



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 946 OF 2016**

**SARAH MOGUSU ..... CLAIMANT**

**V**

**OMEGA RISK MANAGEMENT LIMITED.....RESPONDENT**

**JUDGMENT**

1. Sarah Mogusu (Claimant) was offered employment as a Loss Prevention Officer by Omega Risk Management Ltd (Respondent) around 8 May 2013.
2. On 9 November 2015, the Respondent wrote to the Claimant to notify her of summary dismissal and the reason given was that she was involved in promoting and abetting theft... by dispatching goods which included a suitcase worth shs 6,650 and a bicycle worth shs 7,000 to a customer who had not purchased them.
3. The Claimant was aggrieved and on 23 May 2016 sued the Respondent alleging unfair termination of employment and breach of contract.
4. The Respondent filed a *Defence and Counterclaim* on 14 July 2016 contending that the dismissal was fair and counterclaiming for Kshs 13,650/-.
5. The Claimant filed a *Reply to the Defence and Defence to the Counterclaim* on 21 July 2016 and the Cause was heard on 19 February 2020.
6. The Claimant and the Respondent's Human Resources Manager testified (the witnesses adopted their filed witness statements and also produced exhibits).
7. The Claimant filed her submissions on 13 March 2020 while the Respondent's submissions have no date stamp.
8. The Court has considered the pleadings, evidence and the submissions and identified the Issues for determination as examined hereunder.

**Unfair termination of employment**

**Procedural fairness**

9. Under section 41(2) of the Employment Act, 2007, for *summary dismissal* case to pass the procedural fairness threshold, an oral disciplinary hearing is mandatory.
10. The Claimant was arrested on 4 November 2015 and was released on 5 November 2015.
11. On 9 November 2015, the Claimant tendered to the Respondent's Human Resources Manager a written statement of what transpired on 3 November 2015.
12. In light of section 41(2) of the Employment Act, 2007, the Respondent should have afforded an opportunity to the Claimant to a face to face representation. The opportunity was not made available.
13. The Court is therefore satisfied that the Respondent was not in substantial compliance with the requirements of section 41(2) of the

Employment Act, 2007 in that the Claimant was not afforded an opportunity to make oral representations before the decision to dismiss was taken.

### **Substantive fairness**

14. It was incumbent upon the Respondent to prove, and prove as valid and fair, the reason(s) leading to the summary dismissal of the Claimant.

15. The witness presented by the Respondent relied on records as she was not involved in the process leading to the dismissal of the Claimant. She referred to CCTV footage which was not produced in Court.

16. Amongst the records produced was the statement made by the Claimant. The Claimant admitted in the statement that a colleague had warned her about a suspicious customer and requested her to be on the lookout.

17. According to the Claimant's statement, the colleague who tipped her off about the suspicious customer had gone to get a trolley for a different customer when she was dealing with the suspicious customer.

18. A copy of the receipt presented to the Claimant by the customer was also produced in Court and it showed that the customer had paid for a *red bull energy drink, pure natural honey and amigos crisps*, and not a suitcase or bicycle.

19. In the view of the Court, despite the Respondent not producing in Court CCTV footage of the incident, the statement by the Claimant demonstrates negligence in the performance of her duties which led to uncharged for goods being released.

20. The Court, in the circumstances, finds that the Respondent had valid and fair reasons to dismiss the Claimant.

### **Salary in lieu of notice and compensation**

21. The Court will consequently allow the equivalent of 1-month salary in lieu of notice but decline to award compensation.

### **Breach of contract**

#### **Earned wages**

22. The Claimant sought Kshs 6,520/- being earned salary arrears for September 2015 and Kshs 16,954/- for October 2015.

23. The Claimant filed copies of payslips including for September and October 2015.

24. The Respondent had offered the Claimant earned wages and she is entitled to the same as of right if the same were not paid.

25. The head of the claim is allowed.

#### **Overtime**

26. On account of overtime, the Claimant sought Kshs 64,192/-.

27. The Claimant did not disclose which period the overtime pay claim related to.

28. Copies of payslips filed in Court by the Claimant show that she was consistently getting paid for overtime work.

29. This head of the claim was not proved.

#### **Service gratuity**

30. Copies of the Claimant's payslips filed in Court indicate that she was contributing towards the National Social Security Fund. If by *service gratuity* she meant *service pay* as contemplated by section 35(5) & (6) of the Employment Act, 2007, she is not eligible. If there was a contractual basis for *service gratuity*, the same was not proved. Relief is declined.

#### **Damages for malicious process**

31. The Claimant made a plea for Kshs 200,000/- stated to be damages for malicious abuse of the legal process. No evidential, contractual or statutory anchor for this head of the claim was demonstrated and relief is declined.

#### **Counterclaim**

32. The Claimant dispatched goods which were not paid for but the Respondent did not prove that it paid Tusky's Supermarkets for the loss.

It is the Supermarket which suffered a direct loss.

33. This head of the claim was in the nature of special damages. It was not proved to the required standard.

### **Conclusion and Orders**

34. From the foregoing, the Court finds and declares

(a) Summary dismissal of the Claimant was procedurally unfair but substantively fair.

(b) The Respondent did not prove the Counterclaim.

(c) The Claimant is entitled to earned wages up to date of dismissal and 1-month salary in lieu of notice.

(d) The Respondent to compute and pay earned salary arrears and salary in lieu of notice within 15 days failure to which the amount to attract interest at Court rates from 23 May 2016.

35. Save for the earned salary and salary in lieu of notice, the Cause and Counterclaim are dismissed with no order on costs as Claimant has only partially succeeded.

**Dated, signed and delivered through video/email in Nairobi on this 8<sup>th</sup> day of May 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Osewe instructed by Kuloba Wasike & Co. Advocates

For Respondent Ms. Githinji instructed by Kimanthi & Associates Advocates

Court Assistant Judy Maina