



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 428 OF 2017

RITA ADHIAMBO ADHOCH.....CLAIMANT

VERSUS

MWALIMU NATIONAL SAVINGS &

CREDIT CO-OPERATIVE SOCIETY.....RESPONDENT

JUDGMENT

Introduction

1. The Claimant lodged this claim through a Memorandum of Claim dated 27th November, 2017 and filed on 29th November, 2017. She seeks judgment against the Respondent for payment of one-month salary in lieu of notice, overtime pay, gratuity, service pay and 12 months' salary compensation for loss of employment.
2. The Respondent filed a Response to the Claim on 14th February, 2018, wholly denying the Claimant's claim.
3. During the hearing, the Claimant testified in support of her case, and adopted her witness statement dated 29th November, 2017 and produced her bundle of documents.
4. The Respondent presented two witness to testify on its behalf; a Mr. Odhiambo Oyange and Mr. Robinson Otieno, who adopted their respective witness statement as their evidence in chief.

The Claimant's Case

5. The Claimant's case is that she was employed by the Respondent on 15th August, 2011 as a senior clerical officer, earning a salary of Kshs. 22,075/= but which had been enhanced to Kshs. 62,000/= by the time of her dismissal.
6. The Claimant's further case is that on 18th September, 2013, the Respondent interdicted her and thereafter dismissed her from employment on 2nd December, 2014. She states that the reasons given for her dismissal are dishonesty in provision of services, willful neglect of duty and causing pecuniary loss to the Respondent. She avers that she was never dishonest in her duty and further that she used to file daily reports with her supervisor, whose work included cross-checking her work daily.
7. The Claimant states that the Respondent dismissed her and refused and/or neglected to pay her terminal dues. The Claimant attributes her dismissal to criminal charges leveled against her at the instigation of the Respondent, which charges she was acquitted of.
8. The Claimant avers that she was not given a fair hearing and neither was she given reasons prior to her dismissal contrary to Sections 41(1) and 45(2) of the Employment Act, 2007. It is her case that her dismissal is wrongful and unlawful.
9. It is the Claimant's case that she was not given notice prior to her dismissal as required under the law and further that she was not issued with a certificate of service when she exited the Respondent's employment. It is her further case that she was not paid gratuity/service pay and overtime allowance.
10. The Claimant admitted receipt of Kshs. 30,000/= paid to her upon dismissal, which she was informed was her pension payment.
11. The Claimant's claim is for payment of Kshs. 901,740/= being 12 months salary in compensation for unfair dismissal, an order that the Respondent issues her with a certificate of service and costs of this suit.

12. On cross-examination, the Claimant stated that she used to be paid Kshs. 1500/= every time she worked overtime and that she could not remember the number of days she worked overtime that were not paid.

13. The Claimant further admitted owing the Respondent Kshs.1, 399,035/= and a further Kshs. 496,539/=, being loan facilities advanced to her by the Respondent and which she had not paid at the time of her dismissal. She further stated that she owes the Respondent a salary advance of Kshs. 141,645/-.

14. The Claimants further states that her salary at the time of dismissal was Kshs. 62,000 but only produced a pay slip giving her salary as Kshs. 56,000/=.

15. The Claimant confirmed on cross-examination that she received an invitation dated 23rd September, 2014 asking her to appear before a disciplinary committee. She further confirmed attending the discipline hearing.

16. The Claimant further confirmed that she at one time had a cash shortage of Kshs. 1,400,000/= which she attributed to a system error. She further admitted making payment to a deceased member of the Respondent and further stated that although this happened within her portfolio, the payment was made by one of the Respondent's loans officer.

17. The Claimants states that the charges against her were considered by the disciplinary committee which found her culpable, resulting in her dismissal. She states that she was not given sufficient time to defend herself.

The Respondent's Case

18. Mr. Odhiambo Oyange, the Respondent witness number one (RW1) adopted his witness statement and proceeded to state that he was the Branch Manager of the Respondent at the time of the Claimant's dismissal.

19. It is RW1's case that the Claimant was employed by the Respondent as a teller in its Kisumu Branch. It is his further case that the Claimant was entrusted with money to pay the Respondent's customers and that the payment was to be made upon the customer presenting themselves and the Claimant confirming that their documents are correct and in addition, confirming the money in their accounts before effecting payment.

