



GRACE GACHERI MURIITHI.....CLAIMANT/APPLICANT

VERSUS

KENYA LITERATURE BUREAU.....RESPONDENT

JUDGMENT

The claimant in this cause is Grace Gacheri Muriithi. The respondent is Kenya Literature Bureau. Through Kurauka & Company Advocates, the claimant filed the memorandum of claim dated 11/01/2011. The respondent's statement of response in reply to the claim was filed on 4/02/2011 through Okongo Omogeni & Company Advocates. On 8/3/2012 the respondent's supplementary list of documents was filed. The claimant's submissions were filed on 22/03/2012 and the claimant's supplementary submissions were filed on 26/03/2012. The respondent's submissions were filed on 02/04/2012. On 7th May 2012, the court directed that the award would be on notice.

The respondent is a government parastatal and by the letter dated 10th January 2005 it employed the claimant as assistant data clerk with effect from 10th January 2005. The claimant successfully served for the probation period of 6 months and was confirmed in appointment by the letter dated 27th June 2005.

In accordance with the provisions of the letter of appointment, the confirmation was on KLB Scale 8. The clause on termination of employment provided, thus "After confirmation, employment may be terminated by either party giving one month's notice or paying one month's salary in lieu of notice. Further details are as per the terms and conditions of service."

By the letter dated 14/01/2008 the claimant was promoted to the grade of Assistant Accountant with effect from 1/01/2008 and on the salary scale KLB level 3C. By the letter dated 3/08/2009 the claimant was again promoted to the grade of Accountant with effect from 1/8/2009 at salary scale KLB level 4.

The respondent's managing director wrote the letter dated 18/5/2010 to the claimant as follows:

***"Ms Grace Gacheri Muriithi
Thro\
Finance Manager
KLB***

Dear Ms Muriithi

RE: SUSPENSION

Following the burglary of the cash office over the weekend of 15th /16th May 2010, it has been noted that money received on the week starting 10th May 2010 to 15th May 2010 had not been verified and balanced daily by the cash office of which you were supervising.

You are hereby suspended from duty with effect from 19th May 2010 and you are required to handover

to the Finance manager or his appointed nominee and explain within 48 hours the circumstances under which the monies were not verified and banked as required by the cash office procedures and you are further required to provide any information that you may be having as regards the incident of 15th/16th May 2010.

While on suspension you will receive no salary and you will not be allowed into KLB premises without the permission from the Managing Director.

Yours sincerely,

E.A Obara (Mrs)

MANAGING DIRECTOR

C.C HUMAN RESOURCE MANAGER”

The claimant responded to the letter promptly. By the letter dated 19/05/2010 she wrote to the Managing Director through the Finance Manager as follows, thus,

“RE: SUSPENSION

The above subject refers. The reason the revenue collected had not been banked is that most of it Ksh.59,300/= had been used to make payments. Hence it was not possible to bank the balance Ksh. 72,500/= before the cash used was either replenished or other imprest requisition procedure finalized eg. Cash used to buy air ticket for Mr P. Kyunguti to Zambia.

The reason for using the revenue collection to make payment is because the petty cash imprest was not adequate. Out of Ksh.150,000/= the maximum allowed petty cash float Ksh. 24,244/= had been advanced to staff and Ksh. 30,000/= was issued for entertainment both of which are not petty cash expenses hence reducing the float to Ksh. 95,746/= (see the handing over report for supporting documents.)

From the cash collection summary report that I circulated to the Finance Manager and the managing shows that most of the times there is delayed banking. The Finance Manager was aware of the cause of the delay in banking also no questions have been raised before from your Office that I am aware of before the incident of 15th/16th May 2010.

The issue of delayed banking has been brought up severally by the external Auditors which the Finance Manager and I explained the constraints we had operating with a float of Ksh. 150,000/=. During the last audit carried out by the External Auditors in April 2010 they were to recommend in the audit report that the petty cash float be increased so that revenue collection is not used to make payments.

The petty cash float of Ksh.150,000/= was the maximum limit set in year 2003. Since then bureau sale volume have more than doubled which means expenses have also increased accordingly hence the constraints faced in the cash office.

Despite the constraints mentioned above, I tried my best to offer services with integrity, transparently, honestly and without any unnecessary delay or inconvenience to the bureau operations.

Regarding the incident that occurred on May15/16th 2010, I left the office on Friday 14th May 2010 at about 6.20 pm after locking in the safe the cash used by Mr. Robert O. Omenda to keep the revenue collected. I also looked the safes small box were all the cash was locked. I then locked the safe\'s main door kept the safe key in my desk drawer which I also locked with a key that I carry home. I left Mr. Robert O. Omenda in the office. He was to lock the office doors and put the alarm on as is the procedure since he was the last person to leave the office.

The reason for leaving the safe key in the office was that I felt it was more safe leaving the key in a draw that I usually locked. The office has an alarm and access to the office was only limited too. I had only left the key in the office for barely a month after a mugging incident I had on a weekend (a copy of the police abstract attached) and was afraid the key home in case it got lost. I also had trust in my colleague Mr. Robert Omenda since we were both entrusted with the responsibility of handling Bureau revenue.

