



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

**AT NAIROBI**

**SUIT NO. 1595 OF 2013**

**EMILY GUMBA.....CLAIMANT**

**VERSUS**

**BRITISH COUNCIL.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed her suit on 3<sup>rd</sup> October 2013 contemporaneously with a notice of motion under certificate of urgency. She averred in her memorandum of claim that she was employed as a programme and business manager at all material times to this claim. She averred that at the time of suspension she was earning a monthly salary of Kshs. 172,227/- and that the illegal suspension was on the false allegations that she had showed gross negligence in the performance of her job leading to the suspension and issuance of a notice of disciplinary hearing both dated 15<sup>th</sup> July 2013. She averred that she was not given a hearing before her suspension and that other than the show cause letter she was not given any hearing by the Respondent in violation of the rules of natural justice. The Claimant averred that she faithfully served the Respondent and no proper or thorough investigations were undertaken before her suspension and that she had been subjected to endless disciplinary sessions. She thus sought reinstatement to employment, general damages and exemplary damages. She also sought costs and interest on the sums claimed.

2. The Respondent filed a response and counter-claim on 24<sup>th</sup> October 2013. In the response and counter-claim, the Respondent averred that the Claimant was employed as a programme and business manager on various fixed term contracts beginning 29<sup>th</sup> November 2010 and the last contract was dated 1<sup>st</sup> July 2012 for the period 1<sup>st</sup> July 2012 to 31<sup>st</sup> March 2013 extended to 31<sup>st</sup> July 2013. The Respondent averred that it begun an audit of its programme activities in early 2013 overseen and coordinated by the Claimant. The Respondent averred that one of the issues that arose from the findings of the audit was that there was a number of discrepancies between the activities stated to have been undertaken and the amount of money that had been procured from the Respondent for those programme activities. The Respondent averred that 12<sup>th</sup> July 2013 one of the Respondent's internal auditors Andrew Manning held a meeting with the Claimant to try to establish the correct facts in relation to the discrepancies that had been identified and in order to facilitate the audit process the Claimant's employment was suspended on 15<sup>th</sup> July 2013. The Respondent averred that the Claimant was invited to a disciplinary meeting on 22<sup>nd</sup> July 2013 and that her fixed term contract ended on 31<sup>st</sup> July 2013 and her full salary for the period between 15<sup>th</sup> and 31<sup>st</sup> July whilst she was on suspension was paid. The Respondent averred that the Claimant was subsequently invited to a meeting on 22<sup>nd</sup> September 2013 to enable the Respondent clarify certain facts and that she attended the said disciplinary meeting. The Respondent averred by way of counterclaim that the Claimant

was bound to act with good faith, fidelity and loyalty to the Respondent and that on diverse dates between April 2012 and mid 2013 had caused, initiated and/or allowed various payments totalling 4,000,000/- to be made to her in cash advances and the sum of Kshs. 359,300/- was the sum unaccounted for which the Respondent claimed together with interest and costs. The Respondent subsequently sought to amend the response and counterclaim to include additional sums exposed by the audit being Kshs. 2,659,480/- unaccounted for by the Claimant between 2011 and 2013.

3. The Claimant filed a reply to the amended response and counterclaim on 28<sup>th</sup> March 2014 and in it averred that she was illegally and unfairly terminated. She averred that the Respondent was on a fishing expedition in order to fix and terminate her contract of employment. The Claimant averred that though her contract was to end on 31<sup>st</sup> July 2013, the same was constructively and impliedly extended and has not been paid. The Claimant averred that the rules of natural justice were violated by the Respondent in conducting disciplinary meetings against her. The Claimant averred she was the one who had suffered great loss due to unfair termination.

4. The Respondent filed a reply to the response to amended defence and counterclaim on 23<sup>rd</sup> September 2015. In it the Respondent denied that the Claimant's contract of employment was constructively or impliedly extended and averred that the meeting called on 11<sup>th</sup> September 2013 was not a disciplinary enquiry but a meeting for her to clarify some issues within her knowledge that led to the loss of the Respondent's funds. The Respondent denied that the rules of natural justice were violated in respect of the Claimant and denied that the Claimant had suffered any loss as alleged or at all as her contract came to an end and she was paid all her dues. The Respondent urged the response to amended response and counterclaim be dismissed with costs.

5. The Claimant testified on 7<sup>th</sup> November 2017 and stated that she was a property manager at present and was formerly employed by the Respondent. She stated that she was a programme and business manager from November 2010 on a renewable yearly contract. She testified that she on a contract that was to expire on 31<sup>st</sup> July 2013 which had an oral promise by the country manager that the contract was to be extended. She stated that while on leave she was called back to the office and asked to answer audit questions. She stated that she wanted to know why she was subjected to the disciplinary issues in September 2013 when the contract had ended. She testified that she was not given a chance to represent herself on 15<sup>th</sup> July 2013 as two days after being given time to respond she was asked to hand over office keys and laptop. She stated that she deserved an opportunity to present the defence she had. She testified that she was not able to access the premises and the termination was unfair. She stated that the counter claim by the Respondent was misplaced and that she did not owe the Respondent any money as the activities in question were conducted. She testified that there is no document to support the Respondent's claim against her and that there is no audit report.

6. In cross-examination she testified that she used to design programmes under schools which entailed training of students and teachers on computer labs and that it entailed working closely with county officials. She stated that the objective was to improve teacher proficiency in ICT and there was an exchange programme with counterparts in the UK on best practices for the sector learners. She testified that if there was a regional programme she was to fine tune for local application and the regional team together with the project team would select and funding would follow. She stated that depending on the activity they would get the DEO involved but if it was exchange, the money would be sent directly. She testified that there was an annual plan for training and the quarterly plan would be extracted from it. She stated that closer to the time they would liaise with the procurement department and school, identify the venue, cost would be negotiated, she would oversee the process and would then ask for funds based on budget allocation. The application was online and after approval by line manager the funds would be sent to her account and the original receipts would be given as one enters in the system how the funds were utilised. If the budget is overshoot one was required to give an explanation and if less was utilised the system would automatically deduct the unspent amount from funds applied for. She stated that she met Manning on 12<sup>th</sup> July and he told her that he was doing an audit of programme activities. She testified that she was asked to explain certain expenditure and expenses. She stated that she was called on 15<sup>th</sup> July and she got two letters – one on suspension and another for the disciplinary meeting. She testified that

Hugh Moffat the country director, Kandie, Amolo and her colleague attended and they had a lengthy meeting. She stated that she gave responses where she had the answers and that it was mainly yes or no. She stated that there was a way forward agreed. She testified that she refused to attend the meeting on 13<sup>th</sup> September and instead sought more time. She asserted that the documents were tampered with. She testified that she was told that the contract ended on 31<sup>st</sup> July and that she was paid her July salary. She stated that she got some money in November but did not know how it was calculated. She testified that she received Kshs. 153,400/- and did not receive a termination letter. She received a certificate of service. She stated that she knew the contract was to lapse on 31<sup>st</sup> July 2013 and that she continued working and expected a renewal. She testified that she went to the office after the suspension and had limited access to the office. She stated that she filed this case to stop the hearing and that the activities referred to in the probe took place. She testified that the trip to Malindi was a site visit and monitoring & evaluation. She disagreed that she was liable as the activities took place and the receipts were handed in.

7. In re-exam she testified that she needed to get into the system to get the claim she had submitted. She stated that the time was limited and that she worked under duress. She testified that by the time she went she found that some documents had been removed from her files. She felt disadvantaged and that is why she came to court as she was feeling like she was out of employed and had been judged by HR. She stated that she did not have access as she could not get into the system and that her files were brought to the boardroom and she could not speak to her colleagues. She testified that the documents used to be archived after a year and that the documents were in the basement. She stated that she only saw some documents after the court case started and that she did not get the full audit report. She testified that she met Manning only once when she was recalled from leave as he sat in the UK office. She stated that she never got an audit report and was expecting renewal of a contract that never came. She testified that she had promises of renewal and that she had no position when she was subjected to disciplinary proceedings.

8. The Respondent called Sanuel Kandi Herman the HR manager of the Respondent. He testified that the Claimant was one of the staff of the Respondent and that she was a connecting classrooms project manager. He stated that she joined in 2011 or thereabout and that the life of connecting classroom was 2 years but it was extended and it was still running with expected end in March 2018. He testified that the Claimant left employment in July 2013 and that there was an audit after Finance established that there were fictitious claims. He stated that an auditor came from London and the audit revealed misappropriation of funds. He testified that the auditor met George Muite a programmes manager premier skills and David Nguli programmes director who had been mentioned adversely. He stated that Manning met the Claimant on 12<sup>th</sup> July 2013 and it was to shed light on the issues that had come up in the audit and expense claims. He testified that the Claimant was still at work and was on suspension. He stated that she could not account for some money she had been given while conducting the programme. He testified that there was a disciplinary hearing on 22<sup>nd</sup> July 2013, she was informed on 15<sup>th</sup> July 2013 and came for the hearing. He stated that he was the one taking the notes of the hearing. He testified that the Claimant offered explanations and it was agreed that the Claimant was to get more information and the meeting was adjourned to a later date. He stated that the Claimant went to his office and went through the records and asked for documents and left. He testified that he was the one who was guiding the exercise and that any document she sought she got. He stated that she wanted to access her drawer and the box where the expense claims were placed and then she left. He testified that she was invited after that and she was given enough time to verify the records and she did not come back from there. He stated that the Claimant was allowed access to her email and she did not come for the meeting in September. He stated that the gross was Kshs. 463,984/- after PAYE Kshs. 374,789 less SACCO loan and a trip where she had to refund Kshs. 1,000/- and that she got Kshs. 153,400/- paid into her account through EFT. He testified that the Claimant could not find the receipts or documents and that she abandoned the disciplinary process halfway. He stated that on application for funds, the line manager would approve and once approved the funds would be channelled to the applicant's account and on conducting the exercise one would account for the funds. If there was a balance left over, there were two options, one could either pay cash to the cashier and be issued with a receipt or at the end of the month have it deducted from the salary. If one overspent then one would lodge the accounting and the excess sum would be paid to the applicant's account. He stated that the receipts are not attached online. He testified that other employees were implicated and they were subjected to disciplinary hearing and were dismissed. He testified that the Claimant could not explain some of the expenditure and that there were some expenses such as the one

for Kshs. 100,500/- that was for the Malindi trip which the Claimant did not account for. He stated that the Claimant did not submit receipts for funds advanced and that the receipts were placed in a box. He denied the suggestion that the Claimant was not allowed to come and check for the documents. He testified that the Claimant should have cleared herself. He stated that she had indicated that she was tired of endless hearing.

9. In cross-examination he stated that he had not filed a statement before the court and that the Claimant was suspended on 15<sup>th</sup> July 2013 as a result of the audit on programme activities by Hugh Moffat the county director. He testified that there was no letter from him suspending her and that the Claimant was issued with a show cause letter. He stated that the Claimant could not attend the meeting without the letter and her response in writing was that she would attend. He testified that he even spoke to the Claimant personally and she even had given the name of the person who would accompany her. He stated that of given time he would produce the documents and that the Claimant was to hand over the laptop and keys to her cabinet. He testified that she handed over laptop but retained the keys to the cabinet because she had personal items and that she would hand over when she came to the office. He stated that there was a form she signed and that if given time he would produce it. He testified that the Claimant was given a notice stating the areas to be discussed at the meeting. He testified that Vera Amolo was the employee picked by the Claimant and that the Claimant had confirmed this in writing. He denied that the person who took over from the Claimant attended the disciplinary meeting. He testified that Louisa Kitsao is the one who took over from the Claimant and that the programme ended in July 2013. He stated that Hugh Moffat undertook the audit and that the Claimant had to some extent confessed. He testified that the Claimant responded and during the meeting held was availed an opportunity to explain. He stated that the procedure was to surcharge when there was evidence and that the Claimant was not surcharged and she was paid what was considered to be her entitlement.

10. In re-exam he testified that there was a suspension letter and the notice of disciplinary meeting and a show cause letter as well as minutes. He stated that the Claimant agreed to read the report with her colleague Vera Amolo an official of the staff association. He stated that the audit report was submitted indicating that the Claimant had £20,000 unaccounted for. He testified that the Claimant was taken through the items identified in the audit report. That marked the end of oral testimony and parties agreed to file written submissions.

11. The Claimant filed submissions on 11<sup>th</sup> December 2017 and the Respondent filed its submissions on 14<sup>th</sup> December 2017. The Claimant submitted that the suspension and her termination were unfair and constituted psychological torture and caused her mental anguish. She submitted that she was subjected to endless disciplinary meetings and was suspended while on leave, such that she was not afforded an opportunity to know the allegations against her and the circumstances under which she was being investigated. She was not permitted full access to enable her retrieve the necessary documents for her defence. She submitted that she was to surrender her keys to the office and also return the laptop where she had stored the operational information which would have enabled her to answer the allegations made. She submitted that the contract was not renewed after July 31<sup>st</sup> and yet she was continuously called upon to attend meetings up to and including the month of October 2013. She submitted that the Claimant was to be accompanied by an employee of her choice but the Respondent had chosen the person who had taken her responsibilities. She submitted that her colleague was already biased and would want to remain in that position that was held by the Claimant. She submitted that the receipts for the expenses incurred were kept in an office that could be accessed by everyone. On the counter-claim she submitted that the same was meant to defeat her claim and that if she owed the Respondent any money she would have been surcharged and the money would have been deducted from the money she was paid as her terminal benefits. She relied on the case of **Principal and BOG Machakos Teachers College v. Wambua Muange [2016] eKLR** where the court held that a dismissal can be both unfair and wrongful at the same time. The Claimant submitted that she could not be subjected to disciplinary proceedings as an ex-employee. The Claimant submitted that the Respondent had failed to prove the counter-claim and thus sought the award of Kshs. 5,000,000/- for breach of contract, Kshs. 4,000,000/- for unfair termination and Kshs. 2,000,000/- for mental anguish and torture, Kshs. 5,000,000/- as exemplary damages in light of the loss sustained and the current global economic trends and inflationary tendencies adversely affecting the Kenyan shilling.

12. The Respondent submitted that the findings of the internal audit undertaken by the Respondent necessitated the Claimant's suspension for further investigation and thereafter a show cause process. The Respondent submitted that there was a discrepancy between the sums the Claimant took for activities and the sum expended for the same. The Respondent submitted that the Claimant was invited to a disciplinary meeting on 22<sup>nd</sup> July 2013 after the suspension on 15<sup>th</sup> July 2013. The Respondent submitted that the Claimant voluntarily attended the meeting of 11<sup>th</sup> September 2013 to clarify certain facts and that at the meeting of 11<sup>th</sup> September the Claimant was informed that she was no longer an employee of the Respondent as her contract had ended on 31<sup>st</sup> July 2013. The Respondent submitted that the Claimant never returned after this meeting though she answered the questions asked despite the clarification being made that she was no longer an employee. The Respondent submitted that the Claimant was well aware of the reasons for the suspension and the disciplinary meetings. The Respondent relied on the case of **Donald C. Avude v. Kenya Forest Service [2015] eKLR** and stated that the Claimant was suspended to enable the Respondent to carry out investigations and during the suspension the Claimant received full pay. On the contract, the Respondent relied on the case of **Samuel Chacha Mwita v. Kenya Medical Research Institute [2014] eKLR** where the court dealt with the definition of a contract of service. The Respondent submitted that the Claimant admitted that all the contracts of service came to an end upon their expiry by effluxion of time and that the Claimant was paid all her terminal dues, her terminal gratuity and received a certificate of service. It was submitted that the Claimant was not dismissed from service. The Respondent relied on the case of **Banking, Insurance & Finance Union (Kenya) v. Commercial Bank of Africa [2015] eKLR** where the court held that *where an employee is on contract with a fixed period once it has expired there automatic termination by effluxion of time*. It was submitted that the fixed term contracts carry no expectancy of renewal and cited the case of **Margaret A. Ochieng v. National Water Conservation & Pipeline Corporation [2014] eKLR** for this proposition. The Respondent submitted that the Claimant had caused to suffer loss as a result of her negligence/irregularities. The Respondent submitted that the Claimant obtained cash advances and failed to account for the funds received in the various programmes she oversaw as the project manager. The Respondent submitted that the Claimant cannot receive an award of general damages, exemplary (punitive damages) in an action for breach of contract. Reliance was placed on the cases of **Abdulhamid Ibrahim Ahmed v. Municipal Council of Mombasa [2004] eKLR** and **Dalmas B. Ogoye v. KNTC Ltd [1996] eKLR**. The Respondent also cited the cases of **Alphonse Maghanga Mwachanya v. Operation 680 Limited [2013]** and **Lawrence Onyango Oduori v. Kenya Commercial Bank Limited [2014] eKLR** on the issue of the damages payable where unlawful termination is proved. The Respondent submitted that the case cited by the Claimant being **Principal and BOG Machakos Teachers College v. Wambua Muange (supra)** was distinguishable as in that case the court was dealing with a claim for summary dismissal and was premised on the Employment Act in force as at 5<sup>th</sup> December 2005. The Respondent submitted that it had proved the case against the Claimant and she had failed to prove her case against and was therefore entitled to the orders sought against the Claimant and a dismissal of the Claimant's case.

13. Judgment was reserved to 23<sup>rd</sup> January 2018 but due to delay in my retrieval of the file there was some delay in completing it and the delivery by my brother Radido J. I apologise to parties for the delay, albeit a short one.

14. The Claimant in this case was on a contract that was to terminate on 31<sup>st</sup> July 2013. She was subjected to disciplinary process after her suspension on 15<sup>th</sup> July 2015. She had served as a project manager for a few years on term contracts that had been renewed or extended in writing. She was still to undergo some disciplinary process in September 2013 when she decided she had had enough. The Respondent on its part seeks a recovery of funds it asserts were lost through the negligence of the Claimant. It was the parties position that a requisition would be made online and the accounting was also online but the receipts proving the expenditure were placed in a box. The receipts and submitted documents were randomly checked. It is not therefore surprising that the Respondent was unable to get an account for some of the monies expended on some of the programmes. The Claimant asserts she accounted and availed documentation. She was suspended and during the period of her suspension called to give an account. On the balance, the Claimant could not properly give an answer to the queries she was asked to respond to during the disciplinary meeting and even before the court was unable to give some answers.

Some of the issues were pretty straight forward yet she had difficulty responding to them. On the issues raised by the Respondent, one wonders how she would have been able to mount a defence when her laptop had been taken away, she had no access to the office or to the emails. It is unclear who was responsible for the losses the Respondent claims the Claimant was responsible for as there is no document in the form of the application for expense by the Claimant attached to the sums alleged to have been lost. This area is one where the Claimant could not be faulted without documentation as the project could be run by her or staff under her and she was the titular head of the projects. It is true other employees were dismissed and it is unclear whether they were the ones responsible to the exclusion of the Claimant. One of the claims that the Claimant advanced was for general damages and exemplary damages. It is becoming increasingly common to see such claims before the court. Let it be heard loud and clear. There is no provision for an award of general damages or exemplary damages under the Employment Act. Compensation under Section 49 of the Act is compensatory and is not an award of general damages.

15. Given the analysis above on the respective claims, it is clear neither of the two parties before me was able to prove their respective cases on a balance of probabilities. I accordingly dismiss the claims by the Claimant in her claim and the Respondent's counterclaim. Each party is to bear their own costs for the suit.

It is so ordered.

**Dated at Nairobi this 23<sup>rd</sup> day of January 2018**

**Nzioki wa Makau**

**JUDGE**

**Delivered at Nairobi this 25<sup>th</sup> day of January 2018**

**Radido Stephen**

**JUDGE**