



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

CAUSE NO. 1652 OF 2013

(Consolidated with Petition No. 26 of 2015)

(Before Hon. Lady Justice Hellen S. Wasilwa on 19th July 2017)

MIRIAM WAMBUI THIRIKU.....CLAIMANT

VERSUS

BOMAS OF KENYA.....RESPONDENT

JUDGMENT

1. The Claimant filed her Memorandum of Claim dated 11th October 2013, through the firm of Mwaure & Mwaure Mwihiiga Advocates where she prays that the Honourable Court issues the following orders:

- a) A permanent injunction or extension of any existing injunction to restrain the Respondents, its servants or agents from proceeding with the summons, the disciplinary action and process and the envisaged or any termination or dismissal from employment against the Claimant.*
- b) For a permanent injunction or extend any existing injunction to restrain the Respondent, its agents or servants from recruiting, filing, appointing and/or employing any person to replace the Claimant or with or the same job description as those of the Marketing Officer/Head of Marketing Department of the Respondent.*
- c) A declaration that the Respondent has harassed, intimidated, threatened and has been biased and gender discriminated against the Claimant and is in breach of her constitutional rights.*
- d) A declaration that the Respondent's action to summon her to show cause for being absent from duty is illegal and unlawful, actuated by malice and intended to sack her and form a basis for sacking her. A declaration that the conduct of the Respondent to advertise for the Claimant's job while she is still employed was flawed in procedure as neither the guidelines under the Bomas of Kenya Manual or the Employment Act were followed and is also unconstitutional and unlawful.*
- e) An order for compensation for Gender Discrimination, harassment, bias, intimidation and damages for breach of contract.*
- f) Costs and interest of the suit at Court rates.*
- g) Any other or further relief as this Honorable Court will deem fit to grant.*

On **11th March 2015** the Claimant filed a **Constitutional Petition no. 26 of 2015** through the same firm, seeking among other reliefs a declaration to nullify a purported disciplinary process commenced by the Respondent vide the compulsory leave letter dated 1st December 2014. Together with the Petition the Claimant also filed a **Notice of Motion application of even date and obtained a Court order on 11th March 2015** which among other orders stated as follows:

“.....

2. THAT pending the hearing and determination of this Petition, the compulsory leave by the Respondent be and is hereby suspended and an order be granted compelling the Respondent herein to allow the Petitioner/Applicant to access her workstation and continue with her normal duties of employment under the contract of engagement between the Petitioner/Applicant and the Respondent.

3. THAT the Respondent be and is hereby ordered to release and pay the Petitioner her monthly salary in arrears starting from December 2014.

.....”

3. This order which was served on the same day is still in force.

4. The Claim No. 1652/2013 and the Petition No. 26/2015 were later consolidated and heard together.

Facts:

5. On or about the 5th of September 2007, the Respondent employed the Claimant via an employment contract for a salary of Kshs. 27,486.00 per month. She conducted her work diligently and with loyalty until sometime in 2013 when she alleges that she began to experience discrimination and intimidation under the said contract of employment. The Respondent advertised for the Claimant's job in the local dailies whilst she was still an employee, yet she had not resigned, not shown signs of resigning, nor had she been dismissed from her job.

6. The Claimant alleges that she was subsequently issued with a show cause letter falsely accusing her of having been absent from work for three days without permission and was threatened her with Summary Dismissal under the Bomas of Kenya Manual and the Employment Act. She responded to the letter giving reasons for her absenteeism that she was attending to her sick husband admitted in hospital on those dates when she was absent, that is from 17th to 19th of September 2013 and attached supporting medical documents in support of her examination.

7. The Respondent then issued the Claimant with summons ordering her to appear before a disciplinary committee which is the Staff Advisory Committee at her work place to be held on the 14th of October 2013 via invitation dated 7th October 2013 where she would be explain the reasons as to why the Management cannot take disciplinary action against her which will include termination or dismissal from employment.

8. The Claimant attended the disciplinary committee and was charged with two counts of misconduct; being absent without permission and insubordination arising out of her refusal to receive the show cause letter. She was found guilty and a recommendation for issuing her with a termination letter was done and she was informed accordingly.

9. The Claimant alleged that the administrative process was unfair as she appeared before the same persons from whom she experienced discrimination from. The Claimant further alleges that the action to issue her with summons was contrary to the Bomas of Kenya Manual which clearly stipulates that Summary Dismissal can only be instigated when an employee has been absent from work for more than ten (10) days.

10. The Claimant has written several letters to the Respondent pleading with them to afford her with fair treatment and complaining of acts of discrimination. However the Respondent still continues to discriminate and harass her in the course of her employment.

11. The Respondents have filed a Statement of Defence dated 2nd May 2014 via the Federation of Kenya Employers, where they admit that the Claimant was in their employment at the stated time but deny that she was treated unfairly.

12. The Respondent states that the Claimant failed to disclose to the Court that she appeared before the disciplinary committee as per Section 41 of the Employment Act 2007 and that the Court did not have jurisdiction to issue orders as though it was sitting as an appellant body of the Respondent's Disciplinary Committee.

13. They state that the Court while considering to make an order of reinstatement ought to consider if the Claimant will suffer irreparable damage not able to be compensated by way of damages. Reinstatement at interlocutory level was unfair.

14. They state that the Claimant had been warned several times to stop maligning the name of the organization and also blackmailing the management by writing letters to various constitutional officers containing false and misleading information.

15. They state that when she was issued with a show cause letter, the Claimant refused to acknowledge receipt an act of insubordination and disrespect of authority.

16. They state that the claim here is malicious and without a legal basis. The Claimant was properly terminated from employment and that the orders issued by the Court restraining the Respondent from proceeding to discipline the Claimant and terminate her services after the disciplinary process, facts that the Claimant failed to disclose should be struck out.

17. They state that the Respondent acted within the confines of the law and fair administrative process by issuing the Claimant with a show cause letter. The Respondent was carrying an investigation at this stage not for purposes of terminating but ensuring that rules and regulations were being followed by all employees and that every employee had to be treated equally.

18. They state that she was subjected to fair processes of law and procedure, was informed of the charges before hand, given an opportunity to respond and explain herself.

19. They state that the Court order in place done before both parties were heard causes prejudice to the Respondent as they were denied their chance of being heard.

20. They state that the case has no merit and ought to be dismissed.

Submissions:

21. The Claimant submits that in addition to her role, she was also serving as the Chairperson of the Respondent's Procurement Committee where she experienced a lot of frustrations. Decisions would be taken without her being involved and she would be required to give approval as one who had been involved among other issues. Some Staff members had also formed companies and were supplying goods to the organization without disclosing their interest. There was also the problem of single sourcing of commodities. The Claimant raised all these issues. The frustration led to her eventual resignation in that committee and subsequent deterioration of her relationship with the General Manager.

22. She then experienced even more frustrations, malicious and false complaints from two or three fellow employees as well as threats that she reported to the police and other administrative bodies. Some threats were made by text messages to her phone and she has kept one such a text message to date which read as follows *"If u think u r so clever, ensure u don't cross the line once and 4ever!! Ua days are numbered en*

I will ensure u see what u have never seen. U will really regret!". In or about 2012 she cooperated with anti-corruption investigation which did not auger well with Respondent's management.

23. She submits that she was able to obtain business for the Respondent from a client RCCG "Redeemed Christian Church of God who intended to hold a one week event at the Bomas, paid deposit but when she forwarded the balance via cheque, the Finance Manager had the same returned under instructions from the General Manager asking that the same be returned to the client. She submits that she was later interrogated by a senior NSIS officer at the DC's office in Kibra over the matter which she found unusual.

24. The Claimant submits that her Head of Marketing Department duties would also be interfered with, duties being allocated and taken over by other departments unilaterally. Decisions would be made for the department without her involvement and emails sent to the Marketing Department would be deleted before they are acted upon.

25. On 4th September 2013 the Claimant's job was advertised when she was still the occupant of the office, holding the advertised position and heading the marketing department. This was unilaterally done by the General Manager when there was no Board of Directors which under the Manual is responsible for recruitment of senior staff.

26. Further, on 17th and 18th September 2013 the Claimant did not make it to work. Her husband was admitted in hospital. **See pages 69-70 of the bundle.**

27. On 17th September 2013 on her way to work she was also arrested for a traffic offence. She was arraigned and charged on 18th September 2013. All this time she tried to reach the General Manager and the Finance Manager on the phone but their phones went unanswered. This was not controverted. What followed was the disciplinary process.

28. The Claimant further testified that she did not refuse to receive the show cause letter, the said letter stated that there was contemplation of summary dismissal although she had not been away for 10 days and was in a state of panic as to her family's livelihood. She submits that her daughter had narrowly escaped death at Westgate mall around the given time and had been given permission to take her daughter for counseling when on the Monday of 23rd September 2013 the offensive letter was issued. She submits that she was able to write a response but her state of mind made her unable to properly canvass the issues.

29. The Claimant also testified in support of **Petition No. 26 for 2015**. The Petition was triggered by a letter dated 1st December 2014 which purported to send the Claimant on compulsory leave pending a ruling of a case filed against the organization.

30. She submits that earlier in the year 2014 the Claimant had represented the Respondent in the UNESCO-Kenya-Week in Paris celebrations planning meetings from around May 2014 to October 2014. The Respondent, being the organ of Kenyan government concerned, was involved and the task fell under the marketing department and the Claimant being the head of the department naturally participated. Although there was no letter specifically appointing the Claimant to that role the Respondent has confirmed that she was automatically nominated by virtue of her position. She attended all meetings giving emails after each meeting and wrote effective reports. She has yet to receive a response from the Management whom the emails and reports were addressed to.

31. The Claimant submits that she was never terminated from employment as the letter of termination was issued on 15th October 2013. However, before that letter was delivered, the Claimant served the Respondent with the Court order issued on 14th October 2013. The order was served on 16th October 2013. The effect of the Court order was ***to restrain the Respondent, its servants, and agents from proceeding with the summons, the disciplinary action and process envisaged or any termination or dismissal from employment against the Claimant.***

32. The Claimant also submits that the disciplinary process commenced against her was unfair as

Employment Law emphasizes that any disciplinary process against an employee must not only be for a valid reason (s) but must also adhere to a fair procedure. **Section 45 (2)(c) of the Employment Act No. 11 of 2007** terms as unfair termination any termination in which fair procedure is not observed. The process that the Claimant was subjected to did not adhere to the law or the Bomas Manual, they submit that it was the Respondent's own evidence that the Bomas Manual does not provide for compulsory leave. The compulsory leave letter does not give the terms of the compulsory leave. The Respondent was therefore bound to follow the disciplinary processes prescribed by the manual.

33. To this end, they rely on **David Wanjau Muhoro vs. Ol Pejeta Ranching Limited [2014] eKLR**, the Court stated as follows:

“The Respondent’s Human Resources Policy Manual in force at the time of the Claimant’s exit adopted these principles of fairness. It states that the Company adheres to the policy that any procedure, involved in bringing to an end to an individual’s employment, must be observed, to ensure fairness. It states unequivocally that an Officer alleged to have committed gross misconduct, shall be allowed an opportunity to defend...”

34. The Claimant goes on to point out that in the letter of 19th September 2013 she was required to respond by 23rd September 2013, only 4 days. In the letter of 23rd September 2013, the Respondent gave the Claimant 7 days to respond while **Clause 10.15.2 (i)** of the Manual states that the Claimant ought to have been given 14 days to respond to such letters. Even RW1 conceded that this process was not a fair process.

35. The show cause was issued by the HR officer when it was mandatory that a show cause letter ought to be issued by the General Manager under clause **10.15.2 (iv)** of the Manual. The Manual does not state that any other person can be authorized to issue a show cause. Still, no authority to the HR officer to issue the show cause letter was produced. Further, the Staff Advisory Committee was chaired by the Finance Manager instead of the General Manager under **clause 10.2.1**. The Manual does not indicate that such power to chair the Staff Advisory Committee can be delegated and no letter to delegate the power was produced.

36. The Claimant submits that **the committee ambushed her with offences which she had not been given notice of**. These were charges that she was not made aware of and were not contained in the summons. The Claimant informed the Court that she was actually not called upon to answer to these charges at the meeting. They were just sneaked in after she had left and discussed in her absence. The Respondent's own witness told the Court that the Claimant answered to these charges in the meeting.

37. To this end they rely on **David Wanjau Muhoro case (quoted above)** the Court stated as follows:

“There was no evidence shown to the Court by the Respondent of charges given to the Claimant, before he attended the hearing. He was merely told there were fraudulent activities in the Finance Department. The specific charges, the Claimant was invited to respond to, were not given to him...”

...The Claimant was doubly impaired in preparing for the hearing, in that he did not have specific charges...”

38. The Claimant submits that the disciplinary process commenced through the compulsory leave dated 1st December 2014 was a *non-starter*. It was null and void *ab initio*. The Respondent's Manual does not provide for a disciplinary procedure called compulsory leave. The Respondent is not at liberty to unilaterally adopt a strange disciplinary procedure and subject the Claimant to it.

39. In **David Wanjau Muhoro case (quoted above)** the Court condemning such a strange process stated as follows:

“The Court has not read the term ‘compulsory leave’ anywhere in the Respondent’s Human

Resources Policy Manual, the term in use being ‘suspension...’

40. As to the prayers, the Claimant submits that she is entitled for various reasons. She submits that as per duties in the above mentioned UNESCO Kenya Week celebrations in Paris, the General Manager knowing the role she played refused to clear the Claimant only, albeit without giving any reasons. This amounts to discrimination and harassment.

41. She submits that the disciplinary process was null and void from the start. It was not in conformity with the Respondent Operation Manual which binds everyone including the Management. It was also not consistent with tenets and principles of the Labour laws and practices.

42. They submit that it has been demonstrated from the pleadings, evidence and documentary evidence that the Respondent subjected the Claimant to discrimination, harassment, bias, intimidation and oppression, from having the Claimant’s job in September 2013 advertised while she was still serving and the occupant of the head of marketing office, to on different occasions being locked out of the Respondent’s compound at the instance and order of the Respondent’s Management. This in effect meant that she could not access her office to discharge her duties. This happened even after the Claimant had obtained Court orders for non-interference with her work and served the same upon the Respondent.

43. This in effect amounted to discrimination, harassment, bias, intimidation and oppression for among others. To this end they rely on **Hesbon Ngaruiya Waigi vs. Equatorial Commercial Bank Limited [2013] eKLR**, the Court stated as follows regarding discrimination:

“Where a person is treated differently from others similarly situated like him, and then this amounts to discrimination. If this treatment in differentiation is on a specified ground, then whether there is discrimination will depend upon whether, objectively, the ground is based on reasons which have the potential to impair the fundamental rights of a person or to affect them adversely in a comparably serious manner. If there is a specified ground for discrimination, then unfairness will be presumed. If on unspecified ground, unfairness will have to be established by the claimant. In this case, the test of unfairness focuses primarily on the impact of the discrimination on the Claimant and others in his situation. Where differentiation is found to be unjustified, the same is discriminatory and unfair and not justified.”

44. They submit that the Respondent also withheld the Claimant’s salary and the Court had to intervene for the Claimant to be paid. Withholding an employee’s salary that she has worked for without any justifiable reasons is not only harassment and oppressive but amounts to violation of the Constitution of Kenya and labour practices over the World.

45. They rely on **David Wanjau Muhoro case (quoted above)**, the Court stated as follows regarding withholding of an employee’s salary:-

“As pointed out in the recent decision of the Industrial Court of Kenya in Cause Number 1149 of 2011 between Peterson Ndung’u and 5 Others vs. The Kenya Power and Lighting Company Limited, Employers should not withhold Employee’s salaries as a form of a disciplinary sanction. It adds on to the gravity of the procedural irregularity, when the Employee’s salary is used as a weapon against him. How was the Claimant expected to defend himself effectively at the disciplinary hearing, without an income?”

46. They submit that the treatment of the Claimant on these and other issues highlighted within evidence clearly amounted to discrimination, harassment, bias, intimidation and oppression.

47. They submit that the Constitution of Kenya prohibits discrimination; **Article 27(4)** states that:-

“the state shall not discriminate directly or indirectly against any person on any ground...”

48. **The Respondent is a government corporation and is bound by this Article of the Constitution.**

Article 27(5) prohibits any person, including the Respondent, from discriminating another on any ground.

49. **Article 28 states that:-**

“Every person has inherent dignity and the right to have that dignity respected and protected”

50. Article 29 (f) states that:

“Every person has the right to freedom and security of the person which includes the right not to be treated or punished in a cruel, inhuman or degrading manner.”

51. Article 41 (1) states that every person has the right to fair labour practices.

52. All these rights have been violated and they ask the Court to grant the Prayers sought with costs to the Claimant.

53. The Respondent has filed submissions dated 19th May 2017 where they rely on their pleadings and add that they were justified in taking action against the Claimant.

54. They submit that there were numerous complaints by other employees on the personal conduct and relations of the Claimant.

55. They submit that on the 17th, 18th, and 19th of October 2013 the Claimant was not at work and reported on the late afternoon of the 19th of October 2013.

56. They submit that disciplinary action on account of unauthorized absence from work is not entirely uncommon and they rely on the cases of **Michael Mbugua Kariuki vs. Eng A S Kitololo t/a Kitololo Consultants Engineers ELRC 1387 of 2011 and KETAWU vs. KPLC ELRC No 782 of 2011.**

57. They submit that there were numerous complaints against the Claimant by juniors and peers. The same have been tendered into evidence and she was unable to fully remove herself from the allegations nor was she able to demonstrate that the complaints arose from malice on the part of the employees who made them.

58. They submit that the Claimant failed to disclose to the Court that she appeared before the Disciplinary Committee as per Section 41 of the Employment Act 2007 and therefore the Honourable Court did not have the jurisdiction to issue orders as though it was sitting as an appellate body of the Respondent's Disciplinary Committee.

59. They submit that this was misrepresentation on her part which had the effect of stopping recruitment of a position that the Claimant had an opportunity to apply for which she did not.

60. As to the Claimant's writing of letters to various institutions, they submit that these were unjustified and uncalled for and specifically refer to one dated 10th October 2013 where the substance and timing show the relationship they had with the Respondent's top Management.

61. They submit that this letter being a further response to the show cause letter was unsolicited as the Respondent had not sought further clarification. They submit that it did not clarify certain facts such as why the Claimant failed to inform anyone that her husband was unwell being reason for her absence. She is yet to provide any medical evidence to support this.

62. They submit that as to allegations of traffic charges, no proof was availed and no rational reason has been given for the lack of communication. At the disciplinary hearing she alluded to having informed a

colleague whose name she did not supply nor did she call the HR office that would normally deal with such issues.

63. It is the Respondent's submission that they were justified in taking disciplinary action against the Claimant and that these same reasons fall within the ambit of Section 43 of the Employment Act 2007.

64. As to procedure, the Respondent submits that the Claimant was served with a show cause letter which also gave rise to issues of insubordination when she refused to receive them. She was given the opportunity to respond in writing and orally as well as be accompanied but no one agreed to do so. She was given an opportunity to defend herself and this was not challenged. Hearing was given both orally and via hearing.

65. They rely on the matter of **Selvarjan vs. Race Relations Board [1975] 1 WLR 1686, 1694** and in **R vs. Immigration Appeal Tribunal ex-parte Jones [1988] I WLR 477, 281** where it was stated that:

“The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than Courts and bodies whose procedures are laid down by state are master of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how to proceed and there is no rule that fairness always requires oral hearing.....whether an oral hearing is necessary will depend on the subject matter and circumstance of the particular case and upon the nature of the decision to be made...”

66. The Respondent submits that Section 45 (2) (c) of the Employment Act provides that:

45 “No employer shall terminate the employment of an employee unfairly,

2) a termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is fair reason;

(i) related to the employees conduct, capacity or compatibility or ;

(ii) based on the operational requirement of the employer; and

c) that the employment was terminated in accordance with fair procedure.

67. They submit that they were satisfied that an act of gross misconduct had taken place and therefore there was need to take action. They state that Section 43 (2) of the Employment Act provides that the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which cause the employer to terminate the services of the employee.

68. They submit that the Petition was misconceived as it raised no cause of action against the Respondent. The Petition could not have been entertained by the Honourable Court because it amounted to litigating over the same issue in different forums.

69. The Respondent asks that the same should be struck off.

70. The Respondent submits that the Claimant has been terminated from employment but continues to use the Court to circumvent the law. They submit that the issue was to whether termination has been effected or not has already been canvassed by the Court and most recently in an unsuccessful contempt proceeding. They note that the Principal Judge in a Ruling made on the 11th of December 2014 delivered by Hon. Nzioki wa Makau on the 17th December 2014 made certain determination and findings but they

highlight the following:

a) At paragraph 27 – The Claimant’s employment was terminated by letter dated 15th October 2013;

b) At Para 29 that the Claimant was guilty of material non-disclosure to the Court at the time she obtained the Court order.

71. They submit that she was duly terminated and she remained in office not because of her employment contract but on the strength of various Court orders obtained irregularly on the 14th of October 2013 and 11th March 2015.

72. They submit that she has used the Court and numerous changed representation and has appeared before four different Judges at various stages with several interlocutory applications.

73. As to the prayers sought, they submit that the prayers she is seeking ought not to be granted. The Claimant did not demonstrate that the position advertised by the Respondent is the same as the one she does as a Marketing Officer, she further failed to prove all allegations set out in the claim.

74. They submit that no reinstatement can be ordered as the years have lapsed and oust the jurisdiction of the Court to make such an order. They note that in the earlier contempt of Court proceedings the Judge Noted that she had already been terminated and no contempt of Court orders were placed.

75. They submit that she has failed to prove discrimination, intimidation or harassment and that her attempts at these allegations are but from an employee who tries very hard to bring the name of the Respondent into disrepute.

76. They conclude that there was a genuine reason leading to her termination and that fair procedure was involved. They ask the Court to dismiss the claim with costs. They also ask that the Petition be struck out as being *res judicata* and or in any event for being untenable.

77. Having considered the evidence and submissions of both parties, this Court lays down the issues for determination as follows:

Whether the Respondent had valid reasons to subject the Claimant to a disciplinary process as envisaged through their letter dated 23rd September 2013 and delivered to her on 25th September 2013.

1. Whether due process was followed in this disciplinary process.

2. Whether the Court can interfere with internal disciplinary process.

3. Whether the Respondents’ action to send Claimant on compulsory leave was justified.

4. Whether the Respondents’ decision to advertise for a job whose mandate was similar to the mandate held by the Claimant/Petitioner was fair and justified.

5. Whether the Claimant/Petitioner suffered any discrimination.

6. What remedies are available in the circumstances?

78. On issue No. 1, the Claimant informed Court that she received a letter dated 23rd September 2013 on 25th September 2013 stating as follows:

“It has been noted that you were absent from duty with effect from 17th September 2013 to 19th

September 2013, when you reported for duty on the same day in the evening. On the same day a letter to show cause was addressed to you, to explain why you were absent without permission. Unfortunately you refused to accept the letter insisting that you had to know the contents before accepting it. This is misconduct and is liable to summary dismissal.

According to the Employment Act Section 44(1) (a) and Bomas of Kenya Manual Section 10:13 (ii) absence from duty without leave or other lawful cause can render an employee to be summarily dismissed.

Bomas of Kenya Manual on terms and condition of service Section 10:13 (iii) an employee may be summarily dismissed if he/she fails to comply and execute properly any valid order given to him/her by General Manager or any officer duly authorized by him.

In view of the above, it is contemplated to dismiss you from the service on account of misconduct and absence from duty. But before this is done, you are called upon to show cause why the intended action should not be taken against you.

Your representation, if any should reach this office within seven (7) days from the date of this letter, failure to which the contemplated action will be taken without further reference to you.

Signed-----“

79. The Respondent's HR Manual at bullet 10.11 state as follows:

“10.11.1 – An employee who, without leave or reasonable cause, absents himself from duty for more than ten (10) days shall be regarded as having absconded duty and may render himself to summary dismissal with loss of benefits-----“.

80. It is apparent then from the Manual the length of period that raises eye brows is 10 days. In the case of the Claimant, she was away from 17th to 19th September 2013 and therefore though there was absence, institution of a disciplinary process was premature.

81. The Petitioner went ahead and responded to the show cause letter on 27th September 2013 indicating that she was a dedicated worker and the nature of her work in marketing require her to be away from office from time to time. She went ahead to submit that she was being subjected to harassment and denied any misconduct in refusing to receive a letter. She indicated that she refused to sign a delivery book prior to receiving delivery of a letter.

82. In another letter dated 10/10/2013 she clarified that she didn't absent herself from duty deliberately but it was because her husband had been admitted in hospital on 16th September 2013 and she produced letters to show this. She indicated that she had also been charged with a traffic offence on 17th September 2013 on her way to work and had to attend Court on 18th September 2013. Her husband was thereafter discharged from hospital and she had called the General Manager and Finance Manager whose phones were unanswered. She then called a colleague and informed her of her predicament.

83. The discharge summary of her husband was part of her documents showing he was admitted at Nairobi Hospital on 16/9/2013 and discharged on 18/9/2013.

84. Absence from duty however is an offence which an employer can use to summarily dismiss an employee as envisaged under Section 44 of Employment Act and Rule 10.13 of Respondent HR Manual. This however is subject to due process.

85. On the issue of due process, upon the Claimant receiving the show cause letter, she indeed replied as indicated above. On 7th October 2013, she was summoned to appear for a disciplinary hearing on 14th October 2013. The Claimant has indicated that the whole process was flawed because it disregarded the

Respondent's own Manual.

86. Rule 10.15.2 of Respondent HR Manual states as follows:

(i) ..” where irregularity is of a more serious nature, the employee shall be informed in writing of the specific charge(s) by the Head of the Department to explain why disciplinary action should not be taken against him. The employee shall be required to reply to the charges within fourteen (14) days of the date thereof.

(ii) Where the Head of Department is not satisfied by the employee's explanation, he shall write a letter reprimanding him with a copy to the General Manager.

(iii) The Head of Department shall inform the General Manager that the employee had been given due notice to defend himself but his defense had been found unacceptable. The Head of Department shall recommend to the General Manager any one of the disciplinary actions mentioned in Regulation 10.14 to be meted against the employee.

(iv) In cases of serious misconduct where dismissal or termination of service is likely and where interdiction or suspension from duty is deemed necessary to facilitate full investigation into the case, the General manager, shall issue a “show cause” letter to the employee through which the employee may be interdicted or suspended depending on the nature of the case”.

87. Rule 10:15.2(i) above shows that the time required to reply to the show cause letter shall be 14 days. In the case of the Claimant, she was however given 7 days to respond.

88. The show cause letter is expected to be written by the Head of Department and if HOD is not satisfied with the explanation of the employee, he shall write a letter reprimanding her with a copy to the General Manager.

89. In the case of the Claimant, it is apparent that such response or reprimand was never received and there is no indication that the General Manager was informed of the short fall in Claimant's response nor was he informed that the defence was found unacceptable.

90. It is therefore apparent that the Respondent failed to adhere to their own HR Policy and therefore the entire disciplinary process meted against the Claimant was unprocedural.

91. Another complaint by the Claimant concerns the composition of the Advisory Committee that was expected to hear the disciplinary case. The committee according to the Claimant was chaired by the Finance Manager. Rule 10.2.1 of the Respondent's HR Manual states as follows:

“The Staff Advisory Committee shall deliberate on disciplinary cases involving all employees. The committee shall be composed of all Heads of Departments as members. The committee shall be chaired by the General Manager while the H.R and Administration Manager shall be Secretary to the Committee”.

92. This provision is also couched in mandatory terms and it therefore follows that no other person can chair such a meeting. To have heard the Finance Manager chair the same was therefore a procedural flaw.

93. This then leads me to issue No.3. Courts have stated and restated this position over and over again (see Alfred Nyungu Kimungui vs. Bomas of Kenya (Industrial Court Case No. 620 of 2013, Industrial Court Case No. 1200 of 2012 between Professor Gitile Naituli vs. University Council Multimedia University College and Another and Everlyne Anyango Obondo vs. KRA (ELRC Case No. 2141/2016 where the Courts have held that the Courts will not and shall never interfere with the employer's internal disciplinary processes as this would be seen as shifting the employer's prerogative in staff administration. However Courts will ordinarily interfere to give prudence to the process initiated

and put on course and correct a seemingly flawed process.

94. It is therefore this Court's position that the Court interfered with a flawed process hence the order given by Hon. J. Marete on 14th October 2013 Injuncting the Respondent from proceeding with the flawed disciplinary process that had been instituted against the Claimant. This was merited to prevent a breach of the law and the Constitution and indeed the Respondent's own laid down disciplinary process.

95. The 4th issue above, emanates from the Respondent's decision to send the Claimant on compulsory leave vide a letter dated 1/12/2014.

96. It is this letter that triggered off the institution of the Petition No. 26/2015. The letter in part stated that the Claimant had been guilty of insubordination and had absented herself from duty and also failed to comply and execute properly any valid order given to her by the General Manager or any other officer authorized by him.

97. The insubordination is alleged to have emanated from the action taken by the Claimant to represent the Respondent in preparatory and planning meetings for celebration of 50 years of UNESCO in Kenya and Kenya Week in Paris whereas another officer had been appointed to this Committee. It is also alleged that she travelled to Paris to participate in Kenyan Week in Paris without clearance.

98. The Claimant has averred that contrary to the allegation by the Respondents of insubordination this is not true and that the General Manager was aware all along of her involvement in this Planning Committee as Head of Marketing and she all along informed him of what was transpiring in the meetings as evidenced from the emails she wrote to him on 29.5.2014, 15.10.2014, 23.10.2014, 30.10.2014 and 17.11.2014 Exhibit MWT5.

99. Attached to the Petitioner's Petition is also a letter dated 13.11.2014 from the Secretary General/Chief Executive Officer of UNESCO (Kenya) informing the Respondent's General Manager of the Petitioner's participation in the Planning Committee and requiring she be cleared to travel. Her travel and accommodation expenses were to be met by UNESCO (K).

100. Back to the compulsory leave letter, the tail end of the letter stated as follows:

“Due to insubordination factor, the Management has considered to send you on compulsory leave with effect from 1st December 2014 as we wait for ruling of the case filed against the Organization”.

101. The Petitioner averred that at that time, there was no case she had filed in Court which was awaiting a ruling save for the same cause she had filed whereby the Respondent's had been barred from instituting disciplinary action against her.

102. The Claimant/Petitioner also submitted that by sending her on compulsory leave, the Respondents were continuing to disobey a Court order that had barred them from instituting disciplinary proceedings against her. The compulsory leave could not therefore be tied to the continuing case No. 1652/2013.

103. The Claimant/Petitioner filed Petition No. 26/2015 contesting infringement of her rights on 10th March 2015 seeking orders stopping the decision of the Respondent ordering her to proceed on compulsory leave. She also sought orders compelling the Respondent to provide her with a conducive working environment and also pay her, her salary arrears starting from December 2014. The Court gave her orders sought.

104. The Petitioner had submitted that there was no reason allowing the Respondent to send her on compulsory leave and that the Respondent's HR Manual never envisaged such a punishment and that condition for the compulsory leave were not stated. It is for this reason that the Court injuncted the Respondent against continuing with the said leave against the Petitioner and also ordered the Respondent

to continue paying her salary which the Respondent had since stopped from December 2014.

105. The Respondents were even cited for contempt and the contempt was purged. It is also my finding that the decision to send Claimant on compulsory leave was not justified.

106. The Respondent proceeded also to advertise for a position of Marketing and Product Development Manager. This is evidenced by Claimant's Appendix MWT 2 attached to her application in Court filed on 14/10/2013. The duties of this position were as follows:

“Reporting to the General Manager, the Marketing and Product Development Manager will be responsible for the following:-

- ***Developing, implementing marketing plans and strategies.***
- ***Executing and monitoring marketing plans.***
- ***Formulating and reviewing customer services strategies.***
- ***Attending to customer feedback and take continuous improvement action.***
- ***Carry out market surveys and market recommendation to improve service delivery.***
- ***Developing of new products and executing product launches, promotions and demonstrations.***
- ***Developing new market opportunities.***
- ***Market cultural tourism and performing art business outside the country.***
- ***Ensuring efficient and continuing marketing.***
- ***Gathering and reporting market intelligence.***
- ***Managing marketing department and officers under supervision.***
- ***Preparing monthly reports...”***

107. The Claimant/Petitioner indicated that this position that was advertised was indeed her substantial position baptized to disguise her termination. She submitted that as Marketing Officer, her duties were laid down in a letter to her dated 5th September 2007 (appendix 1 I) which stated as follows:-

“RE: MARKETING OFFICER

I am pleased to inform you that you have been appointed as a Marketing Officer form 1st September 2007.

Your duties though not limited to include the following:-

- ***Developing and implementing marketing plans and strategies for the Institution to achieve set objectives.***
- ***Formulating and reviewing customer service strategies and attending to customer feedback and taking appropriate continuous improvement action.***
- ***Carrying out market surveys and make recommendations to improve service of the Institution.***
- ***Opening up new marketing opportunities for the Institutions produces.***
- ***Delivering the Institution's sales targets.***
- ***Preparing timely and accurate marketing reports for effective management decision making.***
- ***Ensuring continuous and effect marketing of the Institution and its produces.***
- ***Product Development and other duties that you will be assigned from time to time.***

Your salary scaled is Kshs.27,486 x 73-828,224 x 82-831,536 x 86-433,264 x 939 pm and stating point of Kshs.27,486/= pm.

I congratulate you on the appointment and expect you to redouble your efforts towards work.

Best wishes.

Signed

QURESH H. AHMED

GENERAL MANAGER”

108. It is apparent that these duties overlap those in the advert these stated above and it was therefore in bad taste to advertise the position without considering the position currently occupied by Claimant and deciding what her position will be. She was also the Head of Marketing and there was indication that the Respondent was restructuring the organization and either dissolve the position occupied by Claimant or to upgrade it all together.

109. That decision was therefore done hastily and without proper procedures which were going to be counterproductive to the Claimant.

110. On the 6th issue, the Claimant/Petitioner has averred that she suffered discrimination. It is however not clear what was not done to other employees as opposed to her that brings out the issue of discrimination.

111. It is my finding that this averment is not properly established and I find that the Petitioner though treated unfairly and unjustifiably, this was not a case of discrimination.

112. Having found as above, it is my finding that the actions or omission of the Respondent as targeted against the Claimant amounted to unfair labour practices aimed at frustrating the Claimant by removing her from the pay roll to sending her on compulsory leave without due process to locking her out of the office and denying her leave to travel to a meeting that was at the core of her duties.

113. The action of trying to advertise for a position occupied by her when she had neither been terminated or resigned was also unfair in the circumstances.

114. I find for the Claimant/Petitioner and make the following findings:

1. A Permanent Injunction do issue against the Respondent herein restraining the Respondent, its servants and agents from continuing with any disciplinary action against Claimant/Petitioner on issues prosecuted upon in this Petition/Claim.

2. A declaration that the Respondent actions against the Petitioner/Claimant amounted to unfair labour practices and were in breach of her constitutional rights.

3. That the Respondent should pay the Claimant damages amount to Kshs.500,000/= for the breach complained in (2) above.

4. The Respondent will pay costs of this suit.

Read in open Court this 19th day of July, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kariuki for Claimant/Petitioner – Present

