Co-operative Bank of Kenya Limited v Ojwang (Civil Appeal 278 of 2019) [2024] KECA 1265 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KECA 1265 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 278 OF 2019

HM OKWENGU, SG KAIRU & HA OMONDI, JJA

SEPTEMBER 20, 2024

BETWEEN

CO-OPERATIVE BANK OF KENYA LIMITED .... APPELLANT

AND

ORWA JAMES OJWANG .... RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Kisumu (Mathew Nderi Nduma, J.) dated 24th January, 2019 in ELRC Cause No. 43 of 2016)

RULING

1. In this appeal, the appellant, Co-operative Bank of Kenya Limited (hereafter "the appellant" or "the Bank") has challenged the judgment of the Employment and Labour Relations Court (ELRC) (Mathews N. Nduma, J.) at Kisumu delivered on 24th January 2019 in favour of the respondent, Orwa James Ojwang (the respondent). In that judgment, the ELRC found that the respondent's "negligence (sic) conduct, as the Operations Manager gave opportunity to his co- custodian to steal…money from the branch" and that "this was a proper case for a normal termination as opposed to a summary dismissal." In the result, the Judge substituted the summary dismissal of the respondent by the Bank with normal termination. The court proceeded to award the respondent three (3) months' salary in lieu of notice, with interest at court rates; and ordered the Bank to issue him with relevant certificates of all statutory contributions and pension scheme.

2. The Bank is also aggrieved that the learned Judge failed to consider its counterclaim against the respondent in respect of outstanding liabilities to the Bank in the amount of Kshs. 3,474,741.00 that fell due upon termination of his employment.

3. By a Notice of Cross Appeal dated 25th January 2024, the respondent urges the Court to set aside the finding by the learned Judge that his dismissal was justified or fair and to substitute the same with a

finding that the dismissal was unfair and that he is therefore entitled to the relief of 12 months' salary which he contends the judge should have award him.

4. The facts are that the respondent began his banking career with the Bank on 6th May 2003 when he was employed as a Graduate Clerk. Over the next ten years, he served the Bank in different locations and capacities rising through the ranks within the Bank to the position of Operations Manager, Mumias Branch, where he was posted on 20th September 2012. As the Operations Manager at that Branch, his responsibilities included financial control, management reporting, branch administration and business continuity. He was also a co-custodian of the Bank's vault of the Branch's strongroom.

5. In early March 2013, between 2nd March 2013 and 21st March 2013, irregular removals or withdrawals of varying amounts totalling over Kshs. 30 million were made from the vault account. According to the Bank, on 21st March 2013, the vault had a cash shortfall of Kshs. 2 million because the respondent and his co-custodian paid out Kshs. 6 million from the vault but only made a transfer of Kshs.4 million; that between 2nd March and 21st March 2013, the respondent and his co- custodian were giving out cash from the vault without establishing the need for cash. At the time, the Branch had two vault custodians, namely the respondent, who, as already indicated, was the Operations Manager, and one David Watila, who was the Branch Checker.

6. Following the discovery of the irregular transactions, the Bank suspended the respondent from employment by a letter dated 25th March 2013 to facilitate investigations. Based on an investigation report by the Bank's Head of Security Services which was part of the Bank's documents before the trial court, between 2nd March and 21st March 2013, funds were removed from the vault prior to presentation of duly authorized cheques to the Chief Teller or Cash Officer, which should have been the basis for requesting for cash from the custodians of the vault. In effect, payments were made out from the vault without any request in the form of a cheque or instructions to warrant such removal of funds and without corresponding posting to any customer's account. According to the report, a total of Kshs. 32,701,093.00 was paid out by the respondent and his co-custodian David Watila, through that irregular method.

7. After the investigations, by a "show cause letter" dated 15th April 2013, the Bank invited the respondent to explain his actions and show cause why disciplinary action should not be taken against him on account of his having "either wilfully or by negligence allowed or facilitated loss of Bank property/cash and approved payments without following the established procedure." The respondent responded by his letter dated 18th April 2013 in which he sought to exonerate himself. He stated that there were serious "system challenges" when the Bank was offline from 2nd March 2013 to 12th March 2013 giving rise to reconciliation issues; that due to those reconciliation issues, his co-custodian David Watila took advantage of his position as the Branch audit person and as custodian "to execute the fraud by confusing the teller with transactions alleging they were reversal transactions."

