



**REPUBLIC OF KENYA**

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

**CAUSE NO. 87 OF 2011**

**OLGHA AUMA ADEDE.....CLAIMANT**

**VERSUS**

**NEW KENYA CO-OP CREAMERIES LTD..... RESPONDENT**

**JUDGMENT**

By a memorandum of Claim dated 25<sup>th</sup> January 2011 and filed in court on 26<sup>th</sup> January 2011 the Claimant seeks the following orders:-

- a. That the Honourable court do find that the termination of the Claimant's employment to be unfair and order the reinstatement of the Claimant without loss of any benefits and instant payment of all accrued benefits.
- b. Alternatively:-
  - i. Compensation for wrongful termination equivalent to 12 months gross remuneration for loss of employment.
  - ii. Terminal benefits in accordance with the law Employment Act) and the contract of service , including total remuneration in lieu of the period of notice.
  - iii. The payment of the Claimant's remuneration for the unexpired period of her contract of service.

These demands to be worked out as follows:-

1. Half salary for the months of June-August 2010	Kshs.	489,000.00
2. 2 days salary for the month of September 2010	Kshs.	17,666.66
3. Pending leave days - 69.5 days	Kshs.	613,916.66
4. 3 months' pay in lieu of notice	Kshs.	795,000.00
5. Gratuity for 3 years at 31%	Kshs .	2,957,400.00
6. 12 months gross wages as compensation	Kshs .	3,180,000.00

For wrongful termination

7. Unexpired period (28 months) Kshs. 7,420,000.00

**Total** Kshs. 15,472,983.32

The Claimant's claim is for the total sum of Kshs 15,472,983.32 less the Kshs. 1,261,224.40 paid into the Claimant's account bringing the total to Kshs. 14,211,758.92 being outstanding remuneration and terminal dues. And the Claimant claims the same from the Respondent.

- c. Interest on (b ) above at court rates until payment in full.
- d. Certificate of Service.
- e. Costs of the Claim plus interest thereon.
- f. Any other relief as this Honourable Court may deem fair and just.

The Respondent filed its Response on 1<sup>st</sup> February 2011 but was granted leave to withdraw the same by the court on 7<sup>th</sup> July 2011. The Respondent filed another Response to the claim on 23<sup>rd</sup> November 2011.

This case was originally heard by Justice Mukunya on 22<sup>nd</sup> May 2012 when the Claimants testimony was taken. The case was re-allocated to me after the retirement of Justice Mukunya and with the consent of the parties, continued with the hearing of the Respondents evidence.

### **Claimant's Case**

The Claimant testified that she was employed by the Respondent as head of Sales and Marketing on 18<sup>th</sup> December 2006 on a 3 year contract which was renewed on 1<sup>st</sup> December 2009. On 7<sup>th</sup> June 2010 she was given a letter of suspension for reasons that she had involved herself in questionable transactions leading to the loss of business of the company. She was alleged to have sold 1000 bags of milk powder which she stated was a normal sale. The sale was the subject of an audit which did not mention any loss to the company. She responded to the suspension letter on 21<sup>st</sup> July 2010. She was also questioned by the CID and recorded a statement but was never charged with any criminal offence. She was served with a letter to show cause dated 9<sup>th</sup> August 2010 which she responded to on 11<sup>th</sup> August 2010. The letter to show cause had different allegations from the letter of suspension. On 2<sup>nd</sup> September 2010 she received a letter of termination. The reasons for termination in the letter was failure to execute her duties diligently. She challenged her termination by letter dated 13<sup>th</sup> September 2010. She was paid Shs. 1,261,224.40 as terminal benefits.

She was never given an opportunity to appear before the Respondents disciplinary committee. The Respondent which is a State Corporation failed to comply with a circular dated, 24th May 2010 giving guidelines on how to handle matters on corruption and provided for one month's suspension yet the claimant was suspended for 3 months.

The Claimant prayed for payment of Shs. 14,211,758.92 as tabulated in the memorandum of claim less Shs. 1,261,224.40 that she was paid. She also prayed for issue of certificate of service and costs.

