



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CASE NO.339 OF 2012

(Before Hon. Justice Mathews N. Nduma)

ZACHARY OKUNGUCLAIMANT

VERSUS

UNITED NATIONS SACCO LIMITED.....RESPONDENT

J U D G M E N T

1. The Claimant is an employee of Central Bank of Kenya. He worked for the Respondent as a Finance Officer II from 1st December, 2010. Whilst there he applied for the position of Internal Auditor and was offered the job on 1st February, 2011. The Claimant earned gross salary of Kshs.197,142.

2. On 30th November, 2011, the employment of the Claimant was terminated after serving 12 months. The letter of termination does not give any reason for the termination. It simply reads that the UNSACCO Board had decided to terminate the employment of the Claimant. He was given one month notice from 30th November, 2011 and was offered payment of one month's salary in lieu of notice.

3. The Claimant states that the termination was wrongful and unfair in that he was not given any reason for the termination, was not given opportunity to show cause why his employment ought not to be terminated and no hearing was accorded to him at all.

4. The Claimant prays for payment of the following reliefs:-

- a. 1 month salary in lieu of notice, Kshs.197,142.
- b. One month salary in lieu of leave not taken Kshs.197,142.
- c. Leave allowance @50% of the salary Kshs.98,571 and
- d. Compensation for the unlawful termination.
- e. Grant of certificate of service, and
- f. Costs of the suit.

5. In his sworn testimony, the Claimant explained that he was the first person to be appointed to the newly created position of Internal Auditor. The Claimant got the position and place and he reported directly to the CEO of the SACCO Mr. Cyrus Njeru.

6. On 14th July, 2011, the IT administrator was arrested for being involved in fraud. His name was Alphonse Riaga. The Board sent the claimant on compulsory leave by a letter dated 20th July, 2011. He was to resume upon completion of investigations.

7. On 18th October, 2011, the leave was extended. The Claimant was invited to a Board meeting by a text message from the Treasurer of the SACCO Mr. Washington Wanjau. The Claimant was questioned at that meeting on his job status, when he had joined the organization and if he was doing his job well. He responded to the questions asked to his satisfaction. Claimant felt he had achieved much in his short spell at the SACCO.

8. The Chairperson of the Board Mrs. Mary Oyugi told the Claimant that the Board had the view that he should resign from the job. The Claimant explained his reluctance to resign. The Claimant asked for the report of investigations to get information on what he should do. The claimant responded to the request to resign by a letter dated 22nd November, 2011. The Claimant declined to resign for no reasons given and requested to be furnished with the investigations report. On 30th November, 2011, the Claimant received the letter of termination. The Claimant had completed six months' probation. Probation was to end in July when he was sent on compulsory leave. There was no requirement to be confirmed in writing according to the Claimant.

9. The Claimant stated, he had a good record and had no warning of misconduct or non-performance at all.

10. The Claimant prayed to be awarded as per the statement of claim. The Claimant was employed by CBK on 16th April, 2012 at a gross salary of Kshs.99,900. As at the time of hearing he earned Kshs.197,142. The Claimant was out of employment for six months. The Respondent gave a positive reference check to CBK. He was therefore hired.

11. The Claimant while being cross examined stated that he was not aware that the SACCO had lost 11,008,819, which was stolen by Mr. Alphonse Riaga. The Claimant was not aware that Mr. Riaga was facing criminal charges for theft.

12. The Claimant was questioned on his past employment in the firm of Githongo & Co. Accountants. The firm was the external auditor of the SACCO. The Claimant had in fact undertaken external audit of the SACCO then. He had joined the Audit firm in 1999. He left and rejoined in 2007 up to November 2010 when he was employed by the Respondent. It was suggested to the Claimant that the Audit firm through his work was negligent and had failed to detect the theft. The Claimant denied any such negligence stating that the Audit report they had provided were not qualified and had pointed out some operational loopholes to the Board. The claimant acknowledged that he did not detect any loss of money while working as an external auditor and even upon being employed as internal auditor by the Respondent. The Claimant insisted that he was unaware why his employment was terminated.

Response

13. The Respondent filed a memorandum of reply to the Claim on 17th April, 2017. The Respondent admits that the Claimant was their employee on probation in the position of internal auditor on probation. That the claimant was not confirmed to his job until termination. The letter of offer dated 24th January, 2011 was produced as exhibit 1. The effective date was 11th February, 2011.

14. In terms of the letter, the Claimant was placed on six months' probation "(which may be extended for an additional three months in writing should your performance be unsatisfactory)". During the probation period, the employment was terminable by giving 30 days' notice in writing or one month's pay in lieu of notice.

15. The letter stated that the Claimant would be confirmed to his position upon successful completion of probation.

16. The employment of the claimant according to the Respondent was not confirmed prior to the termination on 30th November, 2011. The Claimant had served ten (10) months in the position of internal auditor by the time his employment was terminated on 24th January, 2011.

17. The Respondent submitted that it was entitled to terminate the employment of the Claimant who was still on probation as provided in the letter of appointment and that it did so.

18. In the alternative, the Respondent avers that forensic investigations had revealed irregularities that ought to have been detected by the Claimant if he had discharged his duties diligently which irregularly caused the SACCO to loose over Kshs.43 million.

19. That the Claimant was offered opportunity to resign but had declined.

20. The Respondent denies that the Claimant is entitled to payment of notice pay in lieu of leave and leave allowance. The Respondent avers that terminal benefits had been paid upon termination. These includes one month salary in lieu of notice. The Claimant also was on compulsory leave so ought not to be paid in lieu of leave and that he received full salary during this period. The position of Respondent on the matter as stated above was articulated before court by RW1 Washington Kamau Wanjau who was the Treasurer of the SACCO at the material time.

Determination

21. The issues for determination are:-

(i) Whether the employment of the Claimant was terminated for a valid reason and in terms of a fair procedure and

(ii) What reliefs, if any the Claimant is entitled to.

Issue I

22. The Claimant had served the Respondent for a period of twelve months and for a period of ten (10) months in the position of internal auditor. The Claimant was placed on probation for a period of six months subject to extension for a further period of three months, if the six months' probation period was not completed successfully.

23. The Claimant worked continuously from 1st February, 2011 up to 20th July, 2011 when he was sent on compulsory leave pending investigations on matters disclosed in the letter dated 20th July, 2011. The Board referred in general terms to lapses in monitoring and control of the SACCO Policies and procedures that had resulted in loss of funds as a result of fraudulent activities in the recent past.

24. The Claimant was not charged with any disciplinary offence related to misconduct or poor performance. He remained on compulsory leave until he was called to a meeting of the full Board in which he was requested to resign. The Claimant refused to resign and demanded to be furnished with the report of investigations. No report was furnished to him but instead he received a letter of termination which gave no reason for termination dated 30th November, 2011.

25. This is a classical case of failure by an employer to follow the provisions of sections 41, 43 and 45 of the Employment Act 2007. The Respondent did not inform the Claimant of any disciplinary charges facing him. No show cause letter was served on him. No disciplinary hearing took place. Instead the full Board convened a meeting in which the Claimant was called and asked to resign. The Claimant refused to resign and his employment was terminated for no reasons given.

26. The termination of the employment of the claimant was in violation of section 41, 43 and 45 of the Act. It was not for a valid reason and the Respondent did not follow a fair procedure in effecting the

