



**REPUBLIC OF KENYA**  
**INDUSTRIAL COURT AT NAIROBI**  
**CAUSE NUMBER 1314 OF 2012**

**BETWEEN**

- 1. PAUL ABADE OGIRA**
- 2. WILSON OWUOR OKUDO**
- 3. SANTOS MUTINDA ..... CLAIMANTS**

**VERSUS**

**UFUNDI CO-OPERATIVE SAVINGS &  
CREDIT SACCO SOCIETY.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Kubai Musyoka & Company Advocates for the Claimants*

*Macharia Kahonge & Company Advocates for the Respondent*

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**JUDGMENT**

1. The Claimants filed Cause Number 23 [N] of 2009, against their former Employer, the Respondent herein, on 21<sup>st</sup> January 2009.
2. The Court read an Award dated 10<sup>th</sup> September 2010, finding that the Claimants, having been dismissed from employment on 27<sup>th</sup> June 2006, should have approached the Court under the repealed Trade Disputes Act, Cap 234 the Laws of Kenya, in accordance with the transitional Section 84 of the repealing Labour Relations Act. They had come to Court directly, invoking Section 12 of the Labour Institutions Act 2007. The Court ordered Cause Number 23 [N] of 2009 struck out, without prejudice to the Claimants filing fresh Claim, upon exhaustion of the mechanisms provided for under the Trade Disputes Act.
3. They subsequently reported the existence of a trade dispute to the Cabinet Secretary for Labour, under the provisions of the Trade Disputes Act, as read together with the Labour Relations Act, on 26<sup>th</sup> January 2011. Conciliation did not yield settlement, and the Conciliator issued a Certificate of Disagreement,

paving way for the filing of the fresh Cause Number 1314 of 2012 at Nairobi.

4. The Parties agreed before Hon. Judge Nelson Abuodha, sitting at Nairobi on 23<sup>rd</sup> February 2015, to have the file forwarded to the undersigned Judge who had heard the Parties initially at Nairobi, before being transferred to Mombasa Station.

5. Parties agreed further, upon forwarding of the file to Mombasa, that the proceedings, witness statements and documents filed in the original proceedings, be adopted for purposes of considering and determining the current Cause.

**Claimants' position:-**

6. The Claimants were employed by the Respondent as Accountant, Accounts Clerks and Ledger Keepers, on various dates.

7. They were arrested on 9<sup>th</sup> June 2006, on the allegations of fraudulent loss and encashment of Respondent's cheques.

8. They were charged before the Magistrate's Court for the offence of theft by servant. They were acquitted on 15<sup>th</sup> July 2008, upon the Court finding no *prima facie* case against the Claimants.

9. The Respondent had, prior to acquittal, on the 27<sup>th</sup> June 2006, summarily dismissed the Claimants. They state they requested the Respondent to give them their jobs back after acquittal, without success. They approached the Court seeking the following orders against the Respondent:-

a) Declaration that dismissal was unfair and unlawful.

b) Arrears of salary for the period the Claimants were undergoing the criminal trial, from 27<sup>th</sup> June 2006 to 15<sup>th</sup> July 2008- a period of 24 months.

c) Benefits under Voluntary Early Retirement / Retrenchment comprising 3 months' salary; golden handshake of Kshs. 250,000; and severance pay at 2 months' salary for every year worked.

d) 12 months' salary in compensation for unfair dismissal.

e) House allowance for the period of the criminal trial of 24 months.

f) Pro-rata leave days.

g) Leave allowance.

h) All pension contributions including those made by the Respondent.

i) Refund of their share contributions.

10. The 1<sup>st</sup> Claimant told the Court his duties included keeping custody of all accounting documents. He and the Manager had the keys to the strong room. He went on annual leave in May 2006. He left the key to the strong room with the Administration Manager. He handed over the accounting documents and no issue was raised about any missing cheque book.

11. He was called by Management while on leave and told of missing cheques. The Management confirmed the cheques had been stopped. These were crossed cheques, payable to payee only. All the missing, crossed cheques were cashed over the counter. The Respondent was not able to say how this was possible.

12. The Claimants were not contributing to the pension fund. They contributed to the Sacco. He was paid for his Sacco shares.

13. Cross-examined, the 1<sup>st</sup> Claimant confirmed all cheque books listed in Respondent's appendix 4 were handed over to him, and he had control of the cheque books. He went on annual leave and handed over to Tubman. He did not have any handing over report showing this. There was a report, on being handed over to him, from another Accountant Kioni.

14. In Respondent's appendix 6, the 1<sup>st</sup> Claimant acknowledged loss of the cheque books. He stated he removed them from the strong room to his office. He was not a Member of Respondent's contributory pension scheme. The Sacco is run by a different Management from the Respondent, but is nonetheless, basically same as Ufundi. The 1<sup>st</sup> Claimant did not lodge a complaint with the Cooperatives Tribunal against the Sacco. The 1<sup>st</sup> Claimant's monthly salary was Kshs. 20,425, but was supposed to be adjusted by 20%, hence his claim for a salary of Kshs. 25,000.

15. The other Claimants associated themselves with the evidence of the 1<sup>st</sup> Claimant. They confirmed they worked as Clerical Officers. They did not write any cheques. They did not handle any cheques. All Employees had access to the accounts office. They were at the time, reporting to Tubman Olang'. The Claimants did not understand what fraudulent activities referred to in the dismissal letter. The CBA, in force at the time, required the Claimants to be interdicted. They were not interdicted.

16. The 2<sup>nd</sup> Claimant told the Court he had earlier been suspended for assaulting a fellow Member of the Sacco. He appealed successfully, on 8<sup>th</sup> September 2000. He performed clerical duties. Cheque books were kept in the strong room. Access was through the Manager's office. Many Employees had access to the accounts office. The letter of employment allowed the Employer to terminate respective contracts for reasonable suspicion. He agreed one's contract could be terminated on this ground. Redirected, the 2<sup>nd</sup> Claimant told the Court he was dismissed; the Respondent did not act under the termination clause. He did not have access to the strong room.

**Respondent's Position:-**

17. The Respondent agrees the Claimants were its Employees. The 1<sup>st</sup> Claimant went on leave on or about 8<sup>th</sup> May 2006. He did not hand over to Tubman Olang as alleged, No handing over report was availed to the Court.

18. The 1<sup>st</sup> Claimant was recalled from annual leave, on 6<sup>th</sup> June 2006, when it was realized a cheque book was missing. He gave an explanation, conceding he had custody and control of the cheque book. Cheques from the missing cheque book were used to withdraw money from the Respondent fraudulently. The Respondent reported the offence to the Police, and summarily dismissed the Claimants, having reasonable suspicion of their involvement in theft.

19. Internal investigations revealed the 2<sup>nd</sup> Claimant had a close relationship with the 1<sup>st</sup> Claimant. He had unlimited access to the 1<sup>st</sup> Claimant's office. He was similarly reported to the Police and summarily dismissed. The 3<sup>rd</sup> Claimant was also implicated due to his closeness to the 1<sup>st</sup> Claimant, and unlimited access to the 1<sup>st</sup> Claimant's office.

20. All the Claimants were heard, before action to report the offence and to summarily dismiss them, was taken. They were dismissed under Clause 8 [c] [vii] of the operative CBA, which allowed the Respondent to take this decision, " *if an Employee commits or on reasonable and sufficient grounds, is suspected of having committed any criminal offence against or to the substantial detriment of his Employer's property.*" The business of the Respondent is founded on trust and confidence. Claimants betrayed these values.

21. The Claimants are not entitled to the prayers sought. The 1<sup>st</sup> Claimant did not show he was a Member of the Respondent's contributory scheme, and even if he did, his dispute would be addressed to the Retirement Benefits Authority. The refund of Sacco shares should be pursued under Section 76 of the Co-operative Societies Act, under the relevant Tribunal.

22. Tubman Olang' told the Court he worked for the Respondent, between 2002 and 2008 as the Human Resources Manager.

23. He confirmed the Claimants were employed by the Respondent, in the positions stated in their pleadings.

24. The cheques which raised suspicion surfaced in June 2006. The relevant cheque book had been used from December 2005. Cheque number 0210300, from the missing cheque book, was used in fraudulent withdrawal. The cheque book had not been released to the Cashier to start using. The cheque book went missing while in the 1<sup>st</sup> Claimant's custody.

25. David Kioi handed over to the 1<sup>st</sup> Claimant. There was a report of handover. Cheque book series 021201 -21300, was handed over to the 1<sup>st</sup> Claimant. He had custody and no-one else but him had the key. Tubman was asked to investigate by Management. He confirmed the suspect cheque book had been in use from December 2005. He did not interview the Claimants; they were interviewed by the Management. He was asked by Management to report to the Police. The 1<sup>st</sup> Claimant wrote to the Chairman confirming the cheque book was lost while in his hands. It is not true that the 1<sup>st</sup> Claimant handed over when he went on annual leave, to Tubman.

26. Tubman was not called as a Witness in the criminal trial. He only realized later the trial had been concluded, and the Claimants acquitted.

27. Cross-examined, Tubman testified the 1<sup>st</sup> Claimant had gone away on leave, with the keys to the strong room. This was the arrangement between the 1<sup>st</sup> Claimant and Manager Wambua. There was no handing over to Tubman. There were 5 Account Clerks. 2, who were retained, Mutinda and Wilson, were issued warning letters. Tubman did not know if these 2 had anything to do with the suspect cheques.

28. Page 4 of the criminal trial proceedings indicates there was a 4<sup>th</sup> suspect. Tubman denied he was that suspect. Use of the stolen cheques began in December 2005; the 1<sup>st</sup> Claimant should have realized this fraud was taking place, from December 2005.

29. Anne Waithera told the Court she worked as a Cashier. She would write cheques, from the cheque books in her custody. She was directed by the Accountant. She got the cheque books from the Accountant. Cheque book series 21300 was never issued to her. She noted it had been in use from the year 2005. She reported to the Chairman. The Claimants were reported to the Police and charged. She was not called as a Witness.

30. Questioned by Counsel for the Claimants, she told the Court the Accountant kept a record of the cheque books, in accordance with the serial numbers. He retained custody of the register. Waithera only kept the running cheque, with the rest kept by the 1<sup>st</sup> Claimant. The cheques were account payee only. They could be opened by Management. She did not know if some were cashed over the counter. The Management stopped the cheques, on realizing there was fraud.

31. The issues, as understood by the Court, are:

*a) Whether the Claimants were unfairly dismissed.*

*b) Whether they are entitled to compensation under Section 15 of the Trade Disputes Act Cap 234.*

*c) Whether they are entitled to the raft of terminal benefits sought?*

**The Court Finds:-**

32. The Parties agree the Claimants were employed by the Respondent in the positions indicated in their Claim. There is no dispute they were suspected of cheque fraud. They were arrested and charged in Court over the offence of theft by servant. They were tried, and found with no case to answer.

33. It is not contested that they were summarily dismissed while the criminal trial was going on. They fault the Respondent for not holding on with its disciplinary sanction, until the trial ended.

34. The Court was not directed to any clause in the Claimants' contracts, Collective Agreement, Human Resources Manual or By-Laws, which barred the Respondent from proceeding with its administrative action against the Claimants, simultaneous to any criminal process initiated against the Claimants.

35. The Claimants were dismissed on 27<sup>th</sup> June 2006. They were not on suspension during the 2 - year criminal trial. They do not merit arrears of salary and allowances for the 2 years, as prayed. They ceased to be Respondent's Employees upon dismissal on the 27<sup>th</sup> June 2006. They do not merit arrears of salary; house allowance; annual leave; and leave allowance, for the 2 years under the criminal trial. They were not Employees of the Respondent after dismissal, and acquittal by the Criminal Court, was irrelevant to the administrative process which had already concluded. Their prayers for benefits alleged to have accrued during their criminal trial, are declined.

36. They left employment on specified grounds, stated in the dismissal letters. The Respondent stated Claimants were involved in fraudulent activities; they were charged in Court; and for security reasons, the Respondent had decided not to retain the Claimants. They had earlier been suspended on 8<sup>th</sup> June 2006, pending internal investigations.

37. There is no basis for the Claimants to seek a grant of benefits under Voluntary Early Retirement/Retrenchment. The applicable CBA, appendix KMC2-3 of the Claimants' Bundle, regulated VER/ Retrenchment under clause 10. The clause applied in event of the Respondent's financial inability to maintain the staff. The grounds upon which the Claimants left employment had nothing to do with clause 10 of the CBA. The prayer for benefits under this clause is rejected.

38. They did not bring clear evidence of their membership to any Pension Plan established or operated by the Respondent. They did not give to the Court details of their contributions, or contributions made by the Respondent. This item was pleaded in general terms. There is no material upon which the Court could grant the item. This item is declined.

39. The claim for refund of shares is regulated under Respondent's By-Laws. Clause 96 states that any dispute, arising out of the By-Laws, or concerning the business of the Society, which cannot be settled by the Central Management Committee, shall be referred to the Co-operative Tribunal. The Claimants should have pursued this remedy in the appropriate forum, under the By-Laws governing their membership and shareholding. The Court declines to make orders on refund of share contributions.

40. Issue [c] under paragraph 31 of this Judgment is therefore in large, dealt with in the above analysis.

41. On issue [a] and [b], the Court notes the Claimants' dismissal took place under the Trade Disputes Act. Section 15, required Employers to justify termination, and in event the Court found Employer's decision unjustified, remedies, which included reinstatement, re-engagement and compensation the equivalent of 12 months, could be granted to the wronged Employee. Decisions of the Industrial Court of Kenya of the time, show there was a duty on the Employer, much as is the case today, to show valid reason or reasons justifying termination of employment, and demonstrate fairness of the process.

42. The 1<sup>st</sup> Claimant was an Accountant. He was responsible for the accounting documents, which

included Respondent's cheque books. He had the key, alongside the Manager to the strong-room.

43. It was shown, and this is not disputed by either side to the dispute, that a cheque book went missing from the Respondent's cheque stock, and was used in fraudulent withdrawal of cash from certain accounts. The fraudulent cheques were in use from December 2005, up till June 2006. The Cashier gave evidence and confirmed the 1<sup>st</sup> Claimant was the custodian of the cheque books, and would issue her new cheque book once she had exhausted what had been issued earlier.

44. Evidence was given by Tubman Olang' that, the 1<sup>st</sup> Claimant left for annual leave, without handing over to Tubman. The 1<sup>st</sup> Claimant did not supply the Court with any handover report indicating he left his docket in the hands of Tubman, when the 1<sup>st</sup> Claimant took his annual leave in May 2006. This was in sharp departure from the practice, as shown in the case where Kioni, had earlier handed over to the Claimant, and prepared a handover report.

45. The Respondent had reasonable and sufficient grounds under Section 17[g] of the repealed Employment Act Cap 236 the Laws of Kenya, to suspect the 1<sup>st</sup> Claimant had committed a criminal offence against or to the substantial detriment of his Employer or Employer's property.

46. This provision was replicated in the Parties CBA.

47. The fact that cheque books went missing, and it was the responsibility of the 1<sup>st</sup> Claimant to ensure safe custody of these cheques; the fact that the Claimant did not hand over to Tubman on taking annual leave; considering that a missing cheque book was used in fraudulent withdrawals; and taking into account the clear evidence of the Cashier, the Court is persuaded the Respondent had valid ground in dismissing the 1<sup>st</sup> Claimant.

48. The Respondent however struggled immeasurably, is justifying its decisions against the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants. The Court has not been shown evidence connecting the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants to the fraudulent activities of the 1<sup>st</sup> Claimant. The Respondent appears to have taken action against the 2 Claimants merely on their perceived closeness to the 1<sup>st</sup> Claimant. This closeness was not shown to amount to reasonable and sufficient grounds under Section 17 of the repealed Employment Act, and the CBA, in justifying Respondent's decision.

49. There was no justification in the Respondent's decision against 2<sup>nd</sup> and 3<sup>rd</sup> Claimant.

50. The Claimants were suspended on 8<sup>th</sup> June 2006. They were advised this was to allow for investigations. They would be involved in the process of investigations.

51. The dismissal letter is dated 27<sup>th</sup> June 2006. It does not refer to any investigations carried out. It does not reveal whether the Claimants were in any way involved in the processes which took place between 8<sup>th</sup> June 2006 and 27<sup>th</sup> June 2006. There is no evidence of investigations or disciplinary hearing having taken place between these dates. The Claimants were merely informed that the Central Management Committee of the Respondent met on the date of dismissal, 27<sup>th</sup> June 2006, and decided the Claimants are summarily dismissed.

52. The Respondent did not carry out its decision fairly.

53. The 1<sup>st</sup> Claimant is entitled to compensation for unfair dismissal on account of fairness of procedure.

54. The 2<sup>nd</sup> and 3<sup>rd</sup> Claimants are entitled to compensation for unfair dismissal on account of lack of valid reasons and fairness of procedure.

55. 1<sup>st</sup> Claimant's pay slip for May 2006 shows he earned monthly basic salary of Kshs. 20,425, house

allowance of Kshs. 7,700; medical allowance of Kshs. 1,875; and leave allowance of Kshs. 4,200- total Kshs. 34,200. In April of the same year, the gross amount was Kshs. 30,000- which is the same amount paid in May 2006, less annual leave allowance. For purposes of compensation, 1<sup>st</sup> Claimant's rate should therefore be a monthly gross salary of Kshs. 30,000. **He is granted the equivalent of 6 months' salary as compensation for unfair dismissal, at Kshs. 180,000.**

56. The 2<sup>nd</sup> Claimant earned basic salary of Kshs. 11,437, house allowance of Kshs. 3,800, and medical allowance of Kshs. 1,381, total Kshs. 16,618. **He is granted the equivalent of 12 months' gross salary in compensation for unfair dismissal at Kshs. 199,416.**

57. The Court has not been able to trace 3<sup>rd</sup> Claimant's pay slip. He states his monthly pay was Kshs. 11,437 and prays for 12 months' salary in compensation, based on this figure. Although the Court has not been able to find 3<sup>rd</sup> Claimant's pay slip in the bundle of documents filed by the Parties, it is noted the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants worked in the same position. It is suggested the sum of Kshs. 11, 437 was the basic pay in this position. The Court can safely adopt the gross monthly pay applicable in the case of the 2<sup>nd</sup> Claimant, to the 3<sup>rd</sup> Claimant. **The 3<sup>rd</sup> Claimant is granted the equivalent of 12 months' salary in compensation for unfair dismissal at Kshs. 199,416.**

58. **Costs granted to the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants, against the Respondent.**

IN SUM, IT IS ORDERED:-

**a) Dismissal of the 1<sup>st</sup> Claimant was based on valid ground, but flawed on fair procedure, and to that extent, unfair.**

**b) Dismissal of the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants was not based on valid ground and was flawed on fair procedure, and therefore unfair.**

**c) The Respondent shall pay to the 1<sup>st</sup> Claimant the equivalent of 6 months' gross salary at Kshs. 180,000 in compensation for unfair dismissal.**

**d) The Respondent shall pay to the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants the equivalent of 12 months' gross salary each at Kshs. 199,416.**

**e) Costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Claimants.**

Dated and delivered at Nairobi this 7<sup>th</sup> day of April 2017

James Rika

Judge