



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 1712 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**MICHELLE ERLEEN MUTHONI NYAGA.....CLAIMANT**

**VERSUS**

**SATGURU TRAVEL AND**

**TOURS SERVICES LIMITED.....RESPONDENT**

**JUDGMENT**

The Respondent is a limited liability company incorporated in the Republic of Kenya and carrying on the business of destination management and tours and travel agency.

Vide the letter of 21<sup>st</sup> September 2011, the Claimant was employed by the Respondent as a senior tour's consultant at a net salary of Kshs.50,000.00 and 1% commission made on fare tickets and tour packages. She was summarily dismissed on 29<sup>th</sup> November 2014 through a text message she received from the Respondent's regional manager.

The Claimant avers that she was never accorded due process or given a reason for her summary dismissal hence her termination was wrongful, unprocedural and unfair. As a result, she instituted these proceedings vide the Memorandum of Claim filed on 25th August 2016, to which the Respondent failed to enter appearance or file a response. She sought the following reliefs–

- a. A declaration that the termination of the Claimant by the Respondent was unfair.*
- b. Exemplary damages for unfair and unprocedural termination.*
- c. Employment dues for the month of November 2014.*
- d. Unpaid 10 annual leave days.*
- e. Payment in lieu of notice.*
- f. Service pay at the rate of 15 working days for the 3 years of service.*
- g. Commission at the rate of 1% of the fees brought in by the Claimant to the Respondent for a period of 17 months totaling Kshs. 850,000.00.*
- h. Unremitted NHIF deductions calculated at Kshs.320.00 for 16 months.*
- i. Housing allowance at the rate of 20% of the gross salary for the 3 years of service.*
- j. Certificate of service.*

The Claimant testified that on the day she received the summary dismissal text message, she had gone to see a client with the Project Manager's knowledge. It was her testimony that she was not required to be in the office all days of the week.

The Claimant avers that in June 2013, the Respondent stopped paying her commissions despite having duly earned them. This remained outstanding even at the time of her summary dismissal. Further, she testified that she never received her terminal dues as all unpaid balances from the Respondent's client who had credit facilities with it were deducted from her dues. It was also her testimony that the Respondent never remitted any of her NHIF contributions from August 2013 to November 2014 yet deductions had been made from her salary.

She explained that the commission payable was worked out every month. Thereafter, she would sign the petty cash before collecting the same. She informed this Court that the petty cash vouchers remained with the accountant.

It was the Claimant's evidence and submission that she had been unable to find employment because the Respondent never issued her with a certificate of service or recommendation letter, contrary to the provisions of Section 51 of the Employment Act. She also testified that she was never paid house allowance and which item remained blank in her pay slip.

The Claimant submitted that she was entitled to the unremitted NHIF contributions having adduced a NHIF statement proving that the Respondent last remitted NHIF contributions on 23<sup>rd</sup> August 2013. She further submitted that she was entitled to payment of the 10 leave days she had not utilized, the same being an entitlement under Section 28(b) of the Employment Act.

The Claimant urged this Court to award her the unpaid commissions that the Respondent had neglected to pay as her sales peaked, with the promise that an incentive would be arranged to reward her for the good work. Lastly, she submitted that having worked three full years with salary payment of periodic instalments of one month, she was entitled to service gratuity.

### **Analysis and Determination**

I have carefully considered the claim, the Claimant's evidence together with her submissions and find that the issues for determination before this Court are: whether the Claimant's employment was wrongfully and unfairly terminated and whether the Claimant is entitled to the reliefs sought.

### **Termination of Employment**

The Claimant submitted that she was unfairly and un-procedurally dismissed from employment contrary to the provisions of sections 41 and 43 of the Employment Act, because of the Respondent's failure to afford her a hearing or give her the reasons that prompted the dismissal. She laid emphasis on the case of **Mary Chemweno v Kenya Pipeline Company Limited [2014] eKLR** where it was held that an employee had the right to be subjected to the mandatory disciplinary proceedings as outlined under section 41 of the Employment Act even in a case of summary dismissal.

The Respondent did not enter appearance or file a response despite service of the summons, the Memorandum of Claim which was served upon it twice, a hearing notice and a mention notice. The claim was certified ready for hearing as an undefended claim and was heard in the absence of the Respondent.

It is now trite law that where an employer seeks to summarily dismiss an employee, the employee must be accorded procedural and substantive fairness. (See **Mary Chemweno v Kenya Pipeline Company Limited [Supra]**, **Walter Ogal Anuro v Teacher Service Commission [2013] eKLR** and **Alphonse Maghanga Mwachanya v Operation 680 Limited [2013] eKLR**).

In the absence of evidence from the Respondent to controvert the Claimant's allegation that she was denied an opportunity to be heard or given a reason for termination, the said allegations remain uncontroverted. As such, I find that the termination of the Claimant's employment was substantively and procedurally unfair.

### **Reliefs**

The Claimant sought exemplary damages for unfair and unprocedural termination. Though the Claimant has proved that the termination of her employment was unfair and wrongful, I do not find that the Respondent's actions were arbitrary and oppressive so as to justify an award of the same. In the case of **Godfrey Julius Ndumba Mbogori & Another v Nairobi City County [2018] eKLR** the Court of Appeal observed as follows—

*“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of **Rookes v Barnard [1964] AC 1129** where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are: i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute”.*

Section 12(3)(v) of the Employment and Labour Relations Court Act grant this Court the power to issue an award of compensation in any circumstances contemplated under the Act or any written law. Further, Section 49(1)(c) of the Employment Act grants this Court the power to issue an award not exceeding an employee's twelve months' gross monthly wage or salary at the time of dismissal as compensation where the summary dismissal is unjustified.

The Claimant is awarded 6 months' salary as compensation for unfair termination of employment. In granting this award, I have considered the Claimant's length of service to the Respondent and the fact that she was summarily dismissed without being accorded due process or reason for termination. I thus award the claimant **Kshs.400,500.00** as compensation based on her gross salary of Kshs.66,750 pm.

The claim for employment dues for November 2014 fails for want of particularization and proof, being a claim for special damages.

Even though the claimant did not prove the sum of Kshs.850,000 she claimed as commission, it is clear that she was entitled to the same as is clearly stated in her letter of appointment. **The Respondent is directed to tabulate and pay the same to the claimant within 60 days.**

This court declines to award service pay as it has no justification. The Claimant was a member of NSSF where her contributions were made as evidenced in her pay slips. She made no complaints about non-remittance of NSSF hence is estopped from claiming service gratuity by dint of Section 35(6) of the Employment Act.

Having found the termination of the claimant's employment unfair, she is awarded one month's salary in lieu of notice of **Kshs.66,750.00**, in the absence of evidence controverting the Claimant's evidence that she was not issued with the same. Further, it was a term of the Claimant's contract under clause 4 that either party would terminate the contract by giving one month's notice or pay in lieu of notice.

The claim for payment of house allowance fails as the Claimant was paid a consolidated salary. The sum of Kshs.50,000.00 was her net salary and not gross salary. Her contract was specific that no other emoluments were payable to her. Clause two of the Claimant's employment contract read as follows–

*“You will be paid in accordance with the consolidated rates agreed between yourself and the undersigned. Your initial salary during probation will be Net 50,000/- per month +1% on sale you bring in (on fares for tickets) & the same also on tours except the Park fees element (or where the services are sold NETT &/or with margins less than 5% to the company). Your salary will be paid monthly in arrears. Any statutory deduction will be made at source.*

*The above may be reviewed from time to time at the sole discretion of the Company and will be reflective of your performance. No other emolument and/or benefits are payable to you and it is a condition of your (sic) that the aforementioned remuneration encompasses also a consideration of any daily, extended, extra hours or public holiday you may be called upon to perform on the dictates of your job.”* [Emphasis added]

The claim for 10 annual leave days is awarded as claimed. The Respondent did not adduce any leave records to show the number of leave days accruing to the Claimant yet it was the custodian of the same by dint of section 74(1)(f) of the Employment Act. I award the claimant ( x 10) **Kshs.25,673.08** on account of accrued annual leave.

The Claimant provided an NHIF statement to show that the Respondent last paid her NHIF contributions in July 2013. In the absence of evidence to show that the Claimant's NHIF contributions from August 2013 to November 2014 which were recovered from her salary were remitted, the Respondent is hereby directed to refund the unremitted dues to the Claimant being **Kshs.5,120.00**.

**In conclusion, judgment is hereby entered in favour of the claimant against the Respondent in the total sum of Kshs.492,923.08 plus commission which is to be tabulated by the Respondent within 60 days from the date of this judgment.**

The Respondent is directed to issue the Claimant with a Certificate of Service whose contents are in line with the provisions of Section 51(2) of the Employment Act.

The Respondent shall bear the costs of this suit, and interest thereof at court rates from date of filing suit on all heads of award except for compensation where interest shall accrue from date of judgment.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1<sup>ST</sup> DAY OF DECEMBER 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**