



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 2493 OF 2012

ELIZABETH OMORO CLAIMANT

VERSUS

NAIROBI BOTTLERS LIMITED RESPONDENT

JUDGEMENT

1. This claim was filed on 14th December 2012 by Lumumba & Lumumba Advocates for the claimant Elizabeth Omoro for wrongful, unlawful unjustified and malicious termination of the claimant's employment with the Nairobi Bottlers Limited, the respondent herein. On 12th February 2013 the respondent through Simba & Simba Advocates filed their defence admitting that the claimant was their employee and was terminated after due process and hence the claim is not justified. On 12th February 2013, The respondent filed a Notice of Preliminary Objections but these were not addressed At the hearing the claimant gave her sworn evidence while the respondent called two witnesses, Nicholas Macharia the Country Finance Manager and Winnie Pertet the Country Human Resource Manager. At the close of the hearing both parties filed their written submissions and list of authorities dated 21st October 2013 and 31st October 2013 for the claimant and respondent respectively.

Claimant's case

2. The claimant was on 7th October 2008 issued with a letter of appointment by the respondent as the Procurement Manager on terms that were outlined as permanent and pensionable to commence work on 17th October 2008. As the procurement Manager, the claimant's duties included managing all procurement and contracting functions, prequalification, tender management negotiations and preparation of contracts for the company suppliers, overseeing performance of contracts and supplier relation management. In the performance of these duties, the claimant's work involved collaborating and liaison with other departments such as Commercial/Marketing, manufacturing, logistics and customer service, central planning and shared services and finance. The claimant's supervisor was the Country Finance Manager.

3. On 13th January 2011, the claimant was requested by the Marketing and Channel Activation Manager to engage in negotiations with Skyy Space Media Limited (Skyy) to obtain local authorities licences on behalf of the respondent while paying special attention to costs saving and possibility of working with a lower costs than previous year. Due to time constraints, there was no time to tender for the services and the claimant, after consultation with other departments, proceeded to seek and obtain approval to outsource the functions of local authorities licensing through single outsourcing. The approval was for Kshs.12,000,00.00 plus a further kshs.1,800,00.00 as the consultancy fees payable to Sky as the service provider thus the total sum was Kshs. 13,800,00.00 against the previous year spending in 2010 in the sum of kshs.19,200,000.00 hence a saving of kshs.5.4 million. The contract to Sky was approved.

4. To safeguard the respondent's interests Skyy was asked to provide a performance bond as a guarantee for the performance of the service. The contract was written by the respondent's advocates the firm of *Hamilton Harrison & Mathews Advocates* who advised the claimant that the contract agreement for provisions of professional services was together with performance bond proper and adequate for the company purposes. Skyy arranged an advance payment guarantee provided by their bankers to the respondent as guarantee of their performance on the contract. The claimant received an advance payment guarantee from Skyy which was forwarded to the respondent's advocates for advice as to whether it was proper for the performance of the subject contract and the advocates gave consent allowing the claimant to proceed. Therefore on the *Advance Payment Guarantee* the respondent was to fund Skyy with the contract sum of Kshs.12, 000,000.00 which sum was released to Skyy bank Transnational Bank Limited. This was to enable the service provider, Skyy to pay council license on behalf of the respondent which are obtained and paid for in advance.

5. The advance Payments guarantees to Sky were to be made in phases by the reduction of the guarantees and Skyy thus obtained licences from various local authorities that included Nairobi, Machakos, Masaku, Murang'a, Nakuru, Naivasha and Thika and the claimant wrote to Transnational bank to disburse the contract sum to Sky, to release the money in phases. That the various local authorities also issued receipts for payments made. When the last payment was made to Skyy, there were no complaints or any pending issues regarding payments of licensing fees by Skyy of from the local authorities. According to the claimant, the contract to Skyy was completed successfully within the confines of the funds allocated of Kshs.13, 800,000.00 and the respondent did not suffer any damage or loss. The money reserved as security at Kshs.1, 800,000.00 was used to pay Nakuru and Limuru local authorities as they had some complaints of non-payments of licence fees, which Skyy addressed. para.25.

6. In March 2012, the respondent convened a management meeting where the claimant was informed of allegations touching on integrity brought to the respondent attention that affected the functions of marketing, procurement, finance, manufacturing, human resource, distributional and sales and that the firm of Deloitte and Touche, public accountants and auditors, had been commissioned to carry out a forensic audit on all the affected functions.

7. On 17th May 2012, the claimant was summoned by her supervisor for a meeting and informed that the audit was complete and had highlighted issues touching on supply contract with Skyy. That these allegations were of gross misconduct and that a decision had been reached she be terminated and was requested to resign so as to be paid her full salary and receive a good recommendation letter. That there were no specific issues given to the claimant and the discussions were verbal. The claimant refused to resign as she was innocent. On 18th May 2012, the claimant received a letter suspending her from duty immediately without any reasons being given contrary to the respondent's human resource regulations. On 25th May 2012, the claimant received a notification of disciplinary enquiry that was to be held on 28th May 2012 to answer to charges against her for drawing and executing of the 2011 contract with Skyy in relation to licence to councils contract which was inappropriate. The claimant noted that the notice was short and she requested for more time to 4th June 2012 which was granted.

8. On 4th June 2012, the disciplinary enquiry was conducted where the claimant defended herself to the best of her knowledge and produced documents in support of her explanations. On 5th June 2012, the claimant was terminated with no tangible reasons being given for the same. On 7th June 2012 the claimant wrote to the respondent indicating that she wanted to appeal against the decision on her termination by the respondent, and for this purpose requested to have the minutes of the disciplinary hearing held on 4th June 2012 and the audit report from *Deloitte & Touche* that was said to implicate her. The minutes were sent to the claimant on 6th July 2012 and a signed copy was received on 27th July 2012 but was told the audit report was confidential to the company. The claimant also enquired about her appeal and on 12th September 2012 she received a letter informing her that her that the request to be reinstated was not considered.

9. For these reasons, the claimant stated that her termination was wrongful, unfair and malicious and noted that the respondent had tried to force her to resign, not reasons were given for the termination, the details

of allegations against the claimant were never given to her, the contracts she was alleged to have handled in an inappropriate manner involved other managers who were never mentioned for investigations, the claimant was paid terminal dues that were inadequate, she was not allowed to lodge an appeal and that she was subjected to inhuman treatment of harassment when she went to the respondent premises on 5th June 2012 which was meant to unduly influence her to resign.

10. For the above reasons, the claimant claim is for;

- a. *One month salary in lieu of notice amounting to Kshs.445, 716.43;*
- b. *Loss of salary from June 2012 to April 2027 all amounting to kshs.39, 445,904.55;*
- c. *Loss of house allowance for 52 months all at akshs.650, 000.00*
- d. *Medical allowance for 52 months all amounting to kshs.49, 400.00*
- e. *Telephone allowance for 52 months all amounting to kshs.67, 860.00*
- f. *Leave allowance for 10 months all amounting to kshs.4, 324,344.00*

Total being kshs.44, 537,508.05

11. The claimant is also seeking for the declaration that her termination was unfair and that she should be paid salaries and benefits as outlined above together with compensation and costs of the suit.

12. In evidence the claimant supported her claim and further stated that as the procurement Manager of the respondent she did her work with due diligence and when she was asked by the Marketing and Channel manager to source for a service provider with the local authorities licensing, she commenced the contracting of Sky upon following all the laid down procedures in single sourcing and was given authority to spend but further sought the professional advice of the respondent's advocates on the *performance bond* and its implications. A contract was drawn and Sky provided an *advance payment guarantees* which the claimant sent to the respondent's advocates for their approval who gave approval. That when Sky commenced work, all was well and payments were effected but there was a problem with Nakuru local authority and this was addressed by use of the agency fees that the claimant had reserved at kshs.1.8 million.

13. In May 2012, the claimant was called by the Country Finance Manager who met her at the human resource manager's officer and informed her that an audit had been conducted and that there were anomalies with Sky contract where the respondent lost money and was thus asked to resign. She refused to resign and was put on suspension. On 25th May 2012, the claimant was later invited to attend a disciplinary enquiry meeting on 28th May 2012, she noted the time was short and she thus requested for more time which was granted for the 4th on June 2012. The hearing was re-scheduled for the 4th of June 2012; the claimant was not allowed to bring her advocates but was allowed to bring a friend and in attendance was a Doctor friend of the claimant. On 5th June 2012, the claimant received her letter of termination and was informed of her right of appeal and that she was to be paid for one month. To be able to appeal, the claimant asked to have the minutes for the disciplinary hearing meeting and the audit report from *deloitte & Touche*, the minutes came but the report was said to be confidential. She later received a letter from the respondent that her request for reinstatement was not granted but her request to appeal was never granted.

14. The claimant further gave evidence that she was unfairly terminated and seek damages for the payment of the period of her contract to retirement for the 15 years unexpired period as she had hoped to retire at 60 years. That there were no complaints from SKyy whose contract she was alleged to have handled in an inappropriate manner and hence her termination was not justified in the circumstances. She has done interviews and many possible employers find her overqualified for the job she is seeking and for the last one year, has been unable to secure any job forcing her to start small businesses. She has 3 children who depend on her, one being in university, another in college and the other in high school. She is serving a mortgage at kshs.12, 000.00 a month, she had a medical cover with UAP and a telephone allowance that the respondent should pay for the duration of her contract as she was on permanent and pensionable terms.

15. In cross-examination, the claimant confirmed that she had previously worked with a bank and had dealt with a *performance bond* which was issued to ensure performance of a contract where the party with a contract gives the performance bond to ensure they undertake their work and in this case Skyy was to give the *performance bond*. The claimant had the responsibility to ensure the respondent was protected and thus was to ensure the contract issued to SKyy was properly executed based on the key performance indicated attached to the contract. The contract provided for a *performance bond* but the claimant authorised the contract with a payment *guarantee* instead and she wrote to the bank based on a contract dated 24th January 2011, but in essence there was no contract dated 24th January 2011. The contract that was issued to Skyy was dated 25th January 2011 as approved by the respondent. And no *performance bond* was executed in this regard.

16. The claimant also confirmed that she sent to the respondent's advocates as *payment guarantee* and that when the respondent's advocate wrote back, and confirmed that a *performance bond* was in order but the claimant had sent a *payment guarantee* and that the *payment bond* could only take effect upon the respondent deposit. That the claimant had worked with the *performance bond* before and did not require any advice but since she had not worked with a *payment guarantee* she thus sought the advice of the respondent's advocates. Skyy did not give the claimant what she had asked them for but they continued to give the service they had been contracted to give. All payments were made based on receipts to confirm that Skyy had accounted for all the money received with receipts, permit or an authority to pay.

17. The claimant also confirmed that there were some problems with payment and the respondent managing Director was issued with a warrant of arrest and summoned to Court in Nakuru on a charge that he had not paid licence fees, that this was embarrassing for the Managing Director to be summoned in court whereas Skyy was supposed to have made payments and the claimant ensured that there were no problems.

18. On the disciplinary hearing upon the suspension of the claimant, she stated in cross-examination that she got a hearing notice on 25th May 2012 but requested for extension of time from 28th June to 4th June 2012 which was granted and she was allowed to have with her a friend or a workmate and she chose Peter Muriuki an employee of the respondent.. She was also allowed to access the office to prepare her defence and she made copies of all the documents needed. The claimant was also able to access her laptop. She was given a hearing and later issued with a termination letter and was advised to appeal. The claimant wrote seeking to have the audit report and the minutes of the disciplinary hearing, she got the minutes but not the audit report as it was said to be confidential. In the communications with the human resource manager, the claimant was advised that if she was not satisfied with the decision of the disciplinary committee, she could lodge an appeal with the managing director.

19. That upon termination the claimant confirmed that she was paid 1 month in lieu of notice, salary for 5 days, and leave days not taken.

Respondent's case

20. On the other hand the respondent in their response stated that they had a contract of service with the claimant which was regulated by the Employment Act and could be terminated by issuance of notice or payment in lieu of such notice. That the claimant was supposed to undertake her duties diligently have regard to and ensure that the best interests of the respondent were not prejudiced. The claimant is alleged to have come up with the idea of outsourcing for 'consultancy services' for which she gave justifications knowing well that she did not have the intention of ensuring that the best interests of the respondent were protected and that from the claimant's internal memo dated 18th January 2011, the respondent approved the proposal subject to the observance and adherence to various safeguards with a *service level agreement* with clear key performance indicators and a provision of a *bank performance bond* equivalent to Kshs.12,000,000.00 in order to avoid any exposure during the entire contract period of 11 months of the contract. That the claimant misrepresented facts to the respondent to justify the single sourcing of Skyy due to urgency of the works to be executed in the market and the fact that the subject service was special in nature and that there were no other listed/known suppliers who offer similar services and that the claimant had made reference to the local authorities.

21. The respondent further stated that the claimant was not support to 'request' for a *performance bond* from Skyy as the supplier as it was a requirement that the provision of a *performance bond* as it was to be a covenant by the supplier, Skyy to the respondent and the claimant had stated so in her internal memo of 18th January 2012 that SKyy as the supplier would make a deposit of kshs.12 million in the bank a *bank performance bond* being equivalent to the contract sum of kshs.12 million. This undertaking influenced the respondent's decision to approve the claimant's proposal since its interests would be protected. That the claimant further dishonestly misrepresented to the all and sundry in a letter dated 24th January 2011 that the respondent had contracted SKyy toward the function of applying for and obtaining local authority licensing and related activities while she knew this not to be true. By issuing such a letter to the supplier, Skyy, the claimant exposed the respondent to possible action for breach of contract and other liabilities that may arise as a result of the contents of the letter. That by the issue of this letter, the claimant caused the Skyy banker to issue a guarantee dated 27th January 2011 which as in respect to a purported contract dated 24th January 2011, yet there was no such contract. Subsequent to these misrepresentations and the contract that was issued to SKyy dated 1st February 2011, their bankers did not issue any *performance bond* in respect thereof and the *advance payment guarantee* did not apply to the contract dated 1st February 2011 and consequently, the respondent's interests were not protected under this contract as expected. The claimant had acted to the detriment of the respondent.

22. Further the respondent stated that the claimant failed to send a contract to HHM advocates for their review and from the emails sent by the claimant, what HHM received was a *performance bond* for their review and confirmed that it was in order but the claimant did not cause a *performce blond* to be executed in favour of the respondent. The claimant also failed to disclose the contents of such a *performance bond* and that the guarantee sent to HHM from Skyy bankers was already been issued on 27th January 2011 and there was nothing for them to review and they [HHM] reiterated that the supplier, Skyy needed to make a deposit equivalent to the contract amount. The respondent in approving the contract had anticipated a *performance bond* and not a *an advance payment guarantee* and even in the case that this *advance payment guarantee* was issued, it did not relate to the contract issued and dated 1st February 2011 and the same related to a non-existent contract allegedly dated 24th January 2011. That when the claimant authorised transnational bank to disburse money to Skyy, she was not acting in the best interests of the respondent. Payment was made against receipts that were not authentic which the claimant ought to have noticed and demanded for proper receipts from the supplier, Skyy.

23. That the contract was not completed well as there were numerous complaints especially from demands made by local authorities such as Municipal Council of nakuru for non-payment of fees and the respondent incurred kshs.2,256,275.00 as a result of the claimant mishandling of the matter and hence her termination. The only security that the claimant made was the withholding of Kshs.1, 800,000.00.

24. On the disciplinary hearing, the respondent stated that before the claimant was placed under suspension, the Human Resource Manager discussed the matter with her to enable her prepare for the disciplinary hearing. The claimant was made aware of the reasons for her suspension and was issued with a written notice with details of all allegations against her. Before the hearing, the claimant was given more time to prepare and have present a person of her choice but not an advocate as this is not provided for. She was given access to the respondent premises, her former office and lap top all in observance of natural justice and to enable her make copies of all documents necessary to prepare for her disciplinary hearing and defence. On 5th June 2012 the claimant was terminated and dully informed of her right of appeal. That the claimant did not require the audit report from Deloitte and Touche since it was not part of the evidence relied on during the disciplinary hearing and had the claimant needed this report, she was at liberty to ask for it before the disciplinary hearing. The claimant failed to lodge her appeal and the managing director reviewed the disciplinary panel minutes and reviewed the claimant's letter dated 7th June 2012 and confirmed the decision of the disciplinary panel in the letter dated 30th August 2012 and thus the claimant's appeal was dismissed.

25. The respondent thus denies the whole claim as outlined by the claimant and that the same should be dismissed with costs.

26. In evidence, the respondent called Nicholas Macharia, the Country Finance Manager and Winnie Pertet the Human Resource Manager who supported the defence that the claimant as the respondent's Procurement Manager was dismissed after the respondent received complaints from branding suppliers of harassment by local authorities where the respondent was operating and upon investigations, found that this was caused by the non-payment of council fees. That the respondent Managing Director received a warrant of arrest and was summoned by Nakuru court for non-payment of Council fees which caused the respondent's highest officer great embarrassment that should not have occurred had the claimant been diligent in her duties and followed up the supplier, Skyy to ensure that the receipts received to support payments were authentic. From these events the respondent officers enquired from the claimant on these complaints and it was discovered that the respondent had paid monies to the supplier, Skyy but in return Skyy had not issued original receipts. The respondent asked for a reconciliation of monies paid to Skyy which included a discrepancy between the contract amount and what was on the ground and there was found to be a difference of unsupported documentation of Kshs.5, 600,000.00. The claimant was therefore called upon to answer to the various issues arising from the execution of the Skyy contract as the person responsible but failed to give a plausible reason and thus the termination.

27. The witnesses further stated that in the termination letter issued to the claimant, it was made clear the reasons as to why the respondent arrived at such a decision that the claimant had inappropriately drawn and executed a contract with Skyy on behalf of the respondent which upon review the respondent discovered that there was impropriety amounting to gross misconduct as the claimant, as the Procurement Manager of the respondent had misrepresented to her employer that single-sourcing had been necessitated by there being not known supplier of similar services while she confirmed that there were other suppliers in the market. As the Procurement Manager, the claimant failed to offer the best options available by undertaking a comparative process for purposes of ensuring the respondent got value for its money. Further that the claimant misrepresented the fact that she had obtained a reference on Skyy from various local authorities but failed to produce such references. She also misrepresented to Transnational Bank Limited that there was a contract dated 24th January 2011 between the respondent and Skyy while she knew that no such contract existed causing the bank to issue an *advance payment guarantee* in favour of Skyy based on a non-existent contract and thus was reckless in exposing the respondent by failing to ensure that there was a *performance bond* as outlined in the contract issued to Skyy. That the release of kshs.12 million to Skyy was made without supporting documents or having the authority from respondent and based on questionable documents.

28. The witnesses further stated that when there was discovery of payments without supporting documents and a loss of kshs.5, 632,536.00, the claimant was involved in an internal reconciliation process and was part of the team that confirmed that this amount was unsupported and did her own calculations that confirmed the losses. That during the disciplinary hearing, the claimant was given a chance to make further explanations as to her actions but failed to give satisfactory responses hence the decision to her employment terminated and her appeal was equally dismissed.

Submissions

29. The claimant submitted that this was a case of unfair termination where the claimant was called by her supervisor the Finance Manager and the Human Resource manager and coerced to resign on a trick that she was to be given a good recommendation and two months pay and that when she refused to resign, a case was made up against her. That the claimant was innocent as all what she did was approved by the respondent and the supervisor was made aware of all details necessary with regard to the contract to Skyy and the claimant further sought professional advice from HHM advocates with regard to *performance bond*. The claimant also submitted that fair procedure and due process were not followed in her termination in that the claimant was coerced to resign and when she refused she was suspended, summoned to a disciplinary hearing and immediately terminated and was never given a chance to appeal. That the documents needed for appeal being the minutes of the disciplinary hearing were unduly delayed and the audit report was never made available to the claimant. That the reasons for termination were not valid and fair noting that no suppliers were called to confirm that the claimant had inappropriately made contracts with them and no documents was shown that indicated the claimant was in breach of. The claimant relied on the case of *Walter Ogal Anuro versus Teachers Service Commission [2013] eKLR*

where the court held that for a termination to be found as fair, there must be subjective justification and procedural fairness and that in the case of *Alphonse Machanga Mwachanya versus Operation 680 Limited [2013] eKLR*, the court held that employers must comply with their internal disciplinary procedural rules. The claimant further relied on Article 50(2) (j) of the Constitution on the right to everyone having a fair trial and having reasonable access to evidence against them to be able to prepare their defence.

30. The respondent on their part submitted that the claimant was lawfully terminated. The respondent witnesses stated that when they enquired from the claimant about monies paid to Skyy, it was discovered that she paid without evidence of original receipts and the respondent therefore asked for a reconciliation of monies paid to the supplier which indicated a discrepancy between the contract and what was on the ground. It was discovered there was unsupported documentation for Kshs.5.6 million which meant the respondent had suffered losses of this amount. Since the claimant was the one responsible for this contract, she was called to answer the questions emerging but that she failed to give a satisfactory account. The respondent relied on section 35 of the Employment Act in that the claimant was given notice, there was impropriety and misrepresentations made by the claimants as well as failing to undertake due diligence in giving Skyy a contract and causing the bank to issue an advance payment guarantee in favour of Skyy based on a non-existent contract. That the claimant was wilfully and recklessly exposed the respondent by failing to ensure the respondent was protected by the execution of a performance and hence released Kshs.12 million to Skyy without any supporting documents and releasing money to Skyy when she did not have authority to do so and the same being based on questionable supporting documents some of which were dated a year before the contract date. The respondents cited *John Bowes* on the terms that are to be implied in an employment contract noting that the obligations of an employee to account for monies received during the course of employment. The claimant thus had control of the moneys given to her by the respondent and was accountable to the respondent. In *Daniel N. Ngunia versus KGGCU Limited [CA] No. 281 of 1998* where the appellant was summarily dismissed for gross misconduct arising from loss of files for debtors who were being sued for payments and overpayments to certain farmers to the tune of Kshs.5 million. In dismissing the appeal, the Court of Appeal held that the matters were in the sole hands of the appellant as the credit controller and could not be designated as misdemeanours and thus the appellant was properly dismissed and the appellant had been suspended to facilitate investigations as the allegations against the appellant were serious. In *Ruth Murage versus Standard Group limited Cause No. 1267 of 2011* the court held in a fixed terms contract, the common law principle in the fixed term contract expires automatically on the expiry of the date on which the parties agree that it should. However, even where a party wishes to rely on this principle, there is a reasonable expectation that this can be terminated by either party by giving the other one month's notice. That in my view of these submissions, the claimant's case should be dismissed with costs to the respondent.

Analysis of the case

31. The main claim herein is that the termination of the claimant is stated to have been wrongful, unfair and malicious. The key questions therefore that must be addressed are:

Whether the reason for the termination is valid;

Whether there is a fair reason to justify the termination; and

Natural justice in employment contracts

Whether there are any remedies available to the claimant

32. Without the court descending into the internal procedures applied by an employer in terminating an employee, where such procedure is cited to be unfair the court must interrogate it to ensure that this procedure was legitimate and free from bias and that it was substantially fair. In making this assessment the court must be satisfied that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee and that the procedure adopted by

the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision was procedurally fair. These are the tenants as outlined under section 41 and 45 of the Employment Act. Under section 41;

... 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 this explanation.

33. Whereas under section 45 (5) (a);

*(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section ... the **Industrial** Court shall consider—*

(a) The procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

34. In this case, the claimant was under a contract of service vide the letter of appointment that outlined the terms of her employment dated 7th October 2008. In this contract, under clause 14 it outlined the conditions under which the contract was to be terminated;

Termination of service, after permanent appointment shall, except where otherwise stated expressly stipulated in writing be subject to one (1) calendar month's notice by either party.

This does not however limit the Company's right to terminate with immediate effect for misconduct, incapacity, material breach of contract on your part or the operational; requirements of the Company.

Upon notice of termination all benefits will cease.

35. This contract is however subject to the applicable law that is the Employment Act provisions, and must be assessed for compliance and for good practice even where Court first duty is to follow the written terms and conditions in a contract which has been agreed upon by the parties. Where a termination is contested as being unfair and lacking in due process, the contract terms apply and further the applicable law where the contract is not adequate in any respect.

36. What seems to have triggered events to this suit is the meeting said to have been held between the claimant and her supervisor the Country Finance Manager and the Human Resource Manager on 17th May 2012. Soon after this meeting, the claimant was issued with a letter of suspension on 18th May 2012. A notice of the disciplinary hearing followed soon thereafter dated 28th May 2012 stating the charge against the claimant to be;

The drawing and executing of the 2011 contract with Skyy Space Media in relation to Licence to Councils Contract was inappropriate. This charge arises out of your actions/performance/behaviour on 2011.

37. I take it that the claimant understood what the charge meant as soon after this notice, she sought to have more time to prepare her defence where the respondent granted her more time and allowed her access to her former office and laptop to enable the claimant access documents and preparations for her disciplinary hearing. To this the claimant may have been able to make copies and access emails as evidence from her bundle of documents attached to the claim. Thus the charge against the claimant was specific and before the disciplinary hearing, she had time and access of the respondent premises to access documents for the hearing that took place on 4th June 2012. Soon after the hearing, the respondents gave

their decision indicating that the claimant had been terminated from their employment and was to be paid one month pay in lieu of notice and that the claimant could exercise her right of appeal within seven (7) days.

38.To this notification of termination, the claimant sought to have the disciplinary hearing minutes and the audit report on the investigations on the subject matter. The respondents gave the claimant the minutes but not the audit report as it was noted that the case against the claimant was that of the contract on Skyy and not the audit report. The claimant wrote again to ask about her appeal and got a response that the respondent was not going to reinstate her.

39.From the onset it must be stated that every employer has the right to discipline any employee on the basis of misconduct, poor performance or physical incapacity. However even where these reasons exists, an employee must be given an explanation and the reason or reasons 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 this explanation.

40.To this extent the respondent dully complied, as based on the internal investigations about the execution of the contract to Skyy that the claimant was undertaking at the Procurement Manager, several issues arose and the claimant was thus summoned by her supervisor and the human resource manager after efforts to have reconciliations of disbursed funds failed. This far the claimant admitted to have been aware of these reconciliations and the questions that arose with regard to the execution of the contract with Skyy. The supervisor and human resource manager not being satisfied, the claimant was suspended after their meeting and a disciplinary panel constituted. At the disciplinary hearing, the claimant had a fellow colleague of her choice, Mr. Muriuki, as provided for under section 41. This remained an internal process in exclusion of any outside intervention for the respondent to exploit the internal procedures with regard to internal administrative disciplinary process on a matter of concern. I agree with the respondent with regard to the refusal to allow the claimant to have her advocate, as this is not what is envisaged under section 41 of the Employment Act.

41.I therefore find the claimants rights were not violated this far, before the suspension, there was a meeting between the claimant, her supervisor and the human resource manager. The reasons for suspension were discussed to the point that she was adviced to resign which she refused to do and was thus put on suspension. She cannot therefore say she was not aware of the reasons for her suspension.

42.On whether the termination was fair reasons to justify the termination, this issue will be analysed together with the concept of natural justice as to separate the two, the issue of fairness and justification will be lost. The Employment Act, 2007 unlike before has now made it obligatory to observe the rules of natural justice before a decision to dismiss an employee is taken. The Act requires procedural fairness to precede the termination Process. This Court is now mandated to inquire into the *why* and *how* of terminating an employment contract. If the *why* cannot be sustained, the dismissal would be declared unfair or unlawful. Similarly, if the *how* does not meet the dictates of natural justice, the Court can intercede and grant appropriate remedy. To this Sections 41(2) and 45(5) of the Employment Act, now makes it obligatory for an employer who wishes to terminate the services of an employee to notify such employee and hear any representations which the employee may wish to make before taking the decision to terminate or not to terminate. The obligation to hear the employee is applicable whether the employer intends to make payment in lieu of notice or not. It is even applicable where the employee is accused of gross misconduct. After according an employee a hearing and following all the laid down rules the *why* must still be addressed as under section 45(5) of the Act in that In deciding whether it is just and equitable for an employer to terminate the employment of an employee, the employer must address themselves as to the procedure adopted in reaching the decision to terminate or dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision; the conduct and capability of the employee up to the date of termination; the previous practice of the employer in dealing with the type of circumstances which led to the termination; the existence of any pervious warning letters issued to the employee and more fundamentally the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41.

43. Having found that the procedure adopted by the respondent was free from bias, the remaining questions were the substantive issues raised. In this regard, the claimant was emphatic that before her termination she had been of good performance and had served in the position as Procurement Manager for over 8 years with a clean record. She had handled big contracts without any questions being asked and hence her termination should be seen as a harsh sanction. I differ with this analysis of the case. Employees are employed to give their very best to their employers and to undertake all tasks given to them with diligence, care and to the highest professional standards, otherwise their retention and pay would not be necessary. As much as an employer is to appreciate an employee who performs exceptionally well, this is to be weighed against many factors as that an employee went out of their way beyond their call of duty as against other employees who gave their bare minimum. This is not shown to the case here. The claimant as a Procurement Manager had a high responsibility to ensure that her functions were undertaken with outmost care and attention so as not to affect all the other departments that relied on her role as in a team, functions are complimentary and not separable.

44. I find the respondent complied with the provisions in according the claimant all the necessary steps in addressing her case, save for one detail that is most fundamental and once omitted, affect the entire process of undertaking any internal administrative disciplinary process. I take it also that this is why the claimant was unable to lodge her appeal and the response she got from the respondent Managing Director found to be misplaced. In the letter of termination, the respondent had this to say;

Re: TERMINATION

Following the disciplinary hearing held with you, this is to notify you that you have been terminated from the services of this company from the date of this letter.

You will be paid one month's salary ...

Please ensure to return all company property...

45. There is no reason or reasons given for the decision to terminate the claimant. Whether the claimant was aware of this reason or reasons or whether she ought to have known what the reason or reasons for the termination is immaterial. Section 35 of the Employment Act require such notice be in writing and the reason or reasons for the termination be stated to the employee and where such an employee does not understand these reasons, the same to be explained to the employee she understands best. This is serious decision that affects the life of a person and must be treated as outlined by the law. Beside this, an employee has a right to challenge the reason or reasons for termination if the same is not justified and to be able to do so without knowing what these reasons are would be impossible to say the least. So as much as an employer has the right to discipline, terminate or dismiss an employee, the reason or reasons for arriving at such an advance decision must be clearly stated to the affected employee.

46. In this case, the respondent already had the reasons to terminate the claimant, they had the capacity and resources to share this reasons whether through the supervisor, the human resource manager by email communication or by sending the notice with these reasons to the claimant. This far the respondent failed and hence affected the chances the claimant had to lodge her appeal as she had no known reasons stated in her letter of termination. I find this as an unfair process. Based on the circumstances of this case and the fact that the claimant was paid all her terminal benefits within a reasonable time, I will make an award in this respect for one month's pay.

Remedies

47. On the remedies sought, in the letter of termination, there was provision for payment of one month's salary in lieu of notice and leave days outstanding. At the hearing, notice pay and leave days due were confirmed as having been paid. This claim is therefore declined.

48. The claim for loss of salary is on the basis that the claimant had expected to work for the respondent until retirement and that she would have earned the amounts claimed. However, I note there was a contract of

employment bidding on the parties, the contract had a clear provision for termination and the claimant cannot be found to state that she was not aware of this provision they could be terminated for a good cause upon notice of one month. Having found that there was a valid reason for the termination, I will decline this claim.

49.The claim for house allowance, medical allowance and telephone allowance for 52 months goes with the job. These are work benefits that are due to employees of the respondent and cannot be separated with the employment. To make provisions as such outside the employer/employee relationship would be to defeat what is fair labour practice and to hold the respondent at ransom not to engage any other person in place and instead of the claimant so as to reserve such benefits for her use instead of the person holding this position as these are benefit that accrued to her position as the Procurement Manager of the respondent which has since ceased. I will therefore not grant in this regard.

50.There was no evidence of malice, harassment or any other illegal acts against the claimant to warrant the court to go into the remedies available in this respect. There will be no finding in this regard.

In conclusion, for the above reasons, judgement is entered for the claimant in the following terms;

- a. **The claimant will receive one month salary amounting to Kshs. 445,716.43;**
- b. **Each party will bear their own costs**

Dated at Nairobi this 22nd day of November 2013.

M. MBARU

Judge

In the presence of

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