



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

**CAUSE NO 1664 OF 2011**

**SENSATIONS LIMITED..... CLAIMANT**

**VERSUS**

**CARLENE KALUNDE LOMBO..... RESPONDENT**

**JUDGMENT**

By a Statement of claim dated 23<sup>rd</sup> September 2011 and filed in court on 5<sup>th</sup> September 2011, the Claimant Sensations Limited alleges that the Respondent Carlene Kalunde Lombo was employed by the Claimant on 8<sup>th</sup> December 2008 as Assistant Brand Manager at a basic salary of Kshs.32,000/=. That the letter of appointment provided among others terms and conditions of service for the Respondent to give 1 months notice in advance to terminate her employment contract and in default, to pay 1 months salary in lieu of notice. That the Respondent resigned from employment on 1<sup>st</sup> September 2011 without giving 1 month's notice and has failed to pay 1 month's salary in lieu of notice.

The Claimant further alleges that it has voluntary training where it sponsors its employees to go overseas but the employee has to sign an additional contract binding the employee to remain in the Claimant's employment for at least 12 consecutive months from the date of travel for the training or in default reimburse the Claimant the full expenses included by the Claimant incurred by the Claimant for the training. That the Respondent was sponsored to travel to Greece and signed the additional contract on 20<sup>th</sup> June 2011. That the Respondent travelled on 1<sup>st</sup> June 2011 and the Claimant incurred a total expenditure of Kshs.152,724. That upon the respondents return to the country she tendered her signature letter and quit employment without serving for the minimum period of 12 months. That the Respondent did not refund the cost incurred by the Claimant to sponsor her for training in Greece. The Claimant further alleges that the Respondent owes the Claimant a further sum of Kshs.21,483 being overstated commission and shs.3,721 being the balance of the price of shoes sold to the Claimant on credit at the cost of shs.7,442 on 16<sup>th</sup> July 2011.

The Claimant prays for Judgment against the Respondent as follows;

- a. The sum of Kenya shillings thirty Two Thousand (Kshs.32,000/=) as one month salary in lieu of notice;
- b. The sum of Kenya Shillings One Hundred Fifty Two thousand, seven hundred twenty four (Kshs.152,724/=) as refund for the cost incurred for the trip to Greece;
- c. The sum of Kenya shillings twenty one thousand four hundred eighty three (Kshs.21,483/= as the unpaid over.
- d. The sum of Kenya shillings three thousand seven hundred twenty one Kshs.3,721/= being the balance of the outstanding amount for shoes purchase;
- e. General damages for breach of contract of employment;

- f. Costs of the suit and interests thereon until payment in full,
- g. Any other relief that this Honourable Court may deem just and fit to grant.

The Respondent filed her Response to the Claimant's statement of Claim on 6<sup>th</sup> June 2012. In the Response she admits that she resigned but states it was due to illegal deductions of her salary and due to other unforeseen valid and unavoidable circumstances of a family nature which could not warrant the alleged notice. She avers that the issue of giving 1 months notice or pay in lieu thereof does not arise, is defeated by law and therefore in consequential. She further avers that her contract did not provide for leave relating to unforeseen situations. The Claimant admits she received her salary for August 2011 which was her right. The Respondent denies that she breached her contract or any law as alleged by the Claimant. The Respondent denies that the contract provides for training and studies as alleged by the Claimant, that the additional clause to her contract of employment was presented to her on 20<sup>th</sup> June 2011 and that she never attended any alleged training program after signing the additional clause, and further that the additional clause was not signed by the claimant and is therefore not valid, that she travelled to Greece on 1<sup>st</sup> June 2012. The Respondent further avers that the money spent on her trip to Greece was with regard to her employment activities and the demand for reimbursement is intended to get back at her because of resigning from employment.

In response the claim for overstated commissions the Respondent avers that she did not compute or calculate the commissions, that the same was done illegally without her knowledge and that seeking reimbursement of the same six months down the line is malicious and she cannot be held accountable for the same. The Claimant admits owing shs.3,721 on account of shoes she purchased and she is ready and willing to pay the same.

She prays that the claim be dismissed with costs as it lacks merit, is misconstrued, bad in law and aimed at unjustly enriching the claimant and crippling her financially.

The case came up for the first time on 14<sup>th</sup> March 2012 for the hearing of the Claimant's ex parte application dated 6<sup>th</sup> February 2012. The application was seeking leave to serve the summons and statement of claim through substituted service by way of advertisement in any daily newspaper on the grounds that the Respondent could not be traced for purpose of effecting personal service upon her. The application was heard by Justice Isaac Mukunya (now retired). The application was granted. The case was mentioned on 27<sup>th</sup> June 2012 when Mr. Kingori appeared for the Claimant while the Claimant was present in person. The Respondent was directed to serve her address for service on both the Claimant and the court as she had not given any address for service when she filed her Response to the statement of claim. The case was then fixed for hearing by consent on 23<sup>rd</sup> November 2012 at 10.00 am when the case came up for hearing before me. When the case was called out at 9.00am Mr. Kingori was present but the Respondent was absent. The file was allocated time at 1.30pm. When the case was called out for hearing at 2.28pm both Mr. King'ori and the Respondent were present in court.

The Respondent sought adjournment to enable her seek representation by an advocate. In spite of Mr. Kingori's objections, the court granted the adjournment on the grounds that although the Respondent had ample time to seek legal representation from the time the case was fixed for hearing on 27<sup>th</sup> June 2012 and had kept the claimant waiting in court from 10.00am, she was entitled to legal representation and in any event, the case was coming up for hearing for the first time and it was the first time the Respondent was seeking adjournment and the Respondent condemned to pay the Claimant's advocate's costs. The case again came up for hearing on 26<sup>th</sup> June 2013 when Mr. Kingori was present for the Claimant but there was no appearance for the Respondent. There was also no evidence on the file that the Respondent had instructed an advocate to represent her.

Mr. Kingori informed the court that he had taken the hearing date ex-parte and served the Respondent by registered post through the address of service that she had given to the Claimant upon being directed to do so by the court on 27<sup>th</sup> June 2012.

Having ascertained that the Respondent had been properly served and there was an affidavit of service on

the court record I allowed the Claimant to proceed with its case ex-parte.

The Claimant called one witness BETTY CHEROTICH, CW1 who testified that she is the Human Resources Assistant for the Claimant and that she is responsible for keeping records of all employees among other duties. She was also responsible for organizing training and development of employees, and all trips. The Respondent was employed as an Assistant Brand Manager in 2008 at a salary of Kshs.32,000/= . The Respondent terminated her employment on 1<sup>st</sup> September 2011. She sent an email to their human Resources Assistant giving her reasons for resignation. She did not give notice as required by Clause 7(b) of her employment contract. She did not pay 1 month's salary in lieu of notice. She was sponsored by the company for various trips, one to South Africa in 2010 and another to Greece in 2011.

The conditions for training were that the employee is required to work for the company for 12 consecutive months. She came back from Greece and immediately resigned. She travelled to Greece on 1<sup>st</sup> June and came back on 6<sup>th</sup> June 2011. The company spent a total amount of Kshs.152,724. This included air ticket, accommodation, visa, medical insurance and expenses for taxi in Greece and in Kenya. The Respondent did not refund the money. She also owed the company shs.26,848 as overstated profit on commission. By the time of her terminating she had paid shs.5,365/= leaving a balance of Kshs.21,483. The Respondent had also bought shoes from Company for Shs.7,442. By the time she resigned there was an outstanding balance of Kshs.3,721. CW1 urged the court to give Judgment to the Claimant as prayed in the Statement of Claim.

Regarding the Defence filed by the Respondent CW1 stated that the Respondent did not raise the issue of illegal deductions in her email when resigning because of a family issue she needed to attend to. That Clause 7 (b) of her contract required her to give notice. That the terms of her travel to Greece required her to remain in the employment of the company for 12 months. That the reason why she signed the Additional clause on 20<sup>th</sup> June 2011 was because she was on leave before travelling to Greece and proceeded for the trip directly from leave so there was no opportunity for her to sign. The Respondent was aware about the Clause and signed a similar one when she travelled to south Africa. That the Respondent admits going to Greece. She also admits and agrees to pay money for the shoes, and does not deny owing commission.

I have considered the Statement of Claim and the Reply thereto together with the testimony of CW1 and the documents attached to the Statement of Claim.

The issues for determination is whether the Respondent owes the Claimant 1 months salary in lieu of notice refund of overstated commission, balance of price of shoes and refund of expenses of trip to Greece.

### **1. Notice**

The Respondents letter of Appointment provides only for termination by the employer. There is no mention of the employee resigning.

Section 3(1) of the Employment Act however provides that the Act shall apply to all employees employed under a contract of service and section 3(6) provides that the terms and conditions of employment set out in the Act shall constitute the minimum terms and conditions of employment. For this reason section 35(1) (c) of the Employment Act as read together with section 36 apply to the Respondent.

The Respondent's defence to the effect that she is not liable to give notice or pay in lieu thereof is without merit.

I award the Claimant shs.32,000/= being 1 month's salary in lieu of notice.

### **2. Refund of cost of trip to Greece.**

The Claimant prays for refund of Shs.152,724 being cost of trip to Greece. The claimant's basis for the Claim is the Additional clause to employment contract annexed as Appendix 'SL3' and signed by the Respondent on 24<sup>th</sup> June 2011. CW1 in her testimony stated that the Respondent travelled to Greece on 1<sup>st</sup> to 6<sup>th</sup> June 2011 and did not sign the additional contract before travelling as she was on leave. She further testified that the Respondent was aware about her responsibility under the additional contract.

The Respondent has in her Response to the claim denied that the contract applied to her Greece trip as it was signed after the trip and cannot be applied retrospectively. She further alleges that the clause is invalid as it was not signed on behalf of the Claimant.

I find that the Additional clause to Employment contract signed by the Respondent is valid. However it cannot apply retrospectively as pointed out by the Respondent. There is no indication on the clause to the effect that it would be applicable to the Greece trip or on a date earlier than the date of signature.

CW1 stated that the Respondent was aware about the Clause as she signed one when travelling to South Africa. The Claimant did not attach the Additional contract signed by the Respondent when she traveled to south Africa as alleged, or explain why the Respondent she needed to sign another one for the Greece trip if she had signed one before. The Additional contract clause is not couched to apply to a specific trip. It is framed as an additional clause to the employment contract so that it would become part of the terms of employment and it would not be necessary for the Respondent to sign another one every time she travelled.

For this reason I find that the Claimant has not proved that the Respondent was aware of the Additional clause before travelling to Greece or that the clause applied to the trip and dismiss the claim.

### **3. Overstated Commission**

The Claimant alleges that the Respondent overstated her commission by Kshs.26,848 and she had paid shs.5,365/= leaving a balance of Kshs.21,483 which the Claimant prays for. The Respondent has not denied the Claim. She only alleges that she is not the one who overstated or calculated the same. She does not deny that she had already paid back part of the commission or that the amount demanded by the Claimant is not correct.

I find that the Claimant is entitled to the refund and award the said sum of Kshs.21,483 to the Claimant.

### **4. Kshs.3,721 being balance of the price of shoes sold to the Respondent.**

The Respondent admitted owing the claimant the sum of Kshs.3,721 and her willingness to pay the same. I therefore award the Claimant the said sum of Kshs.3,721/= based on admission by the respondent.

### **5. General Damages for Breach of contract**

The Claimant did not address the court on the issue of general damages for beach of contract. I therefore make no orders in respect of the Claim.

### **6. Costs and interest.**

Having been substantively successful in its claim the claimant is awarded costs of the Claim.

I therefore enter judgment for the Claimant against the Respondent in the sum of kshs.57,204 with costs and interest from date of Judgment.

Orders accordingly.

Read in open Court this 25<sup>th</sup> day of September 2013

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

**Kingori**\_\_\_\_\_for Claimant

**No appearance**\_\_\_\_\_for Respondent