REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 36 OF 2019

KENYA UNION OF COMMERCIAL, FOOD & ALLIED WORKERS..........CLAIMANT

VERSUS

EMUKI SACCO SOCIETY LIMITED..RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for the alleged unlawful termination of the Grievant's services. The Claimant averred that the Grievant Nahashon Njiru was employed by the Respondent on 11th June 2010 as a SACCO driver earning Kshs. 9,000/- without house allowance. The Claimant averred that there is no recognition agreement in place but the nature of the Respondent's business is such that it falls within the purview and province of the Claimant upon representation. The Claimant union averred that it had embarked on recruitment drive as per Section 52 of the Labour Relations Act. It averred that the Grievant was not paid house allowance and that during his 6 years' service he never received any warning letter or any form of reprimand. The Claimant averred that the Respondent underpaid the Grievant throughout his employment period and that he worked overtime without being compensated. The Claimant sought reinstatement of the Grievant without loss of benefits and an order for the payment of the salaries he could have been earning since the date of the unlawful termination to the time the judgment will be delivered. The Claimant also sought payment of 6 months compensation for the torture and trauma the Grievant suffered. In the alternative the Claimant sought payment of Kshs. 459,685.40 comprising of one month notice – Kshs. 15,693.40, underpayment of wages – Kshs. 242,995.80, annual leave – Kshs. 12,675.40 and maximum compensation – Kshs. 188,320/- as well as costs of the suit.

2. The Respondent averred in its defence that the Grievant was employed on a verbal contract from 2010 until 2014 when written annual contracts were introduced. The Respondent averred that the Grievant was paid Kshs. 9,000/- inclusive of house allowance and a daily allowance of Kshs. 100/-. The Respondent averred that the Grievant was not meeting the daily targets set for the SACCO van. The Respondent averred that the Grievant took leave of absence without permission of his supervisor leaving the van with another driver and conductor which was against the Respondent's policy. The Respondent averred that it issued the Grievant with a show cause notice to explain why his van was having low revenue returns. The Respondent averred that the Grievant responded to the show cause letter and that there were several meetings held between the SACCO in order to resolve the issue of low revenue returns. The Respondent averred that when the Grievant's work performance did not improve, the Grievant was summoned by the Respondent's management committee to show cause why he should not be terminated. The Respondent averred that the Grievant was issued with a termination letter detailing the reasons for the termination and that the same was verbally explained to him when he was handed the termination letter. The Respondent averred that the Grievant was paid his December monthly salary as well as one month's salary in lieu of notice. The Respondent averred that the Grievant refused to accept the one month salary in lieu of notice and that despite his refusal the salary was sent to him and paid through a cheque. The Respondent thus sought the dismissal of the claim with costs.

3. The suit was to be determined in line with Rule 21 of the Employment and Labour Relations Court (Procedure) Rules 2016 and the parties were to file submissions and a determination given by the Court. Both parties complied with the directions issued after the file was called up since it had stalled due to the Covid 19 pandemic.

4. In the submissions filed, the Claimant submitted that the Grievant had served the Respondent as a van driver from 2010 and in 2014 February the Respondent introduced yearly contracts which the Grievant signed. The Claimant submitted that the Grievant worked until 5th November 2016 when he was sent on annual leave and on resumption on 9th December 2016 he was informed by the Chairman in the presence of executive members of the board he was informed that the Respondent had decided to terminate his services since the Grievant had failed to hit the target. It was submitted that the Grievant was informed that his contract which was to expire on 31st January 2017 would not be renewed. The Claimant submitted that the Grievant was notified that the December salary would be paid as well as one month's salary in lieu of notice. The Claimant submitted that the Grievant was terminated unfairly since he was not given any chance to defend himself as provided under Section 41 of the Employment Act. The Claimant relied on the case of **Onesmus Kilonzo *v* Nation Media Group Limited [2019] eKLR** and the Court of Appeal decision in **Nation Media Group Limited *v* Onesmus Kilonzo [2017] eKLR**. The Claimant relied on the case of **Onesmus Kilonzo *v* Nation Media Group Limited** *(supra)* where it was held as follows:-

> *The Employment Act requires that before termination of employment is done, an employee must be given a reason for which the termination is being considered and called upon to respond and where necessary call witnesses. This provision applied to all employees whether on probation or not. The court has seen nothing on record giving reasons why the claimant's service was terminated and whether before the termination he was called upon to show cause why his service should not be terminated. Failure to adhere to this requirement would lead to a finding that the termination was unfair and the court so finds and holds in this case.*

The Claimant submitted that there was no proof before this court to demonstrate that the Grievant was warned before the termination on the allegations levelled against him on the low revenue which was clear proof that the Respondent acted in total disregard of Section 41 of Employment Act 2007 and the Constitution of Kenya 2010. The Claimant submitted that Respondent did not invite the Grievant for any

disciplinary hearing before terminating his services and that the Grievant had not been issued with any warning letter or any other form of reprimand. The Claimant submitted that proved that the Grievant was a hardworking servant. The Claimant submitted that the Grievant used to report to work at 6.30am and close as late as 7.00pm a clear indication that the Grievant used to work overtime without being compensated. The Claimant submitted that Section 31 of the Employment Act provides that every employee should be provided with housing or being paid a house allowance which should be 31% of the basic salary. The Claimant submitted that the Respondent did not subject the Grievant to due process of the law and Article 50 of the Constitution provides for a right to fair hearing. The Claimant submitted that the rule of natural justice requires that no man should be condemned unheard. The Claimant sought the reinstatement of the Grievant and in the alternative pay terminal dues amounting to Kshs. 546,699.80.

5. Respondent submitted that the issues to be determined were whether the termination of the Grievant was unfair and if the answer is in the affirmative then what is the remedy the Grievant is entitled to. The Respondent submitted that under Section 45(2) a termination of employment is deemed 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 that the employment was terminated in accordance with fair procedure. The Respondent submitted that the Grievant was terminated for his poor performance at work thus causing the Respondent to incur heavy losses. The Respondent averred that the Claimant even confirmed that the Grievant was given a hearing and that he was informed of the reasons for the termination both verbally and in the letter of termination issued to him. The Respondent averred that prior to the termination it issued the Grievant with a show cause letter seeking an explanation for why the van was receiving low income. The Respondent averred that the Grievant responded to the show cause and that upon dismissal the Grievant was paid a one month notice as well as salary for the month of December. The Respondent relied on the case of **Leonard M. Mudavadi *v* Managing Trustees of Insurance Training & Education Trust (College of Insurance) [2013] eKLR** where Onyango J. held that the prayer for reinstatement was not feasible in the circumstance as no reinstatement could be ordered more than 3 years after termination as provided for in Section 12(3)(viii) of the Employment Act. The Respondent submitted that the Court should not award the maximum compensation as 6 months would be more than sufficient. It cited the case of **Alexander Githui Gathure *v* Tarmal Wire Product Limited [2014] eKLR** in support of the submissions.

6. The Grievant herein was terminated unfairly within the meaning of Section 43 which provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. It further provides that the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee. In this case it was alleged there was poor performance and poor returns on the van yet no evidence was adduced. In addition it was asserted that the Grievant was heard in a series of meetings yet no minutes of the said meetings were availed. In the eyes of the court, there was unfair termination as the since the Respondent failed to discharge its burden under Section 43. The Claimant succeeded in demonstrating the Grievant was unfairly dismissed. The Respondent conceded that there was underpayment of wages amounting to Kshs. 287,136.10 which the Court agrees is the correct calculation as the sum applied by the Claimant was erroneous as it used the figure for the urban municipalities of Nairobi and Mombasa in the Wages Order. There was no evidence led on the leave dues and that is not due. As the Claimant was paid part of his dues the Court would only add the matter of compensation. As held in the case of **Leonard M. Mudavadi *v* Managing Trustees of Insurance Training & Education Trust (College of Insurance)** (*supra*) reinstatement is not feasible as the dismissal took place in January 2017 more than 3 years ago. It would be untenable to impose the employee on his erstwhile employer and as such only a remedy of compensation under Section 49 of the Employment Act is available. The Claimant seeks the grant of the maximum compensation but in the view of the Court there is no basis to grant maximum compensation as the Grievant was not terminated in the most egregious fashion that would warrant a full 12 month's compensation. As the Grievant was dismissed unprocedurally, the Court will award him only 6 months compensation at the salary of Kshs. 15,239.10 and costs of the suit. In the final analysis I enter judgment for the Grievant as follows:-

i. underpayment of wages – Kshs. 287,136.10

ii. 6 months salary compensation – Kshs. 94,160.40

iii. Costs of the suit

It is so ordered.

Dated and delivered at Nairobi this 14th day of July 2020

Nzioki wa Makau

JUDGE