



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 458 OF 2014

BETWEEN

CATHERINE MUTHONI WAIRIMU..... CLAIMANT

VERSUS

**1. WALTER REIF [NATIONAL CHAIRMAN OF
THE PUBS, ENTERTAINMENT AND RESTAURANTS ASSOCIATION OF KENYA]**

2. NASSER LALJI [NATIONAL TREASURER]

3. NJERI KAMAU [COAST REGION CHAIRPERSON]..... RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Mr. Okanga Advocate, instructed by Okanga & Company Advocates for the Claimant

Mr. Issa Mutungi Advocate, instructed by Issa Mutungi & Company 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 lodged her Statement of Claim on the 24th September 2014. She claims she was employed by the Respondents as the Association's Executive Officer, between 1st January 2013 and 30th July 2014. She earned a monthly salary of Kshs. 18,553. Her contract was terminated by the Respondents, on the 30th July 2014. She considers termination to have been unfair and unlawful and seeks the following Orders against the Respondents:-

- a. 1 month salary in lieu of notice at Kshs. 18,553.
- b. Salary for the month of July 2014 at Kshs. 18,553.
- c. 19 days of annual leave at Kshs. 23,499.
- d. Deducted and unremitted N.S.S.F dues at Kshs. 3,800.
- e. Deducted and unremitted N.H.I.F dues at Kshs. 6,080.
- f. 12 months' salary in compensation for unfair termination at Kshs. 222,636.

- g. Commission entitlement at Kshs. 4,250.
- h. Petty cash for June 2014 at Kshs. 8,000.
- i. Petty cash for July 2014 at Kshs. 1,000

Total..... Kshs. 314,371

- j) Costs.
- i) Interest.
- k) Any other suitable relief the Court deems fit to grant.

2. The Respondents filed their joint Statement of Response on the 5th December 2014. They state the Claimant was employed by the Association. The Association is registered under the Societies Act. It is not a Limited Liability Company as alleged by the Claimant. The Respondents state termination was fair and lawful. The Claimant was issued by the Respondents several notices, by word of mouth and through writing, before termination. She severally failed and refused to obey the instructions of her Employer. She absented herself without leave. She was paid terminal dues of Kshs. 41,306. This represented salary for July 2014 at Kshs. 18,553; annual leave pay at Kshs. 18,553; and commission at Kshs. 4,250. The Respondents urge the Court to dismiss the Claim with costs to the Respondents.

3. Parties gave evidence and closed their respective cases on the 18th May 2015. The Claimant testified as did Ms. Lilian Kalela who serves as the Association's Chief Executive Officer.

Claimant's testimony

4. Ms. Wairimu testified she was called by Lilian on 30th July 2014. The Claimant met Lilian who was accompanied by Chairlady for the Association's Coast Region Patricia Njeri. The 2 senior Officers handed the Claimant the letter of termination of employment. They took the office keys away from her. They advised her they would communicate with the Claimant later. The Claimant later went to the office and demanded to be paid her terminal dues.

5. She was paid salary for July 2014; commission; and annual leave for 1 year. She was not issued notice or availed 1 month salary in lieu of notice. She never took annual leave for the period worked. She claims annual leave balance of 7 months. N.S.S.F and N.H.I.F deductions were made and not remitted. The Claimant enquired about her N.H.I.F Account when she was expectant and needed to use the facility. She was advised the Employer had not updated her Account. She prays for refund of these deductions. She was not granted a hearing before termination. She asks for compensation the equivalent of 12 months' salary at Kshs. 222,636. She used her own money to transport her Employer's records from Mombasa to Nairobi. The records were required during the Association's Annual General Conference. The CEO asked the Claimant to use a taxi cab while in Nairobi for ease of transportation of the material. She also purchased items for the Office from her own pocket. This is the basis for her petty cash claims.

6. Cross-examined, the Claimant testified her duties comprised running of the office; calling and organizing meetings; collection of revenue; recruitment of Members ; and visiting of existing Members. She marketed the Association. She assisted Members in linking with the County Governments. There were 13 Members when the Claimant was employed. By the time she left, there were about 28 Members. She was the only Employee at the office. She recruited new Members. It was incorrect to say many Members were lost during her tenure.

7. She was expectant when she interviewed for the job in 2012. She did not request for maternity leave. She went for maternity leave form 2nd April 2013. She did not go for annual leave in 2013/2014. The Chairlady used to threaten the Claimant before termination. The Chairlady told the Claimant the Chairlady had a Cousin who needed employment. The Chairlady would call the Claimant and demand the Claimant is at one place all the time. The Claimant told the Chairlady this was not possible, because the

Claimant's duties required she was always on the move. During the AGM, the Claimant's performance was discussed. She was told by the Respondents she could do better. The pay slips showed N.S.S.F and N.H.I.F deductions were made. They were not remitted as of December 2014. She would receive a cheque of Kshs. 5,000 per month, as petty cash. She incurred extra costs because she used a taxi. She surrendered the receipts to the Chairlady. The policy was that petty cash use is supported by production of receipts. Kshs. 1,000 and 8,000 claimed as petty cash were spent from the Claimant's own money. She claimed she was frustrated in the last month of employment; she spent her own money to run the office. She was paid salary for July 2014, in September 2014. She clarified on redirection that the AGM discussed performance as a general issue; it was not in the context of a complaint lodged against the Claimant's performance.

The Respondents' testimony

8. The CEO explained that the Association is a Members Association, where subscription is through payment of fees. There are individual as well as corporate Members. The Association was established in the year 2002. The CEO manages the Association; she runs its administration; she trains staff; processes their remuneration; she pays suppliers; and supervises staff in Nairobi and Mombasa.

9. The Claimant was employed by the Respondents' Association with duties which comprised recruitment of Members; maintenance of existing Members; acting as linkage between the Nairobi Office and Members in Mombasa; organize and attend meetings; and reporting of her weekly activities. She had been given a target: recruitment of 1 Member every week. She found 46 existing Members on employment. By July 2014, there were 18 Members. The Claimant worked well in January, February and March 2013. The CEO recommended the Claimant is retained, after the Claimant returned from her maternity leave. Her contract had ended, but the CEO recommended she is retained.

10. In August 2013, Kalela realized the Claimant's performance had deteriorated. She cautioned the Claimant about this. The cautionary letter is dated 9th September 2013. The Claimant did not respond. By April 2014, there were complaints against the Claimant. She had not achieved a target of 4 Members in 1 month. The Chairlady called the Claimant on her phone for 5 times; there was no response. When the Chairperson called using an unknown number, the Claimant answered immediately. She explained she did not answer the Chairlady because she knew what the Chairlady was going to say. Kalela asked the Claimant to apologize to the Chairlady; the Claimant declined. This was insubordination.

11. The Claimant absented herself from the office at a time when she was supposed to be preparing, together with Kalela, for a presentation before the Association's Members. Kalela was compelled to wait for the Claimant at a Post Office. Kalela continued to counsel the Claimant to no avail. The Claimant's performance and conduct were discussed at the AGM. Members asked Kalela to seriously consider dismissing the Claimant. Kalela wrote to the Claimant the letter to show cause. The Claimant did not respond. She stated she saw no reason to respond. Kalela followed up the letter to show cause with an e-mail communication calling for an explanation. There was no response. The Claimant only reacted after dismissal by serving the Respondents with the Court Summons. The Witness told the Court the Claimant was dismissed on 3 grounds: she did not maintain existing Members; she did not recruit new Members; and lastly she was insubordinate.

12. The Respondents prepared the Claimant's certificate of service, which is ready for her collection. All her terminal dues were paid to her. Kalela processed the payment. N.S.S.F and N.H.I.F deductions were made and remitted. She took 2 months of maternity leave and 1 month of annual leave between April 2013 and June 2013. Management allocated petty cash of Kshs. 5,000 per month. If the amount was exceeded, the Officer would use her own money, which would be reimbursed upon production of the expenditure receipts. There were no receipts produced by the Claimant to support her claim for petty cash. It is not true that Kalela took these receipts and retained them. The Claimant was paid annual leave pay, July 2014 salary and commission, all amounting to Kshs. 41,306.

13. On cross-examination, the Witness told the Court the Association was founded in 2002. It was the Claimant and the Witness who were in the office on the date of termination. There were no other

Employees at Mombasa Office. Members dwindled from 46 to 18 during the Claimant's tenure. Kalela did not have the specific list of Members. The Claimant was found to have engaged in insubordination, not because she did not pick the Chairlady's call, but because she failed to return the call. New Members pay Kshs. 5000 to Kshs. 10,000. Existing Members pay subscription fees. If they do not pay, they may be thrown out of the Association. The Witness agreed it was tough to recruit 4 Members in a month. Kalela was not aware the sitting Executive Officer Coast Region, one Bob Abwalaba, is a Nephew to the Chairlady. The Witness concluded her evidence with the clarification that recruitment of Members was mainly done through referrals. Employees were recruited online. The Claimant, as well as Bob, were recruited online.

Submissions

14. The Claimant submits the Respondents have not shown valid reason or reasons, for terminating the Claimant's contract of employment. The Respondent was unable to supply a list of Members who had deserted, or stayed in, the Association. It would have been difficult for the Claimant to convince Members to stay in the Association. The Claimant was sometimes held up in meetings and unable to answer the Chairlady's calls. The Claimant answered her Superiors' calls, whenever she could. The Claimant was issued the termination letter on 30th July 2014. She was not heard. The Claimant submits she is entitled to the prayers. Citing ***Industrial Court at Mombasa Cause Number 242 of 2013 between Moses Agugo v. Metric Annex Hotel [2014] e-KLR***, the Claimant urges the Court to grant him 12 months' gross salary as compensation for unfair termination.

15. The Respondents submit they have demonstrated termination was fair, and based on valid reason or reasons as required under Sections 43 and 45 of the Employment Act. The Claimant was warned by the CEO through the letter dated 9th September 2013 about poor performance. The Claimant did not improve. She was called before the Board in Nairobi for a hearing on 2 different occasions. She was accorded a fair hearing in accordance with Section 41 of the Employment Act 2007. She had earlier been asked to formally show cause why she should not be disciplined; she did not respond to this letter. She was paid her terminal dues amounting to Kshs. 41,306. Relying on, among others, ***Industrial Court at Nairobi Cause Number 192 of 2013 between Moses Kaunda Moro v The CMC Motors Group Limited [2013] e-KLR***, the Respondents urge the Court to find the Claimant was properly dismissed on the ground of poor performance.

The Court Finds:-

16. The Respondents are the Officials of Pubs, Entertainment & Restaurants Association of Kenya, an Association registered in the year 2002 under the Societies Act legal regime. It is agreed this Association employed the Claimant as its Executive Officer Coast Region, based at the City of Mombasa. She was initially employed under contract, beginning 7th January 2013 to 31st March 2013. She continued to work after her contract expired under an indefinite contract, up to 30th July 2014 when her contract was terminated by the Respondents. The Respondents gave the following reasons for the decision:-

- a. *The Claimant failed to maintain membership in place at the time she was employed.*
- b. *She failed to recruit new members.*
- c. *She engaged in insubordination.*

17. The questions raised in this dispute are well stated in the Parties' Submissions, and like most Claims for unfair termination are: *whether the Respondent had valid reason or reasons to justify termination; whether the decision was carried out fairly; and whether the Claimant merits the remedies sought.*

18. It is true the Chief Executive Officer severally wrote to the Claimant, complaining or cautioning the Claimant about poor performance. Mainly the complaint was that the Claimant had not recruited new Members to the required standards. In her evidence, Kalela stated the Respondents expected the Claimant to recruit at least 4 Members every month.

19. There was no register of Members produced by the Respondents at the hearing, as would assist the

Court make an informed view of the number of Members in place at the time of the Claimant's recruitment, and the time of her exit. There was no chart, indicating any membership curve. As submitted by the Claimant, in the absence of such a document on membership, the failure to recruit new Members and retain old ones would seem to this Court to be mere allegations, not valid termination reasons.

20. The Respondents did not explain how the Claimant could in any event go into the field recruiting Pub and Restaurant Owners, while she manned the Mombasa Office alone. This was an unrealistic target. As stated in Industrial Court at Nairobi Cause between **Maina Mwangi v. Thika Coffee Mills Limited [2014] e-KLR**, performance standards and elements must be reasonable, understandable, verifiable, measurable, equitable and achievable. The standards adopted by the Respondents with respect to the Claimant were none of these values. She was expected to run the office; link the Members with their Office in Nairobi and with the Local Authorities in Mombasa; and at the same time go to the field recruiting Members, while ensuring old Members were happy and retained their Membership. These were standards which any officer would have problems meeting. The Court does not find the first 2 grounds given in justifying termination fair and valid grounds.

21. The failure to respond to the Chairlady on select occasions does not appear to this Court as an act of insubordination. The Claimant responded to the Chairlady whenever her congested surroundings allowed her to do so. Insubordination under Section 44 [4] [d] [e] of the Employment Act, and as discussed in **Industrial Court at Nairobi Cause Number 1072 of 2012 between Abraham Gumba v. KEMSA [2014] e-KLR**, occurs where the Employee constantly and intentionally refuses to obey direct or implied order, reasonable in nature, given by or with proper authority. The occasional failure by the single Employee, to pick a call from a Superior in an Office where the receiver of that call was the single Employee serving in the Office and Outfield, does not fit the description of insubordination.

22. The Respondents needed to prove the reason or reasons for termination, and demonstrate these were valid reasons. Ultimately, they did not do so. The Court was left with the impression that there was an ulterior motive in removing the Claimant from Office. She was a perfect Employee at the first phase of her employment, the period before she went on maternity leave. This was the evidence narrated by Ms. Kalela. How did she in a few months develop the imperfections? It was suggested the Executive Officer who replaced the Claimant is a relative of one of the Association's Officers. Could his employment have contributed in the firing of the Claimant? This suggestion was not firmly discounted by the Respondents, beyond explaining that the new Executive Officer was recruited online. Is it not possible for an Organization to recruit favoured Officers' relatives online?

23. There was no hearing granted to the Claimant in the form contemplated by Section 41 and 45 of the Employment Act 2007. The Respondents allege they issued the Claimant with warnings and notice to show cause. This was in order. It did not however amount to a hearing under Section 41 and 45 of the Act. She was invited to Nairobi for AGM. Again this cannot be said to be a hearing in the form contemplated by the law. The AGM was a general meeting, where performance of the Claimant and her Office, were among other subjects discussed. A disciplinary hearing would entail the setting up of a specific Panel; charge sheet with the particulars of the offence; reading to the Claimant in a language understood by her of the charges; chance given for the Claimant to respond to, and defend the charges; right to be accompanied by a workmate or trade union representative of her choice; and the right to have any representations made by the Employee or her representative considered. These procedural guarantees were thrown out of the window.

24. Termination was therefore flawed, on both substance and procedure. The Claimant is entitled to compensation for unfair termination. **She is granted 12 months' salary in compensation for unfair termination at Kshs. 222,636 as prayed.**

25. The prayer for notice pay is well-grounded in law and fact. **She is allowed 1 month salary in lieu of notice at Kshs. 18,553.**

26. The Claimant was paid annual leave pay for 1 year. She claims annual leave pay balance of 6 months, having left employment in July 2014. The Respondents' Witness testified that the Claimant took 1 month

in annual leave and 2 months in maternity leave, and is not entitled to the balance of annual leave pay. Section 29 of the Employment Act allows a Woman 3 months of maternity leave with full pay, not 2 months. The Claimant did not therefore take 1 month of annual leave and 2 months of maternity leave, but 3 months of her maternity leave entitlement. Her claim, for the proportionate period of 6 months, would result in 21 days divide by 2 = 10.5 days in leave balance. **Based on a daily rate of Kshs. 713.57, she is granted Kshs. 7,492 in annual leave pay.**

27. Respondents' bundle of N.H.I.F and N.S.S.S.F receipts marked R.6 and R.7 respectively, together with the Claimant's pay slips, indicate the requisite statutory deductions were made and remitted. The Claimant needed to do more to establish her claims on refund of these deductions, probably with unequivocal documentation, or oral evidence, from the respective Bodies. There was no evidence warranting refund of these contributions. This claim is refused.

28. There similarly were no receipts availed by the Claimant to support her claims for refund of money spent by her to meet the shortfall in the petty cash allotment. This claim is rejected.

29. Commission entitlement and salary for the month of July 2014 were part of the money paid to the Claimant in terminal benefits. These claims have been satisfied.

IN SUM IT IS ORDERED:-

- a. **Termination was flawed both in substance and procedure, and therefore unfair.**
- b. **The Respondents shall pay to the Claimant compensation for unfair termination the equivalent of 12 months' salary at Kshs. 222,636; 1 month salary in lieu of notice at Kshs. 18,553 and annual leave pay at Kshs. 7,492- total Kshs. 248,681.**
- c. **The Award shall be satisfied in full within 30 days of its delivery.**
- d. **No order on the costs.**

Dated and delivered at Mombasa this 4th day of September, 2015

James Rika

Judge