



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

ELRC CAUSE NO. 935 OF 2016

GREGORY KWABI WEKULO.....1ST CLAIMANT

LYDIA KEMUNTO OMAGWA.....2ND CLAIMANT

JANE WANJIKU KIMANI.....3RD CLAIMANT

VERSUS

MUSONI KENYA LIMITED.....RESPONDENT

JUDGMENT

1. In the Amended Memorandum in Support of the Claim dated 4th March 2020, the 3 Claimants sued Musoni Kenya Limited for wrongful termination of their employment. They aver that they were employed by the Respondent on diverse dates in 2013 and 2015, as Wealth Creation Officer (Group Lending), Wealth Creation Officer (Group Lending) and Customer Service Assistant respectively. They aver that in recognition of their diligence and competence in performance and discharge of their duties, the Respondent reviewed their basic salary upwards. The Claimants further aver that they reported at their usual place of work on 17th February 2016 and were issued with notice for Disciplinary Committee Hearing scheduled for 11am on 22nd February 2016. They aver that they were accused of fraud and jointly stealing from the Respondent Company and were supposed to show cause as to why disciplinary action should not be taken against them. They aver that when they reported to the Head office for Disciplinary Hearing as scheduled, they were arrested by Police Officers from Kilimani Police Station. They aver that they were then transferred to Narok Police Station the next day on 23rd February 2016 and remained in custody until 25th February 2016 when they appeared in court and each released on cash bail. The Claimants aver that they were charged in Narok Criminal Case No. 329 of 2016 with the offence of stealing by servant. The 1st, 2nd and 3rd Claimants aver that at the time of termination, they were earning a monthly basic salary of Kshs. 50,301, Kshs. 42,071 and Kshs. 47,255.10 respectively.

2. The Claimants aver that the Respondent acted oppressively and in bad faith in summarily dismissing them, and that it was wrong to terminate their services without proof or evidence of their conspiring with clients to forge loan application forms. The Claimants aver that the procedure adopted by the Respondent in reaching the decision to dismiss them, the communication of that decision and the conduct of the Respondent was illegal, unlawful and unfair. The Claimants aver that they were not heard before the disciplinary committee as scheduled but were instead harassed and locked up by the Police. They aver that further, the Respondent forced them to admit in writing that they conspired to defraud the company various sums of monies but they refused to incriminate themselves. The aver that when they were unfairly detained in police custody, the 3rd Claimant was denied the right to breastfeed her 3-month old baby while the 2nd Claimant was seven months pregnant and almost suffered a miscarriage. The Claimants prayed for award/orders against the Respondent and each seek 12 months' basic salary, one-month notice pay, leave not taken, exemplary damages, certificate of service and costs of the suit. The Claimants also seek interest on their claims for salary, notice pay and leave not taken, from the time of termination to payment thereof. The 1st, 2nd and 3rd Claimants each filed witness statements which were amended on 4th March 2020. They state they were not accorded with justice and equity at all in the termination of their employment and assert that the Respondent refusing to allow them participate in the internal disciplinary process was unfair and against natural justice.

3. The Respondent filed an Amended Statement of Response dated 29th August 2020 admitting to having issued a notice to show cause and scheduling a disciplinary hearing as averred in the Claim. The Respondent averred that all the Claimants attended a disciplinary hearing at its Head Office on 22nd February 2016 and were given a fair chance to explain themselves and show cause why disciplinary action should not be taken against them. It contends that any subsequent arrests were procedurally made in connection to the criminal complaints levelled against the Claimants and denies knowledge of the proceedings subsequent to their arrest. The Respondent further avers that the Claimants' criminal case is part-heard and asserts that at the time of termination, the Claimants were earning a basic salary of Kshs. 42,801/-, Kshs. 34,571/- and Kshs. 39,753.10 respectively.

