



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 2264 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

MOREEN ANNE TAAKA.....CLAIMANT

-VERSUS-

NAKU SACCO SOCIETY LIMITED.....1ST RESPONDENT

WILFRED AIMA.....2ND RESPONDENT

JULIUS THUO.....3RD RESPONDENT

WILFRED NYAOGA.....4TH RESPONDENT

OBADIAH CHIVINI.....5TH RESPONDENT

JUDGMENT

The claimant was employed by the respondent, a co-operative society registered under the Cooperative Societies Act as a Teller on 1st October 2012 at a salary of Kshs.27,000 per month. The 2nd, 3rd, 4th and 5th respondents are sued in their capacity as members of the 1st respondent's Board.

The claimant avers that the respondents unlawfully terminated her employment in the form of an indefinite suspension and in violation of Sections 41, 43, 44 (2) and 45 of the Employment Act. In her memorandum of claim dated and filed on 8th November 2012, she prays for the following remedies against the respondents –

- a) A declaration that by terminating the services of the claimant, the respondents acted illegally and in contravention of the relevant labour laws.
- b) Unpaid salary without any deductions for the months of August, September and October 2012.
- c) Untaken leave days for 3 years.
- d) Severance pay.
- e) 12 months' salary as compensation for loss of Employment.
- f) Service pay
- g) One month salary in lieu of notice
- h) Certificate of service
- i) Gratuity pay
- j) Costs of this suit.

k) Any other remedy that the court may deem fit to grant.

In the respondent's memorandum of reply dated and filed on 27th February 2014, they deny the averments in the memorandum of claim and plead that the dismissal of the claimant was for reason of declining and/or refusing and/or neglecting to cooperate with independent auditors appointed by the 1st respondent to carry out a forensic audit.

It is further pleaded by the respondents that the suspension and subsequent dismissal of the claimant was in conformity with the Respondent's Staff Policy 2008. The respondents deny that the claimant is entitled to the remedies claimed. They pray that the claimant's claim be dismissed with costs.

Evidence

The case was heard on 14th December 2017. The claimant testified on her behalf while the respondents called the 1st respondent's Chief Executive Officer JAMES MUCHIRA CHEGE. The parties thereafter filed and exchanged written submissions.

The claimant testified that she was suspended by letter dated 10th August 2012 on grounds that she failed to assist in recovery of monies lost through fraud, allegations that she testified were not true. She was never recalled from suspension, was never paid during suspension and was never subjected to a disciplinary hearing. She testified that prior to the suspension she was never issued with a warning letter. She testified that she was never served with a letter of dismissal and was never paid terminal dues. She prayed for salary, leave days, severance pay, service pay, gratuity and certificate of service as prayed in her claim.

Under cross-examination, the claimant testified that she was not aware of any forensic audit. She was also not aware that any money was lost under her watch.

For the respondent RW1 JAMES MUCHIRA CHEGE testified that he was ICT Manager before becoming the Chief Executive Officer of the 1s respondent. He testified that the 1st respondent realised that there were malpractices in the FOSA when one member complained that Kshs.50,000 had been withdrawn from his account. It was later established that the withdrawal was done by the Teller and the money paid to a person who did not have an account with the FOSA. The claimant was requested to record a statement with the police but she declined. A forensic audit was carried out thereafter. The claimant was implicated in the audit. The claimant was suspended on 10th August 2012 because of her refusal to cooperate with the auditors or record a statement with the police and also being in breach of the oath of secrecy. Her employment was terminated on 11th September 2012 but she did not collect the letter of termination. The claimant was never paid her terminal dues because of the seriousness of the charges against her.

Under cross-examination, RW1 testified that the claimant was never recalled from suspension or subjected to a disciplinary hearing. A report of fraud was made to the police. The claimant was never issued with any warning.

Submissions for the Claimant

It is submitted for the claimant that the termination of her employment was unfair as she was never subjected to a disciplinary hearing. The claimant relied on the case of **SABINA MUTUA -VS- AMEDO CENTRE KENYA LIMITED [2017]**, **PAUL MWAURA MBUGUA -VS- KAGWE TEA FACTORY LTD & ANOTHER [2012]** and **MARY CHEMWENO KIPTUI -VS- KENYA PIPELINE COMPANY LIMITED [2014]**.

On remedies it is submitted that the claimant is entitled to one month's salary in lieu of notice under Section 35 read with 36 of the Employment Act.

It is submitted that the claimant is entitled to salary for the month of August, September and October 2012. The claimant relies on the decision in **THOMAS SILA NZOIVO -VS- BAMBURI CEMENT LIMITED [2014]**.

It is further submitted that the claimant is entitled to 12 months' salary as compensation for unfair dismissal as provided under Section 49, to leave not taken for two years and to service pay, under Section 35 (5) of the Employment Act. It is submitted that the claimant is also entitled to certificate of service under Section 51 of the Act.

Respondent's Submissions

It is submitted that the termination of the claimant was by way of summary dismissal and did not require a warning letter. It is further submitted that the respondent cannot be faulted for not giving the claimant a hearing as she was called and refused to cooperate with the auditors. It is further submitted that the claimant was given reasons for dismissal and the respondents did not violate any law by terminating the employment of the claimant.

Respondents submit that the claimant is not entitled to any benefits.

The respondent relies on the case of **CLEMENT MUTISO MUINDE -VS- BRITISH AMERICAN INSURANCE COMPANY LIMITED [2014]** eKLR and **NICHOLAS MWASYA KYULA -VS- FARMCHEM LIMITED [2012]**.

Determination

The issues arising for determination in this case are whether the dismissal of the claimant was unfair and if she is entitled to the remedies sought.

Unfair termination

It is not in dispute that the claimant was suspended from employment indefinitely by letter dated 10th August 2012. The relevant paragraph of the letter reads –

“Guided by your conduct above the management has decided to put you on suspension for the first case until such a time when the SACCO will recover lost funds and warns you to be diligent in your actions.”

The Respondent’s Staff Policy dated May 2009 does not provide for suspension. Suspension is also not provided for under the Employment Act and may therefore only be resorted to if provided for in the terms of service of the employee.

The Respondent’s Staff Policy however provides for interdiction under Clause 8.2.1 but does not specify for how long or under what terms.

In the present case, the claimant was not recalled after the suspension and was never issued with a letter of termination. The suspension was therefore a disguised termination of employment and is unfair as the respondent did not comply with Section 41 which provides for the procedure for termination of employment. I therefore declare the termination of the claimant’s employment unfair.

Remedies

The claimant having been terminated through the letter of suspension and the same having been declared unfair, she is entitled to one month's salary in lieu of notice. I award her Kshs.27,000 in lieu of notice.

The claimant is also entitled to pay in lieu of leave as the respondent did not deny that the claimant did not take her annual leave during the period of 20 months that she worked with the respondent. I award her 35 days at the rate of 1.75 days per month worked. This translates to Kshs.31,500 which I award her on account of pay in lieu of annual leave.

The claimant prayed for severance pay. She is not entitled to the same.

As she was not declared redundant. She further prayed for service pay but did not prove that she was not a member either NSSF or a retirement or gratuity scheme in terms of Section 35 (6) of the Employment Act. The claimant did not adduce any evidence in respect of entitlement to service pay. The claimant further prayed for gratuity but did not adduce any evidence to prove that she was entitled to the same. Both prayers are dismissed for want of proof.

The claimant is entitled to certificate of service in terms of Section 51 of the Employment Act.

In relation to compensation I award the claimant two months’ salary for unfair termination taking into account the length of service of only 20 months and the circumstances under which her employment was terminated including her contribution by refusal to co-operate with the auditors who were investigating fraud in the SACCO or to record a statement with the police.

For these same reasons, I award the claimant only half of the taxed costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF MAY 2018

MAUREEN ONYANGO

JUDGE