



**REPUBLIC OF KENYA**

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

**CAUSE NO. 293 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**PAMELA NELIMA LUTTA.....CLAIMANT**

**-Versus-**

**MUMIAS SUGAR CO. LTD.....RESPONDENT**

**JUDGMENT**

Pamela Nelima Lutta, the Claimant filed this suit against the Respondent seeking orders restraining the Respondent from terminating her employment by redundancy or otherwise without following due process and in accordance with the Employment Act, 2007. The Memorandum was however amended on 9th June 2016 following the termination of the Claimant's employment on 11th August 2015 during the pendency of this suit. In the Amended Memorandum of Claim the Claimant seeks the following reliefs-

aa) a) Three (3) months' salary in lieu of notice @ 778705/=	2,336,115.00
b) Unpaid salary -26 days in May, 2016	674,877.00
c) 75 days unpaid leave	1,310,762.00
d) Seventeen (17) service years@1 months pay	13,237,985.00
e) Compensation for unfair dismissal 12 months salary	9,344,460.00
<b>Total</b>	<b>26,904,199.00</b>

ab) Exemplary damages for malicious press briefings and for discriminatory practices.

ac) An order for the issue of Certificate of Service.

b) Costs of this suit and interest.

The Respondent filed a Statement of Defence and Counterclaim on 24th November 2016 in which it denies the allegations in the Memorandum of Claim and makes a counterclaim for Kshs. 7,787,050 being salaries paid to the Claimant from July 2015 to May 2016 together with interest at 12% per annum and costs.

The case was heard on 24th November 2016 when the Claimant's evidence was taken and on 23rd January 2017 when the Respondent's witness testified. The parties thereafter filed and exchanged written

submissions.

## **Claimant's Case**

The Claimant testified that she was employed by the Respondent in 1994 as Project Administration Assistant in a project to expand the company. When the project ended in 1999 she was employed on permanent basis as Factory Administration Assistant. In the year 2000 when the company decided to go into packaging/branding of its sugar the Claimant and 6 other employees were constituted into a team to develop the branding of the company and its sugar. The team was to come up with a marketing strategy to brand and sell the sugar and the Claimant was selected as the Marketing Administration Manager. In 2004 her role was changed to Marketing Services Coordinator and expanded to encompass servicing sales department.

The Claimant testified that in 2005 when the company was privatised it set up a Corporate Affairs and Communication Department and she was promoted to the position of Corporate Affairs Manager. In 2009 the company decided to separate sales from marketing function and the Claimant was promoted to the position of Marketing Manager. At the same time the Respondent changed the positions of managers to directors and all managers became directors. Her title changed to Marketing and Corporate Director. In April 2014 she was added extra responsibilities to manage Commercial Department (sales aspect) in addition to her corporate affairs responsibilities. In June 2014 she was transferred to the position of Commercial Director.

The Claimant testified that on 29th January 2015 the Respondent's then Managing Director Mr. Coutts Otolu summoned all 7 directors of the company and informed them that the board had decided to restructure and declare all their positions redundant and that there would be an advert for new positions created. The Managing Director promised to give them further details later. She testified that on 30th January 2015 the advert appeared in the Nation Newspaper. The advert stated that the company was restructuring and the jobs advertised were new. Among the new jobs advertised was the position of Chief Commercial Manager which bore her job description.

The Claimant testified that on 27th March 2015 the Managing Director called her on phone and informed her that some board members were around and wanted to talk to her about ethanol at the company Guest House. She went to the Guest House where she met the Managing Director with the Chairman Mr. Dan Ameyo and the Director for Brand Ms. Nancy Kamicha. She was informed that there were fraudulent activities in her department and there was need for her to step aside. She was informed that she informed that she was not allowed to go back to her office and should surrender all communication and proceed to her residence which was within the company premises. The Claimant testified that she proceeded to her residence and the Security Manager Mr. Wabita was sent to collect her ipad and laptop.

The Claimant testified that at around 5pm she received a letter of suspension dated 27th March 2015. The letter stated that the Board had reason to believe that she was involved in fraudulent activities that bordered on grave criminal acts in the ethanol sales process. The letter stated that during the period of suspension she was forbidden to go to her place of work unless invited but should be available at short notice during working hours.

On 27th July 2015 she received a letter signed by the Managing Director titled Show Cause Notice. The letter stated that investigations confirmed several discrepancies in the process of ethanol sales and the company had strong reasons to believe that she deliberately and knowingly participated in the said fraudulent activities contrary to her employment contract, company policy and the labour laws in that she oversaw the under-invoicing of certain customers as listed in a schedule that was attached to the letter, leading to substantial losses incurred by the company. She was required to show cause within 48 hours why disciplinary action which include summary dismissal should not be taken against her.

The Claimant testified that she responded to the letter on 30th July 2015 and explained that invoicing was not in her job description and was also not a sales responsibility but was the responsibility of Finance Department. She further explained that the alleged fraud was not in her docket. She testified that the

Finance Director at the time was John Mbogo but he was not sent on suspension or required to respond to similar charges.

The Claimant testified that after receiving the show cause letter accusing her of charges outside her job description she sought legal advice and filed the present suit soon thereafter in which she sought orders preserving her employment. The orders were granted on 12th August 2015. She subsequently received a letter of termination of her employment on 19th August 2015 through EMS. The letter was dated 11th August 2015. A copy of the letter was delivered to her rural home.

The Claimant testified that the letter of summary dismissal was unlawful as on the date she received it there was an order preserving her employment. She further stated that her suspension was against the company policy which provided for suspension for a period not longer than 21 days. She further stated that the policy provides that the show cause letter should precede the letter of suspension and that in her case the show cause letter was issued on 27th July 2015 while the notice of suspension was issued on 27th March 2015, after 4 months of suspension. She further stated that her position was advertised on 30th January 2015, before the termination of her employment.

The Claimant further testified that her disciplinary process was malicious as the company had already made up its mind to get rid of her. She testified that the Respondent wrote a letter dated 9th July 2015 notifying the County Labour Officer Kakamega of the intention of the company to declare certain positions redundant, including her position. The County Labour Officer was also sent a copy of a letter declaring her redundant further confirming the intention of the Respondent to terminate her employment.

The Claimant testified that as at 12th August 2015 when she received the letter of dismissal there was in force a court order restraining the Respondent from terminating her employment pending the hearing and disposal of her case. She testified that by 14th August 2015 the Respondent had not yet terminated her employment as reflected by the endorsement of 14th August 2014 at page 32 of the Respondent's Defence and Counterclaim. She further testified that she was called for a disciplinary hearing on 12th August 2015, long after she had filed suit and summoned to attend the disciplinary hearing on 11th August 2015 when she was in Nairobi preparing to attend court on 12th August 2015. She testified that in her opinion the disciplinary hearing was intended to pre-empt the court process.

The Claimant further testified that the merits of her dismissal was questionable as what she was accused of was not within her responsibilities. She further testified that although the notice to show cause stated that investigations were complete there is a letter dated 11th November 2015 from Khaminwa & Khaminwa advocates addressed to the Respondent inquiring if investigations were complete, meaning that her employment was terminated before investigations were concluded.

The Claimant further referred to press releases attributed to Dan Ameyo, the Respondent's Chairman, appearing together with his photograph in the media in which he was commenting about the Claimant's suspension on 27th March, 20th April, 21st May and 6th June 2015. The press releases were referring to the termination of the Claimant's employment long before she received the notice to show cause, further confirming that the decision to terminate her employment was made long before the disciplinary hearing.

The Claimant further referred to a communication of 7th July 2015 by the Chief Commercial Officer who took over from her referring to an investigation by a private company which states that there was no solid evidence against the Claimant and other staff who were suspended with her, making the termination of her employment untenable. She testified that the termination of the other employees was lifted and they were recalled back to work. She stated that this was proof that there was no evidence of fraud in the sale of ethanol. She testified that she was suspended with 4 other employees all of whom were reinstated.

The Claimant testified that she was painted as a thief and her reputation injured, causing her a lot of mental torture and public odium.

The Claimant testified that at the time of termination her gross salary was Kshs. 778,705 and she had worked for the Respondent for 22 years. She stated that she is claiming Kshs. 26, 904,199 as

particularised in her claim, which represents what she lost. These include notice, salary for May 2015, 75 days annual leave and service pay for 17 years at the rate of one months' salary per year worked. She further prayed for compensation for unfair dismissal and costs. She further claims exemplary damages for defamation through the press releases and discrimination as she was the only person dismissed out of the 5 employees suspended with her. The Claimant stated that she has not been able to get any other job as there was no apology from the Respondent and she was not given a recommendation letter by the Respondent.

