



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

**CAUSENO.163 OF 2014**

**DOROTHY NCHABIRA BERNARD..... CLAIMANT**

**VERSUS**

**SOLUTION SACCO SOCIETY..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 26<sup>th</sup> June, 2015)

**JUDGMENT**

The claimant filed the memorandum of claim on 10.12.2014 through Mbaabu M'Inoti & Company. The claimant prayed for judgment against the respondent for:

1. The claimant to be reinstated to her former position as FOSA Manager in the respondent's Sacco.
2. General damages for unlawful dismissal.
3. Costs of the suit.

The respondent filed the statement of defence on 9.01.2015 through Gichunge Muthuri & Company Advocates. The respondent prayed for the claimant's claim to be dismissed with costs.

The parties agreed that the suit be determined on the basis of the pleadings and the documents on record. Final submissions were filed for the parties and the respective advocates made highlights of the written submissions.

The claimant was employed by the respondent in 1993 as an accounts assistant. The claimant was promoted to the position of a FOSA manager.

By the letter dated 1.03.2014 the respondent suspended the claimant from duty for 3 months effective 4.03.2014. The reasons for the suspension were as follows:

- a. Un-fixing the amount which was fixed in a fixed deposit account which was done in spirit of promotion and the claimant having declined to put in writing the reasons for that action.
- b. Being rude to the finance and administration manager during morning assembly briefing on 26.02.2014.

The suspension letter stated that the alleged claimant's conduct constituted sufficient course for disciplinary action. The chief cashier was to take over the claimant's duties until further notice.

It was the claimant's case that the account in issue was unfixed in accordance with the prevailing policies and the transaction had been done in her absence. As for the 2<sup>nd</sup> allegation it was the claimant's case that

at the assembly the staff were engaged in a discussion about staff shares and differing opinion between herself and the manager ought not to have been interpreted as rudeness on her part.

The claimant was invited to attend the respondent's board meeting on 27.05.2014 to defend her-self against the allegations leading to her suspension. By the letter dated 29.05.2014 the respondent informed the claimant that following her appearance at the board meeting on 27.05.2014, the board had concluded as follows:

- a. Salary withheld during the period of suspension is restored.
- b. Apologies in writing as there were elements of truth on the accusations made against the claimant and it was important to show the spirit of team work in all respondent's business.
- c. The claimant to proceed on annual leave and to get deployed upon completion of the leave period.

By the letter dated 22.08.2014 the respondent deployed the claimant as the branch manager for the respondent's Maua Branch effective 26.08.2014. The letter of deployment stated that the claimant's remuneration remained the same but the duty allowance per month would be Kshs.8000.00. The claimant was dissatisfied with the deployment and wrote to the respondent's chief executive officer the letter dated 23.08.2014 as follows:

**“DEPLOYMENT**

**Your letter dated 22.08.2014 refers. I wish to inform you that I am very dissatisfied in the manner my case has been handled ever since 4<sup>th</sup> March 2014 when I was suspended for three months without any salary warning or notice. I appealed to the chairman B.O.D as per our terms & conditions of service and received no response until 24.05.2014, when I received no communication stating clearly what crimes I had committed, my salary that was withheld was released without other benefits for my job grade. Even after approving my leave I still continued receiving salary for Job group F without other benefits for that post. After completion of my leave I am deployed to a post that is two grades lower than the one I held. This translates to a demotion still with no reasons as for the action taken. I now take this opportunity to decline the appointment until given reasons for the action that includes duties that have never been possible in our branches.**

**Yours faithfully,**

**Signed**

**Dorothy N. Bernard.”**

The respondent replied by the termination letter dated 11.09.2014 addressed to the claimant thus:

**“RE: TERMINATION OF SERVICE**

**The Board Meeting held on 26.08.2014 vide minute number MIN.73/BOD/2014 refers. It was the conclusion of the meeting that your services to Solution Sacco Society Ltd be terminated with full benefits.**

**This follows your decline to take the duties of a Branch Manager the position which you were redeployed. By a copy of this letter i have asked the Finance Manager to compute all your benefits.**

**Yours faithfully,**

**Signed**

**Justus Mburugu Ikiara**

**CHIEF EXECUTIVE OFFICER”**

The claimant appealed against the termination by the letter dated 10.10.2014. The claimant demanded to be told the reasons leading to her demotion then termination. In the letter dated 11.11.2014 by the respondent's advocates it was admitted that the deployment of the claimant to Maua Branch entailed reduction of the claimant's allowance by 4,000.00.

The **1<sup>st</sup> issue** for termination is whether the claimant's suspension was regular or fair. Clause 19(B) of the respondent's Management Staff Terms and Conditions of service provides as follows:

- i. An employee on suspension may not attend for duty and may not be paid salary.
- ii. Suspension is appropriate when an employee is charged and convicted in a court of law on an offence which is likely to lead to his or her dismissal or when an employee is guilty of any other serious offences which would lead to his dismissal.
- iii. If the suspension is rescinded or punishment short of dismissal is ordered, salary withheld during the period of suspension must be restored. Where dismissal is ordered salary ceases from the date following that on which the order of suspension from duty was given.
- iv. Suspension from duty shall only be ordered by the board members.

The court has considered that provision and finds that suspension was tenable only in instances of established criminal charge or conviction in a court of law with respect to an offence likely to lead to dismissal. The respondent has not showed such charge or conviction or offence against the claimant. The court finds that the suspension was in breach of that clause and was therefore irregular or unfair.

The **2<sup>nd</sup> issue** for determination is whether the deployment amounted to a demotion. The said clause 19 of the Terms and Conditions of service provides as follows:

#### **“DEMOTION**

**The most severe action short of dismissal. Demotion is appropriate only for employees at or above supervisory level. An officer demoted in rank takes seniority below his colleagues in grade to which he has been reverted and will be precluded from acting in a higher grade for at least twelve months. Demotion can only be approved by the management.”**

The respondent has admitted that the deployment had the effect of reducing the claimant's duty allowance by Kshs.4000.00. The claimant stated that the deployment placed her 2 grades below the position she held before the deployment decision. In the court's opinion, whereas a promotion is conferment upon an employee a position to which is attached a higher remuneration or remuneration scale compared to the position before the promotion, a demotion is conferment upon an employee a position to which is attached a lower remuneration or remuneration scale compared to the position held before the demotion. In the present case the claimant's remuneration reduced by Kshs. 4000.00, the claimant was emplaced 2 grades below the previously held position, and the court finds that the deployment amounted to a demotion. The demotion was not approved by the management and the court finds that it was irregular and unfair. The deployment amounted to an irregular and unfair demotion.

The **3<sup>rd</sup> issue** for determination is whether the claimant's termination was unfair. Upon the offensive deployment, the claimant raised a grievance about the unfair and irregular suspension and deployment which she rightly lamented amounted to a demotion. She demanded an explanation in view of her grievances. Instead of addressing the grievances, the respondent acted by treating the emerging grievances as a misconduct and proceeded to terminate the claimant's employment. Section 46 (h) of the Employment Act, 2007 provides that 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, does not constitute a fair reason for dismissal or for imposition of a disciplinary action. The court finds that the claimant's grievance was responsible and with foundation. Thus the termination was unfair because the reason for termination was not fair or valid as envisaged in section 43 of the Act.

Further, prior to the termination, the claimant was not given a notice and a hearing as envisaged in section

41 of the Act. There was no due process after the claimant raised the grievance and the court finds that the termination was unfair on that account.

The court has revisited the respondent's management staff terms and conditions and finds that there was no provision for grievance management and resolution in the respondent's human resource management system. The court finds that in such circumstances, the claimant was subjected to unfair labour practices contrary to Article 41 of the Constitution because the respondent did not provide for the relevant grievance handling procedure. This court stated in Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR as follows,

**“To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer’s operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer’s operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer’s operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust.”**

The court upholds that opinion and further finds that it was a deficient operational system for the respondent to fail to institute a grievance handling procedure and the claimant should not be visited with adverse consequences in a situation whereby she acted in her best discretion and good faith to register her grievances in the manner she had proceeded to act when she was faced with the offensive deployment and flowing from the offensive suspension. The court finds that the termination of the claimant's employment by the respondent was unfair.

The **4<sup>th</sup> issue** for determination is whether the claimant is entitled to the remedies as prayed for. The respondent did not urge any serious ground to show why the claimant would not be reinstated in the respondent's employment. The court has considered the long dedicated service the claimant had rendered to the respondent. In the circumstances of this case there is no bar against the reinstatement of the claimant established on the part of the respondent and the court finds that the claimant is entitled accordingly. The termination was effective September 2014 and to the date of this judgment it makes 9 months. In view of the reinstatement the respondent will pay the claimant Kshs. 145, 119.00 x 9 months making **Kshs. 1, 306, 071.00**.

The court finds that the claimant is entitled to maximum 12 months' salaries for the unfair termination and in view of the aggravating situation that the respondent consistently imposed against the claimant unfair labour practices during the termination, deployment and suspension administrative proceedings; and in view that the claimant's long service and that the claimant did not contribute to her termination in any manner. The claimant's gross monthly salary being Kshs. 145, 119.00 the claimant is awarded **Kshs1, 741,428.00** for the unfair termination.

In conclusion, judgment is entered for the claimant against the respondent for:

- a. **The respondent to pay the claimant Kshs.3, 047, 499.00 by 1.10.2015 in default interest to be payable thereon at court rates from the date of this judgment till full payment.**
- b. **The claimant is reinstated into the service of the respondent with effect from 11.09.2014 without break in the service in the position of FOSA Manager without reduction in grade, salary, allowances and benefits prevailing before the offending deployment to Maua Branch and for that purpose the claimant will report to the respondent's Chief Executive Officer on 1.07.2015 for appropriate deployment.**
- c. **The respondent to pay the claimant's costs of the suit.**

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 26<sup>th</sup> June, 2015.**

**BYRAM ONGAYA**

**JUDGE**