



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2028 OF 2013**

**GREGORY MOMANYI NYAKWARA....CLAIMANT**

**v**

**CO-OPERATIVE INSURANCE**

**COMPANY OF KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

1. This judgment could not be delivered on 31 May 2018 because the Court was engaged in other official work.
2. Gregory Momanyi Nyakwara (Claimant) commenced legal proceedings against Co-Operative Insurance Company of Kenya Ltd (Respondent) on 18 December 2013 and he stated the issues in dispute as
  - a) Wrongful and unfair dismissal of the Claimant;
  - b) Unlawful termination of the Claimant's employment;
  - c) Failure to issue termination notice.
3. In a Response and Counterclaim filed in Court on 27 October 2015, the Respondent contended that the Claimant's employment was fairly terminated for gross *misconduct*.
4. The Respondent counterclaimed against the Claimant for outstanding car and study loans totalling Kshs 926,134/55.
5. Nzioki wa Makau J took the Claimant's and the Respondent's first witness evidence on 14 December 2017, and I took the testimony of the Respondent's second witness on 24 April 2018.
6. The parties' submissions were not on file by this morning.
7. The Court has considered the pleadings and evidence and identified the Issues for determination as

*Whether the dismissal of the Claimant was unfair Whether the Respondent was in breach of contract Whether Claimant was defamed the counterclaim and*

*Appropriate remedies.*

**Unfair dismissal**

8. The Respondent suspended the Claimant pending investigations into allegations of fraud through a letter dated 27 September 2013.
9. The suspension letter in the material part stated that

...

You have been suspended from CIC Life Assurance employment with immediate effect pending investigations relating to negligence and allegations of fraud against you.

10. On 23 October 2013, the Claimant appeared before a Disciplinary Committee. According to a copy of the minutes filed in Court, he was asked questions and afforded an opportunity to make responses.
11. In his testimony, the Claimant stated that apart from the suspension letter, he was not given particulars of the allegations he was to confront or issued with a show cause letter.
12. The piece of testimony by the Claimant that he was not given particulars of the allegations he was to confront or a *show cause* were not challenged by the Respondent.
13. Section 41 of the Employment Act, 2007 contemplates informing an employee of the allegations to confront.
14. The process may take an oral route or documentary route.
15. The letter suspending the Claimant was too general/vague such that it cannot be said that the Claimant was put on notice as to what allegations he were likely to confront.
16. There was no evidence or documents presented by the Respondent that after the investigations the Claimant was notified of any allegations or charges to respond to.
17. The evidence on record is that the Claimant was invited through phone to attend a disciplinary hearing a day before the hearing.
18. Even the minutes of the disciplinary hearing do not show that the Claimant was made aware in advance of the allegations he was to respond to.
19. The Respondent took a casual approach to the disciplinary process. This is difficult to understand considering that the Respondent even had a Group Human Resource Manager.
20. Although it was not disclosed, the Respondent must have had more than 50 employees at the material time. It should have had a disciplinary policy as required by section 12 of the Employment Act, 2007.
21. In the view of the Court, the disciplinary process did not meet the minimum requirements of section 41 of the Employment Act, 2007. The dismissal was tainted with procedural impropriety and the Court so finds.
22. With that conclusion, it is not necessary for the Court to examine whether the Respondent discharged the burden imposed on it by sections 43 and 45 of the Employment Act, 2007.

#### **Breach of contract**

#### **Leave**

23. An employee is entitled to at least 21 days annual leave and the Claimant pleaded that he had 25 leave days pending by the time of separation.
24. However, the Claimant did not lead any testimony as to this head of claim or disclose the period in respect of which the leave related. He equally did not reveal the formula he used to compute the pay in lieu of leave as Kshs 147,500/-.

#### **Pension fund contributions**

25. The Claimant did not lay any evidential basis to the claim for Kshs 969,365/- being pension fund contributions.
26. However, he filed a member statement of account indicating a sum of Kshs 969,345/-.
27. The dismissal letter had however acknowledged that some benefits were due to the Claimant.
28. The Court will therefore allow the head of claim.

#### **Defamation**

29. On this head of claim, the Claimant was content with stating in examination-in-chief that he was seeking damages for defamation because the allegations leading to his dismissal were wild.
30. There are ingredients or elements a party alleging defamation should prove. The Claimant did not lead any evidence to discharge that burden.

### **Counterclaim**

31. The Claimant admitted that he had both a study loan and car loan with a balance of Kshs 970,000/- or thereabouts.

32. The Respondent's witnesses were not sure of the exact balance of the loan. A figure of Kshs 906,000/- was mentioned.

33. This claim being in the nature of special damages should have been proved. Not even a loan statement was produced in Court.

34. The Court will give the parties time to agree on the exact balances and deduct the same from any awards made hereinafter.

### **Appropriate remedies**

#### **Pay in lieu of notice**

35. The Court finds that in view of the procedural improprieties, the Claimant is entitled to Kshs 142,033/- in terms of clause 10 of the letter of appointment.

#### **Service pay**

36. The Claimant was a member of a pension scheme and therefore is not entitled to *service pay* by dint of section 35(5) & (6) of the Employment Act, 2007.

#### **Pension funds**

37. The dues are allowed.

#### **Compensation**

38. In light of the Claimant's length of service, the Court is of the view that the equivalent of 6 months gross wages would be appropriate and fair.

### **Conclusion and Orders**

39. The Court finds and holds that the summary dismissal of the Claimant was procedurally unfair and awards him

(a) Pay in lieu of notice	Kshs 142,033/-
(b) Pension funds	Kshs 969,345/-
(c) Compensation	Kshs 852,198/-
<b>TOTAL</b>	<b>Kshs 1,963,576/-</b>

40. The Respondent to deduct outstanding loan balances from the above award.

41. Each party to bear own costs, the parties having failed to file submissions as agreed.

**Delivered, dated and signed in open Court in Nairobi on this 13<sup>th</sup> day of June 2018.**

**Radido Stephen**

**Judge**

#### **Appearances**

For Claimant      Mr. Ogutu instructed by Okindo Ogutu & Co. Advocates

For Respondent    Mr. Mbaluto instructed by Oraro & Co. Advocates

Court Assistants    Sikulu/Lindsey