



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 161 OF 2013
[Formerly IC at Nairobi Cause Number 1829 of 2011]

BETWEEN

ALI SAID MWALESO CLAIMANT

VERSUS

**JITEGEMEEE CO-OPERATIVE SAVINGS AND CREDIT
SOCIETY LIMITED, alias JITEGEMEE SACCO SOCIETY
LIMITED CS-1834 [Sued through its CHAIRMAN CHUMA
MOHAMED, VICE- CHAIRMAN MOHAMED KIBWANA AND SECRETARY ALI
HAMISI MZEE RESPONDENT**

Rika J

Court Assistant: Benjamin Kombe

Miller & Company Advocates for the Claimant

Mwaniki Gitahi & Partners, Advocates for the Respondent

JUDGMENT

1. This Claim was initially filed at the Industrial Court at Nairobi, on 3rd March 2011. It was transferred to the Court at Mombasa, and registered as Cause Number 161 of 2013.
2. The Claimant filed an Amended Statement of Claim on 4th October 2013, upon transfer of the Claim. He states he was employed by the Respondent Society as a Senior Accountant Clerk, on 5th October 1987. He rose to become the Manager on 29th May 2009. His contract was terminated by the Respondent on 1st August 2011. As of this date, he earned a monthly salary of Kshs. 66,000. He worked for 24 years.
3. He states he was not afforded an opportunity to be heard before termination. He was placed on indeterminate compulsory leave. His salary was withheld. He was victimized by Committee Members.

The Members intended to shield themselves as they were guilty of embezzlement of Respondent's Funds. He was offered terminal dues by the Respondent in a letter dated 1st August 2011. He was not given particulars of these dues. He prays for Judgment against the Respondent in the following terms:-

- a) Damages for wrongful dismissal and unfair termination the equivalent of 12 months' salary at Kshs. 792,000.
- b) 1 month salary in lieu of notice at Kshs. 66,000.
- c) Salary for the remainder of employment period of 11 years at Kshs. 8,712,000.
- d) Annual leave pay at Kshs. 243,000.
- e) Punitive damages at Kshs. 150,000.
- f) Any other suitable relief.
- g) Costs.

4. The Respondent filed its Statement of Response on 3rd January 2012. It admits the Claimant was its Employee, working in the positions stated in the Statement of Claim. Termination was on valid ground and carried out fairly, in consultation with the Commissioner of Co-operatives Development, Mombasa. He was heard and given reasons for dismissal. He was offered terminal benefits. He was found guilty of insubordination, neglect of duties, breach of confidentiality, using abusive language, absenteeism, and theft of Respondent's money. He had been issued several warning letters. The Respondent prays that the Claim is dismissed with costs to the Respondent.

5. The Claimant gave evidence on 25th March 2014 before the first trial Judge Hon. Stephen Radido. Parties recorded an order agreeing to proceed from where the first trial Judge signed off upon his transfer to another station. The Claimant was cross-examined and re-examined before the incoming Judge on 12th February 2015 and 13th February 2015. He rested his case on 8th February 2016.

6. Respondent's Chairman at the time the dispute arose, Chuma Mohammed Omar, his Vice Mohammed Kibwana Ali, and Committee Member Ali Khamisi Mzee, all gave evidence for the Respondent on 14th November 2016 when hearing closed. The matter was last mentioned in Court on 6th February 2017 when Parties confirmed the filing of their Submissions and Judgment scheduled for delivery.

Claimant's evidence: -

7. He told the Court he was employed by the Respondent on 5th October 1987 as a Senior Accountant Clerk. Prior to this, he worked with the Ministry of Commerce.

8. He rose through other ranks, to become the Manager, on 29th May 2006. His contract was terminated while he held the position of Manager.

9. He did not have a job description. There was a memorandum of understanding signed between Respondent and Management Staff. His main duty was to act as the custodian of Respondent's by-laws and policies. He was Secretary to the Management Committee.

10. The Ministry of Co-operatives had oversight of the Respondent. There was a Supervisory Committee.

11. The Claimant received a letter from the Respondent on 10th May 2010, sending him on compulsory leave. The letter did not cite any reason for the decision. There was no prior warning. He handed over to his Assistant and left.

12. During compulsory leave, he received his full salary. He was called by the Respondent on 18th February 2011, and given a letter of the same date. He was asked in the letter, to appear before the Management Committee on 16th March 2011.
13. He attended the meeting. He had not been told it was a disciplinary hearing. Members of the Committee started asking the Claimant questions.
14. On 10th June 2011, he received another letter from the Respondent, advising that his salary would be stopped, effective from 1st May 2011. He wrote to the Respondent enquiring why this was so. There was no reply.
15. On 1st August 2011, he was called by the Respondent, and given a letter of summary dismissal. The letter alleged the Claimant was guilty on incompetence, absenteeism, and used abusive language against Members.
16. He was not a signatory to any of the Respondent's Bank Account. Cheques could be signed by any 3 of 4 Committee Members. He did not know the reasons for termination.
17. He was not given to absenteeism. He signed an attendance register. His work nonetheless, required a lot of movement outside the office. The Member, who alleged he was abused by the Claimant, was a debtor of the Respondent.
18. There was no disciplinary hearing. He did not go on annual leave for about 3 years. He was owed about 105 days of annual leave.
19. Cross-examined, the Claimant stated the Respondent had revenue of about Kshs. 48 million annually. The previous Manager retired in 2005, and the position was advertised. The Claimant applied for the position and was successful.
20. He was answerable to Members, Shareholders, Management Committee, and Executive Committee.
21. He oversaw day-to-day running of the Respondent. He was the custodian of the by-laws. He was asked to go on leave compulsorily. He was invited to a Management Committee meeting. He was questioned. He was asked 8 questions in all. He answered all of them.
22. The Respondent did not have an attendance register. It is not true that the Claimant operated a private business at Mombasa. It is not true that Inspectors found him absent from the workplace. He was the Manager and needed to visit Co-operative Bank frequently on official business. He needed to walk around, He was not a Doctor, he testified, to sit about in the office.
23. Committee Members alleged the Claimant inflated their loans. There was no inflation. Interest was pegged on the loans. He did not know how the Chairman was alleged to have received kickbacks. The Claimant did not admit that he took excess money, and paid himself. Management Staff had arrears of dues from past Collective Bargaining Agreements. The Claimant was paid his outstanding dues. Payment was reclaimed by the Respondent. In the end it was paid to the Claimant.
24. At the Annual General Meeting of the Respondent, a Member proposed the Claimant is removed from office. This was before the disciplinary hearing. The Member was an aggrieved individual with an un-serviced loan, which the Member had disowned.
25. The minutes of the alleged disciplinary hearing are incomplete. They do not record questions asked by the Claimant. He was not given the agenda for the meeting before its convention. The minutes show 4 questions were asked to the Claimant. 8 questions were asked to him. He made his own notes of the hearing. He did not at any time apologize for his alleged shortcomings.

26. There was a Report compiled by the District Co-operative Officer [DCO] concerning the affairs of the Respondent. It is annexure 4 of the Claimant's bundle of documents. It showed the Respondent was engaged in over-loaning. The Claimant had a loan with the Respondent. He received his salary in full, for the 10 months he was on compulsory leave.

27. He did not have a grudge with other Committee Members. Kshs. 6.5 million was withdrawn from Respondent's account to purchase a server. 6 months down the line, no server had been bought. Signatories issued the relevant cheque. The Claimant did not know who specifically issued the cheque. He did not write to the Committee explaining the extent of his involvement in the transaction.

28. The Respondent went on to compute Claimant's retirement benefits. He had not been retired. He was to receive Kshs. 557,317. He was offered pay for 86 days of annual leave. He claims 105 days. The leave records are with the Respondent. He could not accept the cheque in Court.

29. Redirected, the Claimant told the Court the letter calling him to the Committee meeting did not set out any agenda. Previous meetings used to. He was bound to interact with Co-operative Bank and the DCO, as the Manager. He was present during inspection. Inspection Report showed Committee Members were divided, and loan facility skewed. No one complained for 24 years about Claimant's service. He developed the Respondent. He did not sign the minutes of the meeting alleged to have comprised a disciplinary hearing. He was not accompanied by anyone to the hearing. He was not informed why he was placed on compulsory leave. He did not understand reasons for dismissal. The loan facility was divisive. Termination was unfair.

Respondent's evidence:-

30. Chuma Mohammed told the Court the Claimant was employed by the Respondent as an Accountant. He was elevated to the position of Manager. He was okay as an Accountant, but unsuitable as Manager. He did not have suitable credentials to hold the office of CEO.

31. The Respondent looked for a suitable CEO.

32. Shareholders complained that the Claimant disrespected and insulted them. The Board called the Claimant to a meeting. He was heard. Omar sat in the Board. It is not true that Members were annoyed with the Claimant after he cautioned them about irregular loans.

33. It is no true that Omar took a loan as shown in the Inspection Report. In any event Kshs. 115,200, payable in 27 months, could be described as over-loan. The Claimant had 2 warnings. First, he was warned for leaving office without authorization; and second for use of abusive language.

34. His terminal dues were tabulated by the Respondent. In total he was offered about Kshs. 1.2million. He was issued a cheque for the first installment of about Kshs. 600,000. He rejected the cheque which has since expired. The Respondent is willing to pay to the Claimant the amount which was offered at the time. The Claimant concedes in his recording of the disciplinary meeting, that he would exchange words with Clients. His papers did not allow him to be the CEO. He held the position in an acting capacity.

35. Omar testified on cross-examination that the Claimant worked for about 10 years. He worked from about 1987. He did not sign the warning letters. He earned a salary when on compulsory leave. Omar was not aware of the letter dated 10th June 2011 from the Respondent, stopping Claimant's salary. The notice calling the Claimant before the Management Committee did not contain any charges. It did not state he was to attend a disciplinary hearing.

36. The Inspection Report pointed out certain managerial deficiencies. It did not lay blame on the Claimant. The Report is a public document and accessible. He was not the CEO yet. He worked well as an Accountant. Terminal dues were calculated at Kshs. 1.2 million. Details could be provided by Respondent's Accountant. It was possible the Claimant was at times out banking. Redirected, Omar told the Court the Claimant was advised when placed on compulsory leave, that the issue was before the

Disciplinary Committee. It was clear he was to appear before the Disciplinary Committee, for a hearing. He did not ask to appear with his Advocate.

37. The Vice- Chair Ali restated the testimony of his Chairman. The Claimant worked well as an Accountant, but was unreliable as CEO. He operated private business in Mombasa. He created disharmony at the Respondent. He was issued verbal and written warnings. He did not change. He used abusive language against Clients.

38. He was invited for a disciplinary hearing, which he attended unaccompanied. He was questioned about his unauthorized absence from the office and his wanting to fight one of Respondent's Members. He concedes in his notes of the proceedings that he had verbal arguments with staff. The Ministry dealt with the issue of over-loans. It was not for the Claimant to deal. Over-loan referred to situations where, Members obtained loans in excess of 3 times their respective salaries.

39. Termination was on 1st August 2011. There is an Inspection Report of 2009. Over-loaning was an issue even in 2009. The Claimant was given a cheque for terminal dues which he rejected.

40. Kibwana sat in the Disciplinary Committee and in the overall Executive Committee. The Respondent was initially satisfied with the work done by the Claimant. As the Accountant, he would bank outside the Respondent. He transacted outside the normal office setup. He oversaw staff and dealt with disciplinary issues. He was advised on the charges against him. The hearing notice advised he was to attend a hearing. No details of the hearing were stated. It was his duty to bring a representative. He did not sign the warning letters. The cheque issued after dismissal. He was offered Kshs. 1.2 million in terminal dues. Termination was fair. Kibwana told the Court on redirection that details of terminal dues offered, are given in Respondent's document marked as appendix 3 [c].

41. The last Witness Mzee, told the Court he served as a Committee Member of the Respondent. Claimant was employed by the Respondent as was stated by the other Witnesses in their evidence.

42. As an Accountant, his work was not satisfactory. The Respondent was forced to hire external Accountants. Clients complained their accounts were not in order. The Claimant was unable to complete preparation of accounts before the year ended.

43. He attended the disciplinary hearing. In the end he walked out, telling Members to do as they wished. Over-loaning affected all Members. Mzee had a loan of about Kshs. 1 million. His salary was about Kshs. 30,000. This problem started well before Claimant's contract was terminated. It is captured in the Ministry's Report of 2009. If this informed the decision to terminate Claimant's contract, Respondent would have acted way back in 2009.

44. On cross-examination, the Witness told the Court he did not know how long the Claimant worked. Mzee served as the Secretary to the Committee. He wrote the letter inviting the Claimant for a hearing. There were no specific charges. The Claimant would know the charges when he reported. The Board decided the Claimant is dismissed, after receiving report of the Disciplinary Committee. The DCO was not involved in the process of hiring and firing of Employees. Fair procedure was followed in terminating Claimant's contract. Mzee, like others before him, told the Court on redirection that the Claimant did not ask to be allowed to go to the hearing with his Advocate. The letter placing him on compulsory leave advised him he would be required to attend a disciplinary hearing. The Respondent prays for dismissal of the Claim.

45. The issues are: **whether termination was grounded on valid reasons under Section 43 and 45 of the Employment Act 2007; whether it was carried out fairly under Section 41 and 45 of the Act; and whether the Claimant is entitled to the remedies sought.**

The Court Finds:-

46. There is ample evidence showing the Claimant was first employed by the Respondent on 5th October

1987 as an Accounts Clerk. His letter of appointment of the same date is attached to the Statement of Claim as appendix 1 [a]. There is no evidence to suggest he served from any other date suggested by some of the Witnesses.

47. The Certificate of Service issued by the Respondent, dated 1st August 2011 shows the period of service as beginning 5th October 1987 to 1st August 2011. It also confirms the Claimant was working in the position of Manager as of the date of termination. His pay slip for the month of April 2011 indicates he earned basic salary of Kshs. 66,000 and house rent allowance of Kshs. 15,500, total – Kshs. 81,500 monthly.

Validity of Reason for Termination:-

48. The letter of summary dismissal captures 3 grounds justifying dismissal. First, the Respondent states the Claimant was incompetent.

49. The Court has not found evidence of incompetence on the part of the Claimant. There were no specific facts made available to the Court, indicating the Claimant was incompetent.

50. He had worked from the year 2006 as Manager. He was an Accountant before then, conversant in the operations of the Respondent. He had a combined 24 years working for the Respondent. In these years, allegations of incompetence came to the fore only in 2011.

51. The complaints about Claimant's incompetence from his peers seem to have coincided with the concern about the increase in irregular loans, accorded to Committee Members. The significant point was not that the so-called over-loaning started in 2009, some years before Claimant's contract was terminated; the problem was that these insider and irregular loans continued to grow. Some Committee Members had accumulated loans and were not likely to repay before retirement. Mzee testified he had a loan of about Kshs. 1 million, against a salary of Kshs. 30,000 per month.

52. The Court formed the view that Committee Members were not comfortable with the CEO for raising concerns about Respondent's loan portfolio. The Provincial Co-operative Officer commissioned an Inspection which supported the Claimant's concerns about the loans. It is difficult to see how the Claimant was incompetent, whereas all he did was to protect the Respondent from internal avarice. The Inspection Report by the Ministry did not find the Claimant incompetent.

53. The Respondent, realizing the inherent weakness in the competence argument, introduced in the course of the proceedings herein, additional ground justifying termination. Chairman Omar told the Court the Claimant was not the substantive CEO. He did not have the credentials. He was okay as an Accountant, but abysmal as a CEO. The record indicates the Claimant was appointed CEO upon application for the position after it fell vacant. There is nothing to show he was in acting capacity, or that his papers were found wanting. The Certificate of Service states he was Manager, not acting Manager. Would he have been appointed if his papers were less than required?

54. Contradicting the evidence of the Chairman is that of Committee Member Mzee. Mzee told the Court the Claimant's work as an Accountant was wanting, to the extent the Respondent was compelled to outsource the accounting function. Clients complained their accounts were not in order.

55. These inconsistencies support the conclusion that incompetence was not a valid termination ground.

56. The second ground was that the Claimant was occasionally absent from work, without leave or lawful cause. The Court is satisfied with his explanation, that as CEO, he was not expected to sit still in his Office. He interacted with various Banking Institutions and the Co-operatives Office, on official business. This ground was not shown to have validity.

57. The last ground was that the Claimant used abusive language against Members. There was no Witness brought before this Court, to state he was abused by the Claimant. The words allegedly uttered by the

Claimant in abuse of Members, are not specified. If there was misunderstanding between the Claimant and any Members, it was on the ground that the Members were indebted to the Respondent, and saw the Claimant as a hindrance, in retention of the status quo. They were not comfortable with the Claimant and would not be expected to always have civil dialogue with him. The Claimant was asked about his misunderstanding with Members and conceded he engaged in verbal arguments in line of his duty. There was no specific mention of an insult uttered by the Claimant to Members or Staff, outside the normal work-related verbal disagreements. Use of abusive language was not established as a valid termination ground.

58. In all, the Court is convinced termination was not based on valid grounds. The Claimant appears to have fallen afoul of the elected Management Committee Members, who were tasked with running the affairs of the Respondent. Their personal interests were at par with those of the Respondent which the Claimant attempted to protect, and ended up with all manner of demonstrably false accusations placed on his head.

Procedural Fairness:-

59. Was procedure fair? The Claimant was sent on compulsory leave with effect from 12th May 2010. He was asked to appear before the Management Committee on 16th March 2011, almost 1 year after he was placed on compulsory leave.

60. The letter sending him on compulsory leave does not reveal any reason why the Claimant was being placed on compulsory leave. Neither does the letter calling him to attend Management Committee meeting on 16th March 2011, give any charges against the Claimant.

61. The Claimant was not asked to show cause, why disciplinary action should not be taken against him. He was called to the meeting of the Management Committee, without being advised it was in the nature of a disciplinary hearing.

62. He was not advised he was to attend a disciplinary hearing, over whatever employment offence. He was not accompanied to the meeting, the Respondent explaining, quite bafflingly, that the Claimant did not request to be accompanied by his Advocate. Section 41 of the Employment Act 2007, required he is accompanied by a workmate of his choice, or if unionized, by trade union representative at the shop-floor.

63. The procedure was well below the minimum standards of fairness created under Section 41 and 45 of the Employment Act 2007.

Remedies:-

64. ***It is declared termination was unfair, on account of lack of valid reason and fair procedure.***

65. ***The Respondent shall pay to the Claimant the equivalent of 12 months' gross salary in compensation for unfair termination at Kshs. 978,800*** under Section 49 and 50 of the Employment Act, and Section 12 of the Employment and Labour Relations Court Act.

66. The Respondent offered to pay the Claimant 3 months' salary in lieu of notice, as shown in Respondent's appendix 3 [c]. ***The Claimant is granted 3 months' salary in lieu of notice at Kshs. 244,500.***

67. The Claimant seeks leave pay based on 105, at Kshs. 243,000. The Respondent offered him 86 days, which by Respondent's computation, amounted to Kshs. 258,000. The offer by the Respondent is superior to that sought by the Claimant. Section 26 of the Employment Act binds the Court to uphold the superior terms on offer, and as such, ***the Respondent shall pay Kshs. 258,000 in annual leave pay to the Claimant.***

68. The Claimant did not establish his prayers for anticipated salary totaling Kshs. 8,712,000, and

punitive damages. These prayers are rejected.

69. The Chairman Omar and his Vice Chairman both testified the Respondent offered the Claimant a total of Kshs. 1.2 million as terminal dues. The sum of approximately Kshs. 600,000 paid under appendix 3 [c], was, in the evidence of the Chairman, an initial amount. The total offered to the Claimant was Kshs. 1.2 million.

70. The Court was not given details of the amount which remained to be paid. As it was offered, the Court cannot ignore the offer, or deny the same to the Claimant. The offer which the Claimant rejected was for total sum of Kshs. 557,317. Deducted from the total offer of Kshs. 1.2 million, the Claimant is entitled to Kshs. 642,683 in terminal dues. ***He is granted Kshs. 642,683 as the balance of the terminal dues computed by the Respondent.***

71. No order on the costs.

72. ***Interest granted at 14% per annum, from the date of Judgment, till payment in full.***

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant: the equivalent of 12 months' salary in compensation for unfair termination at Kshs. 978,800; notice pay of 3 months at Kshs. 244,500; annual leave pay at Kshs. 258,000; and balance of terminal dues computed by the Respondent at Kshs. 642,683, total – Kshs. 2,123,983.

c) No order on the costs.

d) Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.

Dated and delivered at Mombasa this 30th day of June 2017

James Rika

Judge