REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO413 OF 2014

GLADYS AGAYO ……. CLAIMANT

VERSUS

SOMAK TRAVEL LTD ……..…….. RESPONDENT

JUDGEMENT

1. Issues in dispute herein are the unfair termination of employment; unpaid terminal benefits; and underpayment of terminal benefits.

2. On 18th March 2014 the Claimant filed the Memorandum of Claim against the Respondent who filed their defence on 30th April 2014. In evidence, the Claimant testified in support of her case while the Respondent called Ms Ominde the human resource manager as their witness. At the close of the hearing, each party filed their written submissions.

The claim

3. The Claimant was employed on 5th June 2001 as a Customer Service Officer a position she held until 13th March 2012 when she was terminated. The Claimant was earning Kshs.56, 911.00 per month in salary. The claim is that the termination was unfair as there was no prior notice or reasons given before termination on the grounds of redundancy and the laid down procedures before such termination were not followed. The circumstances that existed did not permit termination on redundancy. The Respondent offered to pay Kshs.389, 194.00 as terminal dues which was not a true reflection of the rightful entitlement as terminal dues. The Claimant refused to take the payment in final settlement and on the basis that this was an underpayment.

4. The claim is for;

a. *1 month notice pay Kshs.113, 882.00*
b. *Severance pay for 10 years Kshs.571, 007.00*
c. *Salary for March 2012 Kshs.56, 911.00*
d. *Unlawful medical deductions 2009 Kshs.120, 000.00*
e. *Unlawful medical deductions 2010 Kshs.120, 000.00*
f. *2011 Kshs.120, 000.00*
g. *2012 Kshs.27, 091.00*
h. *Unpaid prorate leave 2011/12 Kshs.16, 416.00*
i. *Damages from unfair termination Kshs.682, 932.00*

5. The Claimant is also seeking for interests on the claimed amount together with costs.

6. In evidence, the Claimant testified that upon employment she was issued with an employment contract with her terms and conditions of employment as a Customer Service Officer. The salary was paid in cash but later this would be deposited at the bank. Other than the salary, there was a medical cover benefit which was wholly met by the respondent. There was a company doctor where one went when sick. In 2009 the Respondent outsourced medical cover and the Claimant was deducted Kshs.120, 000.00 per year. There was no communication prior to such deduction.

7. In 2012 the Claimant was told to go on leave and when she reported back on 13th march 2012 she was issued with a termination letter. She was told to see the finance officer who gave her the letter of termination and informed that the terminal dues would be paid later. She was told to leave immediately. The Claimant got so stressed that she could not read the letter and only did so at home. The letter stated that the termination was to take effect from 1st April 2012. There was no notice prior and due to the stress over the abrupt termination, she took 2 days off.

8. The terminal dues were computed at Kshs.389, 395.00 which was an underpayment. The medical cover should not have been deducted. When the suit was filed, the Respondent paid part of the dues. This was a wrongful dismissal and the Claimant is seeking compensation; unlawful medical deductions; severance pay; salary for March 2012; notice pay; and a certificate of service.

9. In cross-examination the Claimant testified that for 8 years while in the employment of the Respondent she received medical treatment without payment as there was a company doctor. When she required inpatient service, the company doctor would give advice. In 2009 the doctor changed and the Respondent outsourced the service to a medical cover. APA and AAR service providers were invited to talk to staff and all took cover with AAR and because the Claimant feared being victimised for refusing to take the cover, she filled her forms just like other staff for her family of 3 children and the spouse. Upon application for the cover, the Respondent paid and the Claimant was deducted from her salary every month. The staff complained but none was able to write a complaint due to fear of victimisation. There was an internal complaint but the Respondent did not address it. If there was any memo on the matter, this was not brought to the attention of the claimant.

10. The Claimant also testified that when the medical cover was changed to AAR she was able to add her family. The Claimant stated that she had never seen the memo dated 30th September 2009 and only saw it in Court in the Respondent list of documents. The Claimant was aware that the Respondent outsourced medical cover but the notice to these changed was never publicised. She was verbally told that the medical cover would be deducted but the details were not indicated. She had no choice when she saw the deduction from her salary. She felt she was forced to pay for the medical cover. Since 2009 the Claimant felt insecure in her job as things started to change with the management and this did not improve until her termination.

11. He Claimant also testified that she was aware the Respondent was going down on and off. There was a significant change after 2008 post-election violence as the staff were retrenched and in 2009 they were recalled until 2012 when the Claimant was terminated. The Claimant was recalled as business had improved. Before the Claimant was terminated, others had also been retrenched. The Claimant was in the tours department as customer service all 11 employees in the department from 15. That the Claimant was forced to go on leave and when she reported back she was the only one terminated out of the 11 employees in her department. There were others left who had been employed after her and were left and she was therefore being targeted with malice.

Defence

12. In defence the Respondent admitted that they had employed the Claimant and was lawfully terminated. Due to dwindling number of foreign visitors due to the downturn in the tourism business, it was not possible to keep the Claimant in employment and hence her termination. The Respondent followed the law and the contract terms between the parties in terminating the claimant. The Respondent offered to pay the Claimant for two months' salary in notice instead of one month but she declined the payment. The Respondent has been willing to pay the entitled dues;

a. Salary for March 2012 at kshs.56,911.00
b. Two months' salary in lieu of notice at kshs.113,822.00
c. Service pay for 10.75 at Kshs.571,007.3
d. Less PAYE at Kshs.216,393.00
e. Less NSSF at kshs.320.00
f. Less NHIF at kshs.200.00
g. Less salary advance Kshs.40,615.00
h. Less medical loan balance kshs.40,615.00

Total dues Kshs.389, 394.03

13. The Claimant refused to collect the above dues and opted to file suit. Such amounts have since been deposited with the claimant's advocate.

14. The defence is also that the Claimant was a beneficiary of the respondent's medical scheme which was contributory in nature and the claimant's outstanding contribution stands at kshs.94, 818.00. The claim is grossly exaggerated and an afterthought as the Claimant had only disputed the medical cover and hence the suit was filed in bad faith and should be dismissed.

15. In evidence Ms Willkie Ominde the Respondent ground human resource manager testified that she has been with the Respondent since 1st April 2008 and is conversant with the claim and the duties the Claimant held. The Respondent whose main business was in the tourism sector was affected by the post-election violence in 2008 when business started going down. In 2007 business was high and done well; in 2008 it went suddenly down; 2012 business went further down up and until 2014 and 2015 has been worse due to terrorisms, tribal violence and travel advisories by foreign governments. The Respondent r4ealsied that they had to retrench staff. At the time the Claimant was employed by the respondent, 26 employees had to be laid off and currently the Respondent has 5 employees only.

16. Ms Ominde also testified that in customer service department there were 11 employees all doing languages and since most tourists from Germany, France, Russia were not coming in a decision had to be taken. Some employees were moved to the Mombasa office; sold most vehicles and some given to the drivers as an option to payment and once there is business these drivers are recalled for outsourcing new business. In 2009 the Respondent made a decision to dispose off most of its assets. In the year the Respondent had made 170 million shillings; in 2008 this went down; 2012 there was only 12 million and 2015 only 6 million shillings has been realised. This was largely from a building owned by the Respondent which has 5 floors but very little space has been sublet. Cash flow has gone down.

17. Ms Ominde also testified that they had to lay off staff. The Claimant was in French speaking department and since tourists from France were no longer coming in, the Respondent decided to retain the only other employee who had multiple languages unlike the Claimant who specialised in fewer languages. The Respondent also took into account work performance and since the Claimant had several warning letters this was put into account. There was also the issue of abilities and skill and overall, the employee who had multiple languages especially Japanese and Russian, Joyce Maseko was left.

18. The respondent's case is also that the claim for medical cover deductions does not arise. The Respondent realised that they could not continue with the medical cover when they offered services of a company doctor and all admissions referred to Nairobi hospital. Due to low business the Respondent was unable to give a medical cover. The employees were informed. There was a memo posted on the notice board on 30th September 2009. There is a staff lounge where employees would convene for lunch and the memo was posted there. The Claimant was on leave at the time and that notwithstanding, she heard through the grapevine. The tours manager and the managing director sourced AAR and APA and employees were required to consent to voluntary deductions. AAR and APA officers came to the Respondent offices to talk to employees and 9 such employees agreed to take cover with AAR and each singed their forms by giving personal details. In 2009 19 other employees took the same cover and in 2010, other 13 took the cover. This took effect immediately each employee singed. The Claimant cover was to take care of her family which was not a benefit before. The Respondent paid a lump sum and each

employee was deducted monthly.

19. In cross-examination, the witness testified that the Claimant was terminated due to low business and her performance was poor; she had warning letters and her abilities were challenged as she did not speak multiple languages like Joyce. With regard to the changes to the medical cover, the witness testified that there was a memo issued to all employees and was posted at the notice board. Those who gave consent the accountant was instructed to make deductions immediately. The list indicating who was to be deducted the medical cover payments is not in court.

