



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 193 OF 2014

PAMELA ODERA.....CLAIMANT

VERSUS

AFRICAN MEDICAL AND RESEARCH FOUNDATION.....RESPONDENT

J U D G E M E N T

1. In her Memorandum of claim filed on 14th February, 2014 the Claimant pleaded in the main as follows: -

- (a) The Claimant was employed by the Respondent as a Financial Planner through an initial service agreement dated the 9th of July, 1999.
- (b) Owing to her good and impressive work, the Claimant was appointed and later confirmed as a Financial Controller.
- (c) In 2003 the Claimant was transferred from the AMREF Kenya Country Office to AMREF corporate headquarters.
- (d) The Claimant was then promoted and appointed as a Corporate Finance Manager at the AMREF Corporate headquarters in 2003.
- (e) At the time of her suspension from employment the Claimant was being remunerated at the monthly gross pay of US \$ii,608 equivalent of Kshs. 1,016,867.
- (f) The service agreement was renewed on several occasions with the last renewal being on the 21st of July, 2010 for a period of four (4) years ending April, 2014.
- (g) During the entire period of employment, the Claimant worked diligently thus receiving excellent performance appraisals without any complaint, warning or disciplinary action being lodged against her.
- (h) Apart from the contract of employment the Claimant's employment was governed by the Disciplinary Code stipulated in AMREF'S Human Resource Policy and Procedures Manual (2012).
- (i) On the 4th October, 2013, while attending the Respondent's Board meeting in Addis Ababa the Claimant was prematurely suspended from employment for thirty (30) days to facilitate investigations into suspected financial irregularities in the finance department.
- (j) Upon her suspension, while in Addis Ababa, the Claimant immediately handed over a laptop, a laptop power adaptor and a credit card to the Respondent as she was directed to.
- (k) On the 9th October, 2013, the Claimant received a letter from the Respondent directing her to return all of the organization's assets in her possession and avail herself to assist in the taking of an inventory of all the documentation and assets and collection of her personal items.
- (l) On 10th October, 2013 the Claimant proceeded to the Respondent's premises pursuant to the letter mentioned hereinabove at paragraph 13 and amid tight security, took her personal effects and handed over the Respondent's bank codes, computer cards, files and keys that were in her possession in the presence of the Respondent's Corporate Human Resource Manager, a security officer, a PricewaterhouseCoopers "PWC" representative and AMREF's records officer.

(m) On the 4th of November, 2013 the Respondent's Director of Human Resources extended the suspension for a further thirty (30) days to allow for the finalization of investigations.

(n) Communication of the Claimant's suspension was sent internally to the Respondent's staff and externally to donors and financial institutions.

(o) The actions and content of the communication sent out by the Respondent on the Claimant's suspension before the finalization of investigation supposed that she was guilty of the allegations of financial irregularities thus injuring her reputation and condemning her guilty before the hearing or her case.

(p) The Claimant was subsequently requested to attend an interview on the 15th of November 2013 with PWC who were investigating on the alleged financial irregularities.

(q) The Claimant attended the interview and cooperated in the investigations.

(r) The Claimant received a letter from PWC on 18th November,2013 seeking clarification on some issues to which she responded by email on the 19th of November,2013 in addition to providing the supporting documents.

(s) On the 25th of November, 2013 the Claimant received a letter from the Respondent requiring her to show cause why disciplinary action should not be taken against her on the grounds that her alleged negligence in the diligent performance of her duties and failing to protect the interests of Amref by allegedly flouting requisite policies procedures, best practice and fiduciary breach amounted to abuse of office.

(t) The Show Cause letter required the Claimant to respond before the 28th of November,2013 and attend a disciplinary meeting on the 19th of November, 2013 without giving her access to the records in the office.

(u) Following the disciplinary hearing, the Claimant was terminated from employment through a letter dated 3rd December,2013.

