



**REPUBLIC OF KENYA**

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

**ELRC NO. 1605 OF 2014**

(Before Hon. Lady Justice Hellen S. Wasilwa on 20<sup>th</sup> December, 2018)

**ESTHER KARIMI NDAMBIRI .....CLAIMANT**

**VERSUS**

**PHARMACEUTICAL MANUFACTURING COMPANY (K) LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed the instant Claim on 5<sup>th</sup> August 2014, through the firm of Mwamuye, Kimathi & Kimani Advocates seeking payment of Kshs. 158,848/- being the unpaid salary for the month of April, 2014 by the Respondent Company and interest accrued at prevailing Court rates.
2. The Claimant states that she was employed by the Respondent as a Quality Assurance/Regulatory Affairs Manager on 1<sup>st</sup> February, 2014 earning a basic monthly salary of Kenya Shillings Two Hundred and Forty Five Thousand as gross salary and Kshs. One Hundred and Seventy Five Thousand as net salary.
3. She avers that she served the Respondent with loyalty and diligence until 30<sup>th</sup> April, 2014 when her notice of resignation served on 1<sup>st</sup> April 2014 was to expire.
4. She further avers that during the period of employment the Respondent Company accorded her a motor vehicle Registration Number KAR 538F to facilitate her movements as her personal vehicle underwent repairs. She further states that the said Motor Vehicle that was not properly serviced broke down on or about 14<sup>th</sup> March, 2014 around Ngara area.
5. She states that it was following this that the Respondent verbally declined to pay her salary for the month of April 2014 for the reason that the sums were used to settle the repair bills for the Motor Vehicle Registration Number KAR 538F.
6. In her Memorandum of Claim the Claimant prays for Judgment be entered for the Claimant as against the Respondent for:-
  - a. Judgment in the sum of Kenya Shillings: One Hundred and Fifty Eight Thousand, Eight Hundred and forty Eight Only (Kshs. 158,848/-) being monthly salary for the month of April 2014.**
  - b. Interest accrued at prevailing Court rates as this Honourable may deem fit on the above sum from the date of filing and every other month that sum remains unpaid.**
  - c. Costs of the suit be awarded to the Plaintiff against the Defendant**
  - d. Any other monetary or pecuniary amounts this Honourable Court deems just to award to the Claimant.**
7. The Respondent in its Memorandum in Response to the Statement of Claim and Counter claim dated 13<sup>th</sup> October, 2014 and filed in Court on 14<sup>th</sup> October, 2014 admit the employment relationship existed between the Claimant and Respondent Company.
8. The Respondent denies that the Motor Vehicle Registration Number KAR 538F was not properly serviced and goes further to state that the Claimant's negligence caused the Motor Vehicle Registration Number KAR 538F to stall at Ngara as she was running her personal errands and not official duties as was expected.
9. The Respondent avers it is entitled to recover the repair costs of repairing Motor Vehicle Registration Number KAR 538F from the

Claimant which forms the basis of the counterclaim of Kshs 130,703.00/-.

10. The Respondent further prays that the claim herein be dismissed with costs and Judgment entered in favour of the Respondent in terms of the Counter Claim.

### **Evidence**

11. The Claimant gave her evidence on 18<sup>th</sup> October, 2018 where she reiterated the averments in the Memorandum of Claim.

12. On cross-examination, CW1 stated that during the subsistence of her employment she was assigned Motor Vehicle Registration Number KBC 820L which she used for about 4 weeks then was assigned Motor Vehicle Registration Number KAR 538F. She further stated that she used the Motor Vehicle to go to the university where she enrolled for a masters' degree this fact was known to the Respondent's Company.

13. On further cross-examination, CWS1 stated that she had informed the Respondent Company that the Motor Vehicle Registration Number KAR 538F was faulty but nothing was done and the said Motor Vehicle stalled at Ngara Market.

14. That repair works were done on the Motor Vehicle KAR 538F. Subsequently she served her notice of resignation but the Respondent withheld salary for April 2014.

15. The Claimant urged the Court to allow her Claim as prayed.

16. The Respondent witness Dr. Kumar Shah (RW1), a pharmacist by profession and owner of the Respondent Company relied on his written statement dated 22<sup>nd</sup> July, 2017 and asked it to be adopted by Court as his evidence in chief in which he reiterated the averments in the Memorandum in Response to the Statement of Claim and Counter claim.

