

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**ELRC CAUSE 573 OF 2017**

**SIMEON MWAKOI MKONGO.....CLAIMANT**

**VS**

**JITEGEMEE CO-OPERATIVE  
SAVINGS & CREDIT SOCIETY LIMITED.....  
.....RESPONDENT**

**JUDGMENT**

Background

1. Contending that at all material times, he was an employee of the Respondent, whose employment they summarily terminated, the Claimant sued the Respondent seeking declaratory and compensatory remedies through his Memorandum of Claim dated 13th July 2017.
2. Upon being served with a summons to enter an appearance, the respondent filed a Memorandum of Appearance dated 13th September 2017 and a Memorandum of Response also dated 13th September 2017. In the Memorandum of Response, the Respondent denied the claimant's cause of action and entitlement to the reliefs sought. The respondent counterclaimed against the claimant, seeking KShs 3,320,000.
3. At the hearing, the parties adopted their respective witness statement filed herein as their respective evidence in chief and produced their various documents filed under the respective lists of documents as their documentary evidence.

Claimant's Case

4. It was the Claimant's case that he was first employed by the Respondent on 6th April 2010 as Senior Accountant Clerk I on permanent and pensionable terms. He rose through the ranks and was promoted to Acting Chief Executive Officer (CEO) on 1st October 2013. He was confirmed as the full Chief Executive Officer on 1st January 2015.
5. He was employed consistently for approximately six years until his termination. During his tenure he maintained an exemplary record: no warnings, no disciplinary actions for indiscipline, absenteeism, or unsatisfactory performance. He received commendations for his excellent performance and significantly contributed to the Society reaching its full potential, attaining its highest levels of growth and success.

6. He collaborated extensively with the Respondent's auditors, senior management, Sub-County Cooperative Officer (Mombasa), County Co-operative Officer (Mombasa), and managed duties as stipulated under Jitegemee Sacco Society Limited By-laws No. 66 to enhance service quality, oversee daily operations, and guarantee excellent productivity.
7. At the time of termination on 1st December 2016, his basic salary was KShs. 173,452, and the house allowance amounted to KShs. 56,199.
8. Through a letter dated 14th August 2016, the respondent placed him under administrative suspension for a period of 52 days in order to facilitate an investigation concerning the financial matters of the Sacco.
9. Subsequently, by its letter dated 1st October 2016, the Respondent invited the Claimant to aboard of directors meeting scheduled for 8th October 2016 to address the various allegations of misconduct set out in the letter.
10. On 19th October 2016, he received a show-cause letter and was required to respond thereto within 48 hours; in the event of default, he would face disciplinary action. This notwithstanding that he was not issued with any report, inquiry proceedings and/or other relevant documents to enable him to respond adequately to the show cause letter.
11. Though the letter dated 2nd November 2016, the respondent interdicted him indefinitely.
12. He further stated that through a letter dated 11th November 2016, he was invited to attend aboard hearing meeting that was scheduled for the same day at 2:00 pm. He attended the meeting. Random allegations were raised, and he was allowed to respond. He later submitted a detailed written response to the Chairman dated 29th November 2016.
13. On 21st December 2016, he received an email invitation for a board meeting on 23rd December 2016 at 2:00 pm. The notice was unreasonably short. He was out of town and could not attend. The Board proceeded in his absence and summarily dismissed him. The decision was communicated through a letter dated 23rd December 2016. The effective date of the dismissal was backdated to 1st December 2016. At this point, he had not been formally interviewed by the Disciplinary Committee, nor had the committee's decision been properly communicated to him.
  14. The dismissal letter cited lack of professionalism, insubordination, and misappropriation of Society funds as the reason for the dismissal. The grounds were false and unfounded. The summary dismissal was wrongful and unfair. It lacked substantive justification and procedural fairness.
  15. The Claimant asserted that the dismissal was retaliatory. He had raised serious concerns with the Management Committee about the manner in which allowances were being awarded to members without proper compliance with Society rules and procedures. These irregular allowances, together with increased benefits to committee members, denied the Society income and threatened its financial position and possible untimely winding up. These issues had been highlighted earlier by SASRA during the approval of the 2015 financial statements.
  16. In his role as CEO, he raised these matters to protect the Society's finances and ensure compliance with By-laws. The committee members allegedly felt

threatened and instigated the termination to protect themselves from scrutiny for misappropriation and misuse of Society funds. 17. The Respondent unlawfully withheld his Sacco savings entitlement/dues of KShs. 520,268 without justifiable cause or satisfactory communication.