2. The respondent on its part pleaded in the main as follows: -

(i) In answer to paragraph 16 and 17 of he Claim, the Respondent states that the communication referred to was to the members of staff and to banks with whom the Respondent transacts business. The internal communication was intended to facilitate the Respondent's operation during the Claimant's suspension. The Respondent denies that the said correspondent could or did injure Claimant's reputation or condemn her before the hearing as alleged or at all.

(ii) The Respondent's communication as indicated vide the notice on **page 232** of the Claimant's bundle of documents was intended to secure the Respondent's financial transactions. No reasons were given as to why the Claimant was no longer a signatory or indication given that any investigations related to suspected acts by the Claimant were on going.

(iii) Further to the above, the Respondent states that the document at **page 236** of the Claimant's bundle of documents was draft communication intended to be sent to the donors in case any enquiries were made by donors and was never sent to donors. The said draft was only shared with the Respondent's members of the internal Senior Management Term and could only have been obtained by the Claimant illegally and through a violation of the I.T Policy and Procedure.

(iv) In response to paragraph 18 to 20 of the claim the Respondent admits that on 8th November, 2013, it invited the Claimant for a meeting on 15th November 2013 to aid with the ongoing investigations. As a result of the meeting the Respondent followed up with a request for further information which the Claimant complied with on 19th November ,2013.

(v) The Respondent's investigations revealed serious irregularities that entitled the Respondent to summarily dismiss the Claimant relating to breach of her fiduciary duty as the Respondent's Corporate Finance Manager, violated the Respondent's policies and procedures and failed to adhere to the Respondent's internal controls on managing finances.

3. At the hearing the Claimant adopted her amended witness statement filed on 21st October,2015 as her evidence in Chief. She further stated that her rating at work as excellent. It was further her evidence that she was never furnished with a copy of the audit report upon suspension and was never interviewed by any person from internal audit. Further the audit document was never shared during the disciplinary hearing and that the report has never been filed in Court.

4. It was further the Claimant's evidence that she was never shown any property of the respondent stolen or misappropriate by her.

5. Her suspension letter was delivered to her on 4th October ,2016 at a Board meeting in Addis Ababa. She was consequently asked to return the respondent's assets in her custody and was informed she had not been terminated. The letter asking her to return the Company's assets was issued five days after suspension. According to the Claimant clause 9.3 of the HR Policy and Procedure Manual sets out separation and clearing process.

6. During the suspension the respondent communication to their bankers and changed signatories to their accounts by signing change mandate form. There was also communication to donors during her suspension. It was her evidence that the suspension was for 30 days and

was extended on 4th November,2013. She was never called during the first 30 days of suspension. PWC called for interview on 15th November, 2015 for the first time. She was thereafter issued with a notice to show cause and was given three days to respond which she did. She however stated that she was not properly equipped to respond to the Notice to show cause. The time was too short and some of the information was in her office and the lap top which was taken. She indicated these difficulties in her letter of response.

7. The Claimant further stated that she appeared before the disciplinary committee. These presents were the Director General, HR Director, Chair of Audit and Finance and Chair of HR- Directorate. At the hearing she raised her incapacity issue.

8. On the issues raised in the termination letter she stated that her personal credit card was in use since 2007 when the respondent finally got official credit card. It was her evidence that she used the official credits for her personal expenses bybut paid back the money. She further stated that apart from fiduciary duties other grounds were not covered in the HR Manual. She never appended her dismissal to the Director General since she was the one who chaired the Disciplinary Meeting.

9. In cross-examination she stated that she did not intend to pursue reinstatement since she has since found another employment. Concerning her position at the time of termination she stated she was Corporate Finance Manager and that she was next overall finance person reporting to a Director. It was her evidence that she was terminated over financial irregularities which were majority involved one Jenny, Lenny too was terminated. She denied knowledge why Jenny was terminated.