17. RW1 added that the Respondent company was sold out few weeks prior to the hearing.

18. On Cross-examination RW1 confirmed that the Respondent Company was still in existence. Further RW1 confirmed that he is aware of the Counter Claim but cannot point out the verifying Affidavit for the same.

19. Further that the Claimant was allowed to use the Motor Vehicle Registration Number KAR 538F for official use only and not for personal benefit. This communication was made verbally to the Claimant.

20. On further cross-examination, RW1 admitted that there is no provision of the Claimant's Contract of employment that provided for repair costs of the vehicle from the Claimant's salary.

21. RW2 Johnson Mwaniki Nganga, a driver at the Respondent Company gave his evidence stating that he has been employed as such by the Respondent for a period of 8 years.

22. On cross-examination, RW2 stated that, he has at the request of the Claimant, driven her to USIU where the Claimant used to attend classes.

23. He further confirmed that the Motor Vehicle Registration Number KAR 538F was an old vehicle but was in good working condition.

24. The Respondent urged the Court to dismiss the instant Claim with Costs and allow its counter claim as prayed.

### **Submissions**

25. It is submitted on behalf of the Claimant that the Counter Claim is not supported by a Verifying Affidavit contrary to the mandatory requirement provided under Order 7 Rule 5(a) of the Civil Procedure Rules, 2010. The Claimant urged the Court to dismiss the Counter Claim on this basis.

26. It is further submitted by the Claimant that her Salary for April 2014 was withheld by the Respondent contrary to the provisions of Section 19 (1) (b) and (c) of the Employment Act (Act No. 11 of 2007).

27. The Claimant urged the Court that she is entitled to the reliefs sought in her Memorandum of Claim.

### **Respondent's submissions**

28. On behalf of the Respondent, it is submitted that the Claimant had an implied duty to exercise reasonable care while handling company assets. It is further submitted that she broke the implied term to use skill and be competent as from 15<sup>th</sup> February 2014 when her car broke down and she failed to get a replacement.

29. It is further submitted that the Claimant has breached her implied duty of fidelity to her employer; first, she frequently came late for work or absented herself from work altogether; second, she used company vehicle to carry out personal errands.

30. The Respondent further submitted that the Court finds that the Claimant was negligent in her use of the Company Motor Vehicle KAR 538F and further that the Respondent was bound to recover the costs of repair. The Respondent relied on the authority of **Nabro Properties Limited versus Sky Structures Limited (2002) Vol. 2 KLR 299.**

31. The Respondent admits that the Counter Claim is not supported by a verifying Affidavit. It is submitted that the omission of the Verifying Affidavit is not fatal to a suit. They relied on the case of **High Court Civil Case Number 610 of 2001: Microsoft Corporation Versus Mitsumi Computer Garage Limited & Others** and further the provisions of Article 159 (2) (d) of the Constitution of Kenya.

32. The Respondent prays that the Claim be dismissed with costs and allow the Counter Claim.

33. I have examined evidence and submissions of the parties. The only claim by the claimant is for payment of her April 2014 salary which Respondent withheld citing repairs on the motor vehicle driven by the Claimant. Indeed the Claimant had been assigned this motor vehicle for use by Respondent. There is no indication in the contract of employment of the Claimant that she was to meet the repair costs of the motor vehicle she was using.

34. The motor vehicle had a driver who used to drive the Claimant and the fact that the vehicle stalled when Claimant was driving it is not an indication of carelessness or negligence on Claimant's part.

35. The Respondent did not call a mechanic to assess ever the extent of damage to the said motor vehicle and the negligence if any assigned to the Claimant.

36. It is my finding that the Respondent's action of withholding the Claimant's salary is uncalled for. I therefore find Claimant's case meritorious and I allow the claim as prayed with costs to the Claimant plus interest at Court rates with effect from the date of filing this case.

37. The Counter claim lacks any merit and is dismissed accordingly.

**Dated and delivered in open Court this 20<sup>th</sup> day of December, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Bahati mwamuye for Claimant – Present

Matagora holding brief Dr. Kuria for Respondent – Present