



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 369 OF 2014**

**LYDIAH WAMBUI WAHOME.....CLAIMANT**

**VERSUS**

**2NK SACCO SOCIETY LIMITED.....1<sup>ST</sup> RESPONDENT**

**TWO NK INVESTMENT HOLDINGS LIMITED.....2<sup>ND</sup> RESPONDENT**

**J U D G M E N T**

**INTRODUCTION**

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's employment contract by the respondents on 6/1/2014. The first respondent avers that the claimant's services were transferred from her to the second respondent way before the alleged termination and denied any liability for matters that arose after the date of the said transfer. In addition, the first respondent avers that as at the date of the transfer, the claimant had no outstanding claims for accrued leave, off days, public holidays, or overtime worked and not paid.

2. The second respondent admits that the claimants services were transferred effective 1/7/2013 but denies liability for any claims that accrued before the transfer of the claimant's services and the bus transport business from the first respondent. The second respondent therefore admits employing the claimant for only six months, from July-December 2013 after which she dismissed the claimant for refusing to obey a lawful command, namely to go on transfer and thereafter absenting herself from work without leave or other lawful course. It is the second claimant's case that the termination was fair because the claimant was invited to a disciplinary hearing by the letter dated 2/4/2014 but refused to attend to defend herself.

3. The suit was heard on 1/12/2016 when the claimant testified as CW1 and Anne kinyua testified for the first respondent as Rw1. The second respondent relied on the written statement filed by her witness Mr. Stephen Muriithi Wambugu dated 23/5/2016 to which the other parties consented. Thereafter both parties filed written submissions.

**CLAIMANT'S CASE**

4. CW1 stated that she was employed by the first respondent as a Data Clerk in 2007 and later she was transferred to the second respondent. On 21/11/2013, she applied for annual leave but it was ignored. Instead, she received letter dated 26/12/2013 deploying her to Nyeri. She appealed against the transfer by

her letter dated 28/12/2013 on ground that she was pursuing a course in Mombasa where she was also staying with a sick mother. The appeal was also ignored and instead she was served with a suspension letter dated 6/1/2014. The suspension was for an indefinite period and without pay and as such she construed it to mean termination and demanded for her accrued employment benefits. She contended that she was working from Monday to Sunday including public holidays and working time ran from 8.00am to 7pm.

5. On cross examination, she admitted that by the time of the suspension, she was employed by the second respondent. She contended that throughout her employment by the respondent, she never went for leave and all her applications were not granted. She maintained that her work station was Mombasa since 2007. She admitted that she joined the second respondent from 1/7/2013 as per the letter dated 22/6/2013. She further admitted that the second respondent's head office was at Nyeri. She also admitted that after receiving the suspension letter, she opted to leave. Finally she admitted receipt of letter dated 2/4/2014 inviting her to a hearing on 5/4/2014 at 10.00am.

#### DEFENCE CASE

6. RW1 is the first respondent's General Manager. She confirmed that CW1 was employed by the first respondent from March 2007 to July 2013 when her services were transferred to the second respondent. The said transfer followed a separation of transport business from the Sacco and transfer to the second respondent. RW1 contends that the claimant agreed to the new deal and she is therefore without any valid claim against the first respondent.

7. On cross examination she admitted that by the business transfer agreements dated 28/11/2013, any liability prior to the agreement were to be borne by the first respondent while all the liabilities after the agreement were to be borne by the second respondent. She however contended that the agreement for transfer of business dated 28/11/2013 did not refer to the employees but accidents claims/liabilities on the buses.

8. Mr. Stephen Muriithi Wambugu is the Secretary for the second respondent. He stated that following the passing of the Sacco Societies Act (Cap 490B) in 2010, the first respondent transferred all other functions to the second respondent save for the Sacco business under the said Act. On 28/11/2013, the respondents executed agreement for sale of business which provided that all liabilities in respect of the bus project, prior to the agreement were to be borne by the first respondent while those liabilities/claims arising after the agreement were to be borne by the second respondent.

9. Mr. Muriithi contends that the second respondent is not privy to the agreements between the claimant and the first respondent prior to 28/11/2013. He however admitted that the second respondent offered the claimant a transfer of service from first respondent effective 1/7/2013 and she accepted. He therefore contended that CW1 was employed by the second respondent for only six months between July and December 2013.

10. Mr. Muriithi has denied that CW1 was unfairly dismissed and contends that the claimant was dismissed for refusing to obey a lawful command from her employer to go on transfer and, thereafter absenting herself from work without leave or any other lawful cause. In addition, he contends that the claimant was invited to a hearing by the Board of Directors by letter dated 2/4/2014 but she refused to attend the hearing.

11. He denied any claim for salary or outstanding dues and averred that the claimant was paid all her salary for the six months she worked for the second respondent.

#### ANALYSIS AND DETERMINATION

12. There is no dispute that the claimant was employed by the first respondent from March 2007 to June 2013. There is further no dispute that her services were transferred to the second respondent from 1/7/2013 following the transfer of the bus transport business from the first to second respondent. There is

also no dispute that the claimant's employment was terminated by the second respondent in 2014. The issues for determination are:

- (a) Whether the termination of the employment was unfair.
- (b) Whether the claimant is entitled to the reliefs sought, and if yes, from whom.

### **Unfair termination**

13. Under Section 45(2) of the Employment Act, termination of employment by the employer is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. The procedure is fair if the employee is accorded a chance to defend herself. In this case the second respondent has contended that the reasons for dismissing the claimant's services is because she refused to obey a lawful command to go on transfer and thereafter absented herself from work without leave or lawful cause. The claimant has admitted that she never went for the transfer and instead opted to leave. As a result she was suspended by the second respondent pending further disciplinary action. In addition the second respondent has contended that she followed fair procedure by inviting the claimant to a disciplinary hearing by the Board of Directors but she refused to attend. The claimant has admitted in her evidence that she received the letter dated 2/4/2014 inviting her for the hearing but she never attended.

14. In view of the foregoing evidence, I find that the second respondent has proved that the reasons for termination was valid and fair and that the procedure followed before dismissing the claimant was fair. Consequently, I hold that the termination of the claimants services was fair within the meaning the Section 45 of the Act.

### **Reliefs**

15. The claim for salary in lieu of notice and compensation for unfair termination is dismissed because of the finding above that the termination was fair. The said claims are only availed by Section 49(1) of the Act to employees who are found to have been unfairly dismissed.

16. The claims for overtime, off days and public holidays worked are dismissed for want of particulars and evidence. Likewise the claim for salary during suspension is dismissed because the suspension was done after the claimant refused to report to her new station after transfer. Had she been suspended after reporting to the new station, she would be entitled to the salary because it is the employer who would take the blame for denying her a chance to work. In this case however the claimant refused to report to her new work station and when she was suspended she wrote letter dated 9/1/2014 demanding for her terminal dues. She actually declined the suspension and quit work and as such she lacks legal right to demand salary for the suspension period.

17. The claim for severance pay is also dismissed because the claimant was not terminated on account of redundancy. I however award her the claim for leave accruing for 6 years and 10 months equaling to 143.5 days.  $(143.5/26 \times \text{ksh}10000) = 55192.30$ . The liability to pay the sum awarded shall be apportioned in the ration of the period served. The claimant served the first respondent for 6 years and 3 months, while the second respondent she served for 6 months. Using the ration of the months she served the respondents 75:6 months respectively equaling to ration of 15:2. Applying that ratio to the total award of ksh.55,192.30, the first and second respondent will pay to the claimant ksh.48,699.10 and ksh.6493.20 respectively.

### **DISPOSTION**

18. For the reason that the claimant was denied leave during his 6 years and ten months she served, I enter judgment for her in sum of ksh.55192.30 plus costs and interest from the date of filing suit. The judgment will be paid by the respondent, in the ration worked above.

Dated, signed and delivered this 9<sup>th</sup> June 2017

O. N. Makau

Judge