



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.229 OF 2015

(Before D. K. N. Marete)

JOHN KEBASO OMAYO & 3 OTHERS.....CLAIMANTS

VERSUS

NYAMIRA TEA FARMERS SACCO LTD.....RESPONDENT

JUDGMENT

This matter was originated by way of a Claimants' Statement Memorandum of Claim dated 7th August, 2015. The issue in dispute is therein cited as;

“Wrongful/unfair termination from employment of;

1. *John Kebaso Omayo*
2. *Victoria Nyaboke Oigo*
3. *Charles Ongwenyi Momanyi*
4. *Jaspher Ageta Nyachiro*

The respondent in her Respondent's Reply/Defence to the claimant Statement of Claim denies the claim and prays that the same be dismissed with costs to herself.

The claimants' case is that the parties have a standing Collective Bargaining Agreement (CBA) signed on 9th December, 2013 and are currently before a conciliator on a dispute on this Collective Bargaining Agreement (CBA). It is the claimant's further case that the grievants are covered by the respondents Code of Regulations in force. Their records are as follows;

- a. *John Kebaso Omayo: The claimant was employed on 31/10/2007 as a clerk*

and confirmed to permanent employment on 30/04/2008. He worked in several branches. His last work station was at Sanganyi Branch. On 18/02/2014, the claimant was suspended allegedly for debiting members account below the minimum balance without authority and sharing password with other cashiers. The suspension was extended on three occasions being 27/02/2014, 07/03/2014 and 20/03/2014. The claimant was never given itemized details of the allegation as required by law. During the meeting with the executive board, he was only questioned on union matters and the issues of raised in the termination letter were never brought to his attention. The claimant was terminated on 16/04/2014 allegedly for defrauding the Sacco Kes. 3,777,350/= either personally or in collusion with other staff. (Annexed and marked “BF3:

A-F' are copies of employment record).

- b. Victoria Nyaboke Oigo: The claimant was employed on 27/01/2011 as a clerk and confirmed to permanent employment. He worked in several branches. His last work station was at Head Office- FOSA. On 07/04/2014, the Claimant was suspended allegedly for manipulating accounts leading loss of SACCO funds. The suspension was extended on 08/09/2014. The claimant was never given itemized details of the allegation as required by law. During the meeting with the executive board, he was only questioned on union matters and the issues of raised in the termination letter were never brought to his attention. The claimant was terminated on 22/09/2014 allegedly for defrauding the Sacco Kes. 1,333,112/= either personally or in collusion with other staff. (Annexed and marked "BF4: A-D" are copies of employment record)*
- c. Charles Ongwenyi Momanyi: The claimant was employed on 29/01/2011 as an audit assistant. On 18/11/2011 he was deployed as the FOSA Supervisor. The Claimant was confirmed as audit assistant on permanent*

employment on 10/01/2012. He was promoted to the position of assistant internal auditor on 23/04/2013. The claimant was redeployed to Gesima

Office. He worked in several branches. His last work station was at Head Office- FOSA. On 04/04/2014, the Claimant was suspended allegedly for manipulating accounts leading loss of SACCO funds. The suspension was extended on 24/04/2014 and 08/04/2014. The claimant was never given details of the allegation. During the meeting with the executive board, he was only questioned on union matters and the issues of raised in the termination letter were never brought to his attention. The claimant was terminated on 22/09/2014 allegedly for defrauding the Sacco Kes. 1,608,400/= at Gesima, Marani and Nyansiongo Branches. (Annexed and marked "BF5: A-I" are copies of employment record)

- d. Jasper Ageta Nyachiro: The claimant was employed on 25/06/2001 as a clerk and confirmed to permanent employment. He worked in several branches. His last work station was at Sanyangi Office. On 18/02/2014, the claimant was suspended allegedly for underpaying and debiting member's accounts below the minimum balance without authority. The suspension was extended on on 27/02/2014, 07/03/2014, 27/03/2014 and 16/04/2014. The claimant was never given details of the allegation. During the meeting with the executive board, he was only questioned on union matters and the issues of raised in the termination letter were never brought to his attention. The claimant was terminated on 01/08/2014 allegedly for defrauding the Sacco Kes. 3,777,350/= either personally or in collusion with John Kebaso Omayo.(Annexed and marked "BF6: A-G" are copies of employment record)*

