

REPUBLIC OF KENYA
IN THE CHIEF MAGISTRATES' COURT AT NAIROBI
MCELRC CASE NO.....OF 2023

RITA VALERIE ACHENI.....CLAIMANT

VERSUS

HEALTHY U 2000 LIMITED.....1ST RESPONDENT

HILLARY OYANDO.....2ND RESPONDENT

MEMORANDUM OF CLAIM

A. DESCRIPTION OF PARTIES

1. The Claimant is a female adult of sound mind residing and working for gain in Nairobi within the Republic of Kenya. Her address of service for the purposes of this suit is care of **Mutunga Justus & Associates Advocates, Hazina Towers, 11th Floor, Monrovia Street, and P.O. BOX 867-00100 Nairobi.**
2. The 1st Respondent, Healthy U 2000 Limited is a Limited Liability company duly incorporated in Kenya under the Companies Act, Cap 486, Laws of Kenya and having registered offices at Nairobi, Kenya. **{Summons to be served through the Claimant's Advocate's Office}.**
3. The 2nd Respondent is a male adult residing and working for gain in Nairobi within the Republic of Kenya. **{Summons to be served through the Claimant's Advocate's Office}.**

B. FACTS

4. At all times material to this claim, the Claimant and the 1st Respondent were in a employer-employee relationship since November 2019. Until 17th July 2022, the Claimant was under a contract of service dated 17th December 2023 and was engaged by the 1st Respondent under the designation of Assistant Shop Manager at the 1st Respondent's ABC Place shop at a gross monthly salary of Kshs. 47,079.76.

5. During the Claimant's employment, the 2nd Respondent was the Operations Manager hence the Claimant directly reported to him. During the Claimant's term of employment she served the Company with zeal, dedication and commitment in all the three branches where she had been designated, that is, Sarit Centre, Two Rivers Mall and ABC Place.

C. THE DISPUTE


6. Vide a letter dated 5th July 2023, the 1st Respondent wrote to the Claimant to show cause why disciplinary action should not be taken against her for an alleged loss of revenue of Kshs. 48,023 in loyalty points during the period when the Claimant was in-charge of the ABC Place Shop.
7. Since the Claimant was off duty on 6th July 2023, she came across the letter on 7th July 2023, at around 10:00am when she resumed work. The discovery of the said letter was followed by incessant phone calls and sustained pressure by the Human Resource Manager (HRM) who demanded that she must respond to the detailed letter within a record three (3) hours latest by 2:00pm on that day.
8. As directed, the Claimant complied with the demands and replied to the Show Cause Letter by the aforesaid time. In her response, the Claimant informed the 1st Respondent that the persons said to have been unlawfully awarded loyalty points were all customers who visit the shop and that the 1st Respondent was at liberty to reach out to them.
9. Immediately after sending her response, the Claimant received various telephone calls from her colleagues in the 1st Respondent's other shops namely Two Rivers and Village Market informing her that the 1st Respondent had through the HRM sent an email designating one of the staff to immediately replace the Claimant at the ABC Shop, a decision which had caught the Claimant's colleagues by surprise. The Claimant was never informed of her transfer, suspension or otherwise.
10. Upon receipt of the said information and in view of the sexual harassment (particularized below), with-hunt and malice that had been meted upon the Claimant by the 2nd Respondent, she had been subjected to significant mental trauma hence could not continue working in the

toxic environment. As such, she handed over keys to the shop as her new successor was to replace her on the morning of 8th July 2023.

11. The Claimant only learnt of alleged disciplinary proceedings that took place against her on 8th July 2023 and in her absence on 20th July 2023 through a letter by the 1st Respondent's HRM, in response to her Advocates' Demand Letter for unfair termination.
12. In the said letter, the HRM alleged that the Claimant was served with a disciplinary hearing invitation letter via email but failed to acknowledge receipt.
13. The Claimant avers that she was never served with any letter inviting her for disciplinary hearing hence was not granted an opportunity to defend herself.
14. Further, through the said letter of 20th July 2023, the HRM forwarded to the Claimant's Advocates a Summary Dismissal letter which in the opening paragraph read;

“Reference is made to the Show Cause Letter dated 5th July 2023, your written response to the same dated 7th July 2023 and the disciplinary hearing held on 8th July 2023...”
15. The Claimant avers that the 1st Respondent failed to comply with the provisions of sections 41, 43 and 45(2)(c) of the Employment Act, 2007 as her dismissal was substantively and procedurally unfair.
16. By failing to properly notify the Claimant of any disciplinary hearing, the 1st Respondent failed to subject the Claimant to the mandatory statutory procedure as required under section 41 of the Employment Act by: -
 - a) Failing to explain to the Claimant of the grounds of termination in a language that she understands;
 - b) The reasons for termination;
 - c) The right of the Claimant to have the presence of an employee of her choice when the explanation for the grounds of termination is made; and
 - d) Hearing and considering any representations by the Claimant and the employee chosen by her.

