



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO.143 OF 2014**

**(Formerly Cause No. 102 of 2013 at Nairobi)**

**JANICE MASSIMO.....CLAIMANT**

**VERSUS**

**PAN AFRICA LIFE ASSURANCE LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday, 24<sup>th</sup> March, 2016)

**JUDGMENT**

The claimant filed the memorandum of claim on 25.01.2013 through Otieno C & Company Advocates. On 07.05.2014 the claimant filed the notice of change of advocates to Nganga Munene & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. Special damages of Kshs. 11,894, 000.00 being payment in lieu of notice Kshs. 38,000.00 and lost future earnings of Kshs. 11,400,000.00.
- b. Punitive damages for wrongful dismissal.
- c. General damages.
- d. Interest.
- e. Costs of the suit.
- f. Any other relief the honourable court may deem fit to grant in the interest of justice.

In alternative to the foregoing prayers the claimant prayed for:

- a. Reinstatement of the claimant and restore her employment files and records as if the claimant's employment had not been terminated.
- b. Special damages for the 23 months (December 2010 to December 2012) that the claimant had been wrongfully dismissed (23 x 38,000 = Kshs.874, 000.00).

The respondent filed the memorandum of defence on 07.05.2013 through Dally & Figgs Advocates. The respondent prayed that the claimant's claim be dismissed with costs. The claimant filed the reply to defence on 30.05.2013.

The respondent employed the claimant to the position of branch administrator effective 13.08.2007. The claimant earned promotions overtime until termination on 15.11.2010. At termination she earned Kshs. 38,000.00 per month and she testified that she held the position of business development manager but the respondent's position was that she still held the position of branch administrator. The claimant's summary dismissal was on account of investigation report on fraud allegations made in regard to one of the respondent's clients that the claimant tried to solicit a bribe from the client in exchange for service. The

claimant's case was that she was not given a notice and a hearing as envisaged in section 41 of the Employment Act, 2007.

The claimant testified that at termination she was serving at the Meru branch and on 04.10.2010 she was handed a letter by the Sales Manager. The letter alleged that she had used abusive language. She declined to take the letter because the letter stated allegations that were not true. Later she was summoned to a disciplinary hearing where she denied using abusive language and there were no witnesses or particulars of the allegations.

Subsequently she received the letter of summary dismissal on account of allegedly soliciting a bribe from an unknown client. At all material times, the claimant testified that she never knew the identity of her accusers. The claimant's evidence was that she was on leave from 20.09.2010 to 01.10.2010 so that on 28.09.2010 the alleged date the claimant allegedly solicited for a bribe from one Alice Wangui, the claimant was on leave and not on duty. The claimant testified that she had never known the said Alice Wangui. After the disciplinary hearing she received the letter of summary dismissal dated 15.11.2010. The claimant cleared with the respondent and was paid terminal dues being the pay for due leave days and days worked.

The court has considered the evidence and makes the following findings:

- a. The respondent's witness RW testified that the client one Alice eventually withdrew business from the respondent. Further, clients like Alice left by writing to cancel their insurance policies. No evidence was filed to show that the said Alice wrote to cancel her policy. Thus, the court finds that the client was not lost at all and it was not shown that Alice was a client because her policy documents were not filed at all.
- b. The alleged client, Alice, was never cross-examined by the claimant at the disciplinary hearing or at the hearing in court. The said Alice remained a stranger and in view of the serious bribery allegations, the court finds that the respondent has failed to establish the reason for termination as envisaged in section 47(5) of the Employment Act, 2007. That is more so because the claimant's evidence that on the date of the alleged soliciting for a bribe, she was on leave, has not been controverted.

To answer the **1<sup>st</sup> issue** for determination in this case, the court returns that the termination was unfair as the reason for termination was not established as it was not valid in terms of section 43 of the Act.

To answer the **2<sup>nd</sup> issue** for determination, the court has considered the strained relationships between the parties, the time of over 5 years that has lapsed since the termination, and returns that reinstatement will not be a convenient and fair remedy in the circumstances of this case.

The **3<sup>rd</sup> issue** is whether the claimant is entitled to compensation for the unfair termination. The court has considered that the claimant had served for a considerable period of over 3 years, she was keen to remain in employment and serious allegations of soliciting a bribe were levelled against her but without being established at all. The court returns that the claimant be paid the maximum 12 months compensation under section 49 (1) (c) of the Employment Act, 2007 making Kshs. 38, 100 times 12 being **Kshs.457,200.00**. The claimant is entitled to one month pay in lieu of termination notice being **Kshs. 38, 100.00**.

The **4<sup>th</sup> issue** for determination is whether the claimant is entitled to Kshs. 11,400,000.00 being the lost earnings for 25 years if she served till the mandatory retirement age of 65 years. The claimant did not show that she was not capable of getting engaged gainfully after the dismissal and there is no reason to find that she will not get gainful employment. In the circumstances, the prayer will fail.

In conclusion judgment is entered for the claimant against the respondent for:

- a. The declaration that the summary dismissal was unfair.

- b. The respondent to pay the claimant **Kshs. 495,300.00** by 1.05.2016 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
- c. The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Thursday, 24<sup>th</sup> March, 2016.**

**BYRAM ONGAYA**

**JUDGE**