10. Regarding her contract she stated that the same was a fixed term contract and by the time of termination it had been extended for a further five years. It could have expired on 30th April, 2014. She admitted that it was possible to terminate her on account of gross-misconduct. Either party to the contract was required to give two months' notice of termination or pay no lieu of notice and that she was paid two months salary in lieu of notice. It further evidence that her contract was governed by regulations in the HR and Finance Manual and that her position required higher degree of mutual trust. She acknowledged the respondent is donor funded hence financial regulation was paramount.

11. On suspension she stated that HR Policy Manual provided for suspension for 30 days and that suspension could be extended. She was paid full salary and benefits during suspension. She however stated that by the time of her suspension she was not aware of any irregularities.

12. Regarding notification to staff about her suspension, it was her view that passing the information to all staff including those below her showed the matter was predetermined and further communication to Banks was not in accordance with respondent's policy and practice. She accepted that Jenny Panow and her were signatory to the respondent's Bank accounts. She stated that the respondent never told the Banks the reason why she was suspended.

13. She stated in her evidence that she had no evidence he emails to Banks and her suspension was sent to donors. Regarding meeting with PWC, she said this took place on 15th November, 2013 and that the meeting was documented. She disagreed with the contents of the minutes of the meeting and that minutes never addressed all the issues raised in the show cause letter.

14. Regarding Jenny Panow home travel, she said the invoice was raised by Holoday Bazeez Ltd and payment was made from Amref to Panow. The claim surrender from showed Jenny took an imprest of USD 10,000/= and further that Jenny was not responsible for claiming travel allowance for her husband who was in Lubumbashi. According to her, she satisfied herself that the document were proper.

15. She further stated that Jenny made a claim for Business Class aid travel and that Jenny's claim was a surrender of an advance she (Jenny) had taken. It was not procurement for a new ticket. Concerning Jenny's relocation allowance, she stated that the claim was made in May 2010. The form was signed by Jenny, Smalling and herself.

16. It was her evidence that Jenny joined the respondent in September,2004 and that the travel took place in August, 2008 one year before Jenny joined Amref. The claim was made in 2010. According to her she satisfied herself that the payment was proper and was made on the basis of an invoice not an air ticket. She agreed that the individual was supposed to approve his or her own expenditure and that Jenny never approved her expenditure. The approval was by Smalling and she signed to confirm.

17. About her mortgage she stated that the repayment was to be through the check off system. She however requested for direct payment from Amref account to HFCK and recovery from her to Amref. She was making the payment in cash not through check-off. There were times she could make lumpsum payment. All payments were made as scheduled and that none full behind. Her reason for direct payment was to ensure her take home pay was 50% otherwise her net salary could have been below 50%.

18. Concerning salary advances, all advances were to be paid within 3 months and that she never fell in arrears. Jenny approved her advances.

19. Regarding the Corporate Credit Card, she stated that she once used the same to pay for personal items but also used her personal card at times to pay for Corporate items.

20. Concerning the Kshs. 100 million Amref recovered, she stated that Kshs. 90 million was invested in a fixed deposit account and 10 million used for institutional expenses. That was the practice.

21. In conclusion she said that she made a written response to the allegations against her and that she met PWC on the same allegations and responded to them during the disciplinary hearing.

22. In re-examination she stated that the contents of the minutes do not reflect what was discussed with PWC and that she saw them for the first time when the matter was filed. She further stated that Jenney and Smelling were her supervisors. The claim surrender form was signed first by the person claiming (Jenny) , then the DG then she signs last. The imprest surrender form in this case was approved by higher

authorities.

23. The respondent's first witness Mr. Anthony Wmatu testified and the main that he was the Internal Audit Manager for the respondent and that he had held the position for about 6 years (since 2013). He adopted his witness statement filed on 19th February, 2013 as his evidence in Chief. He also relied on his documents attached to the statement.

