



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 152 OF 2014**

**SIMON MAINA MUTHEE.....CLAIMANT**

**VERSUS**

**LAIKIPIA TEACHERS SACCO SOCIETY LTD....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday, 24<sup>th</sup> June, 2016)**

**JUDGMENT**

The claimant filed the memorandum of claim on 06.11.2014 through Olando Udoto & Company Advocates.

The claimant prayed for judgment against the respondent for:

- a. Reinstatement to employment.
- b. Payment of outstanding dues.
- c. Costs of the cause.
- d. To be issued with a certificate of service.
- e. Any other just and equitable relief the court may grant.

The respondent filed the statement of defence on 20.01.2015 through Mwangi Kariuki and Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

The claimant applied for a job with the respondent and was invited for the interview on 22.08.2005. He was telephoned and notified that he had been successful and he reported on duty on 01.09.2005. He rose through the ranks of office supervisor to internal auditor and later he was promoted to the position of Senior Finance Officer. He worked until July 2010 when the respondent reported a complaint to the police against the claimant. The claimant was arrested and was charged with four offences involving theft by servant contrary to section 281 of the Penal Code; and fraudulent false accounting contrary to section 330(b) of the Penal Code. The record in the Criminal Case No. 1483 of 2010 at Nanyuki shows that the prosecution's witnesses failed to attend court including on 21.05.2012 whereas the investigating officer had notified them to attend court but they had failed to do so. On 16.10.2012 the trial court found that the complainants had lost interest in the case because the prosecution had failed to avail the witnesses and the charges were dismissed under section 202 of the Criminal Procedure Code.

The claimant had written the letter of 05.10.2010 addressed to the respondent inquiring about the fate of his employment. He had stated in that letter that on 09.08.2010 the respondent's chairman had informed the claimant outside the Nanyuki Law Courts that it would be difficult for the committee members to allow the claimant to continue in employment. Further the general manager had directed the staff not to allow the claimant into the office. Micro-finance clients had also been notified that the claimant was no

longer the respondent's employee. The claimant's advocates addressed to the respondent the letter dated 8<sup>th</sup> November, 2012 demanding reinstatement and all amount owing to be paid failing, a suit would be filed in court. The claimant testified that he had written an earlier letter of 16.08.2010 seeking information from the respondent about his fate but a copy was not filed or produced in the present proceedings.

During the hearing, the claimant testified that he admitted to have participated in the fraud against the respondent. The claimant testified that the fraud had involved tampering with the data base so that loans were paid out without necessary approvals. The claimant further testified that he had not admitted that he had taken part of the money, the proceeds of the fraud in issue. The claimant testified that after arrest, the respondent's chairman advised him not to report at work. The claimant prayed for half salary withheld between the date of acquittal and the date of the arrest. He earned Kshs. 26, 800.00 per month at the time of arrest.

Respondent witness No. 1 (RW) was one of the respondent's client and testified how the claimant had aided her to irregularly get a loan by way of alleged set off against her shares with the respondent and through the claimant's schemes and designs she ended up with a loan of Kshs.70,000.00. RW1 then made a report to the police station about the fraud on her account with the respondent.

The court has considered the pleadings, the submissions and all the evidence on record.

The **1<sup>st</sup> issue** for determination is whether the claimant was terminated from employment. The evidence is clear. The claimant was arrested and arraigned in court. Shortly thereafter, the respondent's chairman advised the claimant that he would not be allowed back at work. Following the criminal complaint against the claimant and the subsequent prosecution, the court finds that the claimant had no reason to doubt that he had lost his job. The chairman verified that position and the claimant had no reason to imagine that he continued to be in employment. By reason of the arrest and then prosecution, the court returns that the claimant's contract of employment was thereby constructively terminated.

The **2<sup>nd</sup> issue** is whether the constructive termination was unfair. The claimant testified in court that indeed he participated in the fraud. RW1 then confirmed that position. There was no reason for the respondent to retain the claimant in employment as the claimant has confirmed to this court that he was involved in the fraud. The court returns that the constructive termination was not unfair.

The **3<sup>rd</sup> and final issue** for determination is whether the claimant is entitled to the remedies as prayed for. The court returns that as the termination has been found not to have been unfair, the claimant cannot be entitled to reinstatement. He is equally not entitled to outstanding dues as the same being in the nature of special damages, were not quantified in pleadings as they were also not established or justified by way of evidence. The court returns that the claimant's suit will therefore collapse and get dismissed as the claims and prayers were unfounded.

In conclusion judgment is hereby entered for the respondent against the claimant for the dismissal of the memorandum of claim with costs.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 24<sup>th</sup> June, 2016**.

**BYRAM ONGAYA**

**JUDGE**