



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE NO. 211 OF 2013**  
**FORMERLY 1322 OF 2012(NAIROBI)**  
*(Before Hon. Lady Justice Maureen Onyango)*

**CROSPEA NAFULA SELI ..... CLAIMANT**

**-Versus-**

**SUKARI SACCO LIMITED ..... RESPONDENT**

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

In her Memorandum of Claim originally filed in Nairobi on 3<sup>rd</sup> September, 2012, the Claimant avers that she was employed by the Respondent, a savings and credit cooperative society registered under the Cooperative Societies Act by letter dated 27th October 1994 as a clerical officer. The Claimant alleges that she worked with diligence and dedication and was rewarded with salary increments and other incentives, rising to the position of Acting Credit Officer in Loans Department. She alleges that her employment was terminated on 9th January 2010 without reason or proper cause. She prays for the following remedies-

- (a) Reinstatement to employment
- (b) One month pay in lieu of Notice .....**Kshs.42,682.50/-**
- (c) Back pay for the period **January 2010**  
to **July 2012 @ Kshs.64,525.70 x 31.....Kshs.2,000,296.70/-**
- (d) **2 years** increments 2010, 2011 and 2012  
@ 5% x **Kshs.64,525.70 x 3 years.....Kshs.9,678.85/-**
- (e) Lost Salary increments @ 5% x **Kshs.64,525.70 x 17 yrs.....Kshs.54,846.84/-**
- (f) Days worked and not paid in **January 2010**  
**9/30 x Kshs.64,525.70 .....Kshs.19,357.50/-**
- (g) Pro-rata leave for **1 month basic salary @ 42,682.50.....Kshs.42,682.50/-**

- (h) Leave accrued for 4 years @ **Kshs.42,682.50**.....**Kshs.170,730.00/-**  
Public Holidays and weekends worked  
Public Holiday **4 x 15 x Kshs.8000**.....**Kshs.480,000.00/-**  
Weekends worked **4 x 12 x 15 x Kshs.8000**.....**Kshs.5,760,000.00/-**
- (j) Service for the **15 years** completed **Kshs.42,682.50 x 15yrs**...**Kshs.640,237.50/-**
- (k) Loss of future earnings **12 x Kshs.64,525.70 x 20years** ....**Kshs.15,486,168.00/-**
- (i) Retirement benefits **12 x 42,682.50 x 20yrs**  
(upto Retirement) .....**Kshs.10,243,800.00/-**
- (m) Leave pay till retirement **Kshs.42,682.20 x 20 years** .....**Kshs.853,650.00/-**
- (n) Anticipated leave travel allowance up to retirement  
**Kshs.42682.50 x 7.5 x 30/22 x 20yrs**.....**Kshs.1,164,068.28/-**
- (o) Employer contribution to provident fund as @DEC 2009.....**Kshs.400,000.00/-**
- (p) Anticipated employer contribution to provident fund  
till retirement .....**Kshs.653,333.00/-**  
Total .....**Kshs.38,021,531.00**
- (q) Certificate of service.
- (r) Costs of the suit.

The Respondent filed a defence through Kadima and Company Advocates on 20th September 2013 in which it denies all averments in the Claim and avers that the Claimant was not diligent in her work as alleged in her Claim but on the contrary was reckless and advanced herself and other officers loans which they did not bother to repay. The Respondent prays that the Claim be dismissed with costs.

In another Defence dated 21st November and filed on 22nd November 2013 through the Federation of Kenya Employers, the Respondent avers that the Claimant was dismissed from service for valid reason after a fair procedure following several incidents of gross misconduct involving mismanagement and fraudulent transactions leading to loss of SACCO Funds. The Respondent denies owing the Claimant the sum of 38,021,531 as claimed or any other sum and prays that the Claim be dismissed with costs.

At the hearing of the case the Claimant testified on her behalf while MARTIN MUGAYA NDEGEYO, the Respondent's CEO testified on its behalf. The parties thereafter filed and exchanged written submissions.

### **Claimant's Case**

The Claimant testified that after her employment as clerical officer on 1st November 1994 she worked in various departments under different titles. At the time of termination of her employment she had risen through the ranks to FOSA supervisor, a position in which she was confirmed on 5th January 2008. She testified that on 25th May 2009 she was transferred to become Reconciliation Supervisor. On 10th July 2009 she was suspended from work on grounds of loss of society funds. She testified that she was not

given a chance to respond to the suspension but was warned after investigations on grounds that her gross negligence led to malpractices leading to loss of funds in FOSA Office. She testified that at the time of the warning she was Reconciliation Supervisor and not in FOSA. The warning letter redeployed her to credit office as Acting Credit Officer reporting to Acting Operations Manager.

The Claimant testified that on 24th December 2009 she received a suspension letter with 3 charges which she responded to on 25th December, 2009. Thereafter she was summarily dismissed without a hearing. She testified that she was not among the people who attended the disciplinary hearing of 5th January 2010 which she denied being summoned to or attending. She denied the charges she was accused of in the suspension letter.

In the written submissions filed by the Claimant it is argued that the Claimant was never given proper notice for the disciplinary hearing held on 5th January 2010 and the dismissal was therefore unfair.

### **Respondent's Case**

For the Respondent MARTIN MUGAYA NDEGEYO testified that he joined the Respondent as marketing officer in 2008 and worked with the Claimant. He testified that as credit officer the Claimant's function was to receive loan applications, appraise applicants' qualification for loans, sit with credit committee and recover loans. The credit committee consisted of 3 board members and a staff who is the technical advisor to the committee. He testified that the Claimant as credit officer was not allowed to post loans before approval of the committee. He testified that what led to the termination of the Claimant was the posting of a facility to three staff members. Mr. Ndegeyo testified that the Claimant was suspended then invited for a hearing before she was dismissed.

Under cross examination Mr. Ndegeyo stated that the Claimant's name was not in the attendance list of the Disciplinary Committee meeting because she was the subject of the committee's discussion and was only called in when it was her turn to be heard. He stated that she was invited to the disciplinary hearing by telephone.

In the Written submissions filed for the Respondent it is submitted that the Claimant was dismissed for violating the Respondent's rules which did not allow an overdraft facility to boost shares. That the Claimant advanced Kshs. 100,000 to one Samuel Odima and Kshs.200,000 to Victor Sagide purporting the advances to be loans which did not exist. The Claimant was also found to have falsified the share value for Odima as Kshs.270,000 instead of Kshs.170,000 and the share value for Sagide as Kshs.185,000 instead of Kshs.33,900 in their October salary payslips. This led the Credit Committee to approve loans to the staff which they were not qualified for. It is submitted that the Respondent being a financial institution handling member's money cannot tolerate any acts of dishonesty.

It was submitted that the reason for termination was valid and the Claimant was given a hearing as demonstrated in the minutes of the meeting.

### **Findings and Determination**

I have considered the evidence and submissions on record. The issues for determination are whether the dismissal of the Claimant was fair and if she is entitled to the remedies that she has prayed for.

#### **Fair termination**

Fair termination, as provided in section 45(2) of the Employment Act and restated in numerous judgments of this court has two limbs; fair procedure and valid reason. Both must exist for the court to make a finding of fair termination of employment.

In the present case I am persuaded that there was valid reason for dismissal of the Claimant. According to her letter of suspension, she was charged with the following-

1. That on 14th August 2009 she authorised the transfer of Kshs. 320,000 to boost the shares of her colleague Phylis Chemweno, an amount that was above her authorisation limit.

2. On 12th and 16th November 2009 she colluded with and advanced Samuel Odima Kshs.100,000 and Victor Sagide Kshs.200,000 purporting these to be advances against BOSA Loans which were later found to be non-existent. She later appraised and presented the loan applications for the two falsifying their share values as Kshs.270,000 for Odima instead of Ksh.170,000 and Kshs.185,000 for Sagide instead of Kshs.33,900. When asked to write a statement on the two she failed to do so.

These were valid reasons for termination of Employment.

However, I do not find any evidence that the Claimant was given a hearing before dismissal. The Claimant testified that she was not given a hearing but the Respondent's witness Mr. NDEGEYO insisted that she was given a hearing on 5th January 2010. He referred the court to the minutes at appendix 10 of Response which are minutes of Staff Sub-Committee held on 5th and 6th January 2010. The minutes only refer to a summary of the Claimant's case and the recommendation for her summary dismissal. The letter of summary dismissal also does not refer to a hearing. The letter reads as follows-

*Crospea N. Seli*

*P O Box 1606*

**BUNGOMA**

*Dear Madam*

**RE: SUMMARILY DISMISSAL**

*Following your suspension letter dated 24<sup>th</sup> December, 2009 and your subsequent response dated 25<sup>th</sup> December, 2009; Management has carefully and keenly evaluated your defense and found you guilty of all the accusations labelled against you.*

*Consequently, management has decided to summarily dismiss you from employment with Sukari Sacco Society Ltd w.e.f 11<sup>th</sup> January, 2010.*

*Yours faithfully,*

*For and on behalf of*

**SUKARI SACCO SOCIETY LTD**

*Laurence A. Omuhaka*

**BOARD CHAIRMAN**

The letter only refers to her letter of suspension and the response. It does not mention any invitation for a hearing or the Claimant's failure to attend a hearing after invitation.

For these reasons I find that the Respondent failed to prove that the Claimant was given a hearing before dismissal and the dismissal was procedurally unfair.

## **Remedies**

Having found that the dismissal of the Claimant was procedurally unfair, she is entitled to the remedies

under section 49(1) of the Employment Act as read with section 49(4).

The Claimant prayed for a plethora of remedies. I will consider each of them.

### **1. Reinstatement**

According to the Employment Act, reinstatement is a remedy that is available only in exceptional circumstances and according to the Employment and Labour Relations Court Act, can only be granted within 3 years of termination. Apart from the Claimant not having demonstrated that there are exceptional circumstances that warrant her reinstatement to be considered, her employment was terminated in January 2010, more than 3 years ago. She is therefore not eligible for the remedy of reinstatement.

In any event the Claimant in her testimony abandoned this prayer. The prayer is therefore dismissed.

### **2. Pay in lieu of notice**

Having found the termination of the Claimant's employment unfair, she is entitled to one months' salary in lieu of notice which I award her at Ksh.42,682.50 as prayed.

### **3. Back Pay**

The Claimant prays for back pay for the period January 2010 to July 2012. Having been dismissed in January 2010, the Claimant can only be paid salary up to the date of dismissal. The prayer for pay up to July 2012 has no basis and is dismissed.

### **4. 2 years Increment**

The prayer for 2 years increment for the period January 2010 to July 2012 is, like the prayer for back pay, without basis and is dismissed.

### **5. Future Earnings**

The Claimant has prayed for lost salary increments for 17 years, loss of future earnings for 20 years, retirement benefits up to date of retirement, anticipated leave and leave travel allowance till retirement and anticipated employer contributions to provident fund till retirement. Employment relationship is not permanent and the law clearly provides for termination of the same. In the event of termination, the employer is only liable if the termination was unfair and only to the extent provided in section 49 of the Employment Act. Indeed the Employment and Labour Relations Court. Act sets out the jurisdiction of this court to award compensation and damages only to the extent provided in the Act or under any other written law applicable to the court. The Claimant has not stated the basis of her demand for anticipatory income and benefits.

In the cases of **D.K Njagi Marete v Teachers Service Commission, Menginya Salim Murgani v Kenya Revenue Authority** and **Linnet Ndolo v The Registered Trustees of the national Council of Churches of Kenya**, cited by the Respondent and in many other cases, the courts have emphatically stated that claims for future earnings cannot be entertained by the Courts. Persons whose employment services are terminated ought to move on and mitigate the losses attributable to the termination as provided in section 49(4)(l) of the Employment Act.

For these reasons all the prayers for anticipatory or future earnings are dismissed.

### **6. Days worked and not paid in January 2010**

According to the Claimant's terms of employment she was to be on half salary during suspension which is for a maximum period of 10 days. The Claimant is therefore entitled to half salary up to 10th January 2010. The Respondent did not confirm that the Claimant was paid. I award her the same at

Kshs.19,357.50 as prayed.

### **7. Public Holidays and Weekends**

The Claimant did not testify that she worked on public holidays and weekends. The Respondent has denied that the Claimant worked on public holidays and weekends. I find that this Claim has not been proved and dismiss it.

### **8. Service Pay**

Having been a member of a provident fund the Claimant is not entitled to service pay as provided section 35(6) of Employment Act. The prayer is dismissed.

### **9. Prorata Leave**

The Claimant prayed for prorata leave for one month. The Respondent admitted in the submissions that the Claimant is entitled to 58 days leave being 28 days for 2008 and 30 days for 2009. I award the Claimant Kshs. 82,519.50 in respect thereof.

### **10. Certificate of Service**

The Claimant is entitled to a certificate of service which the Respondent is directed to issue to her in terms of section 51 of the Employment Act within 30 days from date of judgment.

### **Conclusion**

In conclusion I find that the Claimant's dismissal was procedurally unfair and award her the sum of Kshs.144,559.50 as more particularly set out above. The Respondent shall also pay costs which in view of what is claimed and what has been awarded, I assess at Kshs.80,000 all inclusive.

Orders accordingly.

**Dated, Signed and Delivered this 22nd day of September, 2017**

**MAUREEN ONYANGO**

**JUDGE**