REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

(Before: Paul K. Kosgei, Judge, S.K. Luyali & C.M. Mulupi – Members)

CAUSE NO. 664 OF 2010

LIBERATA NJAU NJIOKA……..……**CLAIMANT**

Vs

MAGADI SODA COMPANY LIMITED……**RESPONDENT**

Mr. Omwanza Ombati of M/s Nchogu, Omwanza & Nyasimi Advocates for the claimant

Mrs. Cosima Wetende of M/s Kaplan & Stratton Advocates for the respondent

Issues in Dispute:

1. **Wrongful/unfair termination of employment of Liberata Njau Njioka**
2. **Breach of trust and confidence by the employer and non-payment of terminal benefits**
3. **Loss of career of the claimant herein.**

AWARD

On 16th June 2010 the claimant filed the memorandum of claim herein seeking the following prayers:

a. The salary that would have been earned by the claimant for the remainder of her employment period, had the said employment not been terminated early; Ksh. 402,548x49 months = Ksh.19,724,852
b. Benefits that the claimant was entitled to within the requisite 3 months notice period prior to the termination of her employment contract;

i. Furniture	- Ksh. 400 x 3 months = 1,200	
ii. Water	- Ksh. 500 x 3 months = 1,500	
iii. Electricity	- Ksh. 1,500 x 3 months = 4,500	
iv. Economic house rent	- Ksh. 10,000 x 3 months = 30,000	
	Total	Ksh. 37,200

c. Damages for breach of trust and confidence
d. Punitive damages
e. Certificate of service
f. Any other remedy that this court may deem fit
g. In alternative and without prejudice to the foregoing the claimant prays an award equivalent to 12

months salary for loss of career an amount Ksh.402,548 x 12 = 4,083,057/=

The respondent filed its memorandum of defence on 5th August 2010. The dispute was heard on 7th December 2010 and the parties were directed to file their closing submissions on or before 17th January 2011.

The claimant's advocate relied on her memorandum of claim herein and submitted as follows:

The claimant was employed by the respondent on 4th October 2004 as a Human Resource Development manager then corporate communications manager. On 1st November 2009 her job title was changed to Human Resource Manager Training & Development. She was on permanent and pensionable terms.

On 2nd February 2010 the respondent wrongfully and unfairly terminated her contract of employment four and half years before her retirement. Before the issuance of the termination letter she was ambushed with information and asked to write a resignation letter but she refused to write. The termination was effected in flagrant disregard of the labour laws and the respondent's Disciplinary procedure.

There were no warning letters cautioning the claimant against poor performance issued to her prior to her termination. She was invited to attend what she believed to be a Key Performance Indicators meeting, which she attended but was later informed that the meeting was aimed at showing the respondent's dissatisfaction with her performance, a fact which was unknown to her even during the meeting. She was not given an opportunity to defend herself against the allegations levelled against her. After being terminated she was not given a chance to appeal against the termination. The claimant was commended on various occasions for her good performance and given merit increments of salary. She was also offered ex-gratia payment upon termination which payment is payable only in cases of exceptional performance.

The allegations of dissatisfaction with her performance on the respondent's part are unfounded. The Human Resource Director disliked her on grounds of gender and ethnicity. She was subjected to mental anguish and loss of career at an age when it is difficult to find alternative employment. She is entitled to maximum compensation for loss of employment. Her termination violated ILO Convention No. 158 and the Employment Act 2007. The claimant was allegedly dismissed for her dismal performance as a Corporate Communications Manager. It is not true that the audits of 2006/2007 reflected poor performance on her part. The respondent's witness RW1 Dominic Ooko was unable to produce even a single document showing poor performance on the claimant's part. No warnings in her record were produced. The allegations of unspecified verbal warnings are untrue. She was commended for good performance in 2007 by the Managing Director through a letter dated 20th April 2007 in the following terms:

> *"for hardworking, commitment and dedication in the delivery of critical business objectives which have earned you merit increase of 5%".*

The fact that she was retained by the respondent for many years and assigned various responsibilities means she was efficient.

The claimant was treated arbitrarily and vindictively and the respondent breached the trust and confidence that should exist between an employer and an employee. Her termination was activated by malice on the part of the respondent's Human Resource Director. Her legitimate expectations to work upto her retirement age was disrupted. She was 51 years old at the time of termination. It is hard for her to mitigate by getting another job. The respondent did not produce any documents showing that termination procedures were followed. Minutes of the alleged meetings held with the claimant are not given to show her inadequacies. The termination was therefore malicious.

