



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO. 2560 OF 2012**

ESTHER Omutanyi Wakhungu .....CLAIMANT

VERSUS

KUEHNE & NAGEL LIMITED .....RESPONDENT

**JUDGMENT**

By a Plaint dated 21<sup>st</sup> December 2012 and filed in Court on 24<sup>th</sup> December 2012 the Claimant herein Esther Omutanyi Wakhungu prays for the following orders:-

- i. A permanent and mandatory injunction stopping the defendant from terminating the services of the plaintiff without following the due process of Law.
- ii. General damages for unlawful procedure of termination.
- iii. Twelve months' salary for breach of law on termination.
- iv. Bonus for the year 2012.
- v. A decision that the process of dismissal or terminating of the plaintiff is arbitrary and illegal.
- vi. In the alternative severance pay for 8 years.
- vii. In the alternative general damages for unlawful termination or dismissal.

Together with the Plaint the Claimant filed a notice of motion under certificate of urgency seeking the following orders:-

1. That this application be certified urgent in the first instance and be heard during Christmas Vacation.
2. That application be heard *ex parte* at the first instance.
3. That a temporary injunction be issued against the Defendant from terminating the services of the Plaintiff pending the hearing and determination of this suit.
4. That the honorable court to issue an injunction against the Defendant from terminating the services of the Plaintiff pending the hearing and determination of this suit.
5. That costs of the application be in the cause.

The Notice of Motion was heard by Justice Marete on 24<sup>th</sup> December 2012 and he issued orders of temporary injunction and fixed the hearing of the notice of motion on 3<sup>rd</sup> January 2013.

The parties appeared before me on 3<sup>rd</sup> January 2013 when the Respondent informed me that the

Claimant's employment had already been terminated on 24<sup>th</sup> December 2012 before the court orders were issued. The Respondent filed a Replying Affidavit of Catherine Kibera in opposition to the notice of motion.

After hearing the parties on 3<sup>rd</sup> January 2013 I ordered status quo as at 24<sup>th</sup> December 2012 before issuance of the court order pending interpartes hearing of the notice of motion on 4<sup>th</sup> February 2013.

The Respondent filed its Responses to the memorandum of claim on 26<sup>th</sup> February 2013 in which it averred that the employment of the Claimant was terminated after a disciplinary process in accordance with the law on 13<sup>th</sup> December 2012.

The parties appeared before me again on 4<sup>th</sup> February 2013 and agreed to consolidate the issues in the Notice of Motion with the claim and the claim was fixed for hearing on 27<sup>th</sup> February 2013 when however both parties were not ready to proceed. The case was mentioned on 8<sup>th</sup> April and fixed for hearing on 3<sup>rd</sup> June 2013.

On 3<sup>rd</sup> June 2013 the parties recorded settlement as follows:-

- i. That the Respondent pays the Claimant Kshs. 183,000 being all days worked up to and including 13<sup>th</sup> December 2012, 1 months' basic salary in lieu of notice, severance pay at 20 days' pay for every completed year of service of 7 years.
- ii. That the Court determines the prayer two on general damages for unlawful termination, bonus for the year 2012.
- iii. That the case be canvassed by way of written submissions.

The parties thereafter filed their written submissions in respect of the two issues that is general damages and bonus.

In the written submissions the Claimant prays for the following:-

1. General damages for unlawful procedure of termination;
2. 12 Months' salary for breach of the Law of Termination;
3. Bonus for the year 2012;
4. A decision that the process of dismissal or termination of the plaintiff was arbitrary and illegal;
5. General damages for unlawful termination or dismissal;

The Claimant submits that she was employed by the Respondent as a clerk on 18<sup>th</sup> June 2005, she worked diligently and was always awarded Shs. 18,000/- every year for good service except in 2012. That on 24<sup>th</sup> October 2012 she received a show cause letter which she responded to. On 12<sup>th</sup> November 2012 she was issued another show cause letter which she responded to, but the Respondent arbitrarily decided to terminate her employment. She submitted that the reasons for termination of her employment were not valid. She submitted that it was Mr. Henry Musau who failed to inform the client that goods required inspection, that it was not her duty to take measurements on dimension of cargo shipment as this was done by Kenya Revenue Authority and Kenya Ports Authority without allowing her into the warehouse and therefore she cannot be blamed for the wrong measurements.

On the allegation that the Claimant supplied the wrong code for another consignment leading to a penalty of Shs. 1.7 million the Claimant submitted that she was never given an opportunity to defend herself against the claim and further that it was the mistake of Mr. Daffa Mathias who declared that he was importing a water purifying plant when in fact it was an industrial effluent treatment and discharge system. The Claimant further submitted

that she was overworked and had to miss classes in preparation for her exams. The Claimant further alleges that the Respondent sent her letter of termination to the wrong address and sent her terminal

benefits of Shs. 50 through her Mpesa account which is proof of malice.

The Claimant further alleges that the disciplinary procedure was flawed for the following reasons:-

1. That the Claimant was given one warning as opposed to three warnings as provided for by the code of conduct of the Respondent.
2. That she was given insufficient Notice on mobile phone of 3 hours to attend a disciplinary meeting on the 3<sup>rd</sup> day of December 2012 at 4.00 pm.
3. That the letter calling her for the meeting was forwarded to her in the corridors of the Respondents business premises a few minutes before the meeting.
4. That she was not allowed to call another employee during the disciplinary meeting contrary to Section 41 of the Employment Act.
5. That the meeting of 3<sup>rd</sup> December 2012 was conducted in a kangaroo manner.
6. Allegations were made in the disciplinary meeting without affording her a right to respond.
7. She was not allowed to consult a lawyer.
8. The issue of the water purifying machine was deliberated in her absence after she had left the meeting and without giving her an opportunity to defend herself.
9. The issue of water purifying machine was used as a ground in her termination despite her being denied an opportunity to explain her decision.

10. The letter of termination was sent to the wrong address of

service despite the fact that the Claimant had given the proper

address of service.

The Claimant prays for orders as follows:-

- a. General damages of Shs. 2,000,000
- b. Kshs. 384,000 being 12 months' salary as compensation for wrongful termination
- c. Bonus for 2012 in the sum of Kshs. 18,000/-
- d. Compensation for breach of constitutional provision of fair labour practices of Kshs. 1,000,000
- e. Severance pay for 8 years of Kshs. 500,000
- f. Costs of the Claim
- g. Any other remedy the court may deem fit to grant.

In the written submissions the Respondent avers as follows:-

1. There is no valid claim as the Claimant commenced her case by way of plaint thus the claim is fatally defective and should be struck-out.
2. The Claimant used a wrong code to issue import declaration form to a client Challow Drive Investments Limited for clearing imported goods leading to a penalty of 15% of the value of the goods which the Respondent had to incur.
3. The Claimant was issued a show cause letter on this and for lying about completion of her course for which she was sponsored by the Respondent. The Claimant's response was unsatisfactory and she was issued a warning letter for the two offences on 6<sup>th</sup> November 2012.
4. The Claimant was again involved in another disciplinary case when she gave wrong measurements for a container as 17 cubic meters instead of the correct measurement of 6 cubic meters leading to inflated storage charges by Kenya Ports Authority which was corrected after someone else was sent by the Respondent to take the measurements.
5. The Claimant was issued with a show cause letter on 12<sup>th</sup> November 2012 and she responded on 15<sup>th</sup> November 2012. By a letter dated 29<sup>th</sup> November 2012 the Claimant was invited for a disciplinary hearing. The letter was read out to her on phone as she was away on leave. The letter was issued to her on the day of the disciplinary hearing.

The letter reads in part:-

“Following the above and considering that this happened hardly one week after having been issued with a warning for carelessness and negligence of duty, please note that management has once again viewed this serious lapse on your part in the execution of duties assigned to you and is considering serious disciplinary action against you. The above amounts to gross misconduct that calls for immediate termination of your services as stipulated in the Employment Act 2007.

You are therefore summoned to appear before the disciplinary committee named below for the above mentioned meeting on Monday, 3<sup>rd</sup> December at 4.00 pm at the Head office for further scrutiny of the subject matter and determination of your case. We also wish to remind you of your right to representation by any other employee of your choice.

Please be guided accordingly and keep time”.

It was further submitted for the Respondent that the Claimant did not give satisfactory response to the issues raised following which the Respondent decided to terminate her employment contract on 17<sup>th</sup> December 2012.

The Respondent submitted that the Claimant is not entitled to damages and bonus as her employment was terminated legally while bonus is a discretion of the management, and her very poor record would not warrant her to be paid bonus.

The Respondent also submitted that at the disciplinary hearing the Claimant was tasked to explain yet another issue concerning her work regarding wrong IDF its code on another consignment causing the client to incur demurrage excess costs of USD 6000. The Claimant was further accused of not disclosing that she failed in her exams.

I have considered the pleadings and documents filed by the parties, the written submissions and the relevant law.

The parties hereto recorded a consent in which the only issues left for the determination of the court are general damages for unlawful termination and bonus.

Before I can decide whether or not the Claimant is entitled to damages for unfair termination, I have to determine whether the termination of her employment was unfair.

Termination of employment is governed by Section 41 and 43 of the Employment Act. Section 41 provides for fair procedure while Section 43 provides for validity of reason.

The Respondents code of conduct also has provision for disciplinary procedure.

Paragraph 5 provides for an employee to be represented by a shop steward but also gives the employee the right to be represented by “any other representative”.

Paragraph 6 provides that an employee should be given at least 24 hours’ prior notice of holding of a disciplinary inquiry meeting. The Respondents code further provides at the two bullets under paragraph 56 that the HR department will arrange a disciplinary hearing if this action is warranted and issue written confirmation to the employee of the allegations and details of when the hearing will take place.

In the present case both parties agree that the Claimant was on leave when the disciplinary hearing was arranged and the letter informing her about the hearing which was to take place on 3<sup>rd</sup> December 2012 was dated 29<sup>th</sup> November 2012 and sent to a wrong address. She was therefore informed about the hearing by text message on her cellphone at 12.26 pm for a meeting to take place at 4.00 pm. The Claimant was only handed the letter inviting her to the meeting when she arrived for the meeting on 3<sup>rd</sup> December 2012

which was a Monday. The letter must therefore have been sent on Thursday to her office within the Respondents premises.

In the case of **Rebecca Ann Maina & 2 others V. Jomo Kenyatta University of Agriculture and Technology [2014] eKLR**, Justice Ndolo stated that “in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.”

Would the process used in the present case pass the test of fair procedure?

I do not think so. In the 1<sup>st</sup> place the Claimant was on leave. No reason has been advanced by the Respondent as to why they could not wait for the Claimant to report back on duty before the disciplinary hearing could take place.

Secondly, the address in the letter informing the Claimant about the hearing was to her address at work in spite of the fact that she was on leave.

Thirdly, the letter does not have clear charges. It is argumentative. It gives the Respondent's verdict on the conduct of the Claimant. It further reminds the Claimant of previous charges against her and threatens her with immediate termination of her employment. It summons her to appear before a disciplinary Committee “*for further scrutiny of the subject matter and determination of your case.*” It does not invite her for a hearing of the case

Again, the Claimant was not informed about the disciplinary hearing until about 3 hours before the time of the hearing. This was done by mobile phone.

From the foregoing, the Claimant was not given sufficient time to prepare for the hearing of her case or to identify and obtain representation by either a colleague or a union official.

All these reasons point to the fact that there was no fair procedure. The Respondent did not comply with Section 41 of the Employment Act or its own disciplinary procedure.

I therefore find that the termination of the Claimant's employment was unfair. She is therefore entitled to compensatory damages.

The Claimant has prayed for damages in the sum of Shs. 2 million. No explanation has been made in support of the amount claimed.

Both the Employment Act at Section 49 (1) (c) and the Industrial Court Act Section 12 (3) (v) provide for compensation. Section 49 (1) (c) provides for a maximum of 12 months' salary.

I have considered the circumstances under which the Claimant was terminated and the provisions of Section 49 (4) of the Employment Act.

In my opinion 12 months' salary would be reasonable compensation in view of the circumstances of this case. The Claimants last gross salary was Shs. 32,302.00. Twelve months' salary would therefore be Kshs. 387,624.00 which I award the Claimant.

The second issue for determination is whether the Claimant was entitled to bonus for year 2012.

The Respondent has not contested that the Claimant used to receive annual bonus of Shs. 18,000.00 every year. The Claimant contends she is entitled to the same while the Respondent states that in view of her bad record she would not be entitled to bonus. The Respondent has not shown that bonus was dependent on performance and that some employees were paid bonus while others were denied at the discretion of the

employer.

The termination of the Claimant's employment having been found to be unfair, the Respondent cannot deny her payment of the bonus on grounds of performance. I find that she is entitled to bonus.

I therefore award the Claimant the sum of Shs. 18,000 being bonus for year 2012.

The result is that enter judgment for the Claimant in the total sum of Shs. 405,624. The Respondent will also pay the Claimant's costs of the suit and interest on decretal sum from date of judgment.

Orders accordingly.

**Dated and delivered at Nairobi this 18<sup>th</sup> Day of July 2014**

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

**In the presence of:**

**No appearance for Claimant**

**No appearance for Respondent**