IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 293 OF 2015

BETWEEN

COOPERATIVE BANK OF KENYA LIMITED ……..APPELLANT

AND

BANKING INSURANCE & FINANCE UNION (K) ……...RESPONDENT

(An appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Nairobi (Mbaru, J.) dated 19th May, 2015

in

***E.L.R.C. Cause No. 1982 of 2013*)**

****

JUDGMENT OF THE COURT

1. This appeal is against the judgment of the Employment and Labour Relations Court (ELRC) wherein the court found that **Co- operative Bank of Kenya Limited** (the appellant) had wrongfully dismissed a member of the **Banking Insurance & Finance Union (Kenya)** (the respondent) namely, Samuel C. Njoroge (Samuel). The court went on to reinstate Samuel as well as grant him damages. Being a first appeal we take cognisance that we are called upon to re-evaluate the facts before the trial court and make our own conclusion. This Court in ***J. S. M. v E. N. B. [2015] eKLR*** aptly put our role as a first appellate as follows:-

> ***"We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions."***

2. With the foregoing in mind a brief background is essential to place the appeal in perspective. Samuel was employed as a graduate clerk by the appellant on 17th June, 2010 and was later confirmed on a permanent and pensionable basis. He held different positions within the appellant bank. Of relevance, he

was designated as an ATM custodian together with one Jacob Kalama at the Mariakani Branch. They both had charge over two ATM machines in the branch described as No. 198 and 199.

3. According to Samuel, on 11th December, 2012 he noticed that Kshs. 576,000 was missing from ATM No. 198 and Jacob was acting rather peculiar. Upon inquiring Jacob confessed that he had taken the said amount to facilitate a certain business venture and would repay it. On that very day Samuel reported the same to the Operations Manager one Nancy Kirorei. The following day on 12th December, 2012 when Nancy went to do a surprise check on the ATM in question Jacob reimbursed a sum of Kshs.45,000 thus reducing the missing amount to Kshs. 531,000. Jacob gave his word that he would reimburse the entire amount and Nancy indulged him. However, the appellant's version differs somewhat with that of Samuel. In her statement, Nancy stated that Samuel had approached her on 11th December, 2012 and told her that something had been troubling him for the past three weeks. Jacob had taken money from the ATM in question and despite his promise to refund the same he had not done so. The reason he had not reported earlier is because Jacob had pleaded with him not to.

4. Be that as it may, on 21st December, 2012 Samuel was suspended from duty on account of the missing amount of Kshs.531,000 pending investigations. Investigations were carried out and vide an investigation report dated 28th December, 2012 the head of security services recommended that Samuel be issued with a notice to show cause why disciplinary action should not be taken against him for failing to account/report the ATM cash difference. In adherence to the recommendation, Samuel was served with a notice to show cause dated 31st December, 2012 which read in part as follows:-

> ***"RE: DISCIPLINARY INQUIRY- EMBEZZLEMENT OF KSHS 636,000 FROM ATM NO. 198 OF MARIAKANI BRANCH***
>
> ***We refer to the above matter and inform you that investigations have revealed that you committed breach of security in matters affecting the Bank's business in that-***
>
> > ***1) Between 23rd November, 2012 and 13th December, 2012 you failed to account for Kshs. 636,000 which had been entrusted to you by the Bank and which you noted was missing from the ATM No. 198 after being taken by your co-custodian for personal use without authority. You also concealed the cash difference on 11th December, 2012 by indicating on the ATM reconciliation form that the ATM had a difference o Kshs. 7000 whereas the actual difference was Kshs. 636,000 contrary to the provisions of the Operating Manual.***
> >
> > ***2) Further, it has been established that you failed to adhere to the provisions of the Operating Manual on dual custody while confirming cash at the ATM thereby facilitating cash being taken from the ATM and exposing the Bank to loss.***
> >
> > ***…Consequently, you are required to explain your actions as above and show cause why disciplinary action should not be taken against you …"***

5. He responded to the notice by a letter dated 4th January, 2013. He was later invited to attend a disciplinary hearing on 18th January, 2013. Thereafter, Samuel was summarily dismissed by a letter dated 21st January, 2013.

6. Like every employee whose services have been terminated has the right under ***Section 35(4)*** of the ***Employment Act*** to dispute the lawfulness or fairness of the termination of employment, Samuel through the respondent tried to reach an amicable solution with the appellant. When the same failed to bear fruit, the respondent reported a trade dispute to the Minister of Labour who appointed a conciliator to handle the issue. Unfortunately, the appellant did not agree with the recommendations of the conciliator provoking the respondent to refer the dispute to the ELRC pursuant to ***Section 69*** of the ***Labour Relations Act***. In its claim, the respondent averred that Samuel had been wrongfully dismissed and sought several orders. The basis of its claim was that the appellant did not follow the proper procedure before

terminating its member's services and there was no valid reason for the termination.

7. In its defence, the appellant argued that it had valid reasons for terminating Samuel and had complied with the proper procedure. The appellant also counterclaimed for the refund of Kshs.636,000. After considering and weighing the evidence before her, the learned Judge (Mbaru, J.) found in favour of the respondent in a judgment dated 19th May, 2015. In holding that there was no valid reason for the dismissal of Samuel she expressed that:-

> ***"I take notice that the Respondent is a banking institution. As such, there are daily cash returns, reconciliations and so often, audits. The easiest thing to confirm the transactions spanning from 12th November, 2012 when the Grievant is alleged to have noted shortages in the ATM transactions until the 17th December, 2012 when the shortages were addressed is to produce these financial records particular the audit reports. For the Respondent to state that they were exposed to loss and cannot trust the Grievant is neither here nor there. Upon submission by the Grievant that he reported the shortage to his supervisor on 11th December, 2012 and no action was taken on his report until 13th December, 2012 so as to facilitate Jacob to make deposits, then the burden of proving that indeed shortage was running from 12th November, 2012 up and until the surprise check on 13th December, 2012 shifted to the respondent. The records, reports and the financial audits are in the custody and possession of the Respondent and not the grievant. The duty and burden of prove placed on the Grievant under section 47 having been addressed through his evidence, the Respondent thus was left with the duty to controvert the same by demonstrating that indeed they had a valid and just cause for the action taken against the grievant. Nothing would have demonstrated this better than the financial records for the subject period. There is absolutely no reason as to why Ms Nancy Kirorei and Jacob Kalama were never called in evidence or in the alternative the audit report covering the subject period, November and December 2012 were never produced."***

8. The learned Judge also found that there was procedural unfairness to the extent that Samuel was not represented by an employee or union official of his choice at the disciplinary hearing. In her own words she stated:-

> ***"The provisions of section 41 of the Employment Act are not mechanical. The provisions therein relate to an employer giving an employee a fair and honest chance to be heard in his defence.***
>
> ***…***
>
> ***To break it down further, the above section with regard to representation has two parts;***
>
> ***First, the employee shall be entitled to have another employee of his choice present during the hearing of his case and when making his explanation as to his actions; OR***
>
> ***Second, the employee shall be entitled to have a shop floor union representative of his choice during the hearing.***
>
> ***The operative words here being the choice of the representative to be present. It is upon the employee, as the right-holder to make the choice of his representative to be present during his hearing at a disciplinary committee. The choice made cannot be negated by the employer where for expediency; an employer opts to make the choice for and on behalf of the subject employee. To do so is to engage in conflict of interest as the right-holder retains the right to make his choices at all time during the hearing of his case. So fundamental is such a right to choose one's representative that once interfered with, the resulting outcome of any deliberations, decisions or judgment made in the presence of the employer's choice of who to represent the employee is subject to challenge. It does not matter that the only available shop floor union representative is away or the one present is known to the employee, the right to choose as to who to be present is held by the right-holder – the employee."***

In the end the following orders were granted: -

> ***a) A declaration that the dismissal of the Grievant was unfair and is hereby set aside;***
>
> ***b) The grievant, Samuel Chege Njoroge is reinstated to his former position as Graduate Clerk/ATM Custodian without any loss of his employment benefits or seniority in service;***
>
> ***c) The Grievant shall be paid by the Respondent all salaries and allowances dues from 21st January 2013 to this day, the 19th of May 2010;***
>
> ***d) The amounts payable under (c) above be paid on or before the 31st May 2015;***
>
> ***e) The grievant, Samuel Chege Njoroge to report to the Respondent Managing Director/Chief Executive Officer on 2nd June, 2015 for deployment in any branch other than Mariakani Branch;***
>
> ***f) The Grievant shall remain in the employ of the respondent, the past record with regard to this case now removed unless otherwise lawfully removed any other cause*** *(sic)****;…***

9. It is that decision that is the subject of the appeal before us which was anchored on a total of 10 grounds some of which we note contain arguments contrary to ***Rule 86(1)*** of the ***Court of Appeal Rules***. The long and the short of it is that firstly, the learned Judge erred in finding that there was no valid reason for the dismissal of Samuel and there was procedural unfairness. Secondly, the learned Judge misapprehended the application of the remedies under ***Section 49(4)*** as read with ***Section 50*** of the ***Employment Act***.

