



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. 2087 OF 2011

JAMES KURIA MUTURA CLAIMANT

v

**MWALIMU NATIONAL SAVINGS & CREDIT
CO-OPERATIVE SOCIETY LTD RESPONDENT**

JUDGMENT

1. James Kuria Mutura (Claimant) was serving as Deputy General Manager with Mwalimu National Savings & Credit Co-Operative Society Ltd (Respondent) by the time his services were terminated through a letter dated 1 June 2011.

2. Aggrieved with the termination of employment, the Claimant instituted legal proceedings against the Respondent on 9 December 2011 and he stated the Issue in Dispute as

Unlawful/unfair termination.

3. In a Response filed on 28 November 2012, the Respondent contended that the termination of the Claimant's employment was lawful and fair, and was anchored on performance of duties in terms of section 44(4)(c) of the Employment Act, 2007.

4. On 7 April 2017, the Claimant filed an *Amended Memorandum of Claim* introducing claims for breach of contract and quantifying the damages sought.

5. The Cause was heard on 10 July 2018, 29 November 2018 and 18 December 2018. The Claimant and the Respondent's Human Resources Manager testified.

6. The Claimant filed his submissions on 31 January 2019 while the Respondent filed its submissions on 21 February 2019.

7. The Court has considered the pleadings, evidence and submissions and condensed the Issues for determination into the following, *whether the termination of the Claimant's employment was unfair, whether the Respondent was in breach of contract and appropriate remedies/orders.*

Unfair termination of employment

Procedural fairness

8. Sections 35(1) and 41 of the Employment Act, 2007 afford ordinary employees certain protections before termination of employment.

9. Section 35(1) of the Act contemplates *written notice of termination* of employment. Loosely or generally, the written notice could be referred to as a *show cause* notice/letter. The notice would inform the employee of contemplated termination of employment/disciplinary action, the reasons thereof and call upon the employee to make any representations (written most preferably).

10. The written notice is not required if it is a case of summary dismissal as outlined in section 44 of the Employment Act, 2007 or where *service pay* is payable under section 35(5) as read with section 36 of the Act, but on payment of pay in lieu of notice.

11. Since the Claimant was pensionable, the *proviso* to section 36 does not apply to his case.

12. Sometime in June 2010 the Claimant proceeded on leave. Around 19 October 2010 and while still on the leave, the Respondent caused an

unscheduled audit to be carried out.

13. The unscheduled audit revealed anomalies which in turn triggered an audit/investigation of all Withdrawable Savings Fund (WSF).
14. The audit/investigations unearthed several lapses in both controls and operations, and recommended that the Claimant be called upon to offer explanations.
15. As a result of the audit/investigations, the Respondent's acting Chief Executive Officer wrote to the Claimant on 27 December 2010 and the reference of the letter was Theft of Kshs 4,267,000/- WSF Nairobi and Kshs 18,850,000/- Kisii WSF.
16. The letter asked the Claimant to tender explanations before 3 January 2011 on the lapses in monitoring teller balances; handing over treasury operations while proceeding on leave; monitoring of insurance exposure; failure to observe insurance limits on cash released to tellers; guidelines issued to branches on encashment of treasury cheques; guidelines issued to branches on access to strong room/safes and guidelines issued to treasury on cash controls.
17. The letter did not inform the Claimant that the termination of his employment was under consideration or that he was likely to be subjected to a disciplinary process.
18. In his reply of 2 January 2011, the Claimant asked for more time. On 10 January 2011, the Claimant tendered detailed explanations.
19. On 17 January 2011, the Respondent extended the Claimant's leave pending an external auditor's report to the Board on the theft cases. The leave was extended again on 31 January 2011 to enable the Board hear from concerned officers on certain operational issues.
20. Upon perusal of the Claimant's explanations, the Respondent, through a letter dated 2 February 2011 sought further explanations/clarifications. The letter also invited the Claimant to appear before the Board on 19 February 2011.
21. The Claimant gave the clarifications through a letter dated 18 February 2011.
22. On 20 February 2011, the Claimant appeared before the Respondent's Board, and because the Board needed to deliberate, the Claimant's leave was again extended through a letter dated 1 March 2011 up to 28 March 2011.
23. The minutes of the proceedings of the Board on 20 February 2011 were not filed in Court.
24. On the purpose of the meeting of 20 February 2011, the Respondent's witness stated that the meeting was a disciplinary hearing, and that the disciplinary process was governed by the *Management Staff Terms and Conditions of Service* Manual. He did not attend the meeting.
25. On 24 March 2011 the Respondent indefinitely extended the Claimant's leave.
26. Ultimately, on 1 June 2011, the Respondent wrote to the Claimant to inform him of the termination of his employment.
27. The Claimant appealed against the termination on 29 August 2011 but he was informed through letter dated 27 September 2011 that the appeal was unsuccessful.
28. It is a fact that the Claimant was not given *written notice* explicitly stating that the termination of his employment was under consideration or that disciplinary action was underway.
29. However, he was called upon to tender explanations arising from audit queries. Could the invitations to offer explanations be taken to have met the threshold of section 35(1)(c) of the Employment Act, 2007?
30. No particular terms of art are required to be used in a *notice of termination of employment* (*Walmsley v C & R Ferguson Ltd* (1989) IRLR 112), but a notice of termination should be specific.
31. Section 35(1), (3) as read with section 41 of the Employment Act, 2007 in the view of the Court, require the employer to in unambiguous language notify an employee that disciplinary action is under consideration, and set out the reasons for the disciplinary action, and request for the employee to make representations.
32. The need for such latent specificity arises so that the employee is not confused as to whether the explanations sought are in respect of an audit process or disciplinary process.
33. It is generally known that during an audit exercise, management would be expected to respond to audit queries before the audit report is finalised. It is possible as contended by the Claimant that he understood the process he was participating in was part of an audit process.
34. And in the view of the Court, an audit investigation cannot substitute the disciplinary process as envisaged by sections 35(1) and 41 of the Employment Act, 2007.
35. The letter seeking further explanations and inviting the Claimant to appear before the Board did not alert or advise the Claimant that the

termination of his employment was under consideration, or that the meeting was part of a disciplinary process.

36. The Court therefore finds that the Claimant was not issued with a notice as contemplated by section 35(1)(c) of the Employment Act, 2007 and/or afforded a hearing within the context of section 41 of the Act.

37. The termination of the Claimant's employment was procedurally unfair.

Substantive fairness

38. With the conclusion on procedural fairness, it is not necessary for the Court to examine whether the Respondent discharged the burden imposed on employers by sections 43 and 45 of the Act.

Compensation

39. The Court has found that the termination of the Claimant's employment was procedurally unfair.

40. Compensation is one of the primary remedies where the Court finds unfair termination of employment.

41. The remedy is discretionary and the factors the Court should consider in awarding it are set out in section 49(4) of the Employment Act, 2007.

42. Among the factors include any *ex gratia* payment made to the employee. The Claimant was paid *ex-gratia* Kshs 2,600,000/-.

43. In the view of the Court, this is therefore not a suitable case to award compensation.

Breach of contract

Terminal benefits

44. The Claimant sought what he termed *terminal benefits as contributed by him and the employer for the 16 years* of service. He did not however draw the attention of the Court to any contractual or legal foundation to this head of claim in evidence.

45. The letter informing the Claimant of the termination of his employment advised him that he would be paid his pension.

46. The Claimant admitted he was paid Kshs 2,771,000/- and without particulars of the contributory benefits sought, the Court is unable to find any breach of contract under this head of claim.

Children Education Fund

47. Under this head the Claimant sought Kshs 1,350,000/- being the amount he would have benefitted for the 9 years he had to retirement.

48. The *Management Staff Terms and Conditions of Service* provided for a children's education fund at clause 28.4.8.

49. The Claimant did not disclose details/particulars of the children in respect of whom he would have been entitled to benefit from the fund.

50. And even if the Claimant had given the particulars, the Court would not have been able to agree that there was breach of contract, for benefits attendant to an employment relationship would lapse with separation, unless there is specific agreement to the contrary.

Medical cover

51. Under this head of claim the Claimant prayed for Kshs 1,674,000/-, again for the 9 years he had remaining to retirement.

52. For similar reasons to the Children Education Fund, it is the view of the Court that medical cover lapsed with separation.

3 months' salary in lieu of notice

63. Clause 29 of the *Terms and Conditions of Service* provided for either 3 months' notice or 1 month pay in lieu of notice.

54. The Claimant's employment was terminated under clause 30 of the *Terms and Conditions of Service* which contemplated payment of all terminal benefits.

55. Reading both clauses together, the Court finds that the Claimant was entitled to the equivalent of 1 month salary in lieu of notice (salary at time of separation was Kshs 156,055/-).

Conclusion and Orders

56. The Court finds and holds that the termination of the Claimant's employment was procedurally unfair but declines to award compensation.

57. The Claimant is however awarded the equivalent of 1 month salary of Kshs 156,055/- , as pay in lieu of notice.

58. The claims for breach of contract were not proved and are dismissed.

59. Claimant to have costs on half scale having succeeded only partially.

Delivered, dated and signed in Nairobi on this 22nd day of February 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Nyasimi Job instructed by Nchogu, Omwanza & Nyasimi Advocates

For Respondent Ms. Kanyiri, Federation of Kenya Employers

Court Assistant Lindsey