



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A)

CIVIL APPEAL NO. 188 OF 2014

BETWEEN

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

AND

BANKING INSURANCE & FINANCE UNION...RESPONDENT

(Appeal from the judgment and decree of the Employment & Labour Relations Court at Nairobi, (Marete, J.) dated 24th April 2014 in HCCC No. 641 of 2010)

JUDGMENT OF THE COURT

The central question in this appeal is whether on 2nd November 2011 ***the appellant, the Co-operative Bank of Kenya Limited***, summarily and lawfully dismissed its employee, ***Helen Nduta Ngugi (the claimant)*** or whether the dismissal was unfair and unlawful. On 24th April 2014, the ***Employment and Labour Relations Court (Marete J.)*** held that the dismissal was wrongful, unfair and unlawful. By way of remedy the learned judge ordered the appellant to reinstate the claimant and awarded her all her salaries and allowances lost in consequence of the termination, together with the equivalent of 8 months pay as compensation, and costs of the claim.

The appellant was not satisfied by the judgment and after duly lodging a notice of appeal on 28th April 2014, filed this appeal. In the proceedings before the Employment and Labour Relations Court, the claimant, a unionisable member of the ***Banking, Insurance, Finance Union (the respondent)***, was represented by the respondent, which had in force a ***Collective Bargaining Agreement (CBA)*** with the appellant. Before us however, the claimant elected to be represented by counsel of her choice.

Briefly, the background to the appeal is as follows. On 17th May 2007, the appellant employed the claimant as a graduate clerk. After duly serving her probation, she was confirmed in employment on permanent terms. On 29th March 2009, the claimant was promoted to Section Head and after serving a three-month probation; she was confirmed in that position on 29th June 2009. At all material times she was working at the appellant's branch on ***Digo Road***, Mombasa. On 22nd June 2011, in the course of her employment as an Accounts Services Officer, which entailed, among other things verification of customers' signatures, the claimant received an email from one ***Peter T. Ndzai*** of the appellant's ***Nkurumah Road Branch*** requesting her to confirm and authenticate the authorized signatures for a bank

account at her branch in the name of **Coast Water Services Board**, before payment by electronic funds transfer could be effected. The email had 3 attachments, of which the claimant was able to open only one. Nevertheless she gave the all clear, stamped the signatures as verified, and as a consequence the sum of **Kshs 2,481,586/-** was paid out of the said account and it was debited accordingly.

Subsequently it transpired that the transaction was anything but fraudulent and on 19th July 2011, the appellant served the claimant with a notice to show cause, by 22nd July 2011, why disciplinary action should not be taken against her for negligently approving payment without authenticating the signatures and undertaking a callback to the client to confirm the payment.

The record indicates that the claimant received the notice to show cause on 22nd July 2011 and on the same day she sent her response, in which she confirmed having received the email; having been unable to open two of its attachments; and having not undertaken a callback to the client. As regards the failure to make the callback, the claimant explained that the request to her was limited to authenticating the signatures; she did not have the original documents; and that she assumed that the callback had been done from Nkurumah Road Branch. Otherwise she apologized for any oversight on her part and pleaded for pardon.

By a letter dated 2nd August 2011 the appellant invoked **clause A5** of the CBA and terminated the claimant's employment with immediate effect. The letter left no doubt that the fraudulent loss of the client's money and the claimant's role in it was the reason for the termination of the employment. Her appeal against dismissal dated 6th August 2011 was dismissed on 9th August 2011, as was a subsequent appeal by the **Central Staff Committee**, in which the claimant and a union representative were heard. On 8th November 2011, the respondent entered the fray and reported to the **Minister for Labour and Human Resource Development** the existence of a trade dispute with the appellant and requested the Minister to invoke **section 65** of the **Trade Disputes Act** and set in motion the machinery for the resolution of the dispute.

A conciliator was duly appointed and after hearing the parties, he recommended on 2nd April 2012 that the claimant's dismissal should be reduced to normal termination and she be paid six months compensation for unfair termination. The appellant rejected the recommendation and on 12th October 2012, the respondent, on behalf of the claimant lodged a claim in the Employment and Labour Relations Court, contending that her dismissal was unfair and unlawful and seeking orders for reinstatement without loss of benefits or seniority; payment of all salaries and allowances lost by the claimant as a result of the dismissal; compensation for unfair loss of a job and costs.

The appellant filed its memorandum of reply on 17th May 2013 and denied that the claimant's dismissal was unfair or wrongful. The appellant maintained that the claimant had violated the Bank's operating manual and its business code of conduct and ethics; that it had valid and fair reasons for terminating the claimant's employment; and that her employment was lawfully terminated for negligently confirming the signatures in question and failing to make a callback to the client to confirm the instructions. As regards the termination process, the appellant averred that it was fair and that the claimant had been afforded an opportunity to be heard.

Before Marete, J. who heard the claim, each party called one witness. As earlier intimated, the learned judge found for the claimant, thus provoking this appeal. Although by consent of the parties the appeal was to be heard through written submissions with limited oral highlights, only the appellant filed its submissions. On application by counsel for the respondent, we allowed him to address us orally in response to the appellant's submissions.

Prosecuting the appeal, **Ms. Cherono**, learned counsel for the appellant compressed her 9 grounds of appeal into four, namely whether the claimant's dismissal was unfair and unlawful; whether the claimant was entitled to damages; whether the order for reinstatement was valid; and whether the compensation awarded to the appellant was properly calculated. Counsel submitted that the termination of the claimant's employment was substantially and procedurally fair because the claimant had violated the

appellant's procedures, operating manual and the business code of conduct and ethics.

That violation, which was admitted by the claimant, it was contended, amounted to misconduct. Even the conciliator, it was urged, was satisfied that there were grounds justifying termination of the claimant's employment. It was also submitted that the claimant had been afforded a fair hearing through the notice to show cause and the subsequent appeal in which she appeared in the company of a union representative. In the appellant's view, section 41 of the Employment Act was fully complied with.

Relying on *CFC Stanbic Bank Ltd v. Danson Mwashako Mwakuwona, CA. No. 3 of 2014* and *Earl v. Slatter & Wheeler (Airlyne) Ltd [1973] 1 All ER 145*, it was submitted that in determining whether the employer had acted reasonably, the court must take into account the circumstances known to the employer and that the court was not entitled to simply substitute its views for those of the employer. In this case it was argued, the appellant had acted reasonably because the claimant was negligent as a result of which the appellant was exposed to financial loss. We were urged to find that the claimant had failed to discharge the burden on her under section 47 (5) of the Employment Act to show that her termination was conducted substantively and procedurally in an unfair manner.

On the award, it was submitted that the claimant was not entitled to any because the termination of her employment was fair and lawful and that if she was entitled to compensation, which the appellant denied, then the learned judge had awarded a manifestly excessive amount. Relying on the judgment of this Court in *Bamburi Cement Ltd v. Farid Aboud Mohammed, CA No. 63 of 2015 (Malindi)*, we were urged to find the award was not justified and to set it aside.

As regards the order for reinstatement, the appellant submitted that the learned judge erred by making an order for reinstatement without paying due regard to **section 49(3) and (4)** of the Act as read with **section 50**. It was urged that in the circumstances of this case, reinstatement should not have been ordered because the claimant's length of service was relatively short; the appellant did not wish to have the claimant back in its employment; the court ignored the fact that the claimant's position was sensitive and required outmost trust; the claimant was solely responsible for the termination of employment; and the claimant was capable of obtaining alternative employment.

Lastly the appellant submitted that the learned judge erred awarding the claimant compensation on the basis of **Kshs 84,822.00/-** whilst her monthly pay was **Kshs 81, 822.00/-**.

Learned counsel for the claimant, **Mr. Njoroge** opposed the appeal, submitting that there were no good reasons for the termination of the claimant's employment and that the procedure adopted by the appellant was not fair. He contended that under the CBA, negligence was not a ground for termination of employment unless there were two previous warnings in writing. Counsel further contended that under the appellant's callback procedures, the person who verified the signatures was not supposed to do the callback.

