



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

**CAUSE NO. 47 OF 2015**

**BANKING, INSURANCE & FINANCE UNION (KENYA)..... CLAIMANT**

**VERSUS**

**CAPITAL SACCO SOCIETY LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 6<sup>th</sup> November, 2015)

**JUDGMENT**

The claimant filed the memorandum of claim on 13.03.2015 on behalf of its members Erastus Murithi and Kirimi Murimi David (the 1<sup>st</sup> and 2<sup>nd</sup> grievants respectively). The claimant prayed for judgment against the respondent for:

- a. A declaration that the grievants' dismissal from employment was substantively unprocedural, wrongful and unfair.
- b. The grievants to be reinstated back to their positions without loss of any benefits or break in service.
- c. The grievants be paid all salaries and allowances lost by the act of wrongful dismissal from the time of action to the very date of the award and the employment to continue as it was not broken by the act of dismissal.
- d. The grievants to be paid 12 months' gross salary for the dismissal.
- e. The court to make any other relief it may deem fit.

In alternative:

- f. Compensation of 12 months' gross salary.
- g. A further 12 months' salary for wrongful termination.
- h. The court to order exemplary damages of Kshs. 3,000,000.00 for the loss of gains after the dismissal.

The respondent filed the defence on 17.04.2015 through Mwenda Mwarania, Akwalu & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The following facts are not in dispute between the parties:

- a. The parties are in recognition and a collective agreement.
- b. The grievants are members of the claimant union.
- c. The grievants were serving as watchmen at the time of their termination effective 11.04.2014 by a communication dated 22.04.2014.

- d. Before termination each grievant was served with a show cause letter, each replied in writing and each was given a hearing on 11.04.2014.
- e. Each grievant was suspended from duty by the letter dated 3.03.2014.

The court has considered the undisputed facts. First the court finds that the grievants and the respondent were in employment relationship. Second, during the disciplinary process leading to the grievants' termination from employment the respondent accorded the grievants a notice and a hearing as envisaged in section 41 of the Employment Act, 2007. Third, the court considers that the only issue for determination is whether the respondent, at the time the grievants were dismissed, had a valid or genuine reason to terminate the employment as envisaged in section 43 of the Employment Act, 2007.

The respondent levelled against the grievants that on Sunday 16.02.2014 while the grievants were on duty as the night watchmen, the respondent's building they were assigned to guard was broken into whereby the iron sheet was cut and thieves gained entry into the building from the roof top. It was stated that part of the ceiling was also damaged in the process and the attackers stayed in the building for 2 hours and stole a laptop, a camera and a mobile phone all being the respondent's property. Further, on Monday 17.02.2014 the grievants left duty as if nothing had happened and when asked about the event, the grievants stated that they were not aware of the attack to the building they were assigned to guard.

The alarm system by G4S installed on the building failed to give the relevant siren because the attacker had disabled the cable that should have transmitted the siren into action. The G4S security system as installed on the building further showed that the attacker struck at 2.37am and stayed in the building moving around the offices until 4.38am. The allegations were further that the roof's iron sheet was cut leaving an opening on the roof and there was no water on the floor or ceiling to show that the night had been rainy as was alleged by the grievants.

Thus the 1st grievant's explanation that he reported at work at 6.00pm, patrolled the building up to 12.30am when he entered the changing room to shelter from rains and that at 2.00am it was windy that he could not hear the intruder attacking the building was on the whole, in the respondent's view, unbelievable.

The 1<sup>st</sup> grievant testified that on the morning of 17.02.2014 he was summoned at the office. Staff and customers had been prevented from entering the building. He entered the building at around 9.00am. There was a cut on the roof measuring about 4 metres. He further testified that the cut was very small that a person could not pass through and there was wetness he observed on the floor on 17.02.2014. There was no ceiling board in that area of the roof and there was nothing on the floor. He confirmed that his explanation was that on the material night there had been heavy rains and storms and he had decided to go for refuge at a makeshift shelter 10 metres away from the front of the shop so that he could not have heard the attackers. Later at 12.30am he went to the changing room located on a plot other than the one the respondent's building was located. Thus he could not have heard the attack which started about 2.00am.

The court has considered the 1<sup>st</sup> grievant's evidence. The court finds that the testimony was contradictory that the cut in the roof was like 4 metres and then it was too small for a person to fit or go through. It was also contradictory that he saw nothing on the floor then that he saw wetness on the floor. The court finds that such contradictory evidence cannot be trusted. It was also clear from the evidence that starting 12.30am the 1<sup>st</sup> grievant admitted he left his place of work and he admitted that he could not hear or see the intruder. Thus the court finds that as at the time of termination and taking the 1<sup>st</sup> grievant's explanation to his employer, the respondent had a valid and genuine reason to terminate the grievant's employment; that the grievant failed to notice and report the intrusion on the night of 16.02.2014 to 17.02.2014, and the 1<sup>st</sup> grievant testified that he indeed left his place of work to take refuge from the rains so that he did not notice the attack.

The 2<sup>nd</sup> grievant's disciplinary case and facts were similar to those of the 1<sup>st</sup> grievant. Both grievants were on duty on the material night. The 2<sup>nd</sup> grievant's explanation was that he could not notice the attack

due to windy rains and darkness on the material night. He did not testify at the hearing. The court finds that at the time of the termination, the respondent has established that the 2<sup>nd</sup> grievant like the 1<sup>st</sup> grievant slept on the job by failing to notice the attack.

The court has noted that the siren as installed by G4S and which would have supported the grievants in performing their duties on that material night had failed. It was not explained that the intruders had by design damaged the relevant cable to disable the siren and there was no explanation as to why the installation failed to curb the attack by ensuring that the siren acted as was expected in event of the kind of attack that took place. There was also no explanation why the police officers failed to take action in view of the signals the security system as installed, was said to have transmitted to the police station. Taking into account those deficits, the court finds that the grievants failed in their duty but they were not solely responsible for the failure to notice and promptly report the attack. In the circumstances, the court finds that each party shall bear own costs of the suit.

In conclusion, the claimant's suit is dismissed and parties to bear own costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 6<sup>th</sup> November, 2015.**

**BYRAM ONGAYA**

**JUDGE**