



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 162 OF 2012

BETWEEN

SOPHIA WAMBUI MUTHONI CLAIMANT

VERSUS

MURAMATI SACCO SOCIETY LIMITED RESPONDENT

Rika J

CC. Elizabeth Anyango

Mr. Ndege instructed by J.M. Rioba & Company Advocates for the Claimant

Ms. Wanjiru instructed by Wanjao & Wanjau Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

1. Sophia Wambui Muthoni filed her Statement of Claim on 2nd February 2012. The Respondent filed its Statement of Response on 22nd April 2012. The Claimant testified, and closed her case on the 28th November 2012. The Respondent's evidence was given by Business Operations Manager Mr. Nyaga Thagichu, Credit Officers Ms. Anne Wangui Muchunu and Manases Muchiri, and Internal Audit Manager Martin Kinuthia. The first three of the Respondent's Witnesses testified on 1st March 2013. The last testified on 15th July 2013 when hearing closed. Parties were directed by the Court to file their Final Arguments in a span of twenty eight days, and advised Award would be delivered on notice.

2. The Claimant's position is that she was employed by the Respondent as a Clerk/ Teller on 28th February 2003. She rose through the ranks to become the Branch Manager. The Respondent terminated her contract or employment on 9th March 2011. She states termination was without valid reason, unlawful and unfair. She seeks from the Court:-

- A declaration that termination was wrongful and unlawful;
- One month salary in lieu of notice;
- 49 days of annual leave;

- Half month salary for the period under suspension;
- Terminal benefits and other deductions;
- General damages for breach of contract;
- Costs; interest; and any other suitable remedy.

3. The Respondent agrees the Claimant was its Employee as stated in her Statement of Claim. She was the Branch Manager, Kahatia. Her contract of employment and the Respondent's Human Resource Policy, required the Claimant to adhere to the principle of confidentiality; safeguard Respondent's financial interest; and manage the Branch responsibly. She violated her terms of employment by diverting loans, or causing money to be diverted, contrary to the regulations governing such transactions; she in collusion with others, accessed money from the Respondent's M-pesa float amounting to Kshs. 80,885; and advanced loans to her spouse and a friend causing the Respondent actual financial losses and exposure to credit risk. She was suspended and investigated. In an attempt to obviate disciplinary proceedings and summary dismissal, she wrote to the Respondent on 20th September 2010 and purported to resign. The Respondent rejected this, and terminated her contract of employment on 9th March 2011. The Respondent prays the Court to uphold its decision, and dismiss the Claim.

4. The Claimant testified she is presently working for Umoja Sacco as its CEO. She was employed by the Respondent previously, from 28th February 2003. She was appointed the Branch Manager, Kahatia Branch, on 28th December 2009. The Branch Operation Office, the Micro-Finance Officer, Tellers and Clerks were under her. On 14th April 2010, a Lady Customer went to the Respondent Kahatia Branch and lodged a complaint with the Claimant. The Lady alleged she had sent money through M-pesa to an Employee of the Respondent towards part payment of her loan with the Respondent. The money was not deposited in the Customer's Account. The Claimant was consequently suspended. The Respondent coerced her into writing a letter, admitting that the offences committed by the Employees, were committed with the Claimant's knowledge. There were allegations on misappropriation of funds and un-procedural dealings.

5. She was suspended on 22nd June 2010, and her contract terminated in a letter dated 9th March 2011- about 9 months after suspension. The Claimant wrote a letter of resignation after 6 months, which the Respondent rejected. She did not have any warning letters, and was not given a chance to explain herself, before termination. In October and December 2010, she was already serving suspension. She was not responsible for the M-Pesa Account. Every Teller prepared a report, and money taken back to the Reserve. The Reserve Book was always balanced at the end of the day, and the Chief Cashier at the Head Office always informed of the closing balance. No criminal proceedings ensued against the Claimant. The Claimant was not made aware of any forensic audit.

6. Mr. Muchiri and Ms. Anne Muchunu were Micro-Finance Officers. The Claimant wrote to them in early June 2010, seeking explanation on the Customer's M-pesa deposit, as the Customer had stated the money was sent to their numbers. The 2 Officers replied, and gave different explanations. Muchiri stated he received the sum of Kshs. 16,970 from the Customer through M-pesa on 27th April 2009. His phone got lost, but he deposited the money on 20th May 2009, after replacing his line. Anne on her part confirmed the money was deposited, and gave the transaction receipt as 35429 and Security No. 159.

7. She testified on cross-examination that the Branch had 7 Employees, including herself. The Branch Operations Officer was answerable to the Claimant. Other Officers were answerable to the Operations Officer. The Claimant was not aware of the Human Resource Policy until it was sent to her through e-mail by Muchiri on 12th December 2011, after she had left office. She was aware of the Code of Ethics which she signed in 2006. Every end of the year, someone from the Head Office would confirm what was in the Branch's Reserve. In December 2009, a stock-taking process took place. The books tallied. There was no money which was missing. The Branch Operations Manager was in charge of the cash. Soft loans were given at the Head Office. The Claimant retained the key to the Reserve Office. She was not aware that Officers from the Head Office found no money, in 2010 when they came to post money in the Members Accounts. There was a General Ledger Account at the Branch. The Claimant's M-pesa code was always used to receive money. She wrote the letter of 22nd June 2010 under duress. She referred

to M-pesa shortage, and to 'mistakes.' These related to the letters she wrote to Muchiri and Anne. She had taken a loan from the Respondent which she repaid, but was not able to say which year she did so. Lawrence Karani was a Customer of the Respondent. She did not know another Customer named Jackson Kaguru. She did not recall they defaulted in their loan repayments which they were supposed to pay through M-Pesa. It was not true that money stopped being paid after the Claimant left employment. She was not informed of loan security documents which were missing. Security documents were kept at the Head Office. She wrote the resignation letter because she wished to move on with her life.

8. She testified further on redirection that there were different keys for the Reserve, and an Officer could access the Reserve without involving other key custodians. She was not responsible for the storage of security documents. She was appraised in December 2009 and scored 60%. She did not deal in Vouchers, and the Branch Operations Officer dealt with cash. Cash reports were prepared daily, and reconciled with the Reserve Book. She did not meet the CEO. She wrote the letter of 22nd June 2010 under duress. She was forced to write the letter to keep the job. The Claimant prays the Court to grant her Claim.

9. Nyaga Thagichu informed the Court he had served the Respondent in different capacities for 11 years as at the time he gave his evidence. He knew the Claimant from 2001 when she was on attachment, and from 2003 when she was employed as Clerk/Teller. She served in different Branches. She rose to become the Branch Manager, Kahatia. She was appointed Manager conditionally. She was the Branch CEO, overseeing all aspects of the Branch, including supervision of staff and credit management. She chaired the Credit Committee, and was in-charge. She oversaw access to the facility and financial records including ledgers, Teller summaries and cheques; oversaw business development including marketing; operations; and human resource processes. She was guided in exercise of her role by the Human Resource Policy. Employees are taken through induction on recruitment, and issued letters of appointment which makes reference to the Human Resource Policy.

10. In June 2010, Harun Mwangi the Operations Manager received complaint from a Credit Officer that Members' Funds were being diverted to other uses other than loan repayment. Thagichu and the Operations Manager contacted the Claimant. She answered that no money had been misappropriated. She said it was Anne and Muchiri who had failed to remit money paid by Customers through M-pesa. The Branch Operations Officer said there was no money that was misappropriated, while Muchiri confirmed there were problems with cash transactions at the Kahatia Branch.

11. Thagichu visited the Branch in the company Harun Mwangi. They found out that money was being collected by the Branch from Members, but was not being distributed. The system involved Credit Officers visiting the field with Members' Schedule. They collected money, and lump sum amounts were meant to be posted. Control was done in the General Ledger. The Credit Officer would then distribute the postings to the individual Member repayment Accounts. The Ledger would be closed. It was discovered the Ledger had un-reconciled figures.

12. At the close of every year, the Respondent had stock-taking. There were vouchers which staff held, and had not cleared repaying the amounts indicated in the vouchers to the Respondent. It was against the Respondent's Policy for staff to have un-cleared vouchers at the close of the year. Money collected from Members was used to clear some of the vouchers. The Respondent operated as an M-pesa agent. Money collected through this agency did not reconcile. Some Members confirmed they had forwarded loan repayment installments; these were not captured in their respective accounts. Thagichu asked the Branch Manager to report to the Head Office to pave way for further investigations. The Claimant and Irungu were suspended. The Claimant wrote to the Respondent a resignation letter on 20th September 2010, which the Respondent rejected as she was still under investigation.

13. Cross-examined, Thagichu testified that the Claimant was promoted on merit. The Branch Manager and the Operations Manager both had access to the Reserve Room. One could not access the room without the other. The Claimant was availed a copy of the Human Resources Policy on recruitment. Harun Mwangi was the acting Operations Manager. Credit Officer told Thagichu she had been collecting money from Members, which was diverted by the Claimant and the Operations Manager. The money was

collected from the field and deposited at the Cashiers.’ The Claimant was not a Cashier. The Claimant was categorical nothing was being diverted. Muchiri confirmed he had paid money to the Claimant in the letter dated 9th June 2010. He received money from a Member but alleged he lost his phone. This was a different matter from the accusations against the Claimant, although it was reported sometime in June 2010. No pending vouchers held by Employees were exhibited in Court and no evidence that stock-taking was carried out, was brought to the Court. Investigations focused on the Branch Manager and the Operations Manager. The Claimant was granted an opportunity to be heard. She was heard by Thagichu before the investigations took place. She was given another hearing by the CEO after the investigations. The Human Resources Policy stipulated suspension for 1 to 6 months. The Claimant was suspended from 22nd June 2010 to 14th April 2011. She was suspended for around 8 months. She was not there in October, November and December 2010, and it was not possible for her to transact business then. Loans for Kshs. 500,000 and below are approved by the Credit Committee comprising the Credit Officer, Operations Manager and the Branch Manager. The Witness denied that he sent the Claimant the Human Resource Policy while she was under suspension, via e-mail. Thagichu testified on redirection that other Officers who were investigated included Muchiri and Anne. Investigations took about 7 to 8 months.

14. Anne Wangui Muchunu worked with the Claimant for 4 years. She was in the Credit Department while the Claimant was the Branch Manager. It was part of Anne’s duty to go and collect loan repayment money from the Members in the field. On 30th December 2009, Anne, in the company of Muchiri went and collected a sum of Kshs. 300,000 from a place called Ichiche. The money would be given to the Cashier in case the Branch had not closed. On this occasion the two Credit Officers arrived after closure, at 6.30 p.m. The Claimant demanded to have the money. Anne refused to hand over and received a rebuke from the Claimant. She instead handed the money to Muchiri who would entrust the money to the Branch Operations Officer. He handed the money to both the Branch Manager and the Branch Operations Manager. When Anne resumed on 4th January 2010, the money had not been posted to the different Members’ Accounts. Anne complained to the Branch Manager who rebuked her again. There was a gap in the Accounts, and when Anne persisted in her complaint, the Claimant advised that Irungu would take a loan and redress the shortfall. The Claimant reported to the Head Office that Anne had diverted money entrusted to her by a Customer through M-pesa. Officers from the Head Office visited the Branch and upon investigations, asked the Claimant to step aside. Anne was not suspended but received a warning letter.

15. Anne testified on cross-examination that she wrote the letter dated 7th June 2010 on being asked to explain the M-pesa transaction by the Claimant. She did not have the receipt quoted in the letter. She gave the money collected at Ichiche to Manases Muchiri after the two Officers arrived from the field to find the office closed. The regulations required she gives the money to the Operations Manager. The money was eventually given to the Claimant by the Operations Manager. It was not deposited. Anne looked at the Ledger when she resumed work on 4th January 2010, and found the money was not deposited. Muchiri posted the schedules. The Ledger was in debit. The Claimant told Anne, Irungu would obtain a loan to repay the money. Anne made verbal complaints against the Claimant, and wrote to the Head Office around 12th June 2010. When the Officers from the Head Office visited the Branch, the Claimant advised that no liquid money was missing. Anne was issued a warning letter in May 2011. She clarified in redirection that the M-pesa allegations against her were resolved. She gave the Kshs. 300,000 with the schedules to Muchiri.

16. Manases Muchiri confirmed he works for Unite Us Sacco, formerly Muramati Sacco. He worked at Kahatia Branch between 2008 and 2011. He was a Credit Officer, responsible for business growth. He confirmed he and Anne collected Kshs. 300,000 from Members at Ichiche on 30th December 2009. Anne was proceeding on leave and entrusted the money to him to be forwarded to the Operations Manager. The Branch Manager took the money. There was stock taking on 31st December 2009 which involved an Officer from the Head Office. There were pending vouchers, and the Branch Manager and the Operations Manager said they would use the money to clear these vouchers in time for the stock-taking. They alleged the money would be returned to the rightful accounts by 4th January 2010. They were not able to do so. The situation did not change, and dragged on well into the New Year. The Branch Manager stated that her Operations Manager would get a loan to clear the deficit. The issue against Muchiri on the late payment

of the M-pesa money repaid through him by a Customer from Narok, was escalated by the Claimant to the Head Office. It was investigated, and Muchiri gave his explanation to the Head Office. When the Officers from the Head Office visited, security for loan in the form of a log book for a Customer named Jackson Mugereki was not in the custody of the Branch. The gentleman was husband to the Claimant, and she had removed her husband's logbook from the Respondent's custody. Like Anne, Muchiri was issued a warning letter for his role in the problems bedeviling the Respondent Branch.

17. Answering questions from the Respondent's Advocate, Muchiri testified he knew the Claimant from 2008. He reported directly to her. The M-pesa loan repayment was received by Muchiri on 27th April 2009. He paid the money on 20th May 2009 after he obtained a new sim card. The Witness asked the Claimant about the money when the Customer asked for reconciliation on 9th June 2010. The Claimant did not sign in acknowledgement on receiving the Kshs. 300,000. Stock-taking was carried out on 31st December 2009. Some money was deposited around June 2010 to meet part of the shortfall. Muchiri could not say which staff held pending vouchers. Muchiri posted the schedules to satisfy the enquiries of the Members. The Branch Manager and Operations Manager were responsible for custody of the securities. Muchiri agreed that the Respondent's Human Resource Manager Mr. Nyaga is his relative. Muchiri sent the Claimant the Human Resource Policy Manual after her dismissal, upon her own request. She alleged the Respondent had quoted several provisions of the document. He received a warning for his role. He testified in redirection that the M-pesa query was resolved. He forwarded the Kshs. 300,000 to the Claimant. Muchiri had a schedule of the loan securities at the Branch, and was involved upon investigation in this way.

18. Martin Kinuthia is the Internal Auditor of Unite Us Sacco, having worked for 8 years. He was called by the CEO Tony Mwangi in June 2010, and given a report done by Aron Murimi the Respondent's Administration and Finance Manager and Human Resource Manager Nyaga Thagichu. It was a preliminary report on Kahatia Branch. Four Branch Officers – the Branch Manager, her Assistant and two Credit Officers were the main suspects. There was embezzlement of funds, and unaccounted for M-pesa transactions. The Officers were called to explain at the Head Office. The Claimant and the Operations Manager were suspended, and in-depth Audit carried out by Kinuthia.

19. The Audit showed the Claimant's Teller Account had money; it was not supposed to hold money as she was not a Teller on duty. On 4th March 2009, embezzled money was found concealed in M-pesa Ledger. Money was concealed by book entry, but there was no cash movement. On 22nd December 2009, Kshs, 36,000 was embezzled. There was concealment on 30th December 2009. The Claimant and the Operations Manager breached the duty of fiduciary and confidentiality. M-pesa transactions did not show in statements obtained from Safaricom. Members applied for loans which were granted. The Claimant reversed the loans, indicating money was not owed to the Sacco. She gave a loan of Kshs. 250,000 to her husband. It was not being serviced. Irungu admitted liability, while the Claimant asked her Employer for more time to ruminate. She did not revert to the Employer.

20. Cross-examined, the Auditor clarified that his Report referred to the year 2010, instead of 2009 by error. There were typographical errors, which the CEO replicated in terminating the Claimant's contract of employment. Internal Audit Reports need not be signed. The Claimant and the Operations Manager had the key to the Strong Room where cash was kept. None could access the room without the other. Two loans did not have securities. This would be possible with insider collusion. In fraud, Auditors look at the intent. It was not definite who pocketed the money. The Claimant was given an opportunity to be heard. Kinuthia confirmed in redirection that he indicated the year 2010 instead of 2009 in his Report by error. Custodians of cash at the Branch were the Manager and the Operations Manager. The Respondent urges the Court to dismiss the Claim.

The Court Finds and Awards:-

21. Sophie Wambui Muthoni was employed by the Respondent Sacco as a Clerk /Teller on 28th February 2003. She worked her way up, and on 6th March 2009, was appointed the Branch Manager Kahatia. She was suspended on 22nd June 2010, under Clause 9.4.3 of the Human Resource Policy, on the following

grounds-:

- Financial impropriety- Between January 2009 and May 2010 diverted or caused to be diverted money meant for group loan repayment, to her personal use.
- She led other staff in fraudulently accessing M-pesa float cash to the amount of Kshs. 80,885.
- She advanced or caused to be advanced loans irregularly, including to her husband, which resulted in default and loss to the Respondent.

22. On the same date 22nd June 2010, the Claimant wrote to Respondent's Operations Manager and Human Resource Manager, conceding that her Officers had been collecting money from Members and failing to deposit in the respective accounts. There is no shred of evidence to suggest her letter was involuntary. She conceded there were M-pesa shortages and un-cleared vouchers. She stated that Group money had been used anyhow. She wrote that she at one time had to borrow money from a friend, to assist in the group posting mess. She had M-pesa shortage which she cleared from a loan she took. She apologized for misappropriation of Members' funds, and asked to be forgiven, expressing her desire to go on working.

23. Her letter clearly corroborates the evidence given by Nyaga Thagichu, Anne Wangui Muchunu, Manases Muchiri and Martin Kinuthia the 4 Witnesses for the Respondent. There was deep rooted culture of graft at the Branch the Claimant headed. She was leading in the practice, and it is surprising that she would file this Claim for unfair and unlawful termination against the Respondent.

24. Money was collected by the Credit Officers from Members out in the field; the Claimant demanded to be given the money, and failed to deposit it in the respective Members' Loan Accounts. There was widespread abuse of the M-pesa transactions, with cash float money diverted by staff including the Claimant, and M-pesa loan repayment money forwarded by customers, directed to other uses. The Claimant facilitated a loan for her husband, and withdrew the security from the custody of the Respondent, leaving the Respondent with grave credit exposure.

25. What the Claimant did, or failed to do as the Manager Kahatia Branch, amounted to crystallized employment offences under the Employment Act 2007. In particular, pursuant to Section 44 [4] [c], the Claimant willfully neglected to perform work which was her duty to perform, or carelessly and improperly performed work which was her duty, under the contract, to perform carefully and properly. She concedes in her letter above that she, and Employees serving under her, liberally utilized her Employer's and Members' money. She failed to prevent this abuse, and became an active participant in the abuse, frequently exchanging words and blame with her juniors Anne and Muchiri. She failed to perceive and exercise her role as the Manager of the Branch. Section 44 [4] [g] is the alternative charge under which this Court finds the Claimant was guilty. The Section states that it is an act of gross misconduct warranting summary dismissal where an Employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his Employer or his Employer's property. There is ample documentary and testimonial evidence implicating the Claimant in such an act of gross misconduct.

26. The Respondent investigated the matter slowly, deliberately and meticulously, the only excusable error being the Internal Auditors' reference to the year 2010, rather than 2009 in his Report. The Court is satisfied that the incidents subject matter of the investigation took place in 2009, with the most outstanding of them being the diversion by the Claimant on 30th December 2009, of Kshs. 300,000 of the Members' Funds, collected by the Credit Officers from Ichiche. The Respondent undertook preliminary investigations and full investigations, and afforded the Claimant the chance to explain herself. She did so in her letter of 22nd June 2010, and in subsequent meetings at the Branch and Head Office. She conceded to the allegations, attempted to draw attention away from herself, by pointing accusing fingers at her juniors, but in the end was found to be the lead actress.

27. She wrote a letter of resignation in the middle of the investigations on 20th September 2010, which was rejected by her Employer. It is inappropriate to come to Court at any rate and claim unfair termination, when in fact the Claimant had taken a bold step, and initiated termination of her contract of

employment. This move portrayed the Claimant as a captain who digs a giant whole in her ship, and then attempts to leap out. The Respondent correctly declined this move, advising the Claimant that its comprehensive investigations needed to be brought to an end, and responsibility apportioned. The Internal Audit concluded correctly, that the Claimant opened up the avenue for abuse of the M-pesa facility and Group collections; and loans were advanced to certain individuals with no intention that they would repay.

28. She received her letter of termination on 9th March 2011. Although there was a slight procedural oversight in extending the investigation beyond the 6 months' ceiling allowed under the Human Resources Policy; and although there were other minor departures from the ideals of the minimum disciplinary procedure contemplated under Section 41 and 45 of the Employment Act 2007; the Court has the discretion in grant of remedies. In this case the Claimant betrayed her enormous fiduciary and confidential responsibilities. Her stint as the Manager of Kahatia Branch shall remain a lasting lesson, on how not to manage a financial institution. She failed to protect Members' money. She stole, and presided over theft by her junior officers of Members' money, destabilizing a critical Co-operative Society. She made a decision to resign, and although resignation was rejected, she intended to terminate the contract through her own initiative. She does not merit any remedy for the minor procedural lapses. In the end, the Court is satisfied there were overwhelming valid reasons justifying the decision made by the Respondent terminating the Claimant's contract of employment. Procedure was in large fair, though perhaps flawed in minor aspects. ***The Claim is hereby dismissed in its entirety, with no order on the costs.***

Dated and delivered at Nairobi this 26th day of February 2014

James Rika

Judge