



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO.471 OF 2017

ABEID MWAMBURI.....CLAIMANT

VERSUS

SOKORO SAVINGS AND CREDIT

C0-OPERATIVE SOCIETY LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant was employed by the Respondent on 1st August, 2007 as a book keeper and later promoted to the position of Chief Executive Officer earning a gross salary of Kshs 49,819. He maintained this position till his termination.
2. The circumstances leading to his termination was that on the 2nd March, 2016 the Claimant received a letter from the manager which had been signed by unknown members of the board suspending the Claimant with immediate effect for allegedly being involved in fraud and embezzlement of the Respondent's funds and requiring him to pay Kshs 83,000.
3. It is stated that the details of the alleged embezzled funds were never communicated to him. The letter suspended him indefinitely without requiring him to give a response to the letter or appear before any disciplinary committee as is the norm. Nonetheless, the Claimant wrote a letter to the Respondent dated 5th March, 2016 demanding particulars of the alleged embezzled funds, which letter never elicited any response.
4. On 10th may, 2017, the Claimant received a termination notice dated 26th April, 2017 from the Respondent's advocates B.W Mathenge and company Advocates indicating that the termination was to take effect from 1st March, 2016 more than a year prior to the termination. In the said letter the figures allegedly embezzled rose to Kshs. 1,654,274.03 which the Respondent demanded immediate refund.
5. The Claimant then responded to the letter of termination by his letter of 22nd May, 2017, and requested for an opportunity to defend himself, but the Respondent became adamant.
6. The Claimant contends that he was terminated unfairly from employment since the Respondent flouted the law on termination provided for under the employment Act and under its own Human Resource manual. The Claimant thus prays for the following reliefs:-

i. A declaration that the termination was wrongful, unfair and unlawful and thus prays for an order of payment of terminal dues and benefits owed and full compensation for wrongful dismissal from employment as particularized below; -

a) 12 months' pay or its equivalent as compensation and damages for unlawful termination of Kshs.49,819 x 12= Kshs 597,828.

b) Severance pay of Kshs 249,095.

c) 3 months' salary in lieu of Notice Kshs 149, 457.

d) House allowance for 3 months of Kshs. 14, 799.

e) Telephone Allowance of Kshs 6,000.

f) Leave allowance for 5 years worked of Kshs 249,095.

ii. Certificate of service as per section 51 of the Employment Act.

iii. Costs and interests of this claim from the time of filing until its conclusion.

7. The Respondent entered appearance on the 20th December, 2017 and filed a response to claim on the 8th February, 2018.
8. The Respondent admits to employing the Claimant on 26th January, 2002 as an Accounts clerk which position he maintained till 26th January, 2012 when he was promoted to be the Respondent's CEO earning a gross salary of Kshs 37,819 and not Kshs. 49, 819 as pleaded.
9. It is stated that sometimes in January, 2016 internal audits were carried out and it was discovered that Kshs. 266,046 had been embezzled. Later on the Claimant issue loan of Kshs. 600,000 and Kshs 200,000 under unclear circumstances as the recipient members had not applied for the same and when he was interrogated in a meeting held on 18th February, 2016 he promised to pay the said monies vide his letter dated 18th February, 2016 and when the board insisted on being furnished with security he requested to avail the security the next day at 8.00 am.
10. The Respondent avers that the board met on various days including the 15th February, 2016 and the 19th February, 2016 to discuss the issue of lost money occasioned by the Claimant. Another meeting was convened on 2nd March, 2016, where the Respondent discovered Kshs 247,000 of Sukuma Loan was fraudulently disbursed in December, 2015 and not posted for deduction. It was at that meeting that the board resolved to suspend the Claimant together with two other staff members who were all later dismissed from employment. A letter was subsequently written to Molo DCI informing the police of the situation.
11. Upon the termination, it is stated that the Claimant paid Kshs. 100,000 to defray the misappropriated funds and promised to pay the remainder in installment, though he never paid the money to date.
12. The total amount of money which was reportedly lost as per the Respondent's members amounted to Kshs. 1,120,875, which were all disbursed by the Claimant and unaccounted for. Further that the Claimant had borrowed money with the sacco and was owing Kshs. 369,398.03 at the time of suspension.
13. It is the Respondent's case that, a case of fraud and embezzlement of the society's money was filed at the Chief Magistrates Court in Molo under Civil case number 319 of 2017 which case is still ongoing.
14. The Respondent therefore maintains that the termination of the Claimant was proper, having been subjected to due process before the termination and urged this Court to find as such.
15. In response to the defence the Claimant denied all the averments in the defence and in addition stated that he never admitted to paying the alleged Kshs. 620,000 as alleged rather that he sought time from the Respondent to reconcile his books only for the Respondent to suspend and later dismissed him without granting him an opportunity to defend himself.

Hearing

16. The Claimant testified at CW-1 and adopted his witness statement dated 27.11.2017 and produced the 10 documents as per the list filed together with the claim.
17. Upon cross examination, CW-1 testified that his basic pay was Kshs 37,819 plus allowances summing up to Kshs 49, 819, however that the payslip indicates his salary as Kshs 37, 819. On being interrogated on the lost money as per meeting of 26.1.2016, he testified that he never admitted to misappropriating the said amount rather that he sought for more time to account for the same. He further stated that he asked to be allowed to be accompanied to the meeting by a witness but the Respondent did not give any response. He then maintained that he was not subjected to due process before termination.
18. The Respondent called two witness in support of its case, **Walter Ogada** as RW-1 and **Joseph Ouko** as RW-2.
19. RW-1 adopted his witness statement dated 16.7.2021 which merely reiterates the response to claim and upon cross examination RW-1 testified that the Claimant was summary dismissed for being implicated in the embezzlement of the Respondent's money. He further testified that the Claimant agreed to refund the money in the board meeting therefore that there was no need to subject the Claimant to any disciplinary hearing having admitted to embezzling Kshs 620,000 and already paid Kshs 100,000.
20. He then testified that on 4th March, 2016 while the Claimant was still on suspension, the Respondent Board resolved to terminate the Claimant's services and admitted that the Claimant was not paid his march salary, untaken leave, any terminal dues or given his certificate of service for the reason that the Claimant owes the Respondent a total sum of Kshs 1,600,000.
21. RW-2 also adopted his witness statement dated 23.12.2021 and upon cross examination, he testified that he was the internal auditor during the said period and testified that the letter of 2.3.2016 shows the embezzled funds was Kshs 83,000 however that the termination letter did not give any figure.
22. On further cross-examination the witness testified that the total amount which was lost was Kshs 1,622, 253 however that the said amount did not reflect in the disciplinary hearing. He also testified that for money to be approved there were three officers involved, that is the tellers, managers and auditors who confirmed the said money conformed to their requirement and procedure. He then stated that the three employees were all terminated eventually.

23. On re-examination, he testified that he was the one that noted the lost Kshs 83,000 and reported to the board of management and that the person implicated was the manager. He then testified that when the report was tabled before the disciplinary committee the Claimant did not have issue with the report rather that he sought time to answer to the queries therein.

Claimant's Submissions.

24. The Claimant maintained that he was unfairly terminated from employment when he was not accorded an opportunity to defend himself after the charges of embezzlement of funds were raised by the Respondent. It was argued that the Respondent did not give the Claimant time to respond to the claims and instead suspended him from employment and soon thereafter dismissed him without giving him proper opportunity to defend himself. In support of his argument the Claimant relied on the case of **Zephania O. Nyambane & another v Nakuru Water & Sanitation Services Company Limited [2013] eKLR**

25. It was further submitted that the figure in the notice to show cause was amount of Kshs 83,000 which amount later varied to Kshs 620,000 and in the end the alleged amount rose to Kshs 1.6 Million which figures were never explained. Also that the Claimant was not supplied with the audit report prior to the meeting neither was he allowed to have a witness in the disciplinary hearing. The failure to furnish him with the documents the disciplinary committee were relying upon, made him fail to prepare and when he requested for more time he was terminated instead of being granted the opportunity to defend himself.

26. The Claimant therefore argued that the process of terminating his services was done shoddily; therefore the termination was unfair in the circumstances.

Respondent's Submissions.

27. The Respondent on the other hand submitted that it allowed the Claimant to give his side of the story by subjecting him to disciplinary meetings which were held in various dates e.g. 25.1.2016 where the Claimant admitted to embezzling the Respondent's funds and meeting of 8.2.2016 where the Claimant sought for more time to record a statement and meeting of 15.2.2016 where the Respondent's members complained of loan registered under their portal and not advanced to them.

28. It was submitted that after the meeting held on 24.2.2016 the Claimant who had admitted responsibility invite his relatives who paid a sum of Kshs 100,000 and the balance of Kshs 520,000 was to be paid in installments within 36 months. It is argued that the board then resolved to dismiss the Claimant from employment having been found culpable for gross misconduct as per section 44 (4)(g) of the Employment Act. It was then argued that the Claimant was terminated after being given sufficient reason and subjected to disciplinary hearing as such the termination conformed to the provisions of section 41 and 43 of the Employment Act and not unfair as submitted by the Claimant.

29. In conclusion, the Respondent submitted that it was justified in dismissing the Claimant from employment and prayed for an order that the Claimant refund it Kshs 1,622,253 embezzled and then dismiss the Claimant's case with costs.

30. I have examined all evidence and submissions of the parties herein. From the Claimant's exhibit dated 2/3/2016, the Claimant was placed on suspension for an indefinite period for reason of fraud and embezzlement of the Respondent's funds.

31. Details of the embezzlement were not given and vide a letter dated 5/3/2016, the Claimant requested for details of the said embezzlement.

32. There is no indication that the Respondents responded to this request.

33. The Respondent have averred that the Claimant wrote a letter admitting to embezzlement of funds dated e.g. on 25/1/2016 during a disciplinary hearing.

34. The Respondent produced board paper for the board meeting held on 25/1/2016 prepared by the Claimant.

35. In the paper, there is nowhere the Claimant has indicated he admitted to embezzling funds of the Respondent.

36. The Respondent on their part aver that their audit report revealed that the Claimant had embezzled funds of the Respondent and the board meeting resolved to suspend him and later terminate his services.

37. Section 41 of the Employment Act 2007 states as follows;

***“41. Notification and hearing before termination on grounds of misconduct
(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”.***

38. Despite the fact that the Claimant had reasons to suspend the Claimant the avenue they had to prove the allegation and establish the guilt

of the Claimant was to take him through a disciplinary process as per the law.

39. The Respondent failed to pursue this avenue and therefore it follows that the termination of the Claimant was unfair and unjustified as per Section 45 (2) of the Employment Act 2007 which states as follows;

“45. (1).....

(2) A termination of employment 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”.

40. It is therefore my finding that the Claimant has established his case against the Respondent for unfair termination and I award him as follows;

1. 6 months salary as compensation for unfair termination

= 6 x 37,819/=

= 226,914/=

2. 1 month salary in lieu of notice as per Section 35(1) of Employment Act

= 37,819/=

TOTAL - 264,733/=

Less statutory deduction

3. The Claimant be issued with a certificate of service

4. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.

DATED, SIGNED, AND DELIVERED IN OPEN COURT THIS 21ST DAY OF APRIL, 2022.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Owino for Claimant – present

Owuor for Respondent – present

Court Assistant - Fred