IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, M'INOTI & KANTAI, JJ.A.)

CIVIL APPEAL NO. 370 OF 2017

BETWEEN

THE COOPERATIVE BANK OF KENYA LIMITED.....APPELLANT

AND

JOSEPH KINYUA NGARI.....RESPONDENT

(Being an appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Nairobi (Nderi Nduma, J.) dated 2nd March, 2017

in

ELRC Cause No. 2155 of 2014)

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JUDGMENT OF THE COURT

Joseph Kinyua Ngari ("the respondent") was employed by **Co-operative Bank of Kenya ("the appellant" or "the bank")** vide Letter of offer dated 23rd January, 2009 and his position was that of a Project Assistant at the appellant's Property and Supplies Department. That employment was confirmed by the appellant by a letter dated 10th August, 2009 and the respondent received Performance Based Reward for each year that followed until problems between the parties began.

By a letter dated 19th June, 2014 titled **"Irregular Procurement Practices"** the respondent was informed that an audit of his department had revealed he had either willfully or by negligence allowed or facilitated loss of the appellant's cash in that on or about 21st March, 2014 he (the respondent) had allowed payment for refurbishment of Ngong and Marsabit branches without confirming valuation details thus leading to a loss of **Kshs.300,000.** Further, that on various dates between 26th July, 2013 and 21st March, 2014 he had authorized various payments without confirming delivered quantities thus occasioning a loss of **Kshs.1,258,059/60**. He was thus required to, within 14 days, explain his actions and show cause why disciplinary action should not be taken against him in accordance with the provisions of a Staff Manual.

That letter was quickly followed by another – dated 25th June, 2014 on the same subject. Referring to the earlier show cause letter, the appellant's Director, Human Resources Division, informed the respondent that further investigations had revealed that the respondent, either wilfully or negligently had allowed or facilitated loss to the bank of **Kshs.481,000** when he had allowed payment without confirming quantities at the appellant's Embakasi branch. As in the first letter, particulars of actual items involved were given and the respondent was required, within 14 days, to explain his actions and show cause why disciplinary action should not be taken against him in accordance with the said Staff Manual.

The respondent gave a written explanation vide his letter dated 25th June, 2014 where he stated, *inter alia*, that he did not deal with fees in the projects, neither did he verify or approve payments to contractors as this was not within his job description. He further explained that payments to contractors were based on amounts certified by consultants. This explanation was found to be unsatisfactory and by a letter dated 3rd July, 2014 the respondent was invited to a Disciplinary Committee Meeting to be held on 10th July, 2014 at 11.15 a.m. The respondent was further informed that he was free to tender documentary evidence and he was entitled to be accompanied to the meeting by a colleague **…. "provided that the staff in question is not charged with similar offences or appearing before the committee on similar or related charges …."** The venue for the meeting was given and attached to the letter were charges preferred against him, which he would be expected to answer.

There is on record minutes of **"Disciplinary Committee Meeting held on 9th and 10th July, 2014 in The Group Managing Directors Boardroom, Co-op House"** which was attended by various officers of the appellant. The respondent was present and he was called into the meeting at 12.40 p.m. on 10th July, 2014. Charges were read out to him which he denied and a hearing took place and at the end of the proceedings the Committee found him guilty and it was resolved that he be dismissed from employment. That was formalized in the appellant's letter dated 14th July, 2014 headed **"Summary Dismissal"** where it was stated, amongst other things, that the respondent had a right of appeal within 21 days as provided in the Staff Manual.

That is a synopsis of what led to the suit that was filed at the Industrial Court of Kenya at Nairobi (now **called "Employment and Labour Relations Court" "ELRC"**) where it was stated that the respondent was employed by the appellant as a Project Assistant through a letter dated 29th February, 2009; particulars of the letter of offer were given; that he had served the appellant diligently and with dedication; that he had received notice to show cause letters but those letters were actuated by malice as he (the respondent) had received the first letter on the day he was required to have responded to it; that he had given an explanation; that there was breach of rules of natural justice because the appellant had not responded to his explanations. It is admitted by the respondent at paragraph 13 of the Memorandum of Claim that he attended disciplinary committee meeting but he says that rules of natural justice were flouted as:

> ***"(i) The Claimant was not given an opportunity to be heard during the hearing.***
>
> ***(ii) The panel as constituted was biased and had a pre-determined mind-set on the onset (sic).***
>
> ***(iii) The Claimant was not afforded a chance to call any witnesses."***

It is further stated that the respondent received the letter terminating his services with immediate effect; that the respondent exercised his right of appeal by a letter dated 13th August, 2014 but he was not accorded an opportunity to appeal; that the dismissal subjected him to mental anguish, severe financial distress, defamation and loss of future earnings. For all that the respondent asked for Judgment – a declaration that the dismissal was wrongful, unfair and in breach of rules of natural justice; an order for payment of salary in lieu of notice, payment in lieu of 36 leave days not taken and compensation equal to 12 months' salary; unconditional letter of reference, interest and costs of the suit.

The claim was resisted through a Response to Memorandum of Claim. It was stated that an internal audit conducted in the Property and Supplies Department had revealed various losses; that the respondent's explanations were found unsatisfactory; that he was accorded a disciplinary hearing in accordance with the law which led to summary dismissal after charges preferred against him were proved. On the complaint by the respondent that he was not allowed to appeal the decision to dismiss him from employment the appellant stated at paragraph 22 of its Response:

> ***"22. The respondent denies the contents of paragraph 17 of the claim and avers that the claimant was given 21 days from the 14th day of July 2014 to appeal against the decision by the disciplinary committee. The 21 days fell due on 4th of August 2014 by which time the claimant had not rendered an appeal. Nevertheless the claimant is put to strict proof thereof. (A copy of the letter informing him of his right to appeal is annexed herein and marked CBK-17 at page 159 the respondent's list of documents)."***

It is stated that the respondent was issued with a Certificate of Service and it is further stated that, upon dismissal, all loans due by him were taken over by the appellant's Credit Management division. In disputing the prayers in the Memorandum of Claim the appellant averred at paragraph 29 of the response:

> ***"29(a) The claimant is not entitled to the one month's salary in lieu of notice as he was summarily dismissed in a manner that is just and fair in the circumstances and within the province of the Employment Act, 2007 and as provided under Appendix 14 of the Bank's staff manual.***
>
> ***(b) The claimant is not entitled to the 36 leave days as at January 2014 his operating leave balance was 32 leave days of which he already took 1 day. This means that he was left with 30 leave days in 2014. Between the period of 1st January 2014 and 14th July 2014 he had accrued 17.10 days which were duly paid. The other days had not been earned by the claimant and thus he could not claim for them. (A copy of the computation is annexed herein and marked CBK-20 at page 162 of the list of documents).***
>
> ***(c) The claimant was issued with a Certificate of Service which he collected 17th July 2014. (A copy of the certificate of service is annexed and marked CBK-18 at page 160 of the respondent's list of documents)."***

In conclusion the appellant stated that the respondent had been paid all his terminal benefits.

The suit was heard by **Nderi Nduma, J.** When the parties appeared before the Judge they informed him that they would rely on pleadings as filed and bundles of documents that had also been filed. The Judge reserved Judgment to be delivered on 24th February, 2017. Judgment was eventually delivered on 2nd March, 2017 where the Judge found that the respondent had not been given the internal audit report that:

> ***"…. formed the basis of the allegations levelled against him ….."***

He further found that the allegations made by the appellant against the respondent were complex technical matters which required explanation by technical officers in the impugned projects. He therefore found breaches of provisions of the Employment Act for which he held in favour of the respondent. He awarded him one month salary in lieu of notice; disallowed the claim for leave; awarded him 8 months salary compensation for wrongful and unfair dismissal; the monetary awards to carry interest and costs of the suit were awarded to the respondent.

It is those findings that have provoked this appeal premised on a Memorandum of Appeal drawn for the appellant by its lawyers, **M/S Ochieng, Onyango, Kibet & Ohaga Advocates** where 12 grounds of appeal are taken.

We may sum them as: that the Judge, in allowing the matter to be determined by documentary evidence erred in law and fact and misdirected himself on the nature of the dispute thus reaching the wrong decision; that in allowing the matter to be determined by documentary evidence it was a wrong exercise of discretion which led to a misjustice; that all evidence relevant to the dispute was not contained in the documentary evidence; that evidence of witnesses was necessary to prove the documents; that the Judge having found issues in the case to be complex, not simple, Judge should not have exercised his discretion to allow a hearing through documents; that the Judge erred in failing to scrutinize documents filed to be satisfied on the probative value of the documents (this covers grounds 1 – 6 of the Memorandum of Appeal). In ground 7 the Judge is faulted for failing to consider the weight of material placed before him by the appellant on the reasons leading to summary dismissal; the Judge is faulted for holding that the respondent had not been paid terminal benefits. Next, that the Judge erred in holding that the appellant had failed to adduce evidence to show that the respondent had contributed to his dismissal; the Judge is faulted for holding that the appellant should have called technical people involved in the impugned projects and in the penultimate ground it is said that it was wrong for the Judge to give the respondent 8 months salary compensation. Finally, that the Judge took into account irrelevant factors or unjustifiable grounds in awarding the said 8 months salary compensation.

We are therefore asked to allow the appeal; set aside the said judgment; dismiss the suit at ELRC or, in the alternative, remit the matter to ELRC for hearing by way of taking evidence of witnesses.

When the appeal came up for hearing before us on 9th June, 2020 by "Virtual Go-to-Meeting" due to the prevailing COVID-19 pandemic, the appellant was represented by learned counsel **Mr. Isack Kiche** while the respondent was represented by learned counsel **Mr. Kigata**. Counsel for the appellant had filed written submissions as well as List and Digest of Authorities. Counsel for the respondent had also filed submissions. In oral submissions before us it was Mr. Kiche's case that the proceedings before ELRC were through documents only. According to counsel in such a hearing it is the duty of the court or tribunal to analyse the documents to ascertain their probative value. Counsel submitted that the respondent had a duty to prove that the dismissal was unfair and he faulted the Judge for holding that the appellant should have called technical people when the case was that the respondent was dismissed for financial impropriety. Counsel further submitted that the Judge erred in failing to consider all documents availed. On award of compensation counsel referred to the contract of employment which stated that for termination, either party could give 1 month notice or salary in lieu and it was wrong, in counsel's view, for the Judge to award compensation equivalent to 8 months salary.

It was then for Mr. Kigata to respond. Counsel referred to the show cause letters and submitted that the respondent could not respond adequately to the allegations as he was not availed a copy of internal audit report. According to counsel, composition of the Disciplinary Committee was wrong as there was no engineer or other technical person in the Committee. On the submission by the appellant in regard to the hearing before ELRC proceeding by way of documents only, it was Mr. Kigata's submission that the rules governing hearings before ELRC allowed it and that both parties had filed submissions and documents and had requested for a documents-only hearing. According to counsel, in regard to the disciplinary hearing, it was necessary that allegations be clear to the respondent which, according to him, had not happened in the case. On the award of compensation counsel defended it submitting that the respondent had lost a high paying job and was entitled to such compensation. Counsel denied that the respondent had been paid terminal benefits, and he prayed that we dismiss the appeal.

In a brief rejoinder counsel for the appellant submitted that proceedings before a criminal court were different from administrative proceedings. According to counsel, all that an employer was required by **Section 43** of the **Employment Act** to do, was to be satisfied that facts leading to dismissal of an employee were true. It was not necessary, concluded counsel, that allegations be proved beyond reasonable doubt.

We have considered the record, submissions made and the law.

The first six grounds of appeal are an attack on the Judge who is faulted for allowing a documents-only hearing and it is also said that the Judge did not consider those documents properly to give them their probative value.

The record shows that on 15th June, 2016 lawyers for the parties appeared before **Nzioki Wa Makau, J.** Counsel for the respondent is recorded as stating that parties had filed documents and he requested that the case proceed ….

> **"under written submissions under Rule 24 of the Rules of the Court…".**

Counsel for the appellant in response, stated that he was not aware of the relevant rule but left the issue to court. He stated that he had filed a response to the claim and wished to file a list of documents. The court made the following order:

> ***"COURT***
>
> ***The rule that allows cases to proceed by way of documents is Rule 21. The court is minded to allow parties to file submissions to enable the cause to be determined on the strength of documents on file. The claimant may file submissions within 14 days of today and respondent within 14 days of service. Mention on 18th July 2016 to confirm and obtain date for judgment."***

It will therefore be seen that it is the parties, through their lawyers, who requested for a document/written submissions hearing only. For reasons best known to themselves, parties did not wish to call witnesses or even highlight any matter before the Judge.

