



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

**CAUSE NO. 1675 OF 2012**

**ESTHER MUTUMA ..... CLAIMANT**

**VERSUS**

**THE REGISTERED TRUSTEES,**

**YEHU MICROFINANCE TRUST ..... RESPONDENT**

Mr. Kamunde for the Claimant

Mr. Onduso for the Respondent

**JUDGMENT**

1. The suit was filed on 18<sup>th</sup> September 2012 by a statement of claim dated 23<sup>rd</sup> July 2012.
2. The Claimant seeks payment of:
  - i. one month's pay in lieu of notice in the sum of Kshs. 262,000/=.
  - ii. 12 months compensation for unfair termination in the sum of Kshs. 3,144,000/=.
  - iii. interest on (i) and (ii) and costs of the suit.

3. **Claimant's case**

The claimant told the Court that she was employed by a written contract of employment dated 21<sup>st</sup> February 2011, and accepted by the Claimant on 15<sup>th</sup> April 2011 in the position of the Chief Operations Officer of the Respondent at an initial monthly salary of Kshs. 180,000/=.

The salary was rated to Kshs. 202,000/= per month which salary she earned at the time she was summarily dismissed by a letter dated 5<sup>th</sup> July, 2012.

4. Termination Clause of the employment contract provides:

**“termination of service will be in accordance to the Human Resource Management**

## **Manual.”**

5. The letter of termination reads:

**“The deteriorating trend of portfolio quality over the last couple of months has been of great concern to the Board of Trustees. During the Board meeting held on 4<sup>th</sup> July, 2012, it was decided that your employment with Yehu Micro-finance Trust be terminated with immediate effect. Consequently, you have been separated from employment with effect from 5<sup>th</sup> July 2012.”**

6. The Claimant averred in the Memorandum of claim and in her testimony before Court that the summarily termination was unwarranted, unlawful and unfair taking all the circumstances of the case into account and prays for relief as indicated above.

## 7. **Respondent’s Case**

The Respondent filed a memorandum in Reply on 18<sup>th</sup> October 2012 stating as follows inter-alia;

- i. That prior to the termination, the Board of Trustees reviewed the Claimant’s performance sometimes between April 2011 and June, 2012. This was followed by a meeting of the Governance Committee held on 23<sup>rd</sup> June 2012 and a meeting of the Credit Committee held on 30<sup>th</sup> June 2012.

The meetings culminated in a meeting of the full Board on 4<sup>th</sup> July 2012, where it was resolved that the Claimant be summarily dismissed for poor performance.

## 8. **Analysis of facts**

The Claimant was a trained Banker and CPA(K) holder. That she had served six (6) months probation in terms of the contract and reported directly to the Chief Executive Officer of the Respondent Mr. Adet Kachi.

That she was recruited pursuant to a competitive process.

That her main task was to grow the Respondent’s Credit Portfolio in the 32 branches. That the Respondent’s core business was to give soft loans to women in Mombasa ranging from Kshs. 10,000 to 500,000.

She told the Court that during her tenure, she had grown the Respondent’s profitability by 300 % as seen in the audited Accounts of the financial year ending December 2010 and December 2011. That she also grew the loan portfolio by 100% according to the said audited accounts in the period 2009 to 2011.

The Court was referred to these audited accounts indicating that in the year 2010, there was a surplus of Kshs. 65,356 whereas in 2011, the surplus had grown to 2,873,502. Further the loan portfolio shows a growth from 97, 150,307 to 202, 232 – 352 during her tenure and as at the time of termination the portfolio was 237, 065, 714/= and the profit margin was Kshs.7 million.

9. She told the Court that in view of her good performance, she was shocked by the summary dismissal which was effected without notice whatsoever and in a most demeaning manner by the CEO, who called her to his office, offered her the letter of termination, denied her a chance to hand over, withdrew the laptop from her without giving her any opportunity to retrieve her personal information and items and directed her subordinates not to speak to her at all.

She told the Court that she was treated like a criminal by the CEO.

She narrated that, the relationship between her and the CEO and with her staff was cordial. She denied that any relevant issues concerning her performance had been raised prior to the dismissal pointing out that matter raised in a letter dated 10<sup>th</sup> February 2012 by the Auditors pointing out weaknesses in the general processes and controls including weaknesses in the central data base system were beyond her control.

10. She referred to correspondence between herself and the CEO, where she had pointed out specific matters that required to be addressed but the CEO did not respond to her letter.

She had noted that some junior credit officers were involved in unscrupulous practices and in fact gave out loans to ghosts. This was communicated to the CEO via a letter dated 13<sup>th</sup> April 2012.

11. A client had also complained that she had lost money and it was demonstrated that a credit officer had stolen the money. The Claimant recommended disciplinary action against the officers involved but the CEO responded stating that no disciplinary action was required. Her complains regarding deteriorating performance by the said officers was also ignored by the CEO but the lady was instead transferred to another branch. Her name was **Peninnah Mwaka**. Others included **Terry Ann** and **Fatuma Rama**, whose performance was wanting but the CEO prevented the Claimant from taking any remedial measures.

Claimant noted that Peninnah Mwaka continued to issue ghost loans in the new branch she had been transferred to.

12. She had proposed that these cases be referred to the police as they amounted to theft of public funds but the CEO opposed the suggestion.

Thereafter, the Claimant proceeded on maternity leave and was served with a letter of dismissal immediately upon her return from leave.

That no due process was followed at all in that she had no warning letters, nor was her performance appraised and found wanting to warrant the drastic measures taken against her.

13. She told the Court that she had received unconfirmed reports that the CEO was colluding with the officers who were giving ghost loans for his own benefit. She reported the matter to the chairperson of the Board and a credit officer was dismissed which justified her concerns.

She believe that she was unfairly dismissed for insisting that the police be brought in to investigate the alleged thefts by credit staff.

She told the Court that another good example of her good performance was that she had grown a partner fund called KIVA from between 35 – 40,000 US Dollars when she started work to between US Dollars 80,000 – 100,000.

The performance of the fund was upgraded from score 2 – 3 due to excellent management. The Claimant wondered how it could be said that her performance was poor on the face of such glaring evidence to the contrary.

14. The Claimant pointed out that on 28<sup>th</sup> October 2011, when she left for maternity leave she had pointed out in her handing over report, all matters, that needed to be addressed, including disciplinary cases that needed to be concluded. This was never to be, instead she was dismissed upon her return.

The quality of portfolio was affected by a few officers she had fingered for attention and discipline. This was ignored by CEO and thus, the CEO was to blame for any issue, if at all, of poor portfolio performance for failure and obstruction to taking of remedial measures.

Furthermore, the Claimant states that she had lodged new products and reviewed the procedure manuals.

15. In conclusion, she told the Court that her performance was good and the dismissal was not for a valid reason nor did it follow a fair procedure.

She added that she was doing well at the Standard Chartered Bank where she worked prior, and had left for personal reasons to further her studies, in Cambridge, U.K.

That her demand letter for payment of terminal benefits was ignored by the Respondent.

16. She withstood very close, cross examination well and her testimony was candid in all material respects in the Court's view.

She concluded by saying that she suffered loss and damages due to the sudden dismissal and false accusations. She had relocated from Mombasa with her young family to take up the job, with the Respondent and felt let down greatly. She got an alternative job in October 2012. It is a good job and she was now recovering from the sudden loss of employment which was done unlawfully and unfairly by the Respondent.

17. The Respondent called **Dr. Rita Dlugogo** to testify in support of the case. She is a founder of the Respondent a Non-Governmental Organization founded in 1997 to empower rural women by giving them soft loans. The Respondent is mainly based at the coast in Kilifi and Voi.

She is the chairperson of the Board and knew the Claimant well as the Chief Operations officer of the operation. The Claimant was recommended to her by a co-Director by the name Louis Pope, a co-founder of the Respondent. She did not participate in the recruitment.

She played an oversight role and leading the Board in that respect.

She told the Court that the Claimant and the Chief Executive Officer Mr. Adet, did not have a good working relationship.

The CEO told her that the Claimant was not doing well in her job, and had a lot to learn. He was not very complimentary of her performance as time went by.

18. Mr. Louis Pope, called her severally stating that he was not happy with the way the Claimant was being treated by the CEO. Louis asked her who she would prefer as between the two, and she opted for the CEO and told Louis to tell the Claimant to slow down and be submissive to Mr. Adet. A meeting was floated to resolve the issue.

The Claimant also demanded a higher pay than she was getting and Mr. Louis Pope agreed to top up her pay from his organization.

She told the Court that the Claimant visited Pope regularly and she was not sure if they had a love relationship.

19. She told the Court further that the Credit and Governance Committee met to discuss the deteriorating Credit Portfolio and the relationship between the Claimant and the CEO.

At that meeting held on 30<sup>th</sup> June 2012, it was decided to dismiss the Claimant from her employment.

A Board meeting was held on 4<sup>th</sup> July 2012 wherein the Credit and Governance committee's report on the Credit Committee portfolio was tabled and deliberated upon.

