



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 594 OF 2015**

**NAPHTALI WARAMBO OLUGA.....CLAIMANT**

**VERSUS**

**POSTMAIL SACCO SOCIETY LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant's claim brought by a Memorandum of Claim dated 14<sup>th</sup> April 2015 and filed in court on 15<sup>th</sup> April 2015, is for unlawful and unfair dismissal. The Respondent's defence is contained in a Response dated 1<sup>st</sup> August 2015 and filed in court on 4<sup>th</sup> August 2015.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called its Manager, Simon Alex Gatua. Only the Claimant filed written submissions.

**The Claimant's Case**

3. The Claimant was employed by the Respondent as an Accounts Assistant in October 2008. He was deployed as a Loans Officer in the Loans Department. In December 2011, he was transferred to the Accounts Department as an Accounts Clerk.

4. In January 2012, the Claimant resumed duty from annual leave and found that his desk and computer had been allocated to other staff members. He claims that thereafter, he was subjected to discrimination and false accusations. On 11<sup>th</sup> November 2014, the Claimant applied for 15 days' study leave but was only granted 6 days, from 27<sup>th</sup> November 2014. He reported back to work on 5<sup>th</sup> December 2014 and worked until 4.30 pm when he was issued with a dismissal letter dated 28<sup>th</sup> November 2014.

5. The Claimant denies the allegations of gross misconduct contained in the dismissal letter. He adds that earlier on 26<sup>th</sup> November 2014, the respondent had declined his application to withdraw from the Society's membership.

6. The Claimant further states that his dismissal did not comply with the procedural requirements stipulated under Section 41 of the Employment Act, 2007. He now claims the following:

a) 12 months' salary in compensation.....Kshs. 475,500

b) Service pay @ 15 days per year.....156,900

c) Punitive and aggravated damages

d) Certificate of service

e) A fine of Kshs. 100,000 against the Respondent for failure to comply with the mandatory provisions of Section 51(3) of the Employment Act, 2007

f) Costs plus interest

### **The Respondent's Case**

7. In its Response to the Memorandum of Claim dated 1<sup>st</sup> August 2015 and filed in court on 4<sup>th</sup> August 2015, the Respondent admits having employed the Claimant as an Accounts Assistant with effect from 21<sup>st</sup> October 2008 and later as an Accounts Clerk from 13<sup>th</sup> December 2011.

8. The Respondent states that the Claimant's employment was terminated on 5<sup>th</sup> December 2014, lawfully for valid reasons and in accordance with due procedure. He was paid one month's salary in lieu of notice. The Respondent adds that prior to the termination, the Claimant had been issued with several verbal and written warnings, which he had ignored.

### **Findings and Determination**

9. There are two issues for determination in this case:

a) Whether the termination of the Claimant's employment was lawful and fair;

b) Whether the Claimant is entitled to the remedies sought.

### **The Termination**

10. The Claimant's employment was terminated by letter dated 28<sup>th</sup> November 2014, stating as follows:

#### **"RE: DISMISSAL FROM SERVICE**

*In our letter of 22<sup>nd</sup> July 2014, you were given a last warning over your official misconduct, it is regrettably noted that you did not heed to our concern.*

*It is noted with regret that you have not reformed as expected since the office continues to note the following:*

- *Habitual late coming especially so in the afternoons. Most often you report from 3 pm.*
- *Attending to personal businesses at the expense of official duties especially whenever the manager is out of the office.*

*You may recall the following among others:*

*- that on 17/10/2014 you reported at 9.10 am and disappeared after 12.30 hours and never came back.*

*- On 21<sup>st</sup> October 2014, you vacated the office at 11.30 am and never came back.*

- *Disrespect to your seniors besides your workmates.*
- *On 23<sup>rd</sup> September 2014, you deliberately told a member to demand her share refund even after Erastus had explained the position. You incited her to wait for the manager to be sorted out the way he does to others. This provoked your colleagues who shouted you down over your negativity*

towards the Sacco. The member was wise enough and left without a fuss. Your action was awkwardly negative towards the Sacco.

- Some members including one Mr. Peter Mwanjala have confided to the office that you have asked them to withdraw their membership “since the Sacco” is collapsing. Those who have heeded to your advice are said to be grouping to hire lawyers so as to demand their deposits as a way of crippling the Society’s financial obligations. Whereas some have ignored you, others have actually withdrawn and are really pressing for their refunds. On 25/11/2014, in our Accounts office you showed Mr. Mwanjala your withdrawal letter and again told him the Sacco is collapsing. Your intention is to ensure that the Sacco collapses to satisfy your selfish desire.

In the circumstances the management has approved your dismissal from service of the Sacco with effect from 1<sup>st</sup> December 2014 on account of negligence of duty and dishonesty occasioning loss of trust in you. You will be paid one month’s salary in lieu of notice.

Kindly surrender all official items in your possession to the manager.

Issued in duplicate copy to be noted and returned upon service of this letter.

(Signed)

**(Obrien O. Weluji)**

National Chairman”

11. This letter accuses the Claimant of a litany of administrative charges, ranging from unauthorized absence from the office to inciting the Respondent’s members to withdraw their membership. It is however evident that none of these charges were ever put to the Claimant at the shop floor. Indeed, the Respondent’s Manager, Simon Alex Gatua told the Court that the Claimant was not invited to the Board meeting held in November 2014, at which the Claimant’s case was discussed and a decision taken to terminate his employment.

12. It follows therefore that the accusations leveled against the Claimant, which led to the termination of his employment were untested and unproved. The result is that the Respondent failed to establish a valid reason for terminating the Claimant’s employment as required under Section 43 of the Employment Act, 2007. Additionally, the Respondent failed the procedural fairness test set out under Section 41 of the Act.

### **Remedies**

13. Pursuant to these findings, I award the Claimant six (6) months’ salary in compensation. In making this award, I have taken into account the Claimant’s length of service as well as the conduct of the parties prior to the termination.

14. No basis was laid for the claims for service pay and punitive and aggravated damages which therefore fail and are dismissed.

15. Finally, I enter judgment in favour of the Claimant in the sum of Kshs. 235,530 being, 6 months’ salary in compensation.

16. This amount will attract interest at court rates from the date of judgment until payment in full.

17. The Claimant is also entitled to a certificate of service and costs of the case.

18. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17<sup>TH</sup> DAY OF NOVEMBER 2017**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Kamotho for the Claimant

Mr. Andolo for the Respondent