



**REPUBLIC OF KENYA**

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

**CAUSE NO 825 OF 2012**

**SUSAN CLARE MUTHONI.....CLAIMANT**

**VERSUS**

**HIPORA BUSINESS SOLUTIONS (EA) LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Susan Clare Muthoni, the Claimant in this case was employed by the Respondent in the position of Front End Checker. Following the termination of her employment on 31<sup>st</sup> March 2012, the Claimant filed this claim seeking compensation for unlawful termination plus terminal dues. The Respondent filed a Memorandum of Reply on 28<sup>th</sup> July 2012.

2. At the trial the Claimant testified on her own behalf but the Respondent did not call any witnesses in spite of being granted adequate opportunity to do so. Both parties filed written submissions.

**The Claimant's Case**

3. The Claimant was employed by the Respondent at a monthly salary of Kshs. 27,000 effective 14<sup>th</sup> September 2011. She was confirmed in her appointment following four (4) months probationary period.

4. The Claimant worked in several branches, the last one being Nakumatt Lifestyle Branch. On 31<sup>st</sup> March 2012, her employment was terminated on allegations of poor performance. She contends that the termination was unlawful and unfair and therefore claims the following:

- a) 12 months' salary in compensation;
- b) One month's salary in lieu of notice;
- c) Allowances and benefits;
- d) General and exemplary damages
- e) Costs plus interest

**The Respondent's Case**

5. In its Memorandum of Reply dated 20<sup>th</sup> July 2012, the Respondent admits having employed the Claimant on 14<sup>th</sup> September 2011 as a Front End Checker. Her employment was subject to a four (4) months' probation period and her monthly salary was Kshs. 27,000.

6. The Respondent states that in the course of her employment, the Claimant was persistently late for work. While denying the Claimant's claim for unlawful and unfair termination, the Respondent avers that the Claimant was dismissed for poor performance, negligence and gross misconduct. The Claimant was therefore in breach of Sections 16 and 21 of the Company's Code of Conduct.

### **Findings and Determination**

7. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Termination**

8. The Claimant's employment was terminated by letter dated 31<sup>st</sup> March 2012 stating as follows:

**"Re: Summary Dismissal for Poor Performance**

*You were employed as a Front End Checker and given full details of the duties and responsibilities that appertain to this position. Besides, you were also informed on the nature and extent of relationship with the client's staff in the work place. All these instructions are meant to ensure that you perform your duties effectively and independently. You have quite often acted in collusion with the client's staff to hide loss incidences from the management. On another incidence, one of the supervisors encashed a credit note on 2<sup>nd</sup> March 2012 but you did not report to the LCM or the Branch Manager.*

*Such negligence and conduct undermines the company's objectives and goals to control loss. In view of the above, you have willfully neglected to perform your duties as expected. It contravenes **Section 44(4)(c) of the Kenya Labour Laws** and our **Company's Code of Conduct Section 16**. Consequently the management has, after a careful thought and consideration, summarily dismissed you from employment.*

*Please return any company item(s) that is (are) in your possession after which you will be paid your terminal dues.*

*Please acknowledge receipt and understanding (sic) of this letter by signing below."*

9. According to the termination letter and the Respondent's Memorandum of Reply, the Claimant's employment was terminated on account of poor performance and misconduct. From the supporting documents filed by the Respondent, it would appear that these issues were a source of concern within the Respondent's management. There was however no evidence that any charges in this regard were ever put to the Claimant to enable her respond.

10. In ***Kelvin Karungu Karanja v Tusker Mattresses Limited [2017] eKLR*** this Court held that poor performance is one of the grounds that must be established pursuant to the mandatory procedure set out under Section 41 of the Act. The same would apply to allegations of misconduct.

11. By failing to seek an explanation from the Claimant on the allegations set out in the termination letter, the Respondent circumvented the mandatory disciplinary procedure set out in law thus rendering the termination substantively and procedurally unfair.

**Remedies**

12. In light of the foregoing I award the Claimant two (2) months' salary in compensation. In making this award I have taken into account the Claimant's short stint in service which was characterized by a negative record. I have also taken into account the Respondent's conduct in the termination process. I further award the claimant one (1) month's salary in lieu of notice.

13. The claims for allowances, benefits, general and exemplary damages were not proved and are dismissed.

14. I therefore enter judgment in favour of the Claimant as follows:

- a) 2 months' salary in compensation.....Kshs. 54,000
- b) 1 month's salary in lieu of notice .....27,000
- Total.....81,000**

15. This amount will attract interest at court rates from the date of judgment until payment in full.

16. The Claimant will have the costs of this case.

17. It is so ordered.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31ST DAY OF MARCH 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Swaka for the Claimant

Miss Kiongi for the Respondent