



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

**AT NAKURU**

**CAUSE NO. 324 OF 2013**

**NANCY WANGUI KARIUKI.....CLAIMANT**

**-VERSUS-**

**FLORENSIS KENYA LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 28<sup>th</sup> March, 2014)

**JUDGMENT**

The claimant **Nancy Wangui Kariuki** filed the memorandum of claim on 26.09.2013 through Owen Magatta Advocates. The claimant prayed for:

- a. 3 months pay in lieu of notice.**
- b. Unpaid leave.**
- c. Gratuity at 30 days for each completed year of service.**
- d. 12 months salary as compensation for unlawful termination as per the provisions of section 50 of the Employment Act, 2007.**
- e. Aggravated damages for tarnishing the claimant's reputation.**
- f. The respondent to pay costs of the suit.**

The respondent **Florensis Kenya Limited** filed the memorandum of response on 20.11.2013 through A. F. Gross & Company Advocates and prayed that the respondent's claim be dismissed with costs. The claimant's memorandum of reply to the memorandum of response was filed on 10.12.2013 and the claimant reiterated the prayers set out in the memorandum of claim.

The case was heard on 20.02.2014 and on 24.02.2014. The claimant gave evidence to support her case. The respondent's witnesses included Eddy Verbeek, the respondent's General Manager (**RW1**) and Paul Ihiga (**RW2**), a Certified Public Accountant appointed by the respondent to undertake a special assignment investigation and to report in the matter.

The claimant was employed by the respondent in the capacity of a Human Resource Officer. Her duties included salary and payroll management by preparing the payments due to the respondent's employees.

RW1's evidence was that preparation of salaries entailed use of attendance biometric system that the claimant used to prepare the due employee pays with help of the payroll system. The payroll system generated the relevant bank pay information which the claimant forwarded to the respondent's finance department to upload to the CFC Bank pay system for transmission to staff individual accounts.

On 29.05.2013, RW1 received a short message service on his cell phone with details about the payroll. The information when compared with the payroll confirmed the mentioned persons had been paid way above their legitimate pay as analysed with the respective payslips and actual payments at CFC Bank. RW1 said he waited for a month to monitor the emerging scenario. In June 2013, the same errors occurred. RW1 consulted the respondent's directors in the Netherlands and it was resolved that an independent investigation be carried out. The respondent's independent investigator was RW2.

RW2's report was at page 13 of the response bundle. The field investigation started on 8.7.2013 and ended on 12.7.2013. About the payroll, RW2 received information up to 22.07.2013. RW2 testified that his investigations found discrepancies on the payroll. There were about 400 employees and some were paid at bank and others by cash. Persons who were not employees had been created in the payroll. The report covered 1.1.2012 to 30.06.2013 being 18 months. The case on payroll discrepancies and relating to the claimant covered February to June 2013. The discrepancy was that money paid at the staff bank accounts was more than the net pay indicated on the relevant payslips.

RW2 testified that for example, for the claimant, her net pay for March, 2013 was Kshs.17,550.00 but she received Kshs.28,150.00; in April, 2013 she was on leave and she was not overpaid; in May, 2013 her payslip net pay was Kshs.19,168.00 but paid Kshs.56,072.00 being Kshs.36,004 overpayment; in June, 2013 her pay was Kshs.20,813.00 net per payslip but she was paid at her bank account Kshs.40,000.00 being over payment of about Kshs.20,000.00. There were similar instances of overpayment affecting some other staff. Accordingly, RW2 testified that the report required the claimant to explain.

In July 2013, the claimant was on an approved two weeks leave. RW1 recalled her to the office in view of the emerging issues relating to salary payments to the staff and the identified discrepancies. The claimant testified that she reported at work on 16.07.2013. The leave terminated and she continued to work as usual. The evidence on record suggests the correct date was sometimes in August 2013.

On 19.08.2013, there was a meeting which RW1 convened and those present included RW1, RW2, the respondent's Finance Manager, the claimant's deputy called Philomena Njoki, and the claimant. RW1 testified that the claimant denied discrepancies in the net pay on payslips and the excess payments at the bank including in the case of her own overpayments. For cash payments, the claimant told the meeting that there might have been a mix-up in the particulars of the names of the persons paid and she would make the necessary corrections.

At that meeting, RW2 testified that the claimant stated that she had learned about the salary over payments, including her own, at that meeting. It was her submission at the meeting that she went to her bank after 3-4 months so that she could not keep track of the money paid to her. RW2 testified that the claimant's submission at the meeting had been an explanation inconsistent with a normal employee. RW2 testified that the meeting concluded that she would make an explanation and the claimant requested for time to comply. RW2 testified that the claimant was to reanalyse his report and identify any errors that may have been made. Subsequently, he was called to testify in court in the present case between the parties. He never heard from the claimant and her anticipated explanation.

RW1 testified that the recall of the claimant from leave on 14.08.2013 and the subsequent meeting of 19.08.2013 were in accordance with the decision by the respondent's directors that the claimant be given an opportunity to explain the discrepancies. As of 19.08.2013, RW1 testified that the claimant had been accorded 5 days to study the auditors' report but had no valid explanation for the discrepancies. She admitted at the meeting that there were mistakes in the payment of salaries as identified in the report but did not know how they had come about. The meeting became red-hot and sour and RW2 called it off and asked the claimant to come back at 3.00 pm.

RW1 testified that he then called Sheila, the workers' shop floor representative. The details of the case were given to Sheila and the workers who had been overpaid testified and stated that they had been asked to refund the overpayment to the claimant and her deputy as an error in payment and therefore a due refund to the respondent. RW1 testimony was that the refunds never got back to the respondent but was pocketed by the claimant and her deputy called Philomena Njoki. The respondent then found the overpaid workers innocent and retained them at work. RW1 testified that it became increasingly clear and irresistible that the claimant had engaged in corruption.

The respondent decided to suspend the claimant and her deputy. On 21.08.2013, the claimant attended another scheduled meeting but offered no explanation to the discrepancies. The suspension was extended till 28.08.2013 when another meeting was held. RW1 testified the claimant was shown all the evidence including the payslips, bank transfers and the differences. She was asked to explain the discrepancies and she said she did not know and it could be that it was a mistake. RW1 testified that the claimant failed to explain even her own overpayment. As the General Manager, RW1 then made the decision that the claimant could not remain in the position of the respondent's Human Resource Manager. The respondent decided not to prefer criminal proceedings in view of legal costs. RW1 gave the claimant the option to resign with all benefits and no adverse consequences. The claimant refused to resign. RW1 then exercised the only other available option which was to terminate the claimant's employment.

The termination letter dated 28.08.2013 stated as follows:

**“RE: TERMINATION OF EMPLOYMENT SERVICE**

**Dear Ms. Wangui,**

**The management of Florensis Kenya Limited has made a decision that your services shall be terminated from this date being the 28<sup>th</sup> of August 2013 due to gross misconduct based on the following reasons:**

- 1. It has been confirmed that there were serious mistakes in the payroll resulting in loss of the company's resources;**
- 2. It has been confirmed that you paid to yourself a higher salary than you were entitled to;**
- 3. It has been confirmed that you paid other employees a higher salary than they were entitled to; and**
- 4. It has been confirmed that you failed to inform the management of the above occurrences.**

**The management is therefore terminating your employment contract with immediate effect.**

**In view of the above, please arrange to collect your clearance forms from the office.**

**Further, please note that you will be remunerated in accordance with the termination clause of the employment contract.**

**Yours sincerely**

**Signed**

**Eddy Verbeek**

**General Manager.”**

The claimant considered herself aggrieved by the termination and she filed this suit.

The issues for determination are whether the claimant was unfairly terminated; and whether the claimant is entitled to the remedies as prayed for.

The court has considered the pleadings, the evidence and the submissions on record. The court finds that the respondent at the time of the termination had valid and genuine reasons to terminate the claimant's employment as was set out in the termination letter. Thus, the court finds that the termination was not unfair as envisaged under the provisions of section 43 of the Employment Act, 2007. The court has also considered the process that the respondent invoked towards the claimant's termination. The claimant was notified about the findings by the auditors, she was invited to rebut the findings, on more than two occasions meetings were held and the claimant was given an opportunity to be heard in self-exculpation, she failed to exculpate, refused to resign as offered by the respondent and she was then, ultimately dismissed. The court finds that the respondent complied with the due process of affording the claimant a notice of the poor performance or misconduct and a hearing as envisaged under section 41 of the Act. Thus, the court answers the 1<sup>st</sup> issue for determination and returns that the claimant was not unfairly terminated.

The court has revisited the pleadings and the evidence and finds that the claimant has not established any justification for grant of any of the remedies as prayed for. To answer the 2<sup>nd</sup> issue for determination, the court returns the finding that the claimant is not entitled to the remedies as prayed for.

In conclusion, the claimant's case is dismissed with costs.

**Signed, dated and delivered** in court at **Nakuru** this **Friday, 28<sup>th</sup> March, 2014**.

**BYRAM ONGAYA**

**JUDGE**