



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT MOMBASA**  
**CAUSE NUMBER 374 OF 2014**

**BETWEEN**

**EUNICE ADHIAMBO OKUMU.....CLAIMANT**

**VERSUS**

**PHARMAKEM LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Ms. Onyango instructed by Munyao, Muthama & Kashindi, Advocates for the Claimant*

*Mr. Nyabincha Advocate instructed by Mogaka Omwenga & Mabeya Advocates for the Respondent*

**ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION**

**AWARD**

**[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]**

1. The Claimant filed her Statement of Claim on 8<sup>th</sup> August 2014. She states she was employed by the Respondent Pharmaceutical Company as an Accountant/ Administrator, on 1<sup>st</sup> December 2014. She was promoted to become the Chief Accountant on the 19<sup>th</sup> October 2012. She earned a basic salary of Kshs. 79,028 monthly. She states her contract was unfairly and unlawfully terminated by the Respondent on 22<sup>nd</sup> April 2014. She prays the Court to grant her the following remedies:-

- a. April 2014 salary for 22 days worked, at Kshs. 57,954.
- b. 1 month salary in lieu of notice at Kshs. 79,028.
- c. 12 months' salary in compensation for unfair termination at Kshs. 948,336

Total.....Kshs. 1,085,318

d) Costs, Interest and any other relief

2. The Respondent filed its Statement of Response on the 1<sup>st</sup> September 2014. It concedes to have employed the Claimant as an Accountant on 1<sup>st</sup> December 2009, promoted her to the position of Chief Accountant on 19<sup>th</sup> October 2012, and terminated her contract on 22<sup>nd</sup> April 2014. It is not disputed the Claimant earned a monthly basic salary of Kshs. 79,028. Termination was fair and lawful, and was based on the Claimant's failure to perform her duties, and/ or negligently performing her duty. The Respondent was penalized Kshs. 325,000 by the Kenya Revenue Authority, as a result of the Claimant's failure in performance of her duty. She was paid her terminal dues, computed as follows:-

- a. 22 days salary for April 2014 at Kshs. 57,953.
- b. Accrued annual leave for 2013/2014 at Kshs. 23,708.
- c. 1 month salary in lieu of notice at Kshs. 79,028

Total.....Kshs. 130,395

Less Statutory Deductions..... Kshs. 96, 884

The Respondent urges the Court to dismiss the Claim with costs to the Respondent.

3. The Claimant testified on the 16<sup>th</sup> June 2015 and 26<sup>th</sup> June 2015 when she rested her case. The Respondent testified through its Human Resources Manager Mr. Ceiphas Kalu Munga and Financial Controller Mr. Muhamed Abdulla Jaffer on the 10<sup>th</sup> September 2015 when the hearing closed. Parties confirmed the filing of their Closing Submissions to the Court at the last mention on 28<sup>th</sup> October 2015.

4. The first thing the Court must do is look into whether the Claimant was offered any terminal dues and paid those terminal dues. The Respondent offered the Claimant the terminal dues shown in paragraph 2 above. There is evidence she did not accept the amount, on the ground that she as required to sign a Voucher discharging the Respondent from further liability. The evidence of the Claimant and that of Ceiphas agree the Claimant was offered this money, but did not take it due to the disagreement on the Discharge Voucher.

5. The amount included salary for 22 days worked in April 2014 at Kshs. 57,953 and 1 month salary in lieu of notice at Kshs. 79,028. These are part of the prayers sought in the Statement of Claim. The salary is rounded off at Kshs. 57,954. As these items are not in dispute, ***the Court grants the Claimant April 2014 salary at Kshs. 57,954; 1 month salary in lieu of notice at Kshs. 79,028; and accrued annual leave at Kshs. 23,708.***

6. The only issue left for the consideration of the Court is whether termination of the Claimant's contract was unfair and unlawful, and whether she merits compensation.

#### Claimant's Position

7. The Claimant testified the Respondent alleged she did not prepare bank reconciliation statements. This was not true. She had earlier been warned on this and replied explaining her position. The Respondent alleged secondly, that the Claimant failed to pay installment tax. This was not her duty; it was the duty of the Directors and the Auditor. She paid the tax on their advice.

8. She was called to a meeting by the Financial Controller, shortly before termination. The Claimant was not advised on her right to be accompanied by a Colleague, or a shopfloor Trade Union Representative. No one from the Respondent accepted to accompany the Claimant. She was not allowed to call an outsider to accompany her. The meeting lasted less than 1 hour. She was immediately issued the termination letter. The Claimant attributed her tribulations to the bad blood between her and the Financial Controller Jaffer. Jaffer was vulgar in his conversations with the Claimant.

9. Cross-examined, Eunice testified she worked for 4 ½ years. She held a Bachelor of Commerce [Finance] Degree, on joining the Respondent. At the time of termination, she was studying for the

Masters Degree. She was to do all the accounting duties, including payment of installment tax. The Company had External Auditors.

10. The Auditors communicated with the Claimant. They held their role was to Audit, prepare Financial Statements and Advise. They alleged the statutory obligation to pay the tax on behalf of the Company was the Claimant's. It was not the first time the Respondent was paying installment tax. The Claimant's role was to write the tax cheque, upon instructions. She had not received instructions on this occasion when the Respondent failed to pay the tax and was penalized. The Respondent had not written the cheque by the time the Auditor wrote to her. She was aware there was a penalty of Kshs. 325, 000 to be paid for not paying the tax. She was issued warning letter on the issue of tax.

11. The Claimant agreed she had used strong language herself, in communicating to her Colleagues. She did so out of depression. The Respondent alleged the Claimant suffered incompatibility and incapacity. The Financial Director Raza, had advised Employees' grievances be handled through the Human Resources Department. There was no grievance procedure at the time.

12. Warning letters had expired. The Claimant agreed she was invited to the disciplinary hearing in writing. This was on the same day she was sacked. She was given the opportunity to bring Witnesses from within the Company. She gave written response to all allegations. She knew why the disciplinary meeting was called. She did not object to Jaffer and Munga being in the Panel. She thought objection would be rude. She did not have the chance to appeal. It was necessary to hear the Claimant further, after she had given her written reply to the allegations leveled against her. She sought to call Witnesses from outside the Company; this request was turned down.

13. Redirected the Claimant stated it was not her responsibility to compute the installment tax; it was done by the Directors and the Auditor. She was aware the tax had not been paid. She reminded the Director about payment. He advised she waits for him to consult the Directors. Jaffer computed the tax, and informed the Accountant to pay. The Claimant prepared some bank reconciliation statements while others were pending due to her workload. She prayed for more time. The Respondent's sales had increased creating the heavy workload. The Claimant raised this with Management, but the issue was not attended to. Eunice was sent the letter inviting her for the disciplinary hearing at around 1.56 p.m. The meeting was scheduled to start at 3.00 p.m. She did not have control over who would attend.

14. Eunice submits there was no valid reason or reasons preceding termination. It was not her responsibility to pay installment tax. Section 10 [1] [c] of the Employment Act 2007 requires the Employer to give the Employee a job description. The job description form issued to the Claimant was silent on payment of tax. The Employee could be held liable for failure of a function which was not in the job description, as held in the ***Mombasa Industrial Court Cause Number 121 of 2012 between Kenya Plantations and Agricultural Worker Union v. Kilifi Plantations Limited***. On bank reconciliation, the Claimant submits she fulfilled her obligation in part, and where not able to meet the obligation in time, gave an explanation for the default. The Claimant submits the Respondent failed in showing the reasons for termination under Section 43 of the Employment Act 2007.

15. Procedural justice was denied to the Claimant. She was invited for the disciplinary meeting at 1.56 p.m. through an e-mail. The meeting was to take place at 3.00 p.m. the same day. The Panel was composed of the same Persons who had made the allegations against her. The same Persons made the decision to terminate. Rules of natural justice were disregarded. Quoting the decision in ***Mombasa Industrial Court Cause Number 247 of 2013 between David Omuya v. Mombasa Maize Millers Limited***, the Claimant submits compliance with procedural fairness in Section 41 of the Employment Act 2007 is not a mechanical rote process. The essentials are to notify the Employee about the charges; and give the Employee the opportunity to prepare, and respond to the charges in person or through a Colleague, or Trade Union Representative. These procedural protections were not observed. The Claimant urges the Court to allow the Claim.

Respondent's Position

16. Ceiphas confirmed the Claimant was the Respondent's Chief Accountant. She prepared Bank Reconciliation; Daily Reports; Annual Reports; Internal Audits in liaison with the External Auditors; and prepared Statutory Returns. Her dismissal was on valid grounds and was carried out fairly.

17. She lacked commitment and was incompatible. She failed to accurately report outstanding Customer's Accounts. She was argumentative and not ready to accept criticism. Ceiphas issued her first warning letter on 1<sup>st</sup> August 2013. She accepted the letter. She created animosity between her and other Employees. She used improper language. She was issued a second warning letter. In total 2 warning letters issued. She failed to fulfill statutory obligations among other things. She accepted these letters and appealed.

18. KRA penalized the Respondent Kshs. 325,000 for failure to pay installment tax in time. The Respondent sought to recover the money from the Claimant through surcharge. She appealed against the surcharge. She declined surcharge. The issues against the Claimant were incompatibility, use of insulting language, low performance and misconduct. She was notified of the charges through a letter to show cause, why disciplinary action should not be issued against her. She did not respond. Hearing took place on 22<sup>nd</sup> April 2015 at about 3.30 p.m. She was advised of her right to go to the meeting with a representative of her choice. She asked to bring an outsider with her. She was told the law does not allow the participation of outsiders. She was allowed to call Witnesses. She told the Panel her Workmates refused to testify for her. She was aware about the composition of the Panel. She agreed to proceed with the hearing.

19. The hearing took place fairly, and the Claimant was granted the full opportunity to testify. It was determined the Claimant's contract be terminated regularly, rather than subject her to outright summary dismissal. Terminal dues were computed and offered to the Claimant. She declined the cheque and refused to sign the Discharge Voucher.

20. Ceiphas told the Court on cross-examination that he signed the termination letter. It was Eunice's duty to ensure the Company paid taxes. There was communication between her and Finance Director Raza. The two consulted. The Claimant replied to the warning letters, but not to the letter to show cause. She was informed of the disciplinary hearing at about 2.00 p.m. The meeting took place at 3.30 p.m. She did not belong to a Trade Union. She was advised she could be accompanied by a Workmate. The Panel included Ceiphas, Jaffer and a Secretary. The meeting ended at around 5.00 p.m. The decision had been made at around 4.00 p.m. The Director had given the Panel full mandate to determine the matter. The Claimant did not take her terminal dues. She did not collect her certificate of service; she ran away.

21. Jaffer stated his duties included the production of management accounts. Bank reconciliation was a major factor in production of management accounts. Eunice was responsible for bank reconciliation. Jaffer wrote to the Claimant asking for bank reconciliation. He asked her to pay statutory dues on time. She did not pay. She conceded she had not done bank reconciliation. She was responsible in the payment of installment tax. When Jaffer joined the Respondent, he noticed the Claimant had only paid one installment. The second was due, and unpaid. The Respondent was penalized for delayed payment. The Directors decided to surcharge the Claimant. She declined surcharge. She was asked to show cause, invited to a hearing and subsequently had her contract terminated. Jaffer participated in the disciplinary hearing on the authority of the Director.

22. Jaffer worked with the Claimant for one month, he testified on cross-examination. He discussed bank reconciliation with her. She had written explaining that her workload was too heavy. The Respondent suffered penalty and interest from the KRA. Tax payment was due in October 2013. Jaffer was not in employment then. There was no documentation on penalty paid. Eunice was junior to Jaffer. He did not have a grudge against her. She complained about his use of vulgar language. The Director did not give the three Panelist mandate in writing, to conduct the disciplinary hearing. Jaffer emphasized that penalties to KRA for late payment of taxes are provided for by the law.

23. The Respondent submits termination was fair and lawful. The provisions of Section 43 and 45 of the Employment Act were duly observed. She was issued warning letters prior to termination. She was notified of a disciplinary hearing ; she was availed the charges against her ; she was given the opportunity

to be heard and advised of her procedural rights under Section 41 of the Act; and she was heard and a decision made against her. She was offered terminal dues which she rejected. The Respondent urges the Court to reject the Claim and direct the Claimant receives what was offered by the Respondent, in full and final settlement.

24. Was termination fair, and the Claimant entitled to compensation?

*The Court Finds:-*

25. The Claimant was employed by the Respondent as an Accountant on 1<sup>st</sup> December 2009. She rose to the position of Chief Accountant. She earned a monthly salary of Kshs. 79,028 as of the date she left employment.

26. She left employment on 22<sup>nd</sup> April 2014. Her contract was terminated by the Respondent. The letter of termination gives the following reasons in justification of the decision:-

- Delay in preparation of Bank Reconciliation Statement for the period up to December 2013, with the result that Management/ Directors were inconvenienced in strategic plans and with the result that the Respondent was exposed to financial loss.
- Lack of compatibility with Colleagues and Company Auditors

27. In support of these grounds, Ceiphas testified that the Claimant failed to fulfill statutory obligation, which in detail was that the Claimant failed to pay installment tax to the KRA, resulting in penalty and interest imposed against the Respondent at Kshs. 325,000. Jaffer testified the Claimant did not avail to him bank reconciliation statements on time with the result that he was unable to generate management accounts to guide the Directors in the strategic stewardship of the Respondent. He also confirmed the Claimant did not pay installment tax on time, resulting in penalization of the Respondent.

28. The Claimant did not deny that there was delay in bank reconciliation or that it was her duty to do bank reconciliation. She however explained that the Respondent's business had peaked, and she alone was not able to complete its accounting requirements on time. Her workload was too much to handle. On payment of installment tax, the Claimant stated it was not her duty to ensure payment. She acted on the instructions of the Directors, and the External Auditors. She had reminded the Directors about payment.

29. The Claimant's job description included overall stewardship of the accounting department; preparing daily and monthly banking reports; preparing bank reconciliation; liaising with Statutory Authorities and External Auditors; and performing overall financial duties.

30. This job description would suggest to the Court that the Claimant was central in both bank reconciliation and tax remittances. She made an explanation for her failure in meeting the bank reconciliation function, which the Respondent did not discount. She said there was too much work, and communication passing between her and Management through e-mails on record, supports the position that she made this known to the Management. There was no form of assistance offered to the Claimant in meeting her heavy workload.

31. In the e-mail to Jaffer dated 28<sup>th</sup> March 2014, she complained about a huge volume of work, asking Jaffer to give her the chance to handle one matter at a time. In the e-mail by Jaffer preceding her request, Jaffer demanded to be updated on Mombasa Debtors by the close of the day; he sought to be supplied with the Creditors' List fully analyzed; he asked for banking deposit report for February 2014; and sought to have bank reconciliation up to December 2013 without delay. These requests and the reply by Eunice, support the view that there was perhaps too much work in the Claimant's docket. Default in meeting her deadlines cannot in the view of the Court be attributed to the Claimant's laziness; she had been working in the same position from 2009 without much complaints.

32. It is also noteworthy that Jaffer had just been employed at the time he applied so much pressure on the

Claimant. This generated friction and the feeling in the Claimant that she was unwanted, resulting in mutually uncivil language at the workplace. The Court has held that Employers have the right to dismiss incompatible Employees. In *Industrial Court at Nairobi case between Dede Esi Annie Amanor Wilks v. Action Aid International [2014] e-KLR* it was held the Employer has the right to terminate the contracts of Employees who fail to fit in the corporate culture of the Employers. Section 45[2] [b] of the Employment Act 2007 lists lack compatibility as a fair termination ground. Incompatibility however, is not to be read from every complaint an Employee makes; incompatibility stems from persistent and irrational inability of the Employee to work with her workmates. The Claimant appears to have had a problem mostly with the new Financial Controller. The Financial Controller appears to have entered the workplace, and acted more like a hard-taskmaster to the Claimant, generating an environment in which the Claimant started to appear incompatible. She had worked with the rest of her Colleagues well from 2009, and incompatibility appeared prominent, only in her association with the Financial Controller.

33. The Court's overall view is that the Claimant was not given adequate support in discharging her obligation. In, *Industrial Court at Nairobi case between David Wanjau Muhoro v. Ol Pejeta Ranching Limited [2014] e-KLR* the Court concluded an Employee who had pointed out faults in the Employer's accounting system, could not be solely liable for the outcome of such a system, and punished for poor performance of his duty. In the instant Claim, the Claimant gave her advice that the accounting role could not adequately be discharged by her singly. There is no evidence of any action taken by the management in contesting the Claimant's position, or rectifying it. The Court has noted that payment of tax, while done through the hand of the Claimant, was not entirely her responsibility. The letter from External Auditors Athman Errey & Company advising the Respondent on installment taxes for the year 2014, for instance, was addressed to the Directors. The Claimant could only act upon the advice of the Directors and the External Auditors. It was not proper therefore to hold her solely responsible for late payment of taxes and the consequential penalties and interest imposed by the KRA.

34. The Court is satisfied the two reasons given in justifying termination were not fair and valid. The explanation given by the Claimant for delay in bank reconciliation was not considered by the Respondent. The payment of taxes was a collective function involving the External Auditors and the Directors, with the Claimant's role confined to executing the instructions to pay, and perhaps to reminding the Auditors and the Directors that tax payment was due. She did not fail to remind, or execute instructions when called to do so. She perhaps did not adequately agitate for improvement in her conditions of work. She had been advised about addressing her grievances through the Human Resources Department, and to the extent she did not do so, suggests she contributed to the worsening of her work environment. Her grievances were bottled up, resulting in mutually inappropriate language, unsuitable for any productive workplace, passing between her and Jaffer. The Court is nonetheless convinced termination was not based on fair and valid grounds.

35. The procedure was not in conformity with the minimum statutory standards of fairness under Section 41 of the Employment Act. The Claimant was informed she was required to attend the disciplinary hearing on the material date, at 2.00 p.m. The meeting was at 4.00 p.m. The hearing proceeded at about 3.30 pm. The decision was made at 4.00 p.m. and the decision communicated to the Claimant at the end of the same day. In the case of *Muhoro v. Ol Pejeta* the right of a fair hearing was held to comprise: sufficient time to prepare; to understand the charges; and to access all documentation. It is not possible that the Claimant's right of a fair hearing was fully respected in a space of 2 hours, within which the disciplinary process took place. Preceding the hearing was a warning letter issued on 10<sup>th</sup> April 2014. This was indicated to be a 'first warning.' There was no second or final warning before termination 12 days later. This would support the view that the Panel was convened prematurely, and went about its work with a preconceived mind.

36. There was no defect in the composition of the Panel. In *Industrial Court at Mombasa case between Thomas Sila Nzivo v. Bamburi Cement Limited [2014] e-KLR* it was established that disciplinary proceedings at the workplace are not criminal trials, or quasi judicial in nature such as in proceedings of administrative tribunals, where the Employer, who invariably is the Complainant, must be precluded from driving the disciplinary process forward. Employment places sometimes have limited number of Officers, compelling them to use investigating Officers and other individuals closely connected with the dispute, as

Members of the Disciplinary Panel. Such Officers are only required to show objectivity in discharging their disciplinary roles, and not let their acquaintance with the facts, erode their ability to act impartially, independently and fairly. Procedure cannot be faulted on the ground that the Panelists were involved in the earlier processes leading to the disciplinary process.

37. The Claimant was not prejudiced by the lack of a Representative accompanying her to the hearing. The Respondent advised her on this right, but she was unable for whatever reason, to secure a Representative. The law does not allow an Employee to attend a disciplinary hearing in the company of an outsider. It is not prohibited to call Witnesses from whatever quarter, even from outside the workplace, so long as such Witnesses have relevant evidence relating to the issues in dispute at the disciplinary hearing. The Court does not see however, what a Witness from the outside, except perhaps if such an outsider was the External Auditor or the Respondent's Banker, would have assisted the Claimant's case. She was not prejudiced on the ground of the failure to have a Representative or a Witness at the hearing. The Respondent advised her on her right, and the limitations attaching to that right.

38. Termination was unfair on the substantive and procedural grounds discussed above. ***The Court grants the Claimant 6 Months' salary at Kshs. 474,168 in compensation for unfair termination.***

39. **IT IS ORDERED:-**

- a. ***Termination was unfair;***
- b. ***The Respondent shall, within 30 days of the delivery of this decision pay to the Claimant 6 months' salary in compensation at Kshs. 474,168, and terminal dues conceded at Kshs. 160,690- total Kshs. 634,858; and,***
- c. ***No order on the cost and interest.***

Dated and delivered at Mombasa this 26<sup>th</sup> day of February, 2016.

James Rika

Judge