



1. *Civil Appeal*

2. *Subject of Subordinate Court Case*

CONTRACT

*Employment Contract*

2.1 *Made adult - employee*

February 1984. 2.2 *Employed as a clerical officer with effect from 1<sup>st</sup>*

2.3 *Rose through the ranks to be*

i) *A registry assistant (1988),  
Job grade CH8 after training to be*

1999) ii) *Records officer II (27<sup>th</sup> February  
Job grade HC7 with effect from  
23<sup>rd</sup> June 1999.*

iii) *Promotion letter  
17<sup>th</sup> December 1999*

2002 iv) *Job description letter 30<sup>th</sup> September*

2.4 *Employer a co-operative savings and credit society.*

<p>the section. Key tasks: staff in the section.</p>	2.5	<p>Duties of employee co-ordinating work flow within</p>
<p>is well manned.</p>		<p>a) Supervising and assigning duties to</p>
		<p>b) Ensuring the customer service counter</p>
<p>application, payslip but no guarantors.</p>	2.6	<p>Appellant dealt with a file having a loan</p>
<p>sufficient shares.</p>	2.7	<p>The applicant for emergency loan appeared to have</p>
<p>was deducted from M. N Arwa of Mbita</p>	2.8	<p>Appellant approved the loan without guarantors.</p>
<p>found to be fraudulent.</p>	2.9	<p>It transpired that Ksh. 20,000/- as emergency loan</p>
	2.10	<p>On investigations, deductions for Ksh. 20,000/- was</p>
<p>appellant not charged in criminal court case, he was</p>	2.11	<p>Indication led to the appellant, whereas the</p>
		<p>interdicted on the 14<sup>th</sup> May 2003 and summarily</p>
		<p>dismissed on 7<sup>th</sup> November 2003.</p>
<p>seeking:</p>	2.12	<p>Appellant files suit in the magistrate's court</p>
<p>dismissal and breach of the terms under the management</p>		<p>i) General damages for wrongful</p>
<p>Ksh. 157,138/-</p>		<p>staff terms.</p>
		<p>ii) Two months salary in lieu of notice</p>
		<p>iii) Costs of suit</p>
		<p>iv) Interest</p>
		<p>v) Any other relief.</p>
<p>the appellant on 8<sup>th</sup> October 2008.</p>	2.13	<p>After trial, Hon. Magistrate dismisses suit against</p>
	2.14	<p>Appellant/original plaintiff files appeal on 7<sup>th</sup></p>

November 2008.

3. *Appeal*

*The Hon. Magistrate erred in law and fact:*

- 3.1 ... to hold the plaintiff was to prove that he was not negligent ... when the burden of proof lay with the defendants.
- 3.2 ... considering the evidence of an irrelevant witness.
- 3.3 ... in holding that plaintiff admitted to vetting the loan application, subject matter of suit ...
- 3.4 ... in not making a finding of facts in issue between the parties.
- 3.5 ... in holding it was the plaintiff's duty to vet the entire confines of loan application.

4. *Submission by appellant:*

- 4.1 Worked diligently for respondent from 1984 to 2003.
- 4.2 Was unlawfully dismissed from employment.
- 4.3 Claims damages of 2 months salary in lieu of notice Ksh. 157,138/-
- 4.4 Claims further damages for wrongful dismissal.

4.5 *Burden of proof shifted by trial magistrate to appellant.*

4.6 *There was no negligence on his part. Duty only included vetting of guarantors who guarantee loans not the loanees.*

5. *Submissions by respondent:*

5.1 *Termination of appellant was lawful.*

5.2 *Appellant was negligence in duty.*

5.3 *Appellant admitted his duty included vetting of guarantors.*

5.4 *The appellant was correctly dismissed, no Damages is entitled.*

5.5 *Misconduct was proved against appellant.*

5.6 *Prayed for costs.*

6. *Held:*

6.1 *Decision of trial magistrate's court upheld.*

6.2 *Appeal dismissed.*

7. *Case law:*

8. *Advocates :*

i) *David Owiyo appellant present in person*

*Original plaintiff*

- ii) *M.N. Bonyo instructed by M/s Obura Mbeche & Co Advocates for the  
Respondent/original defendant*

**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CIVIL APPEAL 605 OF 2008**

**DAVID OWIYO.....APPELLANT/ORIGINAL PLAINTIFF**

**VERSUS**

**HARAMBEE CO-OPERATIVE SAVINGS & CREDIT.....RESPONDENT/ ORIGINAL  
DEFENDANT**

*(Being an appeal from the Ruling of the Hon. W. Mokaya – Principal Magistrate dated*

*8<sup>th</sup> October 2008 in CMCC 357 of 2005 in Milimani Commercial Courts)*

**J U D G M E N T**

**I. BACKGROUND**

1. The relationship between the parties was that of employer/employee. The appellant/original plaintiff David Owiyo (herein referred to as the employee) was first engaged in service with the respondent/original defendant M/s Harambee Co-operative Sacco Ltd, (herein referred to as the employer) on the 1<sup>st</sup> February 1984.
2. He rose through the ranks to the position of a
  - 2.1 Registry Assistant (1988)  
Job Grade CH 8
  - 2.2 Records officer II (27<sup>th</sup> February 1999)  
Job grade HC 7  
After undergoing training with effect from 23<sup>rd</sup> June 1999.
  - 2.3 A promotion letter was issued to him on  
17<sup>th</sup> December 1999.
  - 2.4 A job description letter was issued on the  
30<sup>th</sup> September 2002
3. His duties was described as a “co-ordinating work flow within the section.” The keys tasks being:
  - 3.1 Supervising and assigning duties to the staff in the section.
  - 3.2 Ensuring the customer service counter is well manned.
  - 3.3 Compiling of weekly and monthly management report.
  - 3.4 Vetting of guarantors

- 3.5 Attending to branch officials complaints and inquiries.
- 3.6 Co-ordinating the tracking of misplaced files.
- 3.7 Ensuring the files are returned to their dockets daily.
4. He was further given authority/decision making the following areas:
  - 4.1 Vetting access to the repository
  - 4.2 Vetting of guarantors
  - 4.3 Supervising staff in the section
5. As far as the appellant was concerned, he dealt with a file that came to him with a loan application and pay slip. The application had no guarantors but this was because the applicant had sufficient shares to guarantee his own loan.
6. In essence, the appellant opposed the forms on ground that the loanee had sufficient shares. The issue of the loan was to be handled by another section.
7. It transpired later that sometime before March 2003, Ksh. 20,000/- as emergency loan, had been deducted by monthly installments from the payslip of one N.O. Arwa, a member of the respondent's co-operative of Mbita.
8. Upon investigation by the respondents the deduction for the Ksh. 20,000/= was found to be fraudulent.
9. Indication led to the employee. Whereas he was not charged before a court of law for a criminal offence, and whereas others had been so charged he was instead interdicted in May 14<sup>th</sup> the year 2003.
10. On the 7<sup>th</sup> November 2003, the employer summarily dismissed the employee appellant.
11. The employee's formal computation was as follows:
  - 11.1 Salary in lieu of leave
  - 11.2 withheld salary
  - 11.3 Prorata salary
  - 11.4 Salary arrearsTotal Ksh. 390,519/-
12. Less the following deductions
  - 12.1 Tax
  - 12.2 Salary advances
  - 12.3 Car loanTotal Ksh. 458,955/60

13. This brought a deficit sum of Ksh. 68,436/- that is the employee was to refund this sum of moneys back to his employer.

14. On the 17<sup>th</sup> January 2005, the employee filed suit against his employer through his advocates M/s Kandie Kimutai & Co Advocates. He prayed for:-

14.1 General damages for wrongful dismissal and breach of the terms under the management staff.

14.2 Two months salary in lieu of notice Ksh. 157,381/-

14.3 Costs of the suit.

14.4 Interest on the two months salary in lieu of notice.

14.5 Any other relief that the court may deem fit to grant.

15. The defence denied the allegation contained in the plaint.

16. After trial the Hon. Magistrate dismissed the suit against the appellant on 8<sup>th</sup> October 2008 as having not been proved that his employment was unlawfully terminated.

17. Being dissatisfied with the decision of the Hon. Magistrate, an appeal to the High Court was preferred by the employee. The memorandum was filed by M/s H. M. Mudeizi & Co Advocates 18<sup>th</sup> August 2006 (formerly of Kandie Kimutai & Co Advocates).

