



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1634 OF 2017

(Before Hon. Justice Ocharo Kebira on 28th February, 2022)

MATHIAS OMONDI NZUYACLAIMANT

-VERSUS-

RELI CO-OPERATIVE SAVINGS

& CREDIT SOCIETY..... RESPONDENT

JUDGMENT

Background

1. The Claimant came into the employment of the Respondent on the 20th July 2012 as a loans officer, on a 3 years' contract that was renewable on satisfactory performance. Credit be to his impressive performance, the contract was renewed on the 20th July 2015, for a further 3 years. Eight months into the renewed term, the relationship became rocky, with a result that the Claimant's employment was brought to an end not by an effluxion of time but summary dismissal.
2. The holding that the dismissal was substantively and procedurally unfair and unlawful, he initiated the claim herein against the Respondent, whereas he has sought for:
 - a) A declaration that the Claimant's termination was both substantively and procedurally unfair and unlawful.
 - b) An award of Kshs. 1,001,000 made up as follows:
 - c) Accrued leave for one year, Kshs. 77,000.
 - d) 12 months' compensation, Kshs. 924,600.
 - e) Any other relief that the court may deem fit to grant.
3. The statement of claim was filed side by side with a list, and bundle of documents, and the Claimant's witness statement.
4. The Respondent filed its memorandum of response dated 7th December 2018, on the 8th April 2019 contemporaneously with a list of exhibits.
5. When this matter came up for hearing on the 2nd day of November 2021, the parties proposed the manner in which they desired the matter be proceeded with and recorded a consent in the following manner:
 - a) That this matter be determined upon the pleadings, parties' respective witness statements, which shall be their evidence and the documents their exhibits.
 - b) That the Claimant to file and serve written submissions within 21 days of today, contemporaneously with the email of 3rd March 2013 from him to Ruth Mwangi.
 - c) The Respondent shall have 21 days to file and serve their written submissions within 21 days of service of the Claimant's.

The Claimant's case

6. It was the Claimant's case as it comes out in the statement of claim and his witness statement, that on the 20th July 2012, he was employed by the Respondent as a loans officer. The contract of employment was a fixed term contract that provided for renewal upon satisfactory performance.
7. The Claimant stated that the employment contract was renewed on the 20th July 2015 for a period of 3 years. The termination date therefore was to be 19th July 2018.
8. The renewal followed his application for renewal dated 15th June 2015, the Respondent expressed that it had accepted to renew the contract, the salary was to be Kshs. 77,000 per a month. The other terms and conditions of employment were spelt out in the contract of employment that was executed by the parties on the 20th July 2015.
9. The Claimant stated that on the 22nd March 2016, the Respondent issued him with a letter demanding an explanation on an allegation that he [the Claimant] had misled the office over issuance of loans on the specific accounts that were put forth therein, Fredrick Ooko's account and that of Daniel O. Yogo. He stated that through his letter dated 4th April 2016, he gave a candid explanation to the Respondent
10. After the explanation, the Respondent gave him a warning, that was expressed through the letter dated 14th April 2016.
11. On the 30th May 2016, the Chief Executive Officer of the Respondent wrote a letter to him, alleging that through her email dated 19th May 2016, she had required him to give a report on all loanees who were servicing their loans through cash deposits or bank standing orders, their banking dates, their loan status, and position of defaulters, and that the email did not attract any action from the Claimant. The letter required an explanation for the failure.
12. He stated further that he wrote a letter in reply dated 31st May 2016, indicating that:
 - a) He had already forwarded the said list vide his email dated 24th May 2016.
 - b) Keeping of the records requested for was the duty of the accounts department and did not in any way fall under his duties. The accounts department had full access to the bank statements which he did not have.
 - c) Getting data on defaulter was done to his level best with one Ann assisting him. However, there were files that had already been forwarded to Kenya Railways for recovery and one Kepha, who could have assisted him to get the files was busy retrieving files for purposes of the audit that was going on.
 - d) That immediately after the annual delegates meeting, the said Kepha was deployed to the cash office leaving him alone in the loan's office.
 - e) That this was effectively impacting his ability to fulfil his core duties as a loans officer.
13. He stated that on the 26th January 2017, he received a warning letter, alleging that he had given some members loans that were either above or below the qualified for amounts.
14. On the 10th March 2017, he was ordered to proceed on leave against his wishes and plans. While he was still on his forced leave, he received a letter dated 29th March 2017 via an email of even date unilaterally extending his leave without any reason. He did not sign the application for leave /travelling allowance form dated 29th March 2017.
15. The Claimant stated that in reaction, he wrote a letter dated 19th April 2017, raising various issues over the forced leave.
16. The Claimant states that he received a rather arrogant letter dated 9th May 2017 wherein the Respondent indicated that they knew the law, that his letter was not in good faith and was geared towards interfering with the good working relations in the office. That other officers had gone on leave without contestations, he would not be an isolated case.
17. He stated further that he had agreed to proceed on leave but on 10th March 2017 he was summoned back to the office.
18. Immediately after resuming from leave he was issued with a letter dated 9th May 2017 whose subject was "charge sheet on gross misconduct." The letter gave him 48 hours to respond.
19. He asserted that through his email of 10th May 2017, he requested for additional time to respond. The Respondent grudgingly allowed him up to 11.00 a.m. of 11th May, through its letter of even date. He responded his of 12th May 2017.
20. It was further stated that on the 24th May 2017, the Respondent wrote him a notice of a meeting for a personal hearing before a disciplinary committee, that had been set for the 26th May 2017 at 2.00 p.m. to discuss his conduct. His right to attend the meeting with representation was expressed.

21. On the 25th May 2015, the Claimant wrote a letter to the Respondent, seeking for further and better particulars of the charges against him, contending that charges of dishonesty, integrity and unprofessionalism were ambiguous. He asked for more time to enable him prepare adequately. That he intimated that he was ready to attend and participate in a properly and procedurally organized meeting with clarity of the accusation, adherence to fairness and the rules of natural justice.
22. He alleges that the Respondent failed to respond to his letter, and instead wrote to the Claimant on 26th May 2017 accusing him of failing to appear for the hearing but granted him another opportunity by inviting him to appear again on the 29th May 2017.
23. He contends that he attended the meeting on the 29th May 2017, and requested that he be provided with specifics and particulars to enable him respond adequately noting that he had already been punished for earlier offences by warning letters.
24. The disciplinary committee members declined to hear him and the chairman of the committee treated him with rudeness and arrogance. The Respondent went ahead to issue the Claimant with a termination letter and alleged that he refused to be heard. The termination letter cited dishonesty, lack of integrity and unprofessionalism.
25. He stated that the Respondent went further and terminated his membership with the society by holding his account and refunding his shares yet he had not made a request for the closure and refund.
26. He alleged that the Respondent made a decision to terminate his contract by trying him over matter he had been tried over before. The committee made a determination based on matters that were not in issue before them. He was not given an opportunity to prepare his defence afresh.
27. He summed up his case by stating that the Respondent did not have a substantive reason to terminate his employment. It affronted the provisions of the Employment Act of 2007 and rules of natural justice. The Respondent's actions were orchestrated and a planned scheme to edge him out of employment.

The Respondent's case

28. The Respondent's case is encapsulated in its statement of response and the witness statement of Anastacia Kimani, its chief executive officer.
29. The Respondent contended that it employed the Claimant as a loans officer, and that his said employment was terminated on 30th May 2017 after he failed to execute his duties as stipulated in his contract, committed acts of gross misconduct as a result of dishonesty, unprofessionalism and lack of integrity. The termination was through the letter dated 29th May 2017.
30. It was asserted that the Claimant had earlier in January 2017 been issued with a warning letter dated 26th January 2017, upon basis that he forwarded loan forms for signing and approval to the credit committee with wrong figures intentionally with a view of intentionally misleading the committee, and failing to communicate to members, information on their loan approvals as required under his contract.
31. The Respondent's witness asserted that despite the warning, the Claimant failed to change and continued to mishandle members of the Respondent, and for instance in relation to A/C No. 37657 for Javas Otieno he approved a super main loan of Kshs. 500,000, being four times his savings instead of Kshs. 392,100. This was contrary to the loans' procedures of three times. Javas Otieno Odhiambo was mishandled.
32. That in response to the allegation, the Claimant gave an explanation, stated that that was an isolated incident. This affirmed his capability.
33. The witness invited the court to consider the Claimant's email dated 10th May 2017, Respondent's letter dated 11th May 2017, and the Claimant's response to the charge sheet as gross misconduct dated 12th May 2017.
34. The Claimant's response was unsatisfactory. This prompted the Respondent to summon him for a disciplinary meeting to discuss his work and conduct. The meeting was scheduled for 26th May 2017, when the Claimant failed to show up. The meeting had to be postponed to 29th May 2017. The witness refers court to the notice of meeting letter dated 24th May 2017, the Claimant's letter dated 25th May 2017, the minutes of the meeting held on 26th May 2017, disciplinary hearing letter dated 26th May 2017.
35. The witness stated that the Respondent held the disciplinary meeting on the 29th May 2017, the Claimant attended but refused to present his defence even after he was fully briefed on the purpose of the meeting and the committee decided to terminate his contract based on the allegations as per the charge sheet and his general conduct at the meeting.
36. The witness contended that the Claimant was paid all his dues, being gratuity for the period he had worked and a one month's salary in lieu of notice in accordance with the terms of the contract. A certificate of service was issued to him.

Analysis and Determination

37. I consider the following broad issues as the issues that emerge for determination from the material placed before this court, thus:

- a) Whether the termination of the Claimant's employment was procedurally fair.
- b) Whether the termination of the Claimant's employment was substantively fair.
- c) What reliefs if any are available to the Claimant?
- d) Who should bear the costs of this claim?

Whether the termination was procedurally fair.

38. Section 41 of the Employment Act which remains the crux of procedural fairness provides for what must be present in the process leading to termination of an employee's employment or summary dismissal of an employee, in order for it to be considered procedurally fair. The procedure contemplated thereunder has three components, the information, hearing and consideration components. The first component entails the employer who intends to terminate an employee's employment or summarily to dismiss an employee to inform him or her with clarity and in a manner the employee can understand, the intention and the grounds upon which it is contemplated to terminate the employment. The 2nd component requires that the employee be given an opportunity to make representations on the grounds, put in other words, to be given a chance to defend himself against the accusations. Inbuilt in the component is the employee's right to be accompanied by a fellow employee or a shop floor representative when he makes the representation. Lastly, before the employer makes decision to dismiss the employee or terminate his or her employment the representation must be considered, the decision therefore must be a considered decision.

39. Worth noting that the procedure is mandatory.

40. It is through these lens that I will look at all the happenings in this matter to determine whether the termination was procedurally fair. Through a letter dated 9th May 2017, titled charge sheet, the Chief Executive Officer of the Respondent, addressed to the Claimant, the officer expressed:

- a) That the Respondent had noted with great concern that on various occasions the Claimant had performed his duties in a manner that did not meet the Respondent's expectations, from him as a loans officer.
- b) That it had been noted regarding member No. A/c No. 37657, that the Claimant did process and table to the credit committee to approve a super loan of Kshs. 500,000 instead of Kshs. 392,100 a thing which was against the loaning procedures. The customer was appraised by the Claimant four times instead of three times.
- c) That it had been noted that the Claimant mishandled Mr. Javas Odhiambo Otieno A/C No. 0153 by misadvising him as he claimed in his letter dated 10th March 2017, and delaying his loan until he sought for the intervention of the board member and the CEO. The customer also complained that the Claimant kept him in the office waiting as he attended to a phone call for almost two hours. The customer got agitated and threatened to withdraw his membership from the Respondent.
- d) The actions were in contravention of the Sacco policies and best practices. Such actions had the effect of exposing the Sacco to financial and reputational risks had they not been discovered in time.
- e) The Claimant was given 48 hours to respond to the anomalies as the board viewed them as a breach of ethical and professional conduct of an employee of the sacco.

Looking at the letter and the contents thereof one cannot avoid to discern that the factual allegations against the Claimant were in a language that would reasonably be understood. The allegations were sufficiently detailed to allow him to prepare a response.

41. Imperative to state that an employee is entitled to a reasonable time to prepare a response; what is reasonable will depend on the circumstances and complexity of the issues. Short notice will render a dismissal or termination ensuing unfair if an employee demonstrates that he was materially prejudiced as a result. In this matter I have held that the time given of 48 hours to respond was unreasonable but I note that the Claimant asked for an extension and he was accorded.

42. The Claimant through his letter dated 12th May 2017 gave a detailed response to the accusations. Shortly hereafter, when dealing with the substantive fairness aspect of the termination, I will delve into its contents.

43. Through its letter dated 24th May 2017, titled "Notice of meeting" the Respondent's CEO wrote:

"In response to your charge sheet of gross misconduct dated 12th May 2017, you are hereby requested to appear for personal hearing before disciplinary committee to discuss your gross misconduct involving acts of dishonesty, integrity and unprofessionalism in your work.

The hearing has been scheduled for 26th May 2017 at 2 p.m. at Sacco board room. Since meeting may lead to disciplinary action, you may have the right to representation, by choosing one of your colleagues to come along with you."

The letter was coached in a manner that was too unclear for anyone to understand the purpose of the meeting that was to be. Was it going to be a disciplinary hearing meeting or a meeting just to discuss the global items of dishonesty, integrity and unprofessionalism in the

Claimant's work?