17. The Claimant avers that even assuming that she was served with an invitation to appear for disciplinary hearing, which she maintains that was not done, going by the letter by the 1st Respondent's HRM of 20th July 2023, it would appear that such an invite would have been sent past 2:00pm on 7th July 2023 after she had responded to the Show Cause Letter. The said letter would be inviting the Claimant to a hearing on the following day, the 8th July 2023.
18. The Claimant further avers that if indeed the 1st Respondent served the invitation to disciplinary hearing in the evening of 7th July 2023, it is would be unconscionable for the 1st Respondent to give a notice of less than five (5) hours within which the Claimant would prepare her defence, have a colleague employee to accompany her in hearing proceedings slated for the following day as required by law. Such a notice would be unreasonable, unjustifiable, malicious and procedurally unfair and cannot not pass the statutory muster provided under section 41 of the Employment Act.
19. The Claimant avers that any such unreasonably short notice hurriedly issued by the 1st Respondent was a manifestation of the 1st Respondent's predetermined position to dismiss the Claimant from her employment hence the Show Cause Letter and the disciplinary proceedings were a mere sham in the eyes of the law.
20. The Claimant avers that throughout her employment with the 1st Respondent, the 2nd Respondent, being her immediate boss, sent her several offensive WhatsApp messages that had a detrimental sexual connotation and effect on her employment, job performance and job satisfaction. The 2nd Respondent started seducing her in an offensive and abusive manner and thus undermined her dignity and standing at the 1st Respondent work place.
21. The aforesaid messages by the 2nd Respondent amounted to sexual harassment thus exposing the Claimant to unfair labour practices. Some of them were are reproduced herein verbatim:-
- a) "Kawaida...Jikaze babe, its gonna be well."
 - b) "Haha, seems you can't bend well, (emoji), unapigia mbali sana"
 - c) "I like the bending now"
 - d) "Yes babe, please do"

- e) “Hi Babe, congrats for yesterday night”
 - f) “I fill you in ? You’re too far for me to fill in.”
22. Having resisted the 2nd Respondent’s advances, the 2nd Respondent was hell-bent to sabotage her work and ensure that her place of work was a hostile and living hell. The 2nd Respondent would further ask the Claimant to send him money meant for the business on the pretext that he would refund the same which he did not to date. This was meant to place the Claimant in a situation that she would be short of cash at the end of the month in which case she would be forced to pay out the said amount out of pocket since she could not hand in unreconciled accounts from her designated Till.
23. As can be clearly gleaned from the said messages which were sent over a period of time, the 2nd Respondent was looking for emotional investment and never viewed the Claimant as an employee, who is entitled to equal opportunity and treatment at the work place.
24. Owing to the fact that the 2nd Respondent was the Claimant’s boss, the Claimant was fearful of raising her concerns with the management as such objection would disadvantage the Claimant in connection with her employment, including promotion as she had no other job, from which she would sustain her young family.
25. The behaviour of the 2nd Respondent through his direct sexually coloured remarks exposed the Claimant to great mental stress, anxiety, embarrassment, injury to her feelings, humiliation and impaired her sense of worth thus violating her inherent right to human dignity.
26. The Claimant avers that the sexual harassment by the 2nd Respondent directly discriminated against her and undermined her dignity as a person.
27. The Claimant further avers that despite having been unprocedurally and unfairly terminated from employment and by virtue of the 2nd Respondent having subjected her to the cruel and hostile working environment, her termination culminated in institution of spurious criminal allegations at Muthangari Police Station against the Claimant where the Claimant has been previously summoned by the police.

28. The leveling of the said allegations, a case which the 2nd Respondent has been following personally was a retaliatory measure for the Claimant's decision not to give into his sexual demands and was further meant to scare her from letting out the cat out of the bag.
29. Clause 9 of the Employment Contract provided for the mode of termination of employment and further provided that any termination would be in accordance with the provisions of the Employment Act.
30. The Claimant avers that she was never issued with 28-days notice as provided by law neither was she paid one month's salary in lieu of notice, in clear violation of the Employment Act, 2007.
31. Further, the Claimant was not paid her terminal dues despite not being in possession of any company stores.
32. There is no other previous or any pending suit in any Court between the parties on the same subject matter.
33. The cause of action arose in Nairobi within the jurisdiction of this Honourable Court.
34. **REASONS WHEREFORE** the Claimant seeks against the Respondents the following:
- a) A declaration that the Claimant's dismissal was both procedurally and substantively unfair.
 - b) A declaration that the 2nd Respondent sexually harassed the Claimant thus breached her right to fair labour practices.
 - c) One Month's salary in lieu of notice at Kshs. 47,079.76.
 - d) Salary for 17 days worked in July 2023 (1,569.32 x17) at Kshs. 26,678.53
 - e) Unpaid rest days
4days per month x accrued days x gross pay÷30 at double rate
 $(4 \times 34 \times 47,079.76 \div 30) \times 2 = 426,856.00$

- f) Severance pay
15days x years worked x gross pay ÷30
(15 x 3x 47,079.76 ÷30) Kshs. 70,619.64
- g) Compensation for unfair termination at 12 months
(12 x 47,079.76) Kshs. 564,957.12
- h) General damages for sexual harassment and violation of the Claimant's right to fair labour practices.
- i) Certificate of Service
- j) Interest on (c) to (h) above at court rates until payment in full.
- k) Costs of this suit and interest thereon.

DATED at NAIROBI this 9th Day of August 2023



MUTUNGA JUSTUS AND ASSOCIATES
ADVOCATES FOR THE CLAIMANT

Drawn & filed by: -

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NAIROBI

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Sarit Centre

NAIROBI.

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