



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1780 OF 2015**

**(Before Hon. Justice Hellen S. Wasilwa on 31<sup>st</sup> October, 2019)**

**CAROLINE NANCY ATIENO SIKUKU.....CLAIMANT**

**-VERSUS-**

**KUJENGA MAISHA EAST AFRICA**

**(KEMEA).....RESPONDENT**

**JUDGEMENT**

1. The Claimant, Carolyne Nancy Atieno filed a Memorandum of Claim on 06/11/2015 against the Respondent, Kujenga Maisha East Africa (KUMEA). She avers that she was employed by the Respondent as a Programs Manager pursuant to a letter of appointment dated on 27/11/2013 on a two years contract commencing on 01/01/2014 to 31/12/2015.

2. That she was to earn Kshs. 80,000/= per month together with entitlements as stipulated in her appointment letter and that the same was subsequently increased to Kshs. 85,000/= per month together with a monthly pension of Kshs. 6,000/=. That she had no defined job description but diligently performed all duties allocated to her by the Respondent.

3. That vide a letter dated 23/02/2015, the Respondent through its Board of Trustees purported to terminate her contract with effect from 15/03/2015 allegedly on grounds that:-

*a) She had used the Respondent's official vehicle for private use without proper authorization from her superiors;*

*b) She had submitted irregular accounting of the Respondent's funds upon travel imprest being provided to her, resulting to questionable receipts;*

*c) She had misrepresented amounts paid to beneficiaries during a project training session in Mtuobare held in October 2014; and*

*d) She had mismanaged the accounting process during payment of suppliers resulting in a large number of cancelled transactions.*

4. That she had given a satisfactory written explanation to the Respondent's Board on the above matters that had been previously raised by the Respondent and had been vindicated of any wrong-doing.

5. That the Respondent acted in bad faith by revisiting issues and finding her culpable on matters that had already been resolved and that not all the grounds listed in her termination letter were addressed when she went to the meeting for interrogation. That the termination of her contract was therefore against the principles of natural justice and the Employment Act and that at the time of the termination, her contract had not lapsed. She prays for judgment against it for:-

**1. Damages for wrongful and unfair termination of employment.**

**2. Unpaid salary at the rate of Kshs. 85,000/= per month from March 2015 to 31/12/2015 amounting to Kshs. 850,000/=.**

**3. Unpaid Pension of Kshs. 6,000/=per month from March 2015 to 31/12/2015.**

**4. Severance pay.**

**5. Costs of this suit.**

**6. Interest on all pecuniary awards at court rate from the date of filing suit.**

**7. Any other or further relief that this Honourable Court may deem fit and just to grant.**

6. The Claimant filed her Witness Statement on 15/08/2017 stating that she appeared before the Respondent's vice-chairman and another gentleman who was not a member of the Board and that the hearing was conducted hurriedly. That these two people did not constitute a proper board that could effectively resolve to terminate her services.

7. The Respondent filed its Statement of Response on 04/11/2015 denying that it unprocedurally terminated the Claimant's services and that it is a stranger to the particulars of damages and other prayers pleaded by the Claimant.

8. It contends that the termination was necessitated by the Claimant's own actions which resulted in her summary dismissal as under **Section 44(3) and (4) of the Employment Act** and that she was negligent in performing her duties, dishonest, involved in misappropriation and false accounting and abused her office.

9. That she was given a fair hearing with her wrongs brought to her attention in writing where after she made her response and that the Respondent's Board considered her defence and decided that the termination was proper. That it duly paid all her terminal dues on 13/03/2015 as follows:-

**a) Salary for days worked in March 2015 – Kshs. 42,600/=.**

**b) Leave pay of Kshs. 57,814.29.**

**c) A month's salary in lieu of notice – Kshs.85,200/=.**

**d) Self-earning pension of Kshs. 9,000/= (paid to Britam in accordance with the Claimant's instructions).**

10. That the claim herein is therefore in bad faith, frivolous, vexatious and an abuse of the court process and should be dismissed with costs.

11. The Respondent filed three Witness Statements on 14/07/2017 made by Simon Maina, Anasio Jomo and David Mwaniki. Simon who is the CEO of the Respondent confirmed in his statement that the Claimant's services were terminated by the board with reasons and that as far as the Respondent is concerned, due process and the Employment Act were followed.

12. This was reiterated by David Mwaniki, the Respondent's internal auditor in his own statement. Lastly, Anasio Jomo stated that he participated in a training organised by the Respondent as one of the project beneficiaries facilitated by the Claimant. That the Claimant paid him Kshs. 200 as transport reimbursement but recorded Kshs. 2,000 and appended a signature purporting to be his.

### **Evidence**

13. CW1 testified and adopted her filed witness statement as her evidence and stated that before termination she was not given a show cause letter. That her supervisor called her into his office and asked her if the amount paid in the accounting document he had before him was for activities done which she replied yes to.

14. That the supervisor then called several people on speaker phone who confirmed that activities took place and that she was not aware of the reason she was being called to the meeting. That in the meeting it was alleged that Kshs. 58,000/= which was paid to 29 participants trained in Embu was squandered and that each was to be paid Kshs.500 per day for 14 days.

15. She stated that the said money was paid in full with even the Church member present when she paid and that there was a list of all the members paid and their telephone numbers. That she had unfortunately lost the original accounting document and stated that she was not given minutes of the meeting.

16. During cross-examination, CW1 stated that she was given Kshs. 115,000/= to prepare for the training in terms of the venue, fuel, accommodation of staff, meals and Kshs.500 each day for each participant. That the list she prepared is **App 2 in the Respondent's documents** and denies forging their signatures and that since the said participants were from one village in Embu, the chief was to help get the people.

17. That she wrote an apology letter dated 05/02/2015 shown on **App 3** wherein she acknowledged participating in unbecoming behaviour of accounting process but contends that the institution did not lose money.

18. She denied attending any board meeting and states that she appeared before her supervisor, Joseph Ekhuya and church member. That she signed a waiver that she did not have any claim against the Respondent and in re-examination, she stated that the apology letter in App 3 was only in relation to letting people sign her absence. That there was no evidence of misappropriation of funds as alleged.

19. RW1, Anasio Jomo an Evangelist in Embu Kiambeni and one of the participants of the training organised by the Respondent, testified that he attended the training for one day only. That he signed against the payment made to him of Kshs. 200 and that his name is number 16 on **App 2**, the signature thereat is not his. He denied receiving Kshs. 2,000/= from the Claimant and in cross-examination he stated that neither a representative of the church nor the chief was present when they were being paid one by one.

20. RW2, David Mwaniki who works for New Apostolic Church as an Auditor, testified that he also assists the Respondent NGO. That in 2015, the Claimant took an imprest of Kshs. 114,000/= to facilitate a training and brought the expenditure back to the accounting department after the training and that the documents were then forwarded to them for audit.

21. That going through the expenditure he found anomalies and recommended that she gets a list with all the details of the participants and that they also selected 3 people on the list and called them. That one said he only received Kshs. 200 and that this confirmed the list was not genuine and they wrote a report to the CEO.

22. That the CEO called them together with the Claimant who thereafter wrote an apology letter that the matter was then referred to the board for further discussion. That he was called before the board and confirmed his findings to them. During cross-examination, RW2 stated that Kshs. 58,000/= was not accounted for and confirmed he was not a member of the Board. He confirmed that minutes of meeting were not before court and in re-examination he stated that 5 people in the list had incomplete details.

23. RW3, Simon Maina testified that the committee recommended the Claimant's termination and that in his view the apology letter she wrote was not sincere. That the Board has the responsibility of disciplining the CEO while for other staff a committee does the disciplining and that they decided not to report the misappropriation of funds to the police being that they are a church institution.

24. During cross-examination, he confirmed he was not privy to the issues since he joined the Respondent in March 2015 and that there is no written communication to the Claimant among the Respondent's documents for her to show cause why her services should not be terminated. He also stated that while the board constitutes a committee, he did not have any evidence of the same.

#### **Claimant's Submissions**

25. The Claimant submits that she was not accorded an opportunity to defend herself before a properly constituted Respondent's Board before her dismissal and neither was she given notification of the alleged hearing as provided for under **Section 41(1) of the Employment Act**. That she was accompanied to the said training by one John Aura Shikuku a representative of the Respondent whose role was to ensure transparency when paying the participants and that the funds given to her had been accounted for. That the said John Shikuku was in the know of the challenges she faced after she lost the accounting documents and she wonders why the Respondent did not call him to give evidence on its behalf and confirm whether she paid all the attending participants.

26. Further, that not even the Chief of Mtubare was called to controvert her assertions. That there were no minutes of the purported Board meeting produced in court to prove she was given an opportunity to defend herself nor the minutes of the board resolution/recommendations.

27. That there was no evidence that the Respondent made a report to the Police upon discovering she had purportedly falsified the accounting process as alleged all of which demonstrates that her employment services were unlawfully terminated and that she is thus entitled to the prayers sought in her Claim.

28. The Respondents did not file their submissions.

29. I have examined all the evidence and submissions filed herein. The Claimant was terminated vide a letter dated 23/2/2015 which indicated the grounds of termination were:-

***1. "Use of KEMEA official vehicle for private use without proper authorization from your superiors.***

***2. Irregular accounting of KUMEA funds after travel imprest is provided to you resulting to questionable receipts of Kshs.58,000. This was confirmed in your apology letter dated 05<sup>th</sup> February 2015 in response to the Internal Audit reported dated 28<sup>th</sup> January 2015.***

***3. Misrepresentation of amounts paid to beneficiaries during a project training session in Mtubare held in October 2014.***

***4. Mismanagement of the accounting process during payment of suppliers resulting in a large number of cancelled transactions...".***

30. In their Response to the Claim, the Respondent aver that the Claimant had admitted to the wrong doing above and they relied on a letter written by the Claimant dated 5/2/2015 in which they aver that the Claimant indeed apologised for these wrongs.

31. I have considered the letter's contents and I note that the Claimant admitted she had inappropriately made the accounts after the training in that some participants signed the sheets for others but the amounts paid were confirmed by her.

32. The Claimant in this letter never admitted she made irregular accounts which made the Respondent lose 58,000/= as per the termination letter.

33. RW1 indicated that the Claimant was given 114,000/= to conduct the training and after the training, the Claimant brought the expenditure back but the documents were found to have anomalies and only 5 out of 29 participants had all their particulars indicated.
34. That he also confirmed from some of the participants on the list if they had been paid as indicated and they denied.
35. The upshot is that the Claimant admitted some wrong doing on the way she presented the accounts after the training but she did not admit the false accounting and loss of 58,000/= as alleged by the Respondents.
36. The Respondent also terminated the Claimant for other reasons inducing use of the company vehicle without authority and also misrepresentation of accounting process during payment of suppliers.
37. There was no evidence submitted before this Court that she used any company vehicle irregularly. It is also not clear which suppliers she paid irregularly. The Respondents were therefore only partly able to prove they had a valid reason to terminate the services of the Claimant.
38. Other than valid reasons, the Respondents should demonstrate that they took the Claimant through a fair disciplinary process. The Respondent insisted that the claimant was accorded a hearing which the Claimant denied.
39. The RW1 despite insisting there was a hearing process, did not submit minutes of that process.
40. Section 41 of Employment Act states as follows:-

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