



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 351 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 19th July, 2018)

JAMES NORMAN MALOBA WANDERA.....CLAIMANT

VERSUS

HARAMBEE CO-OPERATIVE

SAVINGS & CREDIT SOCIETY LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant herein James Norman Maloba filed his Memorandum of Claim on 10/3/2018 through the firm of Mumia & Njiru Advocates seeking payment of his monthly salary. The claim had been filed accompanied with an application under Certificate of Urgency after the Claimant avers he was forced out of the office on 23.11.2017.
2. The Claimant avers that his salary then was 376,771/= per month. He was the Chief Executive Officer/General Manager of the Respondent. He avers that he was suspended on the allegations of fraud by the Sacco made by some directors, managers and others.
3. It was also stated that some directors, managers and others withdrew money over and above what was needed and that the ICT System was not competent to operate the business transitions of Harambee Sacco i.e Front Office Service Activity (FOSA). He stated that FOSA was run by FOSA Committee of the Board and he was not in the said Committee or the Board.
4. He avers that on 13.12.2012 he wrote a letter after he was suspended denying all the allegations levelled against him. He avers that the Sacco Regulatory never responded to his letter but that they only called him to their office and gave him a letter of removal under police guard.
5. From 23.11.2012 he was never allowed back to the office. The police guarded the office and he was never allowed in. The Respondent never called him to verify allegations against him.
6. He avers that in their response to this claim, the Respondent aver that they gave him a termination which is not true. He avers that he 1st saw the alleged termination letter in Court and it is dated 15/11/2013 stating that he was terminated with effect from 17.1.2013. It is his position that on this date he never knew that his services had been terminated.
7. The Respondents also aver that at page 45, he attended a Board meeting on 23/11/2012 at 11 am yet on this day he had already been forced out of the office and never attended the meeting alleged. The minutes were even confirmed on 24.10.2013 which is irregular as the Board sits monthly.
8. He also faults the minutes, which indicate that he was paid his terminal dues, which is not true as the Respondent only paid him some of his Co-operative Savings and withheld some.
9. In their letter of 23.12.2014 the Respondent also confirm this position (Appendix 16).
10. He avers that shares deducted from him were for Kshs.1,951,021. He denies ever paying himself any salary.
11. On issue of the ICT System being faulty, he avers that at page 59 of Respondent's documents, the letter from SASRA indicate that Computer System had not been completely commissioned and it was still under Craft Silicon Limited and that it has never been

commissioned to date and an agreement need to be produced to confirm the completion (Appendix 13 of Respondent's Defence). He avers that the issue is still being determined upon to date.

12. He also averred that FOSA is run by a Committee of the Board and this is evident from the Bylaws of 2005 Clause 69 of 2012 and Clause 74.1 (Appendix 11) of the Respondent's documents.

13. He avers that he was never part of the Management Committee of the Society and never took part in the FOSA meeting and the Committee did not report to him and he had no duty to ensure FOSA runs in a particular manner.

14. The Claimant seeks prayers as at paragraph 17 of his Reply to Defence which are as follows:-

- 1) **An order declaring that the Respondent's actions towards the Claimant amount to unfair and unlawful labour practices.**
- 2) **Orders that the Respondent compensates the Claimant for the period he stayed out of employment on suspension without any pay.**
- 3) **Orders that the Respondent compensates the Claimant for unfair and unlawful termination.**
- 4) **Payment of Kshs.11,646,594.73 made up as follows:-**
 - a) **Notice pay Kshs.376,771/=.**
 - b) **Salary not paid while he was on suspension for 11 months and 22 days Kshs.4,420,779.73/=.**
 - c) **Compensation of 12 months for unfair and unlawful termination Kshs.4,521,252.00.**
 - d) **30 accrued leave days for the year 2012-2013 Kshs.376,771.00.**
 - e) **Reimbursement of Claimant's shares of Kshs.1,951,021.00 wrongfully deducted from his shares.**
- 5) **Orders that the Respondent finalizes pending issues with the Claimant to enable him have a closure on this matter.**
- 6) **An order that the Claimant's salary from December 2012 till the determination of this matter be paid with interest at Court rates at the rate of Kshs.376,771.00 per month.**
- 7) **An order for the payment of the Claimant's accrued leave for the year 2013 and 2014.**
- 8) **Costs of the suit.**
- 9) **Any other relief that the Court may deem fit to grant.**

15. The Claimant gave his oral evidence in Court. In cross-examination, he indicated that he was not an Ex-officio member of the Board. He avers that he attended meetings but did not participate. He avers that as Chief Executive Officer of Respondent, he effectively coordinated running of the Respondent's back office but not the front office.

16. He avers that he sued the Respondent as they were his employer but also wrote to SASRA as they are the ones who suspended him. He contends that he holds the Respondent liable for allowing an outsider to remove him.

17. He avers that his terminal dues were never paid to him. He avers that he was only paid Kshs.2,445,538.25 refund of his shares saved with the Sacco. He avers that allegations made against him fall under FOSA and that he did not have overall oversight over activities of FOSA.

18. In re-examination, he avers that he was aware that there were fraudulent activities at Harambee Sacco but it was established that the System had shortcomings and was under development also FOSA Committee members had committed fraudulent activities. He stated that no action was taken against them. He contends that he was not given any opportunity to defend himself and that he only learnt of his termination in Court.

19. The Respondents filed their defence on 12.2.2016 through the firm of Oraro and Company Advocates. Despite filing their defence and other documents, they failed to call any witness who would lead any evidence and have even their Statement of Response adopted as their evidence. In principle, it follows that the Respondents never submitted any evidence before Court to counter the Claimant's case.

20. The issue of parties filing Pleadings and documents and even witness statements and assuming they are evidence has been addressed by the Court of Appeal in Civil Appeal No. 140/2008, at Nairobi, **JJA Visram, Mwilu (as she then was) and Otieno Odek** rendered themselves as follows:-

“in Der Raj Sharma vs Reginam 1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marled

for identification and that the few exhibits should be confirmed to articles which have been fairly probed and admitted in evidence. In the Nigerian case of Michael Hausa vs the State (1994) 7-8 SCANJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial Judge and the Judge cannot use the document as evidence”.

21. In view of this decision, I find that the Claimant’s case remains uncontroverted and the Respondent’s pleadings were statements.

22. The issues for determination are therefore as follows:-

- 1. Whether there were valid reasons to warrant dismissal of the Claimant.*
- 2. Whether the Claimant was subjected to due process before dismissal.*
- 3. Whether the Claimant is entitled to the prayers sought.*

23. On the 1st issue, the Claimant avers that he was bundled out of the office under police escort and told not to come back on 23.11.2012. He was not served with any dismissal letter at the point. Without the dismissal letter, the reasons for the dismissal cannot be discerned.

24. Under Section 43 of Employment Act:-

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

25. It is thus envisaged that dismissal or termination must be grounded upon valid reasons. In this case, the Claimant’s case is that he was thrown out of office by SASRA – a regulatory Sacco Authority which was not the Claimant’s employer. This action was definitely an illegality. This policy is buttressed by the Court of Appeal decision in **Barclays Bank of Kenya and Another vs Gladys Muthoni & 20 Others (2018) eKLR** where the Court of Appeal stated that it is a misnomer for a third party to purport to issue a notice of termination or even terminate an employment of a person with whom there exists no employment contract.

26. In that case, **Barclays Africa Group Limited** had purported to issue notices of redundancy to employees of Barclays Bank of Kenya Limited, a position which this Court and the Court of Appeal found unprocedural.

27. Thus when SASRA purported to throw the Claimant out of his office, the Respondent if convinced that the action was valid, should have issued a notice to show cause and taken the Claimant through all disciplinary processes and if found guilty issued a dismissal or termination letter giving reasons for the dismissal. This, the Respondent did not do. I therefore find that there was no valid reason to dismiss the Claimant.

28. On due process, I have alluded to it above. No such process ever occurred. Section 41 of Employment Act is clear on processes to be undertaken before an employee is dismissed. This process was clearly not followed. It therefore follows that the dismissal of the Claimant is unfair and unjustified.

29. Section 45 (2) of Employment Act states as follows:-

(2) A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee’s conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

30. Having found that the dismissal of Claimant was effected without valid reasons and without following due process, I find for the Claimant and I award him as follows:-

1. 2 months’ salary for the period the Claimant was on suspension from 23.11.2012 to 7.1.2013 = 54 days = 54/30 x 376,771 = 678,198.6/=

2. 1 months salary in lieu of notice = 376,771/=.

3. *Accrued leave days for 30 days = 376,771/=.*

4. *Reimbursement of Kshs.1,951,021.00 deducted from Claimant shares.*

5. *12 months' salary as compensation for unlawful termination = 12 x 376,771 = 4,521,252/=*

Total = 7,904,002.8/=

6. *Respondent to pay costs of this suit plus interest at Court rates with effect from the date of this judgment.*

7. *The total figure is subject to payment of statutory deductions except for item No. 4 above.*

Dated and delivered in open Court this 19th day of July, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Dan holding brief for Mbaluto for Respondent – Present

Claimant – Present in person