

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CASE NO. 210 OF 2017

JUDY WARUGURU KAGAI.....CLAIMANT

VERSUS

LAINISHA SACCO SOCIETY LIMITED (formerly – MWEA

RICE FARMERS SACCO SOCIETY LTD.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking resolution of a dispute she framed as suspension from employment pending investigations of alleged theft, prosecution in court and failure to be reinstated upon acquittal and non-payment of terminal benefits. The Claimant averred that she was employed until 5th October 2011 when she was suspended and charged in Wang'uru Cr. Case No. 263 of 2015. She was acquitted on 30th January 2017. She averred that she earned Kshs. 14,234/- after deductions as at the time she was suspended. She sought payment of terminal dues for both the employment for which she sued and her previous employment which was computed in April 2005 but not paid in the amount of Kshs. 405,499/-. She sought one month's salary in lieu of notice – Kshs. 14,234/-, unpaid leave for 6 years – Kshs. 85,404/-, severance pay – Kshs. 42,702/-, damages for wrongful dismissal – Kshs. 170,808/- and a certificate of service.

2. The Respondent filed a defence and counterclaim in which it denied owing the Claimant any sums. The Respondent averred that the Claimant was let off on a technicality and that it still held her liable for the loss. The Respondent claimed a sum of Kshs. 382,348/- comprising of loans, advances and that she was entitled to Kshs. 101,764.40 (after a tax of Kshs. 52,436.60) as terminal benefits if she clears the counterclaim due to the Respondent. The Respondent thus sought the dismissal of the Claimant's suit and entry of judgment for the Respondent in the counterclaim against the Claimant.

3. The Claimant filed a reply to defence and a defence to counterclaim in which she averred that the claim for Kshs. 141,132/- was for Margsta Sacco which has capacity to sue and be sued. She denied owing any sum to Margsta Sacco and that she would seek to have entry of judgment for the admitted sum. The Claimant also filed a request for judgment for the sum of Kshs.120,050/- admitted in the Respondent's defence and counterclaim. The Respondent on its part filed an objection to the request for the entry of judgment.

4. The Claimant testified that she was employed by the Respondent in 2006 and was accused of stealing Kshs. 67,000/- in 2011 and was suspended then subsequently charged in court in Cr. No. 363 of 2015 where she was acquitted. She was not reinstated. In cross-examination she testified that she was not terminated but suspended and she did not abscond from duty. She stated that she was convicted in the first case then later found not guilty as she was convicted then appealed to the high court and a re-trial ordered where she was acquitted. She testified that she had debts that she did not clear which were to be paid through check-off. She stated that the employer could have deducted the debts from her dues. In re-exam she stated that she knew Magsta Sacco and knew of no impediment barring their suit against her.

5. The Respondent called George Wangang'a Thiga who testified that he was a manager at the Respondent for 17 years. He stated that he joined the Respondent in 2001 and that the Respondent was in operation till 2004 when it collapsed due to mismanagement. He stated that the Respondent owed the Claimant Kshs. 405,499/- which was her terminal dues and that this sum was to be paid when the organization fully recovered. The Respondent recovered and was rebranded to the current name. He stated that the Claimant was deployed to work as an Mpesa assistant in 2011 and she worked till 1st October 2011. He stated that the Claimant was convicted after trial and that the Claimant never went back. He testified that the Claimant owed the Respondent some Kshs. 382,348/- and that the sum should be off-set from the sum due to the Claimant and she should be paid Kshs. 101,764/-. In cross-examination he stated that the Claimant absconded duties and of she went back they would enter into negotiations as the Claimant was suspended during the trial. He stated that Magsta Sacco Ltd is registered and was a different entity from the Respondent and that it was a staff Sacco. He testified that the Respondent had an obligation to deduct the dues for it. He stated that the Claimant had been charged in Cr. 735 of 2011 and was convicted and the high court ordered a retrial and she was acquitted in the second case. He was referred to the letter of 31st March 2015 from the Respondent's chairman and he stated that the payment to the Claimant was to be when the situation improved. In re-exam he stated that the letter of demand did not specify reinstatement was the only option and that Magsta Sacco was for the employees of the Respondent. The Claimant filed written submissions while the Respondent did not. In her submissions she stated that she had proved her case on a balance of probabilities and that she was entitled to the prayers sought. The Claimant submitted that the Respondent's counterclaim was not proved.

6. The Claimant was not dismissed from all accounts. She was suspended to pave way for the criminal trial. There is no evidence that she presented herself to the Respondent upon acquittal. As such, her contract was not unlawfully terminated by the Respondent and they are therefore not liable in terms of Section 49 of the Employment Act. The Claimant was entitled to benefits of Kshs. 405,499/- which the Respondent was to pay but never did. The Respondent admitted the sum in the claim. The Respondent's counterclaim was misplaced as the person to claim the dues is an entirely competent legal entity that could not claim under the Respondent. In the premises the counterclaim was not proved as no evidence of any debt owed to the Respondent was presented. The said counterclaim is dismissed with no order as to costs. The Claimant is therefore entitled to recover her terminal dues only as well as interest thereon at court rates from the date of filing suit till payment in full. She will also have costs. The balance of her claim fails and is dismissed as the claims therein are stale. In the final sum,

she is entitled to:-

- a. Kshs. 405,499/- being unpaid terminal benefits
- b. Interest on the sum above at court rates from date of filing till payment in full
- c. Costs of the suit
- d. Certificate of service

It is so ordered.

Dated and delivered at Nyeri this 22nd day of November 2018

Nzioki wa Makau

JUDGE