



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RALARIONS COURT
AT MOMBASA

CAUSE NO. 909 OF 2015(consolidated with 910, 912,and 913)

- 1. TATU ALI MOHAMMED.....1ST CLAIMANT**
- 2. HARUN MUNGA MADEMU.....2ND CLAIMANT**
- 3. ANDERSON CHESHENGA NYALE.....3RD CLAIMANT**
- 4. JACOB KAMBU MTSONGA.....4TH CLAIMANT**

VERSUS

LAMU TEACHERS SACCO SOCIETY LTD.....RESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimants were employed by the respondent from different dates and different positions but they were all terminated summarily on 28/7/2015 for incompetence, non-performance and misconduct. They brought separate suits in 2015 contended that the said termination was unfair and praying for payments of salary in lieu of notice and compensation for unfair termination of their contract of service.
2. The respondent denied the alleged unfair termination and averred that the termination was grounded on valid reasons. In addition the respondent filed counterclaim against each claimant praying for payment of loans advanced to them during their employment relationship with her.
3. The four suits were on 8/5/2017 consolidated under this file by the consent of all the parties. The issues for determination herein revolve around the fairness of otherwise of the termination of the claimant's services and merits of the reliefs sought by the suit and the counterclaim.

CLAIMANT'S CASE

4. Anderson Chitsenga Nyale (3rd claimant) testified as CW1. He testified that he was employed by the respondent on 1/12/2006 as branch manager before being promoted to the General manager in 2007 and Chief Executive officer (CEO) in 2010. His salary was ksh.68378 per month. On 24/6/2015, he was sent on compulsory leave until 28/7/2015 when he received a letter dated the same date, terminating his services effective from 1/8/2015. The reason cited for the termination was incompetence and poor performance which he described as untrue. He further denied ever receiving any warning letter or fair hearing before the termination or even prior notice of the intended termination. He maintained that his performance was excellent that is why he was

- promoted all the way to the top position. He further contended that no performance targets had been agreed between him and the employer which could be cited as the basis for the alleged underperformance. As regards the procedure followed before the termination, he contended that he was not accorded any hearing before the termination as he was on a compulsory leave.
5. He prayed for ksh.888,914 being salary in lieu of notice plus compensation for unfair termination of his contract of service. He maintained that the reason for his termination was because he came from Mijikenda tribe and the respondent's supervisory committee had resolved to reduce Mijikenda employees from the Sacco. He admitted that he had a loan from the respondent but stated that it should be recovered from his shares and the shares of his guarantors as provided under Section 81(g) of the respondent's By-laws. According to him his shares and those of his guarantors exceeded his outstanding loan. He denied ever receiving any letter from the respondent demanding his loan repayment before the counterclaim was filed. He prayed for the counterclaim to be dismissed.
 6. On cross examination, he admitted that he was an obligation to repay the loan to the respondent but he denied ever writing to the respondent to say that he was unable to repay the loan. He admitted that his shares at the Saco were ksh.256300. He further admitted that he signed an authority for recovery of the Sacco loan from his salary, terminal dues and shares. He clarified that the loan could also be recovered from the guarantors of the defaulted repayment for 3 months.
 7. He denied ever approving loans for himself and the other claimants and contended that loans for senior staff are approved by the management committee after consideration by the Credit Committee. He admitted receipt of Ksh.81306 as his terminal dues after termination but clarified that this claim is for compensation for unfair termination and salary in lieu of notice. In response to the mismanagement complained of by the SASRAS vide the letter dated 18/11/2015, CW1 observed that it was done after he had left the respondent. He denied having any relationship with the other claimants. According to him he denied being accused of mismanagement of loans or approving any loans.
 8. Harun Munga Mademu (2nd claimant) testified as Cw2. He testified that he joined the respondent on 5/12/2008 as an II officer thereafter promoted to the IT Administrator and IT Manager. His salary was ksh.45962 per month. He worked until he was terminated on 28/7/2015 without any prior notice, warning or hearing. He therefore prayed for compensation for unfair termination and salary in lieu of notice totaling to ksh.640,403.90. He denied any theft of respondent's money from the Mpesa Account. He contended that although he was in charge of Mpesa, the transactions were done by the letters. He therefore blames the respondents for not according him a hearing on the alleged Mpesa transactions.
 9. Tatu Ali Mohammed (1st claimant) testified as CW3. He joined the respondent on 3/1/2005 as an accountant's clerk and thereafter promoted to Accountant and Operations Manager. His salary was ksh.61,897 per month. He was terminated on 28/7/2015 for alleged misappropriation of funds and gross misconduct. He however denied the alleged misconduct and contended that has never given any hearing before the termination. He therefore prayed for Ksh.862432.50 made up of salary in lieu of notice and compensation for unfair termination. He however admitted that he was in charge of the Sacco accounts and the acting CEO from December 2015. He denied ever awarding himself huge loans while acting as the CEO. He adopted the evidence of CW1 to answer the counterclaim.
 10. Jacob Kambu Mtsonga (4th claimants) testified as CW4. He was employed by the claimant on 4/1/2009 as a Book Keeper and later promoted to Accountant earning ksh.56580 per month. He worked without any disciplinary issue until he was terminated on 28/7/2015 for alleged gross misconduct and fraudulent practices. He denied the alleged misconduct and faulted the respondent for terminating his services without prior notice, hearing or warning. He prayed for ksh.735540 being salary in lieu of notice plus compensation for unfair termination. He adopted the evidence by CW1 to the counterclaim. He admitted that he was paid ksh.60692 as his terminal dues. He denied ever approving loans for the other claimant and contended that the loans were approved by the committee.

DEFENCE CASE

11. Mr. Michael Kirui testified as the only defence witness (RW1). He is the CEO of the respondent

since 1/5/2015. He terminated the claimant's employment on 28/7/2015 for various statements. CW1 was terminated for incompetence as branch manager with Branch where he has been posted in December 2014 on demotion from CEO. The demotion was on ground of underperformance and CW1 never contested it. RW1 accused the claimants of taking loans without approval by the management committee and using guarantors who were not eligible to guarantee loans. That in 2014 SASRA did an inspection of the affairs of the respondent and prepared a report dated 12/6/2014 which implicated the claimants. RW1 and the respondent board did further investigations discovered that the claimants had been involved in malpractices. CW2 was found to have manipulated the system and colluded with the other claimants to steal money from the respondent. He admitted that the claimants were never accorded hearing before the termination contending that the reasons for the termination were valid.

12. He testified that all the claimants borrowed loans from the respondent and defaulted. He prayed for the counterclaim to be allowed contending that the Sacco never recovered the loans from the guarantors because they were the guarantors for each other. He admitted that he never dismissed the claimants but contended that he wrote letter while working as the respondent's internal Auditor. He did not prove by set targets poor performance by the CW1. He admitted that CW1 rose from branch manager to CEO of the respondent and the Sacco never went down. He admitted that all loans were approved by the Credit Committee. He further admitted that the letter by SASRA dated 18/11/2015 raised the issue of unexplained balance of 98 million as at 30/9/2015 after the claimants had been terminated. The said letter also raised issue with loan loss of ksh.39.9 million. He maintained that the claimants gave themselves loans irregularly. He admitted that Clause 81(e) of the respondents Bylaws provided that loans be recovered from guarantors immediately.

ANALYSIS AND DETERMINATION

13. There is no dispute that the claimants were employed by the respondent and that they were terminated by letters dated 28/7/2015. There is also no dispute that during the tenure of office, the claimants were advanced loans which remained unsettled at the time of their termination. There is further no dispute that after the termination the claimants were paid all their terminal dues that accrued from their respective contracts of employment. The issues for determination are:

- a. Whether the termination of the claimant's contract of service was unfair.
- b. Whether the claimants are entitled to the reliefs sought.
- c. Whether the respondent is entitled to the reliefs sought by the counterclaim.

ELRCC 909 of 2015

Unfair summary dismissal

1. Under Section 45(2) of the Employment Act, termination of employment contract by the employer is unfair if he fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case the reason for the termination was misconduct and under performance and the procedure followed was immediate termination with payment of salary in lieu of notice.

Reasons for the termination

2. The reasons cited for the termination of the claimants in the termination letters dated 28.7.2015 were gross misconduct and underperformance. The misconduct included fraudulent practices, manipulation of the System, colluding to give themselves loans contrary to the respondent's By laws email and mismanaging the Mpesa Account all of which led to financial loss to the respondent. The respondent did her investigation especially through RW1 and made the opinion that the claimants were involved in fraudulent conduct and or performed their duties below the expected standard and as a result of which she lost funds. Accordingly she terminated their services.

3. Under section 44(4) (c) (g) of the Act, the employer is entitled to summarily dismiss an employee who improperly performs his or her work and/or who commits or on reasonable and sufficient grounds is suspected to have committed a criminal offence against or to the substantial detriment to the employer or the employer's property. I have carefully considered the testimony by RW1 and the documentary evidence produced and formed the opinion that the claimants being the senior managers of the respondent conducted themselves and performed their duties in a manner that entitled the respondent to lose trust with them. The foregoing opinion is corroborated by the Onsite Inspection Report by the Sacco Societies Regulatory Authority (SASRA) dated 12.6.2014 which found the claimants to have improperly performed their managerial duties, defaulted in their loans and also participated or condoned the set loan approval regulations and policy. In 2015 RW1 as the new Internal Auditor discovered malpractices and system manipulation and financial misreporting which were done in collusion by the claimants herein to the detriment of their employer.

4. Under section 45 (2) (a) & (b) of the Act the said offences were valid and fair and entitled the respondent to summarily dismiss the claimant under section 44 of the Act. They were valid because any reasonable employer would not continue to employ any employee who improperly performs his work and who commits fraudulent acts and omissions against him or substantial detriment to him or his property. The said reasons are fair because they relate to the claimants' conduct; capability and compatibility of the claimants; and the operational requirements of the respondent. The employment relationship between the parties herein had irretrievably broken down and the employer had lost trust that the claimants would perform their contractual obligations as her managers as required.

Procedure followed before dismissal

Section 41 of the Act provides that before terminating the services of his employee on ground of misconduct, poor performance or physical incapacity, he shall first explain to the employee in a language he understands and in the presence of a fellow employee or shop floor union representative of his choice, the reasons for the intended termination and thereafter invite the employee and his chosen companion to air their representation for consideration before the termination is decided.

6. In this case the reason for the summary dismissal was misconduct and poor performance but as admitted by RW1 under oath, the claimants were never invited to any oral hearing in the company of a fellow employee or shop floor union representative of their choice to defend themselves before the termination on 28.7.2015. The respondent has accordingly failed to prove on a balance of probability that the dismissal of the claimants was done after following a fair procedure and consequently I find and hold that the dismissal was unfair within the meaning of section 45 of the Act.

7. Although the termination letter offered to pay the claimants salary in lieu of notice, that did not change the termination from disciplinary action to a voluntary termination under the contract and section 36 of the Act. I have held severally that, whereas parties to a contract of service can end their relationship at any time upon service of the required notice, the circumstances change drastically and the employer is required to accord fair hearing under section 41 of the Act, the minute that the employer cites misconduct, poor performance or physical incapacity on the part of the employee, as the reason for which he intends to end the relationship. And in my view, regardless of the gravity of the offence committed, an employee is entitled, under Article 41 of the constitution of Kenya and the statute law, to a fair hearing and all other legal and contractual rights at the time separation. Failure by the employer to uphold such safeguard like in this case renders termination of the contract of service unfair.

Reliefs sought.

8. In view of the foregoing finding that the summary dismissal of the claimants was procedurally unfair, I make a declaration that it amounted to unfair termination as prayed. Under section 49 of the Act, the claimants are entitled to salary in lieu of notice plus compensation for unfair termination. I award each claimant one month salary in lieu of notice plus twelve months salary as compensation for the unfair termination. I have awarded the maximum compensation because the claimants served the respondent for many years.

First claimant (Tatu Ali Muhamed)

Noticekshs. 61,897

Compensation.....kshs.742,764

Kshs.804,661

Second claimant (Harun Munga Mademu)

Notice.....kshs. 45,962

Compensation.....kshs. 551,544

Kshs.597,506

Third claimant (Anderson Nyale)

Noticekshs. 68,378

Compensation.....kshs.820,536

Kshs.888,914

Fourth claimant (Jacob kambu Mtsonga)

Notice.....kshs. 56,580

Compensation.....kshs. 678,960

Kshs. 735,540

9. The first and second claimants' claim for leave is dismissed because they admitted that they were paid all their terminal dues after the termination.

Counter claim

10. The respondent prayed for judgment against the claimants in respect of loans advanced to them during their term of office. The claimants did not deny that they had been advanced the said loans but only questioned the jurisdiction of this court over the Sacco loan dispute. In addition they contended that the respondent should recover the loans from their share and the shares of their guarantors as provided under her By-laws.

11. I have carefully considered the evidence presented by the two sides and found that the loans to the claimants are not disputed. It is also not in dispute that the loans were advanced to the by the employer and that they agreed to have the loan recovered from their salary, terminal benefits and shares. The said loan are reflected in the claimants pay slips produced by both sides and the schedule of staff loans signed on 3.11.2016 and which was produced as exhibit and not contested by the claimants. I therefore enter judgment for the respondent in the sum of kshs 1,536,133.21, kshs. 656838.14, kshs. 1,238,708.10 and kshs.911,711.82 against the first, second, third and fourth claimant respectively. The said awards to the respondent shall be paid less shares held by each claimant in the Sacco.

Disposition

12. For the reasons that the claimants were unfairly terminated, I enter judgment for them as indicated in paragraph 8 above. They will also be issued with a Certificate of Service as required by section 51 of the

Act. In addition for the reason that they have defaulted in their respective loans, I enter judgment against them severally as indicated in paragraph 9 herein above.

Dated and signed at Malindi this 10th November 2015

O. N. Makau

Judge

Delivered at Malindi this 10th November 2017

O. N. Makau

Judge