20. The Witness states that between January and May, 2013, the Respondent lost money that was entrusted in the Claimant. He states that Kshs. 1,484,800/= was the total amount of money lost under her watch and which money was withdrawn in bits, cumulatively adding up to this figure.

21. RW1 admitted that the Respondent's payment system was experiencing challenges resulting in double entries. It is his case that the Respondent put in place measures where only supervisors were allowed to reverse money when the system made double entries. He states that the Claimant did the reversals herself which she did not have authority to do. He avers that at one time the Claimant made two entries of Kshs. 50,000/= and took the Kshs. 50,000/= and even upon this being discovered, she failed to surrender the money to the Respondent.

22. RW1 further stated that the Claimant was given Kshs. 1,200,000/= to serve customers every day, which amount could be replenished if depleted and surrendered if not utilized at the end of the day. RW1 states that in some instances the Claimant failed to declare that she had excess money at the end of the day, which money was lost through her failure to declare.

23. The witness further states that the Claimant had a habit of debiting customers' accounts twice for the same amount and keeping half the money to herself. He further states that this was discovered through a reconciliation of member statements.

24. The Respondent's second witness (RW2) Mr. Robinson Otieno, told the court that the Claimant's salary at the time of dismissal was Kshs. 52,250/= and not Kshs. 62,000. He states that the Claimant did not perform her duties as was expected. He further states that she did not declare excess money in her custody.

25. RW2 states that the Claimant activated an account of a deceased member of the Respondent and went ahead to withdraw money from it. It is his case that this was part of the reasons the Claimant was taken through disciplinary action as well as the arrest and charges for criminal liability.

26. RW2 states that the Claimant was taken through a disciplinary process which resulted in her dismissal. He states that the Claimant did not appear before the discipline committee on the date the hearing was first set to take place and this resulted in the hearing being rescheduled to a later date when the Claimant could attend.

27. The Respondent's case is that the hearing proceeded in the presence of the Claimant. He further states that a shop steward was present at the hearing of the Claimant's case and that the committee adhered to procedure.

28. RW2 states that the Claimant's terminal dues were computed and paid and this include her outstanding leave days. It is his case that the Claimant is not entitled to overtime pay as this was paid in form of additional risk and Front office service allowance to cover time spend in the reconciliation of books and which is paid monthly together with the Claimant's salary.

Analysis and Determination

29. The Court identified the following as issues for determination in the matter:

- i. Whether the Claimant was wrongfully and unlawfully dismissed
- ii. Whether the Claimant is entitled to the reliefs sought
- iii. Who bears the costs of the suit.

Whether the Claimant was wrongfully and unlawfully dismissed

30. A determination of whether or not an employee's dismissal is wrongful, is depended on the employer's adherence to the fairness principles, otherwise called the rules of natural justice enshrined in Section 41 of the Employment Act, 2007 and Article 47 of the Constitution, as well as the question of substantive justification enshrined in Sections 43, 45 and 47 of the Employment Act.

31. Section 41(1) of the Employment Act, 2007, provides as follows:

“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 dismissal and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

32. RW2 told this court that the Claimant was taken through a disciplinary process which resulted in her dismissal. He stated that the Claimant did not appear before the discipline committee on the date the hearing was first set to take place and this resulted in the hearing being rescheduled to a later date when the Claimant could attend. He stated that the hearing proceeded in the presence of the Claimant. It is his further testimony that a shop steward was present at the hearing of the Claimant's case and that the committee adhered to procedural principles underpinning such disciplinary hearings.

33. The Claimant confirmed on cross-examination, that she was indeed invited to attend a disciplinary hearing and which she admitted attending. She further confirmed to this court that the discipline committee found her culpable resulting in her dismissal.

34. RW2 further told this court, that the discipline process/hearing was rescheduled when the Claimant could not attend on the first date set for the hearing and the Claimant given another date to appear for the hearing which she did. This does not support the Claimant's allegation of not being given enough time to defend herself. Moreover, no evidence was produced to show that the Claimant requested for more time to prepare for the hearing and that the request was declined.

35. In light of the foregoing, I find and hold that the Respondent's disciplinary process satisfied the fairness test enshrined in Section 41 of the Employment Act and Article 47 of the Constitution.

36. The next step in determining whether the Claimant's dismissal was wrongful and unlawful and hence unfair, is the substantive justification test. The Court of Appeal in the case of **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** held:

“..... The employer must prove the reasons for dismissal/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5).....”

37. The Claimant told this court that the reasons given for her dismissal are dishonesty in provision of services, willful neglect of duty and causing pecuniary loss to the Respondent. RW1's testimony is that between January and May, 2013, the Respondent lost money that was entrusted in the Claimant. He states that Kshs. 1,484,800/= was lost under the Claimant's watch and that the money was withdrawn in bits, cumulatively adding up to this figure. It is his evidence that the Claimant failed to declare that she had excess money at the end of the day, which money was lost through her failure to declare.

38. RW2's testimony is that the Claimant activated an account of a deceased member of the Respondent and went ahead to withdraw money from it. He further avers that the Claimant had a habit of debiting customers' accounts twice for the same transaction and keeping half the money to herself. In the opinion of this court, the Claimant seem to have taken advantage of a faulty system to defraud the Respondent.

39. The Claimant told this court that her working relationship with her co-workers was good and none had reason to accuse her falsely.

40. On a balance of probability, the Respondent has proved that it had valid, fair and justified reasons to dismiss the Claimant. An iota of dishonesty in a business that deals with handling of peoples' money is unacceptable. In the case of **British Leyland UK Ltd vs Swift [1981] IRLR 91**, the court held that if a reasonable employer might have reasonably dismissed the employee, then the dismissal was fair.

41. The reasons given for the dismissal of the Claimant herein, are in my opinion valid and fair reasons (**See Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union [2017] eKLR**).

42. The fact that the Claimant was acquitted of the criminal charges has no bearing on this matter as the level of prove in criminal matters is much higher, not to mention that the criminal case did not take off and the Claimant's acquittal was based on technicalities rather than for lack of prove/evidence. The acquittal did not in my view, delink her from the acts of dishonesty described by the Respondents witnesses.

43. I find and hold that the Claimant's dismissal was made within the requirements of Sections 41, 43, 45 and 47(5) of the Employment Act, 2007, hence fair and lawful.

Whether the Claimant is entitled to the reliefs sought

44. The Claimant's claim is for one-month salary in lieu of notice, overtime pay, gratuity, service pay and 12 months' salary compensation for loss of employment.

Overtime Pay

45. RW2's evidence is that the Claimant's terminal dues were computed and paid. It is his case that the Claimant is not entitled to overtime pay as this was paid in form of additional risk and Front office service allowance paid monthly together with the Claimant's salary. The pay slips produced in evidence before this court confirm that the Claimant was paid a risk allowance on a monthly basis.

46. Overtime pay and risk allowance are distinct and separate allowances and which serve different purposes. The Claimant's evidence is that she cannot tell how many days she worked overtime that were not compensated. Although the Respondent's assertions on payment of overtime are not tenable, the Claimant has failed to prove that she worked overtime and how much she is owed for the days/hours worked.

47. The Claimant as the burden bearer, failed to discharge this burden and the court cannot make an award without basing it on evidence. The claim for overtime pay fails and is dismissed.

Gratuity/Service pay

48. The Respondent's case is that the Claimant was a member of its pension scheme and that she was fully paid her pension on dismissal. It is the Respondent's further position that the Claimant was a member of NSSF and that it remitted both her deductions and the employer's contribution to NSSF on a monthly basis and through out her time with the Respondent.

49. The Claimant confirmed that she was paid Kshs. 30,000 upon dismissal, which she was told was her pension payment.

50. The Court finds that the Claimant having confirmed that she was paid pension upon dismissal, is not entitled to this relief and the same is dismissed.

12 Months' Salary compensation for loss of employment.

51. The dismissal of the Claimant has been held to be fair. For this reason, the Claimant is not entitled to compensation.

52. In whole, the court concludes that the dismissal of the Claimant was both procedurally and substantively fair. The dismissal is neither wrongful nor unlawful. The Claimant's claim is dismissed.

53. For reason that the Claimant is currently unemployed, I make no orders as to costs.

54. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 20TH DAY OF JANUARY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Claimant present in person

Ms. Wangui h/b for Mr. Milimo for the Respondent

Christine Omollo- C/A