



**REPUBLIC OF KENYA**

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

**CAUSE NO. 333 OF 2013**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 23<sup>rd</sup> November 2017)**

**LEAH WAKIO NGAMI.....CLAIMANT**

**VERSUS**

**OPTICA LIMITED.....RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed her Memorandum of Claim on 13<sup>th</sup> March, 2013 through the firm of M/s Kounah & Company Advocates contesting unfair, unlawful and discriminatory termination by the Respondent and failure by the Respondent to follow due process in terminating the Claimant's employment.
2. The Claimant's case is that on 1<sup>st</sup> November, 2012, she was employed by the Respondent as HR Executive with an initial monthly salary of Kshs.60,000/= (Appendix LWN 1(a) and (b)). It was an express contract which Claimant signed but Respondent neglected to sign and it was to take effect from 2<sup>nd</sup> October 2012.
3. She avers that she served the Respondent diligently and with dedication from the time she assumed her duties.
4. On 16<sup>th</sup> November, 2012, at around 4.30 pm, the Respondent's Managing Director called her to his office and told her of the Respondent's intention to slash her salary which the Claimant objected to since there were no valid or lawful reasons offered for such fundamental breach.
5. The Respondents then abruptly terminated the Claimant's employment at around 4.55 pm the same day without cause or justification, without following due procedure and without giving written reasons at all.
6. The Claimant prays for judgement against the Respondent for her gratuity and damages for unfair termination.
7. The Respondent on their part filed their defence on 5<sup>th</sup> April 2013 through the firm of Nyaencha Waichari & Company Advocates. They aver that the letter of employment contained a probationary period of 3 months during which termination of employment could be effected by giving 1 weeks' notice. They aver that during the 2 weeks Claimant worked for Respondent, she was incompetent and performed way below expectations and was duly given 1 week notice as per Annex 01.
8. That the Claimant refused to collect her notice letter and absconded duty. They aver that the Claimant's

contention of unfair termination is not valid and want this claim dismissed accordingly.

9. I have examined evidence of both parties. It is not in dispute that the Claimant was employed by Respondent on 2<sup>nd</sup> October 2012 and terminated in November 2012.

10. The Respondent admits the contents of Appendix LWN 1 (a) of the Claimant. Under Clause 2 of this contract, it was indicated that the Claimant was to be on probation for 3 months. During the said period her performance was to be regularly reviewed and if the Respondent were dissatisfied with her performance the contract could be terminated by giving 1 week's notice. The notice was to be in writing.

11. It is apparent that the Claimant was therefore terminated during the probationary period.

12. Under Section 42(2) of Employment Act states as follows:

***(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 a fair reason:-***

***(i) related to the employee's conduct, capacity or compatibility; or***

***(ii) based on the operational requirements of the employer; and***

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

13. Section 41 refers to a disciplinary hearing. The Claimant therefore being on probation could not expect a hearing before termination. Given that the contract provided for 7 days' notice, the Claimant was entitled to the 7 days' notice or payment in lieu.

14. The Respondent insist they gave him notice but there is no indication it was ever served on her. I therefore make a finding that she is entitled to the 7 days pay in lieu therefore which translates to:-

***- 7/30 x 60,00= 14,000/=***

***- The other prayer for unlawful termination cannot succeed. I will award Claimant costs of this suit.***

Dated and delivered in open Court this 23<sup>rd</sup> day of November, 2017.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Chemitai holding brief for Obok for the Claimant

Chege for the Respondent