



**REPUBLIC OF KENYA**

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

**CAUSE NO 1239 OF 2011**

**JOHN CHICHIR ..... CLAIMANT**

**VERSUS**

**KENYA POLICE STAFF SACCO SOCIETY LTD..... RESPONDENT**

**JUDGMENT**

By a Memorandum of Claim dated 21<sup>st</sup> July 2011 and filed in court on 22<sup>nd</sup> July 2011 the Claimant alleges unfair termination of his employment by the Respondent and prays for payment of salary as compensation for unfair dismissal. He also prays for issuance of a certificate of service. He further seeks costs and interest.

The Respondent filed its Reply to the Memorandum of Claim on 10<sup>th</sup> November 2011. The Respondent denies the allegations contained in the Memorandum of Claim and urges the court to dismiss the Claim with costs to the Respondent.

The case was first mentioned by Justice Isaac Mukunya (now retired) on 28<sup>th</sup> October 2011 when the court fixed the case for hearing on 30<sup>th</sup> May 2012.

The case came up for hearing on 30<sup>th</sup> May 2011 when hearing could not take off as Ms. Mumo, counsel for the Respondent was not feeling well. The case was adjourned and fixed for hearing on 21<sup>st</sup> November 2011. The case was heard on 21<sup>st</sup> November 2012, 25<sup>th</sup> February and 17<sup>th</sup> May 2013. The parties thereafter filed written submissions.

The Claimant testified on his behalf while the Respondent called JULIUS MUSEMBI MUTAMBO (RW1) and MOSES ORWE MANYUANDA (RW2), the Human Resources Manager and the General Manager Finance and Banking of the Respondent respectively.

The Claimant testified as follows;

He lives in Kericho and is currently farming. He was employed by the Respondent on 21<sup>st</sup> September 1992 as a book keeper. He was promoted to accounts assistant in 2006. He worked in cash office as a cashier from 1993 to 2003 when Respondent opened a front office (FOSA) where he was transferred to and worked for 7 years. His duties were mainly to withdraw cash from the bank for FOSA use and preparation of staff payrolls. He was still performing the same duties when he left employment on 1<sup>st</sup> May 2011.

In December 2010 he was asked to go on annual leave for 30 days from 7<sup>th</sup> December to 18<sup>th</sup> January

2011 although he had already taken his annual leave earlier in July 2010. The leave form was filled by Mr. Julius Musembi the Human Resources Manager. He did not sign the leave form. When he resumed duty on 17<sup>th</sup> January 2011 he was told to go back home as his leave had been extended to 12<sup>th</sup> April 2011. On 12<sup>th</sup> April 2011 he resumed duty and was issued with a letter to show cause why his services should not be terminated on account of certain fraudulent transactions of SACCO cheques. No cheques were specified in the show cause letter. His duty at the FOSA involved banking cheques that are fully signed. He was aware that some staff seconded to the SACCO by the Police Department were prosecuted. They are Allan Keter and Joseph Mbondo. The allegations against them was stealing SACCO cheques. The Claimant was not a custodian of the cheque book. He replied to the show cause letter explaining what his duties were and denying involvement in the loss of the SACCO cheques. After replying to the show cause letter he received a termination letter dated 12<sup>th</sup> May 2011. The reason for termination in the letter is that he was negligent in the performance of his duties. He was never given an opportunity to explain or answer to the allegations. The staff policy on discipline was not followed. The policy required that an employee be given 3 warnings before being terminated. He was not given any warning. The policy also refers to a hearing by the disciplinary committee. He was never taken through the disciplinary committee hearing. He was also not allowed to appeal. He was never issued a certificate of service. He was also not given notice of termination.

Over the years he worked diligently withdrawing up to Kshs.10 million per day and Kshs.50 million per week. He was never given a report of the investigations. He was not negligent in the performance of his duties. In 2008 and 2009 he was voted the best employee. He earned several promotions.

His last salary was Kshs.86,000. He seeks payment of damages for wrongful dismissal and other prayers as in the Memorandum of Claim.