## II APPEAL

18. The employee/appellant stated that the Hon. Trial Magistrate erred in law and fact:

18.1 ... to hold the plaintiff was to prove that he was not negligent ... when the burden of proof lay with the defendants.

18.2 ... considering the evidence of an irrelevant witness.

18.3 ... in holding that plaintiff admitted to vetting the loan application, subject matter of suit ...

18.4 ... in not making a finding of facts in issue between the parties.

18.5 ... in holding it was the plaintiff's duty to vet the entire confines of loan application.

### i) Submissions by Appellant/Employee

19. In submissions the appellant put in written submission filed by himself. He in fact was acting in person but declined to address the court. (Notice to act in person being 7<sup>th</sup> June 2011)

20. I had occasion to peruse this written submission together with the lower court records.

21. In brief the employer/appellant stated he had worked diligently for the respondent from 1984 to 2003. He was summarily dismissed from employment unlawfully. As such, he prays that he be awarded the two months salary in lieu of notice amounting to Ksh. 157,138/-. He further claimed damages for

wrongful dismissal.

22. The Hon. Magistrate had erred because she shifted the burden of proof to the employee to prove his case. According to the employee there was no negligence on his part. His duty only included the vetting of guarantors who are to guarantee the forms and not the loanees.

23. In essence although not stated, the employee wishes some token of payment from the employer for his loyalty throughout the years of employment.

ii Submission by Respondent/Employer

24. In reply, the respondent employer stated that the termination was lawful. The appellant had been negligent in his duties. He even admitted that his duties included vetting of the guarantors in his letter of appeal. The appellant was therefore correctly dismissed and was not entitled to any damages as misconduct had been proved.

25. The employer prayed the appeal be dismissed with costs to them.

II OPINION

26. There is without a doubt that some fraud occurred in the offices of the respondent whereby a loss of Ksh. 20,000/- occurred. The employee was implicated as he dealt with the application forms. Without his authority the funds may not have been paid. He further incriminated himself by stating:

“a) The loan is self guaranteed (guarantors not required)

b) I never dealt with the loanee’s file” (letter 13<sup>th</sup> November 2003)

c) ... loan application which was brought to my attention to vet guarantors as part of my duty. I later on found that the member’s shares were higher than the loan in question.”

I then crossed, meaning the member could be granted this loan against shares.

So all the guarantors that were there were never vetted that is why I [did] not sign.”

(letter)

27. The employee gave the impression that the employee never had been charged in court to prove his guilty. If that was so, then he ought to have obtained the two months salary in lieu of leave and related benefits.

28. The employer explanation to this, the first being that yes, the employee had been charged with the criminal offence and as such was interdicted. This decision was not bound by the outcome of the police investigations. The whole exercise of interdiction was lawful.

29. The employee was in breach of his contract by simply not vetting the forms to confirm its genuineness before being presented to the next office for approval. The employee was negligence. He was implicated for the breach of his terms of service and was accordingly guilty of gross misconduct.

30. The employer was within the law to summarily dismiss the employee. That the terms of the collective bargaining agreement did not apply to the employee as he was in grade HC7. Anything outside this group grade would be subjected to the collective bargaining agreement. This explains why he was not entitled to what he claims was his entitlement.

31. Whereas all this evidence was before the Hon. Trial Magistrate who found that the employee had made no case against the said employer and

32. Whereas the employee prayed for general damages for breach of contract, damages are not awarded for breach of contract

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33. As stated earlier, the dues entitled to the employee were paid. Unfortunately, he had an enormous car loan that brought his entitlement to a deficit of Ksh. 68,436/60.

IV **CONCLUSION**

34. I would conclude that the trial magistrate findings were correct. The appeal is dismissed with costs to the respondents.

DATED THIS 28<sup>TH</sup> DAY OF MARCH 2012 AT NAIROBI

**M.A. ANG'AWA**

**JUDGE**

*Advocates* :

i) *David Owiyo appellant present in person*

*Original plaintiff*

ii) *M.N. Bonyo instructed by M/s Obura Mbeche & Co Advocates for the*

*Respondent/original defendant*