



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 216 OF 2011

**BETWEEN**

BANKING, INSURANCE &

FINANCE UNION

.....  
CLAIMANT

**VERSUS**

HARAMBEE CO-OPERATIVE

SAVINGS AND CREDIT SOCIETY

..... RESPONDENT

*Rika J*

CC. Leah Muthaka

*Mr. Tom Odera National Organizing Secretary of the Claimant, instructed by the Claimant*

*Mr. Harrison Okeche, Advocate instructed by the Federation of Kenya Employers for the Respondent*

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

DATE CLAIM FILED: 17<sup>TH</sup> FEBRUARY 2011

DATE PROCEEDINGS CLOSED: 18<sup>TH</sup> FEBRUARY 2013

DATE OF DETERMINATION: 19<sup>th</sup> July 2013

AWARD

1. Joseck Argwings Omuhinda Otanga [hereinafter referred to as the Grievant], was employed by the Respondent on 10<sup>th</sup> July 1991, as a Clerical Officer. He served a probationary period of six months, and was confirmed in 1992. He was promoted to the position of Senior Clerical Officer on 10<sup>th</sup> November

2010. He was suspended from duty on 2<sup>nd</sup> February 2010, on the allegation that having accessed the Respondent's server and extracted information without authority from the Respondent. The Respondent summarily dismissed the Grievant in a letter dated 1<sup>st</sup> July 2010 on allegation of gross misconduct. The Respondent justified its decision on its Human Resources Division Staff Regulation and Procedure Manual; the Collective Bargaining Agreement; and Section 44[4] of the Employment Act 2007.

2. The Grievant was dissatisfied with this decision. He instituted this action through his Trade Union, in which he seeks the following orders-

- a. The Honourable Court invokes its powers under Section 15 of the Labour Institutions Act 2007, and reinstate the Grievant to his previous job, without loss of salaries, allowances, employment benefits and seniority in service;
- b. Salaries and allowances which the Grievant has lost as a result of this wrongful dismissal should be paid to him in full and without prejudice to the prayer for reinstatement;
- c. Any further reliefs the Court might find lawful and justifiable; and,
- d. Costs of the Claim.

3. The Respondent filed its Statement of Response on 26<sup>th</sup> August 2011. It is conceded the Grievant was employed by the Respondent. He last worked in the position of Senior Clerical Officer. He was summarily dismissed through a letter dated 1<sup>st</sup> July 2010, for obtaining and circulating Respondent's confidential information, without authority. He was found guilty of gross misconduct and summarily dismissed. The Respondent paid to him his dues in accordance with the existing CBA. Termination was carried out fairly, and was substantively justifiable. The Grievant gave evidence and closed his case on 15<sup>th</sup> November 2011. The Respondent testified on 29<sup>th</sup> March 2012, through its Human Resources Manager Martin Munyao Mutua. The case for the Respondent was closed on 7<sup>th</sup> December 2012, and the dispute last mentioned in Court on 18<sup>th</sup> February 2013, when it was confirmed the Parties' final arguments had been filed, and the Court advised Award would be delivered on notice.

4. The Grievant testified his work included maintenance of debtor register and data cleaning. He was garlanded as the Respondent's Employee of the year in 1996. He has a clean record, and was Chief Shop Steward. He was a member of the Union's Joint Consultative Council, which handles individual and collective grievances.

5. He received a letter dated 2<sup>nd</sup> February 2010 from the Respondent asking him to show cause why disciplinary action should not be taken against him. The allegation against Otanga was that he had extracted information from the Respondent's Server Data, and circulated the information to unauthorized persons. He responded explaining that at the time he was alleged to have committed the offence at 6.22.12 a.m. the Respondent's Offices had not opened, and the Grievant had not arrived there.

6. Otanga was surprised to receive suspension letter dated 2<sup>nd</sup> February 2010. He was issued the letter of summary dismissal dated 1<sup>st</sup> July 2010. He approached the Claimant, who reported the dispute on suspension, and later a separate dispute on the summary dismissal. In either case, there was no settlement, and the Conciliator issued certificate of disagreement under Section 69 of the Labour Relations Act 2007, paving way for the filing of the Claim in Court.

7. To access the Server Data, one had to have the key to the room where the Server Data was installed. One needed to have the password to log in. The Grievant did not have the key to the room housing the Server Data. He did not have the password. There was no evidence that he was present at the time the offence was said to have taken place. The Respondent's Offices were guarded by Security Personnel 24 hours, and were under CCTV Camera.

8. An audit trail could easily have shown who accessed the Server Data. The IT Manager could easily have provided details on printer source. It was not shown by the Respondent who, the unauthorized persons that Grievant allegedly circulated the information to were. The Database Administrator logged in every User to the Server at 8.00 a.m. and logged out at 5.00 p.m. on a daily basis. He could have revealed who accessed the data.

9. The Grievant was victimized due to his trade union activities. The Respondent was anxious to rid itself of all Workers' Representatives. Otanga the Chief Shop Steward was dismissed. Others who were dismissed included Tom Nthenge the Deputy Shop Steward; Secretary Tony Matuku; Assistant Secretary Evans Bosire; Women Representative Penina Owiti; Youth Representative Salome Kech; and Shop Steward Hellen Yaya.

10. The CBA was violated. There was no warning to the Grievant before dismissal. The offence could not be categorized as gross misconduct under the CBA. The Grievant worked for over twenty years without warning. He served as Trustee in the Workers' Pension Scheme. He was victimized in violation of ILO Convention 135, which seeks to protect Workers' Representatives. Article 41 of the Constitution, and Section 45 of the Employment Act 2007 were disregarded. Fair procedure was not observed. The letter to show cause why disciplinary action should not issue referred to the Procedure Manual; the Claimant did not have any prior knowledge of such a Manual.

11. Otanga testified that he knew on Geoffrey Ontieri as a Member of the Respondent and a delegate, representing Government Chemist Branch. He was an elected Official at Branch level. Otanga would meet Ontieri whenever there were Member problems to be resolved. Ontieri authored a letter addressed to the CEO of the Capital Markets Authority, complaining that the Respondent had engaged in illegal share trading with Gina Din Corporation. Gina Din was to receive Kshs.9.95 million from the Respondent. The payment voucher was not a confidential document within the Sacco. The voucher exhibited as part of the Respondent's appendix 5, stated to be a payment voucher, is not genuine. Vouchers from the Respondent had a specific design. The genuine vouchers were not double spaced.

12. The Respondent's annexure 16 is an extract of the Audit Trail. The Respondent concluded the Gina Din voucher was printed by Otanga. There were several vouchers, but it was not shown that the specific Gina Din voucher was originated by Otanga. The Audit Trail ought to show what exactly, the Grievant did. The Respondent alleged that the Audit revealed the Grievant printed the voucher number 181071, on 21<sup>st</sup> December 2009, at 4:26: 27 p.m. This was changed in the Respondent's evidence to 6.22.12 a.m. Any changes were the preserve of the System Administrator. It is not true as alleged in the Statement of Reply that the Grievant was campaigning against the Board of Directors. It is true he appeared before a Parliamentary Committee, having been called by the Claimant to represent the Claimant. He did not speak for the Union at the meeting. Representatives of the Claimant made the representations on behalf of the Union. The Grievant argues that having worked for the Respondent for over twenty years; he could easily fit back in his old job. He states he does not wish to be compensated; he only desires an order for reinstatement.

13. On cross-examination the Claimant told the Court he was summarily dismissed for circulating information to unauthorized third parties. George Ontieri is known to the Grievant. He was Sacco Member and Delegate. The Grievant was familiar with all Members and Delegates. Ontieri was not a personal friend of the Grievant. Both gentlemen dealt with day to day Sacco issues. Nothing in particular made the Grievant come to know Ontieri. The Grievant was not aware that Ontieri caused the Management Committee of the Respondent mayhem, by making the allegation that the Minister in charge of Co-operatives, received money from the Respondent on a weekly basis.

14. Otanga was not able to say if Ontieri had lodged complaints against the Respondent, with the Anti Corruption Commission and the Police, on the basis of the documents supplied to Ontieri by Otanga. The Grievant was not aware of the Union's role in the Sacco's investments. The Cooperatives Minister Joe Nyaga was furious about the accusation that he was receiving weekly bribes from the Respondent. The Anti -Graft Agency had received reports from undisclosed Sacco Officials, that Management was destroying evidence to frustrate the probe. In newspaper reports, Members of Parliament involved in the

probe expressed fears that they were being targeted by whistleblowers. Otanga denied that he was one of the said whistleblowers. The Grievant was not aware that allegations were bandied around; stating Minister Nyaga was a shareholder of the Gina Din Company. The Financial Journal of September 2010 reported that Members of the Sacco had withdrawn their contributions from the Respondent in panic, owing to the persistent probing of the affairs of the Respondent.

15. The matter was investigated by the Police. Eventually, the Minister was cleared of any wrongdoing. The Report of the Parliamentary Committee on Agriculture, Livestock and Cooperatives gave the names of the complainants in the probe. Otanga was among the complainants. There were nine Sacco Members. The Grievant could not say who among them had participated in the Central Management Committee elections. Ontieri, Otanga, Mageto and Sifuna had all contested as delegates. The complainants were malicious. The Audit Trail was erroneous. The Grievant did not access information on the voucher. Otanga attended a disciplinary hearing in the company of Mr. Munoru, a Representative from the Claimant Union. Respondent's Legal Officer and the Human Resource Officer were present at the meeting. The hearing was on 30<sup>th</sup> June 2010. The following day, the Claimant received his letter of summary dismissal. It was four months from the date of suspension. The Grievant would not say he was well prepared for the hearing.

16. The Grievant stressed that he seeks to be reinstated. He appealed the decision to dismiss him. The appeal was rejected by his employer. If the documents from the employer were confidential, Otanga testified that he dealt with them perfectly. Gina Din voucher was not confidential. The newspapers reported about panic withdrawals. The General Manager is Mr. Wandera. The Sacco, and not Wandera, was being investigated. Otanga worked for the Respondent for eighteen years. He was enlisted in a Pension Plan. He was ten years away from the age at which he would start earning his pension, and had received the lump sum payment. He was not paid terminal benefits by the Respondent. There were eight Shop Stewards at the time of Otanga's employment; only four remain. Most of them left before Otanga. They did not all leave, on the same issues that necessitated the Grievant's departure. None is faced with a criminal offence. He stated on redirection that the recommendations of the Parliamentary Committee suggested there were further investigations to take place. He was not paid anything in terms of benefits. His letter of dismissal issued on 1<sup>st</sup> July 2010, but was made effective from 2<sup>nd</sup> February 2010. There was no voucher shown to Otanga at the conciliation or the disciplinary hearing. He saw it for the first time in Court. Otanga pleads with the Court to grant him the prayer for reinstatement.

17. The Respondent agrees the Grievant was its employee. He started on temporary terms on 10<sup>th</sup> July 1991. He was confirmed on 1<sup>st</sup> January 1999. He was made a Senior Clerical Officer on 10<sup>th</sup> November 1999. He was summarily dismissed on 1<sup>st</sup> July 2010, for obtaining confidential information without authority, and circulating this information to unauthorized persons. He was driven in doing so by ulterior motive.

18. He circulated the information to Geoffrey Ontieri, Media Houses and to Politicians, intending to have Sacco Management Officers arrested or scandalized. The documents caused the Respondent great injury to its image and business Investigations carried out by the various arms of the Government including Parliament, concluded that the allegations were groundless. The Parliamentary Committee established that Otanga had joined a splinter group of the Sacco Members, who had vowed to oust the elected Board of Directors. He was suspended on 2<sup>nd</sup> February 2010 to pave way for investigations. When asked to give an explanation, he used abusive language to the Human Resource Manager, the Chief Executive Officer, the Finance Manager and the Senior Security Manager. Investigations revealed Otanga extracted the document from the Respondent's computer.

19. He was heard, in the company of Mr. Munoru, Trade Union Representative, on 30<sup>th</sup> June 2010. He accepted that the document was extracted from the Respondent's system, but denied having done the extraction. His secret password was used to access the document. He was unable to say how this was done. He was subsequently summarily dismissed. He had a poor disciplinary record, replete with warnings dating back to 1999.

20. The persons mentioned by the Grievant as having been victimized by the Respondent on account of trade union activities, left employment for various reasons. Nthenge left in 2007 on account of redundancy; Matuku was a deserter; Bosire was charged in a Criminal Court for stealing Kshs. 8.8 million, belonging to the FOSA Mombasa Branch; Penina Owiti resigned on suspicion that she used a forged KCE certificate to gain employment, a fact confirmed by the Kenya National Examination Council; while Salome Kech and Hellen Yaya left on redundancy in 2007.

21. The Grievant has maintained a campaign of hate against the Management of the Respondent after dismissal, and it would be imprudent to direct that he returns to work with a Management which feels is unsuited for the work. His activities led to the loss of Kshs. 100 million in revenue to the Respondent, through the massive withdrawal of contributions by Members. The Management had an obligation to safeguard the investment of its Members and also the jobs of 142 employees. The Claim has no merit, and the Respondent prays the Court to uphold its decision to summarily dismiss the Grievant

22. Martin Munyao Mutua testified that in December 2009, Otanga accesses the Respondent's Server Data. He extracted and distributed confidential documents to unauthorized persons. The data related to sale of shares from Gina Din. He circulated the voucher widely. He forwarded a copy to Mr. Ontieri, who wrote to the Capital Market Authorities, saying the share transaction was irregular. Respondent's CEO was nearly arrested arising out of this information. Payment to Gina Din was not irregular. The same document was circulated to Parliament and to the Media. Members withdrew from the Respondent massively, leading to substantial loss.

23. Respondent's data is centralized. Audit Trail confirmed Otanga extracted the data. He was subsequently suspended. It is not true that he was suspended at 4.00 p.m. and was expected to respond by 5.00 p.m. He was invited for a disciplinary hearing. Mutua confirmed that Otanga was accompanied by Mr. Munoru. The panel found him guilty as charged, and he was summarily dismissed. Parliament and the Police all found the accusations against the Respondent to be false. Trade Union representative at the Shop Floor were not victimized as stated by Otanga. There was a redundancy process in 2007. The dispute ended up in this Court and the finding was that there was no victimization. Other employees mentioned by the Grievant left for other reasons. The Claimant was paid terminal dues and pension. The Respondent is ready to issue the Grievant with the Certificate of Service, once he cleared with the Respondent.

24. On cross-examination, Mutua stated that Otanga accessed data on 21<sup>st</sup> December 2009, not 21<sup>st</sup> December 2010, as mentioned in the letter of summary dismissal. The Grievant worked from 1991 to 2010, a period of about 19 years. According to the records presented by the Respondent, there were no warning letters issued to the Grievant during his service. The employees at the Respondent were interconnected, and anyone so connected could access data. The unauthorized information was a voucher. It was circulated to unauthorized persons including Ontieri. Ontieri was at the time a Member of the Sacco and a delegate from one of the Branches.

25. The voucher related to a third party Gina Din. It was used in scandalizing the Minister. The Claimant was not authorized to see the voucher. The transaction was legal. It was alleged the money was paid to the Minister. It was confirmed Otanga extracted the information from the Respondent's system. The Audit Trail confirmed Otanga was liable. He was a Member of a group that was opposed to the serving Sacco leadership. The letter to show cause issued on 2<sup>nd</sup> February 2010, and the Grievant responded on the same day. The letter of suspension followed on the same day 2<sup>nd</sup> February 2010. The witness explained that the Grievant was not rushed. His explanation was sought and received in the morning of 2<sup>nd</sup> February 2010, whereas the suspension issued in the afternoon.

26. Of the eight Shop Stewards listed by the Claimant in his appendix 2, only one is still working for the Respondent. Others left for various reasons. They were not victimized. Two resigned voluntarily; one was jailed for ten years; and three left on redundancy. Mutua was aware the matter went before the Parliamentary Committee. Mutua did not himself appear before that Committee. This Committee recommended further investigations. The Grievant was the Secretary to the Pension Scheme and also a Chief Shop Steward. He was paid all terminal benefits. Pension is a terminal benefit. Mutua could not

recall the details of terminal dues that were paid. The letter of summary dismissal stated that the Grievant would be paid for days worked; accumulated leave; and overtime. Mutua did not have details of what was paid. The Grievant was not dismissed based on the adverse newspaper reports. The Respondent followed its internal processes. The voucher was shown to the Claimant's Representative Mr. Munoru during conciliation meetings.

27. Redirected, the witness clarified that the Grievant extracted data from the Respondent's computer on 21<sup>st</sup> December 2009, not 21<sup>st</sup> December 2010. The latter date was given through typographical error. The Minister was scandalized. It was alleged he was receiving Kshs. 200,000 per week from the Respondent. The allegations resulted in financial loss to the Respondent, with members making massive withdrawal in panic. New Shop Stewards were elected after the former ones left. The Report of the Parliamentary Committee showed Otanga, as well as Trade Union Representative Mr. Tom Odero who is seized of the Claimant's brief herein, were in the list of the complainants. Mutua gave several verbal warnings to the Grievant. There were one or two written warnings in the Grievant's file. He was not a disciplined employee. The Respondent urges the Court to dismiss the Claim.

*The Court Finds and Awards-:*

28. Joseck Argwings Omuhinda Otanga was employed by the Harambee Co-operative Savings and Credit Society Limited on 10<sup>th</sup> July 1991. He started off as a Clerical Officer. He was summarily dismissed effective from 2<sup>nd</sup> February 2010. At the time of dismissal, he worked as a Senior Clerical Officer. The Respondent justified its decision on the ground that the Grievant had irregularly obtained confidential information from the Respondent's Computer System, and circulated the information to unauthorized persons. The Grievant's action led to the soiling of the Respondent's name. The Minister for Co-operatives was equally besmirched. Members of the Respondent withdrew from the Respondent in a panic, leading to substantial financial loss for the Respondent.

29. The Court must first examine whether these facts constitute valid reason or reasons, to justify the Grievant's summary dismissal, as required under Sections 43 and 45 of the Employment Act 2007. There is sufficient factual material to conclude that the Grievant extracted the information that contained details of a sale of shares transaction, between Gina Din Corporate Communications Sacco and Harambee Sacco Society Limited. The Respondent purchased shares worth Kshs. 9,950,000 from Gina Din.

30. The Grievant's password was used in extracting the information. His assertion on the exact time the data was extracted, or on his whereabouts at the time of extraction, does not absolve him from being suspected on reasonable and sufficient grounds, of having committed a criminal offence against or to the substantial detriment, of his employer or his employer's property. Events that followed this extraction adequately show the Grievant's complicity. These events leave no doubt on the participation of the Grievant, in an incident that left the Respondent reeling from reputational and financial harm.

31. The information found its way to Geoffrey Ontieri, Member and Delegate, Respondent's Government Chemist Branch. He immediately wrote to the CEO of the Capital Markets Authority saying the shares were purchase by the Respondent from Gina Din irregularly. The actual payment voucher was attached to Ontieri's letter. On 30<sup>th</sup> September 2010, eleven persons who included Ontieri and Otanga made presentation to the relevant Parliamentary Committees, on alleged mismanagement of funds at the Respondent.

32. The Parliamentary Committee doubted the integrity and sincerity of the complainants, given that some of them had contested and lost elections for Sacco Central Management Committee positions. This

fact was corroborated by the Grievant in his testimony to the Court. The Media reported widely the allegations raised by the Grievant against the Respondent, in not very laudatory terms. On 2<sup>nd</sup> September 2010, the Dailies reported that since May 2010 1,115 Members had withdrawn their contributions amounting to more than Kshs. 109 million, saying they were scared on losing their money, having followed public discussions of the alleged financial improprieties at the Respondent.

33. The plot was reported in the Dailies to have thickened, drawing in Minister Joe Nyaga. He was alleged to be a shareholder of Gina Din, and on a weekly stipend of Kshs. 200,000 per week, paid by the Sacco Management to keep a lid on the corrupt dealings taking place at the Respondent. The Parliamentary Committee absolved the Minister of any wrongdoing. The Committee confirmed with the officers of Gina Din Sacco that the share purchase was regular. The transaction was found to be within the mandate bestowed upon the Central Management Committee by the Sacco's by-laws. It was observed that the allegations made by the complainants were without foundation, and that similar allegations had been made against the CID, Anti-Corruption Commission, Auditors, and the Attorney General.

34. The differences between Ontieri and the Sacco Management appear to have stretched back to 2004, years before the incident of 2010. In the newspaper reports, he is alleged to have initiated Nairobi Chief Magistrates' Miscellaneous Application Number 45 of 2004, a private criminal prosecution, against some Management Officials for graft. The illegal search for evidence, the extraction and circulation of the Gina Din payment voucher by Otanga in 2010, would therefore fit in this long-drawn out battle between certain groups, for the control of the Harambee Sacco's Central Management Committee. It is important to note that some of the persons, who postured as whistleblowers and graft-fighters at the Sacco, had offered themselves for elective positions at the CMC and lost.

35. As this Court concluded in a recent ruling in ***Industrial Court Cause Number 805 of 2012 between Leland Salano v. Intercontinental Hotel*** one of the commonly used methods of determining whether documents are confidential at the employment place, is where their release would damage the employer's business. In this case, the theft, and circulation of the documents by the Grievant triggered all manner of calumny against the business of the Respondent in the Mass Media, leading to panic withdrawals by Members and uncontroverted financial loss to the Respondent. The actions by the Grievant impeded effective management of the Sacco. The Grievant was still in active employment at the time he extracted the documents and circulated to Ontieri and the Media. The employment relationship is based on mutual trust, confidence, good faith and fidelity. The Grievant had an obligation to keep his employer's documents confidential. He not only assisted persons who had axes to grind with the leadership of the Sacco to obtain what was supposed to be a smoking gun; he facilitated the circulation of those documents, leading to the defamation of the Minister under whom the Respondent fell. The allegations which were meant to be supported by the documents went through various credible investigatory agencies, and were discounted. The damage had already been done to the Sacco and the Minister.

36. In this Court's view, the Grievant made a wrong choice to associate with certain splinter groups within the governance structure of the Sacco. He misread his role as Chief Shop Steward, by delving into the politics of the Sacco, which in the view of the Court, was outside his mandate of representing workers. Trade Union representatives have no reason to lose focus on their core mandate, which is worker representation. The Grievant digressed in Management power struggles, and forgot his obligation as an employee. The Respondent had valid reason to summarily dismiss the Grievant.

37. The procedure leading to the summary decision was in conformity with Section 41 of the Employment Act 2007. There is no specific clause in the CBA that was shown to have been violated. The allegation that the Sacco deliberately set out to victimize Shop Stewards was adequately answered in the evidence of the Respondent. Many of the Shop Stewards left for different reasons, including redundancy and criminal conviction, which did not contain any visible element of victimization. Other Shop Stewards have filled the vacancies left by those who left. The Grievant was issued with a letter requiring him to show why disciplinary action should not be initiated against him. This was in morning of 2<sup>nd</sup> February 2010. He responded promptly in the same morning. In the afternoon, a decision was made to suspend him

to pave way for investigations. Investigations followed, which included an Audit Trail. It was established that Otanga accessed and printed the payment voucher on 21<sup>st</sup> December 2009. The ICT Manager explained that the date and time on the user's terminal could be changed by the user. Date and time indicated on the payment voucher was the date and time in the user's terminal at the time of printing. This Audit Trail discounted the Grievant's assertion that the Respondent's evidence was not credible, owing to variance in the date and time of the data extraction.

38. The Grievant was heard on 30<sup>th</sup> June 2010. He had a clear four months to prepare his defence. He was accompanied to the hearing by a no-nonsense Trade Union Representative Mr. Munoru. He was heard, and found not have given adequate rebuttal of the serious charges against him. He was found to have flouted Staff Regulations. He was summarily dismissed in accordance with the Employment Act 2007 and the CBA.

39. The Grievant can hardly claim the remedy of reinstatement, let alone any other remedy, considering these findings. The Court did understand him when he testified that he wants to be reinstated, and that he does not want any compensation. The Grievant came out across as an employee who burnt all the bridges of trust, confidence and fidelity he had with his former employer. He caused the Respondent considerable financial loss. He was involved in a war against the CMC. It is not likely that the parties can reconstruct the burnt down bridges. There was no chance that the Court could order for reinstatement in the circumstances. Summary dismissal was well grounded in fact and law, substantively justifiable as well as procedurally fair, that even the remedy of compensation does not come for consideration. In the end, IT IS HEREBY ORDERED-

***[a] The Claim is dismissed with no order on the costs.***

Dated and delivered at Nairobi this 19th day of July 2013

James Rika

Judge