



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 539 OF 2013**

**MOSES KIBET CHELUGUI.....APPELLANT**

**- V E R S U S -**

**NACICO CO-OPERATIVE SAVINGS**

**AND CREDIT SOCIETY LTD.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgement of the Chief Magistrate's Court at Milimani Commercial Courts, Nairobi delivered on 11<sup>th</sup> September 2013 by Hon. Obulutsa in CMCC No. 7589 of 2007)*

**JUDGEMENT**

1) Moses Kibet Chelugui the appellant herein, was employed by NACICO Co-operative Savings and Credit Society Limited, the 1<sup>st</sup> respondent herein, as an information technology manager. The appellant while in the course of his employment at the 1<sup>st</sup> respondent's premises, was arrested by police officers from Kamukunji Police Station on 28<sup>th</sup> February, 2007 at the instigation of the 1<sup>st</sup> respondent herein. He was detained and released without being charged. The 1<sup>st</sup> respondent thereafter dismissed him from work for gross misconduct after the arrest and detention. The appellant thereafter filed a claim against the respondents in the Chief Magistrate's Court, Milimani commercial Courts, Nairobi and claimed for ksh.106,680/= general damages for defamation, unlawful arrest and detention.

2) Hon. Obulutsa learned trial magistrate entered judgment for the appellant as against the respondent for ksh.154,375.20/= without costs and interests. The appellant being aggrieved by the judgment of the trial court, preferred this appeal.

3) On appeal, the appellant put forward the following grounds in its memorandum:

***1. That the learned magistrate erred in law and in fact in failing to appreciate the triable issues raised in the appellant's defence to counterclaim and in allowing the respondent's claim.***

***2. That the learned trial magistrate erred in law and in fact in failing to weigh the evidence and testimony of the witnesses for the appellant as against the respondents evidence.***

***3. That the learned trial magistrate erred in law and in fact in failing to evaluate the documentary evidence adduced by the appellant.***

***4. That the learned trial magistrate erred in law and in fact in finding that the appellant was only***

*entitled to a sum of ksh.300,000/= in damages which is manifestly low.*

**5. That the learned magistrate erred in law and in fact in finding that the 1<sup>st</sup> respondent was entitled to the sums claimed in the counterclaim.**

4) Though the appellant put forward the above 5 grounds of appeal, I am satisfied that those grounds can be summarised to three main grounds namely:

*i. Whether the learned trial magistrate erred in holding that the 1<sup>st</sup> respondent was entitled to the counterclaim.*

*ii. Whether the learned magistrate erred in law and fact in his award on damages.*

*iii. Whether the findings of the magistrate on evidence adduced ought to be disturbed.*

5) When this appeal came up for hearing, learned counsels appearing in this matter recorded a consent to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court and considered the rival submissions.

6) The first ground of appeal is whether the learned trial magistrate erred in holding that the 1<sup>st</sup> respondent was entitled to the counterclaim. The appellant submits that he was an employee of the 1<sup>st</sup> respondent and was dismissed from work. What is disputed is whether the said dismissal was lawful, and if so whether the 1<sup>st</sup> respondent is entitled to the sums claimed in the counter claim.

7) The appellant has argued that it is settled law that the basic principle in assessing damages for dismissal is that the employee must be put in the same position as if the employer had properly performed the contract. Therefore, the prima facie measure of damages is the sum which the employer would have had to pay in order to bring the contract to an end lawfully, that is to say, the sum payable in respect of the notice period or remainder of the term of the contract if it is a fixed term contract.

8) The appellant is urging this honourable court to set aside the award in the counterclaim and in lieu thereof dismiss the counterclaim by the 1<sup>st</sup> respondent with costs to the appellant.

9) On the other hand it is the 1<sup>st</sup> respondent's submission that the trial magistrate was right in holding that they were entitled to the counterclaim and the decision ought not to be disturbed.

10) It should be known that the appellant admitted in his defence to the counterclaim that he was granted a loan of ksh.125,000/= with interest at 1.5% per month by the 1<sup>st</sup> respondent. It was the 1<sup>st</sup> respondents counter claim that the appellant failed to repay the loan together with the accrued interest.

11) The appellant denied that he was indebted to the 1<sup>st</sup> respondent on account of the counterclaim. The appellant did not tender any evidence to show that he had repaid the loan in full. The 1<sup>st</sup> respondent on the other hand produced a statement of the appellant at pages 27 to 31 of the record of appeal which show the amount due and unpaid was ksh.154,375.20/= on account of the loan and accrued interest at the time of making the counterclaim. The 1<sup>st</sup> respondent relied on the case of **Magunga General Stores –vs- Pepco Distributors Limited KLR 150** where it was held that: in a claim for repayment of a debt, it is not sufficient to simply deny liability without giving some reason. A mere denial is not sufficient. The appellant had to give a good reason as to why he did not owe the money. The appellant failed to discharge this responsibility and hence failed to prove its defence on a balance of probability.

12) After a careful consideration of the rival submissions vis-a-vis the evidence tendered before the trial court, I am convinced that the learned trial magistrate applied the correct principles. He analysed the evidence to determine the counterclaim and eventually allowing it in favour of the 1<sup>st</sup> respondent and against the appellant. The trial court's decision therefore on this cannot be faulted.

13) The second ground of appeal is whether the learned magistrate erred in law and fact in his award on damages. The appellant submits that the damages awarded to him for unlawful arrest and detention are inordinately too low and that he suffered mental anguish, loss and damage in which he lost his employment and the award of ksh.300,000/= cannot be adequate compensation of the same. The appellant further argued that the trial magistrate failed to appreciate the fact that the appellant was arrested without the 1<sup>st</sup> respondent conducting any prior investigation to ascertain the issue of fraudulent transaction that had occurred, leading to his arrest.

14) Finally, the appellant has also argued that the award should be revised upwards.

15) The 1<sup>st</sup> respondent on the other hand did not submit on the issue on general damages awarded for unlawful detention but went ahead to submit under this head a sum of ksh.53,340/= awarded as special damages. This award to the appellant as salary in lieu of notice is viewed as proper by the 1<sup>st</sup> respondent and that the appellant was not entitled to any more compensation on account of the claim for unfair termination. The appellants contract of employment clearly shows that the same is terminable by giving one month's notice. This means that if the 1<sup>st</sup> respondent intended to terminate the appellant's contract it would have given the appellants one month's notice or pay him one month's salary in lieu of notice.

16) I have carefully considered the competing argument and further re-evaluated the tendered before the trial court evidence and I find no fault in the manner quantum was assessed by the trial magistrate. I am satisfied that the trial magistrate was properly guided in arriving at the award of kshs.300,000/=.

17) The third ground of appeal is whether the findings of the magistrate on evidence adduced ought to be disturbed. This has been raised by the appellant because he believes that the trial magistrate did not weigh the evidence and testimony of the appellants witnesses as against the respondents' evidence.

18) It is the appellant's submission that the 1<sup>st</sup> respondent ought to have investigated the claim before having him arrested. Further to the foregoing the appellant submits that the 1<sup>st</sup> respondent caused to be published in the Daily Nation dated 21/3/07 at page 49 a photograph of the appellant with the appellant's name in bold print and under the photograph alongside a public notice with the following words captioned:

**“the person whose photograph appears here (formerly I.T. Manager) ceased to be an employee of NACICO Sacco Ltd, he has no authority to transact any business for NACICO Sacco Ltd”**

19) The 1<sup>st</sup> respondent on the other hand submits that it was not defamatory for an employer like them to publish such a notice since it was intended to caution their clients or customers, not to deal with the appellant because he was no longer employed by the 1<sup>st</sup> respondent.

20) As it relates to evidence provided in the trial court, the 1<sup>st</sup> Respondent submits that the trial magistrate looked at both the evidence adduced and the documentary evidence provided and arrived at a sound finding. For the damages awarded the 1<sup>st</sup> respondent still reinforces his point as argued earlier that the appellant has not laid a basis justifying the award of a higher sum.

21) Having considered the competing arguments and I find no fault in the manner the learned trial magistrate arrived at his judgment. The appellant has not shown what relevant factors the trial court failed to take into account or what factors not taken into account in arriving at the judgment.

22) With respect, I agree with the submission of the 1<sup>st</sup> respondent. Consequently, the appeal is dismissed. In the circumstances of the appeal a fair order on costs is to direct which I hereby do that each party should bear its own costs of the appeal.

**Dated, Signed and Delivered in open court this 19<sup>th</sup> day of October, 2017.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondent