



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT AT NAIROBI**  
**CAUSE NO 555 OF 2011**

**JANE WAMBUI MUHOHO ..... CLAIMANT**

*VERSUS*

**GATEWAY INSURANCE COMPANY LIMITED ..... RESPONDENT**

M/S Kanyiri for claimant

Ms Ogude for respondent

**JUDGMENT**

1. This suit was commenced by way of a statement of claim on 11<sup>th</sup> April 2011.
2. The claimant seeks compensation for unlawful and unfair termination of employment and terminal benefits to wit;
  - a. Reimbursement of dental treatment expense in the sum of Kshs.19,000.00.
3. The claimant further seeks payment of damages for false, malicious and unjustifiable report in the sum of Kshs.5,738,040.00.

**Facts of the case**

4. The salient facts of the case from the pleadings, documents produced and the oral testimony by the claimant may be summarized as follows;

The claimant was employed by the respondent on 11<sup>th</sup> June 2007 in the position of financial controller at a salary of Kshs.240,000.00. The letter of employment dated 5<sup>th</sup> June, 2007 was produced and marked annex I.

5. The claimant was placed on probation for six (6) months and was subsequently confirmed. The claimant worked diligently and received salary increments on 1<sup>st</sup> January 2008 to Kshs.280,000.00, on 1<sup>st</sup> January 2009 to Kshs.300,000.00 and on 1<sup>st</sup> January 2010 Kshs.315,000.00.
6. On 31<sup>st</sup> May 2010, at about 4.30 p.m. the respondent instructed the claimant to proceed on compulsory leave with immediate effect on allegations of poor work performance to wit; lateness,

absenteeism, refusal to respond to letters, failure to do and / or complete assignments, failure to meet deadlines, being rude, disrespectful and uncooperative and poor leadership. The letter sending her on compulsory leave dated 31<sup>st</sup> May 2010 was produced as annex 5.

7. The respondent required the claimant to hand over all the respondent's property including office keys and the logbook and transfer form for the claimant's motor vehicle registration number KAZ 952 W and all official documentation in her possession.
8. The sending of the claimant on leave was precipitated by a confidential memo to the chairman of the respondent dated 27<sup>th</sup> May 2010, in which the Ag. CEO / principal officer Mr. Robert N. Kiboro highlighted issues touching on the performance of the claimant. These touched on her absenteeism; attitude and hiring of a new chief accountant scheduled to report on 2<sup>nd</sup> June 2010.
9. In the memo, the Ag. CEO recommended that the claimant proceeds on terminal leave with effect from 28<sup>th</sup> May, 2010, the day following the memo. This was to avoid the new chief accountant from being inducted by the claimant and this be done by the accountant, Mr. Michael Muhe.
10. The letter dated 31<sup>st</sup> May 2010, sending the claimant on compulsory leave did not ask the claimant to respond to the six (6) allegations made against her. She was simply told to hand over to the Ag. C.E.O. personally by close of business on the same day and that she would be contacted in the near future regarding her employment in the company.
11. The respondent did not revert to the claimant until the 3<sup>rd</sup> June 2010 when the respondent wrote a letter of termination to the claimant. The claimant was informed that her case had been reviewed by the Human Resources, Marketing and Business Development Committee before making final decisions and the committee had decided to terminate her employment for;
  - i. persistent lateness and absenteeism as reflected in the record kept;
  - ii. refusal or failure to respond to some of the letters written to her to explain her lateness or absenteeism and completion of some of her work assignments;
  - iii. display of bad attitude, rudeness or disrespectful behavior when dealing with other managers and her seniors;
  - iv. removal and keeping of car loan security documents in respect of her mortgage.
12. The claimant was paid terminal dues upon termination of employment.
13. The claimant states that there was bad blood between her and the Ag. C.E.O. evidenced by a record number of memos written to her by the Ag. C.E.O. within the short period he was elevated to the position of C.E.O.
14. That she had good explanation for the occasions she was absent or late to work during that short period and the Ag. C.E.O. had received numerous responses from her on his queries and he had warned the claimant to rectify her habits.
15. The claimant asserts that the Ag. C.E.O. was being vindictive, that she had served the respondent diligently for a long time and was a good performer.
16. That the termination was malicious and unlawful and this malice was exhibited even after she had left the employ of the respondent by the Ag. C.E.O. giving a very damaging report (reference) to a prospective employer which report cost her the position of GBS Kenya CoE leader with effect from 1<sup>st</sup> July 2010 in which she was to earn an annual gross salary of Kshs.4,536,000. The claimant has produced the letter of offer and the damaging report by the Ag. C.E.O. of the respondent which led to the retraction of the job offer to her loss and detriment and the claimant seeks damages set out in the statement of claim.
17. The report by Ag. C.E.O. to her prospective employer sent on 30<sup>th</sup> June 2010 gave untruthful