Mr. Ombati urged the court to enter judgment for the claimant as prayed in the memorandum of claim.

The respondent called one witness RW1 DOMINIC OOKO who testified as follows:

He is the Director of Human Resource of the respondent. He was employed in January 2009. He detected displeasure from management with Human Resource delivery. He met the management team to seek views on what needed to be changed. He agreed with the claimant that they had to deliver on succession planning, talent management and general development of the employees and launch a performance management system using score card methodology. The claimant was unable to communicate what these entailed to the departmental heads. Her write up was so incompetent that he had to take up the duty himself.

When the claimant was incharge of Corporate Communication, no communications such as the Managing Director's monthly newsletters were produced. It was decided that communication be moved to another office; that of Marketing Development.

In November 2009 he tailored the claimant's job description to suit her competency and was assigned Training and Development responsibilities. Her position changed to Human Resource Manager, Training and Development. It was agreed that she would meet all departmental heads and establish their training needs but by January 2010 no training had taken place and she had not met any departmental head. He reported the issue to the Managing Director and Chief Human Resource officer in India and it was decided that the claimant was not the right person for the job.

On 27th January 2010 he called a senior manager to participate in discussions with the claimant. He told her the areas of concern. In reply she said she had met some junior managers who have no role in determining training needs for their departments. He told her that due to her consistent poor performance the respondent had decided to terminate her services. He considered everything she said in her defence. The disciplinary procedures are applicable only where summary dismissal would apply. This was a case of poor performance and only the Employment Act and the contract of employment applied.

An audit report was prepared on her performance. She was sent to India for training so that she could improve her performance, but she did not. The respondent tried to soften the blow on her. She was told she could appeal against the termination. After some weeks, she wrote a letter to the Managing Director making some allegations about the reason for termination such as that he wanted to replace her with someone from his ethnic group.

On cross-examination by Mr. Ombati for the claimant he said as follows:

The claimant was sent to India to boost her performance. She was the only Kenyan as the other trainees came from **ΤΛΤΛ** employees worldwide. He met the Human Resource team when he was employed. Minutes of meetings are taken and are available on request. The employees score cards are also available but hers was not produced in court. Salary review letters are issued to all the employees. Good performance yields higher salary increase. The claimant's job description was changed so that she could perform.

Mrs. Wetende for the respondent then proceeded to submit as follows:

RW1's evidence confirmed that the claimant's performance was poor. He referred to numerous meetings held about her performance and warnings given to the claimant about her performance. Annual increments don't reflect sterling performance as there is an element of cost of living compensation. The claimant failed to perform her duties which are outlined in her job description such as producing a training programme for the company after meeting the departmental heads to assess their needs. The claimant's claim is an afterthought raised two months after termination. The claims of discrimination on ethnic grounds are baseless.

When the claimant wrote to the respondent on 2nd February 2010 she did not question the poor performance leading to her termination. She was not aggrieved by the termination process. Her immediate supervisor and the Finance Director met her when the termination was effected. She was

therefore given a hearing. The procedure was lawful.

It has not been proved that the claimant cannot get another job. The provisions of the Employment Act 2007 have overtaken the respondent's disciplinary procedures of 2004 which envisage disciplinary action on the basis of misconduct. Misconduct and poor performance are different.

Her contract of employment clause 13 entitled the respondent to terminate her employment for incompetence without any reference for any warnings. The termination was arrived at after efforts to assist her yielded no fruits.

The claimant's claim for 49 months salary has no basis in law. Her contract was terminable by three months notice on either side. The claim for benefits in lieu of notice is untenable as it is not provided for in the contract and the law. In any event the claimant vacated the respondent's house and did not utilize electricity, water, furniture or pay rent. As the termination was lawful, the claim for 12 months salary compensation is untenable. The same applies to the claim for reinstatement. The claim for damages for breach of trust and confidence is not applicable. They are not provided for by the Employment Act.

Mrs. Wetende urged the court to dismiss the claimant's claim.

We have carefully considered the parties memoranda and the annextures thereto, the testimonies of the respondent's witness and the parties closing submissions. The issues for our determination in this matter are:

i. Was the termination of the claimant's employment contract justified?
ii. Is the claimant entitled to any of the remedies sought?

The reasons for the termination of the respondent's services are disclosed in the letter of termination dated 2nd February 2010 which is worded as follows:

> *"Please refer to the recent discussion touching on your performance and specifically to the discussion in my office attended by the Finance Director, yourself and the undersigned. Management dissatisfaction with your performance was brought to your attention and statements you made in your defense were taken note of. However, management is of the opinion that adequate time has been accorded to you in addition to support from your manager which has not led to any remarkable improvement."*

In accordance with clause 13 and 14(b) of the contract of employment between yourself and the Company, we have to advise you that the Company has decided to terminate your service with effect from 2nd February 2010."

The details of the alleged poor performance on the claimant's part are outlined in the respondent's memorandum of defence and the annextures thereto. It is alleged that an audit of the claimant's performance was conducted in February 2007 for the year 2006 and she was notified that her 2006 performance was below expectation. Several recommendations for corrective action were suggested.

In 2009 while she was appointed as the Corporate Communication manager, it is alleged that no visible activities took place under her docket. In July 2009 some of her urgent responsibilities were assigned to the Marketing Department manager. The Director of Human Resources is stated to have met her and asked her to show energy, focus and drive in Talent Management, succession planning and in general carry out her responsibilities as expected. In November 2009 her role was changed to Human Resources Manager Training and Development. She was given her job description and targets were agreed upon. She was particularly to meet the departmental managers to agree on a training programme to be carried out from December 2009 to March 2010. By mid January 2010 the claimant had not met the departmental heads. The claimant did not complain and appreciated the chances given to her to help her improve her performance. She was also given training opportunities in that regard.

The claimant on the other hand avers that she was diligent and efficient in her work and attributes her dismissal to vendetta on the part of the Human Resources Director on grounds of gender and ethnic considerations. She avers that the respondent's Managing Director granted her merit salary increments particularly in 2006/07 for her good performance contrary to the respondent's assertions. She was also promoted to other positions because of her abilities and not inability as alleged by the respondent.

In **Cause 273 of 2010, Kenya Science Research International Technical and Allied Institutions Workers Union (KSRITAWU) Vs. Stanley Kinyanjui and Magnate Ventures Ltd**, this court dealt with a similar situation in which the claimant was dismissed for alleged poor performance. In our judgment, we stated inter alia as follows:

"It is not disputed by both parties that the grievant was terminated on grounds of poor performance. The respondent avers that the termination was valid under section 45 of the Employment Act 2007. The evaluation done by the respondent may have indeed shown that she was a poor performer. But in our view poor performance cannot be dealt with through just one evaluation. The proper procedure once poor performance of an employee is noted is to point out the shortcomings to the employee and give the employee and opportunity to improve over a reasonable length of time. In our view about 2-3 months would be reasonable. The respondent should have therefore given the grievant a chance to improve after the said evaluation instead of proceeding to dismiss her. If the employee is unable to attain the required standards after a fair evaluation and despite receiving instruction, training, guidance or counseling, alternative employment ought to be offered where possible. Where it is not possible termination may be effected as the last resort. In the case of ***National Union of Mine Workers & Another v. Libanon Gold Mining Co. Ltd. [1994] 15 ILJ 585 LAC at 586*** *which we find persuasive the court stated as follows:-*

"While an employer may not be obliged to retain an employee who is not productive, fairness requires that a proper assessment is made of whether that situation has been reached before the employer resorts to dismissal. A fair employer will ensure that the employee, assisted if needs be by his trade union, will be kept informed and will be properly consulted in the course of making that assessment…….. Observance of a fair process is fundamental to the question whether its decision to do so was fair. The fairness or otherwise of the decision cannot be divorced from the process by which it was arrived at. It is through fair process that fair decisions are generally reached."

We endorse the said sentiments of the court.

By the time the evaluation was done the grievant had worked for about one year. There are no letters of caution or warning arising from poor performance. If one is a bad performer, the employer usually will weed out such employees during the probation period. There is no indication that the grievant was not confirmed after probation. Probation period in many enterprises lasts between two and six months. Since she had worked for more than six months the grievant is deemed to have established her competence during probation. It appears that the evaluation relied on by the respondent may have been tailored to facilitate the grievant's exit. The issues raised in the grievant's letter of appeal are valid and they were wrongly ignored by the respondent."

We find our foregoing sentiments in that case relevant to this case. The claimant was confirmed after serving her probation period successfully. If her performance was extremely below par as suggested by the respondent, then she could not have been confirmed. Vigilant employers will identify poor performers during probation and ensure that they are not confirmed. The claimant served the respondent for six years and we find it incredible that the respondent could tolerate a poor performer for such a long time. But where poor performance is not detected during probation period for one reason or the other, then the principles outlined in the abovementioned case must apply to the process of removal of such poor performers. Although the respondent claims that the claimant was a poor performer, there is little evidence to support the respondent's claim. Other than the 2006/07 audit reports on her performance, there is no other documentary evidence that lends credibility to the said allegations. Even the credibility of the 2006/07 audit reports is doubtful in view of the praises heaped on the claimant by none other than the respondent's Managing Director in his letter dated 20th April 2007 in the following terms:

"I am pleased to inform you that a salary increase which incorporates both cost of living and merit components has been approved.

The approved cost of living increase for everyone is 5% with additional merit payout depending on the assessed individual performance rating. In your case the total salary increase amounts to 10% which will be added to your basic pay effective 1st January 2007. Allow me to congratulate you for your hardwork, commitment and dedication in the delivery of critical business objective which have earned you the merit increase of 5%. I look forward to an even higher performance level and wish you every success in your career with the company."

The plain meaning of the Managing Director's said words is that the claimant earned merit increment of salary of 5% arising from her hard work and commitment. In our view these words of the respondent's Chief Executive Officer should be given more weight than the words of the auditor who is certainly junior to the Managing Director. In the circumstances we are unable to find that the claimant did not perform her work well in the years 2006/07. We are also unable to find that the claimant performed her work poorly in the subsequent years of 2008, 2009 and 2010 so as to warrant her dismissal on 2nd February 2010. The testimony of the Human Resources Director is not supported by documentary evidence showing the respondent's attempts to subject the claimant to a fair process of assessment and termination. Disciplinary matters are sensitive and must be documented so that there is no doubt about the fairness of the disciplinary process. Whereas the respondent claims that the claimant was moved to different jobs to give her a chance to improve, there is no record showing that the movements were disciplinary. Infact, there is no written statement on the claimant's alleged shortcomings and the agreed processes to be followed to enable her to improve. It was the respondent's duty to assist the claimant to improve, if her performance was poor. The respondent relies on alleged verbal communications which are disputed by the claimant. As stated above, disciplinary matters are so crucial that they should not be left to the realm of oral engagement. The respondent should have clearly documented the claimant's shortcomings and the procedures employed to improve her performance. Such information would have enabled the court to see the alleged fairness of the claimant's dismissal. In the absence of such documented evidence we are forced to conclude that poor performance on the claimant's part did not precipitate her dismissal. The claimant was hounded out of her employment for undisclosed reasons.

In the circumstances the respondent has failed to demonstrate that the claimant was dismissed for a valid reason related to her conduct, incapacity, incompatibility or related to the respondent's operational requirements as required under section 45 of the Employment Act 2007. The respondent has therefore failed to discharge the burden of proof thrust on its shoulders under section 43 of the Employment Act 2007.

As regards the procedure used to terminate the claimant, we find that the respondent flouted the law and the provisions of its own Disciplinary procedure. The respondent's disciplinary procedure provides as follows:

"RESPONSIBILITY

3. *Discipline is the responsibility of the immediate Line Manager. The Head of Department is responsible for ensuring that Line Managers in his department understand and apply this instruction firmly but fairly.*
    3. *The ultimate responsibility of ensuring fair play, uniformity of treatment as between departments and harmonious industrial relations lies with the Director of Human Resources. The Director of Human Resources is also responsible for recording in each case in the individual file:-*

a. *The nature of the offence*
b. *The action taken*
c. *The nature of any warning given.*

PROCEDURE

4. *Where disciplinary measures are contemplated the following procedures must be followed in all cases.*
    4. *The Head of Department must be informed by the immediate Line Manager. The Managing Director must be informed by the HOD where disciplinary measure is contemplated against a Manager.*

4. *The Director of Human Resources must be informed and consulted for all cases about precedents and standards of punishment before any action is taken.*

4. *The personnel involved must be left in no doubt about the nature of the offence and of the disciplinary measures which is likely to be taken against him.*

