



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 387 OF 2018**

**JOSEPH MURUNGA.....CLAIMANT**

**VS**

**BANDARI SAVINGS & COOPERATIVE SOCIETY LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Joseph Murunga worked for Bandari Savings & Cooperative Society Ltd, in the position of General Manager - Operations, from 16<sup>th</sup> September 2016 until 19<sup>th</sup> January 2017 when he was dismissed. His claim before the Court is for compensation for wrongful dismissal. The claim is contained in a Memorandum of Claim dated 26<sup>th</sup> April 2018 and filed in court on 7<sup>th</sup> June 2018.
2. The Respondent filed a Response on 13<sup>th</sup> July 2018 but did not attend the trial in spite of due notice. The Claimant testified on his own behalf.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent on 16<sup>th</sup> September 2016, at a monthly salary of Kshs. 225,000. On 19<sup>th</sup> January 2017, he was dismissed on allegations of irregular lending practices and failure to observe the Respondent's credit policy.
4. The Claimant avers that his dismissal was wrongful and unfair and therefore claims the following:
  - a) 1 month's salary in lieu of notice.....Kshs. 225,000
  - b) Unpaid salary for 32 months under contract of service.....7,200,000
  - c) 12 months' salary in compensation.....2,700,000
  - d) Costs plus interest

**The Respondent's Case**

5. In its Response dated 12<sup>th</sup> July 2018 and filed in court on 13<sup>th</sup> July 2018, the Respondent states that the Claimant was employed on 15<sup>th</sup> September 2016, in the position of Operations Manager.
6. The Respondent further states that on 4<sup>th</sup> January 2017, the Claimant was suspended on allegations of breaching Sacco Rules and Regulations. In this regard, the Respondent accused the Claimant of insider trading and lending to Board and staff. The Respondent claims that the Claimant facilitated issuance of a *Biashara loan* of Kshs. 2,000,000 to *MS Ngina Stores*, a business owned by one Rita Mongina Monda, a wife to a staff member.
7. The said loan is said to have been granted in contravention of the Respondent's loaning policy, requiring a member to have saved for six (6) months prior to the application and submission of a business viability and financial reports.
8. After conducting investigations, the Respondent dismissed the Claimant on 19<sup>th</sup> January 2017.

9. The Respondent submits that at the time of dismissal, the Claimant was serving probation.

10. The Respondent maintains that the Claimant's dismissal was lawful and fair.

### **Findings and Determination**

11. There are two (2) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Dismissal**

12. The Claimant was dismissed by letter dated 19<sup>th</sup> January 2017 stating:

**“RE: SUMMARY DISMISSAL**

*You will recall that you were required through a letter of similar reference dated 31<sup>st</sup> December 2016 to provide a report regarding the irregular issuance of Kshs. 2 million loan on 28<sup>th</sup> December 2016 to M/s Ngina stores contrary to the Bandari Sacco credit policy in biashara loaning.*

*Further investigations into the matter has (sic) revealed that:*

- (i) M/s Ngina stores the loan beneficiary is owned by Rita Mongina Monda who the (sic) wife to a staff; which you did not declare in the whole process.*
- (ii) The member was granted the Biashara Loan against the loaning policy that requires saving for six months.*
- (iii) No loan appraisal was carried out notwithstanding that loan approval was done in the system.*
- (iv) That you and Peter Kingori colluded and fraudulently transferred the money from M/s Ngina stores Acc No. L01-1001368 to Acc. No. L01-1001396 (Nancy Odanga) and finally to Acc. L01-0004202 (Shariffa Mwamzandi's accounts) through which money left the Sacco's custody.*
- (v) That you advised Ms Nancy Odanga to open a FOSA account which you intended to fraudulently use for money transfer in the name of paying her account.*
- (vi) There are no letters of instructions from M/s Ngina Stores for the transfer of the loan amount to Nancy Odanga or any other account as you did.*
- (vii) The loan was granted more than three times the member's saving.*
- (viii) The loan amount transfer was done despite the account having been blocked.*
- (ix) The findings further indicate that these untoward activities appear to have been done by you together with Mr. Joseph Murunga the Credit Manager who approved the loan processing and who has also been found to have had some personal interest in the matter.*

*In view of the seriousness of the allegations against you which appear to be of criminal nature and in accordance with both the employment Act 2007 section 44 (g) and staff code of conduct policy, the Board of Directors of Bandari Sacco at its meeting held on 8<sup>th</sup> January 2017, decided that you be dismissed summarily from employment of the Sacco with immediate effect.*

*You are required to acknowledge receipt of this letter by signing the duplicate copy provided herewith. Kindly handover any Sacco property in your possession to the undersigned.*

*For and on Behalf of Bandari SACCO*

*(Signed)*

*KEN SUNGU*

**CHAIRMAN”**

13. Prior to the dismissal, the Claimant had been sent on suspension pending investigations, effective 4<sup>th</sup> January 2017. The Claimant told the

Court that the suspension letter was delivered to him while he was in custody at the Port Police Station over the said allegations.

14. Soon after the suspension, the Claimant was issued with the dismissal letter of 17<sup>th</sup> January 2017. The suspension and dismissal letters accuse the Claimant of involvement in irregular lending practices and failure to observe the Respondent's credit policies.

15. There was however no evidence that any of the charges were ever served upon the Claimant for his response, prior to the dismissal. What is more, although the suspension letter made reference to investigations, the Claimant appears not to have been involved in any such investigations. In *Caleb Omondi v East Africa Spectre Limited [2017] eKLR* this Court held that an employee on suspension pending investigations has a legitimate expectation that they will be called back to respond to any adverse findings arising from the investigations.

16. In the case now before me, it would appear that after the suspension, the Claimant did not hear from his employer until his dismissal. That procedure flew in the face of the procedural fairness requirements of Section 41 of the Employment Act which were well encapsulated by my brother **Radido J** in *Alphonse Machanga Mwachaya v Operation 680 [2013] eKLR* as follows:

*a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;*

*b) That the employer has allowed a representative of the employer being either a fellow employee or a shop floor representative to be present during the explanation;*

*c) That the employer has heard and considered any explanations by the employee or their representative;*

*d) That where the employer has more than 50 employees, it has complied with its own internal disciplinary rules.*

17. The Respondent made no effort to comply with the aforesaid requirements with the result that no valid reason for the dismissal, as contemplated under Section 43 of the Employment Act, was established.

18. Ultimately, the Court finds and holds that the Claimant's dismissal was wrongful and unfair and he is entitled to compensation.

#### **Remedies**

19. Before making a determination on the final award, I need to deal with the question whether at the time of dismissal, the Claimant was serving probation. This is an important question because under Section 42(1) of the Employment Act, an employee on probation is not entitled to the procedural fairness safeguards provided by Section 41 of the Act.

20. In pursuing its assertion that the Claimant was on probation at the time he was dismissed, the Respondent produced a letter dated 15<sup>th</sup> December 2016, ostensibly extending the Claimant's probation by three months. The Claimant denied ever receiving this letter and there was no evidence of its delivery to him. In reaching its decision therefore, the Court disregarded the said letter.

21. That settled, I now award the Claimant three (3) months' salary in compensation. In making this award, I have taken into account the Claimant's short stint in the Respondent's employment coupled with the Respondent's conduct in effecting the dismissal. Additionally, I award the Claimant one (1) month's salary in lieu of notice.

22. No basis was laid for the claim for unpaid salary for 32 months under contract of service, which therefore fails and is dismissed.

23. Finally, I enter judgment in favour of the Claimant as follows:

a) 3 months' salary in compensation.....Kshs. 969,000

b) 1 month's salary in lieu of notice.....323,000

**Total.....1,292,000**

24. This amount will attract interest at court rates from the date of judgment until payment in full.

25. The Claimant will have the costs of the case.

26. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Otieno for the Claimant

No appearance for the Respondent