information that the claimant had been '*dismissed*' by the respondent; that her performance in the respondents employ was unsatisfactory and that the respondent would not re-employ her again. The Ag. C.E.O. added that the dismissal was for absenteeism, persistent lateness and failure to meet deadlines.

18.The claimant prays for grant of the reliefs set out in the statement of claim.

### **Defence**

19.The respondent relies on the statement of response filed on 19<sup>th</sup> March 2015, documentary evidence presented and the oral testimony of RW1 Mr. Robert N. Kiboro, the then Ag. C.E.O. and a Director of the respondent.

20.RW 1 in particular outlined the reasons set out in the letter of termination as justification for the termination of employment of the claimant.

21.RW1 referred to the various correspondence between himself and the claimant on matters lateness, absenteeism, failure to respond to letters, failure to fill leave forms, failure to meet deadlines, use of '*sms*' by the claimant to communicate to RW1, which communication was viewed by RW1 as a sign of rudeness and alleged poor leadership qualities exhibited by the claimant as a result of the aforesaid persistent conduct.

22.RW1 wrote all the letters concerning the conduct of the claimant between March and May 2010 when he took office. RW1 stated that the claimant had previously only received one warning letter from the previous managing director on 13<sup>th</sup> August 2005. RW1 admitted that he wrote memos and warning letters to the claimant almost daily. RW1 stated that the conduct by the claimant necessitated the correspondence and same was not meant to intimidate and / or harass the claimant.

23.Rw1 admitted that the board of directors and the chairman of the board did not respond to the explanations given to them by the claimant severally.

24.RW1 stated that the board gave him instructions to terminate the employment of the claimant. That the claimant was not asked to show cause why her employment ought not to be terminated after she was sent on compulsory leave. The letter of termination was emailed to the claimant and a hard copy sent by mail. RW1 confirmed that the claimant was not recalled again after she was sent on compulsory leave.

25.RW1 however concluded that the termination of employment of the claimant was justified by the reasons set out in the letter dated 3<sup>rd</sup> June 2010. This was preceded by a committee meeting on 2<sup>nd</sup> June 2010. The committee did not keep any minutes. In this case the decision of the committee to terminate the employment of the claimant did not have to be tabled before the board.

26.RW1 admitted that the claimant had received regular salary increments for good performance. He added this was before she began to frequently absent herself, report to work late, failed to meet deadlines and depicted bad attitude to her colleagues and superiors.

27.RW1 admitted that the claimant was highly commended for good work by external auditors.

28.RW1 denied that he had planned to sack the claimant from the date he was elevated to the position of Ag. C.E.O. RW1 also admits that the claimant had explained all the issues raised against her even before she was sent on compulsory leave. RW1 admitted that he gave a negative reference to claimant's prospective employer. he admitted having seen the new portfolio the claimant had been offered and an annual package of Kshs.4,536.000. RW1 denied his recommendation was evil and malicious.

29. RW1 stated that all terminal benefits were paid including three (3) months' salary in lieu of notice. RW1 concluded that the claimant's letters to board members were taken into account before her employment was terminated but it was not necessary for the board to call her to attend disciplinary hearing.

30. That RW1 did not challenge lateness, absenteeism or failure to return the logbook but admitted and apologized in each occasion.

31. The respondent states that the claim has no merit and should be dismissed with costs.

### **Determination**

32. The issues for determination are:-

- i. whether the claimant's employment was terminated for a valid reason and in terms of a fair procedure;
- ii. whether the claimant is entitled to the reliefs sought.

### **Issue I**

33. The claimant served the respondent as the financial controller, a very senior management position reporting to the chief executive of the respondent between the period 8<sup>th</sup> June 2007 to 3<sup>rd</sup> June 2010 when her employment was terminated. Between the period June 2007 to February 2010, the claimant served the respondent diligently without any issues of performance arising. During the period the claimant received regular salary increments in recognition of her good performance, the last such performance was on 1<sup>st</sup> January 2010. RW1, who was the general manager operations during this period was appointed acting chief executive officer-principal officer in April 2010. The substantive chief executive officer and chief accountant were absent.

34. The problem between the claimant and the acting C.E.O. started immediately when claimant requested for a week's leave to attend to her grandmother's funeral arrangements which leave was declined by the Ag. C.E.O. and the claimant was allowed two afternoons off and the funeral day. Upon attending the funeral the claimant was unable to report back to work on Friday and Monday that followed since the funeral was on Thursday.

35. The claimant filled leave forms to cover up her absence from Wednesday afternoon up to Monday. Ag. CEO wrote to her on 9<sup>th</sup> March 2010 to explain her absence which she did on the same day.

36. On 10<sup>th</sup> March 2010, Ag. C.E.O wrote another letter to her insisting that the claimant should see the chairman to explain her absence. Ag. C.E.O. also asked claimant to explain her failure to see the chairman as requested.

37. The claimant wrote to the chairman on 10<sup>th</sup> March 2010 regarding her absence on 3<sup>rd</sup>, 5<sup>th</sup> and 8<sup>th</sup> March while attending a funeral and her failure to talk to the chairman on 9<sup>th</sup> March 2010 as requested by Ag. C.E.O. The chairman did not respond to the claimant's letter of explanation.

38. On 6<sup>th</sup> April 2010, Ag. C.E.O. wrote to the claimant taking exception to her writing him an 'sms' that morning, informing him that she would be late to work. Again on 8<sup>th</sup> April 2010, the Ag. C.E.O. wrote to the claimant to explain her absence on 6<sup>th</sup> April 2010, lateness on 7<sup>th</sup> April 2010 and reporting to work on 8<sup>th</sup> April at 9.45 a.m. In the letter of April 6<sup>th</sup>, Ag. C.E.O. noted that he appreciated the problems the claimant was facing but it was not acceptable to be late or fail to come to work without prior leave.

39. On 12<sup>th</sup> April 2010, the Ag. C.E.O. wrote again to the claimant after claimant had written an 'sms' to him stating that she would be late due to personal issues. Ag. C.E.O. told the claimant that 'sms' messages were not acceptable. Claimant was also accused of leaving office early at 4.15 p.m. on Friday 9<sup>th</sup> April 2010 without permission.
40. On 13<sup>th</sup> April 2010, the Ag. C.E.O. wrote to the claimant asking for full explanation of her previous absenteeism from the office by 11 o'clock. Ag. C.E.O. also noted that the claimant had not reported to the office that morning by 9.30 a.m.
41. The same day the claimant wrote a lengthy explanation regarding her absence on 6<sup>th</sup> and 7<sup>th</sup> April 2010; 9<sup>th</sup> April 2010; 12<sup>th</sup> April 2010 & 13<sup>th</sup> April 2010. In short, the claimant was attending to a matter with the City Council regarding an intruder who had started constructing a building on her plot illegally on those specific days and had explained to the Ag. C.E.O. and the chairman what was happening. She had obtained an eviction notice, which she was in the process of enforcing on the days she was late, left early or was absent. The claimant had explained every step she took and the reason she would be late in her 'sms' messages.
42. The claimant visited the Ag. C.E.O. to make explanation in his office and also made written explanation to him as requested. She asked for understanding and sympathy due to the problem and stress she was faced with at the time. She was apologetic for late coming and absenteeism on those specific days.
43. The Ag. C.E.O. was not sympathetic at all to the plight by the claimant and by a letter dated 14<sup>th</sup> April 2010, he cajoled the claimant and gave her a formal warning and noted that he would not accept any further late reporting to work, unauthorized absenteeism or making requests by 'sms' for intended absenteeism. The Ag. C.E.O. also noted that the claimant needed to finalize setting up the debt collection unit, job description of the internal auditor and set up interview dates for IT manager and the accountant. The C.E.O. put an end to any further correspondence on the matter and asked claimant to fill leave forms for the days she was absent. The claimant replied to the letter on the same day noting disappointment that the Ag. C.E.O. took her absence while attending to critical personal issues to be "seriously lacking in discipline." The claimant asked for forgiveness but denied she has ever lacked in discipline in her service to the respondent.
44. On 20<sup>th</sup> April 2010, the Ag. C.E.O. responded to the reply dated 14<sup>th</sup> April 2010 stating that the language and tone in the letter was unacceptable and stated that there should be no further correspondence between the two on the matter as follows;
- "I want correspondence about your absenteeism and other issues related to your work to cease immediately. We have spent a lot of time in the past on this and I think it is the high time such correspondence ceased."*
45. On 4<sup>th</sup> May 2010, the claimant sent an 'sms' to the Ag. C.E.O. informing him that she would be late as she had an appointment with a dentist. The Ag. C.E.O. wrote a letter to her on the day stating that her attitude to work was unacceptable. He requested for an explanation as soon as possible. The Ag. C.E.O. wrote a reminder on 10<sup>th</sup> May 2010 demanding a full explanation.
46. On 19<sup>th</sup> May 2010, Ag. C.E.O. wrote a memo to the claimant titled unfinished tasks which are listed therein including finalizing board minutes of 29<sup>th</sup> April 2010; governance board committee minutes of 12<sup>th</sup> May 2010; advertising the accounts after the A.G.M. on 29<sup>th</sup> April 2010; setting up debt collection unit; doing a job description for IT manager and initiate recruitment of a human resource manager which had been recommended by the board with immediate effect.
47. It is the court's observation from the foregoing that the Ag. C.E.O. was managing the corporation and in particular, the claimant using terse memos that made continuous negative criticism of the

claimant, gave deadlines and warnings, did not note anything positive or progress made. It was also apparent that the claimant who at the time held the position of finance controller was in charge of accounting department and human resource department, tasks which were apparently beyond the scope of a financial controller.

48. On 28<sup>th</sup> May 2010, Ag. C.E.O. wrote another memo to the claimant to explain why she reported to work late and it was apparent from her explanation that she had discussed the matters she was handling that day hence the lateness. The claimant apologised for any inconvenience.

49. As submitted by counsel for the claimant, it is apparent that the Ag. C.E.O.'s conduct towards the claimant was hostile and any reasonable person would construe, the frequent negative memos with heavy criticisms, repetition of issues already dealt with in the past, issuance of threats and warnings had created an almost intolerable environment for the claimant.

50. The Ag. C.E.O., who was a colleague of the claimant was in the court's view completely disrespectful to the claimant, and did not reciprocate the continuous consideration, explanation and apologies extended to him by the claimant.

51. The Ag. C.E.O. refused to accept the peculiar misfortunes that faced the claimant at the time, being loss of her grandmother and invasion of her city plot which actions had caused temporary disruption in her life, hence the happenings that took place at the workplace in that short period between March to May 2010.

52. It is not contested that no notice to show cause was given to the claimant upon being sent on compulsory leave; no disciplinary hearing was held nor was any reference made to the claimant by the Ag. C.E.O. or the board between the date of being sent on compulsory leave and the termination of her employment. Section 41 (2) of the Employment Act provides;

*“Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”*

53. This provision, provides an employer who intends to terminate the employment of an employee, the opportunity to comply with section 43(1) of the Act, by presenting to the employee the reason(s) for the intended termination and the employee with the opportunity to show cause why the reason advanced by the employer for the intended termination of the employment does not justify the action.

54. Failure by the employer to provide the employee with an opportunity to explain herself, as happened in this case *ipso facto* renders the termination procedurally unfair.

55. The claimant has in the circumstances established a *prima facie* case that termination of her employment was wrongful and unfair in that the respondent did not give her opportunity to provide what she has shown before court to have been a reasonable explanation why her employment ought not to have been terminated. The claimant has therefore discharged the onus placed on her under section 47(5) of the Act.

56. The same section places the burden on the respondent to justify the termination, once a *prima facie* case of unfair termination has been established by the employee.

57. The respondent has failed to demonstrate any such justification having decided to send the claimant home following a period of continuous and unwarranted harassment by an Ag. C.E.O., who in the court's view lacked necessary empathy and management style to stabilise an hitherto dependable financial controller who was faced momentarily with personal, passing storm which

should not have, if handled professionally led to her loss of employment. The conduct by RW1 was unreasonable and unwarranted.

58. That the Ag. C.E.O. went further to ensure that the claimant did not get a new job, that she had already secured, by giving an inaccurate negative report / reference to the prospective employer is in the court's view evidence of malicious conduct by the Ag. C.E.O. towards the claimant.

59. As a consequence of the unlawful, malicious and unfair conduct by the Ag. C.E.O., the claimant lost her job with the respondent and also lost a job she had secured following the unlawful and unfair termination of her employment.

60. The style of management by the Ag. C.E.O. through constant negative memos with threats and warnings, in the court's view is unfair labour practice and is dehumanizing in character. The same is censured and discouraged by the court.

61. The management letters from the respondent for the years ended 31<sup>st</sup> December 2007, 2008 and 2009 are testimony of the good performance by the staff under the stewardship of the claimant for the financial audit of the respondent during these years. It is not possible that the claimant would have lost her work acumen and discipline, all of a sudden, and in a period of a few months after RW1, the Ag. C.E.O. took over from the previous managing director.

62. The claimant is entitled to compensation under section 49(1) of the Employment Act, 2007.

63. In assessing the quantum of compensation, the court has regard to the factors provided under section 49(4) of the Act. In this regard, the claimant had moved on immediately after losing her job, but met double tragedy under the hands of RW1, who ensured she did not immediately secure a job with a prospective employer. RW1's report led to withdrawal of a lucrative job offer produced before this court. The claimant lost immensely due to the malicious conduct of RW1. The claimant had very promising career prospects, which was adversely affected by inaccurate but very damaging information in a sector which is very sensitive to negative performance reports and indiscipline. The claimant received terminal benefits upon termination except reimbursement of Kshs.69,000.00 in respect of dental treatment expenses she had incurred and to which she is entitled to by fact of the employment cover she held at the work place.

64. The claimant's loss and damage was aggravated by the malicious conduct of RW1 after she had left her employment.

65. The board failed to come to the aid of hitherto dependable employee, while she was constantly harassed and dehumanized by RW1.

66. This court considers this an appropriate case to award maximum compensation for the unfair and unlawful termination.

67. In awarding the maximum compensation of equivalent of twelve (12) months' salary, the court has taken into account that its hands are tied in respect of awarding further damages for the loss of employment by the prospective employer GE, which is not a party to this suit and the claim for defamation would lie in tort against the Ag. C.E.O. (RW1) and not the respondent.

68. Accordingly, the court makes the final order as follows:

The claimant is awarded as against the respondent;

- i. Kshs.3,780,000.00 being the equivalent of twelve (12) months salary being compensation for the unlawful and unfair termination of employment;
  1. Kshs.69,000.00 being reimbursement of dental treatment expenses to which the claimant was entitled;

**Total award Kshs.3,849,000.00;**

iii. Interest at court rates from date of filing suit till payment in full;

iv. costs of the suit.

**Dated and delivered at Nairobi this 17<sup>th</sup> June, 2016**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**