8. Thereafter, a disciplinary committee hearing was held on 9th May 2013 where the respondent, alongside other Bank employees implicated in the matter, appeared to answer the charge by the Bank that he wilfully or by negligence allowed or facilitated loss of Bank property/cash and approved payments without following the established procedure for irregularly removing cash, amounting to Kshs. 32,701,093.00 from the vault. He also faced a complaint of gross misconduct by posting the misappropriated money to a teller's cash account to conceal the fraud and shortage of cash in the vault to give the impression that the funds had been given to the teller.

9. The Minutes of that disciplinary hearing are part of the Bank's documents produced during the trial. The Minutes capture that the respondent conceded that money was removed from the vault, where he was co-custodian, without any formal request, by acceding to representations by his co-custodian

that the same would be formalized. He is recorded as having stated that "the removal of cash (from the vault) is under dual custody" and that both he and his co-custodian would have to log in to access the vault. The Disciplinary committee found the respondent to have been guilty and recommended his dismissal.

10. The Bank thereafter summarily dismissed the respondent by a letter dated 17th May 2013 on the basis that his explanation before the Staff Disciplinary Committee did not exonerate him. The Bank reminded him, in the same letter, that the loans and other facilities accorded to him by virtue of his status as a staff member became due and repayable immediately. The total amount outstanding was stated to be Kshs. 3,474,471.00 the breakdown of which was provided with a stipulation that the amount would start attracting interest at the prevailing commercial rate effective 30 days from the date of the letter, 17th May 2013.

11. The respondent was later charged before the Magistrate's Court at Mumias, alongside two of his fellow employees, with the offence of conspiracy to defraud contrary to Section 317 of the Penal Code and five counts of stealing by servant contrary to Section 281 of the Penal Code. He was acquitted in a judgment delivered on 14th July 2014.

12. Against that factual background the respondent instituted ELRC Cause No. 43 of 2016 against the Bank on 16th February 2016, seeking a declaration that the grounds and reasons stated by the Bank in terminating his employment did not merit the action taken against him and is unlawful; an order for reinstatement to his employment without loss of payments/benefits; and interest and costs. In the alternative, he sought compensation for unfair termination/wrongful termination equivalent to 12 months' salary; 3 months' pay in lieu of notice; issue of certificates of all statutory contributions and pension schemes; and costs and interest. The respondent pleaded that the Bank's conduct and reasons for terminating his employment was a demonstration of bad faith, devoid of merit, and did not follow due process.

13. In its response, the Bank maintained that the termination was for lawful cause and was justified, and that due process was followed in reaching the decision to summarily dismiss him from employment. The Bank also counterclaimed for Kshs. 3,474,471.00 made up of:

Car Loan-Kshs. 101,610.00

Commercial Loan-Kshs. 741,993.00

Development Loan-Kshs. 84,920.00

Furniture loan-Kshs. 197,998.00

House Loan-Kshs. 2,054,595.00

Personal Loan-Kshs. 247,171.00

Personal Loan-Kshs. 46,184.00

14. At the trial, the respondent testified on his own behalf. He did not call any other witness. The Bank called its Relationship Manager Simon Mureithi Maina as its only witness. After reviewing the evidence and the submissions, the learned trial Judge framed two issues, namely, whether summary dismissal of the respondent by the Bank was for a valid reason and done in terms of a fair procedure and whether the respondent was entitled to the reliefs he sought. The Judge concluded:

> " The totality of the evidence by both parties has led the court to a conclusion that though the claimant was not directly involved in the theft of Kshs. 32, 701,093 from Mumias branch of the respondent at the time he served as the branch operations manager, his negligence

> conduct (sic), as the operations manager gave opportunity to his co-custodian to steal the said money from the branch. The claimant was found guilty of negligence upon being granted a fair hearing and was summarily dismissed."

15. The Judge expressed that having considered the mitigating circumstances presented by the respondent, "this is a proper case for a normal termination as opposed to summary dismissal" and substituted the summary dismissal by the Bank with normal termination and thereafter proceeded to grant the reliefs to which we have already stated.

16. As indicated, the Bank is aggrieved by that judgment. Based on Memorandum of Appeal and the written and oral submissions by learned counsel Ms. Owuor for the Bank, the complaints by the Bank crystallize into four issues, namely, whether the Judge erred in substituting the summary dismissal with normal termination; awarding the respondent three months' salary in lieu of notice; awarding the respondent costs; and in failing to consider and allow the Bank's counterclaim.

17. It was submitted for the Bank that based on the investigations conducted and the evidence tendered, the summary dismissal of the respondent was justified as it was established that the respondent and his co-custodian of the Bank vault performed irregular transactions by un-procedurally removing money from the vault which was tantamount to gross misconduct as per the Bank's Operating Manual.

18. It was urged that in the circumstances, the Bank did what a reasonable employer faced with the same circumstances would have done, by summarily dismissing the respondent from employment; that all elements of procedural fairness were fulfilled; and that the termination accorded with the provisions of Sections 41 and 45 of the *Employment Act* and the Judge was wrong in substituting summary dismissal with normal termination.

19. As for the award of three months' salary in lieu of notice, it was submitted that the same was erroneous; that the contract of employment, like Section 35 of the *Employment Act*, provided for a one month notice period.

20. Learned counsel for the respondent Mr. Onsongo in his written and oral submissions urged that the Judge should have upheld the respondent's claim having found that the respondent was not directly involved in the theft of the money but was negligent which gave an opportunity to his co-custodian to steal; and that the Judge erred in merely substituting the summary dismissal for normal termination.

21. Citing the case of Walter Ogal Anure vs. Teachers Service Commission [2013] eKLR, it was submitted that for termination to be fair, there must be both substantive justification and procedural fairness; that in the present case the respondent was not provided with the charges or allegations against him and was not accorded a chance of preparing his defence. Decisions of this Court in Kori Erick Nganga vs University of Nairobi [2019] eKLR and in Anthony Mkala Chitavi vs. Malindi Water & Sewerage Co. Ltd [2013] eKLR were among those cited regarding ingredients of procedural fairness.

22. Regarding the Bank's counterclaim, counsel submitted that the failure by the learned Judge to make a finding on the same is tantamount to disallowing it and that this Court should therefore order that the Bank's counterclaim is deemed to have been denied.

23. In the end, the respondent prays that the appeal be dismissed, the cross appeal be allowed, and the Court returns a verdict that the termination was substantively and procedurally unfair and award the respondent compensation equivalent to 12 months' salary.

24. We have considered the appeal and submissions and re- appraised the evidence in accordance with our mandate under Rule 31(1)(a) of the Court of Appeal Rules, 2022. Four issues arise from the appeal and the cross appeal. First, is whether the Bank was justified in summarily terminating the respondent's

employment and whether the learned Judge erred in substituting the summary dismissal with normal termination. The second is whether the termination was procedurally sound. The third, the relief(s), if any, to which the respondent is entitled. And the fourth is whether the Judge erred in failing to consider the Bank's counterclaim.

25. In addressing those issues, we keep in mind the principle re- affirmed by the Court in Peter M. Kariuki vs. Attorney General, Civil Appeal No.79 of 2012 [2014] eKLR that:

> "…we are duty bound…as first appellate court [to] reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial Judge are consistent with the evidence."

26. We also bear in mind that the trial judge had the advantage or benefit of hearing and seeing the witnesses testify which we do not have.

27. We start with the overarching question whether the Bank was justified in summarily terminating the respondent's employment and whether the learned Judge erred in substituting the summary dismissal with normal termination. Section 44(1) of the *Employment Act* (the Act) provides that summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

28. Section 44(2) of the Act prohibits an employer from terminating a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term. However, under Section 44(3) of the Act, an employer is at liberty to dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

29. Under Section 44(4) of the Act, matters that may amount to gross misconduct justifying the summary dismissal of an employee for lawful cause are set out, and include, under Section 44(4)(c), if "(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;" and under Section 44(4)(g) if "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".

30. It is common course that at the material time, Mumias Branch of the Bank had two vault custodians. Namely, the respondent and one David Watilla. As the respondent stated in his witness statement before the trial court:

> " In order to access the bank's strong room, there are 2 keys of bank personnel that are required to be present i.e. the operations manager (me) and the branch checker auditor (Mr. David Watilla)."

31. It was incumbent upon the respondent to authenticate transactions involving the vault. It was established at the trial, and the respondent acknowledged, that money was irregularly taken from the vault, where he was a co-custodian. It was demonstrated, for instance, that on 21st March 2013, the vault had a cash shortage of Kshs. 2 million. It was also demonstrated that although Kshs. 6 million was removed from the vault, Kshs. 4 million was posted to a teller leaving a shortage of Kshs. 2 million in the vault. On a different occasion, the respondent acknowledged that contrary to regulated practice, money was removed from the vault based on a representation by his co-custodian that a cheque requisitioning the same would later be presented by the customer.

32. Based on the evidence, the learned Judge was therefore correct in finding that the respondent's negligent conduct contributed to the loss to the Bank, a ground under Section 44(4)(c) of the Act justifying summary dismissal. That was indeed the basis upon which, in its "show cause letter" dated 15th April 2013, the Bank invited the respondent to show cause why disciplinary action should not be taken against him on account of his having "wilfully or by negligence allowed or facilitated loss of Bank property/cash." It is the same charge that the respondent was confronted with at the disciplinary hearing.

33. We do not think that the fact that the respondent was charged in a criminal court and acquitted bears upon the matter. As this Court stated in Oyombe vs Eco Bank Limited (Civil Appeal 185 of 2017) [2022] KECA 540 (KLR):

> " ... an employee does not have to be convicted for a criminal offence for gross misconduct to be demonstrated. Reasonable and sufficient grounds to suspect that a criminal offence has been committed to the detriment of the employer suffices to demonstrate or establish gross misconduct"

34. Was it then open to the Judge, in the circumstances, to substitute the summary dismissal for normal termination? In the case of CFC Stanbic Bank Ltd vs. Danson Mwashako Mwakuwona [2015] eKLR the court endorsed the following passage from Halsbury's Laws of England, 4th Edition, Vol. 16(1B) at paragraph 642 thus:

> " ...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted . If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair."

35. To the extent that summary dismissal was justifiable and lawful under Section 44 of the *Employment Act*, no proper basis was laid to support the decision of the learned Judge to substitute the decision of the Bank as employer with that of his own. The position of a vault custodian in a bank is undoubtedly a position of trust, a critical component in banking, and the response by the Bank to summarily terminate the respondent's employment was in our view a reasonable and proportionate response which any reasonable employer might have adopted.

36. We conclude therefore that the Bank was justified in summarily terminating the respondent's employment and the learned Judge erred in substituting the summary dismissal with normal termination.

37. We turn to the questions whether the termination was procedurally sound. Section 41(2) of the Act provides for the procedure to be adhered to before an employee can be summarily dismissed. It provides as follows:

> "41(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 subsection (1), make".

38. This Court in Oyombe vs Eco Bank Limited (above) explained that that Section provides the minimum threshold of a fair procedure that an employer ought to comply with in summarily dismissing an employee. It summed it up into four elements, namely, provision of an explanation of the grounds of termination in a language understood by the employee; the reason for which the employer is considering termination; entitlement of an employee to have a representative of his choice when the explanation of grounds of terminations is being made; hearing and considering any representation made by the employee and the representative chosen by the employee. See also Postal Corporation of Kenya vs. Andrew K. Tanui [2019] eKLR.

39. As already demonstrated, the process in this case began with the suspension of the respondent by the Bank's letter of 25th March 2013 when the irregular transactions came to light. He was then invited, by letter dated 15th April 2013 to show cause why disciplinary action should not be taken, the charges against him having been clearly set out and particularized. After his response dated 18th April 2013, a disciplinary hearing was convened and was held on 9th May 2013 where the same charges were levelled against him. The respondent did not during the hearing before the trial court complain at all regarding the process, which clearly accorded with the demands of Section 41 of the Act. There is in our view no merit in this complaint.

40. It follows, based on the foregoing, that the respondent was not entitled to any reliefs.

41. The last issue is whether the Judge erred in failing to consider the Bank's counterclaim. As already indicated, in its letter terminating the respondent's employment, the Bank intimated to the respondent that the facilities extended to him by virtue of his status became payable and would accrue interest at commercial rates thirty days thence. In paragraphs 36 and 37 of its Memorandum of Response, the Bank counterclaimed against the respondent judgment for the said amount of Kshs. 3,474,471.00 and provided a breakdown as itemized above. The claim was reiterated in the Bank's witness statement of Simon Muriithi Maina and in the Bank's final submissions.

42. When the matter was before the trial court on 29th June 2016, counsel for the respondent indicated that the Bank's response to the claim had been served the previous day and that counsel therefore required 30 days to respond. Thereupon, the court (Maureen Onyango, J.) ordered the respondent "to file reply to defence in 30 days."

43. On 14th July 2017, the record of proceedings indicates that a Mr. Ouma appeared for the Bank and indicated that, "so as not to waste judicial time, I have instructions to withdraw the counter claim as the Claimant has satisfied liabilities". The court (Maureen Onyango, J.) then ordered:

> " The counter claim is marked as withdrawn. The issue of costs on the counterclaim to be addressed in the written submissions after conclusion of viva voce hearing."

44. Consequently, the counterclaim having been withdrawn, the trial Judge had no basis to return to it.

45. In conclusion, the appeal succeeds to the extent that the judgment of the ELRC dated and delivered on 24th January 2019 is hereby set aside in its entirety. The Respondent's cross appeal fails and is hereby dismissed.

46. The Bank shall have the costs of the proceedings before the ELRC as well as the costs of this appeal.

47. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF SEPTEMBER, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

H. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR