



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

**CAUSE NO 1606 OF 2014**

**MARGARET MALOBA JOSPHAT.....CLAIMANT**

**VERSUS**

**SHEER LOGIC MANAGEMENT CONSULTANTS LTD...RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant's claim brought by Memorandum of Claim dated 12<sup>th</sup> September 2014 and filed in Court on even date is for unlawful termination of employment. The Respondent filed a Memorandum of Reply and Counterclaim on 9<sup>th</sup> December 2015 to which the Claimant responded on 15<sup>th</sup> January 2016.

2. When the parties appeared before me on 21<sup>st</sup> November 2016 they agreed to dispense with the matter by way of written submissions.

3. The Claimant states that she was employed by the Respondent on 7<sup>th</sup> November 2005 in the position of Manager, Personnel Recruitment and Administration. She worked as such until 5<sup>th</sup> February 2014 when her employment was terminated. At the time of her termination, the Claimant's monthly salary stood at Kshs. 71,875.

4. The Claimant states that her dismissal was unlawful and unfair and now claims the following:

- a) Salary for 5 days worked in February 2014.....Kshs. 11,979
- b) Leave pay for 43 days.....123,625
- c) 12 months' salary in compensation.....862,500
- d) 1 month's salary in lieu of notice.....71,875
- e) Service pay for 9 years @ ½ month's salary per year...323,438
- f) Certificate of service
- g) Costs plus interest

**The Respondent's Case**

5. In its Memorandum of Reply and Counterclaim dated 9<sup>th</sup> December 2015 and filed in Court on even date the Respondent admits having employed the Claimant at a monthly salary of Kshs. 71,875.

6. The Respondent states that the Claimant's conduct and performance was poor and unsatisfactory for which she had been warned severally. The Respondent adds that the Claimant was verbally notified of the reason for her termination being gross misconduct together with poor and unsatisfactory performance.

7. The Respondent further states that prior to her termination, the Claimant had been given ample opportunity to improve on her conduct and performance but instead her performance declined leaving the Respondent with no option but to dismiss her.

8. The Respondent maintains that at the time of her termination the Claimant had exhausted her leave entitlement and that her terminal dues were applied towards offsetting her indebtedness on account of salary advances and loans granted by Computype Savings & Credit Co-operative Society Limited.

9. The Respondent avers that being a member of the National Social Security Fund (NSSF), the Claimant was not entitled to service pay. The Respondent therefore claims the sum of Kshs. 323,438 paid to the Claimant on this account.

### **Findings and Determination**

10. There are three (3) 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;
- c) Whether the Respondent has made out a proper counterclaim against the Claimant.

### **The Termination**

11. The termination of the Claimant's employment was communicated by letter dated 5<sup>th</sup> February 2014 stating as follows:

*"Dear Madam*

#### **RE: TERMINATION OF EMPLOYMENT**

*We regret to inform you that your services with the company will not be required with effect from 5<sup>th</sup> February, 2014. Under the **Employment Act, 2007**, we are required to give you one month's notice of termination or pay one month's salary in lieu of notice.*

*We have computed your full and final settlement of termination dues payable to you under the following:*

- 1. 4 days pay in February, 2014.**
- 2. Payment in lieu of one month notice.**
- 3. Half months pay for each complete year of service for 9 (nine) years.**

*Kindly study the enclosed table of termination dues and should you have any queries, please report the same to us by 6<sup>th</sup> February, 2014.*

*We regret the above action, but find that we have little alternative given the circumstances. We*

*take this opportunity to wish you well in your career.*

*Yours faithfully*

**SHEER LOGIC MANAGEMENT CONSULTANTS LTD.,**

*(Signed)*

**ASWAN, J.O. (MR)**

**HUMAN RESOURCES MANAGER”**

12. This letter does not disclose any reason for the termination of the Claimant’s employment and the Court could not therefore tell whether the termination was on account of misconduct, poor performance or even redundancy. In its Memorandum of Reply and Counterclaim dated 9<sup>th</sup> December 2015, the Respondent alludes to some form of misconduct and poor performance but gives no details.

13. What is clear is that by time the Claimant was exiting the Respondent’s employment, she had no written notification as to the reason for the termination of her employment. The Respondent therefore failed to discharge the duty placed on it by Section 43 of the Employment Act, 2007 thus rendering the Claimant’s termination substantively unfair. Additionally, the Claimant was not taken through the mandatory disciplinary procedure established under Section 41 and the termination was therefore procedurally unfair as well.

### **Remedies**

14. Flowing from the foregoing findings, I award the Claimant twelve (12) months’ salary in compensation for unfair termination. In making this award, I have taken into account the Claimant’s length of service as well as the Respondent’s failure to notify the Claimant the reason for her termination and to avail her an opportunity to be heard prior to the termination. I further award the Claimant one (1) month’s salary in lieu of notice as well as salary for five (5) days in February 2014.

15. With regard to the claim for leave pay, the Claimant herself produced a leave application form showing her leave balance for the year 2013 as three (3) days. I will therefore allow leave pay for 3 days only.

16. In the termination letter issued to the Claimant, the Respondent undertook to pay her service pay at half month’s salary for each completed year of service. It would appear that this was part of the separation arrangement between the parties with which the Court will not interfere.

17. What is in issue is whether the Respondent’s decision to apply the Claimant’s dues in salary, notice and service pay towards offsetting her indebtedness to Computype Savings & Credit Co-operative Society Limited was lawful. In support of its decision the Respondent produced the following documents:

- a) The Claimant’s loan application forms
- b) The Claimant’s pay slips reflecting loan recovery through check off system;
- c) Receipt dated 6<sup>th</sup> March 2014 issued to the Respondent by Computype Savings & Credit Co-operative Society Limited being acknowledgment of the sum of Kshs. 452,236 in payment of loan balance-Margaret Obingo.

18. From these documents, the Court drew the conclusion that there was a tacit tripartite agreement among the Claimant, the Respondent and Computype Savings & Credit Co-operative Society Limited that the Respondent would recover the loans advanced to the Claimant from her dues for onward transmission to the Sacco. This is what the Respondent did and the Court found no fault in its action. The difference in

the surname appearing on the receipt dated 6<sup>th</sup> March 2013 which the Claimant attempted to pursue in final submissions is a non-issue since in her loan application forms she identifies her next of kin as her husband, John Obingo.

### **The Respondent's Counterclaim**

19. In light of my finding that the amount paid as service pay was part of the separation arrangement between the parties, the Respondent's counterclaim fails and is dismissed.

### **Final Orders**

20. Finally I enter judgment in favour of the Claimant as follows:

- a) 12 month's salary in compensation....Kshs. 862,500
- b) Leave pay for 3 days.....7,185
- c) Salary for 1 day in February 2014.....2,395
- Total.....872,080**

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

22. The Claimant will have the costs of the case.

23. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 16<sup>TH</sup> DAY OF JUNE 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Mbugua for the Claimant

Mr. Kibanya for the Respondent