



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 461 OF 2012**

*(Before Hon. Lady Justice Maureen Onyango)*

**AMBROSE MUTUA MUNYASYA.....CLAIMANT**

*VERSUS*

**UKULIMA CO-OPERATIVE SAVINGS &**

**CREDIT SOCIETY LIMITED.....RESPONDENT**

**JUDGMENT**

Ambrose Mutua Munyasya, the claimant was appointed by the respondent as an Accounts Assistant on 18<sup>th</sup> May 1995. He rose through the ranks and at the time material to this suit he was working as Accountant in Kisumu Branch and deputised the Branch Manager.

On 7<sup>th</sup> May 2010, the Branch Manager travelled out of station and left the claimant in charge of the Branch.

According to the respondent's banking procedures, at the end of each day the Chief Cashier prepares daily reports on cash and books after which they are endorsed by the Branch Manager or in his absence the person in charge. This is done after checking the reports against contents of the main safe.

The claimant did not sign the books for 7<sup>th</sup> May 2010 which was a Friday and did not report to work on Monday 10<sup>th</sup> May 2010. When the Manager checked the records on 10<sup>th</sup> May 2010 there was a shortage of Kshs.20,000.

The claimant was issued with a show cause letter on 10<sup>th</sup> May 2010. He responded on 13<sup>th</sup> May 2010 but was informed that his explanation was not adequate. He was by letter dated 20<sup>th</sup> May 2010 asked to give further explanation which he did by letter dated 3<sup>rd</sup> June 2010.

On 13<sup>th</sup> November 2010 he appeared before the Staff Management Committee and on 17<sup>th</sup> November 2010 he received a letter of termination of service.

The grounds for termination was gross misconduct by improper performance of duties assigned to him at Kisumu Branch. The claimant was paid unutilised leave days, one month's salary in lieu of leave, his pension contributions and 50% of employer's contributions. He was informed that upon clearance and on application he would be issued with a certificate of service.

Unhappy with the termination of his employment the claimant filed this suit against the respondent. In the memorandum of claim filed on 20<sup>th</sup> March 2012 and amended on 22<sup>nd</sup> May 2017a the claimant avers that the termination of his employment was unlawful and unjustified. He seeks the following reliefs –

- (i) A declaration that the dismissal was wrongful, unlawful and malicious.
- (ii) An order that the respondent do pay the claimant terminal dues amounting to Kenya shilling one million, four hundred and thirty four thousand, three hundred and five and seventy five cents (Kshs.1,434,305.75).
- (iii) General damages for wrongful dismissal from employment.
- (iv) Interest and cot of the suit.

(v) Any other orders that the court may deem fit and apt to grant.

In the amended reply to the memorandum of claim, the respondent states that the termination of the claimant's employment was regular and procedural. It denies that the claimant is entitled to Kshs.1,434,305.75 as pleaded or any other sum.

At the hearing the claimant testified for himself and the respondent called RICHARD ONGERI NYAANGA, the Chief Executive Officer of the respondent. The parties thereafter filed and exchanged written submissions.

### **Determination**

I have considered the pleadings and evidence on record. I have further considered the submissions filed by the parties.

The issues for determination are whether the termination of the claimant's employment was unfair and if he is entitled to the remedies claimed.

The claimant has submitted that the termination of his employment was unfair as neither a representative from the union nor an employee of his choice was present during the disciplinary hearing. The claimant relied on Section 41 and 45(2) of the Employment Act and the case of WALTER OGAL ANURO in which the court held that –

*“For a termination of employment to pass the fairness test, there must be substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”*

He further relied on **Industrial Cause No. 192 of 2013 MOSES KAUNDA MORO VS. CMC MOTORS GROUP LIMITED** in which Ndolo J. *“found the termination of the Claimant's employment unfair for want of both substantive justification and procedural fairness and awarded the Claimant the equivalent of 12 months' salary in compensation. She also awarded him one month's salary in lieu of notice.”* He further relied on **Industrial Cause No. 79 of 2012 METAH MZEE VS. SDV TRANSAMI T/A BOLLORE AFRICA LOGISTICS KENYA LIMITED** in which Radido J. held that *“the summary dismissal was not just and equitable because he would have expected the Respondent to confront the Claimant with the details of its investigations so that he could exhaustively reply to the same.”*

For the respondent it was submitted the claimant admitted the charges against him in writing, that the negligence the claimant was charged with was in the ordinary course of his employment and was based on his conduct, capacity and compatibility and based on operational requirements and that there was fair process accorded to the claimant. It is submitted that the respondent complied with Section 45 of the Employment Act.

The respondent relied on the case of **GENTRIX N. WANJALA -V- FORT JESUS ACADEMY** in which Makau J. dismissed a claim stating that the respondent had a valid reason. The respondent further relied on the case of **LOUIS ARMSTRONG OTIENO -V- MEDIAMAX NETWORK LIMITED** in which the court stated that –

*“In order to terminate an employment relationship the employer is required to have a reason for doing so. The reason is not just to be any reason, it must be a valid and or justifiable reason. Further once a valid or justifiable reason has been found the termination must be carried out in a fair manner. That is to say the employee affected must be reasonably notified of the reasons for which the termination of his employment is being considered and given a reasonable opportunity to respond to the accusations for which termination of his services is being contemplated.”*

The respondent further relied on the case of **FULGENCE SUNZA MASAI V KENYA REVENUE AUTHORITY** in which Muya J. stated that –

*“As to the question whether the Defendant was entitled to dismiss the plaintiff on account of gross misconduct. I find that there was sufficient evidence to the effect that the plaintiff being the cashier in charge had negligently performed his duties as a result of which government revenue was lost. The dismissal was in accordance with the Employment Act”*

The respondent submitted that the claimant was invited to show cause and given a hearing and that he admitted the offence.

Section 41 requires employers to give a fair hearing to an employee. In the present suit the claimant was first asked to explain what transpired. His first explanation was not accepted and he was given a second opportunity to respond. Thereafter he was issued with a letter to show cause which he responded to. He was then invited to a disciplinary hearing.

During the hearing the claimant did not raise the issue that he was not given an opportunity to be represented by a union official or a fellow employee of his choice. This issue was also not raised in the memorandum of claim. A party cannot raise a fresh issue through written submissions.

Having not raised that issue during the hearing or in his claim, the issue was never proved.

Since this is the only issue raised by the claimant and the same was not proved, he has not proved that the hearing of his case did not comply with Section 41, 43 or 45(2) of the Employment Act.

I find that there was valid reason for termination of employment as admitted by the claimant and that he was taken through a fair hearing.

The termination of his employment was therefore fair and procedural.

I find that the claimant has not proved unfair termination.

On remedies the claimant prayed for service pay and relied on the case of **ELIJAH KIPKOROS TUNUI –V- NGARA OPTICIANS T/A BRIGHT EYES LIMITED**. The decision is not supported by the provisions of the law and the facts of this case are not similar to the facts of the case wherein the court found that the respondent failed to make some NSSF contributions for the claimant in the past, that the respondent therein made contributions to NSSF erratically unlike this case where no such claims were made. In fact in his evidence the claimant did not mention the issue of service. On the contrary he stated that he was a member of both NSSF and the respondent's pension scheme.

I find that the claimant is not entitled to service pay as he is excluded by Section 35(6) since he was a member of both NSSF and the respondent's staff pension scheme.

The claimant further prayed for notice and accrued leave. His letter of termination stated that he would be paid both and during the hearing he admitted having been paid and the money utilized to offset his loan. The claimant has therefore not proved that he is owed notice and unutilized leave days by the respondent.

The claimant further prayed for general damages. Having been fairly terminated he is not entitled to the same.

The result is that the entire claim fails. The claim is accordingly dismissed in its entirety with an order that each party bears its costs.

**DATED AND SIGNED AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF JULY 2018**

**MAUREEN ONYANGO**

**JUDGE**