



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 4/2013**

*(formerly Nai 1100/2012)*

(Before Hon. Justice Hellen Wasilwa on 30<sup>th</sup> April, 2014)

GRACE ACHIENG OGOT ..... CLAIMANT

**-VERSUS-**

SUKARI CO-OP SAVINGS & CREDIT SOCIETY LTD ..... RESPONDENT

**JUDGMENT**

The claimant herein Grace Achieng Ogot filed her Memo of Claim on 27.6.2012 through the firm of Annet Mumalasi & Co. Advocates. The claimant contends that she was wrongfully and unfairly terminated by the respondents.

The claimant's case is that she was appointed by the respondent on 15.10.1992 vide a letter - **Annex GAO – 1** as a support staff while in the respondent's employment. She faithfully, industriously and efficiently served the respondent and was even given a letter of recommendation – **Annex GAO – 1A**. She served the respondents as a cleaner and completed her probation period on 3.2.1993 and was confirmed in employment as per **App GAO-2**. In June 1996, she was promoted to the position of Ag. registry clerk – **GAO 3**. Due to her efficiency and industry, she earned further promotions on 9.7.1998 as a loan clerk (**GOA-4**) and then as a teller on 10.5.2010 as per **GAO-5**. The claimant also served in other capacities and on 14.5.2007, she served as an Ag. Credit Officer and on 5.1.2008 she served as a loans officer. However, the claimant contends that while working as a loan officer, she was also given an opportunity to act as the credit officer especially when there was need to do orientation to a new credit officer and when the said office was vacant. Letters for that acting capacity are marked as **GAO-7**.

The claimant further told court that the respondent was aware of the claimant's trade union namely; Kenya Union of Commercial Food and Allied Workers and lastly promoted her from a unionisable staff to a confidential staff. The respondent indeed on 23.2.2009 wrote to the claimant indicating that she had been promoted from a unionisable staff to a confidential staff – **GAO-8**. The claimant contends that the promotion of 2009 from a unionisable staff to a confidential staff affected all the unionisable staff including office messengers and cleaners and was meant to deny the unionisable staff the right to belong to a trade union. However for all purposes and intents, the claimant continued with her membership as a unionisable staff and a letter dated 5.3.2009 from the respondent remitting claimant's contribution to the trade union – **GAO-9** is proof of that.

The claimant contends that due to her promotions and and the need to have more knowledge on financial issues, she took time and attended several trainings and obtained a Diploma in Business Management.

It is the claimant's case that on 27.2.2012, the respondents unlawfully terminated her services after falsely accusing her of among other wrong doings of flouting, facilitating flouting and watching flouting of numerous and acting fraudulently resulting to a huge defaulted loan portfolio. Her letter of termination is marked and annexed as **GAO-11**. The claimant contends that this termination was actuated by malice, ill-will and ulterior motives as she had not committed any offence and was not given any opportunity to be heard before the termination. At the time of termination, the claimant was earning Ksh 56,338.40 as per her payslips **App GAO-12**. The claimant appealed against this termination but there was no response from the respondent – GAO-14. She further instructed counsel who served the respondent with a demand letter but again the respondents didn't respond. The claimant submits that due to the unfair termination, she suffered great financial loss including inability to pay a bank loan she had taken. She further submits that she is now limited in the job market and can only seek for employment in financial institutions and such opportunities are rare. She now prays that this court finds her termination wrong and unfair and award her as per Memo of Claim.

The respondents on the other hand filed their defence on 11.10.2012 through the firm of Kadima and Co. Advocates. It is the respondent's case that the claimant was not faithful, industrious and efficient as she has alleged. They state that the reason for her confirmation in employment was due to routine requirement by the law. They further aver that the promotions allegedly given to the claimant were based on enormous false presentation. They admit that they terminated the claimant's service without malice, ill-will and ulterior motives save that the same was aimed at streamlining credit policy. They also contend that the claimant and others took loans which they defaulted in paying and the claimant advanced herself 1,909,916 which amount is owed and due to the respondent. The respondents contend they terminated the claimant in line with the Human Resource Policy Manual of the respondent. Their contention also is that the claimant's salary was Ksh 33,883.90 and net was 16,963.50. They asked court to dismiss the claimant's suit with costs to them.

The respondents also counter-claimed against the claimant for Kshs 164,000,000 which the respondent avers that the claimant should be surcharged to the extent of her blame. The claimant opposed the counter-claim.

The respondents called one witness one Isaac Sumba Sheunda – an employee of the respondent. His evidence was that in April 2011, he was elected chairman of respondents' Sacco. A forensic inquiry had been done and a report made which revealed some malpractices in the Sacco. It was not clear who particularly was involved. Based on that report the members resolved that a forensic audit be carried out to establish the actual perpetrators. The audit revealed that the respondent was at risk of losing Ksh 164,858,188.20. Some of the losses fell within the portfolio of the claimant and it was recommended that she should not hold any position in the factory. The report was marked DMF1, when cross examined about this report, RW1 told court that the report has 64 pages and it does not have the claimant's name and that also RW1 did not show court minutes of the Annual General Meeting that adopted this report. He also admitted that the dismissal letter did not mention the 164 million and that the claimant was a loans officer but it was the board that approves loans after she has appraised of the same. On Human Resource Policy, the RW1 told court that he has no evidence that it was served on the claimant.

Having heard the evidence of both parties, the issues for determination are as follows:-

- 1. Whether the decision by the respondent to terminate the claimant's services was justified and fair.**
- 2. Whether there was any evidence of wrong doing on the part of the claimant to warrant her being dismissed.**
- 3. Whether the claimant is entitled to the remedies she has sought.**

On the first issue, there is evidence that the claimant worked for the respondent without any problems over a period of time from 15.10.1992. She also attended various trainings within the time and earned several promotions.

On 27.2.2012, she was served with a letter of termination. The termination letter stated in part that

during her tenure as Ag. Credit Officer she flouted, facilitated flouting and watched flouting of numerous credit policies and procedures and she was party to some of the fraudulent transactions in the Society that resulted in huge defaulted loan portfolio. The letter further alluded to her in negligence of duty, incompetence and gross misconduct. It is on the basis of this letter that she was terminated with effect from 27.2.2012. Section 43 of the Employment Act however is clear that:-

**“43(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.**

**(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”**

Such reasons must be proved and they are matters the employer at the time of termination of the contract genuinely believed to exist.

The surest way of proving such reasons however is to give the employee a hearing so that he or she can reply to the allegations levelled against him/her.

Section 41 of employment Act states that:-

**“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reasons for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within sub – section (1) make.”**

In the case of the claimant she was told the reasons as to why she was being terminated, but she was not accorded a hearing as envisaged under Section 41 of Employment Act.

Article 50(1) of the Constitution of Kenya also guarantee this right to be heard before action is taken against them.

ILO Recommendation 166 of 1982 provides for similar provisions at Article 7:-

**“The employment of a worker should not be terminated for misconduct of a kind that under natural law or practice would justify termination only if repeated on one or more occasions, unless the employer has given the worker appropriate written warning”.**

Under Article 9 of Recommendation 166:-

**“A worker should be entitled to be assisted by another person who defending himself in accordance with Article 7 of Termination of Employment Convention 1982 against allegation regarding his conduct or performance. Liable to result in the termination of his employment; this right may be specified by the methods of implementation referred to in paragraph 1 of this Recommendation”.**

It is therefore apparent from the claimant's case that she was not given any hearing on the

allegations levelled against her. Further there is no proof of the allegations presented to court even by evidence of RW1. It is therefore the finding of this court that the decision by the respondents to terminate the claimant's services was unfair and unjustified.

On 2nd issue, there is also no evidence of wrong doing on the part of the claimant because evidence of RW1 is clear that the audit report presented in court does not bear the claimant's name. The same witness told court that issuance of loans, the mistake the claimant was accused of flouting was not her presence because there was a loans board that used to approve loans. The blame if any cannot therefore be laid on the claimant. The report produced in court was also not clear as to the wrong doing the claimant is alleged to have perpetrated. The respondent had made a counter-claim alleging that the claimant facilitated loss of over 164 million due to her negligence of duty and involvement of fraud. Such evidence was however not presented in court.

It is therefore the finding of this court that there is no evidence of any wrong doing on claimant's part and the counter-claim must therefore fail with costs to the claimant.

What remedies then is the claimant entitled to?

From the claimant's payslips, her gross pay was Ksh 56,338.40. I therefore award her as follows:-

1. **1 month salary in lieu of notice = Ksh 56,338.40**
2. **12 months salary as damage for wrongful and unfair termination of employment = 56,338.40 X 12 = Ksh 676,060.80**
3. **Payment of gratuity assessed at 23 days for each year worked as per the CBA entered into between the Union and Respondent – 20 years being the period claimant served 23/30 X 56,338.40 X 20 = 43193 X 20 = 863,855/=**

**TOTALS = 1,596,254/=**

**all subject to statutory deductions.**

4. **The respondents will issue claimant with a certificate of service.**
5. **The respondent will pay costs of this suit.**

**HELLEN WASILWA**

**JUDGE**

**30/4/2014**

**Appearances:-**

Mumalasi for claimant present

Kadima for respondent present

CC. Wamache