



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 567 OF 2017**

**LAO.....CLAIMANT**

**VS**

**COMPACT FREIGHT SYSTEMS LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. LAO, the Claimant in this case lists the issues in dispute as unfair termination, discrimination based on sex, unprovoked demotion and non-payment of terminal dues and contractual benefits.
2. The Claimant states her case in a Memorandum of Claim dated and filed in court on 12<sup>th</sup> July 2017. The Respondent's Statement of Defence is dated 18<sup>th</sup> October 2017 and amended on 23<sup>rd</sup> January 2019.
3. When the matter came up for trial, the Claimant testified on her own behalf and the Respondent called its General Manager, Peter Ng'ang'a as well as Audit and Finance Manager, George Mwangi.

**The Claimant's Case**

4. The Claimant states that she was employed by the Respondent in the position of Human Resource Officer from May 2015 until 22<sup>nd</sup> August 2016, when her employment was terminated.
5. The Claimant claims that almost immediately after her employment, the Respondent's General Manager commenced a series of demotions against the Claimant and at the time of the termination of her employment, the Claimant's position was equivalent to that of Yard Clerk.
6. The Claimant states that on 25<sup>th</sup> August 2016, she was at work carrying out her duties when she was called to the office of the Financial Controller, George Mwangi.
7. The Claimant found George Mwangi in the company of two colleagues, David Mwangi and Francis Mutuku. The Claimant claims that George Mwangi, in the presence of the other two colleagues, sexually harassed her by fondling her breasts.
8. The Claimant states that she fought off her assailant and went home. The following day, 26<sup>th</sup> August 2016, she reported the incident to the General Manager who summoned the assailant who denied the allegations.
9. The Claimant avers that the General Manager was quick to dismiss the incident, citing lack of evidence.
10. The Claimant states that the aggression and resultant embarrassment triggered an asthmatic attack upon which she rushed home to get her inhaler; she claims to have called the office to explain her condition and did not return to the office.
11. The following day, the Claimant reported to work but was informed by the Executive Secretary that the General Manager had directed that she should not be allowed entry until the General Manager, who was out of the country, returned.
12. On 30<sup>th</sup> August 2016, the Claimant was called to the office and handed a letter dated 26<sup>th</sup> August 2016, terminating her services.
13. The Claimant pleads the following particulars of sexual harassment;

- a) The Respondent's employee, George Mwangi used his position and lured his subordinate into his office;
- b) The said George Mwangi, in the presence of two other colleagues, proceeded to fondle the Claimant's breasts without her consent;
- c) The Claimant reported the incident to the General Manger who dismissed it claiming lack of evidence;
- d) The Respondent further unfairly and un-procedurally terminated the Claimant's employment after she reported the incident;
- e) The Respondent as per the Employment Act, remains liable for sexual harassment at the work place.

14. The Claimant submits that the termination of her employment was unlawful and unfair.

15. She further submits that the termination was provoked by her reporting sexual harassment by a senior staff member.

16. The Claimant particularises her claim as follows:

- a) One month's salary in lieu of notice.....Kshs. 35,000
- b) Leave earned but not taken.....5,833
- c) Salary for the month of August.....35,000
- d) Gratuity/ service pay.....26,250
- e) Damages for unfair termination.....587,083
- f) Damages for sexual harassment
- g) An order directing the Respondent to adopt and implement a sexual harassment policy
- h) Costs plus interest

**The Respondent's Case**

17. In its Statement of Defence as amended on 23<sup>rd</sup> January 2019, the Respondent admits that the Claimant was its employee from 10<sup>th</sup> July 2015 to 26<sup>th</sup> August 2016.

18. The Respondent states that the Claimant's employment was lawfully and fairly terminated by letter dated 26<sup>th</sup> August 2016.

19. Regarding the claim for sexual harassment, the Respondent states that at no time were any allegations brought to its attention.

20. The Respondent states that the only terminal benefits due to the Claimant are the following:

- a) Salary for the month of August.....Kshs. 35,000
- b) One month's salary in lieu of notice.....35,000
- c) Leave earned but not taken.....5,833
- d) Gratuity/service pay for 1 year.....17,000

21. The Respondent further concedes that the Claimant is entitled to a certificate of service.

22. The Respondent states that the Claimant, having been a member of the Compact Sacco Limited and having been advanced two loan facilities of Kshs. 60,000 each, in May 2016 and August 2016, the Claimant is in arrears to the tune of Kshs 100,000.

23. The Respondent therefore maintains that the Claimant owes a loan balance of Kshs. 6,677.

**Findings and Determination**

24. There are three (3) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;

b) Whether the Claimant has established a case of sexual harassment;

c) Whether the Claimant is entitled to the remedies sought.

### **The Termination**

25. The termination of the Claimant's employment was communicated by letter dated 26<sup>th</sup> August 2016 stating as follows:

*"Dear Madam*

**RE: TERMINATION OF EMPLOYMENT**

*The above matter refers.*

*Your employment with us is based on an oral agreement. Your salary is paid on a monthly basis thereby making the said employment terminable by either party giving another one a one month notice on (sic) paying the other party one month salary in lieu of one month notice.*

*We have reviewed our operations and no longer (sic) in a position to retain you in our Company. We hereby terminate the same by paying you one month salary in lieu of one month notice.*

*In light of the above, you will be entitled to the following;*

*Salary for the month of August 2016*

*One month salary in lieu of notice for the month of September*

*Salary for five (5) leave days which remain unutilized*

*The above will be paid to you upon you clearing with the SACCO appropriately.*

*In the meantime, ensure that you hand over the Staff Medical Card and any other Company item that is in your custody before leaving the company premises.*

*We wish you best of luck in your future endeavors.*

*Yours faithfully*

*(signed)*

**PETER KAHURA**

**ACCOUNTS DEPARTMENT.**"

26. In this letter, the Respondent does not disclose any reason for terminating the Claimant's employment. All the Respondent states is that the Claimant had been engaged on an oral contract and that the Company, having reviewed its operations, was no longer in a position to keep the Claimant in employment.

27. Under the Employment Act, 2007 every termination of employment must have a reason and termination by notice cannot pass for such a reason. This position applies for both written and oral contracts of employment.

28. In his testimony before the Court, the Respondent's Audit and Finance Manager, George Mwangi stated that the Claimant was in fact declared redundant. If that be the case, the Respondent was under a duty to follow the stringent conditions set under Section 40 of the Employment Act, which I reproduce here below:

**40. (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions –**

**(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;**

**(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;**

*(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;*

*(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;*

*(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;*

*(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and*

*(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.*

29. In its decision in *Fatma Ali Dabaso v First Community Bank Limited [2018] eKLR* this Court held that any termination on account of redundancy that ignores the instructions of Section 40 of the Employment Act is an unfair termination within the meaning of Section 45 of the Act.

30. The Respondent made no attempt to comply with any of the conditions set by law and the termination of the Claimant's employment was therefore substantively and procedurally unfair.

### **Sexual Harassment?**

31. The Claimant accused the Respondent's Audit and Finance Manager, George Mwangi of sexually harassing her by fondling her breasts, in the company of two colleagues, David Mwangi and Francis Mutuku.

32. The Claimant claims to have reported the harassment to the General Manager, Peter Ng'ang'a who denied ever having received such a report. Further, the alleged aggressor, George Mwangi denied having harassed the Claimant.

33. In the face of these denials and given that the Claimant did not call any independent evidence to back her word, the Court found no basis to make a finding in the Claimant's favour on this limb. The Court however noted the admission by the Respondent's General Manager that there was no sexual harassment policy in place and will make an appropriate order in this regard.

### **Remedies**

34. Ultimately, I award the Claimant six (6) months' salary in compensation for unlawful and unfair termination of employment. In arriving at this award, I have taken into account the Claimant's length of service, coupled with the fact that she did not, in any way, contribute to the termination. I have also taken into account the Respondent's blatant violation of the law in effecting the termination.

35. I further award the Claimant one (1) month's salary in lieu of notice, salary for August 2016 and leave pay for 5 days.

36. The claim for gratuity/service pay is admitted and is payable.

37. I therefore enter judgment in favour of the Claimant as follows:

a) 6 months' salary in compensation.....Kshs.	210,000
b) 1 month's salary in lieu of notice.....	35,000
c) Salary for August 2016.....	35,000
d) Leave pay for 5 days (35,000/30x5).....	5,833
e) Gratuity/service pay for 1 year (35,000/30x15).....	<u>17,500</u>
<b>Total.....</b>	<b>303,333</b>

38. This amount will attract interest at court rates from the date of judgment until payment in full.

39. I further issue an order directing the Respondent to adopt and implement a sexual harassment policy within the next three (3) months from the date of this judgment.

40. The Claimant is entitled to a certificate of service and costs of the case.

41. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 16<sup>TH</sup> DAY OF JULY 2020**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Kitonga for the Claimant

Miss Kiptum for the Respondent