



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 196 OF 2015

WASHINGTON ODERA SIREKA.....CLAIMANT

VERSUS

SCANIA EAST AFRICA LIMITED.....RESPONDENT

JUDGMENT

1. Washington Odera Sireka (Claimant) was offered employment by Scania East Africa Ltd (Respondent) as a Stock Control Supervisor in March 2014 (previously he was employed in 2003 by Kenya Grange Vehicle Industries Ltd before it was bought by the Respondent).
2. In 2005, while working with Kenya Grange Vehicles Industries Ltd, the Claimant was elected as Chairman of Scania Sacco.
3. Sometime in 2014, an audit was carried on the books of the Sacco, and the audit revealed massive fraud. As a result, on 29 September 2014, the Respondent suspended the Claimant from work to enable comprehensive investigations to be carried out. The suspension was to last until 8 October 2014.
4. On 8 October 2014, the Respondent extended the suspension until 19 December 2014 to enable conclusion of investigations.
5. However, on 21 November 2014 after conclusion of investigations, the Respondent wrote to the Claimant to notify him of his summary dismissal.
6. The Claimant thereafter commenced these legal proceedings against the Respondent on 17 February 2015 alleging wrongful, unlawful and unfair termination of employment, and breach of contract.
7. The Respondent filed its *Response* on 25 March 2015 and List of Documents on 20 July 2016. On 18 March 2019, the Claimant filed an *Amended Statement of Claim* which introduced a head of claim for salary in lieu of notice.
8. The Respondent filed a Supplementary List of Documents on 1 July 2019 and an *Amended Memorandum of Response* on 9 August 2019.
9. The Cause was heard on 31 October 2019.
10. The Claimant and the Respondent's Human Resources Manager and Internal Auditor testified. The Claimant filed his submissions on 18 November 2019 while the Respondent filed its submissions on 29 November 2019.
11. The Court has considered the pleadings, evidence and submissions and condensed the Issues for determination as examined hereunder.

Unfair termination of employment

Procedural fairness

12. It is not in dispute that this was a case of *summary dismissal*. In cases of *summary dismissal*, the written notice of termination of employment contemplated by section 35(1)(c) of the Employment Act, 2007 becomes superfluous but an oral hearing is a mandatory step by virtue of section 41(2) of the Act.
13. The Claimant testified that he was not afforded an opportunity to be heard before the dismissal while the Respondent's first witness maintained that the Claimant was afforded an opportunity to be heard by being invited orally to attend a hearing before a Disciplinary

Committee on 8 October 2014 but snubbed the offer.

14. The Claimant was first suspended on 29 September 2014 but the Respondent extended the suspension through a letter dated 8 October 2014 ostensibly to allow conclusion of investigations.

15. The Respondent however contended that a disciplinary hearing was conducted on the same date of 8 October 2014.

16. In the view of the Court, it is inconceivable that the Respondent conducted a disciplinary hearing on 8 October 2014 when according to its own letter extending the Claimant's suspension, investigations had not been concluded.

17. The Court therefore finds that the meeting held between the Claimant and the Respondent on 8 October 2014 did not meet the threshold of a disciplinary hearing within the meaning of section 41(2) of the Employment Act, 2007. Any such meeting at best was preliminary/investigative hearing to establish the facts upon which a disciplinary process could be anchored.

Substantive fairness

18. Pursuant to sections 43 and 45 of the Employment Act, 2007, the Respondent had the burden of proving and proving as valid and fair, the reasons for dismissing the Claimant.

19. The reason for the dismissal of the Claimant was the involvement in misappropriation of funds of a Sacco comprising primarily of the employees of the Respondent.

20. The Claimant asserted that the Respondent had no role in the affairs of the Sacco, and therefore dismissing him on account of misappropriation of Sacco funds was not related to his employment contract. He also contended that the allegations of misappropriation of Sacco funds was baseless and unproven.

21. In the view of the Court, the proposition by the Claimant that he was not susceptible to disciplinary control of the Respondent because the Sacco was outside the ambit of his contractual engagement with the Respondent has no merit.

22. An employee, in the humble opinion of this Court can be subjected to disciplinary action for misconduct outside the work place if a nexus can be demonstrated between the misconduct and the employer's interests (see *Tibbet & Britten (SA)(Pty) Ltd v Marks & Ors* (2005) 26 ILJ 940).

23. In the case at hand, the Claimant did not deny that employees of the Respondent formed the main membership of the Sacco. The Respondent deducted and remitted to it Sacco contributions. Misappropriation of the funds would negatively affect the Respondent as an employer.

24. In the view of the Court, there was a clear contractual nexus between the Claimant's contractual obligations and his leadership of the Sacco, and therefore the Respondent was within its rights to take the disciplinary action.

25. On the substantial merits of the *summary dismissal*, the Claimant produced a copy of the Sacco's financial statements for 2013 to show that there was no misappropriation of funds while the Respondent produced a copy of an Inquiry Report of the Affairs of Scania Saving and Credit Co-Operative Society Ltd for the period 2013 to June 2016 by the Commissioner of Co-Operatives dated February 2017.

26. The Respondent's Internal Auditor testified that the Claimant retained the books of account and usurped the role of the Treasurer and signed cheques without complying with procedures/or considering application forms and gave instances such as 22 July 2013 when the Claimant signed a cheque for Kshs 150,000/- while the loan amount was Kshs 100,000/-.

27. According to the Inquiry Report, it was established that the Claimant drew cheque numbers 001957, 001934, 001934, 001846, 001419, 001444 and 001455 in his favour and in favour of some members and that the Claimant not only flouted procedures of the Sacco but could not be account for the funds.

28. The Court is satisfied that the Claimant was involved in actions which showed dishonesty.

29. The Court finds that the Respondent had and has proved valid and fair reasons to dismiss the Claimant.

30. *Compensation* is a discretionary remedy. Considering that the reasons proved for the dismissal of the Claimant involved membership funds, the Court will decline to award compensation but award salary in lieu of notice.

Pro-rata leave

31. Annual leave is both a statutory and contractual entitlement. The Claimant sought Kshs 27,619/- being *pro-rata* accrued leave for 7 months in 2014.

32. The dismissal letter acknowledged that the Claimant had 17 pending leave days and a copy of the November 2014 pay slip show that the accrued leave was paid.

33. The Court will in the circumstances decline to award this head of relief.

Salaries for October and November 2014.

34. The Respondent produced copy of the Claimant's pay slip for November 2014 to prove that the salary for that month was paid. Nothing turns on the head of claim.

35. In the same breath, the Respondent contended that the Claimant was not entitled to salary for October 2014 because he was under suspension.

36. Under the common law, suspension without pay without contractual authority would be unlawful (see *Mckenzie v Smith* (1976) IRLR). The Respondent did not prove that it terms and conditions of service or contract with the Claimant, or any other law provided for suspension without pay.

37. The Court will therefore hold that the Claimant is entitled to the salary for October 2014.

Conclusion and Orders

38. From the foregoing, the Court finds and declares that though the Respondent has proved valid and fair reasons to dismiss the Claimant, the decision was procedurally unfair.

39. Judgment is entered for the Claimant

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|---------------------------|----------------------|
| (a) Pay in lieu of notice | Kshs 47,348/- |
| (b) Pro rata leave | Kshs 27,619/- |
| TOTAL | Kshs 74,967/- |

40. Save for the *pro-rata* leave and pay in lieu of notice, the Cause fails.

41. Claimant to have costs on half scale.

Delivered, dated and signed in Nairobi on this 17th day of January 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Ogutu instructed by Ochieng Ogutu & Co. Advocates

For Respondent Ms. Lipwop instructed by Issa & Co. Advocates

Court Assistant Fred