



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI

ELRC CAUSE NO. 956 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 4th April, 2019)

SUSAN NJOKI KIBE AKA SUSAN MUNGAI.....CLAIMANT

VERSUS

INSTITUTE OF CERTIFIED PUBLIC

ACCOUNTANTS OF KENYA (ICPAK).....RESPONDENT

JUDGMENT

1. The Claimant, Susan Njoki Kibe aka Susan Mungai filed this claim vide a Memorandum of Claim dated 09/06/2014 for unlawful and unfair termination of her employment and seeking payment of her terminal dues against the Respondent, Institute of Certified Public Accountants of Kenya (ICPAK). She also filed a List of Documents dated 09/06/2014.

2. She avers that she started working for the Respondent as an Accountant on a 3 months' contract from 02/04/2003 on a gross monthly salary of Kshs. 40,000/=. That upon expiry of the contract, the Respondent offered her employment of the same position on permanent basis from 01/08/2003 though the contract of employment was formally executed on 19/09/2003 and she was to get a consolidated monthly salary of Kshs. 50,000/= amongst other benefits.

3. That for the 11 years she worked for the Respondent, she rose through the ranks from an Accountant to Finance Manager to the Senior Manager-Finance & Support Services, which position she held until termination of her employment in March 2014, with her last basic salary being Kshs. 280,985/=.

4. She further avers that she received a show cause letter dated 12/02/2014 asking why disciplinary action should not be taken against her which she responded to with evidentiary documents on 19/02/2014. That she then received a letter dated 03/03/2014 seeking her appearance before a Disciplinary Committee the next day, 04/03/2014 at 9.00am and thereafter received a termination letter dated 05/03/2014 that was to take effect immediately.

5. The Claimant avers that the issues raised in the notice to show cause letter were an afterthought after the External Auditor's report had been tabled and that the purported disciplinary process was unfair and marred with irregularities and illegalities in that:-

a. In total disregard of the practice, she was put to task in the wrong forum to explain issues that had been raised in a draft internal auditor's report;

b. She reports to Convener of Finance & Strategy Committee who was absent during the hearing;

c. Despite providing a detailed write down on all the issues raised in the letter dated 12/02/2014 and annexed evidence, the letter calling for her to appear before the committee was not categorical on the issues that were to be dealt with;

d. She was ambushed since she received the letter for her appearance before the committee a day before the said hearing and the letter did not articulate her right to have a legal representative or a peer to appear together with her;

e. After the disciplinary committee rendered its decision, there was no indication that she had a right of appeal or room for review in case additional information was availed;

f. The termination letter did not break down the specific reason of the termination as required by law;

6. The Claimant prays that this Honourable Court enters judgment against the Respondent and make an order directing payment to her of the following:-

- a. **Remaining 35 leave days@ Kshs. 9,366.20.....Kshs. 327,817.00**
- b. **Salary for March 2014.....Kshs. 280,985.00**
- c. **3 months' salary in lieu of notice.....Kshs. 932,955.00**
- d. **One (1) year compensation at the rate of net salary.....Kshs.3,371,820.00**
- e. **Certificate of Service**

7. She further prays that this Honourable Court award as follows:

- a. **A declaration that the termination was unfair and unlawful**
- b. **An order compelling the Respondent to pay the Claimant Kshs. 5,273,575.80**
- c. **Costs of the suit.**
- d. **Interest on (b) and (c) above.**

8. The Respondent filed its Memorandum of Reply dated 01/07/2014 confirming that it had indeed employed the Claimant but denies her averments that the dismissal was unlawful.

9. It avers that it is governed by a Council established by **Section 9 of the Accountants Act, No. 15 of 2008** which oversees all its affairs and that **Section 10** of the said Act permits the Council to establish committees as are necessary for the performance of the functions of the Respondent. That it is for this reason the Council directed the Audit Risk & Compliance Committee (ARC Committee) to investigate various matters touching on the Respondent.

10. That its audit department then conducted investigations in accordance with the terms of reference by the ARC Committee, which are annexed to this response at *pages 1 and 2* and thereafter issued a report to the Council through the ARC Committee. That the report revealed breach of procedures, gross negligence in the discharge of duties and fraudulent activities by some of the Respondent's key officers including the Claimant and that in its meeting dated 27/01/2014 and continued on 05/02/2014, the Council recommended the concerned staff to be served with show cause letters.

11. It further avers that there was no requirement for the convener of the Finance & Strategy Committee to be present at the hearing and that the letter of 03/03/2014 clearly referred to the Claimant's response of 19/02/2014 to the show cause letter she had received and it had indicated the issues that were to be dealt with at the hearing. It denies that it ambushed the Claimant since she had ample time from when she received the show cause letter on 12/02/2014 to prepare for the disciplinary hearing on 04/03/2014.

12. Further, that the Claimant was informed of her right to have a fellow employee present during the hearing and that she confirmed that she did not need the presence of any other person as has been shown on *page 8 of the Minutes* of the hearing. That the Claimant's termination letter also clearly indicated that the dismissal was pursuant to **Section 44(4) (c) of the Employment Act** and the reasons had been further set out in the show cause letter dated 12/02/2014. That the dismissal of the Claimant's employment was justified and lawful in that:-

i. The Claimant approved payment to Tritex Consulting Limited for iPads and accessories worth Kshs. 563,000/= without the relevant supporting documents and indicated during the disciplinary hearing that the supporting documents were lost. She took responsibility for the loss and also admitted that she erred in posting the transaction as raffle prizes.

ii. The Claimant approved an advance payment of Kshs. 45,086,800.90 to China Jiangxi International Kenya Limited for the construction of ICPAK Complex when the advance payment had not been provided for in the contract while no authorization had been given by the Project Manager and the Council. That the minutes produced by the Claimant of a site meeting did not amount to proper approval of the payment and that the Council needed to give approval for such payment outside the contract terms. That the bank guarantee produced by the Claimant was given for 'authenticity only' and did not offer sufficient protection as it exposed the Respondent and absolved the bank of any risk or responsibility.

iii. The Claimant failed to disclose the amount of Kshs. 4,513,120.67 in the accounts as an account or provision for a bill incurred on a telephone line to the Director Finance and Strategy which non-disclosure amounted to a misrepresentation of accounts. The fact that Telkom Kenya waived the bill did not excuse the Claimant from accruing the bill from the time of accrual.

iv. The minutes of the Disciplinary Committee dated 04/03/2014 annexed at pages 2A to 12 set out and confirm what transpired during the hearing and so the allegation that the Claimant was put to task in the wrong forum is denied as the disciplinary committee was duly constituted.

13. The Respondent denies that the Claimant is entitled to the reliefs set out in the Claim and further, that it is ready to pay for the accrued

leave days as at the date of dismissal, the salary for the 4 days the Claimant worked in March 2014 and the Certificate of Service upon the Claimant clearing with it. It however avers that since the Claimant was summarily dismissed from employment, the 3 months' notice pay is not payable and that she is further not entitled to the 1 year compensation or any other sum because the termination was proper and lawful. The Respondent prays that the Claimant's cause be therefore dismissed.

14. The Claimant then filed a Reply to Memorandum of Defence/Reply dated 17/09/2014 averring that the alleged investigation was undertaken without prior knowledge and approval of the ARC Committee and that the annexed terms of reference are merely a request from the Internal Audit Department.

15. Further, that it is not true that the investigation report emanated from the ARC Committee to the Council and that no minutes of any meeting by the ARC Committee have been provided to sanction the investigation or discuss the alleged finding.

16. She avers that the issue of fraud is strange and new to her as it was not included in her show cause letter or her termination letter and that the Council considered the report before concluding investigation since Minute SCD 3/2014 as annexed shows the audit was completed on 05/02/2014.

17. That this created procedural anomalies because the management having not received the report had yet to respond to the issues raised and that the Council also issued show cause letters before getting the investigation report. Further, the investigation was quickly done in 4 days having started on 21/01/2014 and by 27/01/2014 the first report was made to the Council.

18. She avers that the rules of natural justice dictate that the person to whom she reported to in discharge of her duties needed to attend the disciplinary committee to respond to some underlying issues. Further, that she was also not given adequate time to prepare her defence for the following reasons:-

a. She was served with a show cause letter on 13/02/2014 while on leave as from 12/02/2014 meaning she had only 6 days to obtain relevant documents and make a detailed report on matters as far back as 2 years while at the same time attending to her daily duties.

b. The Audit Report was served on 11/02/2014, a day prior to the show cause letter and her request for extension of time was denied.

c. The show cause letter did not inform her of a disciplinary hearing and thus did not facilitate her preparation for the hearing.

d. The hearing was conducted a day after she received the hearing notice letter.

e. The disciplinary proceedings were hastened culminating into premature and prejudicial judgment by the Council on her conduct without considering that she has never received any warning letter in her 11 years of service to the Respondent together with her promotion in January 2014. This was contrary to the Respondent's Human Resource Policy.

f. The alleged disciplinary action was choreographed.

19. The Claimant denies that she took responsibility of the mentioned lost documents and that she was also not responsible for posting any entries. That she made the payment to the China Jiangxi International Kenya Limited with authority from the meeting of 23/03/2012 as highlighted in *Minute 20 on page 39 of the list of documents* and that her salary is for 5 days since the dismissal letter was served to her while in office on 05/03/2014.

Evidence

20. The Claimant filed a Supplementary List of Documents on 17/07/2015 dated 15/07/2015 while the Respondent filed its Supplementary List of Documents on 20/07/2015 dated 17/07/2015. Pursuant to leave granted to the Claimant on 05/12/2016, she filed a Claimant's 2nd Supplementary List of Documents dated 15/12/2016.

21. The Respondent also filed a Witness Statement dated 21/07/2015 sworn by the Respondent's Director of Professional Services, Edwin Makori, who substantiates the pertinent issues regarding the non-accrual of the telephone bill and the importance of disclosure as per **International Accounting Standards No. 10** (events after the Reporting Period).

22. That the Respondent was under an obligation to report the bill as an expense which had been accrued but that it was discovered after the end of the financial period. He also reiterated that there had been no prior request for the Certificate of Service by the Claimant before filing of these proceedings.

23. CW1 testified in Court that last promotion was on 29/11/2013 and that apart from her gross salary, she also received Kshs. 30,000 mileage allowance stating that her payslip is at *page 17* of the her documents. That she never got a detailed job description as per her letter of 29/11/2013 but that she got her instructions from her superiors.

24. She states that the Internal Auditor Manager, Erick Omondi is the one who wanted her response to the audit report and that the report was supposed to go through the HOD, the Management, CEO, Internal Audit & Risk Committee and lastly to the Council but that these steps were not followed. That at the hearing, there were 4 Council members and the CEO and the issues touched on what was in the internal audit report and in her show cause letter and that the minutes at page 2A -13 in the Respondent's bundle do not reflect what really happened: for

example Erick Omondi is listed as present when he had actually resigned on 28/02/2014.

25. Further, that according to the Respondent's HR Policy Manual on *pages 51-56*, the committee would be constituted by Council or a committee of Council but that in this case, it was a part of Council. She states that she cleared on the same date of 05/03/2014 and left the Respondent's premises upon termination of her employment.

26. CW1 took the Court through *pages 22 and 23* on the issue of iPads which she says were purchased after going through a tendering process and that she did not sit in the procurement committee. She went through the external auditor's reports, which confirmed that the advance payment to the contract involving the Chinese company had been disclosed in the accounts and subsequently recovered by 2014 meaning no funds were lost.

27. That it is the Respondent's development committee which approved the advance payment together with instructions from her supervisor and discussions with the CEO as captured in the finance policies provided on *pages 47 & 48 of the Claimant's 2nd bundle* and *page 1-2* of the said bundle. She claims that upon her termination of employment, the Respondent refused to pay her dues and that she feels her termination was unfair.

28. In cross-examination, she confirmed that the disciplinary process involved other people like Abuya and her immediate supervisor and that the minutes of the disciplinary hearing show that Erick Omondi and Francis were actually not present.

29. CW2, John Kirimi Wambugu who is a former colleague of the Claimant at ICPAK as Head of Legal until 2012, a CPA (K) and a Lawyer testified that he was secretary to the disciplinary committee during the hearing and was in charge of disciplinary of staff.

30. He states that the first process should have been the audit process and the notice to show cause should have been given 14 days and that the 7 days given to the Claimant was short. That the Bank Guarantee on page 189 of the Claimant's 2nd bundle of documents provided by the contractor protected the Respondent against any loss.

31. RW1, Edwin Makori stated that he wished to rely on his witness statement as his evidence in chief. He testified that the Claimant was not paid any dues upon termination because the dues are pending clearance from the institute and that the Claimant was fairly terminated after being given ample time to be heard. He confirmed in re-examination that Nebert Mandala was also subjected to a disciplinary process and his services terminated.

Claimant's Submissions

32. The Claimant submits that there were no written allegations by any person availed in this court by the Respondent as was recommended in the **Minutes of 27/01/2014** on *page 6 of the Respondent's 2nd List of Documents* and further, the said minutes do not provide for names of staff members that were to be given show cause letters.

33. That there is also no evidence as to when the audit report was tabled before the ARC Committee and that the report still lacked a response from the CEO. She cites the case of **Nicholas Muasya Kyula –v- Farmchem Limited [2012] eKLR** where Ongaya J pointed out that *it is not sufficient for an employer to make allegations of misconduct against an employee but the employer should have internal systems and processes to undertake the occurrence of such conduct.*

34. She further relies on **Bernard Damunga Ndunda –v- Kerio Valley Development Authority [2013] eKLR** where the Court observed that the audit findings arrived at with the employee's participation cannot amount to a disciplinary process that demands due process.

35. Further, that her immediate superior, Nebert Mandala sought more time for them to respond which was denied and that ultimately, the two parallel processes to respond to both the show cause and the audit overwhelmed her as she was not given adequate time to respond and further, the hearing notice was very short for her to prepare material-wise and psychologically. That due procedure was therefore not followed before termination of her employment to satisfy the threshold of procedural fairness.

36. On substantive fairness, she submits that her job description had not been communicated to her as per **Section 10(2) (c) of the Employment Act** and that her exact duties can therefore not be ascertained and neither can her performance be tested. With regard to the telephone bill, she states that she exercised her financial knowledge and only paid the undisputed and valid bill after the same had been agreed upon between the Respondent and Telkom K Limited.

37. That on the issue of payment documents to Tritex Consulting being misposted, she submits that she sought more time to look for the misplaced documents in the memo dated 20/02/2014 on *page 4 of the Claimant's 2nd bundle of documents.*

38. That the Respondent acknowledged in **Min S6/2014** on *page 34 of the Respondent's bundle* the need to review the policies and procedures. She cites the case of **Grace Gacheru Muriithi –v- Kenya Literature Bureau [2012] eKLR** where the court held to be unfair labour practice for an employer to visit upon the employee adverse consequences for loss or injury to the employer, which is attributable to the deficiency in the employer's operational policies and systems.

39. The Claimant states that she has demonstrated that even though there were gaps in the procedures, she exercised her best judgment and there was no loss of money.

40. It is submitted by the Claimant that the Employment Act sets in **Sections 41, 43 and 45** the minimum termination standards to be complied with while **Article 47 of the Constitution** provides for the right to administrative action that is expeditious, efficient, lawful,

reasonable and procedurally fair.

41. That the Respondent did not specifically state the reasons for her termination and explain to her for her understanding as was held by the Court in **Queenville Atieno Owala –v- Centre for Corporate Governance [2013] eKLR**. That the Respondent also grossly violated her right when it invited an ex-employee, the internal auditor Erick Omondi to present the report to the committee and did not allow her to interrogate him.

42. Further, that since the allegations in her show cause letter vary with the audit findings, her termination of employment was invalid and unfair as was held by the Court in **Zephania O. Nyambane & Another –v- Nakuru Water & Sanitation Services Company Limited [2013] eKLR**. The Claimant states that she has proved her case that the process was flawed and that her rights were infringed.

43. It is the Claimant's submissions that she should be compensated for the unfair termination of her employment and the fact that she had a stellar record during her 10 years of employment with the Respondent. That this Honourable Court should be guided by the factors considered when awarding compensation founded in **Raphael Wellington Okonji –v- Sunthesis Limited [2012] eKLR**.

44. That since the Respondent conceded to the leave days, she has provided the leave form on *page 16 of the Claimant's 1st bundle* but that the condition for clearance is unreasonable for she did not clear with the Respondent.

45. That she also seeks the full monthly salary for March 2014 together with 3 months' notice pay since she was unfairly terminated and that the certificate of service is statutorily provided for and should be given to her. Further, that she has provided her clearance form on *page 2 of the Claimant's 2nd bundle* and seeks the costs of this suit and that the prayers sought in her claim be granted.

Respondent's Submissions

46. The Respondent submits that it did not require the Claimant to give comments on the draft audit report and that at no time did she request for more time to respond to her notice to show cause letter. That after considering the Claimant's responses during the hearing and finding them not to be satisfactory, it terminated her employment on account of gross-negligence and improper performance of her duties in accordance with **Section 44(4) (c) of the Employment Act**.

47. Further, that the Claimant failed to substantiate that the advance payment to China Jiangxi Company was authorized by the Council and that the minutes on *pages 36-47 of the Respondent's Supplementary list of documents* clearly states that the contractor financing was subject to negotiations as seen in *page 38*. That the subsequent recovery of the advance payment did not invalidate the Claimant's actions/omissions since the approval of a substantial amount of money exposed the Respondent to loss and that the fact the telephone bill was disputed did not excuse her from disclosing its accrual.

48. Further, that the Claimant admitted she was charged alongside Mr. Patrick Abuya who was an Assistant Manager for Procurement and Mr. Nerbert Mandala who was the Finance Director and who all faced similar charges and that the Court has already delivered judgment in the cases filed by the other two employees and which are attached herein: **Patrick Abuya vs. Institute of Certified Public Accountants of Kenya (ICPAK) & Another [2015] eKLR** and **Nerbert Mandala Ombajo vs. of Certified Public Accountants of Kenya (ICPAK) [2017] eKLR**. That this Court has held that there was a proper basis and that the proper procedure was followed in the disciplinary procedure that led to the termination of the three employees being the Claimant, Patrick Abuya and Nerbert Mandala.

49. Further, that the Claimant has not shown why the Court should invalidate its findings in the two cases it has determined and the Respondent urges this Court to uphold these two decisions and dismiss the Claimant's case.

50. It is submitted by the Respondent that there are valid reasons for terminating the Claimant as per **Section 43(2) of the Employment Act** as has been confirmed both at the disciplinary hearing and in this suit and that also none of the three charges against the Claimant were controverted.

51. It urges the Court to consider the findings of the disciplinary panel at *pages 29-35 of the Respondent's supplementary bundle* and relies on the case of **Attorney General and Another –v- Crispinus Ngayoo Musundi [2017] eKLR** where the Court of Appeal cited the case of **Michael Dowling v Workplace Safety & Insurance Board [2004] CAN LII 436 92** to state that:-

“The main question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional – dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship...”

52. That it has proved the reasons for termination as per **Section 43(1) of the Employment Act** while the Claimant has failed to rebut the reasons given by the Respondent. It cites the case of **John Ngoko Isoe –v- Nyasionga Tea Factory Co. Ltd [2017] eKLR** where the Court held that a claim for unlawful termination fails once the Respondent adduces evidence to show that a dismissal was founded on valid and fair reasons and the Claimant fails to adduce evidence in rebuttal.

53. Further, that in **Patrick Abuya's case** above, the Court held at paragraph 57 that the Respondent had reasonable and sufficient facts to commence disciplinary process against the Claimant.

54. The Respondent submits that due process was followed in terminating the Claimant as per **Clause 9.0 of the Respondent's Human Resource Policy** as at *page 52 of the Claimant's 1st supplementary bundle of documents*. That it is not true that the disciplinary process was held parallel to the investigations and that **Section 41 of the Employment Act** provides for notice of the reasons for termination by the

employer and hearing any representations by the employee. It relies on the case of **George Kariuki Ngugi –v- Brolaz East Africa Limited [2014] eKLR** where the Court held that there was full compliance with *inter alia*, Section 41 of the Employment Act where the employer invited employees for a disciplinary hearing the next day after the date of the invitation.

55. It submits that the Claimant is not entitled to the reliefs save for the unpaid terminal dues and the certificate of service. That the Claimant confirmed she had not cleared with the Respondent at the time of trial, which is a mandatory requirement before terminal dues are paid as was testified by the Respondent's CEO and that it will thus pay for the admitted claims of *11 accrued leave days and salary for 5 days worked in March 2014*.

56. That **Clause 7 of the Claimant's contract of employment** is clear she was entitled to 24 leave days after 12 months of service and the leave days would be carried forward with the permission of the Respondent. That at the time of termination on 05/03/2014 which was after she had completed 2 months of service, the Claimant had 4 accrued leave days (24 days/12 months x 2 months) and had taken 1 leave day on 12/02/2014 as per the leave form thus leaving a balance of 3 untaken leave days. That in addition to the 8 days carried forward from 2013, she had 11 accrued leave days and her calculations for leave days up to 31/12/2014 is not right because she had already been terminated in March 2014.

57. Further, she cannot also claim for pay for more days than she worked in March 2014, which is only 5 days. It relies on **Clause 12 of the Claimant's contract of employment** and on the case of **Kenya Plantation & Agricultural Workers' Union –v- Keen Kleeners Limited [2014] eKLR** where the Court declined a claim for pay for a whole month where the grievants had worked for 5 days before termination.

58. That it is not bound to pay for notice or 1 year compensation since the Claimant was summarily dismissed as averred herein above and that **Section 18 (4) of the Employment Act** provides that where an employee is summarily dismissed for lawful cause, the employee shall be paid all moneys, allowances and benefits due to him up to the date of his dismissal.

59. That since it has proved the termination of the Claimant was fair and lawful, the Court should exercise its discretion and grant the costs of the suit to the Respondent as the successful party. It cites the case of **Saleh Kiplagat Chebii –v- Centre for African Family Studies [Cafs] [2014] eKLR** where the Court held that the Claimant ought to have gone back and cleared after the disciplinary process ended and should reconsider his stance on clearance, and the acceptance of terminal benefits offered.

60. I have examined all the evidence and submissions of both parties. The issues for determination are as follows:-

i. Whether there were valid reasons to warrant dismissal of the Claimant summarily.

ii. Whether the Claimant was accorded due process before her dismissal.

iii. Whether the Claimant is entitled to the remedies sought.

61. On the first issue, the Claimant has told Court that she was dismissed vide a letter dated 5/3/2014. The letter did not give reasons for the termination but indicated that the Claimant had been terminated under Section 44(4) (c) of the Employment Act. Section 44(4) (c) of Employment Act states that an employee can be dismissed for gross misconduct if:-

“An employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly”

62. It is therefore imperative that the Respondent proves that there is work which was the Claimant's duty to perform and which the Claimant failed to perform or which she performed improperly or carelessly.

63. Prior to the Claimant's dismissal, she had been taken through some disciplinary processes.

64. On 12/2/2014, she was served with a show cause letter asking her to show cause why disciplinary action should not be taken against her. The reasons for show cause for which she was to respond to were as follows:-

i. On 10th April 2012 you approved payment to Tritex Consulting Limited for the supply of two Ipads and accessories worth Kes.563,000 which was paid vide cheque numbers 107739,107740, 107869 and posted as raffle prizes in the Navision system without relevant supporting documents such as LPO, GRN and requisition.

ii. On the 15th May 2012 you approved an advance payment of Kes.45,086,800.90 to China Jiangxi for the construction of ICPAK complex. The advance payment was not provided for in the contract and had no authorization from the Project Manager and Council.

iii. On 24th December 2012 you failed to disclose an amount of Kes 4,513,120.67 in the accounts as an accrual or provision for a bill incurred on a telephone line to the Director Finance and Strategy which has not been paid to date.

65. The Claimant responded to the show cause letter vide a letter dated 19.2.2014. In the response, the Claimant indicated that she approved payment of purchase of two Ipads and accessories for the then Chief Executive Officer and previous Chairman, as there was an LPO number P-ORD-1605 for the said purchase.

66. She indicated she approved payment upon confirmation of relevant supporting documents as per the standards of the Institute and based

on the supporting documentation of LPO, GRN and requisition.

67. On the issue of advance payment to China Jiangxi, the Claimant indicated that the minutes of the meeting of 26th March 2012, Minute 1.3.3 authorized the advance payment of 5% of the contract sum. She indicated that she paid an advance of 10% of the contract price due to advice from the Project Manager, prior duly approved contract there was no variation on the contract amount, Chief Executive Officer approved as evidenced by copy of payment remittance (authorizer KPAK008) Director Shared Services approved as evidenced by a copy of payment remittance (authorizer KPAK007).

68. She indicated that the Project Manager advised that payment of such mobilization fee is standard practice in the industry.

69. On the issue of telephone bill of 4,513,120.67, she indicated that Telecom Kenya gave a credit adjustment to the said line when it was reported lost and therefore it was not correct to report, the bill remains unpaid to date.

70. She also indicated that the amount in excess 7,500/= was not an institution expense as there was a limit to monthly maintenance costs for mobile phone for grade 9 staff at 7,500/=.

71. From the documents availed in relation to the advance payment, 5% had been approved but China Jiangxi International (K) Limited asked for 10% as a normal standard operation. This request was made on 9th May 2012 vide a letter dated 6/2/2013. The Director Strategy and Shared Services approved an advance payment of 45,086,800. The two signed an agreement with China Jiangxi International Limited in the presence of their Legal Manager ICPAK.

72. The Claimant also indicated that there were minutes of the meeting of 26th March 2012 – Minute 1.3.3 which authorized this payment and the Chief Executive Officer and Secretary to Council and the Director, Shared Services were present in the meeting.

73. From the exchange of communication between the Claimant and the Respondent's officers and from the documents before Court, the Claimant as Finance Manager could only authorize payments based on proper approvals. There is evidence that the payment of the 45 million advance payment was authorized by the Director Finance and Strategy on 15/3/2012. The Claimant had queried this as being outside the contract. She however went on to issue the payment.

74. The Respondent authorized an Auditor to carry out some work on their accounts. The report is dated 28/2/2014 after the Claimant had been taken through some disciplinary process but before her termination on 5/3/2014.

75. At page 16 of the Audit report, it was indicated that the payment was made without approval of the Council but based on a signed agreement between the Contractor and Management. The Claimant is mentioned as one of those responsible for the mistake of making the advance payment but there is no indication that the Respondent lost any money due to the advance payment.

76. On the issue of the telephone bill, the Claimant explained that Telkom Kenya had written off the bill incurred when this line had been reported missing. The Claimant also pointed out in her response to the show cause letter that Telkom thus had already been indicated in the Respondent accounts and that the Respondent was not responsible for paying this bill as the Respondent's Nobert Mandala was one using the phone and he only had a limit of 7,500/= monthly bill and therefore the Respondent could not pay that bill.

77. On issue of payment of Ipad for Chief Executive Officer, the Claimant indicated that the whole process went through procurement. On lack of documents to show approval, the Claimant had indicated that she could not receive the documents.

78. From the ongoing analysis, it is apparent that the Claimant had some mistakes committed which related to payment of the 45 million without proper authorization by the Council but which did not cost the Respondent anything as the bonds were fully paid.

79. The issue of the telephone bill also did not cost the Respondent anything as Telecom (K) wrote off the said bill. There could have been some misgivings committed by the Claimant as Finance Manager under whose docket she was to oversee product utilization of Respondent's funds and which she did but not in an excellent fashion. The same cannot however amount to willful negligence as provided under Section 44(4) (c) of Employment Act as indicated in the Claimant's show cause letter.

80. On the 2nd issue, the Claimant has indicated that she was not given a fair hearing before her dismissal. She complained that the entire disciplinary process was hurried off in order to fulfil a predetermined process.

81. The Claimant told Court that she was served with a show cause letter for which she responded to. This was on 12th February 2014. At the same time, the audit was ongoing and in fact the draft audit report was released on 2/8/2014.

82. The Claimant was later summoned to appear for a disciplinary hearing vide a letter dated 3/3/2014 on 4/3/2014 at 9 am. The disciplinary committee met and handed to the main Council its report the same day at 6.35 pm. On the following day 5/3/2014, the Claimant was terminated.

83. Definitely, there is some concern on speed within which all these processes were carried out. 1st the Audit report upon which the Respondent was relying on to discipline the Claimant was not yet completed. A draft was sent on 18/2/2014. A complete or final audit was finally submitted vide a letter dated 28/2/2014.

84. The Respondent have a Shared Services Division Policy Manual whose effective date is May 2012. Under Clause 9.0 of the Manual, it is provided as follows:-

“Investigation

The matter shall be investigated to establish the facts surrounding the complaints if appropriate taking into account the statements of any available witness. An employee may be suspended to facilitate investigations.....”.

85. In the case of the Claimant, I would take the audit process as the investigation process. This was to be brought to the attention of the Claimant as it touched on her. Other than this, Clause 9.3 deals with the disciplinary committee and states as follows:-

“Employee Disciplinary Committee shall consist of Council, Council Committees, Chief Executive Officer, Director Strategy and Shared Services, Legal Manager, Human Resources and Administration Manager, Manager of the staff to be disciplined and one Manager co-opted.

The Chief Executive Officer or Human Resource Manager shall be responsible for positions below manager level while senior positions shall be referred to Council and or relevant Council Committees....”.

86. In the case of the Claimant, the members present were the Chairman and Ag. Chief Executive Officer Makori and other members. The meeting was held on 4/3/2014.

87. From the minutes of the Committee, it was indicated that a Sub-Committee of the Council on disciplinary issue had a meeting to hear the members of staff on 4th January 2014 from 7 am to 4 pm. The minutes of the meeting of 4.1.2014 have not been supplied so it is not clear what transpired on the 4.1.2014 or who attended the said meeting.

88. The Claimant had been invited to attend the disciplinary meeting a letter dated 3.3.2014 on 4.3.2014. The letter indicated as follows:-

“Disciplinary Action

Following your response dated 19th February 2014 responding to the show cause letter dated 12th February 2014, the issues in question have been reviewed by Council.

The Council has formed a disciplinary committee to allow you make a hearing on the issues raised.

You are therefore requested to appear before the Committee on Tuesday 4th March 2014 at 9 am at ICPA Boardroom.

Yours faithfully,

CPA Edwin Makori

Ag Chief Executive “

89. The problem with this letter is that the minutes of the Council that reviewed the show cause letter response are not attached. It is therefore not possible to discern whether such a meeting ever happened and who the members were.

90. Secondly, the Claimant is not informed the areas to be covered in the disciplinary hearing. She was not informed about what offences she was coming to defend herself before the Council on 4.3.2014.

91. The Claimant contends that she did not have adequate time to represent herself and neither was she asked to come with a witness. From the minutes of the disciplinary hearing, observation of the sub-committee of Council on disciplinary as listed, it is not clear how the observations are arrived at as the person indicating the said observation as a witness is not stated.

92. The minutes are either written in a form in which it is not clear what the accusation is and what Claimant’s response is. It is my finding that the minutes do not indicate a fair process as envisaged under Section 41 of Employment Act.

93. It is my finding that the termination of the Claimant was not fair and justified as provided under Section 45(2) of Employment Act 2007 states as follows:-

2. “A termination of employment by an employer is unfair if the employer fails to prove:

a. that the reason for the termination is valid;

b. that the reason for the termination is a fair reason:-

i. related to the employee’s conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c. that the employment was terminated in accordance with fair procedure.

94. The Claimant's termination letter is also silent on reasons for the termination as expected under Section 43 of Employment Act. Save to say that the termination is under Section 44(4)(c) of Employment Act. No details are given and therefore the termination reasons beg for answers.

95. Having found that the termination was not fair and justified for reasons given above, the last issue is on remedies available to the Claimant.

96. The Respondent had admitted their willingness to pay the Claimant 35 leave days owing and 4 days salary for days worked in March 2014. I will therefore award the Claimant this as follows:-

i. 35 leave days owing = 327,815.80/=

ii. 4 days salary for March 2014 = $4/30 \times 280,985 = 37,465/=$

iii. I also further award Claimant 1 month salary in lieu of notice = 280,985/=

iv. Given the Claimant's performance of work, the Claimant is entitled to 6 months' salary as compensation for unlawful termination = $6 \times 280,985 = 1,685,910/=$

TOTAL = 2,332,175.8/=

v. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 4th day of April, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wamboi for Claimant – Present

Miss Odero holding brief Makori for Respondent – Present