24. In highlight he stated that in 2013 he flagged out several financial issues relating to the Claimant and one Jenny Panow. He prepared an audit report and submitted it to Audit and Risk Committee of the Board. One of them was that the Claimant had placed a direct standing order in the respondent's Bank account for payment of her mortgage. He checked the Supporting documents for the transaction and found that the Claimant had instructed junior officers to place the standing order. The effect was that the respondent was paying the Claimants mortgage which was irregular. The agreement with HFCK was that the mortgage was to be deducted from the payroll. The other staff had their loans deducted from the payroll. The Claimant was paying the money at intervals some as long as after six months. The standing order was being posted in a different account as a result the Claimant benefited from another loan which she paid back at her convenience.

25. It was further his evidence that the Claimant processed payments for personal items through the respondent's Bank account and this contrary to procedure. The Claimant for instance paid University fees for her son through the respondent's Bank account.

26. The witness further stated he questioned payment for travel expenses and relocation allowance for Jenny Panow. The refunds were being proceeded almost six years after Panow had joined Amref. In his view he felt the payments to Panow were fictitious. Panow was claiming ticket refunds for her and her family yet the tickets were issued before she joined the organization. The Claimant approved the payments. According to him the Claimant should have praised the inconsistencies before approval. When he flagged issues, he recommended a forensic audit by an external firm to examined the issue further. The Board appointed PWC to conduct the audit.

27. In cross-examination he stated that he joined the respondent in 2013 and that he had no engagement with them prior to 2013. Before then internal audit had been outsourced from KPMG. He was not aware of any reports by KPMG to the Board on the Claimant prior to 2013. Mr. Wamatu further stated that he summarized his findings in report which is summarized in his witness statement. The report had not been filed in court and that his report was not given to the Claimant. He further stated that he had no sessions with the Claimant over the red flags.

28. Concerning claim surrender form, Mr. Wamatu stated that there were three signatories to the claim surrender form. The Claimant was one of them. The project Manager (Director) was another and more senior to the Claimant. It was his evidence that the director approved the claim in January ,2010 and the Claimant approved in May,2010. He further stated jenny Panow was the overrule in in-charge of Finance and that the Claimant was a Corporate Finance Manager. He further stated that the standings order was authorized by Panow and Matte (in - charge programs).

29. It was Mr. Wamatur's evidence that Muthoni Kirwa was the chair of the Audit Committee and that her husband was a partner at PWC. During the forensic audit, all the issues raised in the show Cause letter were raised by the forensic auditors and that the Claimant was given the documents she asked for.

30. In re-examination Mr. Wamatu stated that the issue he flagged led to the termination of Panow's and Claimant's services. Respondent's second witness Mr. Shadrack Kiptoo Kirui informed the Court that he used to work for the respondent as HR to Manager. He sought reliance on his recorded witness statements as evidence in chief. He stated he was the one who was appointed to take minutes at the disciplinary hearing s and that representations by the Claimant were considered. In cross -examination he stated that the Claimant was an excellent worker. It was further his evidence that the Claimant was not provided with the audit report prior to suspension.

31. He further stated that Senior Management were notified of the Claimant's and Jenny's suspension. The email was not forwarded to other staff. He further stated that the Claimant was issued with a show Cause letter and that her colleague Mr. Austin assisted her at the Disciplinary hearings.

32. In the final submissions Mr. Odera for the Claimant submitted in the main that the Claimant termination was unfair for the reason that she was placed on suspension without good reason and clear evidence contrary Clause to 8 of the Disciplinary Code in the Amref's HR Policy and Procedures Manual. Further the suspension was done prior to any internal investigation illustrating grounds for the suspension. Further the Claimant was never confronted with this report to enable her respond appropriately nor was the report stated in Court. According to Counsel there was a predestined decision of the Claimant's guilt when she was ordered to immediately return the organizations property being lap top and Credit Cards. The return of these issues according to Counsel was contemplated under a separation and not suspension. Further the respondent sent internal and external communication to staff, donors and financial institutions halting all transactions before conclusion of the investigations.

33. Mr. Odera further submitted that the institutions of suspension, investigation and disciplinary hearing that were conducted by the DG – Amref was meant to humiliate disparage and embarrass he Claimant with the predetermined aim of termination of her employment irrespective of the investigation or disciplinary hearing outcome. Counsel further submitted that there was conflict of interest as the investigations interview and/or forensic audit conducted by PWC was irregular as the chair of the Audit and Risk Committee of Amref Board who was present at the disciplinary hearing had a direct relationship with a partner at the said audit firm. The said audit firm had in the past declined to undertake any assignment at Amref citing conflict of interest.

34. Further the Claimant also expressed her disadvantage before the disciplinary committee which compromised of the DG, the HR Director, the Chair Audit Finance Committee and chair -HR Directorate. This according to Counsel created a situation whereby the Claimant had no one to appeal to as the appeal under Clause 8.4 of the HR-Manual lie to the DG or his/her designate yet it was the DG who chaired the meeting.

35. Mr. Odera further submitted that the Claimant's detailed, clear and concise response to the show cause letter that brought out many

factual errors and inconsistencies on issues was never considered nor referred to during the disciplinary hearing and the termination letter. Further, the respondent failed to provide valid reasons for termination as the grounds provided fell short of showing financial irregularity primarily attributed to the conduct of the Claimant, fraud or break of any policies, procedures or accounting standards adopted by the respondent. All the transactions referred to were duly approved by the relevant authorized officer of the respondent as per mandate and were within policies and practices with specific reference to Amref's Finance Policies, Procedures and Accounting Treatment Manual.

36. Mr. Muthui for the respondent on his part submitted in the main that the Claimant was not just another employee of the respondent. She was the respondent's Corporate Finance Manager as such. She was offering or was supposed to offer leadership on financial matters. The determination as to whether the termination of employment was fair must consider the Claimant's responsibilities and duties and her conduct.

37. According to Counsel the operational requirements of the employer were codified in among others the employment contract, HR Policy and procedures manual and Amref financia. Mr. Muthui further submitted that the reasons for termination of the contract are based on substantial issues which the employer at the time of termination contract genuinely believed to exist. The Court must not substitute its own views for those of the employee.

38. Applying these principles, counsel submitted, the respondent had proved that it had valid reasons to dismiss the Claimant. It was the Claimant's responsibilities to ensure that the respondent's policies were followed. It was also her responsibility to provide guidance to the respondent in achieving optimal financial management at all times. It was the Claimant's responsibility to ensure that all payments were proper and genuine, fully supported by vouchers and followed proper procedures.

39. Mr. Muthui submitted that placing reliance on the approval of fraudulent or irregular claims by Jenney Panow and Dr. Michael Smalley was not act of faithful and diligent service to the best of Claimant's skill, knowledge and ability as the Corporate Finance Manager.

40. Counsel further submitted that the Claimant used her position as Corporate Finance Manager to benefit herself financially and circumvent laid down policies and the law by placing a standing order on the organizations' account for her own personal mortgage liabilities. She also obtained unapproved loans and advances from the respondent and failed to pay through the pay roll as required, to disguise and hide her liabilities.

41. On the issue whether suspension and termination were procedural, counsel submitted that suspension became necessary when the issue of plausible fraud, requiring investigations arose. Clause 8.3.5 of the respondent's manual provides for suspension and in particular stated that suspension would apply to major or gross misconduct offences that call for investigation.

42. With regard to termination procedure, the respondent submitted that it followed due process prior to termination the Claimant's employment. The Claimant was given adequate opportunity to defend herself.

43. Under Section 45 of the Employment Act, a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid.

44. Further the reason for termination ought to be a fair reason related to employees conduct, capacity or compatibility or based on operational requirements of the employer. The Claimant's letter of termination dated 3rd December, 2013 I brief cites the following grounds.

(a) Lack of due diligence:

Approval of travel and relocation claims which had multiple inconsistencies including unreasonable amounts and making the payment to a personal account while the claim was based on an invoice from a travel agent.

(b) Violation of laid down policies and procedures.

In a number of instances, you took advantage of your position to obtain advances without meeting the conditions for such advances and without following the laid down procedures.

(c) Use of official Credit Card for personal use and use of personal Credit card for official purposes.

It was noted that you used the official Amred Credit Card Assigned to you to make personal purchases without Approval and subsequently failed to book them in Amref's Books of account.

In addition, you used your personal Credit Card to pay for Official purchases but made an irregular claim for the Same, the amount claimed was more than the actual Spend and you authorized payment for it without supporting documents.

45. In her evidence before the Court, the Claimant did not deny that she approved refund for Jenny Panow's relocation expenses. She further did not deny at times using interchangeably the official Credit Card and her personal Credit Card while conducting official or personal transactions. Her justification was that nothing prohibited her from doing so and that on the occasions. She used the official Credit Card for her personal expenses she would make a refund with regard to our refund of Jenny Panow's expense she said the refund was procedural and, in any event, had been approved by Dr. Smalley and Jenney herself who were in any case her superiors.

46. Whereas the Claimant alleged that her actions especially of using the official Credit Card for personal purchases and personal Credit Card for purchases was authorized, she never produced any regulation or memorandum or letter of authority to vouch for her claim, under Section 47(5) of the Act, the burden of proof that an unfair termination has occurred rests on the employee, in this case the Claimant. It was her

contention that by authorizing Jenny Panow's reimbursement, by directly debiting her mortgage liability on the respondent's account without passing through payroll and making refunds later and by interchangeably using official or personal Credit Card for official or personal transactions she did nothing wrong yet the Claimant did not produce any evidence to support her contention. These are the reasons for which the respondent terminated her service hence if she considered such termination unfair in terms of reasons, the burden was on her to justify her actions which she failed to do.

47. On the issue of direct debit for her mortgage the Claimant stated that she did so in order that her net monthly pay should not fall below 50% as per the respondent's regulations. Clause 4.9 of the respondents HR -Manual makes all Amref employees eligible for salary advance provided it did not leave an employee with less than 50% of the net pay after statutory deductions. The Claimant by authorizing the direct debit on the respondent's account without passing through pay roll was therefore concealing her actual net monthly pay thereby flouting respondent's HR Policy and Regulations Manual.

48. AS has been observed by this Court in several of its judgements it is not the duty of the Court to analyze and critique the reasons for which an employment contract has been terminated. From an employer's perspective, the test usually is whether a reasonable employer confronted with a similar situation would consider termination as the most proportionate disciplinary action to take in the circumstances. If the answer by yes, the Court would uphold the dismissal or termination.

49. Policy manuals and regulations for employees form an essential component of the contract of employment. They are usually intended to provide the blue print or the architecture of how the organization should be run and what is expected of every employee. Thee violation is therefore a justifiable reason for termination of an employment contract.

50. From the foregoing the court is persuaded that there existed valid and justifiable reasons for terminating the Claimant's service.

51. On the issue of the procedure followed, the Court as summarized from the pleadings and evidence before the Court above, is persuaded that the respondent followed a fair procedure in according with Section 45 of the Act while terminating the Claimant's services. The Claimant was fully paid her terminal dues upon termination hence no order will issue in that regard.

52. On costs, the Court has noted the courtesy by the Claimant and the respondent in handling this dispute both prior to coming to Court and during the litigation process. The respondent further acknowledged that the Claimant was a good worker. In the circumstances the Court would order that each party bear their own costs.

53. It is so ordered.

Dated at Nairobi this 22nd day of November, 2019

Abuodha Jorum Nelson

Judge

Delivered this 22nd day of November, 2019

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge