



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

**CAUSE NO. 233 OF 2013**

**[Formerly High Court Civil Suit No. 92 of 2011 at Nakuru and Initially Filed as Civil Case No. 1446 of 2009 in the Resident Magistrate's Court at Nakuru ]**

ANN SIMON MUKUHE.....PLAINTIFF

-VERSUS-

TELKOM KENYA LIMITED.....DEFENDANT

(Before Hon. Justice Byram Ongaya on Friday 7<sup>th</sup> March, 2014)

**JUDGMENT**

The plaintiff filed the amended plaint on 9.07.2010 through Waiganjo & Company Advocates. The plaintiff prayed for judgment against the defendant for:

- a. **A declaration the termination of the plaintiff's services by the defendant by the letter dated 27.10.2009 was unlawful, null and void and the said letter has no legal effect.**
- b. **General damages for unlawful and wrongful dismissal.**
- c. **Terminal benefits and or dues.**
- d. **In alternative, reinstatement of the plaintiff's employment with the defendant herein as a typist.**
- e. **Costs of the suit.**

The defendant filed the amended defence on 22.07.2010 through Kagucia & Company Advocates and prayed that the suit be dismissed with costs.

The case was heard on 26.11.2013 and on 3.12.2013. The claimant gave evidence to support her case. The defendant's counsel opted to rely on the pleadings and documents on record without calling a witness.

The plaintiff was employed by the defendant on 1.3.1993 by the letter dated 3.03.1993 by which the defendant absorbed the plaintiff as Typist III in the permanent and pensionable establishment. On 31.10.1994, the plaintiff was confirmed in the permanent and pensionable employment as a Typist.

In the course of the plaintiff's employment, the defendant undertook a retrenchment process. The plaintiff was not retrenched and instead was, by the letter dated 7.09.2009, formally deployed to Mass

Market Department effective 1.04.2009. Subsequently in August 2009, the plaintiff received a letter from the defendant alleging that the plaintiff was not performing as a Sales Agent. The defendant in the letter dated 23.09.2009 referred to the warning of 21.07.2009 and charged the plaintiff with unsatisfactory August 2009 sales performance for failing to achieve 70% average sales performance. The letter conveyed that disciplinary action was contemplated and the plaintiff was required to make representations in self defence. The plaintiff replied in self defence by her letter dated 24.09.2009. The plaintiff stated as follows:

- a. **A good motor vehicle was needed to enable her to reach out to customers outside Kericho town.**
- b. **She needed a DSLAM so as to sell a product called BB Nyumbani to customers in Narok, Bomet, Sotik, and Litein.**
- c. **The customers were discouraged because replacement of Sims was not working in Kericho thereby occasioning negative impact to selling Orange Mobile which customers perceived as not working in event of a customer losing or misplacing it.**
- d. **The management should arrange to visit the shops in Kericho to appreciate the challenges the plaintiff and her workmates experienced.**

By the letter dated 15.10.2009, the defendant again required the plaintiff to explain why she had not attained the 70% average sales performance. The plaintiff replied by her letter of 15.10.2009 which were substantially similar to the ones listed above. The plaintiff further stated that there was vandalism and potential customers were outside the 6 km radius of the broadband network. The plaintiff then concluded thus:

**“The above concerns have been with us from July as we started receiving these warning letters and since the reasons are beyond our means please assist us on the above as we seek to meet our targets and solve our customers better”**

In the meantime, the plaintiff wrote her letter dated 30.09.2009 requesting to voluntarily retire early according to defendant’s MD’s circular No. 3 of 2008 of 17.10.2008 by being paid the package therein and due leave days. The defendant replied by the letter dated 1.10.2009 advising that at the moment the request was not accepted and would revert back in future if the position changed.

The defendant addressed the plaintiff as **“Typist”** in the termination letter dated 27.10.2009. The termination letter referred to the charge letters regarding the plaintiff’s performance in July, August and September 2009. The letter stated the plaintiff’s defence had been considered but found inadmissible because the claimant had failed to improve or register good performance as regards sales targets. She was accordingly terminated from employment and to be paid one month salary in lieu of notice.

The plaintiff’s evidence was that she was not trained as a sales agent, she was employed as a typist and that designation never changed as evidenced by the termination letter in which she was addressed as a typist. The grievances had not been addressed and the plaintiff testified that in such circumstances, the dismissal was unfair. The plaintiff further testified that despite appeal and demands, the respondent refused to purge the unfair termination.

After the plaintiff’s termination on 27.10.2009, the defendant’s Head of Human Resource wrote the circular No. 12 of 5.11.2009 being exhibit **C1** titled **“Performance Management”**. In particular, the circular stated that a review of the performance appraisals received for half 1-2009 revealed anomalies e.g. **“4. No job clarity as some employees do not have job descriptions and therefore do jobs they are officially not designated to do e.g. typists doing sales job.”** The plaintiff testified that she therefore had a valid grievance and it was unfair that instead of the defendant amicably resolving the grievance, a decision was made to unfairly terminate the plaintiff’s employment.

The plaintiff testified that she was 46 years of age and she was entitled to retire at the age of 60 years. She also stated that she had been out of the defendant's employment for 4 years and would not be comfortable working for the respondent in view of the unfair termination and time lapse. She feared that in event of reinstatement or reengagement, the respondent might harass and frustrate her and she withdrew the prayer for reinstatement.

The claimant was a member of the Teleposta Union and in good standing so that the relevant collective bargaining agreement (CBA) applied.

On 3.12.2013, the parties closed their respective cases and agreed to file and serve written submissions. Nevertheless, the plaintiff filed the Notice of Motion under sections 100 and 3A of the Civil Procedure Act, Order 8 Rules 3 and 5 of the Civil Procedure Rules and all enabling provisions of law. The plaintiff prayed that the court grants leave for further amendment of the plaint so as to introduce a claim and prayer for loss of income and to delete prayer for general damages. On 9.12.2013, the court certified the application urgent and was heard on 18.12.2013 when the court dismissed the application with costs and reserved the reasons for the dismissal to be given in this judgment. The reasons for the dismissal are as follows.

This court upholds the well settled principle that amendment of pleadings should be liberally allowed unless it is demonstrated that a party will suffer prejudice that cannot be compensated by way of costs and as held by the **Court of Appeal decision in Central Kenya Limited –Versus- Trust Bank Limited (2000) EALR 365** and upheld by *Nyamweya J* in **Stephen Ngatia –Versus- Clement Kamau Gitau [2013] eKLR.**

In the present case, by court order on 3.12.2013, the parties were to file and serve submissions and to take directions on the judgment. First, the application to amend did not seek to vary the order of 3.12.2013 by review or otherwise. In the opinion of the court, if the amendment was allowed, the defendant would suffer serious prejudice in circumstances whereby the hearing would not be reopened consequential to the further amendment. Secondly, at all material times the matters to be introduced in the amendment were well known to the plaintiff and after the plaintiff had given evidence and both parties closed their respective cases, it was prejudicial for the plaintiff to advance her case by instalment very late in the proceedings. For these two reasons, the court found the application not meritorious and dismissed it with costs.

The substantive issues for determination in this case include:

1. **Whether the termination of the plaintiff's employment by the respondent was unlawful and unfair.**
2. **Whether the claimant is entitled to the remedies as prayed for.**

For the 1<sup>st</sup> issue, it is clear that the plaintiff was given show cause letters but it is also obvious that the respondent did not accord the plaintiff a hearing as envisaged in **section 41 of the Employment Act, 2007**. Thus, the court finds that the termination was unfair because the claimant was not given a hearing before the termination.

The plaintiff has stated that she had valid grievances which could not constitute genuine reasons for termination. The court agrees that valid complaints that are not irresponsible and with foundation do not constitute fair reasons for dismissal as provided for in section 46(h) of the Employment Act, 2007.

The court finds that the plaintiff in the instant case had valid grievances. First, being employed and designated as a typist, she was unfairly deployed as a sales agent and without any training or formal policy to support such deployment. Secondly, the appraisals review findings by the Head of Human Resources confirmed that the plaintiff was wrongfully deployed and the allegations of poor performance as sales agent were constructed by the defendant unilaterally and contrary to the defendant's human resource deployment policy. Thirdly, the plaintiff reported challenges and defects in the defendant's operational systems and policies but no action was taken by the defendant to correct or improve the

situation. Finally, in view of the erroneous deployment, the plaintiff requested to be considered under the retrenchment scheme but the request was declined without substantive reasons.

The court upholds its opinion in **Grace Gacheri Muriithi –Versus- Kenya Literature Bureau [2012] eKLR**, where the court stated, thus:

**“To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer’s operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer’s operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer’s operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust.”[\[1\]](#)**

Accordingly, the court finds that the defendant’s termination of the plaintiff’s employment was unfair and unlawful. The procedure for termination was unfair and the reason for termination was not valid.

The 2<sup>nd</sup> issue for determination is whether the plaintiff is entitled to the remedies as prayed for. The court makes the following findings:

1. The court has found that the termination was unfair and the court finds that the plaintiff is entitled to the declaration accordingly.
2. The court has considered the unfair termination and finds that the defendant shall pay the plaintiff 12 months gross salaries at the rate of Kshs.40,386.00 per month as per the payslip for October, 2009 making **Kshs.484,632.00** under section 49 (1) (c) of the Employment Act, 2007. In this case, the maximum 12 months have been awarded because the plaintiff has abandoned the prayer for reinstatement and the payment is the effective alternative remedy; the plaintiff did not contribute to the dismissal as both the procedure and reason invoked by the defendant were unfair; the plaintiff had served the defendant for many years on permanent terms; and there were several years of service pending the plaintiff’s attainment of the retirement age.
3. Under section 49(1) (a), the plaintiff is entitled to **Kshs.40,386.00** being one month pay in lieu of notice.
4. It was submitted for the plaintiff that the measure of damages for unlawful dismissal is the amount which the employee would have earned during the period of notice if the employment is terminable by notice or from the period of dismissal up to the time the contract would have ended if the employment was on a fixed term basis as held by *Ringera J* in **Mughal –Versus-Lakmer Techs Limited [2002] 1 KLR 191 at 192**. Thus, it was submitted that the plaintiff was 42 years old at termination and was to retire upon attaining the age of 60 years. Thus, it was submitted, the measure of the damages was to be salary for the 18 years remaining for the plaintiff to attain 60 years of age making Kshs.40,386.00 per last monthly salary times 12 months times 18 years making Kshs.8,723,376.00. The CBA being No. 2 on further plaintiff’s list of documents provided at clause 12 that the normal retirement age shall be 55 years but by mutual agreement, employees may voluntarily opt to retire on attaining the age of 55 years. Thus, the court finds that the retirement age of 60 years as submitted for the plaintiff was unfounded. The court further finds that the holding in the cited authority will no longer prevail in view of the statutory intervention in section 49 of the Employment Act, 2007. In the opinion of the court, section 49(1) (c) that provides for the court’s discretion to order a maximum of 12 months gross salaries is the acceptable public policy that balances the interests of the employer and employee. Under section

49 (4) (f), the reasonable expectation of the employee as to the length of time for which the employment with that employer might have continued but for the termination is not a measure of damages or compensation for unfair termination but only one of the factors to consider in deciding which of the remedies in section 49 of the Act would be the best in the circumstances. In this case, the plaintiff abandoned the prayer for reinstatement and the court finds that the expected term the employment would have continued does not begin to emerge as a crucial factor in awarding the payment due in view of the unfair termination and beyond the statutory maximum of 12 months gross salaries. In any event, the court has already awarded the maximum 12 months gross payment which in the findings of the court is fair in view of the circumstances of the unfair termination. The submission as made for the plaintiff will therefore fail.

5. The plaintiff has substantially succeeded and the court finds that the plaintiff is entitled to the costs of the suit.

In conclusion, judgment is entered for the plaintiff against the defendant for:

1. A declaration that the termination of the plaintiff's employment by the defendant was unfair and unlawful.
2. The defendant to pay the plaintiff Kshs.525,018.00 less due income tax by 1.4.2014, in default interest at court rates to be payable from the date of the judgment till full payment.
3. A declaration that the plaintiff is entitled to terminal benefits including pension dues as agreed between the parties and as per provisions of the collective agreement and the defendant's human resources policy manual.
4. The defendant to pay the plaintiff's costs of the suit.

**Signed, dated and delivered** in court at **Nakuru** this **Friday, 7<sup>th</sup> March, 2014**.

**BYRAM ONGAYA**

**JUDGE**

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[1] Page 35 of court record, in the Judgment, Industrial Cause No. 44 of 2011 at Nairobi.