Assuming that the letter was issued in fulfilment of the obligation placed upon an employer under section 41 of the Employment Act, can one say that the grounds that the Respondent was contemplating to base a disciplinary sanction on were spelled out with clarity and specificity to enable the Claimant make a proper representation on them? I fear not.

The invitation letter was not clear whether or not the Claimant was to make a representation on the grounds that were put forth in the letter that was titled "charge sheet" and whether the board had considered his response thereto and found the same unsatisfactory. In my view the invitation letter ought to have brought out these aspects clearly to enable the Claimant adequately prepare for his representations, if it was the intention of the Respondent that the meeting was intended to be for a disciplinary hearing.

44. It is clear from the evidence before this court that on the 25th May 2017, the Claimant requested for further and better particulars of charges against him, on the ambiguous charges of dishonesty, integrity and unprofessionalism. He also asked for more time to prepare adequately. In the circumstances I have mentioned hereinabove, I find that the Claimant's action in so requesting was merited.

45. An employment relationship must be characterized by good faith, honesty, forthrightness and candidness. The Claimant through his letter above- stated did request for better particulars and an extension of time to enable him adequately prepare for his representation. The Respondent's witness in paragraph 6 of her witness statement, acknowledges that the letter is one of those that the Respondent received from the Claimant. What is interesting however, is that the witness is too silent on why the particulars were not given to the Claimant, and why in the committee meeting of 26th May 2017, there was no acknowledgement or mention of the fact that he had sought for the particulars and extension. The committee wholly blamed the Claimant for the adjournment, of the proceedings of the day, adjourned the meeting without making a decision on the Claimant's request. Forthrightness, good faith, honesty and candidness were missing here on the part of the employer [Respondent].

46. The Respondent's witness contended that a disciplinary meeting was held on the 29th May 2017, the Claimant appeared but refused to present his defence after he was fully briefed on the purpose of the meeting. The committee decided to terminate his employment on basis of the allegations as per the charge sheet and his general conduct at the meeting. The Claimant on the other hand asserted that the committee refused to hear him because he demanded for the better particulars and an extension of time to allow him get the particulars and prepare for his defence.

47. I have carefully considered the Respondent's exhibit No. 10 minutes of the executive meeting held on the 29th May 2017, what is revealed therein is contrary to what the Respondent's witness stated but in agreement with the Claimant's version. In the minutes it is captured, thus:

"The chairman gave a briefing of the meeting to Mr. Omondi before starting hearing and immediately Mr. Omondi raised a point of objection, claiming that the time was short and that he had written requesting for more time which the CEO didn't reply. This was because Mr. Omondi had been given the letter for hearing on Wednesday on 24th May 2017, at 2.00 p.m. when he brought his letter on Friday at 4.15 p.m. there was no time to postpone the meeting hence, he was given a whole weekend to rethink and prepare on Monday 29th May 2017 at 11.00 a.m."

48. Herein before I stated that in the circumstances of the matter the Claimant rightfully requested for the particulars and extension of time, clearly, the committee did not at all consider and make a decision on his request. The failure to consider the request sufficiently or at all afforded the Claimant's constitutional right to a fair hearing as postulated in Article 50[2][2] of the Constitution, the right to fair administrative action, the tenets of natural justice, and his legitimate expectation.

49. It is worth stating that the enactment of the Employment Act, imported into contract of employment applicability of the tenets of natural justice. Employers in dealing with matters termination of employee's employment must not superficially apply the same but genuinely.

50. Min. 02/29/017, speaks it all, the Claimant was terminated on a single account, as expressed:

"The committee fully deliberated on this issue with a lot of seriousness and found that Mr. Omondi to be very rude not remorseful, arrogant and not remorseful to the disciplinary committee. He even demanded the minutes of the meeting of which he refused to participate. Based on his character the committee wanted to give him summary dismissal but on humanitarian reason the committee decided and resolved to terminate his contract."

51. I have no doubt in my mind looking at the minute that the termination was on an account, not among those that were on the "charge sheet letter" but as the Respondent's witness put it, his conduct during meeting.

52. I am of the view that this alleged misconduct having occurred on the date of the proceedings, required a separate disciplinary process than that which was before the committee on that day, and full adherence to the provisions of section 41 of the Employment Act. On this count of an offending conduct before the committee, the Respondent required to inform the Claimant that it was intending to take action against him on the account, ask him to make a representation and consider his representation. This did not happen.

53. In the case of **Dairus Kiseu –vs- Cooperative Bank of Kenya [2021] eKLR**, this court stated that the letter of termination must flow from the minutes of the disciplinary committee. Keenly considering the termination letter, it is apparent that it does not wholly flow from minute 02/29/05/2018, the verdict minute.

54. By reason of the foregoing premises, this court comes to a compelling conclusion that the termination was procedurally unfair. The Claimant was denied an opportunity to defend himself adequately, he was denied better particulars and time to prepare for his defence, he was terminated on an account, which was not part of the accusations on the “charge sheet”, which account required a separate process undertaken pursuant to the provisions of section 41 of the Act, and the termination letter in content did not flow from the verdict section of the disciplinary committee minutes.

Whether the termination was substantively fair.

55. The Employment Act, 2007 places upon the employer various burdens that speak to substantive fairness. Section 43 – burden to prove the reason[s] for termination, section 45 – the burden to prove that the reasons were valid and fair, and section 47[5] – the burden to prove that the termination or dismissal was just.

56. Section 45 [4] [b] bestows the court with a platform using the indicators provided for under section 45 [5] to interrogate whether in terminating an employee’s employment, the employer acted in accordance with justice and equity.

57. I have considered what the Respondent stated in part of its minutes thus:

“.....we pleaded with him but he declined. It is at this juncture that the committee decided to inform him to wait outside for 10 minutes, he was called back and the committee resolved to grant him a day off and advised him to report back on duty the following day morning.”

58. Here, the committee did not inform him whether it intended to make a decision on his insistence on getting the particulars and extension of time, or on the accusations on which he was seeking the particulars and d of time to enable him prepare to respond. Only to turn around and terminate his employment on a charge that was not in the list that obtained on the “charge sheet”. It is not difficult to conclude that the act here was not in accord to justice and equity.

59. A decision that is a product of a failure to adhere to the principles of natural justice, a breach of a employee’s constitutional rights to a fair hearing and fair administrative action, and legitimate expectation of that employee cannot be said to be just under any circumstance. The Respondent failed to demonstrate that its decision was just, it did not discharge the burden of prove under section 47 [5] of the Act.

60. As stated above, the employer is enjoined to prove that the reason[s] for termination was fair and valid. Black’s Law Dictionary defines valid to mean legally sufficient, to terminate an employee’s employment on a reason that he was never invited to defend himself against as was the case in this matter cannot be held to be legally sufficient. In the circumstance the court holds that the reason was not valid. The Respondent failed to demonstrate its validity through the testimony of the witness, and even the submissions by counsel.

61. The Claimant’s insistence, not to proceed to defend himself not unless he was given the particulars, and more time to prepare for the defence, clearly did not sit well with the committee. To terminate an employee’s employment on a reason that he insisted on his rights to the displeasure of the disciplinary committee, cannot be looked at in any manner other than being unfair.

62. Lastly, I have considered the accusations on the “charge sheet letter” the accusations are those that the Claimant had at one time or the other been asked to give an explanation on, and subsequently warnings issued to him, over. A warning is a sanction on an employee just like any other sanction recognized in Employment Law and Human resource management practice. Once an employer has made a decision to warn an employee over a certain conduct or omission, he cannot later on revive the accusations on the conduct or omission, and make it a subject of a disciplinary proceeding leading to a termination of the employee’s employment. No reasonable employer can do that, applying the reasonable employer’s test, I find that the decision based on those accusations, [if at all they were the basis, as the minutes are not clear whether they were ever considered], was unfair.

63. By reason of the premises foregoing, the court finds that the termination was not substantively fair.

Of the reliefs

64. The Claimant has sought for a compensatory relief pursuant to the provisions of section 49 [1] [c] of the Employment Act. I am prepared to make an award in favour of him under the provision to an extent of 7 months’ gross salary, therefore Kshs. 539,000. In arriving at the decision to award and the extent, I have considered the extent of the Respondent’s deviation from what the law expected of the Respondent, the impression that the dismissal was retaliatory, and the length of time the Claimant served under the renewed contract, and the outstanding period that were under it.

65. The claim for accrued leave does not find explanation and sufficient support in his evidence placed before court. It is declined.

66. In the upshot, Judgment is entered for the Claimant in the following terms:

- a) **A declaration that the termination of the Claimant’s employment was both procedurally and substantively unfair.**
- b) **Compensation pursuant to the provisions of section 49 [1] [c] of the Act, Kshs. 539,000.**
- c) **Interest on [b] above, from the date of this Judgment till full payment.**
- d) **Costs.**

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2022.

OCHARO KEBIRA

JUDGE

In Presence of

Mr. Cheneto for Mr. Njiru for the Claimant.

Mr. Osando for the Respondent.

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of court fees.

OCHARO KEBIRA

JUDGE