



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA**

**CAUSE NO. 68 OF 2019**

**GODFREY ODIPO TOM.....CLAIMANT**

**VERSUS**

**TABASAMU SACCO LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 18<sup>th</sup> February, 2022)

**JUDGMENT**

The claimant filed the memorandum of claim on 14.10.2019 through Kiprop Cheruiyot & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondent constructively dismissed his contract of employment.
- b) A declaration that the constructive dismissal amounted to unfair termination.
- c) One-month salary in lieu of notice Kshs. 89, 550.70.
- d) Wrongfully deducted salaries for June, July and August 2019 (Kshs.89, 550.70 x3) Kshs.268, 650.00.
- e) Unpaid leave Kshs.29, 850.00.
- f) Gratuity pay 15 months Kshs. 226, 723.77.
- g) 21 months' salary for breach of employment Kshs. 1, 880, 550.00.
- h) Compensation for unfair termination (89, 550.00 x12 months) Kshs.1, 074, 600.00.
- i) Total Kshs. 3, 569, 923.77.
- j) Certificate of service.
- k) Costs of the claim and interest thereon at Court rates.

The respondent filed the memorandum of response on 08.07.2020 through the Federation of Kenya Employers and Mr. Salim Mwawasa appeared in that behalf. The respondent prayed that the claimant's suit be dismissed with costs. The respondent further counterclaimed and prayed for a sum of Kshs.1, 024, 246.29 being loans, salary advances, loss and salary in lieu of notice.

To answer the **1<sup>st</sup> issue** for determination, there is no dispute that parties were in a contract of service. By the letter dated 09.07.2015 the respondent employed the claimant to the position of Finance Manager and reporting to the Chief Executive Officer (CEO). The claimant's duties included managing of all finance operations relating to SACCO revenue & expenditure accounting; processing general ledger transactions and ensuring adherence to statutory policies and procedures; and advising the CEO and the Board of Directors on corporate finances. The contract was for three years from 09.07.2015 (ending 09.07.2018) and was renewable. The contract was renewed for a further 3 years to May 2021 with gratuity at 31%.

To answer the **2<sup>nd</sup> issue** for determination, the contract of employment ended when the claimant wrote to the respondent the letter dated 30.08.2019 titled "**forced resignation**". The circumstances leading to that letter and as per evidence on record are as follows.

On 24.05.2019 the respondent's CEO was on leave and the claimant was acting CEO besides performing his duties as Finance Manager. The claimant received a telephone call on the respondent's official telephone line. The caller said he was George calling from Co-operative Branch at Ukunda and requested to speak to someone who handles POS machine (Coop Kwa Jirani Agent). The claimant told the caller that he was the one handling the POS but the caller again told him that there was nothing wrong that the claimant lets the caller talk to the handler of the POS machine because the caller wanted to inquire something. The claimant then introduced the caller to one Bintisood Abdallah Mwakande, the teller who handled the POS machine. The teller and the caller concluded their telephone conversation and the teller passed the phone to the claimant – and the caller told the claimant that he was over with what he wanted and there was nothing wrong. The claimant inquired from the teller what the caller wanted and the teller stated that the caller wanted her personal number. The claimant wondered why the caller had not requested for the claimant's personal number but the teller assured the claimant that there was nothing wrong.

After about 50 minutes, the teller approached the claimant complaining that fraudsters had stolen some money in the respondent's account through POS machine where she narrated what transpired till she realised that they were conmen.

The teller's statement on record states as follows. Around two minutes after she had given the caller her personal cell phone number, the caller called her back now on that personal number. It was about 9.20am and he asked the teller if the Coop Kwa Jirani was experiencing any charging or network problems and she responded that it was working well. The caller then explained that he had spoken to Mr. Daudi Digo the respondent's Treasurer so that the staff would be trained on how to receive NHIF payments through Coop Kwa Jirani. The caller further told the teller that the respondent's transactions were not reflecting on the Cooperative Bank system so that the monthly commission the respondent got from the bank would be little. The caller then instructed the teller on how to remove the anomaly. The caller gave the teller a step by step guidance on what to do and the teller followed. The caller gave the teller two cell phone numbers 0718839460 and 0743048818 which the caller said were used for the respondent's Coop Kwa Jirani. In the process, the caller instructed the teller to put code No. 69901.00 and the teller did that severally until the teller realised the sequence was repeating the same two cell phone numbers and the code and at that point the teller became suspicious and disconnected the call. The teller immediately looked at the receipt that the machine had printed and realised that they were not reports but four deposits of Kshs. 69, 901.00 each. The teller then notified the claimant who called Cooperative Bank Ukunda Branch who denied to know a person known as George – the caller having in the initial call alleged to be George of that Branch.

The claimant's letter dated 24.05.2019 confirms action taken after the incidence as follows:

- a) He confirmed that the money had really been stolen by verifying POS printed slip.
- b) He called an officer one Erick at Cooperative Bank Ukunda to seek assistance in reversing the transactions. Erick advised that Safaricom be called to block the two lines used in the fraud which the claimant did but was advised that the lines showed no such transactions and nothing would be done to salvage the situation.
- c) The claimant caused the issue to be reported to the police.
- d) The CEO was informed about the episode.

The respondent undertook an internal audit of the events and submitted a report on 25.05.2018. It was discovered that a total of Kshs. 279, 604.00 was lost in connection with the incident being four transactions of equivalent amounts of Kshs. 69, 901.00 each. It was also found that vendors of different systems are able to communicate to different staffs of society and vice-versa at one's discretion. Further, there was a likelihood that staffs handling cash are less sensitised about basic KYU (Know Your Customer) guidelines.

The audit report recommended that forensic investigations be undertaken to recover the lost monies from the fraudster. It was further recommended as follows:

- a) The task of external communication to vendors be tasked to only one staff, the system administrator – and all other staff be prohibited from transacting business between the vendors and the respondent.
- b) A record of all system vendors and their contact persons including names and phone numbers be maintained.
- c) The respondent be registered with the Financial Reporting Centre (FCR) in order to benefit from in-depth fraud investigations in case similar incident happens in future.
- d) The management should consider regular training of the staffs handling cash on basic KYC guidelines among other programmes to impart them with adequate knowledge of their operating environment.

Consequential to the incident and the investigations, the respondent wrote to the claimant the letter dated 27.05.2019. The letter conveyed that the Finance and Administration Committee sat on 25.05.2019 and deliberated on the loss of the Kshs. 279, 604.00 and after reviewing the claimant's report decided administratively that the loss occurred due to negligence on the claimant's part as the head of Finance and receiver of the call and an approved agent of the Bank. The letter stated further, "**The matter should have been handled at your level not transferring the same to the teller who was your junior at that time. The Committee decided that you reinstate the SACCO with a total of Kshs. 139, 802 (One Hundred and Thirty-Nine Thousand Eight Hundred and Two Only)**".

By the letter dated 06.06.2019 the claimant replied that it was not negligent to extend the call to the user of POS machine and he had repeatedly asked the teller about whatever the caller was up to. He regretted the bad thing which had happened and it was an institutional problem due to combined factors as he had no personal liability. He advised the respondent to absorb the loss and the users to be trained especially on management of new products. The respondent wrote to him the letter of 13.06.2019 confirming the surcharge. The claimant wrote back on 15.06.2019 confirming his position that he was not liable. He was also concerned that his SACCO account had been

overdrawn with the Kshs. 139, 802.00 without his knowledge and consent. By the letter dated 09.08.2019 the respondent informed the claimant that the Joint Board Committee had affirmed that he is surcharged the Kshs. 139, 802.00 and which had been debited on his FOSA account as the portion of the loss allotted to the claimant. The letter stated that the decision was final.

On 29.08.2019 the respondent wrote another letter to the claimant on reassignment. The letter stated that he had been reassigned from the position of Finance Manager in Finance Department to Credit Department as Senior Credit Officer Job Group C with immediate effect and he was to report to the Credit Manager. The contract period remained the same to end of May 2021. The letter stated that since the position was lower than that of Finance Manager, the claimant would not enjoy responsibility allowance and the subsequent LTA would be at Kshs. 7,000.00. The claimant replied by his letter dated 30.08.2019 on forced resignation. He stated that he was resigning because he had been forced to pay Kshs. 139, 802.00 being a loss resulted through another person's mistake and, the decision had been biased and unacceptable because the mistake was never his. Further, he had been denied access to his pay since 29.05.2019 and he could not continue in employment with no pay. He concluded. **“Due that reasons I hereby tender my resignation as an employee of Tabasamu sacco because you as employer you have indulged me in an intolerable situation, that a normal and average person cannot continue working under such condition. For that reasons I have no option but to resign.”** The respondent accepted the resignation by the letter dated 05.09.2019 and demanded special loans Kshs. 193, 228.95, normal loan Kshs. 124, 998.00 salary advance Kshs. 466, 666.64 (erroneously typed as 46, 66.64 when compared with the exhibited actual loan statement), fraudulent loss Kshs. 139, 802.00 and salary in lieu of notice Kshs. 89, 550.70 making purportedly Kshs. 1, 024, 246.29.

The 3<sup>rd</sup> issue is whether the circumstances and the resignation amounted to constructive and unfair termination. The claimant has pleaded that the resignation amounted to constructive dismissal and consequently unfair and unlawful termination. The respondent has pleaded as follows:

- a) The respondent never coerced the claimant into resigning.
- b) It was a statutory duty to surcharge the claimant for the loss incurred as a result of his negligence and it was not unfair in the circumstances.

The Court has considered the pleadings, the evidence and the final submissions. As submitted for the claimant and about establishing constructive dismissal, in **Kenneth Kimani Mburu & Another –Versus- Kibe Muigai Holdings Limited [2014] eKLR** Rika J held, **“The conduct by the employer must be shown to be so intolerable that it made it considerably difficult for the employee to continue working. At the heart of constructive dismissal is breach of the duty of trust and confidence. The employer’s behaviour must be shown to have destroyed or seriously undermined trust and confidence.”** The Court follows that holding and finds that the present case meets the threshold set therein.

It is that to establish constructive dismissal the employee must show a fundamental breach of the contract of service by the employer that made it difficult or impossible for the employee to continue in service and, the employee did not condone or consent to such a breach. In the instant case, the internal audit report established that the fraudsters had taken the money in issue and it was as a result of the deficiencies in the respondent's internal systems and requirements. In particular, the policy on communicating with vendors was lacking, a register with contacts of vendors was not in place, the respondent was not registered with Financial Reporting Centre (FRC), and staff handling cash had not been trained regularly on basic guidelines on KYC. Further, the audit report recommended a forensic investigation to recover the money from the fraudsters but which appears not to have been undertaken and instead the claimant was surcharged capriciously. In the circumstances, the Court returns that the loss was attributable to the fraudsters as fostered with the respondent's deficient operational systems and requirements. Under section 45 of the Employment Act, 2007, a reason for termination (and the Court considers to include a reason for imposition of any other punishment like surcharge and demotion like in the instant case) is fair if it relates to the employee's conduct, capacity or compatibility; or is based on the employer's operational requirements. In the present case, there is no established employer's requirement that has been shown to have been contravened by the claimant and the fraud was not attributable to the claimant's conduct, capacity or compatibility – the claimant had a clean record of service per RW's testimony. The Court further returns that it was unfair for the respondent to attribute the loss to the claimant's individual liability, and, the Court finds for the claimant that he could not be liable for the organisational failures as had been found by the internal audit report.

The Court has considered the submission for the respondent that the respondent was entitled to recover the loss from the claimant by way of a surcharge per section 19(1) (c) of the Employment Act, 2007. The section provides that an employer may deduct from an employee an amount equal to the amount of any shortage of money arising through the negligence or dishonesty of the employee whose contract of service provides specifically or his being entrusted with the receipt, custody and payment of money. The evidence is that the claimant was not negligent and at all times took appropriate steps within his authority at the time of the incident. In other words, the Court finds that throughout the incident, the respondent has not shown that the claimant breached an implied or express contractual or other duty of care and although there was a resultant loss from the fraudster's evil designs, the designs were successful due to the respondent's deficient operational systems, policies and requirements as disclosed in the internal audit report and not due to the claimant's failure to take due care. Thus, the respondent's own audit report attributed the loss to the deficient operational systems, policies and requirements of the respondent and not the claimant's negligence.

The Court therefore finds that section 19(1) (c) of the Act did not apply in the circumstances of the instant case and upholds its opinion in **Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR** thus,

**“To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer’s operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer’s operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer’s operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds**

**that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust.”**

As the Court has already stated earlier in this judgment, the holding in the cited case would spread to imposition of any punishment by an employer against the employee on account of the employer’s defective operational systems, policies or requirements.

The Court therefore returns that the respondent fundamentally breached the contract of employment when it imposed the surcharge and then secondly imposed a demotion from Finance Manager to Senior Credit Officer. The letter imposing the demotion styled as a redeployment or reassignment was clear that the new position was lower than the one previously held. The parties’ contract of service was specific that the claimant was to serve in the position of Financial Manager and the Court finds that the unilateral demotion shortly after the unfair surcharge amounted to a fundamental breach of the contract of service and the claimant acted promptly to resign without condoning the respondent’s fundamental breach. The Court finds that as submitted for the claimant the resignation amounted to unfair constructive dismissal.

While making that finding, the Court holds that a demotion means the emplacement of an employee by the employer to a position or grade or rank to which is attached a lower salary or allowance or both than the salary and allowance attached to the position held prior to such emplacement. The Court also considers that a demotion in another sense, may entail imposition upon an employee by the employer a position with diminishing scope of control, authority or lower reporting level than previously held, even if, there is no accompanying variation in salary and allowances. In the instant case the responsibility allowance was withdrawn and the claimant was emplaced at a lower level of Senior Credit Officer reporting to the Credit Manager which was a position at par with that of Finance Manager previously held by the claimant. The Court finds that the same amounted to a super classical demotion where both remuneration and authority were diminished. In the circumstance the Court returns that the double punishments of the unfair surcharge and then unfair demotion amounted to a fundamental breach of the contract and eroded trust and confidence between the parties thereby justifying the constructive dismissal manifested in what the claimant called forced resignation.

The **4th issue** for determination is whether the claimant is entitled to the remedies as claimed and prayed for. The Court makes findings as follows:

- 1) The claimant admitted in his testimony that he took full leave days and he surrendered the claim on leave and the Court finds accordingly.
- 2) The Court has found that the dismissal was constructive and unfair. The Court has considered the provisions of section 49 of the Act on factors to consider in awarding compensation. The claimant had a clean record of service and desired to continue in employment. He had been in the respondent’s continuous service for about 4.5 years and was serving the second 3 years’ fixed term contract. The aggravating factor is that despite the several objections by the claimant, the respondent imposed the unilateral and unfair surcharge, implemented the surcharge by debiting it as an overdraft on the claimant’s FOSA account and thereby denying the claimant access to his monthly pay for June, July and August 2019. The surcharge in its implementation breached section 19(3) which prohibits deduction of wages to beyond two-thirds of such wages or such additional or other amount as the Cabinet Secretary may prescribe. The further aggravating factor is that the respondent thereafter unilaterally imposed a demotion amounting to a fundamental breach of the contract of service. The Court has also considered the unexpired period of the term contract and the amount of money the claimant would have earned if he had not been constructively terminated. He is therefore awarded, under section 49 of the Act, 12 months’ compensation at Kshs. 89, 550.70 making **Kshs.1, 074, 608.40**. He is also awarded the contractual one-month payment in lieu of notice **Kshs. 89, 550.70**. The surcharge has been found to have been unfair and the claimant is awarded the claimed wrongful deductions for June, July and August 2019 making **Kshs.268, 650** and as prayed for. Further, he is entitled to contractual gratuity at 31% for the 15 months served making **Kshs. 226, 723.77** as prayed for. The claimant is also entitled to a certificate of service per section 51 of the Act. Thus he is awarded a sum of **Kshs.1, 659, 532.87**.

The claimant admitted in his testimony that he owed the respondent Sacco loans. Per exhibit 9 on the respondent’s bundle the loans are allowed as follows:

- 1) Special loan Kshs. 193, 228.95.
- 2) Normal loan Kshs. 124, 998.00.
- 3) Salary advance Kshs. 466, 666.64.
- 4) Total **Kshs. 764, 893.59**.

The Court finds that the counterclaim will succeed to that extent and applying the loans as a set off, the respondent will pay the claimant a net of **Kshs. 894, 639.28**. As the resignation amounted to unfair constructive termination the respondent is not entitled to the contractual one month’s payment in lieu of purported termination notice as was counterclaimed.

The Court has considered the parties’ margins of success and all circumstances of the case and returns that the respondent will pay 50% of the claimant’s costs of the entire proceedings herein.

In conclusion judgment is entered for:

- 1) The declaration that the resignation amounted to unfair constructive dismissal.
- 2) The respondent to pay the claimant a sum of **Kshs. 894, 639.28** by **01.04.2022** failing interest to be payable thereon from the date

of this judgment till the date of full payment.

3) The respondent to deliver the certificate of service by **01.03.2022**.

4) The respondent to pay the claimant's 50% of the costs of the suit.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 18TH FEBRUARY, 2022.**

**BYRAM ONGAYA**

**JUDGE**