



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 793 OF 2012

PAMELA ACHIENG ONYOO CLAIMANT

VERSUS

SURGIPHAM LIMITED RESPONDENT

JUDGEMENT

1. The issue in dispute herein is the unlawful, unfair and wrongful termination of the Claimant and the unlawful and unauthorised salary deductions.
2. The claim was filed on 10th may 2012; a Supplementary Memorandum filed on 2nd November 2012; the defence was filed on 24th May 2012; and written submissions on 30th November 2015 and 2nd December 2015 for the Claimant and Respondent respectively

Claim

3. The claim is that the Claimant was employed by the Respondent as a Medical Representative starting 1st February 2008 and served diligently until 30th January 2012 when she was summarily dismissed. The letter of dismissal indicated that the reason for dismissal was misconduct but the details of such misconduct were never given to the claimant. The Claimant was issued with a show cause letter while she was on annul leave and the dismissal was effected while she was away and served via email which was wrong. That the rules guiding a summary dismissal or dismissal on grounds of misconduct were never followed and hence this resulted in an unfair process.
4. The claim is also that the Claimant might have been dismissed for exceeding the kilometres limit that her assigned car had but this was not part of the reasons for her dismissal. Despite other employees being in similar circumstances such as the Claimant they were never issued with show cause letters or dismissed. Such treatment is discriminative and unlawful and in this case the Respondent adopted a discriminatory policy when they issued the Claimant with a show cause letter but failed to do so to Geoffrey Asigo, Emanuel Nyakenga, martin Onyango and Kipkemoi Boit.
5. The claim is also that there were unlawful and unauthorised deductions to the claimant's salary, a tax deduction that was unlawful. This therefore resulted in unfair dismissal, the Claimant has suffered loss and damage, lost benefits in respect of loss of employment as the Claimant had 24 years before re4tirement expected at age 60 and claim the salary at Kshs.26, 704,200.00; service pay is claimed at Kshs.370, 892.00; 12 months compensation at Kshs.1, 112,676.00; damages for loss of employment at Kshs.500, 000.00; and for the illegal salary deductions at Kshs.450, 000.00. The Claimant is seeking

these dues and a declaration that there was unfair dismissal, a reinstatement and in the alternative payments due and compensation together with costs.

6. In the Supplementary Memoranda the claim is that the Claimant was earning a gross salary of Kshs.92, 723.00 per month and employment commenced on 1st February 2008 and not 1st July 2009. There was no notice of poor performance or any warning letter issued in this regard or any at all and the letter of dismissal did not give a valid reason as the alleged gross misconduct was not set out. The dismissal was effected while the Claimant was on annual leave that had been approved. There were no guidelines given for the use of Respondent vehicles and where any were issued, these were never brought to the attention of the claimant. That the Claimant was assigned a company car KBG 731E but was taxed for the use of motor vehicle KBG 729E which car she never used.

7. In evidence, the Claimant testified that she was employed on 1st February 2008 but on 10th January 2012 she was issued with a show cause letter while on annual leave to report back and reply in 3 days. On 13th January 2012 she submitted her response but Christophe Imbaya called her with information that she would not travel with other employees to Mombasa for the office retreat and her flight was cancelled. On 15th January 2012 all staff left to Mombasa and on 17th January 2012 the human resource officer called the Claimant for a meeting on 18th January 2012 and that her letter of response was missing from the file. On 29th January 2012 the Claimant was to proceed to the file but on 31st January 2012 the Claimant was called to the office for a meeting with Mr Imbaya and Adaersh and was instructed to hand over all Respondent property and then was issued with a letter of dismissal to which the Claimant lodged an appeal as it was not clear as to why she had been dismissed. In the show cause reply the Claimant had explained how she had used the company vehicle allocated to her.

8. The Claimant also testified that on 8th December 2011 Mr Imbaya had done an email on the use of company vehicles when the Claimant was on her leave. The policy was to the effect that the Claimant should use the company vehicle at her expense while on annual leave; she was not to travel out of the country without prior approval; she was to indicate what kind of roads were to be used; and she was to meet the repair costs. In this email Mr Imbaya noted 3 issues that were not true in that the Claimant had not travelled abroad [out of the country], she had not driven the car off-road and the car had not been used outside her areas of work. This notice on vehicle use was sent on 8th December 2011 while the Claimant was on 18 days leave ending on 3rd January 2012.