20. The Claimant submitted that section 40 of the Employment Act was not followed in the termination of the Claimant as the process was wrongful. There was no notice in accordance with the law, there was no notice to the Claimant union or the labour officer. These are mandatory provisions of the law that were not followed. The Claimant relied on the case of **Raphael Muchunu Mwangi versus DHL Excel Supply Chain (K) Ltd, Cause no.1343 of 2013.**

21. The Claimant also submitted that the memo issued on 30th September r2009 on the medical cover was to vary the terms of employment without prior notice or consultations with the Claimant as the affected employee. The deductions that followed were illegal and not justified.

22. Before termination, the Claimant was not heard in accordance with the provisions of section 4q of the Employment Act. This violated the rules of natural justice as under article 47 of the constitution. The Claimant is therefore entitled to the reliefs sought.

23. The respondents on their part submitted that before the suit herein was filed they offered to settle the claim but the Claimant rejected the payments made. The Respondent has been willing to settle the matter and has since set a cheque to the claimant's advocate with the terminal dues.

24. With regard to the medical deductions, the Claimant was paying for herself and family and the employment contract did not make for such a provision. In a memo, the Respondent explained to all employees that medical cover would be outsourced and since 2009 to 2012 the Claimant accepted such an arrangement and cannot now demand what she paid for her benefit and family. There was no complaint until the termination of employment. Such deductions were lawful.

25. The Respondent also submitted that the termination of the Claimant was not wrongful as there was a reason of low business. The Claimant confirmed this much in her evidence and further noted that several of her colleagues suffered the same fate. The Claimant had been laid off in 2009 and then recalled. There is no compensation due in this regard as the termination was not wrongful.

Determination

26. I note the Respondent has admitted owing several items outlined by the claimant. These are;

a. *Salary for March 2012 at kshs.56,911.00*
b. *Two months' salary in lieu of notice at kshs.113,822.00*
c. *Service pay for 10.75 at Kshs.571,007.3*

27. There is however a contest with regard to the medical cover deductions and that this was a case for wrongful termination.

28. As noted above, there Claimant only outlined three (3) issue as being in dispute;

a. Unfair termination of employment
b. Unpaid terminal dues and
c. Underpayment of terminal dues.

29. What has emerged during the hearing and in the evidence of the Claimant is that the termination

due to low business. The Respondent on their part gave evidence that the termination was due to low business; the Claimant was of poor performance and that due to her abilities, she had to be laid off. In this regard, the Respondent paid 2 months in lieu of notice pay; salary for March 2012 and *service* pay. Such *service* pay is computed at 10.75 years. In my assessment and analysis of this amount, though neither party made any submissions on it, I find the sum too high for a *service* pay. This should have been for *severance* pay but again, this is still too high. The parties confirmed that the Claimant had been laid off in 2009, was recalled when business picked up and the cut off of years of service must have been interrupted. In the memorandum of claim, the Claimant at paragraph 7(1) is claiming for *severance* pay and I take it this is what the Respondent had intended to award in settlement.

30. All considered and noting that this is a sum that the Respondent was willing to pay to the Claimant from the onset, I will not disturb this head. Despite the use of the term *service* pay instead of *severance* pay. Such amounts for 10.75 years have been paid vide cheque deposit with the claimant's advocates. This cannot be *service* pay as such payment is due under the provisions of section 35(5) and (6) of the Employment Act and in this case the Respondent confirmed having made statutory dues to the NSSF and NHIF.

31. That said, it is important to revisit the reasons for the termination of the claimant. On 13th March 2012 the Respondent wrote as follows:

> *TERMIANTION OF CONTRACT*
>
> *The tourism industry has in the recent past shown a downturn in business a situation which has left us with no other option but to cut on our operational costs.*
>
> *It is for this reason that we regret to advice you that we shall be terminating your services with effect from 01st April 2012.*

32. To this, Ms Ominde for the Respondent testified that since 2008 and due to post election violence, business was going down and the Respondent made losses every year culminating in decision to cut costs and reduce staff. She also testified that this was not the first time the Respondent was taking such a decision as previously the Claimant had been retrenched and recalled later. The witness also confirmed that she well versed with redundancy procedures having been in the human resource work for some time now and with the Respondent since 2008. However, what the Respondent did to the Claimant when they realised that there was a downturn in business was not what is legally acceptable. Section 40 of the Employment Act is the template for any employer and a human resource manager contemplating a redundancy. In this case, the downturn in Respondent business did not just take place overnight. This had been assessed since 2008 to 2012 when a decision was taken to terminate the claimant. The Respondent had made losses over this period before the realisation that there was need to cut on costs and reduce employees.

33. Section 40 of the Employment Act is outlined in mandatory terms. It is not sufficient that an employer is willing to pay more in lieu of notice. Not at all! To the contrary, where there is a need to reduce employee due to a business need, consultations and notification to the affected employees is mandatory. This is necessary as the affected employee has done nothing wrong. The termination has only arisen due to a business reality that must be addressed and the position held by the employee has to cease and thus affect the employer and person behind that position. The employee in this regard is not to blame. The notices therefore due under section 40 are therefore meant to bring to the attention of the employee of this eventuality and to prepare such an employee of the impending need to downsize or reduce employees. Failure to give such notices may end up in a catastrophe such as the Claimant testified to. She went into shock, she had to take two days off to come to turns with what had just happened and as a result she had to file this claim since she was not satisfied with her termination. The Claimant had been on her annual leave, had just returned and on the same date she was issued with a termination letter. Indeed these must have been traumatic, upsetting, distressful and caused the Claimant to take time off which was readily granted. This is not how it should be. Such trauma is not good to the human being where it can be avoided. The Respondent had the law, a human resource manager and the time to issue the required

notices. This was not complied with. See **KUDHEIHA versus Aga Khan University hospital, Cause No.815 of 2015;**

> *… the decision to declare redundancy is the prerogative of the employer as at that date they genuinely believed there existed good grounds that had been preceded by a long assessment of operations, processes and structures … There is nothing wrong with an entity going through reorganization and declaring some positions redundant…. Once the right is thus exercised, before an employer can move further with regard to implementation of the management decision that is likely to affect employees as recognised herein, the applicable Collective Bargaining Agreement and the legal motions under section 40 comes into force.*

34. Equally the Court in the case of **Timothy Mabeta Kambuni versus Bedson East Africa Limited, Cause No.995 of 2013** held;

> *The law on redundancy exists for a purpose. That purpose is to guide an employer who is faced with a difficult commercial situation to put in motion measures so as to avoid further difficulties and losses. These measures include systematic lay off of employees whose positions cannot otherwise be sustained due to the commercial difficulties.*
>
> *When an employer cites redundancy as the reason for termination of an employee, the provisions of section 40 of the Employment Act apply. These provisions are mandatory. It is not left to an employer to decide how and when to declare an employee redundant. This is so because redundancy result from a business crisis that is not the fault of an employer or an employee but the employer being the one to assess the economic situation is placed in apposition as to know well in advance as to the business returns and to start prior preparations to reduce further losses and hence declare some positions redundant which inevitably must affect some employees.*

35. I find the Respondent violated the mandatory provisions of section 40 of the Employment Act. This is an unfair labour practice. Notice is due together with payments required under section 40 of the Act.

36. The other reason for termination according to the Respondent witness Ms Ominde is that the Claimant was of poor performance. That she had been issued with warning letters. Such warning letters were not submitted in Court and the reasons as to why such warning letters were issued was not stated. Equally, the termination letter only mentions that the Respondent was having a downturn in business and nothing with regard to poor performance of the claimant. Where indeed the Claimant was of poor performance, section 41 of the employment Act required that such matter be brought to her attention, she be given a chance to defend herself and a hearing over the same be conducted. Upon such a hearing, the Respondent was to come up with the necessary decision.

37. I find no notice to the Claimant with regard to her poor performance. There was no hearing where the Claimant was made to defend herself against any alleged poor performance. To impute such a reason as the basis of the Claimant termination is an unfair practice contrary to section 45 of the Employment Act. See **Jane Khalechi Versus Oxford University Press E.A. Ltd, Cause No.924 of 2010.**

38. The other contested issue was the medical cover payments. Section 10(2) of the Employment Act requires that all employment contracts should spell out all the terms and conditions of employment. At subsection (h) it states;

> *(h) The remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;*

39. Such benefits once outlined, cannot be applied negatively against the employee without the employee's consent. Such benefit can only be reviewed upwards and for the benefit of the employee. Where an employer thus grants a benefit and the same is reviewed, changed, repealed, evidence must be called in this regard to show that the subject employee gave consent to such a downward review. Such

consent is paramount as once there is a written contract of employment, such a contract remains a document binding between the parties to it and cannot be unilaterally reviewed especially at the expense of the employee. To allow this would invite the violation of employees rights now secured under article 41 of the constitution which prohibit unfair labour practices.

40. In the contract of employment the medical benefit is outlined as follows;

> *Medical cover*
>
> *The company will provide you with a medical cover for both inpatient and outpatient. Kindly familiarise yourself with the benefits his cover has to offer.*

41. In the evidence of Ms Ominde for the Respondent she stated;

> *… Due to low business we were [the respondent] unable to give medical cover. The staff were informed. Through a memo posted at the notice board on 30/10.09. We have a staff lounge where staff have lunch and all staff were aware. At the time the Claimant was on leave and even if she was on such leave, she heard through the grapevine.*

42. The contract of employment is personal and cannot be unilaterally reviewed to the disadvantage of an employee. To assume that employee receive crucial and important information relevant to their work performance, benefit and direction through the grapevine is a practice that is not reasonable and inappropriate for an entity such as the respondent. Where such is the current practice, a review is necessary. Where an employee is on leave, where a policy decision is taken that affect their employment in any material way, reason must be taken and have such an employee informed immediately they resume duty or be recalled for purposes of sharing such crucial and important information.

43. I take it that the payment by the Claimant of all her medical cover was on the basis that she had been left exposed and she had to do something. Ms Ominde testified that the Respondent had taken a decision to have the medical cover become contributory where the employees were cost-sharing. There was however no evidence of what contribution the Respondent made to this effect and with regard to the claimant. From the payments made by the Respondent to AAR for the benefit of a medical cover to its employees, there is no financial audit for the Respondent company showing that indeed this was contributory or what cost was met by the respondent. The documents submitted by the Respondent are not the audited accounts for the Respondent company. Such a document must exist in view of the corporate nature of the respondent. The Respondent has also failed to submit any policy documents that was to guide the Claimant and the Court in this regard. Where such a policy existed such as was noted under the employment contract, reason dictated that the Respondent should make such a document available. In the absence of such an important records and where a medical cover was a work benefit that the Claimant was to enjoy while in the employment of the respondent, any personal payments she made in this regard must be refunded to her.

Remedies

44. On the finding that the Claimant was unfairly declared redundant without due process or justification and that there is no prove that the Claimant was of poor performance contrary to section 45, this was wrongful and compensation for such unfair termination is due. Nothing the two tier requirements under section 40 and 41 of the Employment Act that were not adhered to, the Claimant is awarded compensation at 10 months' salary all at kshs.569,110.00.

45. There is notice due under section 40 and 41 of the Employment Act. I take it that this are the two months' notice pay that the Respondent already paid. Such was not an act of benevolence, it is due under the law. The due amount is kshs.113, 882.00.

46. Salary for March is due. This amounts to Kshs.56, 911.00.

47. Severance pay is due. Where the Claimant remained the employee of the Respondent from 5th June 2001 to 1st April 2012, she had done 11 complete years. Under section 40 of the Employment Act, the Claimant is entitled to 15 days' pay for each year served in the absence any document indicating a higher pay. I note the Respondent had offered to pay a higher amount in this regard, but the Claimant did not set out how such a higher pay was an entitlement. Where the Claimant was unionised and her union had negotiated a better package for redundancy, the duty was upon the Claimant to submit such a documents. The severance pay due herein is assessed at kshs.313, 010.50.

48. The Claimant is seeking prorated leave for 2011/2012. There was no call of evidence or submission in this regard. It is not clear as to why the Claimant lodged this particular claim. It is declined.

49. The deduction of medical cover was unlawful such should not have arisen. The Claimant is awarded the medical cover deductions all amounting to kshs.387, 000.00.

50. The Claimant has since received some dues. Such dues will be put into account in the payment of the judgement amount. Such judgement amounts shall be subject to statutory deductions.

Conclusion.

Judgement is herein entered for the Claimant against the Respondent as follows;

a. **A declaration that the termination of the Claimant was unfair;**
b. **Compensation awarded at kshs.569, 110.00;**
c. **Notice pay at aKshs.113, 882.00;**
d. **Severance pay at kshs.313, 010.50;**
e. **Medical cover Deductions made Kshs.387, 000.00;**
f. **Payments above shall be subject to the provisions of section 49(2) of the Employment Act;**
g. **Payments due to the Claimant shall be less kshs.389, 394.03 already received from the respondent.**
h. **The Claimant is awarded 50% of costs.**
i. **A Certificate of Service should be issued within 7 days without any conditions.**

Orders accordingly.

Dated signed and delivered in open Court at Nairobi this 12th day of November 2015.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant