



REPUBLIC OF KENYA



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**Wanyoike & another v Mentor Sacco Society Limited (Employment and Labour Relations Cause E002 & E003 of 2023 (Consolidated))
[2023] KEELRC 3353 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3353 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS
CAUSE E002 & E003 OF 2023 (CONSOLIDATED)
ON MAKAU, J
DECEMBER 19, 2023

BETWEEN

RACHEAL MUTHONI WANYOIKE 1ST CLAIMANT

KENNETH MAINA KUNG’U 2ND CLAIMANT

AND

MENTOR SACCO SOCIETY LIMITED RESPONDENT

JUDGMENT

Introduction

1. The claimants were employed by the respondent until 21st January, 2023 when their services were terminated for gross misconduct. By the Amended Memorandum of Claim dated 13th April 2023, they seek the following reliefs:-

1st Claimant

- a. A declaration that the Respondent is in breach of the provisions of the *Employment Act*, 2007.
- b. A declaration that the letter of termination by reason of gross misconduct letter dated 20th January 2023 is null, void and of no effect.
- c. An order for for the reinstatement of the claimant to the employment of the Respondent and due treatment of the claimant in all respects as if the claimant’s employment had not been terminated.



- d. An order for the re-engagement of the claimant to the employment of the Respondent in work comparable to that in which the claimant was employed prior to her termination.
- e. An order for a permanent injunction prohibiting the Respondent, whether by itself, its servants and or agents or otherwise howsoever from terminating the claimant's Employment.
- f. An order for the Respondent to pay the petitioner's one month salary in lieu of notice.
- g. The Respondent be condemned to pay a 12 month's salary in compensation for unfair termination of the claimant.
- h. An order of payment to the claimant the six months' salary in damages for unfair dismissal.
- i. An order for payment of statutory entitlements or terminal benefits under the law.
- j. Payment for annual leave which was earned but not taken.
- k. An order for payment of actual pecuniary loss suffered as a result of termination from the date of termination, to the date of payment.
- l. General damages for violation of her constitutional rights.
- m. Costs and interests of this suit at court's rate.
- n. Any other relief that this Honourable court deems fit and just to grant.

2nd Claimant

- a. A declaration that the respondent is in breach of the provisions of the [Employment Act, 2007](#).
- b. A declaration that the letter of termination by reason of gross misconduct dated 20th January, 2023 is null, void and of no effect.
- c. An order for the reinstatement of the claimant to the employment of the Respondent and due treatment of the claimant in all respects as if the claimant's employment had not been terminated.
- d. An order for the re-engagement of the claimant to the employment of the Respondent in work comparable to that in which the claimant was employed prior to his termination.
- e. An order for a permanent injunction prohibiting the Respondent, whether by itself, its servants and or agents or otherwise howsoever from terminating the claimant's employment; or; in the alternative to the foregoing.
- f. An order for the Respondent to pay the claimant's one month salary in lieu of notice.
- g. The Respondent be condemned to pay a 12 month's salary in compensation for unfair termination of the claimant.



- h. An order of payment to the claimant the six months' salary in damages for unfair dismissal.
 - i. An order for payment of statutory entitlements or terminal benefits under the law.
 - j. Payment for annual leave which was earned but not taken.
 - k. An order for payment of actual pecuniary loss suffered as a result of termination from the date of termination, to the date of payment.
 - l. General damages for discrimination.
 - m. Compensation for violation of the claimant's Constitutional rights.
 - n. Costs and interests of this suit at court's rate.
 - o. Any other relief that this Honourable court deems fit and just to grant.
 - p. Costs of this claim.
2. The respondent's defence is contained in the Further Amended Response and counterclaim dated 2nd June, 2023 in which it denies the claimants' allegations and counterclaim against the ksh 1,356,786.00 and against the 2nd claimant ksh 5,535,720.00.

Factual Background

- 3. The 1st claimant was a Registry Attendant while the 2nd claimant was internal Auditor. The claimants declared their marital status to the respondent in 2019. They had worked for 5 and 10 years respectively before the termination. They alleged that there were other couples working for the Sacco.
- 4. The claimants averred that after the 1st claimant reported back from maternity leave in April 2021, the respondent's CEO demanded either spouse to resign or they divorce in order for the two to continue working in the Sacco. Things were not good for the claimants as they were suspended from work forcing them to file a Constitutional Petition no E006 of 2021 in Nyeri and obtained conservatory orders. They were still denied access to work place and after complaining, their computers had been moved and their login credentials blocked.
- 5. A final judgment was delivered on 31st October, 2022 declaring the suspension on basis of marital status discriminatory, unconstitutional, null and void. They then reported back to work on 14th November 2022 as requested by the employer only to be kept in an isolation room and barred from interacting with other employees. They were not given any work to do. When they wrote to the CEO for intervention, they were informed that the reason for not allocating them work was because they were under investigation for the offence of being employed elsewhere while still in the respondent's employment.
- 6. On 17th December, 2022 they were invited for disciplinary hearing before the Board of Directors. However, the hearing failed to proceed because the claimants demanded to be supplied with information related to the offence charged and further to be allowed the company of their lawyer. They also objected to the CEO and the Board chairman sitting in the disciplinary hearing due to their bias against the claimants.
- 7. Another hearing was scheduled on 18th January, 2023 but by a letter dated 17th January, 2023 they protested demanding to be supplied with copy of the HR Policies and the minutes of the meeting that



- adopted the said policies. On the hearing date, the charges were read but no evidence was adduced to support the charges. The demands which caused the adjournment of the hearing in December, 2022 were never met. The claimants requested to know how the alleged employment with another institution fell in conflict with their position in the Sacco or whether there was any hindrance to their productivity since there were no duties allocated to them or allowed access to work since May 2021.
8. The claimants were eventually dismissed from service on 23rd January, 2023 on account of gross misconduct. They faulted the Board for conducting the disciplinary hearing contrary to clause 11.12.2 and 11.10 of the Respondent Human Resource Policy which donates original jurisdiction to staff Disciplinary Committee. As such the claimants' case is that the Board acted ultra vires by exercising original jurisdiction yet its role is only appellate. They maintained that the Board was the highest authority and as such they had nowhere to appeal.
 9. It is further claimants' case that their dismissal was a culmination of scheme by respondent to edge them out for refusing to dissolve their marriage. They maintained that they have been discriminated against on ground of marital status and the dismissal is both unfair and unlawful.
 10. They contended that the fact that they withdrew 50% of their pension does not mean that they are no longer interested in working for the Sacco. They further contended that the reason they failed to work from 9th June, 2021 to 31st October, 2022 was because they were barred access to the work place by the security guards who demanded that clearance be given first by the CEO. They contended that despite obtaining court order and even receiving letters from the CEO dated 21st June 2021 to report back to work, they were barred entry by security guards contending that they had to wait for further clearance from the CEO. They further contended that after the judgment in the said Constitutional Petition, they were denied work on ground of pending investigations.
 11. The claimants admitted that another employer was paying for their NHIF and NSSF during the period they were suspended. The 2nd claimant admitted that he was employed by Mathenge Technical Institute on consultancy basis but denied that it affected his productivity at the Sacco.
 12. He contended that the Sacco allowed its employee to work elsewhere so long as he remains productive. He further admitted that clause 10.9 of the HR Policy provides that conflict of interest is an offence.
 13. The respondent's case on the other hand is that the claimants on 21st May 2021, obtained conservatory orders restraining it from dismissing, suspending or instituting any disciplinary action against them on the basis of their marital status pending determination of their Petition no E006 of 2021. However, the claimants absconded work and wrote a letter dated 15th June, 2021 requesting for the release of their personal effects and belongings from the office. After the hearing of the suit, the court granted the reliefs sought namely quashing the suspension and barring the Sacco from terminating the claimants' services on the basis of their marital status.
 14. It is the respondent's case that during the pendency of the said petition, it paid the 1st claimant ksh 1,356,786.00 and the 2nd claimant ksh 5,228,180.00 without rendering any services. It is further respondent's case that it learned later that the claimants were working for other employers during the period they absconded work. Consequently, the respondent claims refund of the said salary plus interest at court rates. It also prays for costs of the suit and counterclaim.
 15. The respondent denied the allegation that the claimants were secluded at work and denied tools of work including laptops. It further averred that the issue of discrimination was determined in the judgment rendered on 31st October, 2022 in the said Petition. However, the respondent contended that there was conflict of interest for the 2nd claimant (Internal Auditor) to audit his wife's work (teller). It denied that there were other couples in the Sacco.



16. As regards the claimants' second employment, the respondent produced statements from the NHIF and letters from the said other employers to prove that the claimants were working elsewhere during the pendency of their petition. They also produced pay slips and bank statements to substantiate its counter claim.
17. As regards the procedure followed before the dismissal, the respondent contended that the issues involved were weighty and warranted the Board to sit as the Disciplinary Committee. It admitted that the Board has no power to sit, as a disciplinary committee. It further admitted that Clause 11.9 & 10 of its HR Policy Manual establishes the Disciplinary Committee of the CEO and two other persons.
18. The respondent's further admitted that the letter to the 2nd claimant from Mathenge Technical Training Institute indicated that he worked on the need basis. It also admitted that the claimant's request to cross examine the other employer during the disciplinary hearing was not granted. It further admitted that the second employment did not affect the claimant's productivity at the Sacco but averred that it affected the Sacco by paying them while they worked elsewhere.

Claimants' Submissions

19. The claimants submitted on three issues, whether the dismissal was unfair, what remedies are available, and who should bear the costs. On the 1st issue, it was submitted there was no valid reason for dismissing the claimants and the procedure followed was not fair. It was submitted that no evidence has been adduced to prove conflict of interest and negative productivity as envisaged under clause 11.5 of the respondent's HR Policy Manual.
20. It was observed that the respondent's CEO admitted in evidence that she never assigned the claimants any work from May 2021 to December 2022. It was further observed that the CEO admitted that the employment of the claimants elsewhere did not negatively affect their productivity at the Sacco. It was then submitted that the failure by the claimants to work for the respondent during the said period was not deliberate but due to frustrations by the respondent through denial to access their offices and further by being denied access to the computers.
21. It was further submitted that the procedure followed, was not in accordance with section 41 and 45 of the *Employment Act*. It was submitted that the procedure for disciplinary proceedings set out in clause 11.10 of the respondent's HR Policy Manual is that a Disciplinary Committee shall hear cases of first instance while the Board hears appeals from the disciplinary committee. Clause 11.12.2 then provides that the Board is the final authority on day to day operations of the Sacco and on staff matters.
22. It was submitted that, on the basis of the said provisions of the HR Policy Manual the respondent's Board lacked jurisdiction to conduct the disciplinary hearing and therefore it acted *ultra vires*. To fortify the above view reliance was placed on the case of *Okiya Omtatah Okoiti & 3 others v Anne Waiguru, Cabinet Secretary Devolution and Planning 6 others* [2021] eKLR, *Republic v National Police Service Commission ex parte Daniel Chacha* [2016] eKLR and *Simon Rotich Ruto v Judicial Service Commission* [2019] eKLR where the courts dealt with the issue of *ultra vires*.
23. It was further submitted that the respondent violated section 4 of the *Fair Administrative Action Act* (FAA) and Article 47 of the *Constitution* by denying the claimants an opportunity to cross examine the persons who gave adverse evidence against them during the disciplinary hearing. For emphasis, reliance was placed on the case of *Republic v Kenyatta University Ex parte Njoroge Humphrey Mbuti*. In conclusion of this part, it was urged that the dismissal of the claimants was not expeditious, efficient, lawful, reasonable and procedurally fair.



24. In view of the foregoing it was submitted that the claimants are entitled to compensation for unlawful dismissal by dint of Article 23 of the *Constitution*. Reliance was placed on the case of *VMK v CUEA* (2013) eKLR where the court awarded ksh 5,000,000.00 for violation of right to human dignity and discrimination. The court was also urged to award costs of the suit to the claimants.

Respondents Submissions

25. The respondent framed the same issues as the claimants but added the issue as to whether the counter claim should be allowed. On the issue of reason for the dismissal, it was submitted that the employer has the burden of proving that the dismissal was grounded on valid reason.
26. It was further submitted that the 1st claimant took up employment with Equatorial Nuts Limited while still an employee of the respondent. Likewise, it was submitted that the 2nd claimant was employed by Mathenge TT1 while still employed by the respondent. It was observed that the NSSF schedule and NHIF schedule and PAYE remittances for the period from June 2021 was proof of the claimants second employment. It was further observed that the clause 11.5 of the respondents HR Manual provides for summary dismissal of an employee who engages in any activity which conflicts with his/her position or is likely to negatively impact their productivity/duty.
27. It was submitted also that during the same period the claimants were working elsewhere, they were paid salary by the respondent, hence the counter claim. It contended that the claimants were permanent staff under clause 7.10 of the HR Manual but failed to attend work regularly as required. Under clause 10.12.3 and 11.5 of the HR Manual, absence from work warranted summary dismissal and therefore the decision to dismiss the claimants was arrived at after the claimants absented themselves from work.
28. For emphasis, reliance was placed on Section 44 of the *Employment Act*. Further reliance was placed on the case of *Geoffrey Muthinja Nthiga v Kenya Pipeline Co Ltd* and *Godfrey Makindu v Trans Business Machines Limited* (2013)eKLR.
29. As regards the procedure followed, it was submitted that the claimants were served with show cause letter, and thereafter accorded an opportunity to defend themselves it was submitted that the claimants never objected to the composition of the ad hoc committee except the inclusion of the CEO and the Board chairman. Consequently, it was submitted that the issue of jurisdiction, or bias is a misconceived technical objectional.
30. Reliance was placed on the case of *Hudson Liyai & another v Kenya Pipeline Company Ltd* (2019) eKLR where the court held that all what is required is meaningful opportunity to defend oneself against the charges and offer explanations before action is taken against them. In the instance case, it was submitted that the dismissal was done in compliance with the *Employment Act* and the respondent's HR Manual. Consequently, it was denied that the claimants' constitutional rights were violated.
31. In view of the foregoing, it was submitted that the claimants are not entitled to the reliefs sought. On the contrary, it was submitted that the claimants should pay the respondent the sums sought in the counter claim.

Issues for Determination and Analysis

32. Having considered the pleadings, evidence and submissions, the following issues fall for determination:
- a. Whether dismissal was grounded on valid and fair reason.
 - b. Whether fair procedure was followed.



- c. Whether the claimants are entitled to any remedy.
- d. Whether the counterclaim is merited.

Reasons for dismissal

- 33. The reason for the termination was cited in the termination letter dated 20th January, 2023 as absconding duty from 9th June 2021 to 31st October 2022, and instead went to work for another employer. The 1st claimant was allegedly employed by Equatorial Nuts Limited, while the 2nd claimant was employed by Mathenge TTI. There are pay slips to prove that the claimants were paid salary by the respondent during the said period.
- 34. The respondent produced NHIF statement for the 1st claimant that shows that two employers were contributing to the NHIF for her. It shows that the remittances were done for the 1st claimant from June 2022 to November 2022. In May 2022 the respondent remitted ksh 1,400.00 but the joint remittances from June to November 2022 was ksh 2,250.00 per month.
- 35. On the other hand, the 2nd claimant was employed by Mathenge TTI on short term contracts as confirmed by the institution's Principal by the letter dated 23rd November 2022. The 2nd claimant also admitted that he was working for Mathenge TTI. RW2 further produced NHIF statement indicating that Mathenge TTI was remitting NHIF contribution for the 2nd claimant from October 2021 to June 2022 but not continuously.
- 36. Clause 16 of the Respondent's code of conduct provides that an employee shall not work for an agent or a competitor of the respondent Sacco. Clause 10.9 of the respondent's HR Policy Manual provides that an employee should avoid acts that create conflict of interest with the respondent's activities and an employee should have undivided loyalty to the respondent and not to subordinate his/her official duties in favour of private interest.
- 37. The above documents are part of the claimants' contract of employment. They barred the claimants from private activities that caused them to have divided loyalty. The claimants were employed by other employers while their employment by the respondent was still in place. They were in full time basis by the other employers at a time when they were on suspension with full pay by the respondent.
- 38. In my view, the second employment was unlawful and amounted to conflict of interest contrary to clause 10.9 of the HR Policy Manual. Working for two masters at the same time, amounts to conflict of interest. Even the Holy Bible says that a person cannot serve two masters at the same time because he will not honor the two equally. Consequently, I am satisfied that the respondent has proved on a balance of probability that the reason for dismissing the claimants was valid and fair as required by section 43 and 45(2) of the [Employment Act](#).

Procedure followed

- 39. 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.”

40. In this case the claimants were served with show cause letter and thereafter invited to a hearing before a committee of the Board of Directors. Clause 11.9 of the HR Policy Manual provides that Staff Disciplinary Committee shall deal with all the disciplinary cases and may terminate or dismiss an employee. Clause 11.10 provides that;

- “a. “The Staff Disciplinary Committee shall deliberate: -
- i. Appeals against all disciplinary measures for staff.
 - ii. Case of “first instance” that the management considers to be of such nature that require expert and/or technical advice.
- b. Appeals against decision of the staff disciplinary committee shall be referred to the Board.”

41. Clause 11.12.2 of the HR Policy Manual then provides that: -

“The Board is the final authority on the day to day operations of the society and one staff matters shall, act on the advice of the staff sub-committee as relates to;Confirmation of Appointment.Termination of Appointment....Punishment of offending employees.”

42. The respondent admitted that the disciplinary hearing for the claimants were done by the Board due to the seriousness of the offence. I must agree with the claimants that the procedure set out under the respondent’s HR Policy Manual was violated when the respondent’s Board acted without jurisdiction to conduct the disciplinary hearing. By so doing, it denied the claimant’s fair hearing which includes the right to appeal before the Board. The said right of appeal was defeated when the case was conducted by the highest authority in the Sacco’s disciplinary process. The said move also amounted to breach of the claimants’ contract of employment as contained in the HR Policy Manual.

Reliefs to the Claimants

43. In view of the foregoing, the claimants are entitled to declaration that the respondent has breached their contract of employment and the termination of the employment vide the letters dated 20th January, 2023 is unfair. It was rendered unfair by the failure to follow the procedure set out in the respondent’s HR Policy Manual.

44. The claimants prayed for reinstatement or re-engagement. However, they have not demonstrated that it will be practicable in view of the acrimonious separation. Further, clause 10.10 of the respondent’s HR Manual which states that:

“To reduce conflict and distraction at the workplace, the Sacco discourages romantic relationships between employees of the Sacco and board of directors. The following will thus form as guidelines for employees in regard to such relationships:Where two employees mutually agree to get married or live together, one of them shall be required to resign from the Sacco within one month to avoid conflict of interest.”



45. The above clause in the HR Policy Manual has not been challenged and therefore it remains part of the contract of service between the claimants and the respondent. As long as the claimants remain married, one is required to resign by dint of the above clause of the HR Policy Manual. The order of reinstatement or re-engagement of the two claimants is not practicable in the circumstance of this case. Besides the separation was acrimonious and it cannot be reversed.
46. In view of the foregoing, the claimants will have to contend with compensatory damages under section 49 of the *Employment Act*. They will each get salary in lieu of notice plus compensation for the unfair termination. Their appointment letters are silent on the notice period for termination. Consequently, I award each one-month salary. I will also award each three months salary in lieu of notice as compensation for unfair termination.
47. In making the said award, I have considered that, the claimant worked for a fairly long period. I have also considered that they contributed to the termination through misconduct by working full time for other employers while still being paid for full time employment by the respondent. I have also treated the salary they earned from the other employers as a mitigating factor against award of higher compensation of damages.

Counter Claim

48. The respondent prayed for the salary for the period from June 2021 to October, 2022. However, there is evidence that the claimants were prevented from doing work by the respondent itself. They were first suspended and thereafter obtained orders. Upon reporting back to work, they were denied access to their workplaces. Thereafter, they were denied audience from the Board and the security guards locked them out until they obtained clearance from the CEO. The counterclaim is therefore devoid of full particulars as to the exact dates the claimants worked elsewhere.
49. In the circumstances of this case, I find no merits in the counter claim. The claimants were all through willing to work but the respondent prevented them. Therefore, the counterclaim is rejected.

Conclusion

50. I have found that the termination of the claimants' employment was unfair and also a breach of contract. I have found that they are entitled to payment of salary in lieu of notice plus salary compensation. Consequently, I enter judgment for the claimants as follows:
 - a. 1st claimant
 - i. One-month salary in lieu of notice.
 - ii. Three month's gross salary as compensation for unfair termination.
 - b. 2nd claimant
 - i. One-month salary in lieu of notice.
 - ii. Three month's gross salary as compensation for unfair termination.

The award is subject to statutory deductions but in addition to costs and interest at court rates.

DATED, SIGNED AND DELIVERED AT NYERI THIS 19TH DAY OF DECEMBER 2023.

ONESMUS N MAKAU

JUDGE



Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, 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**