9. The Claimant also testified that her dismissal was unfair as she was not given a reason for it and there had been no warning. That the Respondent should pay for the loss of employment as upon dismissal without notice this disoriented the claimant; she had children in school and due to the illegal nature of the process it caused her financial loss and damage; psychological suffering and has since remained unemployed. That other employees got show cause letters but the Claimant was recalled from leave to collect her show cause letter and was the only one who was dismissed and this amounted to discrimination against her. That the Court should award damages for such discrimination.

10. In cross-examination the Claimant admitted that on 18th November 2011 she had an email from Mr Imbaya with regard to her performance but this was not a warning letter. Her car was never checked at odometer reading just like other employees in her level and who had company cars. That she travelled with the company car to her home in Homa Bay and was not aware that she should have reported when travelling to her rural home or outside her work area. That she never travelled upcountry she only travelled to her home in Homa Bay which was her normal area of work as this was her home.

11. The Claimant also testified that she was dismissed on 31st January 2012. She was accompanied by her advocate Mr Odawo to the Respondent office but he was not allowed any communication with the respondent. On 30th January 2012 the Claimant was car-jacked on her way from work at Adams Arcade at 9pm and reported to Kilimani Police Station and only informed the Respondent the next day. She does not know what the Respondent did as soon thereafter she was dismissed and the matter was with the police. The Claimant had been asked to resign but there was no reason for such and the Respondent then

dismissed her.

Defence

12. In defence, the Respondent admit that they had employed the Claimant at a monthly salary of Kshs.92,723.00 on 2nd January 2009 and during her employment was issued with oral and written caution warnings. The Claimant was then terminated lawfully upon show cause and gross misconduct with all details disclosed to her and based on her responses that were not satisfactory. The Claimant was afforded time for hearing before dismissal. The Respondent communicates via emails as one of the modes to share information and as a reminder of its policies and directives which were well known by the Claimant and the Claimant breached. The Claimant elected to disobey the Respondent policies and directives and an email sent on 8th December 2011 was only a reminder of the same. the Claimant was guilty of gross misconduct for knowingly ignoring, failing, neglecting and or refusing to obey lawful and proper command not to use respondent's vehicle to travel outside their normal areas of work of operations and along rough roads or off roads especially out of Nairobi and during leave period without prior approval. The dismissal was therefore justifiable and lawful.

13. The defence is also that the claimant's case was examined on its own merits and determined and there were found justifiable reasons for dismissal. The Claimant was found to be in breach of company policies and directives with impunity. Notice to show cause was issued on 10th January 2012 before dismissal on the reasons of gross misconduct. The claim for losses, damages and compensation do not arise and nothing is due. The claim should be dismissed with costs.

14. In evidence, the Respondent called 2 witnesses Christopher Imbaya and Adaersh Kumar Dharma. Mr Imbaya testified that he is the respondent's Business manager and worked with the claimant. The Claimant was on 2 contracts, one from 1st February 2008 and the other commencing on 1st July 2009. The 2nd contract was relevant because the common employer was Boehringer Ingelheim that was subcontracted to Boerlringer Ingelheim division of Jos Hansen East Africa, Nairobi and the Respondent took over the business that included staff and the Claimant under the same terms as the previous employer.

15. Mr Imbaya also testified that the Respondent has directives on use of company car even though not available in a written document but the rules are communicated to staff when there is a requirement to staff the same is communicated to staff. During the normal work day staff issued company car use it as their own and go home with the vehicle within the normal area of work. When on leave, the practice is for the employee to use the vehicle at own cost but must get permission to go outside long distances away from work area.

16. Mr Imbaya also testified that he emailed staff all these requirements and directives but the Respondent failed to Respondent with the odometer reading was clearly wrong and the use of the vehicle indicated that she had covered long distances as its use in Nairobi did not tally with what was stated. The Claimant admitted to giving reading by error and then gave a different reading. When the Claimant came back from leave as well as all the other staff, the Respondent found it necessary to take new odometer readings and the findings were that there was a difference between what was given by the Claimant and what the vehicle had lodged with a difference of over 800 kilometres. The Claimant was asked to give an explanation. The Claimant stated that she had travelled to Kisumu by air but the reading on her vehicle was too high not commensurate to which she then stated she had travelled upcountry using the vehicle. The Claimant had no prior approval for such use of the company vehicle.

17. That all communications to staff were via group email as a common practice. Office memos were also issued. All staff had lap tops and modems with monthly air time. The Claimant as a filed officer got these facilities and could communicate from anywhere.

18. The evidence was also that the Claimant had performance questions. There was a system to facilitate field staff to report easily as there was a data of customers and the medical Representatives had

to log in their work with set time lines. There were targets to be met by each medical representative and had to be reported. The Claimant had problems with the system and once reports were analysed centrally in Johannesburg there were indications that the Claimant was lax and the quality of her reports were poor and it was obvious she was not meeting her targets. This was an electronic system and when the witness got these reports he called the Claimant and advised her to address the issues. This happened severally despite the Claimant being trained in the use of the system. During one such training, the trainer noted that the Claimant was not keen as she fell asleep during the sessions which the witness was told to address.

19. On cross-examination Mr Imbaya admitted that the Respondent gave the employees vehicles to use as their personal cars but when travelling to the rural home one had to seek approval prior. Emails were sent to this effect. There is no policy or directives in Court to explain the email sent to the Claimant on 8th December 2011. The show cause sent to the Claimant on the 809 kilometres use arose from the fact that within 15 days she had covered so many kilometres unlike when she is in the course of her areas of work in Nairobi. There was a limit to the kilometres to be covered. The Claimant travelled to Kisumu without prior approval. The claimant's leave had been approved but the use of the company vehicle was not in issue until the Claimant gave conflicting information about it. With regard to the claimant's performance, she had set targets and timelines which she did not meet and failed to submit reports. That the Claimant had been trained on her duties and the training was continuous while on the job.

20. The witness also testified that the Claimant had been asked to resign on humanitarian grounds but was not forced.

21. The next witness was Mr Adaersh Kumar Dharma who testified that he is the Operations manager of the Respondent and worked with the Claimant who had been employed by Boehringer Ingelheim and the Respondent as the Boehringer Ingelheim representative took over its work and could incur expenses on their behalf and later be reimbursed. On 1st July 2009 the Claimant was contracted when the Respondent took over as the employer. In December 2011 Mr Imbaya issued directives on the use of company vehicles. Before the Claimant could travel outside her area of work she should have logged the mileage and get approval. What had been recorded prior to the Claimant taking leave and upon return there was a difference of 809 kilometres and was therefore asked to explain. The Claimant replied stating that she had travelled to Kisumu outside her areas of work. This had not been approved.

22. The witness also testified that the Claimant had a basics salary of Kshs.80, 699.00 and a house allowance of kshs.12, 000.00 all being Kshs.92, 000.00 per month. From this gross wage there were lawful deduction –

- a. Motor vehicle tax
- b. HELB loan
- c. Co-operative deductions
- d. PAYE
- e. NSSF
- f. NHIF

23. For the vehicle the Claimant had, she was taxed per KRA regulations as the vehicle usage for personal benefit attracted taxation.

24. Further evidence was that upon the Claimant being issued with a show cause letter, she was called by the human resource officer, the witness was present together with Mr Imbaya as the claimant's supervisor. On 30th January 2012 the Claimant was informed that her explanations were not satisfactory and was dismissed as she refused to resign. She was to receive notice pay; service pay and the leave days due. The Claimant asked for time to make a decision. On 31st January 2012 the Claimant called back and said she had been carjacked the night before the Respondent vehicle in her possession stolen and a report made at Kilimani Police Station. The Claimant was asked to go away to come back the next day for a discussion on her dismissal but she returned with her advocate who put pressure on the witness to be paid all the claimant's dues, the advocate was very aggressive and intimidating and issued threats upon which

the Claimant was advised that any discussions would not be fruitful and if she felt aggrieved she should file suit.

25. That the stolen vehicle was later recovered in Kibera vandalised. The number plate were stolen and since KRA cannot get this number the Respondent cannot use the vehicle.

Submissions

26. The Claimant submitted that the Claimant was dismissed for reasons not expressly indicated in the letter of dismissal after the show cause letter had set out several issue and after the directive on the use of vehicles was first sent to the Claimant while on leave that had commenced on 5th December 2011. The Respondent witnesses testified that the Claimant was given the vehicle for use as her own and from the letter of employment her work was within the Republic of Kenya. That the procedure to dismiss the Claimant was wrongful. There were discriminatory practices against the Claimant when she was singled out from Geoffrey Asigo, Emmanuel Nyakenga, Martin Onyango and Kipkemboi Boit who had similar issues on the use of their vehicles but were not dismissed. This was discrimination against the claimant. For this discriminatory policy the Claimant should be paid damages.

