



**Muteshi v Sacco Societies Regulatory (Cause 1437 of 2016)
[2022] KEELRC 4093 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4093 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1437 OF 2016**

**M MBARÚ, J
APRIL 28, 2022**

BETWEEN

DOMINIC CHUNGANI MUTESHI CLAIMANT

AND

SACCO SOCIETIES REGULATORY AUTHORITY RESPONDENT

JUDGMENT

1. The claimant is a male adult. The respondent is a statutory body established under section 6 of the [Sacco Societies Act](#) with the duty to oversight and manager Sacco Societies Authority.
2. On July 1, 2010 the respondent employed the claimant as chief manager – human resource and administration earning a gross salary of Ksh 504, 267 per month. His duties were to develop and implement human resource strategies and policies; supervise and manage human resources and develop performance management appraisal system.
3. On August 10, 2015 the claimant was accused by the respondent of inciting its staff and threatening one John Mwaka the chief executive officer.
4. On May 11, 2015 a member of staff wrote an anonymous letter to the national treasury which raised several matters that there was corruption at the respondent where the then CEO, Carilus Ademba was accused of influencing procurements and awarding tenders to his friends, there was tribalism in hiring and promoting staff presided over by the CEO, and that the CEO was on numerous and expensive foreign trips together with his cronies.
5. Based on this anonymous letter an audit was conducted by the national treasury where the claimant was accused on un-procedural promotion of staff and recruitment of 23 officers contrary to the code of conduct and Human Resource and Administration Policy Manual, 2012 (the HR policy).



6. On December 9, 2015 the respondent issued the claimant with notice to show cause why disciplinary action should not be taken against him for misconduct following the audit. He was not supplied with the national treasury report or the particulars of the allegations made against him.
7. On December 10, 2010 the claimant responded to the notice to show cause notice and noted that he did not have the treasury report and under the HR policy he did not have staffing powers. Under the SASRA HR policy the claimant's role as to facilitate the recruitment and not to veto decisions by the CEO. The persons the claimant was accused of hiring were issued appointment letters by the CEO as the appointing authority and other appointments were done at the board level.
8. On December 9, 2015 the claimant was issued with another notice to show cause letter accusing him of insubordination for filing a compliant with third parties and not with his supervisor.
9. On December 10, 2015 the claimant responded to the second show cause notice but on December 4, 2015 he was sent on compulsory leave pending investigations.
10. On April 27, 2016 the respondent wrote and invited the claimant to attend a disciplinary hearing on May 5, 2016 but the claimant wrote back on April 29, 2006 and protested the notice period and questioned the legitimacy of the proceedings against him and the fact that 90 days within which the hearing ought to have been done upon suspension had lapsed. The respondent proceeded with the disciplinary hearing. The claimant attended the disciplinary hearing and gave his response and that the CEO was practicing tribalism and favouritism in recruitment and promotion and that the claimant had no role in hiring staff which were done in terms of the HR policy.
11. On May 19, 2016 the respondent terminated the claimant's employment contract. His case and response was not put into account and the action of terminating employment was without good cause and despite lodging an appeal he was not given a hearing.
12. The claim is that the claimant was victimised for addressing tribalism and favouritism by the CEO. The national treasury audit found the respondent had weak governance and the CEO and the board had failed to adhere to internal controls,
13. regulations and procedures and the claimant' termination of employment was unfair and that the respondent failed to pay his allowances, 53 leave days or pay his terminal dues.
14. The claimant is seeking reinstatement back to his position without loss of benefits. The claimant is also seeking the following dues;
 - a. 3 months' notice pay Ksh 1,512,801;
 - b. reinstatement;
in the alternative,
 - c. Damages for unfair termination at 12 months Ksh 6,051,204;
 - d. Outstanding pension remittance from March, 2016 to May, 2016 Ksh 71,925;
 - e. Unpaid salaries from March to May, 2016 Ksh 1,008,534;
 - f. Outstanding leave days Ksh 1,008,534;
 - g. Certificate of service; and
 - h. Costs of the suit.



15. The claimant testified in support of his claims that upon employment by the respondent on July 1, 2010 as chief manager human resource and administration he worked diligently until August 10, 2015 when he was accused of inciting fellow employees and that he had threatened John Mwaka the acting CEO.
16. On May 11, 2015 the respondent received an anonymous letter raising several issues that;
 - i. Corruption of the CEO, Carilus Ademba who was accused of influencing procurement and awarding tenders to his friends;
 - ii. Tribalism in hiring and promotion of staff allegedly presided over by the CEO; and
 - iii. Numerous and expensive foreign trips by the CEO and his cronies.
17. Based on this anonymous letter an audit was conducted by the national treasury and the claimant was accused of unprocedural promotion of staff and recruitment of 23 officers contrary to the code of conduct and on November 9, 2015 the claimant
18. was issued with a notice to show cause for alleged misconduct. The subject report and audit of the national treasury was not supplied to the claimant.
19. On December 10, 2015 the claimant responded to the notice to show cause and informed the respondent that he was not conversant with the contents of the audit report and that the provisions of SASRA human resource and administration policy section C 2(1) had not been adhered to. Under the policy, the claimant's role was to facilitate the recruitment of staff and not to veto the decisions of the CEO or the board. The persons he was accused of hiring were issued with letters of appointment by the CEO in his capacity as the appointing authority. Other appointments and promotions were done by the board.
20. On December 9, 2015 the respondent issued the claimant with another notice to show cause letter accusing him of insubordination for filing a complaint with third parties and not his supervisor. On December 10, 2015 the claimant responded to all the allegations. The claimant was then sent on compulsory leave pending investigations.
21. The claimant testified that once he finished his compulsory leave on March 10, 2016 he was issued with a letter of suspension. After a week it was changed to letter of interdiction.
22. On April 27, 2016 the claimant wrote to the respondent and challenged the notice period and the legitimacy of the proceeding considering that the policy only allowed 90 days within which a hearing should have been held and such time had since lapsed. The respondent then invited the claimant to a disciplinary hearing. He attended and made his representations on the allegations made against him particularly that there was corruption and tribalism perpetuated by the CEO in hiring and promotion of employees within the respondent which was contrary to policy.
23. On May 19, 2016 the respondent issued the claimant with notice terminating his employment. The board in terminating employment failed to consider the minutes of the ad hoc disciplinary committee minutes. There was no justification for termination of employment. The claimant lodged his appeal against such decision which was ignored.
24. The claimant testified that his employment was terminated for addressing tribalism and corruption within the respondent. There was no justified reason leading to such sanction.



Response

25. In response, the respondent's case is that the claimant was the chief manager human resource and administration but his conduct reneged on the terms and conditions of employment as he always acted contrary to the same or below expectations as the chief manager human resource and he was never threatened by John Mwaka as alleged.
26. In August, 2015 the national treasury carried out investigations into the respondent which was prompted by an anonymous letter dated May 11, 2015 and touched in several matters of human resource practices within the respondent and culminated into a report and recommendation. The report found the claimant had failed to advise the board and CEO on the procedural way of handling recruitment, re-designation, promotion, discipline and dismissal of officers among other matters.
27. On December 2, 2015 the claimant together with other employees, Diana Mwaro and Irene Kagendo co-signed a letter and complained about abuse of office by the CEP. This letter was circulated to inspector general, inspectorate of state corporations, the PS ministry of industrialisation and enterprise development, commission secretary public service commission, the ethics and anti-corruption commission and the ombudsperson and copied to the members of the board. The letter made far reaching allegations against the respondent and its officers including the use of internal documents for external purposes.
28. The claimant was issued with a notice to show cause based on the grounds that;
 - i. The claimant had recruited 23 officers contrary to authority to recruit 12 officers in a letter dated January 19, 2015;
 - ii. The claimant had unprocedurally promoted and dismissed employees;
 - iii. The claimant had failed to file his complaints with the appointing authority through his supervisor contrary to the HR and administration policy which amounted to insubordination and calculated to portray the board as incompetent to resolve issues;
 - iv. The claimant had violated section 8(3) of the *Sacco Societies Act*, 2008 by disclosing official information that he had acquired in performance of his duties;
 - v. The claimant was negligent in performance of his duties as head of HR and administration responsible for staff compensation.
29. The claimant responded to the notice to show cause issued. The board considered the responses and decided to send the claimant on compulsory leave to allow for further investigations.
30. The board appointed a committee to investigate issues relating to the conduct of the claimant. The committee invited the claimant for a hearing and found his explanations inadequate. The claimant was recalled through letter dated March 23, 2016 to give more explanations on May 5, 2016 but the claimant protested to the date and was allowed more time until May 10, 2016.
31. On May 10, 2016 the committee heard the claimant. The claimant as a human resource expert and employed as chief manager human resource was found to have failed in his duties of giving his knowledge and expertise to the respondent in the process of recruitment, promotion and dealing with human resource functions. He failed on several occasions to advise the respondent and the board on the procedural way of handling recruitment, re-designation, promotion, discipline and dismissal of officers among other matters.



32. The board considered the gravity of the charges made against the claimant and found they serious. Instead of giving a response, the claimant shifted blame on the CEO for his misconduct and termination of employment was justified, lawful and based on due process. And for these reasons, the respondent urged the court to dismiss the claimants case with costs.
33. In evidence, the respondent called Boniface Musumbi the manager human capital and administration and who testified that the claimant was his superior while he worked at the respondent and was conversant with the matter.
34. He testified that the claimant was the chief manager human resources and administration with duties to develop and implement human resource strategies and policies of the respondent, to supervise and manage human resources, to
35. coordinate, develop and manage a performance management appraisal system and capacity building policies and effective human resource management information system.
36. The claimant was not diligent or faithful to his employment. he did a letter dated December 2, 2015 co-signed with other employees, Diana Mwacharo and Irene Kagendo complaining about abuse of office by the witness as the acting CEO. This letter was circulated to third parties and the actions complained of related to changes taking place within the respondent but the allegations made had far reaching implication as the claimant had shared internal documents for external purposes.
37. The national treasury carried out investigations prompted by an anonymous letter which touched on several human resource practices of the respondent and the report established that the claimant had failed in his duties to advice the board and the CEO. The board held several meetings and resolved to issue the claimant with a show cause notice and sent him on compulsory leave to allow for investigations. The matters the claimant was required to respond to were outlined and he was able to respond and an ad hoc committee was appointed to hear his case and upon considering all matters took a decision to terminate employment and which was adopted by the board which issued the claimant with letter terminating his employment on May 19, 2016.

Both parties filed written submissions.

Determination

38. On May 19, 2016 the respondent terminated the employment of the claimant on the grounds that following investigation and hearing by the ad hoc committee a board meeting held on May 17, 2016 found the claimant guilty of gross misconduct and terminated his employment with effect from March 10, 2016. The respondent stated that

... at the meeting held on May 17, 2016 considered the final report of the ad hoc committee which was appointed to investigate the disciplinary issues against you, and decided to terminated your services with the authority on grounds of gross misconduct with effect from March 10, 2016.

The authority shall accordingly tabulate all the benefits that are due to you up to and including March 10, 2016 in accordance with the human resource and administration policy manual 2012 and the same shall be communicated to you in due course.
39. The ad hoc committee in its report dated May 17, 2016 outlined the allegations made against the claimant, its investigations and findings. The allegations were that;
 - a. The claimant had recruited 23 officers contrary to the authority to recruit 12 officers in a letter dated January 19, 2015;



- b. The claimant unprocedurally promoted and dismissed staff;
 - c. The claimant failed to file his complaint with the appointing authority through his supervisor contrary to the HR policy and which amounted to insubordination;
 - d. The claimant divulged official information of the respondent held in his possession to third parties;
 - e. The claimant was negligent of duty where he paid the acting CEO a commuter allowance then reported the same to be in abuse of office;
 - f. The claimant violated section 8(3) of the *Sacco Societies Act* by disclosing official information.
40. The findings of the committee were that the claimant ignored lawful authority in the recruitment, promotion and re-designation of staff and that he failed to adhere to the HR policy. As the HR expert he failed to advise the CEO and the board accordingly.
41. On the charge that the claimant had acted contrary to procedure in partitioning the office, he was found not culpable since he had no technical skills in this area.
42. With regard to the claimant filing his complaints to third parties and divulging information in his possession contrary to section 8 of the *Sacco Societies Act*, he was found to have failed to exhaust internal systems in addressing his grievance and as a senior manager and lead enforcer of the HR policy he ought to have set an example he failed in this regard.
43. The claimant was also found to be negligent of his duties by acting contrary to the HR policy where he paid the acting CEO commuter allowance.
44. Pursuant to section 47(5) of the *Employment Act*, 2007 the burden of proof with regard to unfair termination of employment rests with the employee and the burden to justify the reasons for termination of employment rests with the employer.
45. For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for termination of employment or wrongful dismissal shall rest on the employer.
46. Consequently, the claimant had the burden of proving that termination of his employment was wrongful while the respondent had the burden of proving that the grounds of termination of employment were justifiable.
47. Section 45(2) of the *Employment Act*, 2007 provides that a termination of an employee becomes unfair where the employer fails to prove the reason for termination is valid, the reason is fair, it related to the employees' conduct, capacity or compatibility; or it is based on the operational requirements of the employer; and that the employment was terminated in accordance with fair procedure. See *Iyego Farmers' Co-operative Sacco v Kenya Union of Commercial Food and Allied Workers* [2015] eKLR.
48. In this regard, procedural fairness is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee and which in return gives a concomitant statutory right to be informed to the employee. This right is secured under the provisions of section 41 of the Act where an employee has a right to be informed of the charges/allegations made against him and then given a right to a proper opportunity to prepare and to be heard and to present a defence as held in *Samsung Electronics East Africa Ltd v K M* [2017] eKLR.



Such is the essence of procedural and fair justice.

49. The claimant was appointed as chief manager, human resource and administration and on the terms that; your duties and responsibilities shall include but not limited to: to develop and implement human resource strategies and policies of authority supervise and manage the human resources of the authority to coordinate human resource capacity building and management develop and manage a Performance and Management Appraisal System (PMAS) and coordinate the capacity building policies of the Authority implement an effective human resource management information system.
50. The claimant was the main officer of the respondent responsible for the function of human resource. He cannot extricate himself from such office in terms of development, supervision, coordination and implementation of an effective system in recruitment, promotion and re-designation. Such also involves termination of employment.
51. The claimant testified that he was not responsible for hiring 23 employees as such function vested on the CEO or the board. That he did not promote any officer as such mandate was with the board. That he did not terminate the employment of any employee since he did not sign such letter.
52. However, such standpoint by the claimant is not commensurate with the position he held as chief manager, human resource and administration. Recruitment, promotion, re-designation and termination have all to do with management of the human resource and administration, which position the claimant held.
53. The claimant was issued with notices to show cause with regard to his acts of omission and or commission with regard to his function and chief human resource and administration. He responded and was invited for oral submissions and based on the ad hoc committee findings, he was found to have failed in his duties. Reasons for the findings are given.
54. Of importance in these proceedings, the claimant testified and admitted that he authored letter dated December 2, 2015 together with other employees. The letter was addressed several third parties and copied to the respondent. The defence was that such letter and complaints therein ought to have been directed to the respondent and it was a violation of section 8(3) of the *Sacco Societies Act* and the HR policies. Section 8(3) of the *Sacco Societies Act* directs that;

(3) except for purposes of the performance of his duties or the exercise of his powers under this Act, or where required under any other law to do so, any officer or any other employee or agent of the authority shall not disclose any information which he has acquired in the course of the performance of his duties or the exercise of his powers in accordance with this Act.
55. As noted above, the claimant as the chief manager, human resource and administration for the respondent should and ought to have been the person/officer enforcing these provisions. To escalate his grievances and complaints against the employer, however legitimate he felt them to be, the due process was to address these with the acting CEO, his supervisor or the board. Where such grievances were not addressed, then recourse was the court as herein done.
56. The position of chief manager, human resource and administration officer was accountable to the CEO and who was accountable to the board. To remove internal matters of the respondent and escalate with third parties placed the claimant at a position he could not enjoy the trust, confidence and honesty that go with such a position.



57. Such conduct violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, and is fundamentally and directly inconsistent with the employee's obligations to his employer
58. The resulting termination of employment is hereby found justified and the respondent applied the due process.
59. On the reliefs sought, the remedy of reinstatement is not available where termination of employment is found justified.
60. The claimant is seeking 3 months' notice pay. On the finding that employment terminated fairly, this being a case of termination of employment unlike summary dismissal; he is entitled to one months' notice pay at the last gross salary all at Ksh 504, 267
61. On the outstanding pension remittances from March to May 2016, employment terminated on May 19, 2016 but was backdated to March 10, 2016. The claimant
62. ceased employment with the respondent on May 19, 2016. To backdate the date to March 10, 2016 is unlawful and bad labour practice.
63. The claimant is entitled to his pension remittances for the entire period of employment together with leave days and salaries unpaid for the entire duration of employment. The claimant cannot be penalised by the respondent as the employer who opted to prolong the disciplinary hearing for periods longer than 90 days as contemplated under the HR policy.
- The claimant shall be paid the following;
- a. pension remittance from March, 2016 to May, 2016 Ksh 71,925;
 - b. unpaid salaries from March to May, 2016 Ksh 1,008,534;
 - c. outstanding leave days Ksh 504,267;
64. On the claim for a certificate of service, such shall be processed and issued in accordance with section 51 of the [Employment Act](#), 2007.
65. Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;
- a. notice pay Ksh 504,267;
 - b. unpaid salaries Ksh 1,008,534;
 - c. untaken leave days Ksh 504,267;
 - d. pension remittances Ksh 71,925;
 - e. certificate of service shall issue;
 - f. each party shall bear own costs.

DELIVERED IN COURT AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

M. MBARŪ JUDGE

In the presence of:

Court Assistant: Okodoi



..... and