After a discussion with the Finance Manager, Mr. Robert O. Omenda and I about the cash collection short of Ksh.33,047/= he had in April 2010, he requested that he go on leave to look for money to pay the deficit since he could not raise the money while still working.

Mr. Robert O. Omenda was to proceed on leave on Monday 17th May ,2010 but he had not finished posting the cashbooks. He was told by the Finance Manager to work during the weekend for his pending work before handing over on Monday May 17th, 2010 to Ms. Julia K. Mbaabu. Surprising though he went to the office on Saturday and spent the day in the office the work was not done.

I only learnt of burglary on Sunday 16th May, 2010 when I was summoned by the Finance Manager. Since then the matter is being handled by the police.

I will be available when called upon if any further information, clarification or explanation is needed.

Yours sincerely,

SIGNED

Grace Gacheri Muriithi”

As proof for the mugging, the claimant attached on that letter receipt No 5338244 issued by the Langata police Division on 1/2/2010 for Ksh. 50/= with respect to loss of I.D card, the application for registration certificate No. 2651572 dated 2/2/2010 for re-issuance with the identity card and the application for abstract from police records at Langata Police Station dated 1/02/2010 for police report serial No. OB 05/01/02/10 with respect to the report the claimant made for the loss of her identification card No. 21770197, the mobile phone make Nokia 6020 and wrist watch.

In the meantime, the respondent's Internal Audit Manager one J.K Ritho had undertaken an investigation whose terms of reference were , “to investigate loss of cash in the Finance department, Head Office between 15th May, 2010 and 16th May 2010 and report to the Managing Director.”

The report found that there had been cash lost totaling to Ksh.604,151.00. The report also identified lapses in financial and accounting internal control systems and procedures. Some of the key lapses identified and crucial to this case were as follows:

- a) There was no formal action taken on Mr. Robert O. Omonda for revenue shortfall of Ksh.33,037.00/= which was collected between 30/3/2010 and 13/04/2010.
- b) The amount of cash left in the cash office was not counted and summarized at the close of business on 14th May 2010. Reconciliations carried out after the theft incident showed that there was Ksh.571,114.00/= in the cash office as per the time of the incidence.
- c) The cash office alarm was not separated from the ICT and the reception area although the caretaker, mr. Jared O. Ochola had raised the matter in September 2009 vide KLB 1/06. V/37 dated 24th September 2009. That meant that whenever alarm in one of the mentioned areas was disarmed the others were automatically disarmed. However, the procurement manager who was tasked to ensure that was done claimed to have informed M/s Pinkertons about it albeit no action.

(d) The keys to the safe were left in the cash office desk drawer of the cashier Ms Grace Muriithi. That implied that the cash was not well secured.

e) Some member of staff held cash amounting to Ksh. 54,244.00 on 1.0 (temporary basis). The staff included the Finance Manager Mr. A.K Oloo who held an amount of Ksh. 44,244.00. That implied that the 48 hours rule of retiring imprest was not followed. The outstanding temporary lending to staff should have been converted to advances to be recovered from staff salary upon approval by the managing director.

f) Two cheques were drawn with similar amounts to pay for air tickets of members of staff who were scheduled to travel on official duty to Zambia. The requested amount was USD 2475 at an exchange rate of 79 amounting to Ksh.195,525.00. The amount was withdrawn via cheque number 7776 dated 12th May 2010 and cashed at the National Bank of Kenya on 13th May 2010. Due to changes in the foreign exchange rate of the USD from K sh.79.00 to Ksh.80.00 this cash was not adequate. The cashier Ms Grace Muriithi requested for additional cash of Ksh.7,515.00 on 13th May 2010. However instead of writing a cheque for Ksh. 7,515.00 as requested by the cashier

Ms Muriithi, Mr. Robert Omenda wrote a cheque number 7779 comprising of Ksh. 195,525.00 and other payments, all adding to Ksh.327,115.00. The cheque was cashed at the National Bank of Kenya on 14th May by Mr. Francis Mutunga and the cash was handed over to the cashier Ms. G. Muriithi. That implied that there was an extra of Ksh.195,525.00 that was left at the disposal of the cashier. Although that money was presumably with the cashier Ms. Muriithi on 14th May 2010 she could not however avail Ksh.84,300.00 to the Assistant Finance Manager Mr. Francis Mutunga who urgently needed it to purchase air ticket for Mr. Kyunguti. The extra cash of Kshs.195,525.00 was ultimately part of the cash allegedly stolen during the theft incidence that occurred between 15th May 2010 and 16thMay 2010.

g) Report of the officers from Pinkerton Professional Security services dated 24.5 2010 who provided security services to KLB and who conducted the preliminary investigations pointed that Mr. Robert O. Omenda used the cash office on 15th May 2010 and 16th May 2010 to complete some outstanding work as instructed by the Finance Manager Mr. A.K Oloo. Mr. Omenda was due to commence his leave on 17.05.2010 and was therefore required to finish his assignment before taking the leave. In both the two days, Mr. Omenda did not sign the security gate book and no one else used the cash office during the two days up to when he reported to the guards on Sunday 16th May 2010 at around 1.15 pm that a theft had occurred in the cash office. The investigating security officers noted in their report that the cash safe was opened and the cash box was broken and the envelopes which had money were torn and contents removed. Interestingly, one envelope belonging to Robert Omenda was intact.

h) Occasionally, the finance manager did not check or call someone to check on his behalf the revenue collected and summarized by cashiers. With respect to other dates between 12.04.2010 and 30.04.2010 the revenue collected and not checked by the Finance Manager amounted to Ksh.505,914.00/=. Although the money was banked ,failure by the Finance Manager to confirm the bankings implied serious lapses in adhering to the laid down controls which put revenue at risk of misappropriation or theft by the cashiers or other persons.

