



**REPUBLIC OF KENYA**

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

**CAUSE NO. 224 OF 2019**

**GLADYS WAMBUI CHEGE.....CLAIMANT**

**- VERSUS -**

**TRIGGERISE KENYA LIMITED..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 19<sup>th</sup> July, 2019)

**JUDGMENT**

The claimant filed the memorandum of claim on 05.04.2019 through Kamotho Njomo & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) The declaration that the claimant's termination from the respondent's employment was unprocedural, unfair and unlawful.
- b) A permanent injunction do issue restraining and stopping the respondent from headhunting, advertising, recruiting a new employee to replace the claimant based on the reasons contained in the letter dated 14.01.2019.
- c) An order do issue revoking or annulling the claimant's termination and reinstating her as the respondent's employee forthwith without loss of any salary and benefits thereof.
- d) In the alternative to (b) and (c) above the claimant prays for remedies for wrongful dismissal and unfair termination as follows:
  - i. Compensation for unfair termination Kshs.1, 800, 000.00.
  - ii. Variable pay Kshs. 45, 000.00.
  - iii. Exemplary damages.
  - iv. Damages for constitutional violations.
  - v. Interest on (a) to (c) above from the date of termination to the date of payment in full.
  - vi. Certificate of service.
- e) Costs of the suit.
- f) Any other relief that the court may deem appropriate to grant.

The respondent filed the reply to the statement of claim on 26.04.2018 through Githinji & Karoki Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

By consent of the parties the Court ordered that the suit be determined on the basis of the pleadings, affidavits and documents filed for the parties.

It is not in dispute that the claimant and the respondent were in a contract of service. The respondent employed the claimant initially as a Tiko System Facilitator (TSF) and promoted to Ecosystem Manager (ESM) then to Area Tiko System Manager (ATSM) through an extension employment agreement dated 02.05.2018. Her last promotion to Tiko System Coordinator (TSC) was on 29.10.2018 on a 12

months contract effective 01.10.2018 (so that the contract was lapsing on 01.10.2019). The salary payable was Kshs. 150, 000.00 per month and subject to mandatory statutory deduction. In the salary clause, the contract further provided, “**On top of that and in consideration of the Quality of the services to be rendered and based on Key Performance Indicators assessment, you will be eligible to an additional variable pay of 30%, calculated on the gross salary (paid on six month calendar basis, end of January and July).**”

It is further not disputed that the claimant’s employment was terminated on the night of 14.01.2019 the claimant’s direct line manager one Jesse Njunguru (and without prior notice) and by email forwarding to the claimant the notice of declaration of redundancy dated 14.01.2019. The notice conveyed that due to structural and business operational changes the respondent had to declare the position of Tiko System Coordinator redundant effective immediate. Thus the claimant’s services would not be required and the final dues would include salary for 14 days worked in January 2019, redundancy notice pay for period 15<sup>th</sup> to 14<sup>th</sup> February 2019, 30 days’ pay being severance pay for 2 years; and less any liability to the respondent. The letter stated that the contract of employment would remain binding upon the claimant until 14.02.2019 especially on confidentiality obligations.

The claimant cleared on 21.01.2019. The evidence is that prior to redundancy the claimant and the respondent’s Country Lead one Jesse Kamau had held a meeting on 03.01.2019 at which certain allegations of fraud against the claimant had been made, the claimant had denied the allegations and Jesse had pressed the claimant to resign or she would be served a notice. The fraud was said to have been perpetrated at the clinics when the claimant served as ATSM and not her current position as Coordinator.

To answer the **1<sup>st</sup> issue** for determination the Court returns that the termination was unfair in procedure and merit. First, the evidence is that after the claimant was terminated the respondent thereafter advertised for a position with similar role. Thus it was not true that the role held by the claimant had been abolished and the Court returns that the reason for termination was not genuine as envisaged in section 43 of the Employment Act, 2007. Second, the termination was sudden without due one month notice to the claimant and the area labour officer as per section 40 of the Act. Thus the claimant was terminated suddenly without consultation and preparation. The Court has considered the allegations of fraud levelled against the claimant and returns that in absence of a disciplinary process by way of a notice and a hearing as per section 41 of the Act, it cannot be said that she was culpable in that regard.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to remedies as prayed for.

The Court has considered the factors in section 49 of the Act. The claimant did not contribute to her redundancy at all. The reason for redundancy has been found not genuine. The claimant had a history of good performance as manifested in the promotions she earned. The Court has considered that she had at least 9 complete and unexpired months of the 12 months fixed term contract that was as well renewable. The aggravating factor is that the notice was delivered at night on email outside working hours in circumstances the Court finds to have been insensitive or callous. Accordingly, the claimant is awarded 7 months compensation making **Kshs.1, 050, 000.00**.

The 30 % variable pay was contractually due in January and on 6 months’ gross pay. The Court returns that the variable pay had not accrued and will be declined.

The Court finds that in view of the strained relationships, reinstatement would not be an appropriate remedy in the present case.

The Court further returns that the compensation is a sufficient remedy because no constitutional violations over and above the unfair termination have been established in the instant case. The claimant is entitled to a certificate of service.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the termination of the claimant’s contract of service by way of redundancy was unfair.
- b) The respondent to pay the claimant **Kshs.1, 050, 000.00** by 01.09.2019 failing interest to run at Court rates from the date of this judgment till full payment.
- c) The respondent to pay costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 19<sup>th</sup> July, 2019.**

**BYRAM ONGAYA**

**JUDGE**