10. Ms. Cherono appeared for the appellant while Mr. Mathenge appeared for the respondent. The appeal was disposed by written submissions.

11. The appellant begun by submitting that the learned Judge erred in finding that the dismissal was unfair which finding was against the weight of the evidence before her. Relying on this Court's decision in ***CFC Stanbic Bank Ltd vs. Danson Mwashako Mwakuwona eKLR [2015]***, it was argued that the learned Judge ought to have taken into account the reasonableness of the employee's conduct. In other words, whether a reasonable employer could have decided to dismiss the employee based on the said conduct. As far as the appellant was concerned, it had established that there was a valid and fair reason for the dismissal since the employee's conduct amounted to misconduct. Furthermore, Samuel in his own statement during the investigation conceded that both he and his co-custodian had not been observing the operations manual on dual custody.

12. With regard to procedure, the appellant stood its ground that it had complied with the requisite procedure. At the disciplinary hearing Samuel was represented by a union official and he never raised any complaint with respect to the said representation. All in all, the dismissal was in accordance with the provisions of Clause A5 (a) (i) of the Collective Bargaining Agreement (CBA) as read with ***Section 44(3) & (4)*** of the ***Employment Act***.

13. Faulting the remedies issued, the appellant contended that in as much as such remedies are discretionary, the learned Judge erred in granting damages which were excessive contrary to ***Section 49(1) (c)*** of the ***Employment Act*** which sets the ceiling of damages awardable should not exceed 12 months' salary. Likewise, the learned Judge erred in ordering reinstatement of Samuel.

14. On its part, the respondent in opposing the appeal urged that there was no lawful basis for Samuel's dismissal. By way of emphasis the respondent reiterated that the allegation of embezzlement of funds by Samuel was not proved. Even if Samuel was negligent in conducting his duties and as a result of which the embezzlement by his co-custodian occurred, the same would not warrant summary dismissal but would be subject to a warning under Clause A5(b) of the CBA.

15. Moreover, the discrepancy in the amount allegedly embezzled as indicated in the suspension letter and the notice to show cause hindered Samuel from knowing the charge levelled against him. Last but not least, the union official who attended the disciplinary hearing wasn't Samuel's choice but was imposed upon him by the appellant.

16. We have considered the record, submissions by the respective parties as well as the law. As correctly observed by the trial court under ***Section 47(5)*** of the ***Employment Act*** the burden of proving that the dismissal was wrongful rests on the employee, while the burden of justifying the grounds of wrongful dismissal rests on the employer. It is a shared burden, which strictly speaking amounts to the same thing. Consequently, as noted by this Court in ***Iyego Farmers Co-operative Sacco vs. Kenya Union of Commercial Food and Allied Workers [2015] eKLR***, whenever an issue of wrongful or unfair dismissal arises, the court looks at the validity and justifiability of the reasons for termination and also interrogates procedural fairness.

17. Due process is a fundamental aspect of the rule of law. It is the right to a fair hearing which is encapsulated in the *audi alteram partem rule* (no person should be condemned unheard) and founded on the well-established principles of natural justice. See this Court's decision in ***Samsung Electronics East Africa Ltd vs. K. M [2017] eKLR***. It is that right that is delineated under ***Section 41*** of the ***Employment Act*** which stipulates: -

> ***"41***
>
> ***1. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.***
>
> ***2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make."*** Emphasis added.

In that regard, the respondent raised three issues; there was a discrepancy as to the amount allegedly embezzled hence Samuel was not clear on the charges against him; Samuel was not allowed to appear at the disciplinary hearing with a representative of his choice; and his appeal was not heard.

18. It is not in dispute that the suspension letter indicated that Samuel was suspended to pave way for the investigation of the missing amount of Kshs.531,000 while the notice to show cause indicated the sum as Kshs.636,000. Perhaps the difference in the figures was occasioned by Jacob admitting during the investigations that he had taken a total of Kshs.636,000. In our view, the amount was immaterial since the charge against Samuel was not for embezzlement but facilitation and concealment of the same. It was not in dispute that a substantial amount had been embezzled by Samuel's co-custodian. The nature of the charge was black and white in the suspension letter, the notice to show cause and the invitation to attend a disciplinary hearing. We find that Samuel was clear as to charges facing him and was in a position to effectively prepare his defence.