The claimants' further case is that this dispute arises out of the election of the grievants as shop stewards on 30th September, 2013 and a letter of accreditation dated 14th November, 2013. This event displeased the respondent as they have enrolled union membership contrary to the wishes of the Chief Executive Officer (CEO). The respondent has thereafter engaged in continuous harassment and intimidation of the workers as evidenced by its letter dated 15/08/2014 signed by all unionisable staff allegedly revoking union membership and the subsequent notice to the union to terminate the recognition agreement letter dated 07/10/2014. The author of the two letters is the respondent. Subsequently the employment of the claimants' was terminated as follows;

- a. Victoria Nyaboke Oigo – 22/09/2014*
- b. Charles Ongwenyi Momanyi – 22/09/2014*
- c. Jasper Ageta Nyachiro – 01/08/2014*
- d. John Kebaso Omayo – 16/04/2014*

1.14 That it is our submission that the claimants are being solely sacked because of union activities or workers representation as evidenced in the suspension letters, the letter requesting the union to do another election and the attempt to terminate the recognition agreement. The claimants are victims of oppressive management.

The claimants were involved in the recruitment of staff to join the union and subsequently elected as their representatives. The reasons advanced do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty as clearly captured under section 46 of Employment Act, 2007;

i) subsection 46 (e), an employee's seeking of office as, or acting or having acted in the capacity of, an officer of a trade union or a workers' representatives.

ii) subsection 46 (h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation.

It is the claimants' further contention that the termination was an affront to statutory obligations on substantive and procedural justice as follows;

- i. Section 43, where an employer is required to prove reason or reasons of termination. The reasons advanced in the termination/dismissal letter were never brought to the attention of the claimants before the termination and even after termination.*
- ii. Section 45, calls for validity and fairness of procedures in termination.*
- iii. Section 41, deals with procedural fairness. Where an employer alleges misconduct, poor performance or physical incapacity on the part of the employee, the employer has an obligation to explain to the employee in a language the employee understands, the reason for which the employer is considering termination. The employee is entitled to be accompanied by another employee, or shop floor union representative of his choice present during the explanation.*
- iv. Section 41 (2), an employer has an obligation to hear and consider any representations which the employee may, on grounds of misconduct or poor performance make. The claimants were never given a hearing before or after the termination as required in law and rules of natural justice.*

They pray for;

- i. The declaration that the termination/dismissal of service of the claimants was substantively and procedurally wrongful/unfair.*
- ii. The claimants are re-instated to their former position or equivalent without loss of any benefits and/or break in years of service as the claimants are young, energetic and the respondent has several branches to post them.*
- iii. The claimants be paid all the salaries/benefits lost for all the months they have been out of employment to the date of judgement.*
- iv. The claimants be compensated for annual leave days pending as herein.*
 - a. Victoria Nyaboke Oigo $50/21 \times 13,896 = \text{Kes. } 33,086/=$*
 - b. Charles Ongwenyi Momanyi $60/21 \times 21,672 = \text{Kes } 61,920/=$*
 - c. Jasphe Ageta Nyachiro $94/21 \times 35,097 = \text{Kes } 157,101/=$*
 - d. John Kebaso Omayo $55/21 \times 20,644 = \text{Kes. } 54,120/=$*
- v. The claimants be compensated for annual leave allowances as herein.*
 - a. Victoria Nyaboke Oigo $50/21 \times 13,896 = \text{Kes. } 33,086/= \times 30\% = 9926/=$*
 - b. Charles Ongwenyi Momanyi $60/21 \times 21,672 = \text{Kes } 61,920/= \times 30\% = 18,576/=$*

- c. *Jasper Ageta Nyachiro* $94/21 \times 35,097 = \text{Kes } 157,101/= \times 30\% = 47,130/=$
- d. *John Kebaso Omayo* $55/21 \times 20,644 = \text{Kes. } 54,120/= \times 30\% = 16,236/=$
- vi. *Claimants be paid twelve (12) months gross salary compensation for suffering wrongful/unfair termination/ dismissal equivalent to*
- vi. a. *Victoria Nyaboke Oigo* Kes. 166,752/=
- b. *Charles Ongwenyi Momanyi* Kes 260,064/=
- c. *Jasper Ageta Nyachiro* Kes 421,164/=
- d. *John Kebaso Omayo* Kes. 247,968/=
- vii. *The claimants be paid service pay at the rate of 15 days for every year worked.*
- viii. *Exemplary/pecuniary damages for malicious and reckless accusations of Kshs. 10,000,000/= to each of the claimants.*
- ix. *Interest on all the above.*
- x. *Cost of the suit.*
- xi. *Any other relief the court deems fit to grant.*

The respondent's case is that the claimants were dismissed because of financial impropriety on their part and that in such termination, she fully complied with the provisions of the law.

- a. *That the 1st claimant, John Kebasa Omayo, was dismissed on 16th April, 2014 on grounds of committing a fraud and that is after he has given a fair hearing and after having been given a warning letter and that the minutes of the board dated 6th March 2013, and 3rd March 2014 all confirms the reason for his dismissal. The amount that was lost through him was Kshs. 3,777,350. (Attached herewith is a bundles of documents relating to the issue and relating to the claimant marked KNM-002 (a) -(k) respectively.)*
- b. *That the 2nd claimant Victoria Nyaboke Oigo was dismissed on 22nd September 2014 on grounds of committing a fraud and that is after she has been given a fair hearing and after having been given a warning letter and that the minutes of the board dated 18th September, 2014 for her dismissal. There is even a letter in her own handwriting where she admitted that money indeed got lost through her hands and she was ready to replace the loss. The amount of money that was lost through her is Kshs. 1,331,112. (Attached herewith is a bundle of documents relating to the issue and relating to the claimant marked KNM 003 (a) – (1) respectively).*
- c. *That the 3rd claimant Charles Angwenyi Momanyi was dismissed on 22nd September, 2014 on grounds of committing a fraud and after being given a fair hearing and after having been given a warning letter and that the minutes of the board dated 18th September 2014 for his dismissal. The amount of money lost through this claimant is Kshs. 1,608,400. (Attached herewith is a bundle of documents relating to the issue and relating to the claimant marked KNM-004 (a) -(k) respectively).*
- d. *That the 3rd claimant Jasper Ageta Nyachiro was dismissed on 1st August 2014 on grounds of committing a fraud and that is after he has been given a fair hearing and after having been given a warning letter and that the minutes of the board dated 1st March 2014 and 3rd April 2014 for his dismissal. The amount of money lost through this claimant is Kshs. 985,904.61Cts. (Attached herewith is a bundle of documents relating to the issue and relating to the claimant marked KNM-005 (a) -(m) respectively).*

22. *That in view of the foregoing, the respondent vehemently denies the allegations stated in paragraphs 13,14,15,16,17,18,19,20,21, and 22 and puts the claimants to strict thereof.*

The termination of the services of the claimants by the respondent was lawful after they were found to have engaged in financial improprieties which occasioned huge financial loss to the respondent. Their services were terminated after they had been served with several warning letters and after having been given a fair hearing by the board of the respondent.

The matter came to court variously until the 7th March, 2016 when the matter was heard *inter parties*.

The issues in dispute therefore are;

1. Whether the termination of employment of the grievants by the respondent was wrongful, unfair and unlawful.
2. Whether the claimants are entitled to the relief sought?
3. Who bears the cost of this claim?

The 1st issue for determination is whether the termination of employment of the grievants by the respondent was wrongful, unfair and unlawful. The parties hold diametrically opposed positions on this one. The claimant during the hearing and their written submissions reiterates their case of termination arising out of ulterior motive other than the issue of fraud as stipulated by the respondent. The claimants further annexes various documents in support of their claim that their services were terminated due to their involvement in trade union activities and not otherwise.

The claimants' further seek to rely on the authorities of Sections 41, 43, 45 (2) (b), 45 (4) (b) of the Employment Act, 2007 and also Article 47 (1) of the Constitution of Kenya, 2010 which provide the conditionalities for unfair termination of employment and fair administrative action. This is as follows;

a. Section 41 of the Employment Act obliges an employer to accord an employee a hearing. The employee is also entitled to bring a colleague or a union member to the disciplinary hearing for support. In this case there was no disciplinary hearing convened to give an opportunity to the claimants to give an explanation to a committee as to why their employment ought not to be terminated. Failure by the employer to comply with section 41 denied the claimants an opportunity to get a fair hearing and the employer did not have an opportunity to get a fair hearing and the employer did not have an opportunity to validate the reasons for the intended termination. The claimants were not involved in any way with fraud as alleged and the allegation which is criminal in nature was never investigated and has never been investigated to date.

b. In terms of section 43 of the Employment Act the employer is obliged to prove the reason for termination. The respondent has failed to prove reasons that informed its decision to terminate the claimants from employment. The allegations of fraud which has not been proved do not sufficiently prove the reason as to why the claimant's services with the employer were terminated. The burden of prove on the reasons for termination lies with the employer. There is no valid and justifiable reason advanced for termination of the claimants. There is no evidence of fraud before the trial court. The alleged details of the fraud were not produced in court. The claimants have never been furnished with the details of the alleged fraud. The respondent's witness confirmed that all the withdrawals were in order and none of the alleged complainants raised an issue of underpayment at the time of payment. They only raised the issue later. The allegations defeats logic.

c. Section 45 (2) b of the Employment Act requires that the reasons for termination should be fair based on the conduct of the employee. In this case the claimants had worked for many years without a valid warning letter for any misconduct or poor performance. They were hardworking, disciplined and self motivated. They executed their duties diligently without supervision. The claimants are innocent of the allegations levelled against them and we submit that they are victims of witch hunt, malice and victimization. They should not be penalized for offences not known to them or committed or instigated by other staff.

d. According to section 45 (4) (b) of the Employment Act, termination of employment shall be unfair if it is established that the employer did not act in accordance with justice and equity in terminating the employment of the employee. In the present case the employer did not

act in accordance to justice and equity when it failed to accord the claimants a fair hearing in the presence of a shop floor representative and prove reasons for terminating them, therefore resulting to the termination being procedurally and substantively unfair.

e. Article 47 (1) of the constitutions read together with Section 4 of the fair administrative actions act gives every person a right to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. We submit that there was a clear violation of this basic right as relates to the claimants. They were not given prior and adequate notice of the nature and reasons for the proposed administrative action to terminate their services, a statement for the reasons for which action was to be taken, they were not provided with any documents, information, materials and evidence relied upon to terminate their services as they were not provided an opportunity to know and to cross-examine the alleged complainants. This is so because there was no substantive justification or valid reason for termination. Moreover, they were not given a chance for a hearing before termination in order to exonerate themselves from the allegations levelled against them by the respondent if any at all.

The claimants' entirely deny involvement in any fraudulent activities in the course of their employment with the respondent and submit a case of malicious accusations by the clientèle of the respondent. This, they aver and submit, was not substantiated or even proven by the complainants or respondent.

The respondent denies terminating the services of the claimants' on account of their involvement in union activities as claimed. At the hearing, she produces DW1- Kefa Nyamweya Makoya, the General Manager of the respondent who testified in reiteration of the respondent's case. It is also the respondent's submission that the grievants' were suspended from employment in writing and the write-up stated the reasons for suspension. The claimants' acknowledged the receipt of their letters of warning, suspension, interdiction and dismissal and therefore cannot deny knowledge of the reasons for termination.

The respondent further submits that the claimants' were subjected to disciplinary proceedings where they were interrogated on the issues raised in their show cause letters and not any other subject. These proceedings were recorded and do not indicate any queries on extraneous matters. They were confined to the issues under scrutiny.

The parties in their witness statements also reiterate their respective cases therefore leaving this court with no option but a determination on the basis of either fraud- as enunciated by the respondent or involvement in union activities which is the case for the claimant. This matter in my estimation tilts in favour of the respondent. The respondent has adduced overwhelming evidence in support of her case for fraudulent activities by the claimants' in their course of employment. This led to massive loss of funds, goodwill and reputation for the respondent. It badly hurt the operations of the respondent. The respondent was therefore justified in terminating employment of the claimants' in return. She left the issue of investigation and possible prosecution of the claimants' to the police, the rightful authority in dealing with cases of theft and fraud. I therefore find a case of lawful termination of the employment of the claimants' by the respondent and hold as such.

On a finding of a lawful termination of the employment of the claimants', they become dis-entitled to the relief sought. This answers the 2nd issue for determination.

I am therefore inclined to dismiss the claim with an order that each party bears its own costs of the claim. And this clears all the issues for determination.

Delivered, dated and signed this 3rd day of June 2016.

D.K.Njagi Marete

JUDGE

Appearances

Mr. Isaiah Munoru for the Union.

Mr. Onyancha instructed by Koina Onyancha & Company Advocates for the Respondent.