



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO 486 OF 2011**  
**GRACE KAVERENGE KENDELI .....CLAIMANT**  
**VS**  
**LABOREX KENYA LIMITED.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant's claim against the Respondent in this case is for wrongful and unfair dismissal and failure to pay terminal dues. The Claimant filed a Memorandum of Claim and a Supplementary thereof while the Respondent filed a Response. The matter proceeded to full hearing on 12th April and 20th May 2013, with Mr. Kiarie Mungai appearing with Mr. Nyasimi for the Claimant and Mr. Nyaanga instructed by Mwaniki Gachoka & Co Advocates appearing for the Respondent. The Claimant testified on her own behalf and Racey Caroline Muchilwa testified for the Respondent. Both parties filed written submissions.

**The Claimant's Case**

2. The Claimant was employed by the Respondent as a Sales Representative on 2nd January 2008. On 31st January 2011, the Respondent terminated the Claimant's employment. The Claimant testified that there were no clear reasons for her termination. She told the Court that on 29th January 2011, she was called by the Respondent's Marketing Manager- Consumer Business, Ms. Muchilwa who told her that she was not needed in the marketing team. Muchilwa instructed the Claimant to proceed to the Human Resource Department where she was issued with a termination letter.

3. The Claimant's salary as at the time of her termination was Kshs. 26,015. Prior to her termination, the Claimant was not issued with any warning or caution letter. The Claimant claimed to have had a good performance record.

4. The Claimant's claim is as follows:

- a. One month's salary in lieu of notice.....Kshs. 26,015
- b. House allowance.....130,587
- c. Severance pay @ 30 days per year.....78,054
- d. 2 days' pending leave.....1,735
- e. Damages for unfair termination .....312,180
- f. Payment for remainder of service period.....7,804,500
- g. Punitive damages.....150,000
- h. Reinstatement to her former position without loss of benefits
- i. Certificate of service

- j. Costs
- k. Any other relief the Court may deem just to grant

## **The Respondent's Case**

5. In its Statement of Response, the Respondent stated that the employment contract between the Claimant and the Respondent was terminated on 31st January 2011 in accordance with its own provisions and in compliance with the law. The Claimant's employment was terminated on grounds of poor performance following oral and written warnings.

6. During her employment as a Sales Representative, the Claimant was in charge of several sales outlets notably; Tuskys Supermarket, Kilimani Green Grocers and Adamji. Her performance was based on set sales targets in these outlets. One of the Claimant's key performance indicators was to ensure that the outlets under her charge had sufficient stocks. However, on diverse occasions, stock shortages were reported which the Claimant was unable to explain.

7. Racey Caroline Muchilwa testified that the Claimant's performance was below average, an issue Muchilwa had discussed with the Claimant on several occasions. The Respondent produced a warning letter dated 6th July 2010 on failure to perform certain tasks by the Claimant. The Respondent also produced an electronic mail from Emmanuel Nzivo, a Sales Representative based at Mombasa to Muchilwa taking issue with stock-outs at Tuskys Supermarket, which was blamed on the Claimant. A similar issue was raised by Reuben Kangogo, the Medical Supervisor regarding stock-outs in five branches of Tuskys. The Claimant was also reported to have had difficulties with Kilimani Green Grocers.

8. Muchilwa kept raising the issue of performance with the Claimant. A performance review plan was developed to address the deficits in the Claimant's performance. Muchilwa further told the Court that in a bid to support the Claimant, she together with the supplier of one of the brands, Cow & Gate accompanied the Claimant to the field.

9. In December 2010, the Respondent was running a promotion in the Supermarkets and Muchilwa asked the Claimant to follow up on execution at Tuskys Supermarket. Due to the Claimant's failure to do the necessary follow up, the promotion did not run as planned at Tuskys, necessitating remedial action. Muchilwa subsequently wrote to the Respondent's Chief Executive Officer and the Human Resource Officer indicating that she could no longer work with the Claimant due to her poor performance and negative attitude. Before sending out this communication, Muchilwa had explained the issue to the Claimant.

11. Upon terminating the Claimant's employment, the Respondent offered to pay her terminal dues being one month's salary in lieu of notice, service pay and pending leave subject to the Claimant clearing with the Respondent. The Claimant however failed to clear as required. The Claimant also failed to collect her dues in spite of due advice by the Respondent's Advocates. On 5th April 2011, the Respondent on its own motion, forwarded the Claimant's dues less statutory deductions and debts owed to the Respondent and/or the Cooperative Society to the Claimant's Advocates.

## **Findings and Determination**

12. The first issue for determination is whether the termination of the Claimant's employment was justifiable and lawful. It was the Respondent's case that the Claimant's employment was terminated on the ground of poor performance. To support its case, the Respondent produced electronic mail correspondence between the Claimant and her supervisor and other employees of the Respondent.

13. The Claimant on the other hand stated that the reason for the termination of her employment was unclear and that in executing the termination, the Respondent did not follow due procedure.

14. Section 43 of the Employment Act, 2007 provides that:

**(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.**

**(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.**

15. Section 45 (2) of the Employment Act, 2007 provides that:

**A termination of employment by an employer is unfair if the employer fails to prove-**

**(a) that the reason for the termination is valid.**

**(b) that the reason for the termination is a fair reason-**

**(i) related to the employee's conduct, capacity or compatibility; or**

**(ii) based on the operational requirements of the employer and**

**(c) that the employment was terminated in accordance with fair procedure**

16. The first question then is whether the Respondent had a valid reason for terminating the Claimant's employment. The letter of termination dated 31st January 2011 did not disclose the reason for termination. However, from the documentary and oral evidence on record, it was clear that there were serious issues concerning the Claimant's performance. The Court has therefore arrived at the conclusion that the Respondent had a valid reason for terminating the Claimant's employment and that this reason was well within the knowledge of the Claimant. Put another way, the Respondent had substantive justification for terminating the Claimant's employment.

17. The second limb of the fairness test in termination of employment has to do with the procedure adopted in effecting the termination. Section 41 of the Act sets out the procedure for handling of cases of misconduct, poor performance and physical incapacity as follows:

**(1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.**

**(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make**

18. An examination of the correspondence between the Claimant and her supervisor reveals some form of communication on the Claimant's performance. Caroline Racey Muchilwa was obviously very concerned about the Claimant's poor performance. However, apart from electronic mail communication, there was no evidence of any objective appraisal process aimed towards getting the Claimant to improve on her performance.

19. In the case of **Kenya Science Research International Technical and Allied Workers Union (KSRIWU) Vs Stanley Kinyanjui and Magnate Ventures Ltd (Industrial Court Cause No. 273 of 2010)** the Court stated thus:

***“The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee an opportunity to improve over a reasonable length of time. In our view 2-3 months would be reasonable.”***

20. There was no evidence that this was done in the current case. I therefore find the termination of the Claimant's employment unfair for want of due procedure and award her three months' salary in compensation.

21. The Claimant claimed house allowance. Section 31(1) of the Employment Act provides that:

***An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.***

22. There was no evidence that the Claimant was housed by the Respondent and the payslips submitted by the Claimant indicated that she earned only a basic salary. I therefore award the Claimant house allowance at 15% of the basic salary. The Court has adopted the basic salary plus house allowance as the Claimant's salary for purposes of this Award. The Respondent did not produce any leave records to prove that the Claimant had taken all her leave days. The claim for leave therefore succeeds.

23. The final effect of this Award is as follows:

- a) House allowance (3,902x 36 months).....140,472
- b) 3 months' salary in compensation for unfair termination (29,917x3) 89,751
- c) 2 days' leave (29,917x2 days).....1,994

30

**Total.....232,217**

The Claimant is also entitled to a certificate of service. This Award is subject to the Claimant handing over within the next 14 days from the date hereof.

Each party will bear their own costs.

Orders accordingly.

**DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 8TH DAY OF AUGUST 2013**

**LINNET NDOLO**

**JUDGE**

In the presence of:

.....**Claimant**

.....**Respondent**