Under cross examination the Claimant stated as follows;

He holds a KCSE certificate, a diploma in Cooperative Management and accounts clerk. He was qualified to hold his office and was guided by the staff policy manual as there were no internal guidelines for performance. His letter of appointment shows he was appointed as a book keeper but he worked as a cashier. His last position was chief FOSA cashier. It was not normal for him to be sent on compulsory leave without applying. He asked why he was sent on leave but was not given any reply. He received his full salary for May 2011 which was paid into his account. He was accountable to the FOSA Manager and did not write to the FOSA Manager about irregularities involving the cheque as he was aware. He is aware that the General Manager, Deputy Accountant, SACCO Cashier, auditor terminated alongside himself.

RW1 Julius Musembi Mutambo testified that he knows the claimant since 2008 when he was employed by the Respondent and they worked together. He is aware the claimant was employed as a book keeper and was Chief Cashier in the FOSA at the time of termination. The Claimant was in charge of banking activities at the FOSA. There were cheques which were lost which found their way to other banks. When this was discovered the Claimant was sent on compulsory leave as he was in charge of fully signed cheques. It was his responsibility to ensure that all cheques were accounted for. The loss amounted to kshs.7 million. The Claimant was required to show cause. He replied denying insolvent. He was terminated and paid in lieu of notice. He was paid May salary in full.

There was a committee constituted by the Board to investigate the matter. The committee did not have minutes.

Under cross examination RW1 stated he was not the immediate supervisor of the Claimant and was not a member of the investigation committee. The Claimant was invited by the investigation team and attended the meeting. The staff policy required the claimant to be given 3 warnings. The claimant was not given 3 warnings. The claimant was not informed of the findings of the committee. The cheques that were lost were fully signed and were paid at the FOSA. The Claimant filed to keep full signed cheques in his custody.

RW2, MOSES ORWE MANYUANDA testified that he is the General Manager, fiancé and Banking of Respondent. He was known the Claimant since 1999 when he was employed. The Claimant had been employed earlier and was working in investments department. In 2003 the Respondent opened a FOSA wing of the Society and the Claimant was transferred to work at the FOSA as Chief Cashier under RW2. The Claimant role as cashier was mainly receiving and banking cash and cheques. He also had custody of cheques and cheque books between August and December 2010 there were incidents of cheques getting lost within the society. After reconciliation 15 cheques were found to be missing. The cheques were found to be missing. The cheques got lost within the office or while in transit for signing by the signatories. There was an employee called Omollo who was doing reconciliation. The chief cashier who is the claimant was in charge. When the cheques got lost the Board forward a committee to investigate the matter. Their report was submitted to the Board. The matter was also reported to the Banking Fraudulent and their investigations are still ongoing. Suspects were arrested and Claimant was sent on leave during investigations. The Claimant was given an opportunity to defend himself. After his leave expired he was terminated. Under cross examination RW2 stated that the Claimant was involved in keeping cheques and cheque books but was unable to explain how the cheques got lost. The decision to terminate the Claimant was made by the Board. No action was taken against Omolo who was responsible for keeping cheques and cheques books with the Claimant as he was on secondment. Omolo is also a witness. RW2 is not aware if the Board established what happened to the cheques. RW2 was not a member of the Investigating committee. He is aware the Claimant appeared before the Committee. There was a report which is not in court. Cheques were being paid without being fully signed. The Claimant is not the one who paid the cheques. The tellers paid. The Claimant was not a signatory. The people who were taken to court are not employees of the Respondent. The case is still pending. The Claimant has not been charged.

In the written submissions for the Claimant it is submitted that the Claimant was not accorded a fair hearing in terms of the Respondent's Employment Policy and the Employment act and that the Claimant was dismissed for reasons which did not relate to the conduct of his duties. It is further submitted that the Respondent only made general statements of denial in its Reply and did not offer any substantive reply to the claims by the Claimant.

The Respondent in its written submissions argue that the Claimants contract was terminated in lien with the terms contained in his contract was terminated in line with the terms contained in his contract of employment and in compliance with the Employment Act, that there were internal investigations carried out and the Claimant was requested to show case why his services should not be terminated and that the Claimant reported to the show cause letter. The Respondent relies on the case of Joseph Muthama Ndambuki and others versus Delmote (k) Limited (2012) EKLR to the effect that a contracting party does not have to rely on misconduct in order to terminate such a contract without giving any reason.

I have considered the pleadings together with the attached exhibits, the testimonies of the Claimant and the Respondent's witnesses and the written submissions of the parties. I have also perused the authorities cited by both parties in my considered opinion the broad issues for consideration are whether the termination of the Claimants employment was unfair and if so, whether the Claimant is entitled to the prayers sought.

In determining whether the termination of the claimant's employment was unfair, the court is guided by the provisions of Section 41, 43 and 45 of the Employment Act. Section 44 of the Employment Act must therefore be implemented within the context of section 41 which provides for an employer who is considering to terminate of the employment of an employee must explain to the employee the reasons for which the employer is considering to terminate the employment subsection 41(2) provides that where the termination is to be under section 44(3) or (4), the employer must hear and consider any representation made by the employee or the person, if any, chosen by the employee to accompany him during the explanation.

I have also noted the contents of the staff policy annexed as Exhibit "f" to the Memorandum of claim.

Paragraph 2.4.5 thereof provides for 3 warning letters before termination of Employment. Paragraph 2.4.4 which provides for suspension, also provides for up to 3 warnings before an employee is either terminated or dismissed. The last paragraph of 2.4.4 states as follows;

*“In all cases of disciplinary action the employee will be given the opportunity for self defence and fair hearing”.*

Paragraph 2.4.8 provides that all disciplinary matters will be handled by a disciplinary committee consisting of five management staff chaired by GM with the HR as secretary, except for Senior Management Staff whose cases will be handled by BOD.

From the evidence on record the Respondent did not comply with either the provisions of the Employment Act or its staff policy.

The Claimant was only asked to respond to a show cause letter. He was never called for the purpose of explaining the charges to him or was never given a hearing in terms of section 41(1) and (2) of the act, nor has the Respondent produced any evidence to prove that any investigations were carried out or there was a meeting of the Board at which the Claimants case was heard ad the decision to terminate him arrived at.

For these reasons, I find that the termination of employment of the Claimant was unfair as the procedure in both the staff policy and the Act was not followed.

The second issue is whether the Claimant is entitled to his prayers. The Claimant prayed for 1 months salary in lieu of notice, 12 months salary as compensation and certificate of service.

**(i) Notice**

The Claimant’s letter of termination states that he would be paid 1 month’s salary in lieu of notice. The letter is dated 12<sup>th</sup> May 2011 but backdates the date of termination to 1<sup>st</sup> may 2011. A letter of termination takes effect on the date4 the Claimant is notified of the termination and not before.

The Respondent has argued that the Claimant was paid full salary for May 2011 yet he did not work for the whole month.

Section 44(2) provides that no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractions term while section 44(1) provides that termination of employment without notice or without notice or with less notice an employee is entitled to amounts to summary dismissal.

In the present case, although the letter of termination offers the Claimant payment of 1 months salary in lieu of notice, no such salary was paid.

I find that the Claimant is entitled to a 1 months salary in lieu of notice and award him Kshs.86,000/=.

**(ii) 12 months compensation.**

Having found that the Claimant was unfairly terminated, he is entitled to compensation in terms of Section 49(1) (c). Having worked for more than 18 years for the Respondent, I find that the Claimant deserves full compensation and award him 12 months gross salary in the sum of Kshs.1,032,000.

**(iii) Certificate of Service**

The Claimant is entitled to certificate of service in terms of the provision of Section 51 of the Employment Act.

**(iv) Costs**

Having been successful in his Claim, I award the Claimant costs of this suit.

**(v) Interest**

The Claimant shall also be paid interest from date of judgment.

In summary I enter judgment for the Claimant against the Respondent as follows;

- i. I declare the termination of the claimant by the Respondent unfair.
- ii. Kshs.1,118,000.
- iii. Certificate of Service
- iv. Costs and
- v. Interest.

Orders accordingly.

Read in open Court this 24<sup>th</sup> day of September 2013

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

In the presence of:

**Juma** \_\_\_\_\_ for Claimant

**Masakwe** \_\_\_\_\_ for Respondent