4. *If the personnel involved is to be laid off pending a disciplinary case this must be formalized immediately in writing to the individual with copies to the Director of Human Resources and the local branch of Kenya Chemical and Allied Workers Union, for union members. This suspension should NOT exceed 10 working days unless the case is before a court of LAW.*

4. *Thereafter, at any interview with the individual involved, there must be present the Line Manager concerned, a representative from the Human Resources Department (if the individual so desires) a representative from KCAAWU or anyone else of his choice from his own department. This should be made very clear to the personnel involved."*

Our interpretation of the said procedure is that the respondent was obligated to write to the claimant to state the offences facing her and the disciplinary action contemplated and ask her to prepare and submit her defence. In this way the claimant could not have been left in doubt about the allegations against her and the proposed disciplinary action. The respondent was obliged to set a particular time in which the claimant would be accorded a hearing. The procedure is in tandem with the rules of natural justice which we have held to be mandatory in all disciplinary cases. The same rules are echoed by section 41 of the Employment Act 2007. The evidence on record show that the respondent did not observe the aforesaid procedures. The letter of termination refers to alleged *"recent discussions between the Director, Human Resources and the claimant"* in which the respondent's dissatisfaction with her performance was discussed. The details of the discussions such as the dates and time are not given. There is no evidence that prior to the said discussions the allegations facing the claimant were communicated to her so that she could prepare her defence. The evidence only confirm that there was a meeting on 2nd February 2010 between the claimant and the Director, Human Resources. In the meeting she was given a letter of termination with effect from the same date. The respondent's deviation from the lawful and prescribed procedure rendered the claimant's termination unlawful. The claimant is entitled to compensation for the unlawful loss of employment. The illegality of the respondent's action is therefore two fold. Firstly, the respondent has failed to prove that there was a valid reason to justify the claimant's dismissal. Secondly, the procedure employed in the effecting the termination was flawed. In the circumstances we agree with the claimant that the termination was effected in a callous manner. Although we are unable to establish that the dismissal was motivated by ethnic or gender considerations as alleged by the claimant, only the respondent knows the true reasons for the termination. For our purposes it suffices to state that the termination was unlawful and unfounded.

We now turn to the remedies available to the claimant.

The claimant has claimed salary of Ksh. 19,724,852 in respect of the pay she would have earned has she worked up to her retirement. We find no basis for the claim in law. Her contract of employment was not a lifelong commitment to serve the respondent. The claimant has a duty to mitigate her losses. Whereas it may not be easy for her to obtain alternative employment on account of her age, it cannot be said with absolute certainty that she will not be employed elsewhere.

The claimant is entitled to the terminal dues stipulated in the letter of termination namely, pay for two days in February 2010, three months' salary in lieu of notice, twenty-five leave days pay, provident Fund dues comprised of her contribution and the employer's contribution and the three months ex-gratia pay.

The ex-gratia pay was offered by the respondent voluntarily. These entitlements seem to have been paid and are not in issue. The relationship between the parties has broken down irretrievably and the claim for reinstatement cannot be granted. The claim for remunerable benefits is untenable because they are not provided for in her contract of employment. The claimant was given free housing accommodation by the respondent during the subsistence of her employment contract and no particular values were attached to the benefits enjoyed therein such as water and electricity. In addition to the aforesaid entitlements, the claimant is entitled to damages for unlawful and unfair termination of her contract. We have considered the claimant's age and the fact that it may be difficult to secure alternative employment. We have also considered the stigma of an underperformer wrongly labelled on her by the respondent and its effects on her efforts to find alternative employment. Considering the foregoing factors, we find that this is a fitting case for maximum compensation.

Keeping in view the foregoing observations and conclusions we AWARD and ORDER as follows:

1. **THAT** the claimant suffered unfair termination of her contract of employment.
2. **THAT** in addition to the terminal dues already paid to the claimant as per the letter of termination, the respondent is directed to pay the claimant Ksh 4,830,576.00 being twelve (12) months salary being compensation for unlawful termination of her employment.
3. **THAT** the claimant will have the costs of the suit in view of the respondent's conduct in the matter.

DATED and **DELIVERED** at Nairobi this 29th day of June 2011

Paul K. Kosgei

JUDGE

S.Luyali **M. Mulupi**

MEMBER **MEMBER**