



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO.E006 OF 2021**

***(Before D.K.N.Marete)***

**KENYA UNION OF COMMERCIAL, FOOD AND**

**ALLIED WORKERS.....CLAIMANT**

**VERSUS**

**NEW GATURI FARMERS' COOPERATIVE SOCIETY LTD.....RESPONDENT**

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

This matter was brought to court by a Memorandum of Claim dated 28th January, 2021. The issue in dispute is therein spelt out as;

*Unfair/unlawful termination of Jane Waigumo Mwago.*

The Respondent in a Response to Claim dated 2nd March, 2021 deny the claim and pray that it be dismissed with costs . She also files a counter claim in the context of loss occasioned by the Respondents negligence.

The Claimant's case is that she is a registered trade union under the Labour Relations Act whereas the Respondent is a registered Coffee Farmers Cooperative Society.

The Claimant's further case is that the parties to this dispute relate through a valid Recognition Agreement though they have negotiated and signed several Collective Bargaining Agreements.

Her other case is that Jane Waigumo Mwago, the grievant herein was employed by the Respondent on 2nd June, 1994 as Assistant Statistics clerk at a salary of Kshs.1,245.00 per month.

The Claimant's further case is as follows,

- The grievant worked as Assistant Statistics Clerk until April 1995 when she was promoted to Cherry Research before proceeding to study for a certificate in Co-operative Management.
- May, 2001, she completed the course and was promoted to statistics clerk.
- February, 2007, moved from Society book keeper and promoted to Acting Secretary Manager.
- 2009, promoted to Secretary Manager.
- Held the position of Secretary Manager from 2009-2019 when her services were unlawfully terminated.

The Claimant's further case is that confusion in the management ensued and the relationship *inter partes* deteriorated until the 28th May, 2019 when grievant was issued with a letter of termination of employment.

The Claimant's avers that the grievant's contract of service was terminated without an award of an opportunity to be heard whereas he had had twenty five years of clean continuous service. Attempts at conciliation hit a deadlock and therefore these proceedings.

She prays as follows;

- a) Reinstatement of the grievant unconditionally without loss of benefit.
- b) The grievant to be paid all his pending unpaid salaries from February 2019 up to the date of the judgment hereof;

*In the event that the reinstatement will not be tenable and in alternative the claimant prays*

- i) An order of separation commenced on judgment date.
- ii) Payment of three months' notice as per the Collective Bargaining Agreement Clause No.3 =115,980.00
- iii) Payment for the unpaid salaries for February, March, April and May 2019=154,640.00
- iv) Payment of the past collective Bargaining Agreement.
- v) Service gratuity for 25 years of service as per the Collective Bargaining Agreement clause No.4=2,017,500.00
- vi) Maximum compensation based by gross earning for unlawful termination=38,660 x 12=463,930.00

TOTAL AMOUNT =Kshs.2,752,040.00

- vii) Payment of damages for breach of the grievant's invaluable right and loss of future earnings. I.e. monthly earning x no of years remaining to retirement.
- viii) Interest in a, c, d, e and f above of 15% with effect from the date of judgment.
- c) Cost of the suit in favour of the claimant.
- d) Any other or future relief that the court deem fit and just to grant in the circumstance meet justice.

The Respondents case is that the grievant conducted the Respondents affair irregular and illegally and was subsequently invited to the management committee meeting on 8th March 2019 to explain the anomalies. These irregularities were *inter alia*;

- a) Failing to provide information and supporting documents in regards to irregular deductions.
- b) Deducting Kshs.10 per kilo from farmers without any backing by minutes or otherwise.
- c) Failing to provide loan application forms despite granting loans and or management committee approving the same.
- d) Granting loans without minutes or documents in support.

She failed to issue a satisfactory answer.

The Respondents further case is that the grievant was on 13th May, 2019 invited to respond to various other anomalies and breaches of duty and gross negligence that resulted in loss as follows;

- a) Alteration in the bank statement which included figures not supported.
- b) Unauthorized salary payment and increment to the applicant.
- c) The applicant admitted having authored the alteration in the statement without any authorization or documentation and admitted the paying salaries illegally.
- d) The applicant admitted to paying cash Kshs.350,000.00 without any authorization or procedure.
- e) The applicant to being a member of the trade union which led to conflict of interest with negotiations with the society.

The Respondents other case is that consequently, the grievant was invited to explain her failure to respect and was requested to show cause why disciplinary action should not be taken against due to her action and gross misconduct. She failed and was summarily dismissed. This is as follows;

6. The interim management committee report dated 1/4/2019 which the respondent shall wish to rely on in total highlights issues which led to the applicant's summary dismissal.

7. Minutes of management meeting of New Gatari Farmers co-operative society held on 13/5/2019 at Wathenje Factory Min No.46 mc 2018/2019 and minutes of executive management committee meeting of New Gatari farmers co-operative society held on 23/5/2019 highlight further the reasons for the applicant dismissal. The respondent shall rely on the said minutes in full report hereof.

The Respondent also raises a counter claim as follows;

9. The respondent claims that it suffered loss and damage due to gross mismanagement of the applicant and seeks compensation.

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REASONS WHEREFORE;

- a) Respondents be compensated for found loss due to the applicant mismanagement and negligence.
- b) Any other order this honourable court may deem fit to grant.
- c) Costs of this counterclaim.

The issues for determination therefore are;

1. Whether the termination of employment of the Claimant by the Respondent was unfair, wrongful and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of the cause?

The 1st issue for determination is whether the termination of employment of the Claimant by the Respondent was unfair, wrongful and unlawful. The Claimant in her written submissions dated 26th May, 2021 submits and reiteration of her case.

It is her case that the termination of the grievant's employment was unlawful for lack of procedure as laid out in the Collective Bargaining Agreement and the Employment Act, 2007. This is because the grievant was not subjected to a fair hearing in consonance with Section 41 of the Employment Act which comes out as follows;

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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)." *Emphasis added.*

Again, the subsisting Collective Bargaining Agreement at Clause 7 provides;

*"An employee may be suspended from duty pending investigations in a matter related to gross misconduct."*

This is coupled with Section 50 of the Constitution of Kenya, 2010 which provides for hearing and fair trial in such circumstances.

The Respondent in her written submissions dated 8th July, 2021 submits a case of no answer to her counter claim.

Her further case is founded as follows;

- The claimant conducted the respondent affairs in an illegal manner and would not satisfactorily answer when called upon to do so.
- Her conduct was irregular in the following manner;
  - a) Deducting Kshs.10/- per kilogram from farmers without any backing or minutes or documents there of
  - b) Providing loan facilities to members without following due process like granting loan application forms and granting loans without approval by management.

- c) Arbitrary increasing the claimant's salary by 10% without authorization.
- d) Altering bank statement.
- e) Paying salary illegally and or irregularly
- f) Necessitating a loss of Kshs.350,000/- to the respondent without procedure or authorization.

The Respondent further case and submission is that the grievant was awarded various opportunities to explain the anomalies and she admitted the loss.

The balance of issues was the amount that was to be awarded to the claimant.

Further, the Respondent submits that the claimant admitted to pay back that which was lost due to her negligence but the parties disagreed on the amount. This amount was Kshs.150,000.00 as counter claimed.

Other issues arising and leading to the dismissal of the claimant are;

- An increase of her responsibility allowance from 10% to 20% of her salary which she admitted was erroneous and without authority.
- She admitted negligence leading a loss of Kshs.150,000.00 to the claimant.
- The Respondent has annexed a list of documents indicating what she owes the claimant.
- The owings comprise the salaries of February to May, 2019 and due deductions leaving a balance of Kshs.25,568.00.
- The claimant was dismissed for gross misconduct and therefore not entitled to benefits accruing from the collective bargaining agreement.
- The counter claim is for Ksh.350,000.00 which the claimant admitted.

The Respondent's case overwhelms that of the claimant. She has adduced sufficient evidence to demonstrate a case of lawful termination of the employment of the claimant. This was prompted by massive gross misappropriation and abuse of office by the claimant. A case of lawful termination of employment ensues in the circumstances and I so find.

The Respondent has however failed to demonstrate her counter claim in evidence and this fails.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is not. Having lost a case of unlawful termination of employment she becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim and counter-claim with orders that each party bears their costs of the claim.

**DATED AND DELIVERED AT NYERI THIS 23RD DAY OF MARCH, 2022.**

**D.K.NJAGI MARETE**

**JUDGE**

**APPEARANCES**

**1. MISS MACHARIA FOR THE CLAIMANT UNION.**

**2. MR.KIMWERE INSTRUCTED BY KIMWERE JOSPHAT & COMPANY ADVOCATES FOR THE RESPONDENT.**