



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 351 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

LORENCIO WABWIRE CLAIMANT

-Versus-

BUNGOMA TEACHERS CO-OP. SAVINGS

AND CREDIT SOCIETY LIMITED RESPONDENT

JUDGMENT

The Claimant filed this suit alleging that his employment contract was unfairly terminated by the Respondent, a savings and credit society with its head office situated in Bungoma town. He prays for the following remedies:

- (a) Kshs.510,000.00 as claimed in paragraph 10 above
- (b) A letter of service
- (c) General damages
- (d) Costs of this suit and interest

The Respondent filed a Statement of Defence and Counterclaim denying the averments of the Claimant and counter claiming Kshs. 324,872 from the Claimant. The Claimant filed a Reply to Defence and Defence to the Counterclaim in which he states that the amount claimed in the Counterclaim was a refund of his shares. He prays that the Counterclaim be dismissed and judgment entered as prayed in the Memorandum of Claim.

At the hearing of the case the Claimant who was unrepresented testified on his behalf while the Respondent was represented by Mrs. Oloo instructed by Oloo & Oloo Advocates called one witness. The parties thereafter filed written submissions.

Claimant's Case

The Claimant testified that he was employed by the Respondent as a loans officer on 22nd January 2010 and was confirmed on 16th June 2010. He testified that before that he had been seconded by his former employer KUSCO to assist the Respondent who was having problems with its loaning services. He applied, was interviewed and employed by the Respondent while on secondment.

The Claimant testified that on 28th April 2010 the Chief Executive Officer Mr. Barasa Chrispinus applied for a normal loan of Kshs. 400,000. As a loans officer he was asked to update and forward the application to the Credit Committee. While updating the form he realised that the CEO was overloaned as he had shares of 274,300 which entitled him to a loan of up to Kshs. 822,900 being 3 times his shares, but at that time he already had loans amounting to Kshs. 1,145,600. If the loan he had applied for was approved he would have a loan of Kshs. 1,545,400. He accordingly advised the Credit Committee that the CEO must boost his shares by Kshs.250,000 to qualify for the loan.

The Claimant testified that prior to his appointment the loans officer was Dorcas Atola, a cousin to the CEO. Dorcas was also related to the Chairman. He testified that the Chairman and Dorcas used to give the CEO as much loan as he wished to take in contravention of the loan policy.

The Claimant testified that the CEO, upset by the rejection of his loan application, called the Claimant to his office and asked him whom he thought he was to reject the CEO's loan application when he had been acquiring loans all along. He responded that he had not rejected the application but was putting the loans system in order. He then left the CEO's office and continued with his work. The Claimant testified that after that he was issued with several show cause and warning letters, and was subjected to a hostile working environment. He was issued with a warning letter on 6th May 2010. On 24th June 2010 he was transferred to FOSA Department and Dorcas was transferred back to Loans Department. He testified that this was met with an outcry as Dorcas was not a good worker forcing the Respondent to transfer him back to Loans Department on 20th August 2010.

The Claimant testified that around the same time the Chairman asked him to prepare a report on fraudulent activities at the SACCO which led to the arrest of 2 junior clerks.

The Claimant testified that his performance was not poor as alleged by the Respondent. He testified that when he was employed in January 2010 the collections from Teachers Service Commission (TSC) was Kshs. 19,211,162.50. In January he issued out loans of Kshs. 22,448,800.00 and in February 2010 he recovered Kshs.188, 750,692 as compared to Kshs. 5,651,000 the previous month. In March 2010 the recoveries from TSC increased to Kshs.19,003,942.00 while loans given to members was Kshs. 6,081,369.00. He testified that before he took over when Dorcas was the Loans officer the loans given out were always higher than the receipts from TSC meaning that what went out was higher than what came in, as opposed to his time when it was the opposite.

The Claimant testified that by letter dated 13th January 2011 he was asked to prepare a strategic plan and he prepared a roadmap which he presented to the CEO and the Board of Directors. He also gave the first ever profiling of the SACCO. The Claimant further testified that when they went out to pay dividends he was the only officer who brought back an excess credit of Kshs. 4000 on the first day and Kshs. 3965 on the second day. All other officers came back with shortages.

Regarding the period leading to the termination of his employment, the Claimant testified that he was supposed to take leave on 19th May 2011. On 4th May 2011 he was directed to take leave from 5th and not 19th May 2011. When his leave ended on 14th June 2011 it was extended from 16th to 28th June 2011. He testified that he suspected this was because he had revealed fraudulent activities at the SACCO.

The Claimant further testified that the CEO Mr. Chrispinus had duplicate keys to all offices and that on 14th December 2011 the CEO was seen removing documents from his office. When he asked the CEO about vouchers he was asked why he was asking about the vouchers when he was not the accountant. He testified that the CEO sent him to go to his outstations stations at Tongaren and Sirisia. The Finance Office was asked to give him money for the trips. He went on 15th and reported back on 19th December 2011.

The Claimant testified that Hon. Joe Nyagah the Minister for Cooperatives was scheduled to visit Bungoma Teachers SACCO on Monday 19th December, 2011 at 10 am to launch its ATM services and there were unconfirmed reports in the grapevine that the Claimant and some officials of the SACCO intended to give a petition to the Minister regarding mismanagement of the SACCO. The Claimant

testified that on 17th December 2011 the CEO advised the Board that he should be sacked. He testified that his letter of termination was written on that day after a Board discussion.

The Claimant testified that he was served with the letter of termination on 19th December, 2011 early in the morning. That while leaving the office he was directed by an Administration Policeman to go to the toilet upstairs so that he could be frisked, that he was not frisked but was instead locked up in the toilet until 5pm when someone came and unlocked the door. That there was a notice pinned outside the toilet door reading "OUT OF ORDER". He testified that he was in the toilet for 11 hours. He testified that the person who opened the toilet door ran away down the stairs after opening the door and he did not see who it was. He testified that when the door was opened he went home and never went back to the office.

The Claimant testified that the minutes of the meeting where his sacking was discussed are not signed. He testified that staff who were sacked before him were subjected to a hearing by the Board but he was not given a hearing. He named the employees who were given a hearing as Norah, Noel and Irene. The Claimant testified that he was discriminated as other employees who had shortages were given loans to pay the shortage and no disciplinary action was taken against them yet he was sacked for poor performance without a hearing. He testified that Kennedy Wafula, his clerk had a shortage of Kshs. 90,000 and was given a loan to pay back the shortage while another employee Anthony Bunyolia was given a loan of Kshs. 50,000 to pay back the shortage.

The Claimant testified that he was an exemplary worker, that the strategies he proposed were implemented by the Respondent successfully and the Respondent made huge profits. He testified that he also introduced serialisation of forms for accountability to stem fraud as some employees plucked out loan forms from the books and used them to obtain fraudulent loans. He also introduced serialisation of all documents so that documents could not be plucked out of files. This was because some loan forms were plucked out of files to remove evidence of loans given out to avoid paying back the loans. He testified that all documents with no serial numbers filed by the Respondent were not genuine as all the Respondent's documents were serialised. He testified that all official minutes were typed and the hand written minutes filed by the Respondent are also not authentic.

He testified that his advocate was a tenant of the Respondent but was locked out of the premises by the Respondent to frustrate him because he took up the Claimant's case. The lawyer was later paid damages of Kshs.4.6 million out of court.

Under cross examination the Claimant stated that his complaint against the Respondent is that he was dismissed without a valid reason and without being heard. The Claimant stated that he was dismissed immediately he blew the whistle on fraudulent activities at the SACCO. The Claimant stated that when he was locked up in the toilet he did not scream because he realised he would be in danger of being killed. He stated he did not report to the police because there was nothing the police could do.

Respondent's Case

RW1 MACKLINE WAMUKOTA testified that he was the (current) CEO of N'garisha SACCO, formerly Bungoma Teachers SACCO, the Respondent. He testified that at the time the Claimant's employment was terminated he was the Finance Manager of the Respondent. He testified that the then CEO Mr. Barasa Chripinus left the Respondent's employment in 2014 but while the Claimant was working he was the acting Finance manager.

RW1 testified that the Claimant's performance was below expectation. He testified that the Claimant was issued with a show cause letter on 16th March 2010 for posting a refund of Kshs. 1.8 million instead of Kshs. 188,000 which led to a loss as the SACCO refunded more than Kshs. one million above what it was supposed to refund. He testified that the Claimant apologised for the error and explained that he had relied on information which he was given.

RW1 also referred to a warning letter dated 6th May 2010 due to over deduction. He testified that the Claimant was required to explain why he had not followed procedures. Rw1 testified that the Claimant

was transferred from FOSA because he did not perform to expectation. He testified that there was a complaint from FOSA Manager that the Claimant failed to make weekly reports which the Manager was supposed to rely on to make reports to the FOSA Committee, which caused default in decision making.

RW1 referred to a letter dated 10th March 2010 inviting the Claimant to meet the Executive Committee on 17th March 2010 in relation to matters to do with his performance. He testified that the Claimant received the letter as reflected in the delivery book but he was not aware whether the Claimant attended the meeting.

RW1 also referred to a memo dated 9th August 2010 giving the Claimant guidelines on how to present his reports. He also referred to a letter dated 9th December 2011 in which the Claimant was being asked to hand in his report which was supposed to be handed in by 5th. RW1 further referred to an audit report in which the auditor queried reconciliation which was done on monthly basis exposing the SACCO to revenue leakage. The auditor also queried decline in operations. RW1 stated that the reconciliation covered the period when the Claimant was working in credit department. He testified that after that the Claimant was moved to marketing Department which had just been created. He referred to a letter dated 28th February 2011 requiring the Claimant to account for his days on 25th and 26th February 2011. He testified that in his response the Claimant did not address the issues raised in the query.

RW1 testified that these matters were the subject of a Board discussion in the meeting held on 17th December 2011 where the Board resolved that the Claimant's employment be terminated and the termination was effected. He denied that the Claimant was dismissed because of misunderstanding with the CEO. He testified that there were valid reasons for the termination. He testified that the Claimant's terminal dues were tabulated and paid as per policy. He testified that the Claimant had a normal loan and a FOSA loan which were recovered from his terminal benefits and there was a balance of Kshs.13,863 which the Respondent has claimed in the counterclaim. He testified that the Claimant was not entitled to overtime as he was paid responsibility allowance according to the policy of the Respondent and that he is not entitled to reinstatement as the termination of his employment was lawful.

RW1 testified that the Claimant is not entitled to annual leave as he took all his leave. He testified that he could not remember the Claimant being locked up in the toilet.

With reference to the Claimant's copy of minutes at page 19(a) of the Claimant's bundle RW1 testified that the minutes in the minute book are hand written and are not the same as the typed minutes. He testified that he had an original copy in the minutes book, and that what the Respondent had filed in Court was the authentic copy.

RW1 testified that Nora appeared before the Board because the Board wanted to find out more about fraud while Noel and the Claimant were given written submissions and their response considered. He testified that two Board Directors, Mr. Siata and Mr. Sungura, were assigned to talk to the Claimant and they confirmed talking to him but there were no minutes.

RW1 urged the court to dismiss the claim.

Under cross examination RW1 stated that he did not know if the Claimant had bad blood with the CEO Mr. Barasa. He confirmed that the Claimant performed better than Dorcas in terms of loans given out and funds collected. He stated that he could not tell the time the claimant was issued with the letter of termination or that the CEO wanted to sack the Claimant before the Minister arrived due to the rumours about the petition that the Claimant was to hand over to the Minister and stated he was not present when the termination letter was issued to the Claimant. RW1 confirmed that the Minister was visiting on the date the Claimant received the letter of termination but he was not aware that people were frisked in the toilet due to security concerns or that the Claimant was locked up in the toilet. RW1 stated that he had not produced appraisal form for the Claimant. He stated that the Claimant was not called for a disciplinary hearing because he was heard through documents.

On re-examination RW1 stated that Norah appeared before the Board.

Determination

It is not in dispute that the Claimant was employed by the Respondent vide letter dated 22nd January 2010 and was terminated by letter dated 17th December 2011. The grounds for termination as stated in the letter are that –

- 1. That as a loans officer you failed to discharge your duties and you were not keen and accurate in your transactions.*
- 2. That your competence is below average having tested you in various positions.*
- 3. That as a marketing manager you lacked knowledge on the society operation and how to serve members is questionable.*

It is further not in dispute that the Claimant was not given a hearing before his employment was terminated. This is admitted by RW1.

The issues for determination are therefore whether the termination of the Claimant's employment complied with the provisions for fair procedure and whether there was valid reason for the termination. The second issue is whether the termination was actuated by bad blood between the Claimant and the Chief Executive Officer of the Respondent and whether the Claimant was unfairly detained in the toilet on the date on which he was issued with the letter of termination. The final issue is whether the Claimant is entitled to the remedies sought.

Fair Procedure

Section 41 provides for fair procedure in termination of employment. It provides as follows:

41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the

employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

The provisions are couched in mandatory terms and section 45(2) of the Act provided that termination of employment is unfair if the employer fails to prove *that the employment was terminated in accordance with fair procedure.*

Having failed to comply with the prescribed provisions of fair procedure the termination of the Claimant's employment was unfair and I find and hold accordingly.

Valid Reason for Termination

The reasons for termination as set out in the Claimant's letter of termination were not presented to him to respond to and therefore the validity thereof were not tested. In any event all the reasons are vague and couched in general terms that cannot pass the test of validity. I find that there were no valid reasons for termination of the Claimant's employment.

Whether the termination was actuated by bad Blood between the Claimant and CEO

The Claimant cited several grounds for his belief that the termination of his employment was actuated by bad blood between him and the Respondent's then CEO Mr. Barasa Chrispinus. He adduced proof that the CEO was upset because he declined the CEO's loan application. He also produced several reports he prepared connecting the CEO to fraudulent financial activities at the SACCO.

It is instructive that the Minutes of the Respondent's Board consistently show that the Board recommended that the Claimant be subjected to some form of hearing which the CEO did not comply with.

In the minutes of the Executive Board meeting held on 29th May 2011 it is stated as follows under the CEO's report:

On Mr. Lorencio Wabwile, it was reported he had shown incompetence in all departments he had worked. The CEO recommended that action be taken against him.

Having received the report members resolved as follows:

1....

2...

3. That Mr. Lorencio Wabwile should be asked to explain his performance. If not he should be terminated.

There are no minutes where the CEO reported that he had asked the Claimant to explain his performance as resolved in the meeting.

In the minutes of the meeting of the Executive Committee held on 16th June 2011 it is recorded that the CEO reported as follows:

On the following who were out on suspension he had the following:

1. Mr. Lorencio Wabwile

- 1. He does not take his duties seriously*
- 2. He discusses negatively about the SACCO to members and non-members.*
- 3. He seems not to understand his duties.*
- 4. He does not take lawful instructions from his seniors.*
- 5. He has been warned severally.*

The C.E.O recommended that his services be terminated forthwith.

Neither the record nor the evidence in court refer to any time when the Claimant was on suspension. The minutes that were produced are incomplete as the page where resolution was recorded was not included in the copy filed.

In the minutes of the Board meeting held on 28th June 2011 the minutes state as follows:

The Chairman reported that he had written to the following staff members to appear before the board to answer charges on their performance of duties.

1. Ms Dorcas Atola

2. Ms M Mbusa

3. Mr Geoffrey Siende

He however reported that he had not written to Mr. Lorenzo Wabwire. Since he was still on leave, it was agreed that he resumes duties when the leave ends. That the Chairman would invite him to meet the board during the next meeting on 9/7/2011.

Again there is no record of the Claimant having been invited to meet the Board on 9th July as resolved.

In the minutes of the meeting of the Finance and Administration Committee held on 9th December 2011, it is recorded that the CEO reported as follows with respect to the Claimant:

LAWRENCIAL

1. He doesn't present the following report as required.

- daily reports.
- weekly reports.
- monthly reports.

2. He is an underperformer.

The C.E.O reported that he has been transferred from accounts section to stores.

Resolution

The Committee resolved that the cases of Noel and Lawrence are chronic. They will be **forwarded to the Board for disciplinary action** to take place.

There is no evidence that the Claimant was ever transferred to the stores.

The minutes of the Board meeting held on 17th December 2011 state as follows:

- It was noted with concern that the employee's performance as Loans Officer and Marketing Officer has been wanting since his employment and has been a liability. He repeatedly failed to discharge his duties as assigned to him by the CEO.
- That he is incompetent and unproductive in sections assigned .
- That he shows serious lack of knowledge in the society operations as the Marketing Officer thus rendering the department ineffective.

Resolution

Given that the society has not been getting its value for money and in consideration that the role of the marketing could not be underestimated in the current world it was resolved:

- that the society terminates Mr. Lawrence Wabwire's services w.e.f 17/12/2011.
- that the society pays him three months salary in lieu of notice as stipulated in the Bungoma Teachers SACCO Staff Policy.
- that the terminal dues be prepared less any liabilities used to the society.

The foregoing reflect that the CEO did not always comply with resolutions of the Board or its committees with respect to the Claimant and that he sometimes made reports on the Claimant that were materially inaccurate. There was further no denial that the Claimant's lawyer was evicted from the Respondent's premises for reasons that he took up the claimant's case.

The foregoing also lend credence to the Claimant's evidence that there was bad blood between him and the CEO and that it is possible that on the date he was handed his letter of termination he was locked up

in the toilet from 8am to 5pm, a fact that the Respondent did not deny as RW1 only stated that he did not know if the Claimant was locked in the toilet and he was not present when the Claimant was issued with the letter of termination.

I therefore find that there was bad blood between the Claimant and his CEO and that he was locked up in the toilet unlawfully on 19th December, 2011.

Remedies

The Claimant prayed for the following:

1. Pay in lieu of notice

As pointed out by the Respondent and supported by the evidence on record the Claimant was paid 3 months' salary in lieu of notice at Kshs. 90,000 based on his basic salary. According to the Claimant's payslip for August 2011 attached to the Claim his gross salary upon which the pay in lieu of notice should have been based was Kshs. 42,500. (Refer to section 36 and 49(1) of the Act) He was therefore entitled to pay in lieu of notice in the sum of Kshs.127,500 which I award him, less Shs.90,000 he received.

2. 30 days pending leave

The Claimant prayed for 30 days pending annual leave for 2011. The Respondent submits that the Claimant was on leave as per documents attached to batch 2 of his documents at page 20(a) and 20(b) which shows he was on leave for 2 months from 5th May to 28th June 20011.

According to both section 10(3)(a)(i) and section 74(1)(f) of the Act, an employer is required to keep and to produce in any proceedings

(a) any terms and conditions relating to any of the following—

(i) entitlement to annual leave, including public holidays, and

*holiday pay **(the particulars given being sufficient to enable the***

employee's entitlement, including any entitlement to accrued

holiday pay on the termination of employment, to be precisely

***calculated**);*

The Respondent did not produce any records to prove that the leave taken by the Claimant was all the leave that was due to him at the time of termination of his employment. As provided in section 10(7)

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

The Respondent having failed to produce records or to discharge its burden of disproving the allegations of the Claimant, I award the Claimant 30 days annual leave at Kshs.30,000.00.

3. December 2011 salary

As pointed out by the Respondent the Claimant did not pray for December salary and among documents attached to his Claim is a tabulation of his terminal benefits which indicates that he was paid December 2011 salary.

The prayer is therefore dismissed.

4. Out of Station Transport allowance

This was not pleaded and no evidence was adduced to prove that the Claimant was entitled to the same. The prayer is therefore dismissed.

5. Medical Allowance

As submitted by the Respondent and reflected in the Claimant's payslip attached to the Claim the Claimant was paid a medical allowance together with salary and did not pray for the same. Besides, no evidence was adduced in support of the Claim. The prayer is dismissed.

6. Refund of SACCO Shares

The Claimant states that the calculation of his terminal benefits did not reflect the proper position as a sum of Kshs. 338,740 was recovered from his terminal dues instead of Kshs. 86,462 reflected in the documents filed by the Respondent on 9th September 2016. I have perused the Claimant's share statement of accounts and transaction details filed therewith and agree with him. His total shares together with shares transfer is reflected as Kshs.159, 550. It is not clear how the figure of Kshs. 338,740 recovered from the Claimant's terminal benefits was arrived at. The least the Respondent would have done is to produce a statement reflecting dates when the loan was taken and a history of repayments reflecting balances every month.

As stated by the Claimant in his final written submissions, his total loan liability was Kshs.86,462 which is the figure that should have been recovered from his terminal dues. RW1 only stated that the Respondent netted off FOSA and normal loans from the Claimant's terminal benefits without stating how and when the loans were acquired. There is also no explanation of how the Claimant's loan was cleared on 7th March 2012 when he left employment on 19th December 2011. The terminal dues letter is dated 23rd January 2012, prior to the said adjustments. In the absence of any proof of the amount recovered from the Claimant's terminal dues, I hold that the Respondent has failed to prove the same. I therefore award him Shs.252,278 erroneously deducted from his terminal benefits.

I further award the Claimant the net share balance of Kshs. 3,088.00. Since this is a share balance that should have been earning the Claimant interest, the same will be paid with interest at court rates from 17th December 2011 being the date of his letter of termination.

7. Severance Pay

This is payable only where an employee has been declared redundant. The Claimant having been terminated and not declared redundant is not entitled to the same. The prayer is dismissed.

8. NSSF

Non remittances of NSSF as by law can only be recovered by the National Social Security Fund itself to whom the payment is due. The Claimant should therefore follow up the issue with NSSF as he would not be entitled to the refund.

9. Damages /Compensation

The Claimant prayed for 12 months salary as compensation for unfair termination. The Respondent submits that since the Claimant had worked for only a short period of less than 2 years he should be awarded only one month. The Respondent has referred the court to the case of **Raphael Muchunu Mwangi v DHL Excel Supply Chain (K) Limited** in which the court awarded the Claimant one month's salary in damages. The Respondent further referred the Court to the case of **Fidelis Mwendwa v BOG Macknon-Road Secondary School** in which the Claimant was awarded damages equivalent to 3

months' salary.

I have looked at the circumstances of this case which show that the Claimant was not only terminated without a hearing but that he was subjected to differential treatment by the Respondent as other employees were given a hearing. I also take into account the fact the Claimant was humiliated by being locked up in the toilet allegedly to stop him from presenting a petition against the management of the Respondent to the Minister, and the obviously bad blood between him and the Respondent's CEO. For these reasons it is my opinion that it would be fair to grant the Claimant maximum compensation of 12 months gross salary which I award him in the sum of Kshs.510,000.

The Claimant further prayed for general/exemplary damages for detention in the toilet for 10 hours inhaling ammonium gas and the psychological torture he went through. He prayed for Kshs. 12 million and relied on the case of **Koigi Wamwere v State**. I have considered all circumstances of this case and award the Claimant the sum of Kshs.1,000,000 as general damages for the unlawful detention.

10. Costs

The Claimant was not represented at the hearing of this suit although the pleadings were drawn and filed by an advocate. He has prayed for costs and interest. For obvious reasons he cannot be awarded costs on the scales for advocates. He however incurred costs in filing and service of documents as well as for preparation and commissioning of documents. I therefore award him a global figure of Kshs. 50,000.00 to cover all his expenses.

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

MAUREEN ONYANGO

JUDGE