20. The relationship between the Claimant and Mr. Pope came into focus at the meeting. Neither of the two attended the meeting. The Board ratified the decision to dismiss the Claimant from employment forthwith.

She was subsequently offered employment by Mr. Pope in his organization.

She said that Mr. Pope's involvement in recruitment of the Claimant presented a conflict of interest since they had a close relationship. The CEO was in the panel that recruited her.

She eventually removed Mr. Pope from the Board as she was unhappy with him on these matters.

She denied that the Claimant was solely dismissed because of her relationship with Mr. Pope. She however said that Mr. Pope was a disruptive influence on the Claimant hence she would not listen to the CEO Mr. Adet hence she had to be sacked.

21. Though she did not dispute that the profitability of the Respondent had risen during the Claimant's tenure, she said that alone was simplistic.

She admitted that the Claimant was not notified that her conduct and performance were to be discussed by the Credit and Governance Committee nor was she called to explain her case on the issues raised against her. She was not called to appear before the Board also. The decision was taken in her absence in the best interest of the Respondent she told the Court.

22. She was unable to show how the portfolio had deteriorated stating that she was not a technical person. She stated that the indicators are that the portfolio at risk had increased. She agreed that the Claimant had raised many issues on particular credit officers and had recommended disciplinary action to the CEO.

She said that she was satisfied with the CEO's explanation and therefore the recommendations by the Claimant were not implemented.

23. She refused to involve the police as proposed by the Claimant stating that she required evidence before she could do that. She decided to get her dismissed instead to remove the conflict between her and the CEO.

She insisted that the dismissal was lawful and justified. She had served for only 6 months. She was paid all her dues except the top up of Kshs. 70,000/= which came from Mr. Pope.

24. PW2 was the CEO Adet Kachi. He told the Court that the Claimant was introduced to her by Mr. Pope in the year 2010.

Mr. Pope recommended her for employment by the Respondent and his influence during the interviews led to her recruitment though she did not have the requisite 4 years experience required in micro-finance operations for the position. She however met the Academic qualifications.

She wanted to be paid Kshs.250,000 per month as salary but was offered Kshs.180,00/= by the Respondent. Mr. Pope offered to top up the difference. The top up was paid as a bonus and this was provided in the contract in the sum of Kshs.70,000/= per clause 3.2 and per clause 3.4 the bonus was payable by Asante Foundation, owned by Mr. Louis Pope. The Respondent never paid the Bonus and therefore cannot be liable in that respect.

She started work in April 2011.

25. The CEO told the Court that he was responsible for supervising her and ensuring that she settled well in her job. She was commissioned on 3<sup>rd</sup> may 2011 upon completion of the probation.

She had specific deliverables stated in the Annual Plan for 2011 and guided by a three (3) months performance framework. In terms thereof she was required to increase the loan portfolio to Kshs.243 million by end of the year 2011.

He admitted that it was his responsibility to maintain the portfolio at risk so that it did not exceed 2% by end of 2011 and to grow the loan clients to 17,400. Customer awareness of products and costs was also a key deliverable and to achieve a 60% rural community coverage.

This had not been achieved by the end of the year 2011.

26. The loan portfolio was Kshs.209 million as opposed to 242 million as at the time of her dismissal and the portfolio at risk was 3.4% as opposed to 2%. The Claimant had spent little time at work because she was commissioned on 1<sup>st</sup> June 2011 and was expectant by end of September 2011 hence had to go for maternity leave for 4 months. She reported back in mid March 2012 and was dismissed in June 2012.

27. The Claimant was not responsive to the performance reviews and directions and the portfolio quality was deteriorating. He corresponded with her on email on the matters for example on 15<sup>th</sup> July 2011 but there was no visible effort to improve. She had spent about 6 months at work in 2011 and 3<sup>1/2</sup> months in 2012 excluding maternity leave.

He told the Court, he initially believed in her and their relationship was amicable but this changed as time went by. She did not go to the field to supervise the staff and he instead went out himself. She was pregnant and he thought this affected her and did not put a lot of pressure on her. They argued frequently and according to him she was not focused on her work. She kept on bad mouthing him and he received feedback on this from Mr. Louis Pope. He requested for a meeting to discuss the issues raised by the Claimant with him.

28. The Board therefore in view of the above decided to terminate her services on 4<sup>th</sup> July 2012 upon considering the report of the chairperson of the Credit and Governance Committee. This to him was done in the best interest of the Respondent.

According to him the allegations of fraud she made were unfounded. She was only keen to look for faults on others whereas she herself was not performing.

29. He however admitted that, the financial rating of the Respondent had improved from grade 'C' to 'C+' in a period of two (2) years.

30. A further admission was that, she was not given a formal warning and she was not paid in lieu of notice. Her gross pay was Kshs.196,706.55 upon termination.

The salary of Kshs.262,000/= in her claim is not correct. He told the Court that the termination was lawful and fair.

31. Under cross examination, he agreed that he was the CEO and therefore was responsible over all for the performance of the Respondent including that of the Claimant and her team.

He denied that he victimized her for being pregnant and going on maternity leave as soon as she had been commissioned.

He said that he decided not to take action on her allegations of fraud as there was no evidence. He also denied that he was shielding specific officers with whom he colluded to fleece the Respondent.

32. He admitted that the Claimant was not charged with any offence of misconduct or non-

performance. She was not asked to show cause nor did she appear before the Credit and Governance Committee and the Board to defend herself before being dismissed. He denied that she was solely dismissed for being close to Mr. Louis Pope who the CEO and the chairperson did not like.

She was not paid in lieu of notice upon dismissal because she sued the Respondent.

He concluded that even if there was fraud it was up to the claimant to put systems in place to prevent it and urged the Court to dismiss her claim with costs.

33. **Conclusions of fact**

The Court has evaluated the aforesaid evidence and has arrived at the following conclusions of fact;

- a. The bad blood between the CEO and the Claimant led to the decision by the chairperson, that one of them had to go and that decision went against the Claimant.
- b. The credit and Governance Committee and the Board simply ratified that decision which had already been taken by the chairperson.
- c. That the Claimant did not receive any warning, charges, nor opportunity to be heard on the issues that led to her dismissal.
- d. That the fallout between Mr. Louis Pope and the chairperson, got the fate of the Claimant sealed because in the words of the chairperson he was a bad influence on the Claimant.
- e. The Audit reports for the relevant period indicate an overall improvement of the Credit portfolio and the volume of business and profit margin for the Respondent.
- f. The CEO did not implement virtually all the recommendations by the Claimant to improve on the risk ratio and stop the alleged fraud mainly due to the perennial differences between himself and the Claimant.
- g. The chairperson took a subjective view on the matter in favour of the CEO as against the Claimant and the evaluation of the overall situation including the negative influences on the risk ratio was not objective.
- h. It is the Court's view that the reason for the summary dismissal of the Claimant was not valid.
- i. The Respondent did not follow a fair procedure in arriving at the decision to summarily dismiss the Claimant.
- j. The gross salary applicable to the Claimant is less the Kshs. 70,000 bonus that was paid by Mr. Louis Pope.

34. **The law**

*Section 37(5)* provides that, it is upon the Claimant to establish that a wrongful dismissal took place and once that happens, the burden shifts to the Respondent to show that the reason for the dismissal was justifiable.

The Court finds that the Claimant has discharged her onus of proof on a balance of probability and the Respondent has failed to discharge the evidentially burden of rebuttal.

35. Accordingly, the summary dismissal of the Claimant was unfair contrary to *Section 45(1)* of

the Employment Act in that it violated the provisions of *Section 45(2)(a)* in that the employer failed to prove that the reason for the dismissal was valid and furthermore, it is clear from the evidence before Court that the dismissal also violated *Section 45(2)(c)* in that the employer failed to show that the termination was in accordance with a fair procedure.

36. **Remedy**

The Respondent admitted that though it had the intention to pay the Claimant one month's salary in lieu of notice, it failed to pay once the Claimant came to Court.

This explanation is not genuine because the payment should have been immediate upon termination.

The Court awards the Claimant one month's gross salary in lieu of notice in the sum of Kshs.196,706.75.

37. **Compensation**

The Court having found that the dismissal was both substantively and procedurally unfair, also finds that the summary manner in which it was done aggravated the circumstances. That she had worked for a short period and was offered alternative employment almost immediately, hence the ensuing loss and damage was mitigated.

38. *Section 49(1)(c)* provides for a maximum compensation of 12 months' gross salary. Taking into account all the circumstances of this case, including the fact that the CEO appears to have taken a negative view of the Claimant due to her pregnancy immediately upon her recruitment, the Court takes a serious view of the matter and cautions against such attitudes especially by an employer whose core business was to improve the lives of rural women in the country.

39. The Court awards the Claimant six 6) months gross salary as compensation in the sum of Kshs.1,180,240/=.

The total award is Kshs.1,375,946.75.

The Respondent is also to pay the costs of the suit incurred by the Claimant.

**Dated and Delivered at Nairobi this 16th day of April 2014.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**