 is an afterthought, malicious, ill- conceived and statute barred by dint of Section 90 of the Employment Act. It is the Claimant's contention that the Claim being a continuing injury ought to have been filed within a year and is therefore time barred. The Claimant urged this Honourable Court to dismiss the same with costs to the Claimant.

66. The Claimant further submitted that she is entitled to the reliefs sought in her Memorandum of Claim and urged this Honourable Court to allow the same as pleaded.

Respondent's Submissions

67. The Respondent on the other hand submitted that it had valid reason to summarily terminate the Claimant's employment for failure to abide by its Policies and Procedures thus warranting her summary dismissal in accordance with the provisions of Section 44 (4) (e) of the Employment Act. To buttress this argument the Respondent cited and relied on the case of **Agnes Kavata Mbiti Vs Housing Finance Company Limited (2017) eKLR** where the Court held that:-

"Where an employer has a work place policy that sets out the work requirements and acts that amount to gross misconduct, such must be read in the context of Section 44 of the Employment Act, 2007."

68. The Respondent further submitted that due process was followed as provided under the Employment Act, 2007 and more specifically Sections 41 and 43 of the Act.

69. The Respondent further maintained that there was no legal obligation on it to provide the investigation report as it believed that the Claimant sought the same for purposes of identifying her accusers. The Respondent further maintained that the Notice to Show Cause letter issued to the Claimant clearly highlighted the charges levelled against the Claimant and that she did not request for any documents to respond to the same.

70. The Respondent further maintained that the investigations conducted were conducted in a fair and reasonable manner and thus no need

to supply the Claimant with the report. For emphasis, the Respondent cited the cases of **Dock Workers Union Vs Kenya Ports Authority (2015) eKLR**, **Judicial Service Commission Vs Gladys Boss Shollei & Another (2014)** where Courts held that investigation bodies are under a duty to act fairly. They are however masters of their own procedure.

71. It is on this basis that the Respondent maintained that the Claimant's termination was both procedurally and substantially fair as required under Section 41 of the Employment Act, 2007.

72. The Respondent further urged this Court to find that its actions were indeed reasonable and fair in the circumstances. It urged this Court to be guided by the case of **Nazareno Kariuki Vs Feed the Children Kenya (2013) eKLR** where it was held that:-

“...the role of the Court is not to reconstruct the internal disciplinary procedures adopted by an employer or to improve on the decision by the employer but to check whether in the particular circumstances of the case, the employer acted in a reasonably fair manner.”

73. The Respondent further urged this Court to find that the disciplinary proceedings were conducted in a fair manner as no evidence was availed by the Claimant to prove her assertion of an unfair hearing. For emphasis the Respondent cited the case of **Rebecca Ann Maina & 2 Others Vs Jomo Kenyatta University of Agriculture and Technology (2014) eKLR**.

74. The Respondent further submitted that the Claimant has failed to prove her claim for unfair termination as required under the provisions of Section 47 of the Employment Act, 2007.

75. The Respondent further submitted that the Claimant is not entitled to the reliefs sought in her Memorandum of Claim and urged the Court to dismiss the same.

76. On the Claim for Pension the Respondent maintained that this Court lacks the requisite jurisdiction to hear and determine the same as was highlighted in the Court of Appeal decision in the case of **Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 & Another Vs Ann Wangui Ngugi & 524 Others (2014) eKLR** where the Court held that the *Employment and Labour Relations Court has no Jurisdiction to determiner matters concerning pension schemes and trustees*. The Respondent further submitted that it had no contractual relationship between itself and the Claimant herein as the Claimant opted to work with Alexander Forbes and entered an agreement with the said firm.

77. The Respondent further submitted that the Claimant is not entitled to the relief of 3 months' salary in lieu of notice as her dismissal was on account of gross misconduct and is therefore not legally entitled to payment in salary in lieu of notice. The Respondent further maintained that the notice period as provided in the Claimant's contract is one month and not three as alleged.

78. The Respondent further submitted that the Claimant is not entitled to compensation for unfair dismissal as her dismissal was done in accordance with the provisions of Section 41 of the Employment Act.

79. The Respondent further submitted that in the event this Court finds any breach in the process of termination (which was denied) the one month's salary shall be adequate compensation. For emphasis, the Respondent cited the case of **CMC Aviation Limited Vs Mohammed Noor (2015) eKLR**.

80. On the Counterclaim, the Respondent submitted that the same is not disputed as the Claimant was given a car loan from Standard Chartered Bank Kenya to purchase Motor Vehicle Registration Number KBZ 330C. The Respondent further maintained that it is also not disputed that the Claimant entered into an underwriting agreement to facilitate the repayment of the car loan.

81. The Respondent further submitted that the outstanding balance of the car loan that remains unpaid is Kshs.1,871,908.45, which amount remains unpaid. The Respondent maintains that the Claimant being bound by the terms of the underwriting agreement and should therefore be directed to make the payment. For emphasis, the Respondent cited the case of **John Kinyanjui Gateru Vs Family Bank Limited (2016) eKLR**.

82. In conclusion, the Respondent urged this Honourable Court to enter Judgment in its favour in terms of its counterclaim and dismiss the Claim with costs.

83. I have examined all the evidence and submissions of the Parties herein. The issues for this Court's determination are as follows:-

- 1. Whether there were valid reasons to warrant the Claimant's dismissal.***
- 2. Whether the Claimant was accorded fair disciplinary hearing before being dismissed.***
- 3. Whether the Counter Claim is proved.***
- 4. Whether the Claimant is entitled to the remedies sought.***

Reasons for dismissal

84. The Claimant was suspended vide a letter dated 28/10/2014 indicating that she was to proceed on a 2 weeks suspension from 28/10/2014 to 11/11/2014 to pave way for investigations on allegations of violation of the Respondent's Code of Business Principles.

85. On 18/11/2014 she was served with a Notice to show cause (NTSC) letter indicating that she breached Code of Business Principles (COBP) and or Code Policies as follows:-

“Standard of Conduct: We conduct our operations with honesty, integrity and openness and with respect for the human rights and interests of our employees we shall similarly respect the legitimate interests of those with whom we have relationships.

Business Partner: Unilever is committed to establishing mutually beneficial relation with our supplies customers and business partners. In our business dealings we expect our partners to adhere to business principles consistent with our own.

In that you are alleged to have:-

- *Obtained actual personal gains by accepting bribes or favours from service providers in return for business benefit to such service providers e.g Glimmer Medial Limited.*
- *Abused your position to coerce/pressure suppliers to provide you with gifts/gains contrary to the Unilever Code of Business Principles.*
- *Conducted yourself in an antitrust and unethical manner during the conduct of your duties”.*

86. The Claimant responded to this show cause letter denying allegations therein. She also complained that she did not know who her accusers.

87. On 29.11.2014, the Claimant was served with a letter inviting her to attend a disciplinary hearing on 27th November 2014 at 9 am.

88. Minutes of the said disciplinary hearing are attached. It is in the Minutes that **“Ruth also requested for a copy of the Investigation Report and she was informed that the report will be presented to her as part of the proceedings and she will have an opportunity to respond to all the allegations”.**

89. At page 4 of the Minutes is a statement by one Ruth Mwangangi who explained how one Beatrice had informed her that she had a business interest and she had a way of viewing what prices suppliers quoted with the help of one Ruth who Beatrice was working with and that Beatrice had told this Ruth Mwangangi that the relationship between Beatrice and Ruth was bad but that she had given this Ruth 200,000/= in instalments of 50,000/=.

90. Ruth Mwangangi later reported this incident to Grace Oduor.

91. In response to these allegations, Ruth had indicated how she heard that a company called Glimmer Media was being run by Beatrice Kutondo and she forwarded the information to Kinuthia Mbugua and also called her Line Manager Rukevine and also notified him of the same. Ruth denied receiving 200,000/= from Beatrice.

92. After this hearing, the Claimant was dismissed for gross misconduct in violation of the Respondent’s Code of Business Principles. The details are not given in the dismissal letter.

93. From the Minutes of the disciplinary hearing, the investigation report was sought for by the Claimant and the same was never given. Thereafter, the evidence used to find the Claimant culpable emanates from hearsay evidence given by one Ruth from her conversation with one Beatrice who was never called as a witness.

94. The Claimant indeed asked for proof that she had been given a bribe by Beatrice or Glimmer Media Limited and no proof was provided. There was also number of allegations levelled against the Claimant.

95. Section 43 of the Employment Act 2007 states as follows:-

1) “In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.

96. The law envisages that before dismissal of an employee, the employer should prove he has valid reason for the said dismissal. The reasons must be what the employer believes to exist at the time of dismissal. This existence can only be demonstrated through tangible evidence.

97. In the case of the Claimant, there is no proof she received bribes.

98. The person who is said to have given these bribes i.e. Glimmer Media Limited through one Beatrice was not called as a witness during the disciplinary and even during these Court proceedings. There is no proof of the validity of reasons relied upon by the Respondent to dismiss the Claimant.

Fair hearing

99. On fair hearing, the Claimant was indeed subject to a disciplinary hearing as envisaged under Section 41 of the Employment Act. She however asked to be supplied with the Investigation Report which was the basis of the proceedings and she was told she could not be given the same.

100. The hearing then proceeded without the Claimant being supplied with all documents needed to enable her defend herself appropriately. The hearing therefore fell below the standard required under the law.

Counter Claim

101. On the issue of the Counter Claim, the Claimant admitted she owes the Respondent 1,871,908.75 being money owing for a car loan advanced by the Respondent. The Counter Claim is therefore proved.

Remedies

102. Having found as above, I find that the Claimant was unfairly and unjustly dismissed as per Section 45 (2) of the Employment Act 2007 which provides 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".

103. In terms of the remedies therefore, I award the Claimant:-

1. 1 month salary in lieu of notice = 233,779.95/=.

2. 9 months' salary as compensation for the unfair dismissal = 9 x 233,779.95= 2,104,019.55/=

3. 18 days leave outstanding at the time of termination= 18/30 x 233,779.95 = 140,268/=

4. Salary arrears for December 2014 = 67,871.60

TOTAL = 2,545,939/= less Counter Claim = 674,030.35/=

Less statutory deductions

5. The Claimant is free to collect her pension.

6. The Respondent to pay costs of this suit plus interest at Court rates with effect from the date of this judgment.

Dated and delivered in Chambers via zoom this 28th day of May, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ogada holding brief Prof. Ojienda for Claimant – Present

Onyango for Respondent – Present