### **Respondent's Case**

RW.1 MILCAH GATHONI MUGO the Respondents Company Secretary testified that she knew the Claimant as they worked together for the Respondent for about 3 years when the Claimant was Head of Sales and Marketing from 2008 to 2010. The Claimant was on a 3 year contract which had a clause on termination of the contract. The contract was renewable. The contract provided for termination notice of 3 months or payment in lieu of notice by either party. The contract did not have provision for giving of reasons for termination. Around June 2010 there was information sent to some Board members and to RW 1 who was at the time the Acting Managing Director touching on various departments including Marketing department. The Board decided to carry out investigations through an external committee. The Committee was comprised of members from the parent ministry of Co-operative Development and the Central Bank. The investigations began in June 2010. Various employees including the Claimant were suspended. RW1 signed the suspension letters in her capacity as the Acting Managing Director. A few of the complaints were mentioned in the Claimants suspension letter, which also sought her co-operation.

The Claimant responded to the suspension letter while investigations were ongoing. The Claimant was later given a letter to show cause which she responded to on 11<sup>th</sup> August 2010. In her response she gave both explanations and a defence. She raised issues where she was not at fault. She appeared before the investigation Committee which completed it's investigations at the end of August 2010 . The report of

the Committee was submitted to the Board. The Board decided to take action against the people who were adversely mentioned in the report and recommended the termination of some and dismissal of others. The claimant was one of the people adversely named in the report and the Board recommended her termination. The termination was communicated to her by letter dated 2<sup>nd</sup> September 2010. She was paid all her terminal dues. She was given a fair hearing.

The parties filed written submissions after close of the hearing.

### **Courts Decision**

I have considered the oral evidence adduced by the parties in court, the pleadings and annexures thereto, the written submissions and the authorities referred to by the parties.

The issues for consideration are :-

1. **Whether the termination of the Claimant's employment was unfair.**
2. **Whether the Claimant is entitled to the prayers sought**

#### **1. Was the termination of the claimant's employment unfair?**

The claimant testified that the termination of her employment was unfair as she was never given an opportunity to appear before the respondent's disciplinary committee, the Respondent did not comply with the government circular dated 24<sup>th</sup> May 2010 and the reasons given in her letter of suspension, the letter to show cause and the letter of dismissal were all different. She further denied that she was guilty of any wrongdoing, that she was accused of selling powdered milk which she did regularly with the approval of RW1 who was then Acting Managing Director. She further submitted that she was never charged in court with any criminal offence.

The Respondent on the other hand submitted that the claimant's termination was lawful, that she was given an explanation of the reasons for suspension and termination at the time of handing over the letters to her by the acting Managing Director, that she appeared before the disciplinary Committee and also defended herself in her response to the letter to show cause. The Respondent further submitted that the claimant's contract provided for termination of her employment by either party and did not provide for giving reasons for termination provided either notice was given on payment made in lieu of notice.

**Section 26 of the Employment Act** provides that the terms and conditions in the Act constitute basic minimum terms and conditions of service and any terms agreed by the parties in a collective bargaining agreement or contract may only replace those in the Act where they are more favourable.

**Section 41 of the Employment Act** provides that an employer must give an employee a hearing where it is contemplated to terminate or dismiss the employment of the employee. The hearing must be with notification in writing and the employee must be given an opportunity to be accompanied by either a union shop floor official or a fellow employee.

The Claimant in this case was never given a hearing in terms of **Section 41**. The Board sat on its own, considered the report of the investigation committee and then handed down the sentence through the Managing Director without giving the employee any specific charges against her or giving her an opportunity to defend herself before the Board. The argument that the Claimant's contract did not provide for giving reasons is against the provisions of Section 41. Section 26 only allows variation of the law where the variation introduces terms better than what the law provides.

For these reasons I find that the termination of the claimant's employment was unfair as she was never given an opportunity to defend herself as provided in Section 41 of the Employment Act.

#### **2. Is the claimant entitled to the prayers sought?**

I will consider the prayers in the order in which they were made in the memorandum of claim.

**i. Reinstatement**

Reinstatement is provided for under Section 12 of the Industrial Court Act 2011 and Section 49(3) (a) of the Employment Act. The Industrial Court Act provides that reinstatement may only be granted within 3 years of the date of termination or dismissal. Having been terminated on 2<sup>nd</sup> September, 2010, it is more than 3 years and the remedy is no longer available to the claimant.

The court has the option of ordering re-engagement but the claimant was on a fixed term contract which would have expired by now. In any event the circumstances under which she was terminated would not auger well with an order for re-engagement, or re-instatement. For these reasons the court declines to grant the prayer for reinstatement.

**ii. Half salary for the months of June to August 2010?**

The Claimant admitted having been paid.

**iii. Two days salary for September 2010?**

The Claimant admitted having been paid.

**iv. Pending leave 69.5 days?**

The Claimant admitted having been paid.

**v. 3 months salary in lieu of notice?**

The claimant admitted having been paid.

**vi. Gratuity for 3 years at 31%?**

The claimant alleges she is entitled to gratuity for the entire contract period of 3 years including the unexpired portion while the Respondent's position is that the gratuity was only payable upon completion of the contract and that having served for less then one year of the 3 year contract term the claimant is not entitled to payment of gratuity.

**Section 49(1)(b)** provides as follows:-

***(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract;***

Gratuity was payable upon completion of the contract or termination after completion of 12 months service under the contract. I find that since the Claimant was serving on a second term of her contract, she had actually worked for more than 3 years and is therefore entitled to gratuity for the period for which gratuity had not been paid from 1<sup>st</sup> December 2009 to 30<sup>th</sup> August 2010.

I therefore award her Shs. 739,350/- being gratuity for the period she served under the new contract.

**vii. Compensation**

The Claimant had worked for just under 4 years. Her contract was for 3 years and was renewable. Indeed it had been renewal once and she had legitimate expectation of it's further

renewal.

Under Section 49 (1) (c ) she is entitled to compensation once the court finds that the termination of her employment was unfair.

I have considered the grounds in Section 49 (4) and specifically the length of service of the Claimant and consider 6 months compensation as reasonable in the circumstances.

I therefore award her Shs. 1,590,000 being 6 months gross monthly wages.

viii. **Payment for unexpired portion of the contract.**

The Claimant has prayed for payment of Shs 7,420,000 being payment for the unexpired 28 months of her employment contract. The Respondent submits that this is not payable as there is no legal basis for the same. That the Claimant's contract does not provide for payment of the remainder of her contract term should it be terminated before expiry and that the court cannot rewrite the contract for the parties.

I agree with the Respondent. Neither the law nor the Claimant's contract provide for payment for the unexpired term of a fixed term contract. The compensation provided by the Employment Act is all an employee is entitled to on the grounds of unfair termination of her employment. In the case of **D.K Njagi Marete V. Teachers Service Commission [2013] eKLR**, Justice Rika had this to say about anticipatory salaries –

*“A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy. The Claimant has moved on after the unfortunate and capricious decision of the TSC. He no longer renders any Labour to the Teachers Service Commission. The Employment Act 2007 requires he moves on as he has done, and mitigated the loss of his job as the Senior Legal Principal Officer of the TSC. He indeed more than mitigated that loss; he secured an appointment as a Judge of a Superior Court in the Kenyan Judiciary, about three years after the retirement from the TSC. It would therefore not make any sense, to grant salaries and allowances for 11 and would offend the principle of a fair go all round.”*

In the **High Court Civil Case No. 1139 of 2002 between Menginya Salim Murgani v. Kenya Revenue Authority**, Hon Justice Ojwang' stated that it would be injudicious to found an award of damages upon sanguine assessments of prospects. In that case the plaintiff was 38 years old when his contract of employment was terminated. He asked for remuneration he would have received between the age of 38, and the expected mandatory retirement age of 55 years. The Court observed that the plaintiff was able bodied, intellectually and professionally well- endowed man, likely to find occupational engagement outside the defendant's employ. The Court applied the principle, then confined to civil law, that an aggrieved party has the obligation to mitigate his or her losses. An aggrieved employee must move on, and not sit back waiting to enjoy anticipatory remuneration.

The High Court observed that the breach of the employment contract coalesced into one broad damage, and went on to award damages under one head. This High Court decision, agrees with the decision of this Court in the case of *Maria Kagai Ligaga*, where the Court upheld the principle of fair go all round; refused to grant anticipatory salaries and allowances and declined to award multiple damages. The rationale was that employees must not be encouraged to replicate injuries, and multiply remedies.

In the present case the Claimant's contract provided for payment of gratuity only for the period served. The law as it now stands does not provide for anticipatory damages and indeed Section 49 (4) (l) provides that in awarding compensation the court must take into account “any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination”.

For these reasons this prayer for anticipatory salaries is dismissed.

**ix. Costs and Interest**

Having found that the Claimant was unfairly terminated, she will be paid her costs by the Respondent . She will also be entitled to interest at court rates from date of judgment.

Orders accordingly.

Read in open Court this 9<sup>th</sup> day of May, 2014

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

Ms. Ahmed holding brief for Mr. Wachira for Claimant

Ms. Kiragu holding brief for Ms. Njenga for Respondent