Rule 21 of **The Employment and Labour Relations (Procedure) Rules,** 2010 (which applied in 2014 when the order was made) provided that:

> ***"The Court may, either by an agreement by all parties, or on its own motion, proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties."***

It was held by this Court in the case of **Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR:**

> ***"The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by previous action or statement of that person."***

See also **Halsbury's Laws of England 4th Edition, Volume 16 p. 992**.

The parties having chosen a certain path – to be heard through documents and submissions – neither of them could turn around to complain that witnesses should have been heard by the Judge.

There is no merit in the complaint by the appellant on the Judge allowing a documents only hearing when it was the parties themselves, represented by lawyers, who chose that mode of hearing and disposal of the suit before the Judge.

Grounds 7 and 9 of the Memorandum of Appeal relate to a complaint that the Judge failed to consider the weight of the material placed before him on reasons for summary dismissal and for holding that the appellant had failed to adduce any evidence to show that the respondent had contributed to his dismissal.

In the pleadings and submissions, counsel for the appellant undertake to various provisions of law on the process that an employer must employ in reaching a decision to dismiss an employee.

Article 41 of the **Constitution of Kenya, 2010** on **"Labour Relations"** provides that every person has the right to fair labour practices.

Section 41 of the **Employment Act** provides in mandatory terms that an employer, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity, must explain to the employee in a language that the employee understands, the reason for which the employer is considering termination. The employee is entitled to have another employee or a shop floor union representative to be present during the explanation. The employer is required, before terminating the employment or summarily dismissing the employee, to consider representations of the employee on grounds of misconduct or poor performance.

Section 45 of the said **Act** forbids an employer to terminate the employment of an employee unfairly and such termination is unfair if the employer fails to prove that the reason for termination is valid; that the reason for termination is a fair reason related to the employee's conduct, capacity or compatibility or is based on the operational requirements of the employer; and that the employment was terminated in accordance with fair procedure.

Under the said **Section 45** the employee should be given an opportunity to explain his performance or conduct; the employee should be informed of improvement required, the time-scale for improvement and consequences of failure to improve.

The procedure for summary dismissal on grounds of misconduct is found in **Section 41** of the said **Act**. It is required that before termination the employer must explain to the employee the reason why the employer is considering terminating the employee's services. Thereafter the employer must hear and consider any representations which the employee may make regarding misconduct; the employee is entitled to have another employee or union representative of his choice present during the explanation and such person is allowed to make representations on behalf of the employee.

The question here is whether the appellant followed due process in reaching the decision to summarily dismiss the respondent from employment. The learned Judge found that the respondent through pleadings and documentary evidence had cast doubt on the validity of the reasons preferred by the appellant and that it was for the appellant to adduce such evidence to rebut the doubts cast by the respondent to justify summary dismissal.

As we have seen through examination of various provisions of the Employment Act, to summarily dismiss an employee on grounds of misconduct, the employer must give to the employee the reason why termination of employment is being considered. The employer must then hear representations from the employee and his witness, if he wishes to call one. This must be done in a language understood by the employee and the process must be fair.

The first "Show Cause" letter served on the respondent gave particulars of what the appellant accused the respondent of doing or omitting to do – that he had either willfully or by negligence, allowed or facilitated loss of money by his employer, the appellant. He was required to explain his actions and show cause why disciplinary action should not be taken against him. He was given a time-frame within which to do that.

The second show cause letter, which referred to the earlier one, meaning that the process was a continuing one, accused the respondent of either willfully or by negligence allowing loss of money by the bank. It gave particulars of loss and again required the respondent, within time stated, to explain his actions and show cause why disciplinary action should not be taken against him.

The respondent gave a written explanation but, it being found unsatisfactory, he was required to attend a disciplinary hearing. The letter inviting him to that meeting indicated the date, time and venue of the meeting and the respondent was informed of his right to produce documentary evidence in support of his case and he was informed of his right to be accompanied by a colleague provided such colleague was

not faced with similar charges. Attached to the invitation letter was a copy of the charges which the respondent was expected to answer. The charge stated **"You either willfully or by gross negligence allowed or facilitated loss of Bank cash".** It gave detailed particulars of dates and items value and the amount of money which was lost when the respondent authorized payments without confirming delivered quantities or valuation details. Attached to the charge was an itemized summary of the losses forming part of the charge.

It is admitted by both parties that the respondent attended the disciplinary hearing. This is indeed confirmed by Minute 71/2014 – **"Appearance before the Committee – Joseph Kinyua"** on 10th July, 2014 at 12.50 p.m. Proceedings in relation to his case run into about 3 pages (pages 198 – 201 of the record).

We have shown that the respondent was required to show cause why disciplinary proceedings should not be taken against him; he was served with a notice to attend a disciplinary committee hearing and all the requirements of the Employment Act were complied with in that he was given detailed charges preferred against him; he was told when to attend the meeting and he was informed of his right to be accompanied by a colleague, if he so wished, but he did not find it necessary to be so accompanied.

It was alleged in the Memorandum of Claim that there were breaches of rules of natural justice in that the respondent was not given an opportunity to be heard during the hearing. The facts of the case show that all steps were taken before and during the hearing for the respondent to present his case in response to the detailed charges that had been preferred against him.

On the claim by the respondent that the panel as constituted was biased, no material was placed before the Judge to show that there was any bias on the part of the panel.

The respondent also alleged that he was not afforded a chance to call any witnesses but, as we have shown, he was informed of that right in the letter inviting him to the meeting.

It is taken as a ground of appeal (Ground 8) that the Judge erred when he found that the respondent had not been paid terminal benefits.

Of this the respondent stated at paragraph 32 of its response:

> ***"Without prejudice to the foregoing the respondent avers that the claimant was paid his entire terminal benefits amounting to Kshs.84,686.50 which was credited into his Internal Settlement Account number 01692186216800 due to the fact that he had two different loans with the bank amounting to Kshs.874,636.00. (A copy of the pay slip is annexed herein and marked as CBK-21 at page 163 of the respondent's list of documents)."***

We have seen a document **"Computation of Terminal Benefits"** at page 211 of the record. It computes salary in lieu of leave days; salary paid for 14 days worked in July, 2014 amongst other items. We need not address this issue further in view of the final decision we have reached in this appeal.

In respect of ground 10 of the Memorandum of Appeal where the Judge is faulted for holding that the appellant was required to call technical personnel – the Judge held at paragraph 35 of the Judgment:

> ***"35. The allegations made by the respondent against the claimant which are denied are complex technical matters which required explanation by the technical officers involved in the impugned projects."***

As we have seen the parties filed pleadings, documents and written submissions and then, not wishing to call any witnesses, they requested the court, a request which was allowed, that hearing be through the documents filed in court. The parties chose not to call any witnesses. The parties were bound by the course they took. The pleadings were detailed and it was not open to the Judge to hold that there were technical matters involved in the case. There were in fact no technical issues. What was before the Judge was an examination of whether due process had been followed by the appellant in terminating the employment of the respondent. The appellant was able to show that it had followed every step required by the Employment Act and its Staff Manual in handling the respondent's case. The Supreme Court of Kenya held in the case of **SGS Kenya Limited v Energy Regulatory Commission & Others [2020] eKLR** on strict application of rules of evidence by tribunals and quasi-judicial bodies:

> ***"…. administrative decision-makers should have significant flexibility, in responding to charges that affect the subject –matter before them. Matters before an administrative tribunal should be determined in a case-to case basis, depending on the facts in place."***

As properly submitted by counsel for the appellant the issue facing the respondent before the appellant's disciplinary committee involved financial impropriety on the part of the respondent. The committee considered the material before it, considered explanations by the respondent and finding them unsatisfactory it decided that the respondent's employment be terminated immediately.

The last 2 grounds relate to the award of 8 months' salary compensation but, again, we need not go into these grounds.

We find that the Judge erred in finding that the process leading to the respondent's dismissal was wrongful. That process was not wrongful. All due process was followed and there was no breach of any law at all.

The appeal has merit and we allow it with the consequence that the suit before the ELRC is dismissed. The appellant will have costs here and below.

Dated and delivered at Nairobi this 9th Day of October, 2020.

M.K. KOOME

……

JUDGE OF APPEAL

K. M'INOTI

……

JUDGE OF APPEAL

S. ole KANTAI

……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR