



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.1791 OF 2015**

**JOYCE GATWIRI MICHENI.....CLAIMANT**

**- VERSUS -**

**WANANDEGE CO-OPERATIVE SAVINGS &**

**CREDIT SOCIETY LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 16<sup>th</sup> November, 2018)

**JUDGMENT**

The claimant filed the statement of claim on 08.10.2015 through Anne Babu & Company Advocates. The claimant prayed for judgment against the respondent for:

- 1) 12 months' salary as compensation for unlawful and unfair dismissal.
- 2) Salary up to 21.05.2015.
- 3) One month salary in lieu of termination notice.
- 4) Payment for accrued leave.
- 5) Interest and penalties accruing on the loans facilities (Further particulars to be provided).
- 6) Certificate of service.
- 7) Costs and interest.

The response to the statement of claim was filed on 01.07.2016 through Ochieng' Opiyo & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs. The claimant filed a reply to the response on 04.10.2016.

The respondent employed the claimant by the letter dated 20.08.2014 to the position of Customer Relations Officer and reporting to the Fosa Manager. By the letter dated 19.12.2014 the respondent appointed the claimant to act as the Business Development Manager (Grade M2) effective 16.12.2014 until a replacement would be made. By the letter dated 18.05.2015 the claimant wrote to the respondent that she had been acting as Business Development Manager since 16.12.2014 and due to medical reasons as per attached letter from her doctor, she wished to step down from acting Business Development Manager and to resume her earlier position of Customer relation officer. The letter by the AAR Healthcare doctor was dated 16.05.2015. The letter conveyed that the claimant was expectant and it was a 3<sup>rd</sup> pregnancy which was a high risk pregnancy due to two previous caesarean section scars. The letter stated that due to that circumstance the doctor was recommending light duties at the claimant's place of work and any assistance accorded would be highly appreciated. The claimant testified that she had therefore written to the respondent to vacate the acting position and to revert to her substantive position in view of the doctor's recommendation.

By a letter dated 18.05.2015 the claimant's employment was terminated. The letter stated as follows:

**“Dear Madam,**

**RE: TERMINATION**

**We refer to your appointment to the position of the Customer Relations Officer and the subsequent appointment as the Business Development Manager in the Acting capacity.**

**While working as the Acting Business Manager, you gave a misleading report on money disbursement which amounts to gross misconduct.**

**This is therefore our Notice to terminate your service with Wanandegé Sacco as provided by the letter of appointment. Your last day of service will be 20<sup>th</sup> May 2015.**

**J.B. MATHEKA**

**CHAIRMAN”**

The 1<sup>st</sup> issue for determination is whether the termination of the contract of service was unfair. The respondent’s purported case is that prior to the dismissal the claimant was given a show cause letter dated 18.05.2015 making allegations that the claimant had contravened the human resource policy including late coming to work; unplanned field visits; absconding duty; not adhering to instructions; and dishonesty. She was to show cause within 48 hours why disciplinary action was not to be taken against her. The respondent’s further evidence is that after receiving the show cause letter the claimant wrote her letter of the same date to relinquish the acting position and to revert to her substantive position. The respondent’s further evidence was that the claimant’s move to revert back was after she learned that she was under investigation for misappropriating the respondent’s funds.

The claimant has however filed the email of 29.04.2015 from one Makori inviting the claimant to a meeting on Monday morning to discuss the claimant’s late coming to work, field visits without prior arrangement or notification of the office, absconding duty on Friday and Saturday for funeral, misuse of society resources, and missing scheduled meetings without apologies. The claimant testified that she attended the meeting as was scheduled and the reason for termination as stated in the letter of termination was not one of the matters discussed at the meeting.

The respondent’s witness stated that the reason for termination of the claimant’s employment was due to gross misconduct being negligence of duty because the claimant failed to bank cash balances after the Annual Delegates Conference (ADC) of 11.04.2015. Further she had presented forged documents or receipts for accounting purposes.

The Court has considered the material on record. It is clear that in the termination letter the claimant was terminated on account of misleading report on money disbursement which amounted to gross misconduct. Further, it is clear that the claimant was not subjected to a disciplinary process of a notice and a hearing as far as that ground of termination was concerned and as per section 41 of the Employment Act, 2007. The reason for termination is found to have lacked in particulars and further, in absence of a disciplinary notice and hearing with respect to the purported ground of termination, the Court returns that as at termination, the respondent has failed to show there existed such valid reason as was stated in the termination letter and as per section 43 of the Act. The Court further returns that the procedure for termination was not fair as per section 45 (2) (c) because while purporting to invoke the contractual provision to terminate by giving agreed notice, the termination letter at the same time invoked purported misconduct or poor performance for which the procedure in section 41 of the Act was the exclusive procedure in view of the purported misconduct or poor performance. The Court returns that the termination was unfair in procedure and in substance. The respondent’s submissions in that respect are upheld. While making that finding, it is incredible that the alleged and purported show cause letter of 18.05.2015 invited the claimant to respond in 48 hours but prior to lapsing of such time, the claimant on the same date received the termination letter citing a ground for termination which was not part of the allegations in the made up show cause letter. The Court finds that such actions on the part of the respondent amounted to gross abuse of due process – it was vague, incredible and unfair.

The 2<sup>nd</sup> issue for determination is whether the claimant is entitled to the remedies as prayed for. The Court makes findings as follows:

First, the claimant prays for 12 months’ salary as compensation for unlawful and unfair dismissal. The respondent cites section 45(3) of the Act which states that an employee who has been continuously employed by his employer for a period not less than 13 months immediately before the date of termination shall have the right to complain that he has been unfairly terminated. The claimant had served 3 months on probation and 6 months on permanent basis. The Court finds that the provision was merely cautionary but does not preclude an employee who has served less than 13 months from claiming unfair termination. While urging the Court thus, **“...to breathe life into Section 45 (3) of the Act and decline to entertain questions of unlawful termination from employees who have served for less than the required period as is in the instant case,”** the Court finds that the respondent has not submitted on the constitutional rule or other settled law that would lead the Court to arrive at such unfair finding of universal application. Indeed the Court finds that the submission is lacking in merit because even the cited section 45(3) of the Act does not inherently have or embody any such prohibitory rule. The Court follows its opinion in Anthony Mugethe Irungu –Versus – The Co-operative University College of Kenya [2018]eKLR where the Court stated thus, **“The respondent has invoked section 45(3) of the Act which provides thus, “45(3). An employee who has been continually employed by his employer for a period of not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.” It is clear that the claimant had not served for more than 13 months but the Court returns that the section does not say that an employee who has not served for more than 13 months cannot complain that he has been unfairly terminated. Accordingly and for the reasons stated, the termination was unfair.”** Thus, the Court returns that the section would not preclude the claimant from claiming compensation for unfair termination. The Court however considers that the shortness of the period served, taken together with the other factors for consideration under section 49 of the Act, may constitute a mitigating factor in favour of the employer in exercising the discretion on the number of months of salaries to be awarded for the compensation. In the instant case, the claimant had served for only 9 months, the probationary period had lapsed and the claimant had been conferred with higher acting position but which she was relinquishing due to medical recommendation for light duties. She otherwise desired to continue in employment. To balance justice for the parties the Court awards her 6 months’ gross salaries under section 49 of the Act in compensation for the unfair termination. Her gross pay as at termination was Kshs. 96, 355.00 and she is awarded **Kshs.578, 130.00** accordingly.

**Second**, the claimant prayed for salary up to 21.05.2015. The Court returns that the claimant's last day at work per letter of termination was 20.05.2015 and she will be paid prorate making **Kshs.64, 236.70**.

**Third**, the claimant prays for one month salary in lieu of termination notice. The respondent opposed the award on account that the termination was not unfair and was properly a summary dismissal. While there was no summary dismissal, the termination was not unfair but the claimant was given a month's notice per the termination letter dated 18.05.2015 stating that her last day at work would be 20.05.2015. The agreed one month notice and as per section 35 of the Act was served and the prayer will fail.

**Fourth**, the Court returns that the claimant had not served for an aggregate of 12 months as envisaged in section 28 of the Act and she is not therefore entitled to payment for accrued leave as prayed for.

**Fifth**, the claimant is entitled to, a certificate of service as per section 51 of the Act

**Sixth**, the prayer for interest and penalties accruing on the loans facilities was not established by way of pleading, evidence and submissions and it will fail. It was in the nature of special damages but which were not quantified and particularised in the statement of claim as well as the submissions. It will fail.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- 1) The respondent to pay the claimant a sum of **Kshs.642, 366.70** (less income tax) by 31.12.2018 failing interest at Court rates to be payable thereon from the date of the judgment till full payment.
- 2) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nairobi** this **Friday 16<sup>th</sup> November, 2018**.

**BYRAM ONGAYA**

**JUDGE**