Consequently, it was submitted, the appellant was condemned for failing to do what the procedures prohibited her from doing. On procedural fairness, counsel contended that there was no fair hearing before the claimant was dismissed and that the hearing where a member for the Union accompanied her was at the appeal stage rather than before the dismissal. In counsel's view, this was an irregularity, which rendered the termination procedurally unfair. As for the award of compensation, it was submitted that the same was within the limits set by the Employment Act and that no basis had been established for interfering with the exercise of discretion by the trial court in awarding the compensation.

We now turn to consider the merits of this appeal, beginning with the question whether in the circumstances of this appeal the appellant was justified in summarily dismissing the claimant. **Section 44** of the Employment Act has elaborate provisions on summary dismissal, which entails an employer terminating the employment of an employee without notice or with less notice than that prescribed by contract or statute. The Act allows an employer to summarily dismiss an employee when the latter has fundamentally breached his obligations under the contract of service. **Section 44(4)** sets out the conduct on the part of the employee, which amounts to gross misconduct so as to justify summary dismissal.

Pertinent to this appeal is **section 44(c)**, which recognizes as gross misconduct the willful neglect by the employee to perform any work which it is his duty to perform or if he carelessly and improperly performs any work, which from its nature it was his duty to perform carefully and properly.

It should be pointed out that section 44 has reserved for the employee the right to dispute that the conduct in question amounts to gross misconduct.

Further, **section 41** requires the employer, before terminating an employee's employment on grounds of misconduct or poor performance to explain to the employee in a language that he understands, the reason for the intended termination and the employee is entitled to have a fellow employee or a union representative of his choice present during the explanation. In addition before summarily dismissing the employee, the employer is obliged to hear and consider any representation that the employee or his representative may have.

If this appeal were to turn on the above provisions alone, the appellant could have made a convincing case that the claimant had carelessly and improperly performed work which it was her duty to perform carefully and properly, not the least for confirming signatures when she could not open two of the attachments to the email which was presumably forwarding to her the signatures to be verified. (See ***CFC Stanbic Bank Ltd v. Danson Mwashako Mwakuwona, supra***). But there is the CBA to be considered in determining whether in the circumstances of this appeal the appellant was justified in summarily dismissing the claimant.

Section 57 of the **Labour Relations Act** empowers an employer and a trade union, which the employer has recognized, to enter into collective agreement setting out terms and conditions of service for all unionisable employees. The terms of the collective agreement are by law incorporated into the contract of employment of every employee covered by that agreement and under **section 59**, a collective agreement is binding upon all parties to it including all unionisable employees employed by the employer.

In this appeal there is no contestation that a CBA was in force between the appellant and the respondent. By the CBA, the parties are at liberty to, and usually do, grant the employees better terms than those secured by statute.

(See ***Thomas De La Rue (K) Ltd v. David Opondo Omutelema, CA No 65 of 2012***). Clause A5 of the CBA in force in this appeal, which was invoked by the appellant to summarily dismiss the claimant, defined gross misconduct or serious neglect of duty justifying instant dismissal to include misappropriation of funds or property, breach of secrecy or security, use of abusive or insulting language to clients, conviction of an offence involving moral turpitude, absence from duty for 5 consecutive days without leave or lawful cause, inability to properly perform work due to intoxication and other such self-induced acts, etc. Negligence or careless performance of duty was not included in the conduct constituting gross misconduct to warrant instant dismissal.

Negligent or careless performance of duty by the employee is addressed by **clause A5 (b)** which provided as follows:

“If after due investigation by the management concerned the employee is considered guilty of any of the following acts, an employee may be dismissed after two (2) warnings in writing, with dismissal being effected on the third offence being committed.

i. ...

ii. ...

iii. if he/she (employee) neglects to perform any work which it was his/her duty to have performed or if he/she carelessly or improperly performs any work which from its nature it was his duty to have performed carefully and properly.

iv. ...

Subject to the dismissal being justified only if three (3) of the offences have been committed within any period of twelve (12) months and warnings in writing have been given to the employee within the period of twelve (12) months immediately preceding the commission of the third offence in respect of two (2) such offences.

A copy of each warning letter and a copy of the letter of dismissal issued to any employee in accordance with the provisions of this section shall be sent by the employer to the central staff Committee of the Bank concerned for information.”

In this appeal, it is common ground that the claimant had no previous warnings in writing to justify instant dismissal under clause A5 (b). In the circumstances, the conclusion that under the CBA the appellant was not justified in summarily dismissing the claimant is inescapable. The appellant, by its own free will, had fettered its right under the Employment Act to summarily dismiss the claimant through the strictures set out in the CBA. Having reached that conclusion, we do not find it necessary to delve into the questions whether it was the duty of the claimant to callback the client, whether the claimant had admitted being negligent and the effect thereof, and whether the dismissal was procedurally unfair.

The next issue for consideration is whether, having found that the claimant’s summary dismissal was unlawful, the learned judge was right in making an order for reinstatement. **Section 49** of the Employment Act gives the remedies for wrongful dismissal and unfair termination. In the event of an unjustified summary dismissal or termination of contract of employment, the employer may be ordered to pay the employee the wages he would have earned had he been given the notice period prescribed by the Act or the contract of service or pay the employee’s salary or wages up to a maximum of 12 months.

By dint of section 49(3) of the Act, where the summary dismissal or termination of the of the employee is unfair, he may be reinstated and treated in all respects as if the employment had never been terminated, or he may be re-engaged in work comparable to his work prior to the dismissal, or other reasonably suitable work, at the same wage.

Our understanding of the Act is that the prescribed remedies, including reinstatement are discretionary rather than mandatory remedies, to be granted on the basis of the peculiar facts of each case. This is made absolutely clear by the use of the word “**may**”, which in the context of the provision imports a discretionary rather than a mandatory meaning. That the remedies, including reinstatement are not a mandatory remedies, is made even clearer by section 49(4) which sets out some 13 considerations which the court must take into account before determining what remedy is appropriate in each case.

Those considerations include the wishes of the employee, the circumstances of the termination and the extent to which the employee caused or contributed to it, the practicability of reinstatement or re-engagement, the common law principle that an order for specific performance of a contract for service should not be made save in exceptional cases, the employee’s length of service with the employer, the employee’s reasonable expectation of the length of time the employment was to last but for the termination, the employee’s opportunities for securing comparable or suitable employment, any conduct of the employee that may have caused or contributed to the termination, any action on the part of the employee to mitigate his loses, etc.

What all the above means, is that before exercising the discretion to determine which remedy to award, the court must be guided by the above comprehensive list of considerations. With respect, in this appeal, the learned judge did not advert to any of those considerations before deciding on reinstatement as a remedy. The principles on which this Court acts when it is called upon to interfere with exercise of discretion by a trial court are well settled. The Court will not interfere unless it is satisfied that the decision in question was clearly wrong because the learned judge misdirected himself or because he considered matters which he should not have considered or failed to consider matters he should have considered. (See ***Mbogo & Another v. Shah (1968) EA 93***). There must be a very valid reason why the statute has set out such a comprehensive catalogue of considerations to be borne in mind before

determining the appropriate remedy to award in cases of unfair summary dismissal or termination of employment.

A decision arrived at without advertent to the stipulated considerations is symptomatic of a decision, which has been arrived at without taking into account relevant considerations. If the learned judge had taken into account the above considerations as he was obliged to do, and in particular the principle that reinstatement is a last resort remedy to be deployed in an exceptional case, we believe he would not have so readily ordered reinstatement. We are satisfied that we have before us a proper case for interfering with the exercise of discretion by the learned judge in fashioning out the remedy of reinstatement.

As regards the question whether the award of compensation was excessive, having held that the summary termination of the claimant's employment was in the circumstances unlawful, but she was not entitled to reinstatement, the only award left is payment of all salaries and allowances lost as a consequence of the unlawful termination from 2nd August 2011 to 24th

April 2014 and the 8 months compensation. In the circumstances of this appeal, we are not persuaded that the award is excessive. The appellant's complaint that the learned judge erred in calculating the compensation based on a basic salary of Kshs 84, 822/- per month rather than the claimant's salary of Kshs 81,822/- per month is well founded and is not contested. Accordingly the compensation awarded shall be calculated on the basis of the basic salary of Kshs 81,822/- per month.

Ultimately, this appeal succeeds only to the extent that the order for the reinstatement of the claimant is hereby set aside. In the circumstances of this appeal, we direct that each party shall bear their own costs. It is so ordered.

Dated and delivered at Nairobi this 25th day of November, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR