



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS**  
**COURT OF KENYA AT NYERI**

**CASE NO. 272 OF 2017**

MARY NJERI GIKONYO.....CLAIMANT

**VERSUS**

ORIENT SACCO SOCIETY LIMITED.....RESPONDENT

**JUDGMENT**

1. The Claimant herein was employed by the Respondent on 10<sup>th</sup> January 2013 as an accounts assistant earning Kshs. 30,000/- a month. She was promoted to the front office service department (FOSA) and became a FOSA supervisor earning Kshs. 50,000/- a month. This salary was enhanced to Kshs. 68,000/- a month in January 2014 and later to Kshs. 95,000/- in January 2015. She was granted maternity leave in October 2016 and on resumption of duty on 30<sup>th</sup> January 2017 suffered a pregnancy related complication and on return to work was issued with the dismissal letter dated 30<sup>th</sup> January 2017. She averred that she was falsely accused of misappropriating the sum of Kshs. 27,600,400/- through a letter of 8<sup>th</sup> May 2017 which the Claimant responded to on 13<sup>th</sup> June 2017. She thus sought salary arrears for one month – Kshs. 95,000/-, compensation in lieu of the leave days not taken – Kshs. 760,000/-, house allowance @15% of the basic pay – Kshs. 684,000/-, compensation for the unlawful dismissal from employment – Kshs. 1,400,000/- and a certificate of service.
2. The Respondent filed a defence in which it averred that the Claimant acted carelessly and negligently causing loss to the Respondent. It averred that between 12<sup>th</sup> February 2015 and 4<sup>th</sup> November 2016, being a member and serving the front office banking officer of the Respondent obtained a sum of Kshs. 793,536/- purportedly for loading into the mobile platform but never did so. The Respondent avers that when the Claimant was asked to account for the said loss she became uncooperative, rude and hostile to the Board of Management leading to her dismissal. The Respondent averred that the dispute should be heard and determined by the Co-operatives Tribunal and would therefore raise a preliminary objection to the suit as the jurisdiction of the court to hear and determine the suit was in question.
3. The threatened objection was never taken and the suit proceeded to hearing. The Claimant testified and the Respondent did not tender any evidence nor did the Respondent participate at the hearing of the suit. The Claimant asserts that her dismissal was unlawful and without any colour of right. The Claimant had reported to work after her maternity leave and her surgical wound required medical attention and on reporting after the hospital visit she was given a dismissal letter and later a demand letter for 27 million. She denied misappropriating the funds of the Respondent.
4. The Claimant submitted that the Respondent did not give her any notice as required under Section 35(1)(c), 35(3) and 41(1) of the Employment Act which make it mandatory for a notice to be issued prior to termination. The Claimant cited the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** where Ndolo J. held there must be both substantive justification and procedural fairness. The Claimant submitted that the dismissal was not procedurally fair and that her abrupt termination from employment without cause was unjustified. The Claimant also placed reliance on the case of **Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu [2012] eKLR** where the court found that where no evidence is called by a party, the court would find the averments made by that party as unproved. The Claimant thus sought the payment of her terminal dues and costs of the suit.
5. The Claimant was dismissed without being accorded the safeguards under Section 41 of the Employment Act. She

was not given an opportunity to give an explanation as required. She was later accused of misappropriating funds of the Respondent. Curiously, the defence filed did not contain a counterclaim pointing to the fickleness of the allegation. No investigations were carried out to prove the allegations and no evidence was tendered to prove the allegations. In the case of **Walter Ogal Anuro v TSC** (*supra*) Ndolo J. held that there must be both substantive justification and procedural fairness. Substantive justification is the establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination. In this case both elements were missing as there was no proof of the reasons for termination and the procedure adopted was in contradiction with the law. As indicated earlier, the Respondent did not avail any witness or attend the hearing of the case and in keeping with the reasoning in **Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu** (*supra*) there was no proof of any of the averments by the Respondent in its defence. The Court thus finds in favour of the Claimant. Her claims were compounded including those that were time barred. She sought dues in excess of what the court can give as Section 90 of the Employment Act limits a claim to 3 years. In the final analysis only the sums that could be due in the preceding 3 years from the date of accrual of action to the filing of the suit would be awarded. These are as follows:-

- a. Kshs. 513,000/- as unpaid house allowance for 3 years
- b. Kshs. 95,000/- being one month in lieu of notice
- c. Kshs. 380,000/- being 4 months compensation for unlawful and unfair termination
- d. Costs of the suit
- e. Interest at court rates on the sums in a), b), c) above from date of judgment till payment in full
- f. A certificate of service.

It is so ordered.

**Dated and delivered at Nyeri this 16<sup>th</sup> day of January 2019**

**Nzioki wa Makau**

**JUDGE**