



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1974 OF 2014**

**JOYCE NJERI MATHU.....CLAIMANT**

**VERSUS**

**TONY MONDA (IN HIS CAPACITY AS**

**THE CHAIRMAN IMPALA CLUB).....1<sup>ST</sup> RESPONDENT**

**GODWIN KARUGA (IN HIS CAPACITY AS**

**THE VICE CHAIRMAN IMPALA).....2<sup>ND</sup> RESPONDENT**

**PHANUEL MATHENGE (IN HIS CAPACITY AS**

**THE CLUB SECRETARY IMPALA CLUB).....3<sup>RD</sup> RESPONDENT**

**IMPALA CLUB).....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant pleaded that at all material times she was working for the 4<sup>th</sup> Respondent as Act Club Manager. On 13<sup>th</sup> June, 2014 the 4<sup>th</sup> Responen through the Chairman summarily dismissed her from employment. According to her, the action was driven by malice and without any just cause hence unfair termination of her employment contract.
2. The Claimant further pleaded that prior to her dismissal, the 4<sup>th</sup> Respondent though it's Vice Chairman maintained a cable of harassment, intimidation and threats against her with single aim of hounding her out of office.
3. The Respondent on its part pleaded that a complaint of harassment carried out by the claimant against one of her subordinates was received that touched on the core value of the claimants employment. The complaint was to the effect that the claimant in her capacity as the club manager summoned the Bar and Restaurant Manager and threatened him and subsequently forced him to reverse a pending expenditure that had been incurred by a club member.
4. Upon receiving the complaint, the claimant was informed of the same on 24<sup>th</sup> April, 2014 and requested to attend a disciplinary hearing on 7<sup>th</sup> May, 2014 almost two weeks thereafter. A disciplinary committee was convened and testimonies taken from relevant parties and witnesses and a report prepared. It was the recommendation of the disciplinary committee that the claimant be summarily dismissed for dereliction of her duties, deliberate intention to defraud the club and extreme poor performance in her mandate.
5. At the trial only the claimant testified. The respondent opted not to call any witnesses.
6. The Claimant additionally stated that she was first employed by the responded in 2006 as Health Club Manager at a salary of Kshs, 27,000/- per month. She was later after 5 years promoted to Assistant Club Manager. From December 2012 to June, 2013 she worked as Acting Club Manager at a monthly salary of Kshs. 100,000/-.
7. According to her, she was dismissed following accusation of impropriety misconduct and poor performance. She denied the accusation.
8. It was her testimony that she received the letter calling her for disciplinary hearing in the evening expecting her to appear the next day. She stated that there were accusations that two goats for a function were unpaid for. According to her she was on leave when the event took place. She responded to the accusations. It was her testimony that it was the Social Secretary who organized the event and that he apologized

and offered to pay for it. The Social Secretary sent an email to the management and copied to her.

9. After the disciplinary hearing she was asked to take all her leave days. On 13<sup>th</sup> June, 2014 she passed by the club and was asked to go to the office and pick a letter. When she picked the same, she found it was a letter of summary dismissal. She denied ordering for a reversal of any expense.

10. In cross examination she stated that she oversaw the management of the club, running facilities and finances. She further stated that she was suspended for playing whistle blower. Everyone was suspended but she was later reinstated after forensic audit.

11. The claimant further stated that she came to know of the members default on 7<sup>th</sup> March, 2014. The defaulter was a committee member. He asked for a statement and she printed one for him. According to her she was to investigate and rectify or if correct, collect the amount due.

12. On question of leave she stated that she went on leave throughout her employment except in 2011 to 2013. She further stated she was registered with NSSF.

13. Concerning overtime, she stated that when she was appointed Acting Club Manager there was a lot of work including late meetings. She however stated that she had no document to show she was entitled to overtime.

14. Section 43(1) of the Employment Act places the responsibility to prove the reasons for termination of contract of employment on the employer. Where the employer fails to do so, the termination shall be deemed to have been unfair. Further subsection (2) states that the reason or reasons for termination are matters that the employer believed to exist and which caused the employer to terminate the service of the employee.

15. By a letter dated 24<sup>th</sup> April, 2014, the respondent issued the claimant with a show cause letter titled: "Indiscipline,, Harassment and Coercion to conceal Member expenditure". It is stated in the body partly that:

***"we are in receipt of a complaint from a staff member whereby it is alleged that on the evening of 7<sup>th</sup> March, 2013 you and a member of the Management Committee Kenneth Thairu harassed, intimidated and coerced him to conceal an expenditure of Kshs. 17,000/- incurred by Thairu in September, 2013".***

16. The letter proceeds to list issues around the above accusation to which the claimant was expected to respond to.

17. By an email dated May, 5<sup>th</sup> 2014 reference is made to the letter of 24<sup>th</sup> April, 2014 and the claimant invited to a disciplinary hearing slated for 7<sup>th</sup> May, 2014.

18. On 13<sup>th</sup> June, 2014, the claimant was issued with a letter of summary dismissal which stated that following her implication on varied cases of impropriety, misconduct and poor performance of her duties the Management Committee made a decision to summarily dismiss her from employment.

19. Apart from accusations' contained in the letter dated 24<sup>th</sup> April, 2014 and which formed the substance of the disciplinary hearing notice scheduled for 7<sup>th</sup> |May, 2014, the court was not furnished with any material by the respondent where the claimant was alleged to be involved in impropriety and misconduct. Further there was no material availed to the court where her performance was questioned. Therefore to dismiss the claimant on accusations which she was neither notified of in the notice for disciplinary hearing nor accused of at any one time was contrary to fair administrative justice and principles of natural justice hence unfair to her. No employer is permitted to subject an employee undergoing a disciplinary hearing to allegations or charges that such employee has never been accused of or contained in the letter of invitation to disciplinary hearing.

20. Concerning the issue for which the claimant was issued with a show cause letter on 24<sup>th</sup> April, 2014 and called for a disciplinary hearing on 7<sup>th</sup> May, 2014, the court has perused the documents attached by the claimant in defence of the allegations and noted that by an email dated 23<sup>rd</sup> April, 2014 addressed to one Francis, the BR Manager, Mr. Thairu asked to be furnished with documents which related to the contested bill and further stated that the function concerned was booked on behalf of one Peter Mwanzia father's medical fund raiser. Mr. Thairu further goes on to state that the reason he asked for records was in the light of recent theft cases at the club involving staff and cash transactions. Further by an email dated 5<sup>th</sup> |May, 2014 Mr. Thairu stated that he was the one who asked for the initial amount of Kshs. 17000/- to be transferred from his account to Mr. Mwanzia's account for follow up after it was posted to his bill erroneously. All these exculpatory emails were filed together with the claimant's pleadings. The respondent never filed anything in rebuttal and further chose not to call any witnesses to controvert these very exculpatory material.

21. In view of the foregoing, by 7<sup>th</sup> May, 2014 when the claimant was undergoing disciplinary hearing the charge against her had completely lost substratum and one wonders the motive for taking her through such unjustified process and summarily dismissing her for reasons which were not included in the notice to show cause and that of disciplinary hearing . The court would agree with the claimant that malice could have been involved in the process.

22. This is a proper case where the court has no hesitation to declare the termination of claimant's service unfair and hereby awards full compensation.

23. At the time of termination the claimants gross monthly pay was 110,000/- per month. The court therefore awards her Kshs. 1,320,000/-

being twelve months gross salary as compensation for unfair termination of service. The award shall attract interest at court rates from date of judgment until payment in full. The award shall however be subjected to taxes and statutory deductions.

24. The claimant shall further have costs of the suit.

25. It is so ordered.

**Dated at Nairobi this 1<sup>st</sup> of March, 2019**

**Abuodha J. N.**

**Judge**

**Delivered this 1<sup>st</sup> day of March, 2019**

**Abuodha J. N.**

**Judge**

**In the presence of:-**

.....for the claimant

.....for the Respondent

**Abuodha J. N.**

**Judge**