



**Mbeu v Bingwa Sacco Limited (Cause E054 of 2021)
[2023] KEELRC 1403 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1403 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E054 OF 2021
ON MAKAU, J
JUNE 8, 2023**

BETWEEN

JAMES NJUGUNA MBEU CLAIMANT

AND

BINGWA SACCO LIMITED RESPONDENT

JUDGMENT

1. By an Amended Statement of claim dated September 30, 2022 the claimant alleges that he was unlawfully suspended from 3rd August to September 2021 and was subsequently unfairly dismissed by the respondent on October 1, 2021. Therefore he seek the following relief:-
 - a. A declaration that the suspension from employment vide letter dated August 3, 2021, August 19, 2021 and September 17, 2021 was unlawful and unprocedural.
 - b. A declaration that the termination of employment vide letter dated October 1, 2021 was unprocedural and unlawful.
 - c. An order for payment for;
 - i. General damages for unlawful and unfair dismissal for the claimant's employment.
 - ii. Payment of unpaid salary in the month of August and September 2021 as follows;
 - a. August 2021- Kshs 73,858/-
 - b. September 2021-Kshs 35,406/-Subtotal Kshs 109,264/-
 - iii. Payment of one month's salary in lieu of notice totaling to Kshs 84,800/-



- iv. Payment of unpaid car allowance from the month of March 2021 to September, 2021 totaling to Kshs 70,000/-
 - v. Payment of gratuity
 - d. Certificate of Service
 - e. Costs of the suit plus interest on (c) above at court rates.
2. The respondent has denied the allegation by the claimant and prayed for the suit to be dismissed with costs. It averred that the claimant was suspended and thereafter dismissed for refusing to report to his new work station upon transfer to Kianyaga Branch and thereafter absconded work.
 3. In addition the respondent has counterclaimed against the claimant the sum of Kshs 169,000.00 being the salary paid to him during the time he had absconded work in the month of August and September, 2021. It also prayed for interest at court rates.

Evidence

4. The claimant testified as CW1 and basically adopted his statement dated September 30, 2022 and produced 21 documents as exhibits. He then denied the counterclaim contending that he was on duty from 1st-August 5, 2021 and thereafter he was suspended until the day he was dismissed.
5. He clarified that he started his career in the respondent on November 17, 2014 as a Micro-Credit Assistant, rose to Micro-credit officer on July 24, 2015, and became a Branch Manager on October 1, 2015. On January 3, 2018 he was appointed acting Credit Manager and due to good performance of his duties he was confirmed as the respondent's Credit Manager on November 1, 2019.
6. He further clarified that in 2019 an inspection audit exercise was conducted in the whole organization by the Sacco Societies Regulatory Authority (SASRA) and a report was published in June 2019. The report noted that some staff and Board members were not adhering to the policy and the regulator recommended that the directors with non-performing facilities be disqualified from holding office.
7. In 2020, he included one defaulting director in the list of defaulters and forwarded to the credit committee in compliance with the SASRA report. As a result he had an altercation with the director and he was advised to write an apology letter to the director and he did so on December 22, 2020.
8. His gross salary as Credit Manager was Kshs 84,800.00 which included Housing Kshs 15,000.00, Responsibility allowance Kshs 10,000.00 and car allowance of Kshs 10,000.00. On July 19, 2021, he received a letter transferring him to Kianyaga Branch Manager effective August 1, 2021. The said new role was a demotion according to the Sacco Organogram. Further the organogram does not include the position of Debt Collection Manager among the Departmental Heads.
9. He further contended that on July 29, 2021, he wrote the above grievances in accordance with the Staff Code of Conduct but in response he was served with the suspension letter dated August 1, 2021. He maintained that the suspension and the termination were retaliatory, unfair and unlawful. Therefore he prayed for the reliefs sought.
10. The respondent called its Operations Manager Mr. Joseph Murimi Kariuki as its witness and he adopted his written statement dated January 25, 2023 as his evidence. He also produced 31 documents as exhibits. He admitted that the claimant rose through the ranks to become the respondents' Credit Manager on November 1, 2019.



11. He explained how the credit committee was constituted under Clause 61 of the respondents By-Laws and did audit in the Credit Department and made finding against the claimant. An inspection was also done by SASRA and the ensuing report implicated the claimant with failure to adhere to credit policy and giving loans in violation of the credit policy and thereby exposing the Sacco to great financial risk. As a result the said committee recommended for a total overhaul of the credit department due to the said disregard of the credit policy by the management.
12. The committee further recorded that the claimant be deployed to the debt collection department as the Debt Collection Manager on March 1, 2021. On April 23, 2021 the committee met again and resolved that the claimant be transferred to Kianyaga Branch. A transfer letter was issued on July 19, 2021 to report to Kianyaga on August 1, 2021 and on July 27, 2021 the claimant signed the job description as acceptance to his deployment to Kianyaga Branch.
13. However on July 29, 2021 he wrote a letter declining the transfer to Kianyaga Branch as a Branch Manager and stated that he would remain in his earlier position until his grievances were addressed by the management. He never reported to Kianyaga Branch on August 1, 2021 and therefore he was dismissed for gross misconduct of insubordination and failure to report to work. The witness prayed for the suit to be dismissed with costs because the claimant misconducted himself grossly and due process was followed.

Submissions

14. It was submitted for the claimant that the transfer to Kianyaga as Branch Manager was a demotion because the said position ranked below credit manager in the Organogram which was in force then. It was submitted that the HR Manual approved by the respondent on October 22, 2021 is not applicable to this case since it was approved after his exit. Further, no reason was given for the said demotion and change of roles.
15. It was further submitted that the claimant's letter of grievance about the said transfer was ignored and in response he was suspended from August to end of September 2021. Subsequently he was dismissed without being accorded any hearing as required under section 41 of the [Employment Act](#). It was further submitted that the termination was not warranted and he committed no misconduct.
16. In view of the foregoing it was submitted that the termination was unfair and unlawful and the claimant is entitled to the reliefs sought. For emphasis reliance was placed on the case of Alphonse Maghanga Mwachanya v Operation 680 Limited (2013) eKLR and Olute v County Government of Siaya & Another (2022) eKLR where the court awarded compensation for unfair termination.
17. Finally, it was submitted for the claimant that the counterclaim by the respondent is unmerited because he never absconded work during the month of August and September 2021 but he was suspended from work by the respondent. Therefore it was contended that the claimant was entitled to full salary during the suspension.
18. On the other hand, it was submitted for the respondent that the suspension and the subsequent dismissal of the claimant was within the provisions of the respondents' HR Manual and the [Employment Act](#). It was submitted that the alleged demotion of the claimant is untrue and the organogram produced by the claimant is strange to the respondent. It was submitted therefore that the failure by the claimant to report to his new work station and perform his duties amounted to gross misconduct under clause 9.4(1) and (5) of the HR Manual and as such the summary dismissal was justified.



19. Finally, it was submitted that the claimant is not entitled to the reliefs sought including car allowance of Khs 10,000.00 since he was no longer working as credit manager after his transfer.

Analysis and determination

20. There is no dispute that claimant was suspended from employment by the respondent from 3rd August to October 1, 2021 when he was dismissed from employment for alleged gross misconduct. The issues for determination are:-
- a. Whether termination was grounded on a valid and fair reason.
 - b. Whether fair procedure was followed.
 - c. Whether the claimant is entitled to the reliefs sought.
 - d. Whether the counter-claim should be allowed.
 - e. Who should pay costs?

Reason for termination

21. The dismissal letter dated October 1, 2021 cited the reason for the summary dismissal as follows:-

“In reference to your letter dated July 29, 2021 where you revoked the official instruction of deployment to Kianyaga Branch as the branch manager, the office carried out further investigations and proved beyond reasonable doubt that you refused to obey a lawful and proper command issued to you by your employer.

Having considered the above issues, the board resolved to dismiss you from service effective immediately.

You are hereby requested to clear any outstanding loan balances plus interest and other liabilities in the organization with immediate effect.

Yours faithfully

.....”

22. The claimant contends that the transfer was a retaliation by the management for doing his work as the credit manager by including the name of a director in the list of loan defaulters. He produced a copy of the Inspection Report by SASRA done in June 2019 and signed on August 15, 2019 before he became the Credit Manager in which it was observed on page 12 that:-

“...the Sacco does not adhere to the credit policy in the administration of credit facilities to some of the staff and board members.”

23. The report further observed on page 13 that 17% of the loans issued to the Board of Directors and staff were non-performing. Some of them had multiple FOSA accounts to separate Staff Loans from other loans products offered by the Sacco, and some of them were not repaying loans as per the contractual terms. Further, that some of the insiders’ loan application forms were incomplete. Some were not signed by the officers responsible for appraisal, had no details of collaterals and the instalments for repayment were missing.
24. The report then recommended that the Sacco should pursue members with non-performing loans to repay the loans. Further it was recommended that members with non-performing loans be denied



further lending and issuing of dividends and interest until the outstanding amounts are fully repaid and loan accounts regularized.

25. In an effort to comply with the SASRA Report, the claimant added a director in the list of loan defaulters. The addition did not go down well with the Board member and the claimant was called for a meeting with the Operations Manager and the Board member after which he wrote the apology letter dated December 22, 2020. The letter stated:-

“To

Director,

Andrew Francis Kibara Mugo,

Through,

The Operations Manager,

Bingwa Sacco Ltd

Dear Sir,

Apology

Further to our meeting held at boardroom by you, Operations Manager and I, I have found it fit to further apologize in writing, so that we can rest the issue. I do regret including your name in the list of defaulters to be invited to the credit committee which caused embarrassment to your end.

I therefore tender my unreserved apology to the above.

Kindly accept my apology.

Yours faithfully,

James N.Mbeu

Credit Manager

Cc: Human Resource.”

26. The above letter brings out the fact that the Director had defaulted in his Sacco Loan, he was a member of the Sacco, he wanted to continue defaulting in the loan quietly, he was powerful in the Sacco and could terrorize the managers, and the action taken against the claimant was retaliation. The claimant seemed to have touched the untouchable and he was therefore going to face the consequences.
27. The first consequence was transfer to a non-existent position of Debt Collection Manager SG4 vide the letter dated February 20, 2021. The second consequence was loss of car allowance of Kshs 10,000.00 per month from March 1, 2021 when the transfer took effect. The third consequence was a deployment to Kianyaga branch as a Branch Manager vide the letter dated July 19, 2021 which was a demotion in rank according to the structure in the HR Manual Appendix 1 and 2. The fourth consequence was suspension for two months and finally dismissal from employment without being accorded any hearing.
28. In view of the foregoing analysis, I agree with the claimant that the said deployment/transfer were retaliatory or disciplinary action taken against him for doing his duty as the credit manager of the Sacco. The respondent produced an organogram which was approved after the exit of the claimant but that cannot apply in this case.



29. The attitude of the said board member and the failure by the management to protect the claimant corroborates the SASRA Inspection Report of June 2019 that some Board members and staff had breached loan policies and had defaulted in their loans. The court should protect accountant and finance officers who do their work according to the business policies and directives from Government Regulations.
30. The respondent has not rebutted the evidence that the transfer/deployment of the claimant from credit manager to Debt collection manager was invalid because the said position did not exist in the establishment. It has also not rebutted the evidence that the further deployment to Branch Manager Kianyaga was a demotion. There was no consultation before the said changes of roles which amounted to a demotion. This case epitomizes a violation of the right to fair labour practices.
31. The claimant raised his grievance on the matter vide the letter dated August 27, 2021 but the same was ignored and he was suspended and subsequently dismissed for disobeying a lawful and proper command from the employer. With due respect, the claimant was entitled to a hearing when he raised his concern about an unclear deployment. All what the employer needed to do was to respond to the grievance but not to suspend the claimant.
32. Having found that the transfer/deployment of the claimant were retaliatory or disciplinary in nature, and further that they amounted to demotion without prior hearing, I must hold that the alleged disobedience to a lawful and proper command was not valid reason for termination. In my view for an employer to succeed in that allegation, he must show by evidence that indeed the command was lawful and proper in law and backed by the contract between the employer and the employee.
33. A command made in breach of disciplinary policies and procedures, or in retaliation and victimization of an employee for doing his job under the law or contract cannot be a valid reason to dismiss an employee when he writes a letter to the employer for clarification on the demotional transfer or deployment before he can move. An employment is an agreement to serve but not a consent to suffer. An employee has equal rights to bargain and to enforce his rights under a contract employment just as the employer. It is therefore a fallacy in the present constitutional dispensation for any employer to violate a contract of service at will.
34. Accordingly, I must hold that the respondent has failed to prove that the reason cited for dismissal of the claimant was valid and fair as required by section 45 (2) of the *Employment Act*. The section provides that:-

“45(2) A termination of employment by an employer is unfair if the employer fails to prove –

- a. That the reason for the termination is valid;
- b. That the reason for the termination is a fair reason -
 - i. Related to the employee’s conduct, capacity or compatibility, or
 - ii. Based on the operational requirements of the employer; and
- c. That the employment was terminated in accordance with fair procedure.”

