



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 2145 OF 2012**

**ELIZABETH WANJA GATHU..... CLAIMANT**

**VERSUS**

**CHILD AFRICA MEDIA.....RESPONDENT**

**JUDGMENT**

1. This suit was filed on 23<sup>rd</sup> October, 2012 seeking compensation for unlawful dismissal from Employment and payment of terminal dues to wit;

- (i) ten (10) days salary for the month of August, 2012 in the sum of Kshs 30,000;
- (ii) pending leave days in the sum of Kshs 120,000;
- (iii) payment in lieu of one month notice in the sum of Kshs 120,000;
- (iv) compensation for loss of study time;
- (v) provision of certificate of service; and
- (vii) costs of the suit.

**Facts of the Case**

2. The Claimant was employed on 26<sup>th</sup> September, 2011 as a Managing Editor at a salary of Kshs 120,000. She worked continuously until the 9<sup>th</sup> August, 2012 when the Managing Director Mr Gean' Paul Deprins called her to his office and handed her a termination letter. The effective date of termination was 9<sup>th</sup> termination and reported to work on 10<sup>th</sup> August, 2012, ready to serve the notice period but her telephone line had beendisconnected and could no longer access her computer. The Respondent made it impossible for her to work and therefore she went home. She was not paid any terminal benefits at that point but the Respondent confirmed that it had deposited in the Claimant's account Kshs 106,680 comprising of;

- (i) ten (10) days salary for August 2012; and
- (ii) payment in lieu of leave.

3. These two claims were therefore abandoned by the claimant. The statement of claim was amended during trial to include a claim for one month salary in lieu of notice in the sum of Kshs 120,000/=.
4. The letter of termination states that the Respondent had decided to terminate the employment of the Claimant because the Claimant's performance did not meet Respondent's expectations and the Respondent needed to terminate her employment in order for it to meet its goals.
5. The Claimant states that she performed her work diligently and oversaw production of three Editions of Bingwa Magazine which was the flagship of the Respondent. The magazine was not for sale but distributed freely in schools as part of the Respondent's poverty eradication initiative in Seven (7) counties. The organization depended on donor contributions and advertisement.
6. The Claimant admitted that a few hiccups which were normal in the business had occurred between her and the staff, between her and a contributor of articles and some complaints had been raised on how she related with the sponsors. In one issue some grammatical error occurred in that the name of 'hyena' had been misspelt.
7. It was the Claimant's case that she had resolved emerging issues well and her performance was good and that she was not subjected to any formal appraisal, complaints or warnings by the Respondent before the sudden termination. Furthermore she was not asked to show cause or charged with any offence prior to the termination and was not afforded any opportunity to defend herself before the termination.
8. The Respondent filed a statement of response with documentary evidence in support of its case. The Managing Director Mr Gean' Paul Deprins also testified under oath.
9. The Respondent admits having employed the Claimant as a Managing Editor. That the Claimant was in-charge of production of three (3) issues of Bingwa Magazine but in the course of producing the third issue, the Respondent made a decision to terminate her employment on account of poor performance in that the Magazine had errors, her relationship was bad with suppliers, contributors and with staff.
10. The 1<sup>st</sup> issue came out late, the 2<sup>nd</sup> one had issues with advertisement and the 3<sup>rd</sup> issue was full of mistakes.
11. The witness told the court that the Claimant had a job description with specific mandate and outcomes which were not met including;
  - (i) Good editorial quality;
  - (ii) Timely production;
  - (iii) Effective and well coordinated editorial team;
  - (iv) Effective systems; and
  - (v) Cost effective operations.
12. The witness told the court that the Claimant failed in all these respects. The witness however admitted that Respondent;
  - (i) did not conduct any formal performance appraisal on the Claimant;
  - (ii) did not make any formal complaint against the Claimant on performance
  - (iii) Did not give her any formal warning with a view to get the Claimant to rectify her performance and

(iv) Did not conduct a formal disciplinary hearing before terminating the Claimant's employment.

13. The Respondent had staff regulations for the Head Office that provided a procedure of dealing with unsatisfactory performance in Clause 28 as follows:

*“ If at any time during the employment period an employer is not satisfied with employee's performance, he may give a warning for unsatisfactory performance to the employee after which the employee's performance will be reviewed after three months. If this employee's performance will not have improved after three months the employer may give one month's notice for termination or one month's salary in lieu of notice”*

14. The Respondent admitted that it did not follow this procedure with respect to the Claimant.

15. The Respondent did not also follow Clause 26 titled 'Disciplinary Procedures and Penalties.' This clause provides for a verbal warning for 1<sup>st</sup> misdemeanor which may be recorded and filed. In case of repeated misdemeanor, this constitutes misconduct, which may be penalized by upto three written warnings followed by termination.

### **Determination**

16. Clearly the Respondent flouted its procedure in every respect. The Claimant was not summarily dismissed and thus ought to have been subjected to a disciplinary procedure in terms of the Respondent's regulations as read with section 41 of the Employment Act, 2007.

17. The failure to subject the Claimant to a fair disciplinary process denied the Respondent opportunity to establish a valid reason to terminate the employment of the Claimant in terms of **Section 43** as read with **Section 47(5)** of the Employment Act, 2007.

18. Accordingly, the Claimant has through the pleadings, documentary and oral evidence established on a balance of probabilities that her termination from employment was wrongful and was unfair.

19. The Claimant is entitled to payment of one month's salary in lieu of notice in the sum of Kshs 120,000.

20. The Claimant is also entitled to compensation in terms of **Section 49(1)** and **(4)** of the Employment Act in that she lost her job without notice and opportunity to prepare herself for the hard times ahead. She was pursuing her studies when she was hired and was forced to abandoned her studies only to get the rude shock of sudden termination of employment. She claims compensation for the forced abandonment of the B. A. programme in peace and conflict studies at Daystar University. The contract of Employment had a provision for study time. The time allowance to attend classes was withdrawn without warning. She used to attend classes daily at 4.30 in the evening.

21. On the day of termination, the Claimant was in utter shock, she locked herself in the washroom and cried for a while. She wrote a mail annexed at page 15 of the response seeking explanation of the predicament she found herself in. The Respondent instead informed her that she could use legal avenues to do that. The Claimant's advocate wrote a demand letter on 15.8.2012 but same was ignored. The Claimant then filed the suit.

22. The Claimant held a senior position which is not easy to replace. She seeks 12 months' salary as compensation for the treatment accorded to her by the Respondent.

23. Considering the circumstances of this case, the court awards the Claimant eight (8) months' salary being compensation for the unlawful and unfair termination.

24. The claim for compensation for lost studies has no merit as the contract only afforded her time to

attend class and compensate that time by working on Saturdays. This was not part of her remuneration but merely a convenient arrangement between herself and the Respondent.

25. Accordingly, the court awards the Claimant;

(i) one (1) month salary in lieu of notice in the sum of Kshs 120,000;

(ii) eight (8) months salary as compensation for the wrongful and unfair termination in the sum of Kshs 960,000;

**Total award Kshs 1,080,000;**

(iii) the Respondent to provide a certificate of service to the Claimant within 14 days from date of this judgment;

(iv) the award is payable with interest at court rates from date of this judgment till payment in full;

(v) the Respondent is to pay the costs of the suit.

**Dated and Delivered at Nairobi this 19<sup>th</sup> day of June, 2015.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**