The problem was further compounded when the cashiers ceased to summarize and bank the revenue collected between 7th May 2010 to 14th May 2010 amounting to Ksh.131,800/=. Although the cashiers Mr. Robert Omenda and Ms. Grace Muriithi claim that they used the revenue collections to pay expenses, the record shows that Mr. Omenda spent only Ksh.72,500.00 on 13th and 14th May 2010. The bulk of the revenue had been collected on 7th May 2010 in form of sale of tenders amounting to Ksh.120,000.00 and should have been banked in the next working day, (i.e 10th May 2010). That was a clear indication that the money could have been diverted to other uses.

The report then concluded that arising from the findings of the report, there were serious lapses in Financial and Accounting Internal Controls Procedure in the month of April 2010 and part of May 2010 that exposed revenue and other monies to risk. Further, had the laid down controls and procedures been

observed as in the period prior to the month of April 2010 the risk of losing the cash amounting to Kshs.604,151.00/= would have been avoided or minimized. Accordingly the report opined that three members of staff in finance who were directly involved in the process of safeguarding cash or revenue bore full responsibility of the loss. The officers Mr. Robert O. Omenda and Ms. Grace Muriithi (the claimant), and Mr. Abraham Oloo, the Finance Manager. For the claimant the report stated that she had-

- (a) Failed to ensure that the revenue collected on various dates between 7th May 2010 and 14th May 2010 amounting to Kshs.13,800.00/= was summarized by Robert O. Omenda and banked as required by the finance regulations.
- (b) Failed to count, summarize and establish the amount of cash that was in the cash office at the close of business on 14th May 2010 as required by the financial regulations.
- (c) Negligently left the key to the main safe in the office drawers without informing or seeking guidance from her superiors thus exposing the respondent's cash to risk of theft which led to loss of Ksh.571,114.00/= on 15th/ 16th May 2010.
- (d) Failed to disclose that she had extra money of Ksh. 195,525.00/= that had erroneously been withdrawn in excess of approved amount of Ksh.7,515 meant to top up for the difference in exchange rate.

The report then made key recommendations as follows:

- a) The three members of staff mentioned to bear the responsibility should be caused to explain for their negligence or failure in discharging their duties and responsibility as is required of them.
- b) The alarm system line which is shared between cash office, the ICT and reception area be separated.
- c) Install CCTV facility in the cash office.
- d) Replace the locks, install a safe with modern security features that would make it difficult to access the content. The report highlighted that this particular recommendation had already been implemented
- e) Minimize cases of holding too much liquid cash in the cash office by minimizing cash transactions and ensuring that revenue collections are banked promptly.
- f) Uphold or adhere to the laid down financial controls and procedures.

Subsequently and in view of the internal Audit report findings and conclusions, the respondent's Managing Director addressed the letter dated 5th July 2010 to the claimant as follows:

“ Dear Ms Muriithi

RE: SUSPENSION

Reference is made to this office letter Ref No. KLB/2/775 (8) dated 18th May 2010 suspending you from the services of the Bureau and your response letter dated 19th May 2010. Further investigations have revealed that you:

- a) Failed to ensure that the revenue collected on various dates between 7th May 2010 and 14th May 2010 amounting to Kshs.131,800.00/= was not summarized and banked as required by the financial regulations.***
- b) Failed to count, summarize and establish the amount of cash that was left in the cash office at the close of business on 14th May 2010 as required by the financial regulations.***

c) Negligently left the key to the main safe in the office drawers without informing or sought guidance from your superiors thus exposing KLB cash to loss of Ksh.571,114/= on 15th May, 2010.

d) Failed to disclose that you had extra money of Ksh.195,525.00/= that had erroneously been withdrawn in excess of approved amount of Ksh.7,515.00/= meant to top up for difference in exchange rate.

You have been given seven (7) days from the date of this letter to show cause why necessary disciplinary action will not be taken against you on account of dishonesty and neglect of duty.

Meanwhile your suspension for the service of the Bureau remains in force until further notice.

Yours sincerely,

SIGNED

E.A.Obara (Mrs.)

MANAGING DIRECTOR

C.C Human Resource MANAGER”

The claimant replied by the letter dated 12th July, 2010 addressed to the Managing Director as follows:

“RE: SUSPENSION

The above subject refers.

i) As per the reply given earlier, the revenue collected had been used to make payments. Please refer to paragraph one, two and three of my reply letter dated 19/05/2010.

