



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1353 OF 2014**

**(Before Hon. Justice Hellen S. Wasilwa on 26<sup>th</sup> October, 2018)**

**ANN GICHIMO.....CLAIMANT**

**VERSUS**

**KENYA ORDINANCE FACTORIES CORPORATION...RESPONDENT**

**JUDGEMENT**

1. The Claimant, Ann Gichimo, instituted this claim by a Memorandum of Claim dated 13<sup>th</sup> August, 2014 through the firm of Muma & Kanjama Advocates seeking damages for unlawful dismissal by the Respondent, Kenya Ordinance Factories, on 7<sup>th</sup> December, 2011. The Claimant and Respondent both led evidence according to their pleadings.

**Claimant's Case**

2. The Claimant avers that she was first appointed as the Chief Marketing Officer of the Respondent on the 7<sup>th</sup> August 2006 and began her duties on 1<sup>st</sup> September 2006. She held the position until 2007 when she left for the United States of America for personal interests.

3. That when she returned to Kenya in May 2008, she re-applied for the same job she had held with the Respondent and being successful, was re-absorbed on 15<sup>th</sup> April 2008 on a permanent basis. Apart from being the Chief Marketing Officer, she was also appointed acting Commercial Services Manager on about 24<sup>th</sup> September 2008 effective from 1<sup>st</sup> July, 2008 and continued with the employment until her termination on the 7<sup>th</sup> December, 2011. As at the time of dismissal, she was earning a gross salary of Kshs. 133,691.00.

4. The Claimant states that from around 2009 while working for the Respondent, she suffered several incidents of sexual harassment and intimidation by Senior Management of the Respondent before being dismissed by the Respondent.

**Respondent's case**

5. The Respondent admits that the Claimant was their employee and states that termination of her employment was as a result of various incidences caused by her conduct and attitude towards her subordinates that led to the Managing Director transferring her to the Farm as Farm Manager on 29<sup>th</sup> July 2011. That before handing over to the incoming Commercial Services Manager, the Claimant deleted important documents from the Commercial Services Manager's Computer between 29<sup>th</sup> July 2011 and 5<sup>th</sup> August 2011.

6. The Respondent avers that upon investigations, the claimant was given show cause why her employment should not be dismissed for deleting corporation files and folders and when she appeared before the Disciplinary Committee (DC) on 7<sup>th</sup> December 2011, she was taken through the proceedings and given an opportunity to ask questions to the witnesses. That she was however rude to the DC and the DC passed its verdict to dismiss the claimant from the Respondent's establishment.

7. That immediately after her dismissal, the claimant sought Judicial Review orders through HC JR Cause No. 330 of 2011 but Korir J. dismissed the application with costs to the Respondent for lacking in merit as the disciplinary process was fair and lawful.

8. The Respondent states that the Claimant seeks to challenge the termination by alleging that the same was contrary to the law and rules of natural justice but which amounts to appealing Justice Korir's judgment before this Court.

**Submissions**

9. On the question of wrongful dismissal, the Claimant submits that for an employer to terminate an employee's employment there is a statutory duty to show the reason for the termination of employment. That the reason was fair and that it was through a fair procedure as required in Section 45 of the Employment Act which states that *"No employer shall terminate the employment of an employee unfairly."*

10. The Claimant further submits that her dismissal was unfair and unlawful because there was no justifiable reason for termination and the procedure followed was not fair. In this case, she was accused of deleting important documents from the Respondent's computer which was accessible to other staff in the department and which listed documents are confirmed to have physical copies. That the Data Handlers who did not incorporate the Claimant in their investigations reported the deleted files were from a Human Resource computer and not a computer from the Commercial Sales Department. She cites the case of **DANIEL KIPLAGAT KIPKEIBUT –VS- SMEP DEPOSIT TAKING MICRO FINANCE LIMITED [2016] eKLR** where Justice DK Marete stated that:-

**"The Claimant further seeks to rely on the authority of Walter Ogal Anuro vs Teachers Service Commission (2013) eKLR where the Court Held that; '...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.' Again, Section 45 (4) (b) of the Employment Act 2007 provides;...that termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating an employee."**

11. That most importantly, as stated by the Court of Appeal in **KENFREIGHT (E.A) LIMITED VS BENSON K.NGUTI [2016] eKLR**:-

**"The burden on the employee is limited only to asserting that unfair termination has occurred, leaving the burden to show that termination is fair to the employer."**

12. On the issue of whether the Respondent breached the Claimant's right to be heard, the Claimant submits that the Respondent breached the natural justice principle that no man should be condemned unheard by failing to sufficiently hear her before her dismissal. She cites the case of **DENNIS NYAMBANE ORANGO VS EGERTON UNIVERSITY [2016] eKLR** where Justice Maureen Odero Held that:-

**"The right to be heard is one of the principles of natural justice. This requires that any person who stands to be adversely affected by a decision must be allowed an opportunity to be heard before that decision is made. The person must be informed of the allegations against him and must be accorded the opportunity to present his case. This was stated in the case of Grace Kazungu & Anor Vs NSSF Cause No.703 of 2010[U/R] "the fundamental principles of natural justice are that a person affected by a decision will receive notice that his or her case is being considered. Second, they will be provided with the specific aspects of the case that are under considerations so that an explanation or response can be prepared and thirdly, they will be given an opportunity to make submissions to the case."**

13. That the Claimant received two letters from the Respondent on 30<sup>th</sup> September 2011, one summoning her before a disciplinary committee and the other emphasizing the likelihood that she would be dismissed if found guilty by the disciplinary committee. The meeting with the DC was adjourned to give the Respondent's Managing Director time to respond to the sexual harassment and intimidation at the workplace raised by the Claimant. The Managing Director however rejected the claims on the premise that they were time barred. That she then received two more letters on 6<sup>th</sup> December 2011, one informing her to appear before the DC on 7<sup>th</sup> December 2011 and the other informing her of the documents she had allegedly deleted.

14. Further, that when she appeared before the DC, only the Managing Director spoke save for the Claimant's questions and the witnesses called by the Respondent. The committee did not deliberate on the Managing Director's decision to summarily dismiss her and neither was she given the investigation report for her interrogation. She also submits that the Respondent had earlier denied her request for representation by an advocate.

15. It is also submitted that the Claimant was not given sufficient time to prepare for the disciplinary meeting and substantively defend herself since she was told a day before and after working hours. Worse still, the decision to summarily dismiss her was reached during the same meeting. She relies in the case of **REPUBLIC –VS- COMMISSIONER OF COOPERATIVE DEVELOPMENT & ANOR EX-PARTE JOYCE WANJIKU RUNYORA & ANOR [2017] Eklr** where the Court states:-

**"Procedural fairness is one of the principles that govern administrative action under Article 47(1) of the Constitution and Section 4(1) of the Fair Administrative Action Act. It is a rule of natural justice that a man must not be condemned unheard. The right to be heard requires that any person who stands to be affected adversely by a decision, should be informed in advance of the case against him, given adequate time to prepare his defence and given a chance to make representations on his behalf before such decision is made."**

16. It is also submitted that the right for sufficient opportunity should not be side-stepped especially in situations of unequal power relations like in the case of the Claimant and the Respondent which is a statutory body. That the decision to summarily dismiss her from employment had a grave impact on her livelihood and she should therefore had been given sufficient opportunity to be heard.

17. The Claimant submits that the Managing Director of the Respondent breached the principle of *nemo iudex in re causa sua* when he acted as both the prosecutor and judge with regard to the Claimant's dismissal. Considering that he was the one who alleged that the Claimant deleted files from the computer of the Commercial Sales Manager, he should not have been part of the DC meetings which summoned the Claimant. She cites the case of **ERNST & YOUNG LLP –VS- MARKETS AUTHORITY & ANOR [2017] EKLr** where Justice JM Mativo held:-

**"Natural justice has been described as 'fair play in action the principles and procedures which in any particular situation or**

set of circumstances are right and just and fair' [38] Its rules have been traditionally divided into two parts: Audi alteram partem- the duty to give persons affected by a decision a reasonable opportunity to present their case. Nemo judex in causa sua debet esse- the duty to reach a decision untainted by bias. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it”.

18. Further, that the Respondent had the duty to ensure the disciplinary proceedings against the Claimant resulting to her dismissal would not be tainted by bias. This was not the case since the Managing Director who accused the Claimant was also in the DC where he is the only one who spoke. She states that the test of bias on the part of the Managing Director as the Chair of the DC has been met.

19. The Claimant submits that the Termination Letter of Employment dated 7<sup>th</sup> December 2011 was defamatory and it greatly affected her chances of securing another job. The defamatory words have caused great embarrassment and brought shame to her as a respected member of the society and her family and she cites the case of **JIMI MASEGE –VS- KENYA AIRWAYS LIMITED [2010] eKLR** where the Court awarded Kshs. 1,500,000.00 as damages for libel as a result of the defamatory words used in the termination letter.

20. The Claimant prays for:-

**a. Damages for unfair termination equivalent to 12 months' salary Kshs. 1,773,468.00.**

**b. Damages under the early exit package Kshs. 5,945,363.00.**

**c. General and aggravated damages Kshs. 1,500,000.00.**

21. The Claimant finally submits that her claim is meritorious and prays for compensation as outlined in her Memorandum of claim.

22. The Respondent submits that the disciplinary process leading to the Claimant's dismissal was fair and is res judicata and this Honourable Court is functus officio by dint of judgment of Hon. Korir J in HC JR No. 330 of 2011 where it was held as follows:-

***“The Applicant alleges that she was not given an opportunity to call witnesses. She also claims that she was denied a chance to demonstrate that she had not deleted any files. The proceedings clearly show that she was taken through a fair process and she never asked to call any witnesses and neither is there evidence that she attempted to adduce any evidence, in fact it is dear that she refused to participate in the proceedings. She also rejected the chance she was given to make submissions. The Disciplinary Committee could not have forced the applicant to participate in the proceedings, it was enough for the Committee to give the applicant an opportunity to be heard”... Looking at the entire disciplinary process, I find that the applicant was given an opportunity to be heard. The process was fair.” (Underlining/emphasis ours).***

23. That the Claimant has not been truthful from the onset of this case, in her character during cross-examination and even in her submissions filed before this court on 23<sup>rd</sup> July 2018, for instance she tried to mislead the court that she was not paid Kshs. 1,370,135.25 as ordered by the court but later admitted that she was indeed paid all the monies. That she admitted she has not filed an appeal to set aside the finding by Korir J. or at all. For that reason, this Court is bound by the findings of the Hon. Korir J that the disciplinary process was fair and this Court cannot therefore revisit the process afresh and sit as an Appellate Court on its own decision which the Claimant is indirectly pushing for.

24. The Respondent further submits that Section 7 of the Civil Procedure Act provides:-

***“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”***

25. They cite the case of **NICHOLAS NJERU -VS- HON. ATTORNEY GENERAL & 8 OTHERS CIVIL APPEAL NO. 110 OF 2011** where the Court of Appeal in Nyeri held as follows:-

***“The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation.”***

26. On whether the Claimant's dismissal for gross misconduct was for a valid reason(s), the Respondent cites the case of **BRITISH LEYLAND UK LTD -VS- SWIFT [1981] IRLR 91** where Lord Denning stated as follows:-

***“The correct test is: Was it reasonable for the employers to dismiss him? if no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable, if it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him” (underlining/emphasis ours).***

27. Further, that the Claimant has not proved that her termination of employment was unfair as required by Section 47(5) of the Employment Act but has just made mere allegations of sexual harassment without basis or proof and which is meant to divert the Court's attention from the main issue in this matter.

28. The Respondent also submits that the Claimant's termination was done pursuant to the Respondent's Terms and Conditions of Service, paragraph 10.13 on summary dismissal and Sections 44 (4) (g) and 45 (2) of the Employment Act 2007 with the reasons for termination being wilful deletion of 75 important documents from the Respondent's computer in an act of rebellion amounting to gross misconduct on the Claimant's part. That her attitude before and throughout the proceedings was one of arrogance and insubordination. That apart from being defiant in nature, the Claimant harassed security personnel at the gate and a Ms. Magdaline Ochola in May and July 2011 respectively. She was given adequate time to make presentation and even call witnesses if she had any but refused.

29. It is submitted by the Respondent that the Claimant did not complain that she was not prepared for the DC meeting as she was in fact accorded an extension of over 2 months to prepare when she appeared before the DC on 7<sup>th</sup> December 2011 and which she admits in her submission. That she cannot therefore be heard to say that she was not accorded enough time to prepare for her defence.

30. Further, that when she was asked whether she was comfortable with the composition of the DC as constituted, she identified a member she was uncomfortable with and the person was excused and replaced with another. After the hearing, the committee found the Claimant guilty and that her actions amounted to gross misconduct which is a ground for summary dismissal. The Respondent cites the case of **BA IMONIKHE -VS- UNITY BANK PLC S.C 68 OF 2001** where the Nigerian Supreme Court held:-

**“Accusing an employee of misconduct, etc by way of a query and allowing the employee to answer the query, and the employee answers it before a decision is taken satisfies the requirement of fair hearing or natural justice. The appellant was given a fair hearing since he answered the queries before he was dismissed.”**

31. The Respondent also submits that with respect to insubordination, they adopt the reasoning by the Court of Appeal in **JUDICIAL SERVICE COMMISSION -VS- GLADYS BOSS SHOLLEI & ANOTHER, CIVIL APPEAL NO 50 OF 2014**, where Kiage JA held as follows:-

**“The idea that an employee, no matter how good at one's work and no matter how important and critical one's office, can declare oneself unaccountable and unanswerable to her employer appears to me so contrary to reason, good sense and the practical realities of life as to be a fantastic oxymoron. It is in the nature of life that no one is indispensable and no one is immutably immune from a vertical accountability to one's employer. Anything else would seem to stand reason on its head and to create a halo of invincibility about an individual that cannot possibly be productive of a healthy working relationship”, (page 72)“It seems to me clear quite beyond peradventure that not only is the Chief Registrar of the Judiciary's accountability to the Chief Justice and the Judicial Service Commission a matter of statutory and constitutional requirement, but such accountability and responsibility is in no way lessened or diluted by any other responsibility to account and answer to other organs, offices or institutions as may be by law required. Being of that mind, I would consider a denial, defiance, violation or repudiation of such accountability and answerability to the Judicial Service Commission on the part of the Chief Registrar of the Judiciary to be an insufferable act of insubordination inviting appropriate disciplinary measures”. (Page 73).**

32. On the issue of whether the Claimant is entitled to the remedies prayed for, the Respondent submits that the Claimant's dismissal was for a valid reason and that procedural fairness was adhered to and for that reason, they pray that the Court finds her not entitled to such declaratory orders. That her request for 3 months' notice pay, 12 months' pay, 12 days unpaid leave and general aggravated damages are disallowed since she did not adduce any evidence before Court to prove she is entitled to the same. That she is not entitled to service pay as she was a member of NSSF under Section 35 of the Employment Act of 2007 and the same be also disallowed. They cite the case of **NYAMOGO & NYAMOGO ADVOCATES -VS- BARCLAYS BANK OF KENYA, CIVIL APPEAL NO. 69 OF 2005**, where Nambuye, Kiage and Murgor JJA cited with approval the case of Hann -vs- Singh [1985] KLR 716 *for the proposition that special damages must not only be specifically claimed but also strictly proved.*

33. The Respondent further prays that their counterclaim be allowed and the Claimant refunds to the Respondent a sum of Kshs. 1,370,135.25/= which she admitted during cross-examination and in the response to the Statement of Defence at paragraph 10. That while the Claimant seeks Kshs. 1,604,292.00/= in the Statement of Claim, in her submissions she now wants Kshs. 1,773,468.00/= and noting that the Claimant is bound by her pleadings, she cannot amend her pleadings in submissions as she is doing.

34. On the issue of Defamation by Libel, the Respondent submits that the letter of termination was addressed to the Claimant and it cannot therefore be termed as Libel since the letter gives a record of issues and reasons that led to her dismissal after forming the basis of the disciplinary proceedings. The dismissal letter was never published in the newspapers or any social sites and thus her allegations for Libel have no merit and do not meet the threshold of Libel. They rely on the case of **Phinehas Nyagah -vs- Gitobu lmanyara [2013] eKLR.**

35. The Respondent submits that the Claimant has ambushed them with a new prayer introduced in her submissions that was never pleaded in the Memorandum of Claim and the same be therefore disallowed.

36. It is also submitted by the Respondent that the Claimant has not demonstrated bias on the part of their Managing Director or even the 4 members of the DC and they cite the case of **JUDICIAL SERVICE COMMISSION -VS- GLADYS BOSS SHOLLEI & ANOTHER, CIVIL APPEAL NO 50 OF 2014** where it was held as follows:-

**Okwengu JA at paragraph 84 and 85**

**“In my view, the learned judge erred in failing to ascertain the facts or circumstances upon which the allegations were anchored. True the allegations were of a serious nature. However, it is one thing to allege facts and another to establish the facts. The perception of bias can only be based on established facts. In this case the circumstances giving rise to the respondent's allegations were not established and therefore could not be the basis of the perception of a reasonable man.”**

37. The Respondent finally submits that the Claimant has not discharged the standard of proof, the burden of proof and the evidentiary burden to warrant the orders sought and therefore her claim should be dismissed with costs to the Respondent. They also pray that since the Respondent's counterclaim is not opposed, the same is allowed with costs and interests.

38. I have examined all evidence and submissions from all Parties. The issues for determination are as follows:-

**1. Whether this claim is res judicata.**

**2. If not whether the Claimant had valid reasons to dismiss the claimant for employment.**

**3. Whether the Claimant was accorded a fair disciplinary process.**

**4. Whether the Claimant is entitled to the remedies sought.**

39. On the 1<sup>st</sup> issue herein, the Respondents have submitted that the Claimant filed HC JR 330/2011 where the issue was matters complained of in this case. Hon. J. Korir heard the Judicial Application and made a finding that is as in paragraph 22 above that the Applicant had been given an opportunity to be heard and that the process was fair.

40. This being the case and which Claimant admitted I rely on Section 7 of the Civil Procedure Act which provides that:-

**“No Court shall try any suit or issue in which the matter directly and substantially is issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised by such Court”.**

41. The position of the law is clear and so is also case law that this Court cannot seek to entertain a matter which has been substantially been dealt with another Court of equal and competent jurisdiction.

42. Indeed J. Korir and this Court are Courts of equal and competent jurisdiction. The Hon. J. Korir having dealt with this matter and having found that the Claimant was accorded a fair hearing, I cannot revisit the same issue again. If I did, that would be tantamount to sitting on appeal or on a decision of my brother.

43. I have been invited to make a finding on the unfairness of the disciplinary process and award the Claimant damages. That I cannot do, I find that indeed this claim is res judicata and I will not delve further into the prayers sought on whether there were valid reasons to terminate the Claimant.

44. The finding on the other issues above will no longer be valuable. I therefore find the claim by the Claimant without merit and I therefore dismiss this claim with costs.

**Dated and delivered in open Court this 26<sup>th</sup> day of October, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Anyona for Claimant – Present

Kabi holding brief for Odukenya for Respondent – Present