Procedure followed

35. I have already observed herein above that the dismissal of the claimant was not preceded by a hearing. The respondent has not adduced any evidence to rebut the claimant’s evidence that he was not



accorded any hearing before the dismissal. All he got was just suspension letter followed by extensions of the suspension and eventually a dismissal letter.

36. Section 41 of the *Employment Act* provides that:-

“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

37. The failure to follow the above mandatory procedure rendered the termination procedurally unfair.

Reliefs

38. The claimant wants the court to declare his suspension unlawful and unprocedural. However he has not shown by evidence that indeed the same was unprocedural and unlawful. The emerging jurisprudence from our courts is that an employer can suspend his employee pending investigations into some misconduct. Suspension is only a temporary measure and it is not necessary a disciplinary action. In this case I find that the employer did not breach the law or procedures by the suspension letter dated August 3, 2021 because it was clear that it was a temporary measure for two weeks.

39. However as regards the termination, I have already made a finding of fact that the reason for the termination was not valid and fair and fair procedure was not followed. Therefore I make declaration that the termination of the claimant’s employment vide the letter dated October 1, 2021 was unfair and unlawful within the meaning of Section 45 of the *Employment Act*.

40. Accordingly, the claimant is entitled to damages under section 49(1) of the Act being salary *in lieu* of notice plus compensation for unfair termination. He prayed for Kshs 84,800.00 as one month salary in lieu of notice and I grant the same. As regards compensation for unfair termination I have considered that he served for about 6 years and the only mistake he did was to pursue a debt from a director of the Sacco who he defaulted in his Sacco loan. He has not secured any other gainful employment since then. Considering the sensitivity of the banking sector where he was working, chances of securing another job in the sector may be compromised by the dismissal. Therefore I award him ten (10) months gross salary as compensation for the unfair termination equaling to Kshs 848,000.00.

41. I have already made a finding of fact that the claimant was unfairly and unlawfully dismissed. Therefore he is entitled to any salary withheld during the suspension from August to September 2021 totaling to Kshs 109,264.00. He is further entitled to the car allowance of Kshs 10,000.00 per month from March-July 2021 equaling to Kshs 50,000.00 because it was part of his benefits while serving as credit manager. The respondent alleged that he was allocated a car and a driver during the said period but no evidence has been adduced to prove that allegation. The claimant never worked in August and September, 2021 and therefore he is not entitled to that facilitation car allowance for that period.



42. The claimant has prayed for gratuity but no particulars were pleaded. Therefore I have no basis upon which to award the prayer for gratuity.
43. The prayer for a certificate of service is however straight forward under section 51 of the Employment Act. Consequently, I grant it as prayed.

Counterclaim

44. The respondent claim for refund of salary paid to the claimant during his suspension. The claimant did not refuse to render services. He was suspended from rendering services by the employer for two weeks which were later extended up to two months. The claimant was entitled to his full salary during the said suspension. Consequently, the counter-claim lacks merits and it is dismissed.

Conclusion

45. I have found that the termination of the claimant's employment was unlawful and unfair. I further found that he is entitled to some of the reliefs sought. I also found that the counter-claim by the respondent lacks merits and it must fail. Consequently, I now enter judgment for the claimant awarding him the following;

Notice.....Kshs 84,800.00
Compensation..... Kshs 848,000.00
Unpaid salary.....Kshs 109,264.00
Car allowance.....Kshs 50,000.00
Total Kshs 1,092,064.00

The award is subject to statutory deductions but in addition to costs of the suit plus interest at court rate from the date hereof.

DATED, SIGNED AND DELIVERED AT NYERI THIS 8TH DAY OF JUNE, 2023.

ONESMUS N MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