27. The Claimant also submitted that she was deducted Kshs.4, 510.00 allegedly sent to Co-operative Bank but was not received.

28. The Respondent on their part submitted that they are distributors of medical equipment and products of Boehringer Ingelheim and the initial contract for the Claimant was with Boehringer Ingelheim after which the Respondent took over and contracted the Claimant on 1st July 2009. Her basic salary was Kshs.80, 669.00; house allowance at kshs.12, 000.00; non-cash benefit of a car amounting to Kshs.41, 720.00. These dues were subject to taxation per KRA regulations. The deductions effected upon the Claimant were lawful and justified as they formed HELB loan; Co-operative Loan; PAYE; NSSF and NHIF. There is nothing owing in this regard.

29. The Respondent also submitted that the Claimant was not truthful in her evidence and in her conduct when she stated that she did not see a text message advising her to check her email sent on 5th December 2011 until 8th December when she was already flown to Kisumu and that the company car was in Nairobi but a check on the mileage it was apparent that she had travelled many kilometres. That she later admitted she used the vehicle to travel to Homa Bay. That before the Claimant was dismissed she was issued with a show cause letter and was able to reply but the same found unsatisfactory, by then the Claimant was aware of the company policy on the use of the vehicles. She used the car to travel upcountry without approval. The Claimant abused the trust bestowed upon her in the use of the Respondent property.

30. That the Claimant also had challenges with her work performance that was brought to her attention but did not change. There were warning issued. The Claimant could not travel to Mombasa with other colleagues as at this time she was facing disciplinary proceedings and had not been cleared. The Claimant was also given a hearing before dismissal. This was in the presence of the human resource officer, her supervisor and the operations manager. Upon this hearing and a decision was made to dismiss the claimant, she was given the option to resign but asked for time but this night the car in her use was allegedly carjacked.

31. On these grounds, the lack of seeking approval to travel upcountry with the Respondent vehicle; poor performance; failure to give satisfactory response upon show cause; being uncooperative at the hearing and being hostile; failure to return company property in her possession; the claim should be dismissed with costs to the respondent. That the Respondent had made an offer to the Claimant which she declined.

Determination

Whether the Claimant was unfairly dismissed

Whether there were unauthorised salary deduction

Whether the Claimant was discriminated against

Whether there are any remedies

32. The Employment Act, 2007 has set out procedures for every employer to follow before effecting a summary dismissal or a termination of employment. Such are to be followed otherwise any resulting dismissal becomes unfair. Such are to be found under section 35 thus;

(2) Subsection (1) shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto.

33. Such notice is important to issue as once a written notice is given, it must give the reason or the reasons for dismissal or termination so that the employer then can apply the provisions of section 35(4) thus;

(4) Nothing in this section affects the right—

(a) Of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46

34. Even in a serious case that warrant summary dismissal, an employee so affected has a right to challenge the fairness of it. This is as a fundamental shift from the repealed Employment Act to the current which at section 47 allow such an employee to challenge the decision of an employer who summarily dismisses him.

47. (1) where an employee has been summarily dismissed or his employer has unfairly terminated his employment without justification, the employee may, within three months of the date of dismissal, present a complaint to a labour officer and the complaint shall be dealt with as a complaint lodged under section 87.

35. In this regard, when an employee has been issued with a show cause letter, at this time the employer has already formed the offence that has been committed and the responses then made by the employee must be the requirements set out under section 41 of the Employment Act. Such an employee should be called for hearing and given a chance to give their defence as set out therein. See **Frederick O Owegi versus CFC Life Assurance Ltd, Cause No.1001 of 2012;**

... the disciplinary enquiry he was taken through, the show cause and the reason for his termination. The comments made in the claimants appraisal, those made for his caution and the eventual termination are not related. Each process was done on its own and to rely on the same to cite poor performance would be to defeat the purpose and milieu within which section 45 (2) (b) must be looked at.

36. In this case therefore, to fail to state the reason for dismissal in the dismissal letter was a procedural lapse on the part of the Respondent who simply said;

LETTER OF DISMISSAL

We refer to your letter dated 13th January 2012.

The management regrets to inform you that your explanation was found unsatisfactory. You are hereby dismissed for gross misconduct with immediate effect.

37. What then was the *gross misconduct*? I find the letter issued to the Claimant failed to meet the legal requirements set out under section 35 of the Employment Act. In essence the letter of dismissal was of no legal consequence as there was nothing set out for the Claimant to address or challenge in accordance with her right set out under section 35(4).

38. With the above set out, Policy guidelines are encouraged at the work place but these must be in writing and sent out to each employee. Section 5(8) (c) of the Employment Act speaks to any employment policy as follows;

*(c) “an employment policy or practice” includes any policy or practice relating to recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration, employment benefits and **terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems**, promotion, transfer, demotion, termination of employment on **disciplinary measures**. [Emphasis added].*

39. Where the Respondent had a *motor vehicle use policy and directives* then such as a legal requirement should have brought to the attention of each person under their employment and direction the policy statement required for this purpose. Such a *policy and directives* should not be let to wait until there is an error so as to be produced. Where such *policy and directives* existed at the Respondent workplace, upon this suit being filed by the claimant, the duty was upon the Respondent to produce such. The emails sent to the Claimant are not sufficient to set out the policy directives. Indeed Mr Imbaya testified that he sent the emails to explain the policy and directives but the actual policy and directives are not submitted for the Court analysis as to whether they meet the principles set out under section 5(8) of the Employment Act. This is a major omission on the part of the Respondent as where they have employed more than 5 employees, such policy guidelines/directives are required to further expound on the terms and conditions of employment and to ensure industrial peace.

40. In this case therefore, the Respondent evidence that the Claimant was issued with a car to use as a personal car, where there were no policy directives on how such use was to be regulated, then the matters that arose in the show cause notice lacked a basis or grounding. Section 43(2) of the Employment Act gives the guidelines to be followed thus;

(2) 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 caused the employer to terminate the services of the employee.

41. Section 43 of the Employment Act requires an employer to give reasons for termination, reasons that must be valid and just in any given case. For the reasons to have such validity, they must be within the knowledge of the employee well in advance to their application otherwise to source for such reasons when a mistake is done makes such lack legitimacy. Also a reason is only just where the employer ensures and impartial process to sanction an employee who has erred upon notification of their mistake so as to have a justifiable reason. Equally in fair labour relations, an employee must be given a hearing before termination and or dismissal pursuant to the provisions of section 41 of the Employment Act where such an employee is called in the presence of a fellow employee and where this is not practically possible, then the employer must demonstrate the circumstances that were so dire that a hearing was not possible before the summary dismissal was effected.

42. In this regard therefore, Where there are no valid reasons given, substantiated or an employee is not taken through a fair process before she is dismissed, then this results to unfair termination under the provisions of section 45 of the Employment Act. In this case I find the actions of the Respondent of sending the Claimant emails while on leave, emails which contained key policy directives that should have been issued way before she commenced employment or went on leave was in essence meant to set her up for dismissal.

43. On the question as to whether the Claimant suffered unauthorised salary deductions, in the claim it

is set out that a sum of Kshs.450, 505.00 was unlawfully deducted. In evidence the Claimant explained this that she was assigned a company car KBG 731E but was taxed for the use of motor vehicle KBG 729E which car she never used.

44. It is trite that all employment benefits are subject to tax deduction which includes the non-monetary benefits such as the Claimant had the use of company car. It is clear that the Claimant had the use of various vehicles while in the employment of the Respondent and was taxed thus. The Respondent gave a plausible explanation that there was an error in the vehicle registration number noted with regard to the claimant's use but that at all material times, she was only taxed for the use of one vehicle. I find such explanation reasonable. The claim for unauthorised salary deductions on the grounds that it related to a vehicle that the Claimant never used is well set out as to how it occurred and there is an admission by the Claimant that indeed while in the employment of the Respondent she was using a vehicle as her own and this she used to travel to her home in Homa Bay in December 2011. There was no double tax deduction to warrant a claim to reimbursement.

45. I find all the other deduction per the payslip annexed to the memorandum of defence – HELB Loan, Co-operative loan, PAYE, NSSF, and NHIF – all lawful and justified.

46. As to whether there was discrimination against the claimant, Discriminatory practices at the workplace are specifically outlawed pursuant to the provisions of section 5 of the Employment Act. Such provisions must also be read together with Article 27 and 41 of the Constitution. In this case the claim is that the Claimant was issued with a show cause letter together with her work colleagues but she was singled out and dismissed but they were not. That when her workmates were travelling to Mombasa for work her flight ticket was cancelled and never travelled. To these the Respondent gave their defence that the Claimant never gave satisfactory responses to her show cause letter unlike her colleagues who explained the use of the vehicles they had and this resolved their cases. That she did not travel to Mombasa with other staff as she had a pending disciplinary case against her and this was not discriminatory.

47. As held by this Court in the case of **Collins Orotu Lukhale versus AAA Growers Limited, Cause 100 of 2012** the unfair grounds setting out an employee against the others must be set out so as to establish acts of discrimination or the circumstances for the same that had no justification. In this case, the Claimant had her show cause letter that set out the issue she was to respond to just like her stated colleagues. The Claimant does not distinguish the explanation that the colleagues gave in response that set hers out in differentiation. This being her claim, the duty rested upon the Claimant to outline the discriminatory practices against her. The non-attendance of any give work related task in Mombasa or any other site was a prerogative of the employer and an employee cannot claim that the non-allocation of specific work is an act of discrimination against them, unless the same is geared towards setting such an employee apart on grounds that must be set out.

48. Having therefore set out above the procedural lapses leading to the summary dismissal, I find no proper context for the discriminatory practices alleged to have been committed by the Respondent to warrant a finding and for the award of damages. A claim for discrimination is not an omnibus for all manner of claims. Once pleaded it should be well articulated with the seriousness it deserves as this is a serious allegation. See findings set out in **Hesbon Ngaruiya Waigi versus Equatorial Commercial Bank Limited, Cause No. 60 of 2013**.

Remedies

49. Reinstatement is set out in the claim but this was not gone into in evidence at all. In any event section 12 of the Employment and Labour Relations Court Act regulate reinstatement thus in the interests of justice should not be awarded after three years since the dismissal. Also, reinstatement being a remedy for specific performance, the circumstances of the Claimant since dismissal and her conduct comes into focus. In this regard it would be important to set out that the Claimant upon her dismissal on 30th January 2012 was to return the property of the Respondent by 1st February 2012 but on the night of 30th January 2012 she was carjacked and the vehicle lost and only recovered without its number plate making it

impossible for the Respondent to use it. In evidence, it was apparent from the Claimant that she was not keen to assist the Respondent recover this vehicle. Her reasoning was simply that she is no longer an employee of the Respondent and her duty ended when she reported the matter to Kilimani police station where she did her statement. Such evidence and the sheer demeanour of the Claimant does not reflect well to her work ethos and to a claim seeking reinstatement. She was in use of a company vehicle given for her benefit and was carjacked and the vehicle lost and despite her dismissal just a few hours before, the employer did not demand that she surrenders this vehicle immediately. It therefore does not speak very well to the person of the Claimant where she is given a benefit despite dismissal to fail and cooperate with the former employer when their asset is lost while in her possession. To award reinstatement in such circumstances even where this could have been the best remedy would be unappropriated due to the very conduct of the claimant.

50. In the alternative and upon the finding that the Respondent failed to meet procedural requirements set out in law, compensation is due. Such compensation is discretionary based on the circumstances of each case and upon compliance with the provisions of section 45(5) of the Employment Act. The conduct of the employee comes into focus here. Despite the unprocedural lapse in her dismissal, the Claimant asked for time to consider the proposal and option of her resignation. Within this short time a valuable asset of the Respondent got lost. The Claimant also fails to explain the whereabouts of the Respondent other assets such as the lap top in her custody. Her attitude and approach to assisting the Respondent recover the lost vehicle while in her possession do not speak well of the character of the claimant. No amount will be assigned herein.

51. On the claim for Loss of employment, lost earnings, with the above findings with regard to compensation. This shall not be awarded. Such is declined.

52. Service pay is due under the provisions of section 35(5) and (6) as read together of the Employment Act. The Respondent has attached pay slip for the Claimant noting that NSSF and NHIF dues were deducted and remitted to the relevant statutory bodies. This is not disputed. Therefore, Service pay does not arise in this case.

Noting the findings above, each party shall bear their own costs.

Delivered in open court at Nairobi and dated this 20th day of January 2016.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

.....

.....