In Response to the Counterclaim filed by the Respondent the Claimant stated that the salary claimed by the Respondent in the counter claim was paid pursuant to a court order and she is not liable to refund the same to the Respondent. She urged the court to dismiss the counterclaim with costs.

Under cross examination the Claimant stated that the press releases referred to her by title and not by name, that for the 22 years she worked for the Respondent she was never served with any warning letter or got involved in any disciplinary issue, and that the employees suspended with her were her juniors.

### **Respondent's case**

The Respondent's witness PAUL MOSES OTIENO testified that he was the Chief Human Resource and Administration Officer of the Respondent. He testified that he knows the Claimant, that she was suspended from work on 27th March 2015 on grounds that she was involved in fraudulent activities relating to ethanol, that she responded to show cause letter on 30th July 2015 and was invited to a disciplinary hearing by letter dated 6th August 2015 requiring her to attend disciplinary hearing on 11th August 2015. She however failed to attend the disciplinary hearing and was dismissed from employment on the same day. The letter of dismissal was served upon her through email on the same day at 13.58 hours. He testified that the Court order was served on the Respondent on 14th August 2015 and the Respondent was not aware about it before it was served.

Mr. Otieno testified that the articles that appeared in the press publications were not written by the Respondent or its agents and did not refer to the Claimant by name. He stated that the Respondent continued paying the Claimant's salary as ordered by the court until the orders were vacated. He testified that the Claimant has not complained about her suspension. He stated that the Claimant is not entitled to the orders in her claim.

Under cross examination Mr. Otieno stated that he started working with the Respondent on 1st July 2015, 2 months before the Claimant was dismissed from employment and he was not in the Respondent's employment when the Claimant was suspended on 27th March 2015.

He testified that the Claimant was suspended for under-quoting and fraudulent sales. He stated that he did not have evidence of the fraud in court. He stated that at the time of her suspension the matter was under investigation. He stated that he did not know how much the Respondent lost due to the Claimant's alleged fraud. He stated that the Claimant's role was to identify customers, send prices and quotations and give instructions for sale. He admitted that sale of ethanol was not in the Claimant's job description. He stated that he knew the difference between sale operations and sales. Referring to the Claimant's response to the show cause letter he stated that the Claimant stated that invoicing is under finance and is done in warehouse while delivery to customers is not done by the Respondent as customers collected the merchandise from the warehouse. He testified that transport is decentralised. He stated that terms of payment and pricing fall under commercial roles. He stated that he had not brought any documents to court to contradict the Claimant's explanation.

Mr. Otieno testified that the Claimant was invited for disciplinary hearing by letter dated 6th August 2015 but he had no proof that the letter was served on the Claimant. He stated that he is aware the Claimant filed this suit on 31st July 2015 and the Respondent was served with pleadings on 10th August 2015. He stated that at the time the Claimant was given notice of the disciplinary hearing the case was already in court. He stated that according to the Claimant's letter of dismissal her last working day was 12th August 2015 and the order that preserved her employment was made on 12th August 2015.

He testified that the Claimant was served by email by he did not know the claimant's email address. He stated that according to the letter of suspension the Claimant's address was Mumias Sugar and that the last paragraph of the letter states she should not leave her station. He stated that she was required to collect the letter from the Respondent's Nairobi office. He stated that there is no evidence the Claimant received the email. He stated the email had no attachment. He stated he did not have evidence of delivery of the letter of termination to the Claimant.

Mr. Otieno stated that the Claimant was suspended in March and dismissed in August 2015 while the Respondent's policy provides for 21 days suspension. He stated that the counter claim is for salary earned by the Claimant during suspension and that according to the policy an employee on suspension is entitled to salary.

## **Determination**

I have considered the pleadings and evidence adduced in court. I have also considered the written submissions filed by the parties and the authorities cited. The issues for determination are the following:

1. Whether the termination of the Claimant's employment was unfair and malicious,
2. Whether the Claimant is entitled to the remedies sought.

## **Fair Termination**

What constitutes fair termination is a matter that is now well settled by the wealth of Jurisprudence of this court and the Court of Appeal. There are two elements that must be satisfied by the employer, fair procedure and valid reason.

### **(i) Fair Procedure**

Fair Procedure is provided for in section 41 of the Employment Act. Section 26 of the Act however provides that parties are also bound by their internal terms and conditions of service provided they are not inferior to the law. The section provides as follows:

#### *Section 26*

*(1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.*

*(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply.*

In the present case the procedure for discipline in the Respondent's Staff Manual provides for disciplinary procedure at Policy No. 47 as follows-

**47.4. AUTHORITY:** *The authority for disciplinary action rests with that member of Management who is directly responsible for the person concerned. Younger members of Management often feel that if a breach of discipline occurs a decision on punishment has to be made immediately for fear it will reflect on their competence as a Manager, In fact the need for instant punishment rarely occurs, although the aim should be to deal with all disciplinary cases as quickly as possible. Fragrant breaches of discipline can always be dealt with by suspension. This at least gives the Manager the opportunity for consultation with his immediate supervisor and with HR Department before final punishment is decided on. Periods of suspension should not be for longer than 21 days. The role of HR Department is to advice on the employee's previous history, to give guidance*

on precedent and to ensure as far as possible that the disciplinary code is standard and that scales of punishment are reasonably consistent across all departments.

**47.7.JUDGEMENT:** *All the facts and circumstances relevant to the case must be obtained before a decision on punishment is made. If time is required to do this the employee should either be told to continue working, or if the evidence is sufficiently strong to establish a prima facie case he should be suspended from duty and told to report back at a stated time. Care must be taken to ensure that employee understands that his suspension is to enable the full facts to be established and is not the punishment itself.*

47.11. *Disciplinary action should not be taken in a state of emotion, i.e. irritation at the offender, anger at the incident, personal dislike of the offender or a biased decision will almost certainly result. A decision based on elementary justice should be taken as objectively as possible and this is unlikely if the Manager concerned is himself emotionally involved.*

The Claimant testified that she was suspended from duty on 27th March, 2015 and issued with a show cause letter on 27th July, 2015, exactly 4 months later, in contravention of Policy 47.4 which provides that the period for suspension should not exceed 21 days. No communication was made to explain to her the reasons for the extended suspension. For this reason the suspension was irregular. This also means that any disciplinary action taken after the 21 days provided for in the Respondent's policy, including the disciplinary hearing of 11th August 2015, was irregular.

The situation is further compounded by the mixed signals from the Respondent who appeared to have abandoned the disciplinary process in favour of redundancy as expressed in the letter of notification of redundancy dated 9th July 2015 sent to the County Labour Officer accompanied by a copy of the Claimant's letter of redundancy dated 2nd July 2015 complete with tabulation of the redundancy package, a fact that the Respondent did not deny.

Having already failed to comply with its own procedure by keeping the Claimant on suspension for more than 4 months during a period when she had not even been called upon to show cause, I find that the disciplinary procedure was so flawed as to make the whole of the process a sham. From the foregoing I find and hold that the disciplinary procedure was unfair and in breach of the Respondent's disciplinary policy.

## **(ii) Valid Reason**

The reason for dismissal as stated in the letter dated 11th August 2015 is as follows:

*"We note with concern and disappointment that you declined to appear before a duly constituted Board Committee on 11th August 2015. After careful review of your written defence. Notwithstanding your non-attendance, the Disciplinary Committee considered your case in the light of the available evidence and in accordance with the provisions of your employment contract, Company Rules and Regulations and the Employment Act 2007, and has resolved that you be summarily dismissed from Mumias Sugar Company Limited with effect from 11th August 2015 for your involvement in the **fraudulent sale of ethanol.**"*

At the hearing no evidence was adduced on the involvement of the Claimant in fraudulent sales of ethanol. The Claimant referred to her job description as Commercial Director which did not include sale of ethanol. She testified that the issuance of invoices and sales were under Finance Department yet nobody in Finance Department was called to controvert her evidence. The only witness called by the Respondent testified on the disciplinary procedure and in any case was an employee who was recruited on 1st July 2015 when the Claimant was already on suspension.

In the written submissions of the Respondent it has concentrated on the fact that the Claimant failed to attend the disciplinary hearing and therefore squandered her opportunity to be heard. The Respondent cited several cases to support this contention. These include the case s of **Caliph O Ogega v National**

**Social Security Fund Cause 280 of 2013** (unreported) where the court held:

*“Before any employee is terminated or dismissed, such an employee must be taken through a fair procedure. This is per section 43 and 47 of the Employment Act where such an employee must receive notice with an outline of the reasons for such termination. A hearing of the employee is paramount in fair employment and labour relations based on section 35 and 41 of the Employment Act. ... due process must be followed.”*

The Respondent further cited the case of **Mathew Lucy Cherusa v Poverelle Sisters of Belgano T/A Blessed Louis Palazzalo Health Centre[2013]eKLR** in which the court held that the Respondent had powers to summon the Claimant to answer to charges levelled against her and she could not complain that she was not given a hearing after failing to attend the disciplinary hearing. The Respondent also cited the case of **Jackson Butiya v Eastern Produce Cause 335 of 2011** in which the court held:

*“An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say ‘‘I refused to talk with those people and therefore I was not heard, order them to pay me.’’ It is not the role of the Court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law’’.*

*“The procedural fairness requirements set out under Section 41 of the Employment Act, 2007 are fulfilled by asking an employee facing disciplinary proceedings to respond to a show cause letter and to attend an oral disciplinary hearing. The employee is not at liberty to decline to respond to the allegations levelled against them and if they have any issues with the process, they must raise them directly with the employer within the timelines provided’’.*

*“It seems to me that the Claimant chose to ignore the summons issued to her by her employer and she cannot therefore come to court and state that she was not given an opportunity to be heard. The Court stated in **Jackson Butiya(supra)** this is precisely what the Claimant did and her claim for unlawful and unfair dismissal must therefore fail’’.*

The court further observed that –

*“From the evidence on record, I find that the Claimant failed to avail herself of the internal grievance handling procedure provided by the Respondent and cannot therefore complain that she was not heard. For this reason the claims for unfair termination and one month’s salary in lieu of notice fail and are hereby dismissed.”*

*“It is a cardinal rule of evidence, which is echoed by Section 47(5) of the Employment Act that he who alleges must prove’’ and **section 47(5)** provides that:*

*(5 “For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”*

*“It is my finding that the Claimant has not proved that he did not get a fair hearing at his disciplinary hearing. From the foregoing I find that there was valid reason to dismiss the Claimant and that he was subjected to a fair hearing of his disciplinary case.”*

The Claimant in its submissions states that the reason she did not attend the hearing is that *“In total disregard of the doctrine of lis pendens the respondent went ahead and summarily dismissed the claimant. The Claimant did not attend the session for the reasons that she did not expect the respondent to sit having full knowledge of the existence of the suit and the hearing date of 12<sup>th</sup> August, 2015.”* As ably pointed out by the Respondent the doctrine of *lis pendens* which is defined in Black's Law Dictionary 9th Edition as the jurisdictional power or control acquired by a court over property while legal

action is pending is not applicable to this case.

All the cases relied upon by the Respondent are not applicable in this case for two reasons; the first is that the Claimant has not complained that she was not given a chance to be heard, and, secondly, the Respondent did not dismiss the Claimant for reasons that she failed to avail herself for the disciplinary hearing but rather, as stated in the letter of dismissal, it was "**for her involvement in the fraudulent sale of ethanol**, a decision that was reached **after careful review of the Claimant's written defence and in the light of the available evidence and in accordance with the provisions of your employment contract, Company Rules and Regulations and the Employment Act 2007**. This was **notwithstanding her non-attendance of the Disciplinary Committee** meeting.

As already pointed out above, that evidence was not availed to the court nor was it expressly referred to in the letter of dismissal. The law is clear at both section 43 and 47 that:

**43. Proof of reason for termination**

*(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*

**47. Complaint of summary dismissal and unfair termination**

*(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while **the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.***

All that the Respondent did was to produce a computer generated list that does not reflect either an under invoicing or the connection of the list to the Claimant. It is also instructive to note that in the Notice to Show Cause the charges are framed as follows:

PER/D/PF/2015

27 July 2015

Mrs. Pamela Lutta- Pr/No.99243,

Commercial Directors,

Commercial Department

**MUMIAS**

Dear Pamela,

**RE: SHOW CAUSE NOTICE**

*Reference is made to the above subject matter and our suspension letter to you dated 27<sup>th</sup> March 2015 notifying you of your suspension from duty pending investigations into allegations of involving yourself in fraudulent activities bordering on grave criminal acts in relation to the sales of Ethanol products manufactured by the Company.*

*As Acting Commercial Director, your responsibilities include coordinating and overseeing the process of approvals of sales orders and procedures relating to invoicing and delivery of the product. However, investigations so far completed have confirmed several discrepancies in the process of Ethanol sales and the company has strong reasons to believe that you deliberately and*

*knowingly participated in the said fraudulent activities contrary to your employment contract, company policy and the labour laws, in that you oversaw the under invoicing of certain customers as listed in the attached schedule, leading to substantial losses that were incurred by the Company.*

*The Company views this as a serious failure on your part in the discharge your responsibilities and you are required to show cause, within 48 hours upon receipt of this letter, why disciplinary action, which may include summary dismissal, should not be taken against you for this failure.*

*Yours faithfully,*

*For: Mumias Sugar Company Ltd*

*Coutts Otolu*

**Managing Director**

The Respondent thus only stated but did not prove the grounds for dismissal as required by law.

The Claimant made other allegation against the Respondent. She alleges that she was discriminated as other employees suspended with her were reinstated. I do not find sufficient proof of discrimination as she did not produce the letters of suspension to prove that the said persons were suspended for similar grounds as herself.

The Claimant further accused the Respondent of defamation. She relied on press statements and articles appearing in the media. The Claimant cited several cases in support of its claim for damages for defamation mostly on the quantum. The cases cited include **Richard Otieno Kwach v Standard Limited & Ano. [2007]eKLR**, **Kipyator Nicholas Kiprono Biwot v Clays Ltd (HHCC NO. 10667 OF 1999)**, and **Martha Karua v Standard Bank Ltd [2006]eKLR**. The Respondent denied the claim for defamation and relied on the cases of **Ibrahim Mbogo kanyuira v Joseph Gitahi Ndirangu & John Ndung'u King'ori[2016]eKLR**, and **John Edwards v Standard Ltd**.

No evidence was led by the Claimant to prove that the Respondent was responsible for the publication of the articles complained of or that they were defamatory of the Claimant. I therefore find that the Claimant did not prove the allegations of defamation against the Respondent.

The arguments by both parties on whether or not the summary dismissal of the Claimant took effect while there was a court order preserving the Claimant's employment are redundant following the Respondent's reinstatement of the Claimant back to the payroll until the disputed court orders were vacated. For the same reasons the Counterclaim filed by the Respondent must fail as the Respondent cannot be refunded salaries paid to the Claimant in compliance with a court order which the Respondent has not contested.

## **Remedies**

Having found the termination of the Claimant unfair for want of both valid reasons and fair procedure, she is entitled to pay in lieu of notice, outstanding annual leave and salary for days worked in terms of section 49(1) of the Employment Act. The Respondent stated in the letter of dismissal that the Claimant is entitled in addition to pension withdrawal benefits as per Mumias Sugar Company Staff Retirement Benefits Scheme Rules and Certificate of Service. The Respondent did not dispute the tabulation of the terminal benefits by the Claimant on the said items and I will adopt the same.

On service pay I agree with the Respondent that under section 35(5) read with section 35(6) of the Employment Act the Claimant is not entitled to the same as she was a member of both NSSF and the Respondent's Staff Retirement Benefits Scheme.

The Claimant is also not entitled to aggravated damages for two reason being first that aggravated damages cannot be granted in a case of breach of a private contract between an employer and an

employee and secondly because she did not prove the claims of either defamation or discrimination. The prayer is therefore dismissed.

The Claimant prayed for compensation. Having found her summary dismissal unfair, and taking into account her long service, I award her maximum compensation based on her gross pay of Kshs. 9,344,460.

### **Conclusion**

In conclusion I declare the summary dismissal of the Claimant unfair and award her the following:

- |   |                          |
|---|--------------------------|
| 1. Salary for days worked                   | <b>Kshs. 674,877.00</b>  |
| 2. Pay in lieu of notice of 2 months        | <b>Kshs.1,557,410.00</b> |
| 3. Pay in lieu of pending annual leave days | <b>Kshs.1,310,762.00</b> |
| 4. Compensation for unfair dismissal        | <b>Kshs.9,344,460.00</b> |

In addition the Claimant is entitled to her benefits under the Respondents Staff Retirement Benefits Scheme and a Certificate of Service.

The Counterclaim of the Respondent is dismissed. Respondents shall pay costs for both claim and counter claim.

**Dated signed and delivered this 22nd day of September, 2017**

**MAUREEN ONYANGO**

**JUDGE**