



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 257 OF 2015**

(Before Hon. Justice Mathews N. Nduma)

**MONICAH WANJIRU MWANGI.....CLAIMANT**

**VERSUS**

**TRANS MATTRESSES LIMITED....RESPONDENT**

**JUDGMENT**

1. Suit was filed on 12<sup>th</sup> November 2015. The claimant seeks maximum compensation being the equivalent of 12 months salary and terminal benefits including notice pay; Gratuity; weekly rest days for two years; arrear salary for 11 worked days in 2010 and prorata leave of 1 1/2 days as set out under annex 3 of the claim.
2. CW1, the claimant testified under oath and adopted a witness statement dated 11<sup>th</sup> November 2015 as his evidence in chief. Statement of claim was amended on 3<sup>rd</sup> October 2016. Statement of Response dated 19<sup>th</sup> October 2016 was filed on 2<sup>nd</sup> October 2016. The respondent denies the particulars of claim wholly and places the claimant on strict proof.
3. CW1 stated that she was employed as Shop Assistant by the respondent in September 2003 at its Trans mattresses Supermarket at Kitale Township at a gross salary of Kshs. 9,244. The claimant states that she ought to have been paid Kshs. 14,069 per month comprising Kshs. 13,017 basic salary and Kshs. 1,952 house allowance. She claims Kshs. 4,534 monthly underpayment from September 2003 to January 2010.
4. The claimant added that on 11<sup>th</sup> January 2010, the claimant was summarily dismissed without notice, notice to show cause or any disciplinary hearing.
5. CW1 stated that at the eve of Christmas 2009, the claimant and two other employees of the respondent did their shopping in the respondent's shop. Claimant bought 3 litres of cooking oil named "Golden Fry", sugar, salt, baking flour and other consumables.
6. There was Christmas promotion for 'Golden Fry' cooking oil and customers buying the said oil were rewarded with free sachets of the same oil in quantity of 200 millilitres, which were not for sale.
7. That the claimant and her colleagues were given the sachets upon shopping just like other customers.
8. The manager of the shop Mr. Kishore retrieved the said oil sachets from the claimant's shopping bag and from her colleagues and returned them to the shop. The three were then compelled to pay a fine. The claimant was informally summarily dismissed for the alleged offence without any disciplinary hearing. She was accused of stealing the sachet even though she was not given a chance to explain her story.
9. Claimant stated her colleagues were awarded damages in the sum of Kshs. 253,479, each in Industrial Court cause No. 1565 of 2010 and urge the court to apply the precedent. She claims a total of Kshs. 293,326.
10. CW1 was closely cross examined and insisted that there was nothing wrong with her being given a promotional sachet like any other customer upon purchasing her Christmas goods from the supermarket in any even the sachet was taken back by the manager and they were forced to write a written apology and fined at the same time. That it was vindictive for the respondent to revisit the matter again in January.
11. RW1 Lucy Wachuke testified for the respondent and stated the claimant worked for the respondent and she was summarily dismissed on

3<sup>rd</sup> January 2010. She relied on a witness statement dated 12<sup>th</sup> February 2012. That the claimant was a member of NSSF and is not entitled to gratuity claimed or at all. That claimant is not owed any arrear salary or overtime. RW1 said claimant took free gifts meant for customers.

12. That these were promotional items for customers. RW1 denied knowledge of judgment in favour of Tabitha in the sum of Kshs 253,000 a colleague who was dismissed under similar circumstances. Monica RW1 said that the matter of Wangu was settled and that only this claim was outstanding. RW1 stated she had no knowledge if the claimant and others were forced to write letters of apology and then later victimized. RW1 did not participate in the claimant's case but said that there was a disciplinary committee that decided the matter. On the same day of summary dismissal RW1 had no minutes of alleged meeting. RW1 insisted that the claimant was sacked for theft. RW1 stated that the claimant had not shopped. RW1 said employees shopped at the end of the day. RW1 said that the dismissal took effect on 3<sup>rd</sup> January 2010 and claimant is not entitled to arrear salary.

### **Determination**

13. The issues for determination are:

- a. Whether the summary dismissal of the claimant was for a valid reason and done in terms of a fair procedure.
- b. Whether the claimant is entitled to the reliefs sought.

### **Issue (a)**

14. The claimant has adduced credible evidence that on 24<sup>th</sup> December 2009 she shopped for Christmas just like any other customer at the sop she worked. That she obtained a promotional sachet upon buying "Golden Fry" cooking oil that was offered for promotion.

15. That other colleagues who had also made purchases obtained the sachets. That one manager by the name Kishore returned the sachets from their shopping bags and forced them to apologise for taking the offer despite of the purchase. That he also imposed a fine on them and they thought the matter was over.

16. That when they reported back to work after Christmas, the claimant was summarily dismissed for the alleged theft of sachet.

17. The claimant denied the offence stating that this was a promotional item to which she was entitled to just like any other customer. RW1 did not offer any evidence to contradict that the claimant just like any other customer was entitled to the promotion item upon making a private, individual Christmas Purchase. Mr. Kishore was not called by the respondent to offer any evidence to the contrary. RW1 did not have personal knowledge of the matter and did not offer any credible evidence to contradict the claimant's testimony that the sachets were unfairly taken away from them by Mr. Kishore who then made them apologise for a non-offence and unlawfully imposed fines on them. The court finds that the claimant has demonstrated on a balance of probabilities that she was summarily dismissed for an invalid reason and the summary dismissal did not follow any fair procedure. The respondent therefore violated *Section 36, 41, 43, 45 and 46 of the Employment Act 2007*.

18. The summary dismissal was unlawful and unfair and the claimant is entitled to compensation in terms of *Section 49(1) (c) and (4) of the Employment Act, 2007*.

19. The court relies on a similar case based on similar facts in ***Nairobi Industrial Court Cause No. 1565 of 2010*** in which the court awarded the claimant maximum compensation for unfair and unlawful dismissal.

20. In the present case, the claimant had worked for the respondent diligently for a period of seven (7) years. She had no warning or any adverse record. The claimant was victimized for supporting the shop she worked in by doing Christmas shopping there on 24<sup>th</sup> December 2009.

21. The dismissal was completely disproportionate to the alleged taking of a promotional oil sachet. The claimant in any event was entitled to the same as any other customer. The claimant was not given notice nor paid in lieu of notice. The claimant was not paid any terminal benefits upon termination. The claimant had prospects of serving the respondent for many more years which chance was unlawfully curtailed by the respondent. The claimant did not contribute to the summary dismissal. It was simply unlawful and unfair. The court awards the claimant the equivalent of 10 months salary in compensation for the summary dismissal in the sum of Kshs. 140,000.

### **Terminal benefits**

22. The testimony by the claimant that she was underpaid by a sum of Kshs. 4,504 per month was not controverted by the RW1. This was the minimum wage for the position of shop assistant for the material period. The court awards the claimant under payment for only three years. The rest of the claim is time barred. The award is Kshs. 162,144.

### **Gratuity**

23. The claim for gratuity is based on the CBA between the union and the Respondent calculated at 18 days salary for each completed year of service in the sum of Kshs. 67,608. The same is awarded accordingly.

### **Arrear salary for 11 days**

24. The dismissal was on 11<sup>th</sup> January 2010. The claimant had served 11 days that were not paid for. The court awards her Kshs. 6,886 in respect thereof.

**Prorata leave**

25. The claimant had earned 1<sup>1/2</sup> days untaken leave for five months in the sum of Kshs. 4,695. Same is awarded accordingly. The court notes that RW1 did not sufficiently rebut the aforesaid claims. They were proved on a balance of probabilities hence the award by the court.

**Notice pay**

26. The summary dismissal was declared unlawful and the claimant is entitled to one month salary in lieu of notice in the sum of Kshs. 14,969.

**Rest days.**

27. The court further awards the claimant in respect of rest days not given for two years Kshs. 30,048.

28. In the final analysis, judgment is entered in favour of the claimant as against the respondent as follows:

- a. Kshs. 162,144 being 10 months salary in compensation.
- b. Kshs. 67,608, gratuity.
- c. Kshs. 6,886 arrear salary
- d. Kshs. 4,695 prorata leave.
- e. Kshs. 14,969 in lieu of notice
- f. Kshs. 30,048 off days not given for two years. (2 per month)

**Total award – Kshs. 286,350**

g. Interest at court rates from date of filing suit till payment in full in respect of all awards except compensation whose interest will accrue from date of judgment till payment in full.

h. Costs of the suit.

**Judgment Dated, Signed and delivered this 9<sup>th</sup> day of July, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Samba for Claimant

Mr. Mbilo for Respondent

Chrispo – Court Clerk