19. Our perusal of the record reveals from the onset that Samuel was given an opportunity to have a representative during the disciplinary hearing and he was represented by a union official. There was no evidence that the said union official had been forced on Samuel simply because the same was never raised during the disciplinary hearing. Furthermore, the respondent did not adduce any evidence to the effect that the said union official did not represent Samuel effectively or that he was unware of what was required of him at the hearing.

20. During cross examination Samuel conceded that the appeal against his dismissal was not signed but

he was also not sure if the same had reached the appellant. In the circumstances we give the benefit of doubt to the appellant that there was no appeal filed against the dismissal.

21. As to whether there was a valid reason for Samuel's dismissal, Kiage, J.A in ***Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR*** observed and rightly so that:-

> ***"Justice Ngcobo proceeded to quote a passage from the decision of British Leyland UK Limited vs. Swift [1981] IRLR 91 at 93 on the approach that a court should take in assessing the reasonableness of the action taken by an employer suggestive that there is quite a wide spectrum of actions that would nonetheless qualify as reasonable and there is a huge element of subjectivity, and I agree:-***
>
> ***"There is a band of reasonableness with which one employer may reasonably take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him."***

22. In addition, the following passage from the Canadian Supreme Court decision in ***Mc Kinley vs. B.C.Tel. (2001) 2 S.C.R. 161*** was cited with approval in the aforementioned case:-

> ***"Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More Specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer."***

23. We like the trial Judge do find that there was no evidence that Samuel had learnt about the embezzlement in November, 2012 or before 11th December, 2012. However, we part company with the trial Judge by finding that there was valid reason for Samuel's termination. We say so because despite maintaining that he discovered the missing amount of Kshs.576,000 on 11th December, 2012 he admitted that he had signed a reconciliation form with respect to the ATM in question indicating the difference on the same date as Kshs.7,000 instead of the actual missing amount. Equally, he admitted that both he and Jacob had not been complying with the operations manual on dual custody which required both of them to physically count and verify the amounts in the ATMs and fill in the reconciliation forms. He stated that at times Jacob would fill in the reconciliation form and he would sign without verifying or they would separately count the amounts in the ATMs. Samuel's conduct clearly went into the core of the employment relationship which was based on mutual trust. It was such that it could not be ignored or wished away because it called into question Samuel's integrity and reliability which is cardinal taking into account the nature of the appellant's business. In the circumstances we are satisfied that the appellant was justified in dismissing Samuel for the reasons outlined in the dismissal letter thus:-

> ***"The Disciplinary Panel found you guilty of failing to account for cash entrusted on you by the Bank from ATM No. 198 of Mariakani Branch which you noted that it had been taken by your co-custodian for personal use without authority contrary to the provisions of the Bank's Operating Manual. You also failed to adhere to the provisions of the Operating Manual on dual custody while confirming cash for loading to the ATM thereby exposing the Bank to possible loss and concealed the cash difference on 11th December, 2012 by indicating that the ATM had a difference of Kshs. 7,000 while the actual difference was ..."***

Besides, the appellant's own disciplinary code sets out the following as amounting to gross misconduct and subject to summary dismissal.

> ***"…***

v) failure to account for monies received or held on behalf of the Bank.

…

viii) makes on signs a statement or entry in a document or 64official record which is to his/her knowledge false …"

24. We are further persuaded by the sentiments of Ngcobo, JA. in ***Nampak Corrugated Wadeville vs. Khoza (JA 14/98) [1998] ZALAC 24*** that:-

"The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction composed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether it could have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable."

25. On the grounds discussed herein above we find that the appeal has merit and is hereby allowed. We set aside the trial court's judgment dated 19th May, 2015 and substitute the same with an order dismissing the respondent's suit in the ELRC with costs. The appellant shall also have costs of this appeal.

Dated and delivered at Nairobi this 8th day of December, 2017.

ALNASHIR VISRAM

…….

JUDGE OF APPEAL

W. KARANJA

……

JUDGE OF APPEAL

M. K. KOOME

……

JUDGE OF APPEAL

I certify that this is a true copy of the original**.**

DEPUTY REGISTAR