



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1032 OF 2014**

***(Before D. K. N. Marete)***

**MARY WAMBUI NGAARI.....CLAIMANT**

**VERSUS**

**CENTERS FOR INTERNATIONAL PROGRAMS - KENYA....RESPONDENT**

**JUDGEMENT**

This matter was originated by a Statement of Claim dated 12th June, 2014. The issues in dispute are therein cited as;

- a) *Wrongful dismissal*
- b) *Non payment of terminal dues*

The respondent's by a Replying Memorandum dated 21st July, 2014 denies the claim and prays that it be dismissed with costs.

The claimant's case is that vide a written contract dated 1st March, 2011, she was employed by the respondent as Administrator – Imarisha Programme at a consolidated monthly salary of Kshs.120,000.00. This was on a 12 months renewable contract which contract was to expire on 30th September, 2014.

The claimant's further case is that on 9th May, 2014, by a letter of even date, she was suspended on grounds of breach, more particularly, financial impropriety. She was invited to present her defence against the allegations. She further presents her case as follows;

5. *The Claimant presented her defence with a covering letter also dated 9<sup>th</sup> May 2014 enclosing an analysis of Cash Reconciliation, compiled by a Financial Consultant which report gave detailed analysis as was requested and/or demanded for by the respondent.*

The claimant's other case is that on 14th May, 2014, when she was required to present herself with a witness to defend herself or do an oral defence at the respondent boardroom, she was instead served with a letter of summary dismissal without being awarded an opportunity to defend herself, or at all. This was premeditated and in disregard of her defence. It was also in disregard to the respondents Human Manual Revised on 1st November, 2011 at Chapter 7 providing for disciplinary, termination and disciplinary procedure by not availing the organization expenditure files, bank statements to enable the parties carry out an all inclusive reconciliation of Accounts. These are;

**PARTICULARS OF DOCUMENTS DENIED TO CONDUCT RECONCILIATION**

- a) *Portion of the Respondents Bank Statement showing the transfers.*
- b) *Audit trail from quick Books.*
- c) *Detailed Ledger for the Claimants Accounts.*
- d) *Summary of the Cheques en-cashed by the Claimant*
- e) *Report from the Finance Manager who was the Accounting Officer was never availed.*

The claimant's further case is that this a clear case of constructive dismissal in that she was not awarded ample opportunity and records to make a complete reconciliation. She has therefore suffered loss as follows;

a) Salary for the remainder Contract period from April to September 2014	Kshs.642,158.67
b) Gratuity from 2013 October to 2014 September	Kshs.166,406.01
c) Pension	Kshs.115,907.25
d) Accrued Leave days	Kshs.257,571.65
e) One Month Notice	Kshs.107,026.44
<b>Total</b>	<b>Kshs.1,289,070.02</b>

And the claimant has suffered mental anguish, pain and character assassination.

She prays as follows;

- a) The sum of Kshs.1,289,070.02
- b) Cost of this suit
- c) Interest on (a) and (b) above from date of filing till payment at court rates.
- d) Any other relief that this court deems fit to grant.

The respondent's case is a denial of the claim.

She admits having employed the claimant in 1st March, 2011 subject to terms and conditions set out in the contract of employment and the respondent's human resource hire manual. She, however, denies the claimant's allegation of wrongful and or constructive dismissal and avers as follows;

4.1. For about three (3) years before the Claimant's suspension and subsequent dismissal, the Claimant was engaged in the course of her duties as an intermediary for the Respondent to distribute office advances for the Respondent's Kisumu program.

4.2. Sometime in March and April 2014, the Respondent established after an audit that a sum of Kshs.434,040.00 out of funds entrusted to the Claimant could not be accounted for with regard to the period 20<sup>th</sup> January 2014 and 19<sup>th</sup> March 2014.

4.3. To facilitate investigations, the Respondent by letter dated 11<sup>th</sup> April` 2014 (see page 94 of Claimant's bundle) suspended the Claimant for thirty (30) days effective 14<sup>th</sup> April 2014.

4.4. By a further letter dated 22<sup>nd</sup> April 2014, the Respondent provided the Claimant with the details of the unaccounted funds under the Claimant's custody and asked for an explanation. A copy of the letter is annexed and marked "CEN 1"

4.5. In the subsequent email correspondence, the Claimant asked for more time to respond to the charge before her and the Respondent by an email dated 28<sup>th</sup> April 2014 allowed the Claimant to respond by the 7<sup>th</sup> May 2014. Copies of email communication are annexed and marked "CEN 2".

4.6. In the course of the suspension, the Claimant requested for several documents to review and assist her in reconciliation of the accounts and with a view to accounting for the missing funds. Annexed hereto is an acknowledgement of a schedule of "Documents to Review" duly signed by the Claimant and marked "CEN 3"

4.7. In lieu of accounting for the missing Kshs.434,040.00, the Claimant forwarded an Analysis prepared by her self-appointed consultants (see page 95 of Claimant's bundle). A copy of her forwarding letter dated 9<sup>th</sup> May 2014 is annexed and marked "CEN 4"

4.8. That the said analysis by the Claimant did not offer any explanation for the unaccounted funds.

4.9. That as a consequence, the Respondent by a letter dated 9<sup>th</sup> May 2014 issued a Notice to Show Cause inviting the Claimant to an oral disciplinary hearing on 14<sup>th</sup> May 2014. The Claimant was given opportunity to be accompanied by a fellow employee. A copy of the said letter is annexed and marked "CEN 5"

4.10. The Respondent avers that a Disciplinary hearing was held on 14<sup>th</sup> May 2014 when the Claimant appeared and declined to be

accompanied by a fellow employee or other witness.

4.11. The Respondent avers that after the disciplinary hearing, the Claimant was unable to and did not account for the missing funds despite having been given the opportunity and documents to review. As a consequence, the Respondent summarily dismissed her. (The dismissal letter is at page 105 of the Claimant's documents).

The respondent submits a case of having awarded the claimant an opportunity to be heard and therefore the falsity of unlawful termination of employment. She further in support of her case avers as follows;

9.1. the Claimant's failure to account for her employers' funds falls squarely under the provisions of Section 44(4) (g) of the Employment Act;

9.2. the claimant was also in breach of clause 20 of her contract of employment;

9.3. the procedure spelt out under Section 41 of the Employment Act was followed to the letter – the claimant appeared at the disciplinary proceedings in person on the appointed date, was reminded of her right to have a witness present but she specifically declined the offer.

Again, the following factors justify the termination of her employment by the respondent;

13.1. Steps taken before dismissal;

13.2. Notices issued to the Claimant and opportunity to present her defence;

13.3. The Claimant's failure to account for missing funds;

13.4. Payments made to the Claimant on dismissal as indicated in the dismissal letter; and

13.5. The justification for the dismissal.

The matter came to court variously until 15th October, 2010 when directions were issued on the way forward. This was in agreement with the parties.

The issues for determination therefore are;

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in her written submissions dated 7th November, 2018 submitted in reiteration of her case as pleaded.

The respondent also did the same in their written submissions dated 13th November, 2013. The respondent's case is elaborate and eloquent. This is through the Replying Memorandum in which various correspondences on the subject including a notice to show cause dated 9th May, 2014 is annexed. This is also emphasized in the witness statements of Harrison Eyinda and Mathew Kimani dated 11th October, 2018 and 29th instant respectively. The respondent, however, has totally failed to adduce evidence of disciplinary proceedings, the bone of contention in these proceedings. There is no annexure of any documentary evidence in support of disciplinary proceedings. This being the contested issue, the respondent's case is weakened to a fault.

From the onset, the respondent claims that she was invited to a disciplinary meeting on 14th May, 2014 but on appearance was served with a letter of summary dismissal. No disciplinary hearing took place at the appointed date and time. It should have been the first point of reference in the respondent's answer to the claim. This should have been demonstrated in evidence, not in the least, documentary evidence. In the absence of this, I find a case of unlawful termination of employment and hold as such. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is. Having won on a case of unlawful termination of employment, she becomes entitled to the relief sought.

I am therefore inclined to allow the claim, award and order the claim as follows;

i. One (1) months salary in lieu of notice.....Kshs.120,000.00

ii. Ten (10) months salary as compensation for unlawful termination of employment Kshs.120,000.00 x 10=.....  
Kshs.1,200,000.00

**Total of Claim.....Kshs.1,320,000.00**

iii. The costs of the claim shall be borne by the respondent.

Dated and signed this 29<sup>th</sup> day of November 2018.

**D.K. Njagi Marete**

**JUDGE**

**Delivered and signed this 3<sup>rd</sup> day of December 2018.**

**Maureen Onyango**

**PRINCIPAL JUDGE**

Appearances

1. Miss Kirui holding brief for Mengich instructed by Mengich & Company Advocates for the claimant.
2. Mr. Akhaabi instructed by Iseme. Kamau & Maema Advocates for the responden