



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO 562 OF 2010**

**JANE WANJIKU THIGE.....CLAIMANT**

**VS**

**CITY COUNCIL OF NAIROBI.....RESPONDENT**

**AWARD**

**Introduction**

1. By a Statement of Claim filed on 25th May 2010 and amended on 11th July 2011 the Claimant sued the Respondent for unfair termination of employment. The Respondent filed a Memorandum of Reply on 23rd June 2010 and the matter was heard on 25th November 2013 with Mrs. Nasser appearing for the Claimant and Mr. Abwao for the Respondent. The Claimant testified on her own behalf and the Respondent opted not to call any witnesses.

**The Claimant's Case**

2. The Claimant was employed by the Respondent as a support staff on 6th March 1992. She was subsequently promoted to the position of Senior Head Messenger and was from time to time assigned duties of a Car Park Attendant within the Nairobi Central Business District.

3. On 6th March 2004, while on duty along Loita Street in Nairobi the Claimant and her two colleagues, Joseph Kiarie and Margaret Kinyanjui were arrested on allegations of having fake parking tickets in their possession. The Claimant was interdicted and subsequently charged at the Anti Corruption Court and at the end of the trial, she was convicted of the offence of destroying evidence and was fined Kshs. 10,000 which she paid. During the period of her interdiction which ran until February 2007, the Claimant was placed on half salary.

4. On 10th March 2010 the Claimant presented herself for a headcount ordered by the Respondent where she was served with a letter dated 25th February 2010 notifying her that she had been summarily dismissed effective 6th October 2004. On 18th March 2010, the Claimant wrote to the Respondent appealing against her dismissal and asking for an opportunity to defend herself

5. The Claimant claims the following:

- a. One month's salary in lieu of notice.....Kshs. 12,390
- b. 12 months' salary in compensation for unlawful termination.....148,680
- c. Salary for the interdiction period (October 2004 to February 2007).....167,265

- d. Unpaid salary for March 2007 to February 2010.....408,870
- e. Accrued leave pay for 6 years from the date of interdiction.....55,062
- f. Unremitted NSSF and NHIF contributions.....77,760
- g. Service pay at 15 days for each year of service.....117,180
- h. Costs and interest

6. In the alternative the Claimant prays for reinstatement without loss of benefits and salary arrears for the entire period she has been out of employment.

### **The Respondent's Case**

7. In its Memorandum of Reply, the Respondent stated that in dismissing the Claimant, it acted within its mandate following a meeting held on 8th October 2009. It was the Respondent's case that the Claimant should have appealed against her dismissal to the Public Service Commission within 42 days from the date of dismissal and having failed to do so she had no right to come to Court.

### **Findings and Determination**

8. The main issue for determination in this case is whether the Claimant's dismissal was lawful and justifiable.

9. Section 45 (2) of the Employment Act, 2007 provides that:

***(2) A termination of employment by an employer is unfair if the employer fails to prove-***

***(a) that the reason for the termination is valid;***

***(b) that the reason for the termination is a fair reason-***

***i) related to the employees conduct, capacity or compatibility; or***

***(ii) based on the operational requirements of the employer and that***

***(c) That the employment was terminated in accordance with fair procedure.***

10. In the case of ***Walter Ogal Anuro Vs Teachers Service Commission [2013]eKLR*** this Court held that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification translates to the establishment of a valid reason for the termination while procedural fairness has to do with the procedure adopted by the employer in effecting the termination.

11. It was not in contest that prior to her dismissal, the Claimant was charged and convicted of the offence of destroying evidence, an offence which would in employment law and practice, amount to misconduct on the part of the Claimant. Since the Claimant did not lodge an appeal, the conviction remains in force and the Court found that the Respondent had a valid reason for terminating the Claimant's employment as contemplated under Section 43 of the Employment Act, 2007.

12. I will now deal with the procedure adopted by the Respondent in terminating the Claimant's employment. The Claimant was interdicted on half salary on 6th March 2004 and was dismissed by letter dated 25th February 2010 which backdated her dismissal to the date of interdiction.

13. The dismissal letter stated that the decision to dismiss the Claimant was taken on 26th

January 2010 following recommendations by the Respondent's Staff Committee and the Finance Committee in meetings held on 8th October 2009 and 11th November 2009 respectively.

14. Section 41 of the Employment Act, 2007 provides as follows:

**41. (1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.**

**(2) 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.**

15. Further, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules which are easily accessible to all the employees.

16. The Claimant told the Court that she was not invited to any of the meetings at which her dismissal was discussed and the Court found no evidence that she was subjected to either the disciplinary procedure set out in Section 41 of the Employment Act, 2007 or the Respondent's internal disciplinary procedural rules.

17. Moreover, there was no explanation as to why the Claimant was kept on interdiction for close to six years and why the Respondent took as long to determine the Claimant's case. I therefore find the termination of the Claimant's employment unfair for want of due procedure and award her 8 months' salary in compensation. I also award her 1 month's salary in lieu of notice.

18. The terms of the Claimant's interdiction were that she would be on half salary and since she was not at work during the interdiction period, she is not entitled to leave. The claims for the half salary withheld during the period between October 2004 and February 2007 as well as leave pay for the period of interdiction therefore fail and are dismissed. The Claimant is however entitled to half salary for the period between March 2007 up to February 2010 when the Respondent's decision to dismiss her was communicated to her.

19. From the documents submitted by the Claimant, which were not controverted by the Respondent, the Court formed the opinion that the Respondent did not make remittances on the Claimant's account to the designated Retirement Schemes. I therefore allow the claim for service pay but disallow the claims for unremitted NSSF and NHIF contributions.

20. Ultimately, I make an award in favour of the Claimant in the following terms:

- a. 8 months' salary in compensation for unfair termination.....99,120
- b. 1month's salary in lieu of notice.....12,390
- c. Half salary for March 2007 to February 2010 (36 months).....223,020
- d. Service pay for 12 years @ 15 days' pay per year.....74,340

**Total.....Kshs.408,870**

I further award the Claimant the costs of this case.

This Award is subject to statutory deductions in accordance with Section 49(2) of the Employment

Act, 2007.

Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF  
JANUARY 2014**

**LINNET NDOLO**

**JUDGE**

**In the Presence of:**

.....*Claimant*

.....*Respondent*