In view of the reasons given I truly believe that I was not negligent in discharging my duties because it is not possible to fulfill regulations\' requirements if sufficient resources are not provided to carry out operations of any given office.

ii) On 14th May 2010 was a very busy day since staff bonus was being paid. The payment of bonus exercise was shared among five Finance Department staff and one staff from Internal Audit office. Each paying staff was allocated the job levels to pay and cash given for that particular job levels. Then cash bonus that was not paid was returned in the cash office in a sealed envelope bearing the name of the paying staff so that they could continue paying the staff who had not been paid or who had balances the following Monday. This is the Cash that was not confirmed. Each paying staff was to pay all the staff assigned without any cash deficit confirming the cash balance for each of the six paying staff would mean going through all staff list and counting those who had not been paid, those who had balances and repeating the same exercise on Monday when payments was to continue. So I used the procedure that

has always been used, i.e each paying staff pays the staff assigned up to completion just in case any claims by staff came up later can be easily solved by tracing back to the staff assigned to pay that particular job level where the claimant falls. The petty cash imprest is updated on real time basis and that had been done. The only thing that had not been was to consolidate the figures to get the total cash that was left in the office. All the cash was not held in one account so giving the total figure off head was not possible without referring to the records.

iii) The reason for leaving the safe key in the office drawer was given in earlier reply letter dated 19/05/2010 paragraph 7 page 3. I agree I didn\'t inform my supervisor about it. In my opinion I thought I had made the best decision since when the key was handed over to me there were no instructions or guidelines on where the key should be kept. In regard to the above, I was not negligent

because I didn't violate any laid down procedure. Besides my superiors had never queried whether I carried or left the key in the office.

iv) I did not fail to disclose about the cash (Ksh.195,525/=) drawn erroneously instead of Ksh.7,515/=. For cash to be drawn, the cheque must be supported by original payment voucher or if a photocopy an explanation is given for using a copy. The signatures confirms that the amount to be drawn equals the sum of supporting payment vouchers value before the cheque and that the vouchers are stamped, paid and cheque written as is the procedure.

In this case what happened is that Ksh.195,525/= had earlier on been drawn to buy air ticket but due to foreign currency exchange rate, and air ticket cost change there was need to top up Ksh.7,515/=. I made a copy of the original schedule used to draw Ksh.195,525 and asked for authority to draw an additional Ksh.7,515 from Financial Manager which was granted. I then forwarded the document together with other payment voucher for cashing to Mr. R. Odhiambo to write a cheque. He wrote the cheque but unfortunately made a mistake; he included the whole Ksh.195,525/= instead of Ksh.7,515/= in the cheque total. He then took the cheque to the Finance Manager and the Managing Director for signing. Before the cash was drawn, I was not aware of the mistake. I only realized when the drawn cash was brought about 4pm on Friday 14/5/2010 when I distributed the cash drawn. The cash was drawn on Friday 14/5/2010 so re-banking of the excess cash upon receipt could only have been done on Monday 17/5/2010. I informed the Finance Manager about the mistake on Monday and also explained the same to the Internal Audit Manager when I was called to answer some queries. The signatories should have queried why same amount of cash was being drawn twice for the same purpose a few days a part and with a photocopy that had been stamped paid and bore a cheque number. If at all the request to draw additional Ksh.7,515/= (which was highlighted with a text marker) was not clear.

The mistake to draw Ksh.195,525/= instead of Ksh.7,515/= didn't originate from me. I didn't use the excess cash to benefit me in any way. I didn't lie, cheat, defraud or deceive. Therefore I was not dishonest at all.

I hope the above information clarifies anything that was not clear.

*Yours faithfully,
SIGNED
Grace G. Muriithi*

cc. Human Resources Manager”

The claimant was then addressed the letter dated 22/09/2010 summoning her to appear before the staff advisory and disciplinary committee meeting on Friday 1st October 2010 at the KLB Headquarters Management Room at 10.30 am. The letter was signed by one Evans T. Nyachienga for the respondent's Managing Director. Flowing from the committee's proceedings the claimant was addressed the letter dated 20th December 2010 as follows;

“Dear Ms Muriithi

RE: TERMINATION OF SERVICES

We refer to our letter dated 18/05/10 and your subsequent appearance before the staff advisory and disciplinary committee on 22/10/2010. The committee considered the representation you made and found them unsatisfactory.

In view of the foregoing it has been decided that your services be terminated with effect from 18/5/2010 in accordance with the terms and conditions of Kenya Literature Bureau.

On termination of services you will be paid one month's salary in lieu of notice. You will also be paid

for any leave days not taken for the calendar year 2010.

Your surrender value benefits from the staff retirement benefits scheme will be processed in due course.

Yours sincerely
SIGNED

Mrs. E.A Obara, MBS

MANAGING DIRECTOR

C.C. Finance Manager,

Human Resource Manager”

In the memorandum of claim, the claimant prays for judgment against the respondent for:

- a) Pay in lieu of 61 days being Ksh.162,941.00/=
- b) Pay in lieu of maternity leave (90 days) Ksh.240,405.00/=
- c) Pay in lieu of notice -(1 month x 80,135.00) = Ksh.80,135.00
- d) Salary arrears for May, 2010 – Ksh. 40,068.00
- e) Salary arrears for June – December 2010 – Ksh. 560,945.00
- f) pension benefits up to December, 2010 - Ksh. 142,680.00
Total Ksh. 1,227,174.00
- g) A declaration that the termination of employment by the respondent herein was unjust and unfair.
- h) An order that the respondent do return the claimant to work forthwith.
- i) Maximum compensation of 12 months amounting to 961,620.00/= to be paid to the claimant.
- j) Any other or further relief that the Honorable court may deem fit to grant.
- k) Costs and interest .

In the statement of response in reply to the claim the respondent contended that the claimant\'s claim is untenable in law and it was an abuse of Industrial Court process as the claimant upon lapse of her contract was paid all her entitlement including gratuity. The respondent further pleaded that the honorable court lacked jurisdiction in view of the status of the claimant and the claim be dismissed with costs.

This cause raises numerous issues for determination. The issues are as follows:

- a) Whether the court has jurisdiction to determine the cause.
- b) Whether the claimant\'s case was handled by the competent authority in the respondent\'s establishment.
- c) Whether the termination of employment of the claimant by the respondent was unjust and unfair.
- d) Whether the claimant is entitled to the remedies prayed for in the memorandum of claim.

The first issue is whether the court has jurisdiction to determine the dispute. The respondent as earlier stated in this judgment pleaded that the Honorable Court lacked jurisdiction in view of the status of the respondent. No mention of this pleading has been made in the respondent's submission. However the court finds it necessary to address this issue before embarking on the substantive issues in the case even in circumstances whereby the respondent appears to have abandoned the same. This is more so because this cause was filed after the promulgation of the Constitution of Kenya, 2010 on 27th August, 2010.

Sub Article 162 (2) (a) of the Constitution provides that Parliament shall establish a court with the status of the High Court to hear and determine disputes relating to employment and labour relations. Thus Parliament has established the court in accordance with the Sub-Article under the Industrial Court Act, 2011. The long title to the Act states, thus, "AN ACT OF PARLIAMENT to establish the Industrial court as a superior court of record, to confer jurisdiction on the court with respect to employment and labour relations and for connected purposes."

Subsection 12 (1) of the Act provides that the court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162 (2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including-

- a) disputes relating to or arising out of employment between an employer and an employee;
- b) disputes between an employer and a trade union;
- c) disputes between an employer organization and a trade unions organization;
- d) disputes between trade unions;
- e) disputes between employer organizations;
- f) disputes between an employers' organization and a trade union;
- h) disputes between an employer's organization or a federation and a member thereof;
- I) disputes concerning the registration and election of trade union officials; and
- j) disputes relating to the registration and enforcement of collective agreements.

Subsection 12(2) specifically states that an application, claim or complaint may be lodged with the court by or against an employee, an employer, a trade union, an employer's organization, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose. The claimant is a public body being a state corporation established under written law. Accordingly, its legal status and establishment would not preclude it from the jurisdiction of the court.

Further, sub-Article 165 (5) (b) of the Constitution provides that the High court shall not have jurisdiction in respect of the matters falling within the jurisdiction of the Industrial Court. Thus, in view of the High Court status of the Industrial Court and in view of the provisions of Sub-Article

165 (5) (b) of the Constitution and Subsections 12 (1) and (2) of the Act, the Industrial Court is also vested with the jurisdiction as follows.

- a) Unlimited original jurisdiction in disputes relating to employment and labour relations.
- b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights provided for in the Constitution of Kenya, 2010, as far as employment and labour relations is

concerned, has been denied, violated, infringed or threatened.

c) Jurisdiction to hear appeals from decisions of tribunals of competent jurisdiction in disputes relating to employment and labour relations.

d) Jurisdiction to hear and determine any question respecting the interpretation of the Constitution in employment and labour relations including the determination of:

(i) the question whether any law is inconsistent with, or is in contravention of the Constitution;

(ii) the question whether anything said to be done under the authority

of the Constitution or of any other law is inconsistent with or is in contravention of the Constitution;

(iii) any matter relating to constitutional power of state organs in respect of county government and any matter relating to the constitutional relationship between levels of Government; and

(iv) a question relating to conflict of laws under Article 191 of the Constitution .

The jurisdiction of the Industrial Court is therefore essentially the jurisdiction of the High Court as provided for in Sub- Article 165 (3) of the Constitution and with boundaries limited to the employment and labour relations as amplified in the Industrial Court Act, 2011 . However it is notable that the Constitution removes from the jurisdiction of the Industrial Court one aspect of employment and vests it in the exclusive jurisdiction of the High Court. Under Sub-Article 165 (3) (c) the High Court is vested with the exclusive jurisdiction to hear appeals from a decision of a tribunal appointed under the Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144 of the Constitution (being a decision by tribunal appointed for removal of the President on grounds of incapacity). Finally, the Industrial Court is vested with the jurisdiction, original or appellate, as may be conferred by any legislation with respect to employment and labour relations matters.

In the instant case the court finds that the dispute falls squarely within the jurisdiction of the court and the plea of lack of jurisdiction in view of the undisclosed status of the respondent lacked merit and had no legal basis.

The second issue for determination is whether the claimant's case was handled by the competent authority in the respondent establishment. Counsel for the claimant submitted that the Respondents Managing Director illegally, unlawfully, corruptly, maliciously and without any reasonable or probable cause rejected the Staff Advisory and Disciplinary Committee's recommendations and reconstituted a smaller committee composed against the respondent's terms and conditions of service for August, 1999. The evidence on this point is clear and obvious. The letter dated 22/09/2010 required the claimant to appear before the Staff Advisory and Disciplinary Committee on Friday 1/10/2010. The termination letter refers to appearance before the Staff Advisory and Disciplinary Committee on 22/10/2010.

There is no evidence produced for the respondent to show that the claimant was summoned and appeared before the alleged proceedings of 22/10/2010. Thus the alleged proceedings of 22/10/2010 were convened maliciously and constituted an authority not properly seized and empowered to hear and determine the claimant's case. The court finds as much.

However, the issue does not stop at that court's finding. Counsel for the claimant further submitted that the respondent purported to discipline the claimant who was in grade KLB 10 through the Staff Advisory and Disciplinary committee knowing that such powers vested in the Board under section 6.2.2 of the respondent's terms and conditions of service for August, 1999. The letter of appointment dated 10/1/2005 provided that after confirmation, employment may be terminated by either party giving one month's notice or paying one month's salary in lieu of notice. It also provided that further details were as per the terms and conditions of service. Such terms and conditions of service are dated August 1999 and the court finds that they applied to the disciplinary proceedings against the claimant.

It is not disputed that the claimant was at the time of the disciplinary proceedings in grade KLB scale 10. Paragraph 6.2.2 of the respondent's terms and conditions of service provided thus,

“ 6.2.2. The power for dismissal , demotion or reduction in rank of employees in KBL scale 9 and above shall vest in the Board.”

On this point, counsel for the respondent submitted that the respondent's Managing Director in informing the claimant of the decision to terminate her services simply acted within her powers as vested in paragraph 1.3 of the Terms and Conditions of service, 1999 which provided, **“The Managing Director shall enforce these regulations as he considers necessary, subject to any instructions of a general nature as may be given by the Board acting in accordance with the provisions of the Act.”**

The court finds that paragraph 1.3 of the Terms and Conditions of Service was a general power and the Managing Director of the respondent could not validly rely on it to override the express provisions of paragraph 6.2.2. which vested the power to dismiss, demote or reduction in rank of employees in KLB scale 9 and above in the Board of the respondent. It is true that the power to interdict or suspend was vested in the Managing Director under paragraph 6.2.3 of the Terms and Conditions of Service. It is also true that the Managing Director could undertake the preliminary work including the investigations as provided for in paragraph 1.3 of the Terms and Conditions of Service. However, the Managing Director could not usurp the powers of the Board under the said paragraph 6.2.2 and terminate (call it, dismiss) the claimant without the Board directing its mind and making a decision as envisaged under paragraph 6.22. The Managing Director's jurisdictional limits were to suspend, investigate and table the case for determination of the case by the Board.

“Competent jurisdiction” means the power to decide. The Managing Director did not have the power or authority to decide the claimant's case. Whatever she did without jurisdiction was therefore nothing but a nullity; a void worse off than the vacuum which has walls. It was nothingness. The court finds that the Board was entitled and required to direct its mind and decide the claimant's case. The Managing Director was entitled to communicate or convey the decision of the Board to the claimant. However, in doing so, the Managing Director was enjoined, on the face of the communication, to state that she was communicating the decision of the Board. In the instant case, the court finds that the case was never tabled for consideration by the Board and the Managing Director pretended to be the Board or usurped the powers of the Board. The procedure adopted was in total contravention of the KLB Terms and Conditions of Service, 1999.

In making this finding, the court has taken into account another aspect as submitted by counsel for the respondent. Counsel referred the court to paragraph 6.3.2 of the Terms and Conditions of Service which stated, thus “An employee to whom disciplinary proceedings are to be held shall be entitled to receive a free copy of any documentary evidence relied on for the purpose of the proceedings, or to be allowed access to it. Such documentary evidence shall not include office orders, minutes, report or recorded reasons for decisions.” In view of that provision, the respondent did not produce to the court any evidence of the records such as minutes of the proceedings and minutes of the committee that handled the claimant's case. Article 10 of the Constitution provides that the national values and principles of governance apply to state offices, public officers and all persons whenever any of them:

- (a) applies or interprets the Constitution;
- (b) enacts, applies or interprets any law ; or
- (c) makes or implements public policy decisions.

The provisions of the Article apply to employers and employees both in public service and in the private sector. The national values and principles of governance include human rights, good governance, integrity, transparency and accountability. Article 35 of the Constitution which the respondent was bound to observe provides that every citizen has the right of access to information held by the State and information held by another person and required for the exercise or protection of any right or fundamental

freedom. The respondent being a public body was also bound by Article 232 (12) (e) and (f) which provide for accountability for administrative acts, and transparency and provision to the public of timely accurate information. In the circumstances, the court finds that paragraph 6.3.2 of the KLB Terms and Conditions of Service, 1999 is unconstitutional to the extent that it contravenes the cited provisions of the Constitution.

The next issue for determination in this case is whether the termination of employment of the claimant by the respondent was unjust and unfair. To determine this issue, the court is guided by the provisions of section 45 of the Employment Act, 2007. Subsection 45 (2) of the Act 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.

The court will first consider the matter of validity of the reasons for termination in this case. The court has reproduced extensively the correspondence and circumstances leading to the termination of the claimant's employment. Two observations stand out clearly. First is that the claimant in her replies offered elaborate and clear explanations to each and every issue that required her response. The respondent's investigations and findings to the serious explanations made by the claimant remain unknown to the court and the claimant. The court has carefully considered the replies made by the claimant to the allegations leveled against her by the respondent and find that, in absence of any investigation report and valid evidence or arguments to demolish the claimant's replies, the replies were satisfactory and the respondent did not have any valid reason to terminate the claimant's employment on account of the allegations made against her. The respondent's reasons were invalid and unfair.

The second consideration on the validity of the reasons advanced by the respondent against the claimant is the nature of the grounds raised by the claimant in her replies. The replies related to the respondent's operational requirements, the policies and facilities for delivery of service, and the claimant's conduct in view of the respondent's discharge of its obligation to create an enabling work environment. A sample of the key considerations as observed by the court is as follows;

(a) The claimant stated that the reason for using the revenue collection to make payment was because the petty cash imprest was not adequate. The petty cash float of Ksh.150, 000/= was the maximum limit set in year 2003. Since then the respondent's sale volume had more than doubled which meant expenses had also increased. Thus the constraints faced in the cash office. The claimant had done her best in view of the constraints.

(b) The claimant further submitted that the Finance Manager was aware of the cause of delay in banking. That the issue of delayed banking had been brought up severally by the External Auditors and the Finance Officer and the claimant had explained the constraints they had faced in operating with a maximum float of Ksh.150,000/=. That in the last external audit of April 2010, the auditors had in their report recommended that the petty cash float be increased so that revenue collection is not used to make payments.

(c) Regarding the incident of 15th and 16th May 2010, the claimant replied that in her own considered view it was safer to leave the key in a locked drawer at the office than to go home with it. That the respondent in handing her the key and the related responsibilities did not provide operational policies and standing instructions on the safe custody of the key. It is also notable that the investigation report by the internal audit into the theft had found as much and recommended installation of a safe with modern

security features that would make it difficult to access the content.

(d) Of the alarm security system of the respondent, the internal investigation report into the theft found that there had been repeated reports and concerns about its deficiencies and recommended that the alarm system line which was shared between cash office and the ICT and reception area be separated.

(e) Of failure to disclose withdrawal of Ksh.195,525/= instead of Ksh.7,515/= as a top up on the air tickets, the claimant replied that she was not aware of the mistake before the cash was withdrawn and that she had made the correct request for Ksh.7,515/=. The cheque had been signed by the Finance Manager and the Managing Director who were the top managers for quality assurance. For unexplained reasons, they appear to have failed on their quality assurance functions since they should have easily noted that they were for the second time, mistakenly so, signing a cheque for Ksh.195,525/= with respect to air tickets, the same transaction they had already dealt with.

The court has dwelt on the foregoing issues to establish that at all material times there were valid complaints and grievances. Would it be a fair labour practice for an employee to be punished in circumstances whereby the alleged misconduct relates to unresolved valid grievances? Would it be a fair labour practice for employer to fail to address valid grievances? Would it be a fair labour practice for an employer to fail to address valid grievances and when that failure results into an adverse consequence to the employer, the employer acts by visiting adverse consequences on the staff?

Employees must be committed to the implementation of the employer's policies and programmes. Employers are entitled to determine and prescribe such policies and programmes. In performance of their respective duties, employees are entitled to raise valid complaints or grievances in relation to the employer's operational policies and programmes. Employees are also entitled to raise grievances about their work place welfare. Grievances or complaints may relate to fellow staff, clients or the employer. Where operational policies, manuals or systems expose the employee to risks, it is sufficient that the employee raises the deficiencies or reports them and, in particular circumstances, takes such decisions that shall be reasonable in view of the deficiencies. Employers expect employees to remain committed and take decisions of omission and actions towards satisfactory performance of the contract of employment.

To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust.

In the instant case, the court finds that the respondent maintained impossible operational policies, namely, unreasonable petty cash limits of Ksh.150,000/= and thereby leading to inadequate petty cash imprest. The court finds that the respondent consistently failed to take corrective measures to increase the petty cash limits to Ksh.300, 000/= as recommended by the external auditors and in view of the claimant's and the financial manager's repeated reports to the respondent. The court further finds that the respondent maintained deficient operational systems by failing to provide for instruction on the safe custody of the key to the cash safes and failing to install a safe with modern security features. In addition, the court finds that the respondent failed to take prompt measures to separate the alarm system for cash office from that serving the ICT and reception offices. Finally the court finds that the respondent's Managing Director and financial manager failed to discharge their quality assurance duties as imposed upon them under the respondent's financial operational systems so that the claimant had a valid grievance against them with respect to the erroneous withdrawal of Ksh.195,525/= instead of Ksh.7,515/= as

correctly initiated by the claimant. Accordingly, in this case the court finds that the respondent did not maintain genuine grievance or complaints management procedures and also maintained deficient operational policies and systems as far as the matters in dispute were concerned. The respondent to that extent, acted in contravention of Article 41 (1) which entitled the claimant to fair labour practices namely, a genuine grievances or complaints management procedure and operational policies and systems that were not deficient. Thus in view of the respondent's operational requirements, the court finds that the termination of the claimant by the respondent was based on reasons that were not valid and the termination was unfair in view of the provisions of section 45 of the Employment Act, 2007. In making this finding, let it be known that the court finds the claimant not culpable for having acted in good faith in an attempt to achieve the best outcome possible in circumstances where the respondent had failed on its obligation to provide effective grievances management procedures and adequate operational policies or systems.

The final issue for determination in this cause is whether the claimant is entitled to the remedies as prayed for in the memorandum of claim. The claimant has admitted receipt of Ksh.832, 327.10/= computed to include pay in lieu of notice, salary for days worked in May 2010 and pension benefits up to December 2010. The claimant is entitled to the declaration as prayed for and the certificate of service as provided for under the Employment Act, 2007. The prayers that remain in dispute include:

- (a) Payment during the period of suspension;
- (b) Pay in lieu of maternity leave for 90 days;
- (c) Salary arrears for June to December 2010; and
- (d) 12 months compensation amounting to Ksh.961,620.00/=.

The respondent terminated the claimant's service by the letter dated 20th December 2010 received on 30th December 2010 and with effect from 18th May 2010, the effective date of the suspension. The issue before the court is whether the claimant is entitled to be paid for the period between the date of suspension and the date of conclusion of the disciplinary case being the date the letter of termination was delivered, that is, 30th December 2010. In opposing this claim, counsel for the respondent has cited paragraph 6.2.4 of the respondent's terms and conditions of service, 1999 which provides, thus, "**An employee under suspension will not be entitled to any salary, but may, in case of hardship, and on request be granted an alimentary allowance in such amount and such terms as may be determined by the Managing Director.**"

The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent's Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional.

In the present case, the court has found that the termination was unfair. Accordingly, the court finds that the claimant is entitled to full payment throughout the period of suspension to the date the decision in her disciplinary case was delivered to her. She is entitled to the Ksh.560,945.00/= being salary for June to

December, 2010.

The claimant pleaded that she was due to proceed for a three months statutory maternity leave in September, 2010. Her counsel submitted that she was therefore entitled to three months pay in lieu of maternity leave without forfeiting annual leave as per the respondent's practice. On this claim, the court has already awarded full pay during the period of the maternity leave in issue. Accordingly, the claim shall fail.

The respondent unfairly terminated the services of the claimant. The termination, the court has found, was in gross violation of section 41 of the Employment Act, 2007 and, in contravention of fair labour practices protected under Article 41 of the Constitution. The court therefore awards a compensation of 12 months gross salary being Ksh.961,620.00/= as prayed for in the memorandum of claim.

The claimant has prayed for an order that the respondent do return the claimant to work forthwith. In making a determination on this claim, the court is guided by the provision of Sub-section 49(4) of the Employment Act, 2007. Taking into account the provisions of the Subsection, the court makes the following findings.

- a) The claimant is willing to go back to work and has made a specific plea to be returned to work.
- b) The respondent is a public body established under the Kenya Literature Bureau Act. The claimant is a public officer and enjoys the general constitutional protection of public officers as accorded under Article 236 of the Constitution. The Article provides thus, "236. A public officer shall not be-
 - a) victimized or discriminated against for having performed the functions of office in accordance with this constitution or any other law; or
 - b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without the due process of law." The claimant must be protected in accordance with that constitutional provision. The court has found that she performed her duties in the circumstances of the case and she was unfairly terminated. She is entitled to get justice one way or the other.
- c) The claimant being a public officer, she was entitled to serve until attainment of the age of 60 years as it applies to public officers generally. She had been confirmed into permanent employment.
- d) There is no material on record that would render any difficulty in the practicability of returning the claimant to her position in the employment of the respondent.

In the circumstances of this case, the court therefore finds that the claimant is entitled to be returned to work by the respondent.

Justice will now swing and strike. Judgment is entered for the claimant against the respondent for:

- (a) a declaration that the termination of employment by the respondent herein was unfair;
- (b) the respondent do return the claimant to work with effect from 15th October, 2012 in the same position and current benefits, terms and conditions applicable to the position and to be deployed by the respondent's Managing Director accordingly from the effective date;
- (c) the respondent to pay the claimant Ksh.1,522,565.00/= comprising payments for June to 30th December 2010 and 12 month compensation for unfair dismissal;
- (d) the respondent to pay interest at court rates on (c) above from 1st January 2011 till full payment; and

(e) the respondent to pay costs of this cause.

Delivered at Nairobi on the 12th October, 2012, in presence of Counsel for Claimant and in absence of counsel for the Respondent.

Byram Ongaya
Judge