18. The termination caused the Claimant mental anguish, loss of career, and right to livelihood.

19. The Claimant asserted that, in the circumstances, he is entitled to the following reliefs. No. Particulars of Claim Amount (Ksh)

i Damages for wrongful/unfair termination (12 months) 2,755,812

ii 3 months' notice pay 688,953

iii Lost earnings until retirement (20 years) 55,116,240

iv Withheld Sacco savings and entitlement 520,268

v Punitive damages 150,000

vi Unpaid salary for 23 days in December 2016 176,065.76

Any other remedy the court may deem fit -

### Respondent's Case

20. The Respondent presented one witness, Bushanga Mzee Mwidada, to testify on their behalf. The witness stated that the Claimant acted as the CEO of the Respondent. However, he was never confirmed into that position at any time.

21. The witness further stated that the Claimant's employment contract was strictly governed by the Respondent's Human Resource and Administration Policy, 2011, the Memorandum of Agreement between all employees and the Respondent regarding salaries and terms and conditions of service, the Sacco Society Regulatory Authority Regulations [Sasra] and the terms specified in their letter of appointment.

22. The Respondent summarily dismissed the claimant from employment on the 23rd of December 2016 for gross misconduct, gross misappropriation of funds, carelessness, and abuse of office in strict compliance with the law and rules governing the claimant's employment.

23. On the 20th November 2014, 13th April 2015, 18th November 2015 and 31st of May 2016, respectively, Sasra, the statutory body mandated to regulate the Respondent, raised regulatory concerns relating to the Respondent's levels of governance, financial soundness and stability, details of which are elaborated in the said letters.

24. The Board deliberated on the concerns raised by Sasra in a board meeting held on 12th of August 2016, and a decision was made to send the Claimant on administrative leave in order to allow the board to investigate matters pertaining to the financial aspects of the Respondent.

25. The Claimant was duly notified that upon completion of the investigation, the Claimant was required to attend a meeting where the results of the investigation and any other disciplinary sanctions were to be discussed.

26. On 1 October 2016, the Claimant was invited to a board meeting on 8 October 2016 to address the serious gross issues of financial impropriety, including:

- a) Massive cash payments of KShs. 3,320,000 from June to July 2016, which had no supporting documents.
- b) Allowances paid to the Claimant for KShs. 1,000,000 without the board's authorisation, at a time when the Respondent was incurring losses.
- c) Failure to appraise the board of the respondent's operations.
- d) Overdrawing of the Respondent's current account without the board's knowledge.

27. On 19 October 2016, the Claimant was issued a show cause letter informing him that the disciplinary committee had concluded that he was culpable of misconduct. The Respondent required him to demonstrate cause within 48 hours as to why he should not face summary dismissal.

28. On 27th October 2016 and 4th November 2016, the Claimant responded to the Respondent's letter, alleging ill will on the part of the Respondent. The Claimant also stated that he was unable to attend the meeting on 8th October 2016 because he was away, yet he did not have the courtesy to inform the board of his unavailability. The Claimant was also firm that he did not act out of mediocrity, but was guided by professionalism.

29. On the 2nd of November 2016, the Claimant was interdicted pending further disciplinary hearing. The Claimant received full salary for the month of November, which also covered December 2017, as he was to earn half salary.

30. After considering the Claimant's responses, the Respondent invited the Claimant to a disciplinary hearing on 11th November 2016 and 30th November 2017, respectively. The Respondent failed to attend both meetings without any explanation.

31. The Respondent again, through an email dated 21st December 2016, invited the Claimant to a disciplinary meeting on 23rd December 2017. The Claimant failed to attend that meeting. A decision was then made to summarily dismiss the Claimant. The dismissal letter was effective from 23rd December 2017, although it was mistakenly dated with effect from 1st December 2017.

32. The Claimant was properly notified of his right of appeal and informed that he should have notified the secretary in writing if he wished to exercise that right. The Claimant decided not to appeal.

33. The concerns raised by Sasra, which were corroborated by an independent auditor's report, were of such severity that they proved the Claimant's involvement in gross misconduct, significant misappropriation of funds, negligence in his duties, and abuse of his office.

34. The witness stated that, as a result of the Claimant's abuse of office and misappropriation of funds, the Respondent suffered losses amounting to KShs. 3,320,000, as can be discerned from the forensic audit conducted on the Respondent's books of accounts.

### **Analysis and Determination**

35. I have carefully considered the pleadings, evidence and submissions by the parties herein, and the following issues emerge for determination;

- a) Whether the summary dismissal against the Claimant was unfair.
- b) Whether the Claimant is entitled to the reliefs sought.

c) Whether the Respondent's Counterclaim is meritorious.

Whether the summary dismissal against the Claimant was fair.

36. Section 45[1] of the Employment Act prohibits the unfair termination of an employee's employment, and subsection 2 delineates the circumstances that would constitute such unfair termination. Unfair termination occurs when it lacks procedural fairness and substantive justification- when the reasons are invalid or unfair. It is important to reiterate that the absence of either or both of these components would render the termination unfair.

37. In the case of *Naima Khamis v Oxford University Press E. A Limited* [2017] eKLR, cited in

*Pandya t/a Ziwa Resort and Bamburi Beach Resort v Katana* [2024] KEERC 1826 [KLR], the Court of Appeal, elaborating on this, stated;

".....we wish to take note of the provisions of section 43[1] of the Employment Act, which provides that in any claim arising out of termination of a contract, the employer is required to justify the reason or reasons for the termination, and where the employer fails to do so, the termination is deemed to have been unfair,

Also, Section 45[2] requires a termination to be done according to a fair procedure. From the foregoing, termination of employment may be substantively and/or procedurally unfair.

A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract, or fails to accord an employee an opportunity to be heard as by law required."

38. Section 41 of the Employment Act, 2007, prescribes procedures to ensure procedural fairness in the termination of employment or in cases of summary dismissal. This provision outlines a mandatory process that any employer must follow when considering terminating or summarily dismissing an employee.

39. However, it is pertinent to observe that, when assessing the procedural fairness of such termination or summary dismissal, the requirements outlined in Section 41 should be considered alongside other relevant statutory provisions and documents. These include the provisions of the Fair Administrative Action Act; constitutional rights such as the right to fair administrative action under Article 47, the right to fair labour practices under Article 41, and the right to a fair hearing under Article 50; as well as principles of natural justice and the employer's Human Resources Policies and Procedures Manual.

40. Recently, in the case of *Judicial Service Commission & 2 others v LMN* [2025] KESC 53 [KLR], reflecting the changed landscape in disciplinary processes against employees, the court authoritatively declared;

"1. We begin this judgment by declaring that the fairness of any disciplinary process is today a constitutional imperative, irrespective of the status of the officer involved. The process must uphold all the tenets of fair administrative action under Article 47 and the right to fair hearing under Article 50 of the Constitution. In addition to these constitutional safeguards, by the provisions of the Judicial Service Act [JSA], Cap 8A,

and the Fair Administrative Action Act, Cap 71, the disciplinary bodies, including the Judicial Service Commission [JSC], are bound to ensure that the disciplinary action against a Judge, judicial officer and staff must strictly comply with both constitutional and statutory requirements.”

41. A careful examination of the submissions submitted by both Counsel for the parties reveals a common aspect: they have both approached the matter from a limited perspective of procedural fairness, heavily relying on Section 41 of the Employment Act, 2007, to the exclusion of other pertinent and essential statutory and constitutional provisions.

42. However, it is important to emphasise that Section 41 of the Employment Act sets out a mandatory procedure that an employer must follow when contemplating terminating an employee’s employment. The procedure includes three key steps: the employer must notify the affected employee of their intention and the reasons behind it; the employer must provide the employee with a sufficient opportunity to make representations on the grounds, with the option to be accompanied by a colleague of their choice or a trade union representative if they are a member, where they wish to exercise that right under the provision; and the employer must consider the representations made before making a final decision on the matter.

43. The Respondent’s Counsel submitted that the Respondent duly conformed with the mandatory procedure in arriving at the decision to summarily dismiss the Claimant from employment. The Claimant, on the other hand, contended that there was non-adherence.

44. There is no dispute that, through its letter dated, the Respondent placed the Claimant under what it termed as an administrative leave of 52 days to enable it to investigate issues discussed by its Board of Directors on 12th August 2016, and the information that emerged thereof concerning the day-to-day operations of the Respondent, issues that were very grave.

45. It is important to note that the letter was expressed in a generalised manner, which, in my view, could not facilitate the Claimant or any observer in understanding the specific allegations or investigations concerning the Claimant. Investigations against an employee may lead to outcomes that are prejudicial to the employee's employment, which, of course, is the employee's livelihood. As such, it becomes essential, pursuant to the dictates of Article 47 [the right to fair administrative action] of the Constitution of Kenya 2010 and the stipulations of the Fair Administrative Action Act, that the employee be explicitly and concisely informed of what is being investigated against them.

46. Subsequently, by a letter dated 1st October 2016, the Claimant was formally invited to a meeting scheduled for 8th October 2016, during which he was expected to address four specific allegations made against him. The Claimant stated that this meeting never took place. Despite these diametrically opposite positions on this point, the Respondent considered it unnecessary to produce minutes or any document to demonstrate that the meeting indeed did not occur. I have no hesitation in holding that it did not.

47. The Claimant was issued a show-cause letter dated 19th October 2016, in which he was given 48 hours to respond to the allegations specifically outlined in the letter dated 1st October 2016. Therefore, I am convinced that the Claimant was informed of the Respondent's intention and the grounds underlying it.

48. On 11th November 2016, the Claimant received an invitation for a hearing scheduled for the same day at 2:00 pm. He admits that he attended the meeting, though the notice was short. Random questions were fired at him, and he was not given an adequate opportunity to answer them. The Respondent claims that, contrary to the Claimant's assertion, he did not attend the meeting. Following his failure to attend, the disciplinary hearing was rescheduled for 30th November 2016.

He did not attend this hearing either.

49. This Court notes that the Respondent did not place forth any evidence to demonstrate that, indeed, on 11th November 2016, it convened a disciplinary hearing meeting, but the same was adjourned to another date as a result of the Claimant's absence. I do not see any document presented by the Respondent to show that the alleged disciplinary hearing was held on 30th November, 2016. In fact, if indeed it was convened and it did not proceed for the said reason, reasonably, it would be expected that this fact be mentioned in the Respondent's subsequent correspondence, the email dated 21st December 2016, that invited the Claimant to a meeting scheduled for 23rd December 2016.

50. The Respondent argued that the Claimant was invited to a disciplinary hearing that was slated for 23rd December 2016, but which he failed to attend, leaving it with no option other than to summarily dismiss him.

51. I have carefully considered the email correspondence dated 21st December 2016, which read in part;

"I am hereby instructed by the Board of Jitegemee sacco that you be invited to attend its board meeting that will be held on Friday, 23rd December 2016 at Fosa offices from 2.00 pm. Take note that this will be a very important meeting that needs your presence, as issues and verdicts will be determined at this level. It's my hope that this finds you well and meet this requirement."

52. I take the firm view that the correspondence did not invite the Claimant to a disciplinary hearing, but to attend a board meeting. Time and again, this Court has held that not every meeting constitutes a disciplinary hearing. Where the employer intends that a meeting is to be for a disciplinary hearing against an employee, they must expressly state the purpose of the meeting as such, and the employee's right of accompaniment under section 41 of the Employment Act. 53. Having stated this, I conclude that no disciplinary hearing meeting was convened by the Respondent, which the Claimant failed to attend, thereby providing the Respondent with a basis to summarily dismiss him, as they purportedly did, without affording him an opportunity to be heard. 54. This Court has not lost sight of the fact that, upon receipt of the email correspondence, the Claimant on 21st December 2016 wrote to the Respondent.

"I acknowledge receipt of your invitation with thanks; however, kindly inform the board that I am not in Mombasa and will be coming back early next year, God willing."

55. The Respondent did not deny receipt of this email correspondence by the Claimant. This correspondence, which I hold, presents a valid reason why the Claimant was unlikely to attend the board meeting and would, in a proper organisational context, warrant careful consideration of the request to reschedule the meeting. The employer would be expected to deliberate and then make a decision regarding this request. If the decision were to be unfavourable, prompt notification should be issued. The stipulations of Article 47 of the Constitution could definitely demand that.

56. Based on the foregoing premises, I reach the unavoidable conclusion that the Respondent did not provide the Claimant with an opportunity to defend himself against the accusations made against him. Consequently, the principles of procedural fairness, which are both constitutional and statutory imperatives, were not observed.

57. This Court is compelled to conclude that the Respondent's actions, as brought out hereinabove, portray it as an employer that acted opaquely and was in a hurry in dismissing the Claimant.

58. In the case of *Eric Kamande v Judicial Service Commission* [ 2025] KESC 48[KLR], the Supreme Court of Kenya held;

"65..... How was he to defend himself? The audi alteram partem rule, as a basic but fundamental principle of natural justice and fair play, dictates that no one should have their rights negatively impacted without a fair hearing. Conversely, a person accused of a transgression is entitled to cross-examine the accuser under oath in order to test the veracity of the complaints." 66. The right to a fair hearing is firmly rooted in Article 50[1] of the Constitution....."

59. By reason of the foregoing premises, I find that the summary dismissal against the Claimant was procedurally unfair.

60. I now turn to consider the substantive justification aspect of the summary dismissal against the Claimant.

61. In a dispute over the termination of an employee's employment, section 43 of the Employment Act stipulates that the employer must prove the reasons for termination. If the employer fails to do so, the termination shall be regarded as unfair under section 45 of the Act.

62. Nevertheless, the obligations imposed upon the employer extend beyond Section 43 of the Act. Additional legal obligations are also mandated by other provisions contained within the Act. Closely related to the legal burden under Section 43 is the requirement under Section 45[2][b] to demonstrate that the reason was fair and valid.

63. Section 44[4] of the Act provides for actions and inactions by an employee that may amount to gross misconduct, thereby justifying their summary dismissal. However, it is imperative to state that the list is not exhaustive.

64. Critically examining the provisions of section 44[3] of the Act, it cannot be safely claimed that it is not sufficient for an employer to simply state that the

employee has committed one or more of the acts or omissions listed in section 44[4] of the Act or in its Human Resources Manual. An employee's misconduct does not automatically justify summary dismissal unless it is 'so grave' that it indicates the employee's abandonment of the intention to remain employed. In the oft-cited case of *Laws v*

*Landon Chronicles Limited* [1959] 2 ALL.L. R, the court held;

"Since a contract of service is but an example of contracts in general, so as the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service."

65. Whether the employee's misconduct attracts dismissal requires an assessment of the degree and the surrounding circumstances, the contextual approach. In *McKinley v BC Tel* 2001 SCC 38[2001]2SCR 161, the Supreme Court of Canada held, and I agree:

"29. When examining whether an employee's misconduct justifies his or her dismissal, courts have considered the context of the alleged insubordination. Within this analysis, a finding of misconduct does not, by itself, give rise to a just cause. Rather, the question to be addressed is whether, in the circumstances, the behaviour was such that the employment relationship could no longer viably subsist.

39. To summarise, the first line of case law establishes that the question whether dishonesty provided just cause for summary dismissal is a matter to be decided by the trier of fact, and to be addressed through an analysis of the particular circumstances surrounding an employee's behaviour. In this respect, courts have held that factors such as the degree of misconduct and whether it violated the "essential conditions" of the employment contract or breached an employer's faith in an employee must be considered in drawing a factual conclusion as to the existence of just cause."

66. It is important to emphasise that, in certain situations, procedural unfairness is intertwined with substantive unfairness. These circumstances include cases where it is evident that the employer deliberately prevented the employee from having a fair chance to defend himself against the accusations and clear his name. Reasonably, it cannot be argued that the employer had a valid and fair reason to dismiss the employee. For this reason, I hold that the summary dismissal against the Claimant was substantively unfair.

66 A. This Court notes that the show cause letter dated 19th October 2016, read in part;

"This has reference to the allegations dated 01/10/ 2016 issued to you by the undersigned and subsequent disciplinary committee conducted against you on the charges levelled against you in the letter dated 15/ 10/2016. Now the disciplinary committee has submitted their report, holding you guilty of the misconduct alleged in the letter given to you. [Emphasis added]

This, in my view, revealed the Respondent as an employee who had a fixed intention to dismiss the Claimant, even before he could be heard.

Whether the Claimant is entitled to the reliefs sought.

67. Section 49 of the Employment Act grants this Court the power to award compensation to an employee who has successfully challenged their employer's decision to terminate their employment or dismiss them summarily on the grounds of unfairness. It is important to emphasise that this authority is discretionary and exercised on a case-by-case basis.
68. After a thorough review of the circumstances surrounding the claimant's termination of employment, including the lack of compliance with procedural and substantive fairness principles, the impression of opacity and haste in the termination process, as well as considering the duration of the claimant's service, I conclude that he is entitled to a compensation award amounting to seven (7) months' gross salary, KShs. 1,607,557.
69. The Claimant sought compensation for the amount he could have earned until retirement. This relief cannot be available to the Claimant. As correctly submitted by Counsel for the Respondent, it is a remedy not contemplated under Section 49 of the Employment Act. See also *Ngokoyo & 2 others vs Telkom Kenya Limited* [2025] KESC 75 [KLR].
70. The Claimant's employment was terminable by notice under the provisions of section 35 of the Employment Act. Inarguably, no termination notice was issued to him. Having found, as I have hereinabove, that the summary dismissal against him was unfair, I have no reason not to hold that he is entitled to the contractual notice pay, three months' salary.
71. The basis for the claim for punitive damages was not established. The relief under the head is declined.
72. The Claimant's employment was terminated on 23rd December 2016. I have no doubt that, up to this date, he was an employee of the Respondent and was entitled to his contractual remuneration. The Respondent did not present any evidence to refute the Claimant's assertion that he was not compensated for the 23 days in December 2016. This Court hereby awards him a salary for those 23 days.

Whether the Respondent's Counterclaim is merited.

73. I now turn to consider the Respondent's Counterclaim. The Respondent claimed against the Claimant a specific amount of KShs. 3,320,000. It is well-established law that where special damages are claimed, they must be specifically proven. I have carefully considered the Respondent's pleadings and the evidence of its witness, and note that they do not, in any detailed, sufficient, or convincing manner, demonstrate how this alleged loss can be attributed to the Claimant. Furthermore, the audit report does not indicate anywhere that the Claimant unlawfully or improperly took the amount for his personal use, nor that he caused the Respondent to suffer a loss in a manner that would render him liable to compensate.
74. Consequently, I find the Respondent's counterclaim lacking in merit. It is hereby dismissed.
75. In the upshot, judgment is hereby entered in favour of the Claimant in the following terms; I. A declaration that the summary dismissal against him was

- substantively and procedurally unfair. II. Compensation pursuant to the provisions of section 49[1][c] of the Employment Act, seven [7] months' gross salary, KShs. 1,607,557.
- III. Salary for 1st -23rd December 2016, KShs. 176,065.76.
- IV. Notice pay, KShs. 688, 953.00.V. Costs of the suit.
- VI. Interest at court rates on the sum awarded above from the date of this judgment till full payment.
- VII. Costs of the Counterclaim.

**Read, signed and delivered this 9th Day of April 2026.**

**OCHARO KEBIRA  
JUDGE**