



**REPUBLIC OF KENYA**

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

**CAUSE NO 1609 OF 2014**

**CAROLYNE AKINYI MADOWO.....CLAIMANT**

**VERSUS**

**CIMBRIA EAST AFRICA LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Carolyne Akinyi Madowo, the Claimant in this case was an employee of Cimbria East Africa Limited, the Respondent herein. She brought this action pursuant to the termination of her employment on 29<sup>th</sup> May 2014. The Claimant's case is contained in a Statement of Claim dated 12<sup>th</sup> September 2014, a Supplementary Memorandum of Claim and Response to Counterclaim dated 20<sup>th</sup> August 2015 and a further Response dated 28<sup>th</sup> January 2016.

2. The Respondent filed a Memorandum of Defence and Counterclaim on 15<sup>th</sup> April 2015 and a Response to Supplementary Memorandum of Claim and Additional Counterclaim on 19<sup>th</sup> January 2016.

3. At the hearing, the Claimant testified on her own behalf and the Respondent called its Human Resource and Administration Officer, Carolyn Nyambura and Finance Manager, Joseph Mwangi Mburu.

**The Claimant's Case**

4. The Claimant states that she was employed by the Respondent on 1<sup>st</sup> April 2008, in the position of Accounts Assistant. She was confirmed in her appointment on 1<sup>st</sup> October 2008. Her employment was terminated on 29<sup>th</sup> May 2014 on allegations of poor performance. She claims that she was not paid her terminal dues.

5. The Claimant avers that the Respondent began discriminating against her after she commenced further studies. She claims the following:

- a) Compensation for loss of employment.....Kshs. 696,000
- b) Gratuity @ 20 days for every year of service.....232,000
- c) General damages for discrimination
- d) Costs plus interest

## **The Respondent's Case**

6. In its Memorandum of Defence and Counterclaim dated 14<sup>th</sup> April 2015 and filed in court on 15<sup>th</sup> April 2015, the Respondent admits having employed the Claimant on 1<sup>st</sup> July 2008, as an Accounts Assistant. The Claimant's initial monthly salary was Kshs. 20,000 and was progressively increased to Kshs. 58,000 as at the time she left employment.

7. The Respondent avers that on 25<sup>th</sup> February 2014, its Managing Director instructed the Finance Manager not to assign the Claimant any duties until she had completed pending Value Added Tax (VAT) returns. On 11<sup>th</sup> April 2014, an employee by the name Anthony sent an email to the Claimant complaining about her failure to submit some financial information for period running from January to April 2014. The Claimant wrote an apology for the delay.

8. On 5<sup>th</sup> May 2014, the Respondent's Finance Manager sent an email to the Claimant complaining about some un-booked cash receipts. The Claimant was instructed to update the records.

9. The Respondent states that the Claimant was an employee who continuously frustrated other members of staff by her poor performance, citing an email dated 8<sup>th</sup> April 2014, from Anthony.

10. The Respondent submits that the Claimant's employment was terminated fairly, after her failure to perform her duties properly and discovery of fraudulent activities carried out by her. In March 2014, the Finance Office, where the Claimant worked, was reorganized and duties distributed for effectiveness. Some of the Claimant's duties were thus handed over to other employees, as she could no longer be trusted with cash management.

11. The Respondent denies the Claimant's claim of discrimination and states that the Claimant was fully supported to further her studies. The Respondent states that the Claimant failed, ignored and negligently refused to keep proper records and defrauded the Respondent by creating multiple dishonest transactions.

12. It is the Respondent's case that the termination of the Claimant's employment was for a valid reason and in accordance with fair procedure. It is averred that the Claimant's poor performance and fraudulent activities led to the loss of Kshs. 149,925, belonging to the Respondent.

13. By way of Counterclaim, the Respondent states that the Claimant completed multiple dishonest transactions by posting receipts as received in the petty cash bank account while retaining the accompanying petty cash vouchers. The vouchers were recorded in employee debtor accounts and forwarded to Human Resource for recovery.

14. The Respondent states that by her actions, the Claimant caused the loss of Kshs. 149,925, which is claimed in counterclaim. Additionally, the Respondent claims from the Claimant the sum of Kshs. 215,248, being an unpaid loan amount due to the Claimant's guarantors on account of a loan advanced by Cimbria Co-operative Savings and Credit Society Limited.

## **Findings and Determination**

15. 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 counterclaim against the Claimant.

## **The Termination**

16. The Claimant's employment was terminated by letter dated 29<sup>th</sup> May 2014, stating as follows:

*"Dear Carolyne,*

**RE: TERMINATION**

*We regret to inform you that as at 29<sup>th</sup> May 2014, your employment with Cimbria East Africa has been terminated.*

*Reference is made to various conversations regarding your performance, which has been below standard resulting in many complaints from internal and external customers.*

*Unfortunately, you have not made any conscience (sic) effort to amend nor improve your performance, which has impacted and affected the organization tremendously. Subsequently, Management is left with no choice but to terminate your contract of employment effective 29<sup>th</sup> May 2014. The company will pay for the shortfall in notice period.*

*The final computation of your terminal benefits (if any) less any company liabilities is as shown on the pay slip attached. You will be required to handover to the Financial Controller Ms. Abigail Gustafson your pending workload, company assets in your possession including documents, keys etc and document a comprehensive handover report before your departure.*

*We take this opportunity to thank you for the period you have given your services to Cimbria East Africa and we wish you all the best in your future endeavors.*

*Yours Sincerely,*

***Cimbria East Africa Ltd***

*(Signed)*

*Jorgen T. Nielsen*

*Managing Director*

*(Signed)*

*Carolyn Nyambura*

*HR & Admin. Officer"*

17. According to this letter, the Claimant's employment was terminated on account of poor performance. This is one of the grounds allowed under the Employment Act, 2007. However, like all other grounds, it must be proved pursuant to due procedure at the shop floor.

18. The Court was referred to the decision in ***Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) v Stanley Kinyanjui and Magnate Ventures Ltd (Cause No 621 of 2012)*** where it was held that once poor performance of an employee is noted, the proper procedure is to point out the shortcomings to the employee and allow them reasonable time to improve.

19. In ***Lilian O. Ochang v Kenol Kobil Limited [2015] eKLR*** this Court held that disciplinary action based on poor performance must be preceded by a capability hearing, within the parameters set out in Section 41 of the Employment Act. The Respondent's Finance Manager, Joseph Mwangi Mburu told the Court that the Respondent did not conduct any performance appraisals. The Court was therefore unable to confirm the basis for the accusations of poor performance made against the Claimant.

20. Further, it was admitted by the Respondent that from March 2014, some of the Claimant's functions were taken away from her. None of the Respondent's witnesses could tell the exact functions off loaded from the Claimant. On her part, the Respondent's Human Resource and Administration Officer, Carolyn Nyambura testified that there were too many complaints regarding the Claimant's performance.

21. Complaints against an employee cannot by themselves, support a termination. The employer must show that the complaints were put to the employee for their response. In this case, there was no evidence of such a process and the Court finds that the termination of the Claimant's employment was both substantively and procedurally unfair. In reaching this conclusion, the Court ignored allegations of misconduct raised in the Respondent's pleadings and evidence as they did not form part of the reason for termination as stated in the termination letter.

### **Remedies Available to the Claimant**

22. Pursuant to the foregoing findings, I award the Claimant ten (10) months' salary in compensation. In making this award I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination transaction.

23. The Claim for gratuity is based on clause 18.2 of the Claimant's employment contract. This clause however puts the service threshold at ten (10) years, which the Claimant did not achieve. The claim is therefore disallowed. The claim for general damages for discrimination was not proved and is dismissed.

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

24. The Respondent's counterclaim is two-fold. First, there is the claim for Kshs. 149,925, alleged to have been lost through the Claimant's negligence. Second, is the claim for the sum of Kshs. 215,248 outstanding on account of a loan advanced to the Claimant by Cimbria Co-operative Savings and Credit Society Limited.

25. With regard to the first claim, no specific evidence linking the Claimant to the loss, was adduced before the Court. On the second claim, the only thing to say is that any outstanding loan amount owed by the Claimant to either Cimbria Co-operative Savings and Credit Society Limited or the guarantors, would be governed by a separate agreement, which was not part of the subject matter before the Court. The result is that the Respondent's Counterclaim against the Claimant fails and is dismissed.

### **Final Orders**

26. In the end, I enter judgment in favour of the Claimant in the sum of Kshs. 580,000 being ten (10) months' salary in compensation for unlawful and unfair termination of employment. This amount will attract interest at court rates from the date of judgment until payment in full.

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

28. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27<sup>TH</sup> DAY OF OCTOBER 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Rakoro for the Claimant

Mr. Njiru for the Respondent