



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 277 OF 2017**

**STEPHEN OLUOCH KABONDO.....CLAIMANT**

**V**

**SOUTH NYANZA TEACHERS CO-OPERATIVE SAVINGS**

**& CREDIT SOCIETY LTD.....RESPONDENT**

**JUDGMENT**

1. Stephen Oluoch Kabondo (the Claimant) instituted these proceedings against South Nyanza Teachers Co-Operative Savings & Credit Society Ltd (the Respondent) on 15 June 2017 alleging unfair termination of employment and breach of contract.
2. The Respondent filed a Statement of Defence and Counterclaim on 31 July 2017 and on 14 November 2018, the parties were sent to mediation.
3. The mediation attempt failed because the Respondent did not cooperate and failed to attend mediation meetings.
4. As a result hearing commenced on 13 February 2020 when the Claimant testified and closed his case. The hearing of the Respondent's case was scheduled to 28 April 2020 but due to COVID19, did not proceed.
5. On 16 July 2020, the Deputy Registrar fixed the Respondent's case for 14 December 2020. Despite notice, the Respondent did not attend before the Deputy Registrar for fixing of the hearing.
6. Come 8 October 2020, the Respondent filed a Motion seeking leave to file and serve a witness statement and documents. The Motion was fixed for hearing on 14 December 2020. The Claimant filed a replying affidavit in opposition to the Motion on 6 November 2020.
7. When the Cause was called out on 14 December 2020, the Respondent was not represented. The motion was therefore not prosecuted.
8. Upon the Claimant's oral application and considering that the Cause had been fixed for hearing and the Respondent was aware as deposed in paragraph 2 of the supporting affidavit to the Motion, the Court closed the Respondent's case and reserved judgment to today.

**Counterclaim**

9. The Respondent did not attend the Court on 14 December 2020 to defend itself and also prosecute its Counterclaim. The Counterclaim is dismissed.

**Background**

10. On or around 29 February 2016, the Respondent sent the Claimant on compulsory leave to allow investigations/audit to be conducted on the accounts.
11. The Claimant was also requested to respond within 3-weeks to certain allegations on the alleged financial scandal. The Claimant responded through a letter dated 23 March 2016.
12. The Claimant's response was placed before the Central Management Committee of the Respondent on 20 April 2016 and it resolved that the Claimant be suspended in order to facilitate an audit/inspection of accounts.

13. The letter advised the Claimant that he would be called before the Committee at an appropriate time to defend himself.

14. The Claimant felt the suspension was not lawful and on 25 May 2016, he sought the intervention of the County Labour Officer.

15. On 28 November 2016, the Respondent wrote to the Claimant to notify him of his dismissal. The dismissal prompted these proceedings.

### **Unfair termination of employment**

#### **Procedural fairness**

16. The Claimant contended that his dismissal was unfair because he was not taken through a disciplinary process.

17. However, the Respondent countered that attempts were made to invite the Claimant to attend before it (including through his advocate), but the Claimant snubbed the invitations.

18. To demonstrate that attempts had been made to afford the Claimant an opportunity to be heard, the Respondent filed letters dated 13 July 2016 calling for a meeting on 19 July 2016 and 27 July 2016 to the Claimant through his advocate to attend a meeting on 16 August 2016 to discuss the allegations in contention.

19. Section 35(1)(c) of the Employment Act, 2007 contemplates written notice of termination of employment. The notice may generally serve as a show-cause setting out the reasons for envisaged termination and asking the employee to make representations.

20. Section 41 of the Act on the other hand obligates the employer to afford the employee an opportunity to make representations, in the presence of a colleague, if possible.

21. The Claimant was informed of allegations to confront through letters dated 29 February 2016 and 26 April 2016 and thereafter he was invited to attend before the Respondent to discuss the allegations through letters dated 13 July 2016 and 19 July 2016. The Claimant snubbed the invitations.

22. In the circumstances, the Court is satisfied that the Respondent was in substantial compliance with the procedural fairness requirements of sections 35(1) and 41 of the Employment Act, 2007.

#### **Substantial fairness**

23. In a break with the general rules of evidence, sections 43 and 45 of the Employment Act, 2007 has placed a statutory burden upon employers (as Respondent) to not only prove the reasons for terminating the contract of an employee, but to prove the reasons as valid and fair.

24. The Respondent herein did not attend the hearing to discharge the burden and the Court can only conclude that the reasons for the dismissal of the Claimant were not valid or fair.

#### **Salary in lieu of notice**

25. The Claimant prayed for 6-months' salary in lieu of notice but he did not lay an evidential or legal basis for the same.

26. The Claimant also did not prove that there was procedural unfairness.

27. The Court declines to award salary in lieu of notice.

#### **Compensation**

28. The Court has concluded that the Respondent did not discharge the burden of proving that the reasons for the dismissal of the Claimant were valid and fair.

29. The Claimant served the Respondent for about 16 years and in light of the length of service, the Court would award the equivalent of 8-months gross salary (Kshs 18,466/-) as compensation.

#### **Breach of contract**

#### **Medical allowance**

30. The Claimant sought Kshs 28,728/- on account of medical allowance for 15 months he was on compulsory leave.

31. Under the contract, the Claimant was entitled to monthly medical allowance of Kshs 700/-.

32. Technically, the Claimant remained an employee and unless the contract provided otherwise, he was entitled to the allowance during the

compulsory leave/suspension.

33. The Claimant was on compulsory leave from 1 March 2016 and he was dismissed with effect from 1 December 2016. He can validly only claim medical allowance for 9 months. The head of claim is allowed in the sum of Kshs 6,300/-.

#### **House allowance**

34. Although seeking house allowance for 15 months in the sum of Kshs 28,728/-, the Claimant did not specify the 15 months and years the allowance related to and the Court will decline relief.

#### **Unpaid leave**

35. On account of leave, the Claimant sought Kshs 308,320/- and he disclosed during oral testimony that the accrued leave related to 2015/2016.

36. Under section 28 of the Employment Act, 2007, an employee is entitled to at least 21 days annual leave with full pay.

37. The Claimant's monthly basic pay at time of separation was Kshs 12,766/- and mathematically he cannot claim the amount sought.

38. The Respondent did not produce/file the Claimant's leave records as contemplated by section 10(3) of the Employment Act, 2007.

39. In lieu of the accrued leave, the Court will allow this head of claim in the sum of Kshs 12,766/-.

#### **Salary underpayments**

40. The Claimant alleged that he was underpaid because the person who replaced him was earning more than what he was earning.

41. Salary underpayments may arise because of payment of salary below the prescribed minimum wage or the contractually agreed salary.

42. The Claimant was not paid below the prescribed minimum wage. He was paid the wage agreed with the Respondent.

43. The Court therefore finds no merit in this head of the claim.

#### **Conclusion and Orders**

44. The Court finds and declares that the dismissal of the Claim was unfair and awards him

(a) Compensation	Kshs 147,728/-
(b) Medical allowance	Kshs 6,300/-
(c) Accrued leave	Kshs 12,766/-
<b>TOTAL</b>	<b>Kshs 166,794/-</b>

45. Claimant to have costs.

**Delivered through Microsoft teams, delivered and dated in Kisumu on this 20<sup>th</sup> day of January 2021.**

**Radido Stephen, MCI Arb**

**Judge**

**Appearances**

Claimant in person

For Respondent Nyauke & Co. Advocates

Court

Assistant

Chrispo

Aura