



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

**CAUSE NUMBER 224 OF 2018**

**BETWEEN**

**ELIZABETH MUNGELI NTHENGE .....CLAIMANT**

**VERSUS**

**INSIGHT MANAGEMENT CONSULTANTS LIMITED....RESPONDENT**

Rika J

Court Assistant: Benjamin Kombe

Mudao & Company Advocates for the Claimant

Waithera Ngige & Company Advocates for the Respondent

**JUDGMENT**

1. The Claimant filed her Statement of Claim on 12<sup>th</sup> April 2018. She avers, she was employed by the Respondent as a Promoter, in a fixed term contract of 1 year, commencing 1<sup>st</sup> November 2017, ending 31<sup>st</sup> August 2018. She promoted sale of milk, for Respondent's Client, a milking business. Her contract was terminated by the Respondent with effect from 9<sup>th</sup> January 2018. She was advised that the Respondent no longer required her services. She avers, termination did not follow a fair procedure. She seeks Judgment against the Respondent for: -

- a. 1 - month salary in lieu of notice at Kshs. 15,000.
- b. 8 months' salary in compensation for unlawful termination at Kshs. 120,000.
- c. Salary up to 9<sup>th</sup> January 2018 at Kshs. 5,192.
- d. Monthly allowance over the same period at Kshs. 1,000.
- e. Airtime allowance over the same period at Kshs. 250.
- f. Monies deducted and not remitted to the N.S.S.F February 2017 to January 2018 at Kshs. 7,200.

Total...Kshs. 146,642.

- g. Declaration that termination was unfair and unlawful.
- h. Costs.
- i. Interest.

j. Any other suitable relief.

2. The Respondent filed its Statement of Response on 13<sup>th</sup> June 2018. Its position is that termination was in accordance with the law, and the contract which governed the Parties' relationship. The Claimant was paid terminal dues in accordance with her contract. Her Equity Bank Account was erroneously credited 2 months' salary, something the Respondent took into account, in assessing her final dues. She declined further offer of employment from the Respondent, unlike other Employees who worked with her. The Respondent urges the Court to dismiss the Claim with costs.

3. The Claimant testified on 11<sup>th</sup> December 2019. She told the Court that she had previously worked for the Respondent, beginning 2016, on short term contracts. She promoted milk sales. No reason was given to her on termination, save that her services were no longer needed. The Respondent was still recruiting other Employees. She was paid notice only after she filed the Claim. She was paid Kshs. 11,000, while her salary was Kshs. 15,000. N.H.I.F deductions were made but not remitted. She seeks compensation based on 8 months left in her contract. She did not receive any double salary in error, on termination. Cross-examined, the Claimant told the Court that her contract was for 10 months. She did not work for any other Employer. She did not involve her Husband in her dispute with the Respondent. He enquired from the Respondent, why his Spouse's contract was terminated. She was paid transport and airtime allowance. She has not complained to the N.H.I.F about unremitted contributions. Her pay slip showing she received double salary on termination, is erroneous.

4. Former Human Resource Officer of the Respondent, Hellen Roberta Akinyi, gave evidence for the Respondent on 3<sup>rd</sup> March 2020. She confirmed that the Claimant worked for the Respondent, as a Promoter. Her contract had a probation clause. Probation would last till 31<sup>st</sup> January 2018. Her contract was terminated while still on probation. She was paid 1-month salary in lieu of notice, salary for days worked in January 2018, and leave days. The Respondent did not declare redundancy. Her contract was terminated on 5<sup>th</sup> January 2018. She did not work up to 9<sup>th</sup> January 2018. Cross-examined, Akinyi told the Court she did not know that the Claimant previously worked from the year 2016. Her contract of 2016 similarly had a probation clause. In 2016, she worked for more than 1 year. Her last contract was terminated on 9<sup>th</sup> January 2018. She was advised that her services were no longer required. The only sum shown to have been paid to the Claimant on termination, is Kshs. 11,738. There was no evidence of advance salary paid to the Claimant. There is no evidence showing the Claimant was offered fresh employment by the Respondent.

**The Court Finds: -**

5. Evidence from both sides, is in agreement, that the Claimant initially worked for the Respondent from the year 2016. Her contract of 2016 shows she worked as a Promoter.

She was offered another contract on 1<sup>st</sup> November 2017. She was still in the position of Promoter.

6. The 1<sup>st</sup> contract had a probationary period of 3 months. The 2<sup>nd</sup>, also contained a clause on probation of 3 months. The Court does not agree with the Respondent that the Claimant was on valid probation, when termination took place on 9<sup>th</sup> January 2018. She had served probation successfully, in the same position, under the 1<sup>st</sup> contract. Probation clause in the second contract was unnecessary, and would amount to an unfair labour practice, under Article 41 of the Constitution of Kenya. It cannot be endorsed by this Court. The Respondent would only have justification in placing the Claimant under probation in the 2<sup>nd</sup> contract, if the role she was to be assigned, had changed. The Claimant had been confirmed in her role as a Promoter, under the 1<sup>st</sup> contract. The purpose of probationary period is to allow the Employer to assess the skills and suitability of the Employee in a given role. After the Employer is satisfied, the way is paved for a definitive contract. The Employee is confirmed as fit for the role. What purpose is served by a 2<sup>nd</sup> round of probation, in the same role, under the same Employer? Fresh probation would only be necessary if there are two different roles assigned to the Employer, the 2<sup>nd</sup> being fundamentally different from the 1<sup>st</sup>. Insertion of a probation clause, where the role has not changed, in a 2<sup>nd</sup> or extended contract, cannot have any validity. Section 42 of the Employment Act therefore, has no applicability in this dispute.

7. The Respondent told the Claimant that her contract was terminated because her services were no longer required. At the same it was suggested in the evidence of the Respondent that the Claimant declined fresh offer of employment. Whatever the actual reason, it is the responsibility of the Employer, under Section 43 of the Employment Act, to prove the reason or reasons, justifying termination. The

Respondent did not discharge this obligation.

8. The Claimant's salary was Kshs. 15,000 monthly. It is described in the contract as being inclusive of house allowance. There are no other allowances shown to be payable, either through the contract or the pay slips. The claims for unspecified monthly allowance, and airtime allowance are declined.

9. There is similarly no evidence on contributions to N.H.I.F, which were deducted and not remitted. The N.H.I.F records exhibited by the Respondent show the Claimant's remittance listed at number 54. There is evidence that the Claimant received adequate, probably much more than adequate, salary for days worked in the month of January 2018.

10. The Claimant's last contract was for a period of 10 months. She had worked in the same position in the past. Her contract had been renewed. She has not justified her prayer for compensation based on 8 months left in her contract. Parties had a history of engaging in **short term contracts. They made provision for premature termination. The contract could be terminated even before the end of the contracted period. In the circumstances, the Court awards compensation to the Claimant, equivalent of her 4 months' salary at Kshs. 60,000.**

11. Her last pay slip shows she received notice pay.

IT IS ORDERED: -

**a. Termination was unfair.**

**b. The Respondent shall pay to the Claimant compensation for unfair termination at Kshs. 60,000.**

**c. No order on the costs.**

**d. Interest allowed at 16% per annum from the end 30- day stay of execution period.**

**e. Stay of execution granted for 30 days.**

**Dated, signed and released to the Parties, at Chaka, Nyeri County, under Covid-19 Ministry of Health and Judiciary Guidelines, this 29<sup>th</sup> day of July 2020**

**James Rika**

**Judge**