4. The Respondent denies the grounds for wrongful termination as pleaded by the Claimants and asserts that in summarily dismissing the

Claimants it followed due process as per the law and company policy. The Respondent averred that it presented and provided the Claimants with the evidence against them and gave them an opportunity to defend and/or exonerate themselves from the claims against them. Further, each Claimant was accorded individual time slots for the hearing and granted the opportunity to have a witness present for the same. The Respondent averred that the Claimants voluntarily acknowledged and accepted their individual acts of violation of the Respondent's credit and lending policy and it consequently justifiably exercised its right to summarily dismiss them. The Respondent averred that all amounts owing to the Claimants were duly computed and paid out to them and that the sums claimed in the Claim are thus unfounded and should be dismissed with costs.

5. The Respondent also filed a witness statement dated on 27th February 2020 by its Chief Human Resources Officer, Judy Ndung'u. She states that the management of the Respondent had received several complaints from clients particularly belonging to Saruni SGH, who accused the Claimants of conspiring with a client named Miriam Ogito of Ntulele Tushirikiane SGH in order to forge loan application forms. She stated that the clients of Saruni SGH claimed the loan application forms were used to deceive them that they had received money through their Mpesa accounts, which money they were later asked to transfer to the said client named Miriam Ogito. She further asserts that in a case of conflict of interest, the 1st and 3rd Claimants had also borrowed Kshs. 10,000/- and Kshs. 5,500/- respectively from the said Miriam Ogito, who was the Respondent's client and that the 3rd Claimant borrowed a further Kshs. 3,500/- from one Agnes Kanana on 7th January 2016. She stated that the 3rd Claimant also allowed the said Miriam Ogito to attend group meetings of Saruni SHG and gave access to confidential information of the said client yet she knew that Miriam is not a member of Saruni SHG and that the said act caused the Respondent a loss of Kshs. 755,000/-. She stated that similarly, the 2nd Claimant allowed the said Miriam Ogito to oversee the activities of several of the Respondent's clients where she was not a member, namely: Inua Majengo SHG, Ntulele Precious SHG and Semeria SHG; which action also caused the Respondent a loss of Kshs. 510,000/-. She stated that in a meeting held in her presence and that of the Chief Operating Officer, the 1st and 3rd Claimants admitted to having violated the Credit and Lending Policy through their aforementioned actions. She stated that the 1st and 3rd Claimants were then notified to fill in their leave application forms for a period of 10 days to enable the Respondent carry out internal investigations into the complaints against them. She also states that a report from an internal auditor confirmed the Claimants' fraudulent activities and that when the disciplinary committee hearing took place, the Claimants refused to append their signatures to the minutes and also declined to bring a witness to the hearing. She asserts that as all Claimants were remanded at Narok Police Station at the time. She stated that each of them was notified of their summary dismissal vide letters dated 24th February 2016 sent through post office registered mail on 1st March 2016. She stated that their dismissal letters gave the grounds for dismissal and also communicated that the dismissal was to be effective from 24th February 2016.

6. The Claimants submit that with regards to the criminal case, the Chief Magistrate Narok Hon. W. Juma found them not guilty and acquitted them under Section 215 of the Criminal Procedure Code and that therefore the basis upon which their services were terminated was found to be false. The Claimants submit that the Respondent acted in contravention of Article 41(1), (2)(a), (b) and (c) of the Constitution of Kenya 2010 and Section 49(c) of the Employment Act by failing to pay the equivalent of the number of months wages or salary not exceeding 12 months on the gross monthly wages.

7. The Respondent submits that the Claimants' admission of having violated the Respondent's policies is corroborated by the emails dated 20th January, 2016 by the 1st and 3rd Claimants while the 2nd Claimant gave a handwritten undertaking to refund the monies lost as a result of the fraudulent actions. The Respondent submits that it has produced signed leave forms with respect to the 1st and 3rd Claimants, notice for the disciplinary hearing, minutes of the hearing and letters of dismissal in respect of the Claimants and maintains that it adhered to the process outlined under Section 41 of the Employment Act. It cited the case of **John Ngatia Ndung'u v Kenya Commercial Bank Limited [2014] eKLR** where the Court found that it was necessary to notify the claimant in detail the particulars of the allegations levelled against him. The Respondent submitted that Section 44(c) and (g) of the Employment Act provides that the wilful neglect to perform work or the performance of such work in a careless and improper manner as well as the commission or the reasonable suspicion of the commission of a criminal offence against or to the substantial detriment of the employer amount to gross misconduct for which an employer is permitted by law to summarily dismiss an employee. The Respondent submitted that under Section 43 of the Employment Act an employer is required to prove the reason or reasons for the termination which the employer at the time of termination genuinely believed to exist and caused the employer to terminate the employment contract. The Respondent submits that on the strength of the findings of its investigations and the disciplinary proceedings, it was reasonable to conclude the Claimants were guilty of gross misconduct and therefore liable to be summarily dismissed. It also submits that the Claimants were prosecuted in a criminal court and put on their Defence after the Court found they had a case to answer on a balance of probabilities. The Respondent relied on the case of **Abdi Mohamed Daib v Kenya Port Authority [2016] eKLR** where the Court held that an employer has the prerogative to discipline her employees for misconduct and that such prerogative is not subject to any parallel or intended criminal proceedings.

8. The Respondent submits that the Claimants have cited violation of Section 49(c) of the Employment Act which section does not disclose any obligation on the part of an employer and that the Claimants have further not adduced any evidence in support of their allegation that the Respondent acted in an arbitrary and unlawful manner. The Respondent submits that on the basis of Sections 49(1)(c) and 50 of the Employment Act, this Court cannot legally give an award over and above the 12 months' salary already prayed for and that the Claimants' prayer for exemplary damages is thus unlawful. The Respondent submits that since it adhered to procedural requirements and had a valid and fair reason to terminate the Claimants' employment, they are not entitled to 12 months' salary. The Respondent submits that the Claimants are also not entitled to notice pay as Section 44 of the Employment Act allows for summary dismissal of an employee without notice. The Respondent submitted that it produced evidence of leave days taken and records of terminal dues paid demonstrating the Claimants were sufficiently compensated for their unutilized leave days and that since this evidence was not rebutted during trial, the sums should not be awarded. The Respondent submits that the Claimants were issued with their certificates of service at the point of termination of their employment which were forwarded together with the termination notices and proof of payment of final dues. However, it submits, should this Court be minded to award the Claimants damages, it ought to be guided by the provisions of Section 49(4)(b) and (k) of the Employment Act which provides as follows:

49(4)(b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination.

(k) any conduct of the employee which to any extent caused or contributed to the termination.

The Respondent submits that the Court ought to exercise its discretion judicially as was held in the case of **Party of Independent Candidate of Kenya v Mutula Kilonzo & 2 Others [2015] eKLR**, and in so doing it ought to be guided by the general rule that costs should follow the event as elaborated in **Republic v Rosemary Wairimu Munene Ex-Parte Applicant Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2014** (unreported). The Respondent urged the dismissal of the suit with costs.

9. The Claimants were no doubt treated in a manner that caused them to be distressed and upset especially for the one who was expectant and the one who was lactating. The Respondent asserts it had no hand in their prosecution and despite such assertion the Respondent triggered this through the report they made. Was it justified to complain about the Claimants? From a reading of the decision of the trial court in the criminal case, they were acquitted after being put on their defence. An employee can be exonerated in a criminal trial yet the employer may still dismiss as the criminal trial does not of itself absolve the employee from the strictures of the employer to discipline for a perceived wrong. There is evidence before me being the admissions of the Claimants that they acted in a manner to suggest they were less than honest to the employer by engaging in dealings that were essentially breaches of their contracts of employment. The Respondent to its credit undertook hearings and gave the Claimants the opportunity to defend themselves as required under Section 41. The Claimants claim was met by a sufficient response under Section 43 of the Employment Act as the Respondent discharged its burden to show they were dismissed for just cause and in a fair process. There was no claim for malicious prosecution and if there was any before me this is not the correct forum for the same as that is a purely civil matter for the High Court. In the final premises as the Claimants did not prove an unfair or illegal dismissal they cannot recover. Suit is dismissed but given the inception of the dismissal process that was tad insensitive to the 2nd and 3rd Claimants I will order each party to bear their own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE