



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2200 OF 2012**

*(Before Hon. Lady Justice Maureen Onyango)*

**LILLIAN AKINYI OTIENO.....CLAIMANT**

**VERSUS**

**SC JOHNSON AND SON KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant, Lilian Akinyi Otieno, instituted this claim by a Statement of Claim dated 24<sup>th</sup> October 2012 filed on 01<sup>st</sup> November 2012. She seeks a declaration that the termination of her employment was unfair, payment of her terminal benefits, costs of the suit, interest at prevailing commercial rates and any other relief this Honourable Court may deem just and fit to grant, against her former employer, SC Johnson & Son Kenya Limited, the respondent.

She avers that she was employed by the Respondent as a Marketing Assistant from 1<sup>st</sup> July 2004 to 4<sup>th</sup> June 2012 with her last basic monthly salary being Kshs. 73,399/= when the Respondent unfairly terminated her employment. That she industriously and efficiently served and/or applied her experience in the service of the Respondent but on 05<sup>th</sup> April 2012, she received an undated notice to attend a Disciplinary Enquiry to be held on 10<sup>th</sup> April 2012 to investigate an alleged offence of defrauding the company by misappropriating and embezzling donations meant for schools resulting in a loss of Kshs.58,233/=. That the enquiry stemmed from the fact that as the Marketing Assistant of the Respondent she was involved in the Kiwi Collect for Cash schools program in 2011 where participating schools would be given cash rewards for schools with the highest collection of used kiwi cans.

That on 15<sup>th</sup> June 2011, she and her supervisor, an agency representative, went to Pandpieri Primary School in Kisumu to award the school as it had won Kshs.67,733/= for being the highest collector. That the Deputy Headmaster being the coordinator of the program at the school gave her team a list of items to buy for the school for its feeding program because teachers of the school felt the Head Teacher had misused the previous year's Collect for Progress funds and at that time, wanted something that would benefit the whole school. That she went to Kibuye Market accompanied by her supervisor and their driver and bought 2 bags of maize (80kg), 1 bag of rice (30kg), 1.5 bags of beans and 4 tins of cooking fat and handed over the items together with the balance of Kshs.12,000/= to the Head teacher. That the accounting documents for the purchases were approved by senior officials of the Respondent being the Marketing Manager, Management Accountant and Finance Director and she was therefore confident the Enquiry would clear her since no embezzlement or fraud would be proved against her. That she was shocked when she received the verdict of the disciplinary enquiry on 4<sup>th</sup> June 2012 recommending her summary dismissal without considering the clear explanation she gave at the hearing and further, that the enquiry should have treated the Head Teacher in attendance as a hostile witness.

She appealed the decision on 07<sup>th</sup> June 2012 and the appeal was heard on 13<sup>th</sup> June 2012 and 03<sup>rd</sup> July 2012 but the enquiry later confirmed its verdict that she had embezzled the money. That the chairman stated in the report that the Claimant's actions were conducted without a written policy by the Respondent, which to her is a charge that had not been levelled at her in the initial enquiry. That the unfair decision to terminate her employment was oppressive, spiteful, discriminative, tainted with illegality and premeditated as the Respondent had no valid reason to terminate her employment. She listed the particulars of illegality on the part of the Respondent to include:

- 1) Refusing to accept evidence of the witnesses who confirmed that they received cash and foodstuffs.
- 2) Basing proof of guilty on a balance of probability which is a very low standard of proof considering the charge against the Claimant of embezzlement.
- 3) Acting despite no proof being tendered of the Respondent losing any money.

- 4) Not demonstrating impartiality in both the initial hearing and the appeal.
- 5) Summoning the Claimant to defend herself in a sham enquiry while knowing that the Claimant's fate had already been predetermined.
- 6) Finding the Claimant guilty of a different offense other than the one she was charged with.

That she was unfairly terminated because the Respondent dismissed her on grounds it knew were unfounded or unreasonable and that it failed, refused and or ignored to impose other forms of punishment provided for. That the Respondent did not also subject her supervisor to the same treatment yet she was supervised and did not act outside her mandate and that the Respondent employed unfair trade practice. Further, that she was targeted for victimization by the Respondent who devised schemes to maliciously get rid of her from its employment. She listed the particulars of malice as producing evidence during the appeal hearing which was not produced during the initial enquiry in violation of the Respondent's Appeal procedures contained in the Respondent's Code of Practice; and appointing a chairman of appeal who would not in the circumstances be impartial.

The Claimant seeks monetary compensation as follows:-

- a) 12 months' salary being Damages for..... unfair termination (73,399 x 12).....Kshs.880,788/=
- b) Service Pay (73,399 x 8 years x 15/30 days).....Kshs.293,596/=
- c) One month's salary in lieu of notice..... Kshs.73,399/=

**Total            Kshs. 1,247,783/=**

### **Respondent's Case**

On 4<sup>th</sup> April 2013, the Respondent filed its Memorandum of Defence dated 02<sup>nd</sup> April 2013 stating that it initially employed the Claimant on contract basis as a Hair Technician before she was later permanently employed as a Marketing Assistant on 01<sup>st</sup> October 2008 at a monthly salary of Kshs.51,038/=.

It avers that it received two anonymous letters in April and September 2011 which cited the Claimant's involvement in fraudulent activities and upon investigating the same, it was revealed that the confirmation letters from the participating schools in the Kiwi Collect programme were falsified. Further, that these schools were not granted cash donations when the Claimant had confirmed that they were granted. That the Deputy Head Teacher for Pand Pieri Primary School confirmed that there was no Kshs.66,733/= received while the head teachers of Mwithumwiru Primary School and Kaaga Primary School confirmed that no cash had been received as stated in the documents submitted by the claimant. That where it was contended the schools had received foodstuffs, the Claimant could not account for the expenditure of purchasing such foodstuffs.

It further avers that the disciplinary committee found a lot of inconsistencies in the expense claim forms and details of fund disbursements to all schools. That the Claimant's actions of inserting amounts to the documents knowing the same would be questioned by the auditor was fraudulent and an attempt to conceal her activities. That it paid the Claimant her dues consisting of salary up to 04<sup>th</sup> June 2012 and 39.3 outstanding leave days with the payments amounting to Kshs. 102,284/= and that she acknowledged receipt of the sum as final settlement of all her claims for terminal benefits. That she executed a discharge voucher releasing the Respondent from all claims arising out of her employment with it except dues from the provident fund which is payable by the trustees of the scheme. It also avers that the Claimant's appeal failed because no new grounds were raised to change the decision taken against her. That it received a demand letter from her advocate demanding inter alia that the Claimant's summary dismissal be reduced to normal termination.

It is averred by the Respondent that the Claimant was aware of company policy that the winners and participants of the Kiwi Collect should be given cash prizes and that she acted in breach of established procedures. That it therefore had no alternative but to summarily dismiss her from employment as it could not tolerate the serious breach of trust. The respondent denied the particulars of illegality and malice as alleged by the Claimant stating that the same are baseless. The respondent avers that since the termination of her employment was lawful and fair, she is not entitled to any monetary compensation.

### **Evidence**

On 3<sup>rd</sup> July 2018, this Court granted the parties leave to proceed by way of documents and written submissions. The claimant failed to file her written submissions.

### **Respondent's Submissions**

The Respondent submits that it had valid reasons in terminating the Claimant's employment as per Section 44 (4) (g) of the Employment Act which included her falsifying of documents. It refers to appendix 4a on page 12 of its Memorandum of Reply as one such falsified document. That she admitted to falsifying documents at the disciplinary hearing when she realised that the confirmation letters submitted by the headmasters of the participating schools had been left blank and that the admission was evidence of her culpability for fraud because if she had not been involved in the embezzlement she would not have falsified the said documents.

It also submits that the Claimant was notified of the charges levelled against her in a language she understood and that she was then invited

to a disciplinary inquiry and notified of her right to be accompanied to the inquiry by a fellow employee of her choice. That she was further given an opportunity to explain her story during the enquiry and a chance to call witnesses. That after the enquiry confirmed her culpability and she was summarily dismissed, she was notified of her right to appeal. That both the initial and the appeal meetings had minutes signed by the Claimant and the minutes have not been challenged. That she was therefore given a fair hearing.

The Respondent further submits that the Claimant is not entitled to any declaration of unfair termination or to 12 months' salary as damages for unfair termination because the said termination was substantially and procedurally fair. That she is not entitled to service pay by dint of Section 35(6) (d) of the Employment Act because as evidenced by the Claimant's annexure 8, she was a contributing member of NSSF. That she is not entitled to 1 month's salary in lieu of notice as she was summarily dismissed and not terminated from employment and that neither is she entitled to costs of the suit nor interest thereon because she has no valid cause of action and is dragging the Respondent into a suit that is tantamount to an abuse of the court process.

The respondent finally submits that it complied with the requirements of Sections 43 and 45 of the Employment Act in ensuring that termination was validly, fairly and procedurally done and that the reason for termination was based on the Claimant's misconduct which is within the threshold of Section 45(2)(b)(i) of the Employment Act. That the Claimant failed to deliver based on the Respondent's operational requirements in terms of Section 45(2)(b)(ii) when she held a position of trust as a custodian of its finances and that was expected to discharge her duties diligently. She instead occasioned loss to the respondent through her fraudulent actions. It cites **Civil Appeal No. 293 of 2015, Cooperative Bank of Kenya Limited vs Banking Insurance & Finance Union (K) [2017] eKLR** where the Court of Appeal in allowing an appeal where an employee was dismissed on account of embezzlement held thus:

*“In addition, the following passage from the Canadian Supreme Court decision in **Mc Kinley vs. B.C. Tel. (2001) 2 S.C.R. 161** was cited with approval the aforementioned case:-*

*“Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.”*

*We like the Trial Judge do find that there was no evidence that Samuel had learnt about the embezzlement in November 2012 or before 11<sup>th</sup> December 2012. However, we part company with the trial Judge by finding that there was valid reason for Samuel's termination. We say so because despite maintaining that he discovered the missing amount of Kshs.576,000 on 11<sup>th</sup> December, 2012 he admitted that he had signed a reconciliation form with respect to the ATM in question indicating the difference on the same date as Kshs.7,000 instead of the actual missing amount. Equally, he admitted that both he and Jacob had not been complying with the operations manual on dual custody which required both of them to physically count and verify the amounts in the ATMs and fill in the reconciliation forms. He stated that at times Jacob would fill in the reconciliation form and he would sign without verifying or they would separately count the amounts in the ATMs. Samuel's conduct clearly went into the core of the employment relationship which was based on mutual trust. It was such that it could not be ignored or wished away because it called into question Samuel's integrity and reliability which is cardinal taking into account the nature of the appellant's business. In the circumstances we are satisfied that the appellant was justified in dismissing Samuel for the reasons outlined in the dismissal letter...”*

The Respondent prays that this Honourable Court finds the Claimant's termination lawful and fair and upholds its decision to terminate the Claimant and that it further prays this Court dismisses the Claimant's suit with costs to the Respondent.

The claimant having failed to file submissions in support of her claim, the claim has not been proved with the result that the same is dismissed.

There shall be no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4<sup>TH</sup> DAY OF FEBRUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**