



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2485 OF 2017

(Before Hon. Justice Ocharo Kebira on 15th March 2022)

KIPKIRUI CHEPKERES LABATI.....CLAIMANT

VERSUS

COOPERATIVE BANK OF KENYA LTD.....RESPONDENT

JUDGMENT

Introduction

1. This suit was initiated by a statement of claim dated 19th December 2017 and filed on 20th December 2017, wherein the Claimant alleged that his employment was wrongfully, unlawfully, and unfairly terminated. Consequently, he sought for the following reliefs against the Respondent, thus –

- (a) The termination from employment of the claimant was substantively and procedurally wrongful/ unfair.
- (b) The claimant be reinstated and/or be re-engaged without loss of benefits and break in the years of practice
- (c) The claimant be paid twelve (12) months gross salary compensation for suffering wrongful/unfair termination amounting to Kshs 1,017,192
- (d) The claimant be paid one (1) month pay in lieu of notice
- (e) The claimant be paid pending leave days pending(sic)
- (f) Interest from the date of termination
- (g) Cost of the suit

2. In response to the claim, the Respondent filed a memorandum of defence dated 25th November 2020, wherein he denied the Claimant's cause of action, and entitlement to the reliefs he has sought.

3. Parties were referred for mediation and on 17th November 2020 the mediator filed a certificate of non-compliance and matter was referred back to litigation.

Claimant's case

4. The Claimant states that he was employed by the Respondent on the 28th January 2013 on 2 years fixed term contract, as a graduate clerk. The contract was renewed for a further 2 years on 29th January 2015. The renewed contract did not come to termination by effluxion of time, but as a result of a summary dismissal from employment that occurred on 22/02/2016.

5. The claimant contends that on 21st December, 2015 while in the course of his duty, he incurred a cash shortage of Kshs 100,000 [One Hundred Thousand]. His frantic efforts to trace the cause of the shortage did not realise any fruits. He got constrained to report to his manager and in accord with the cash operating procedures he filled a cash and shortage voucher and balanced his till.

6. On the 5th January 2016, the Respondent issued him with a notice to show cause why disciplinary action would not be taken against him on account of the cash shortage. He stated that he did respond to the show cause letter, categorically stating that the shortage was a normal operational shortage, which he declared in conformity with the Respondent's Operating Manual for tellers.
7. The Claimant stated that through its letter dated 26th January, 2016, the Respondent informed him of its decision that he appears before the Staff Disciplinary Hearing which was slated for the Monday, 1st February, 2016. On the day of hearing, he admitted the shortage and asked for leniency, as that was his first error as a teller. He was given a one month's notice pay pursuant to clause A5 of the CBA. At the termination, he was earning Kshs. 84,766 per a month.
8. He appealed against the termination on the 7th March 2016. In the appeal he contended that the shortage was an operational error which would not warrant a summary dismissal from employment. A warning letter would suffice. The error was not a wilful and negligent act on his part. The appeal was neither considered nor was he called for its hearing for by the Respondent.
9. The Claimant asserted that there is a lady colleague who previously had suffered a shortage of Kshs.99,000, but a summary dismissal was not visited on her. The bank was not fair to him.
10. The claimant reported the trade dispute through his union on the 23rd May 2016 and a conciliator was appointed on the 15th June 2016. The conciliator issued a report dated 17th March 2017 indicating that the parties disagreed hence the filling of this claim in court.
11. Cross examined by counsel for the Respondent, the Claimant stated that Clause F of the renewed contract, placed an obligation on him to exercise proper precautions in the discharge of his duties.
12. He further stated that the money in issue was at the material time in his possession within his cubicle. Every time he stepped out of the cubicle, he locked it.
13. Referring to paragraph 5 of the minutes of the disciplinary hearing, the Claimant stated that he told the committee that on the material day there was no issue with the journal systems of the bank. The money got lost while in his care.
14. Clause A5[a][i] of the CBA, provided for disciplinary action upon an employee being found guilty of misappropriation. The Claimant stated that the clause that the Respondent referred to in the termination letter refers to misappropriation and not loss. He did not take the money for his own use, he cannot therefore be accused of misappropriation.
15. The Claimant stated that through the union, he reported the matter to the minister. The recommendation from the minister did not blame the Respondent for the termination, but recommended a one month's salary payment to him.
16. The Claimant stated that he was given, a notice to show cause, an opportunity to be heard about the shortage, a right to be accompanied by a representative of the union at the hearing, and gave an explanation to the committee over the loss.
17. The Claimant stated that in the disciplinary hearing he did not give the committee a guide on how the money got lost. He indicated to them that he might have overpaid a customer.
18. In his evidence in re-examination, the Claimant stated that the termination letter does not talk of misappropriation but shortage of the sum.

Respondent's Case

19. The Respondent presented one Leah Kerich, its Employee Relations Advisor to testify as its witness in this matter. The witness urged court to adopt her witness statement as her evidence in chief, and the documents that were filed contemporaneously with the memorandum of Defence, as the Respondent's documentary evidence.
20. The Respondent admits that the Claimant was its former employee and a union member of the Banking Insurance and Finance union having been employed as a graduate clerk on 29th January 2013, on a two-year contract ending on the 28th January 2015. After successfully serving the probation period, the contract was renewed for another 2 years beginning 29th January 2015.
21. On 2nd July 2015, the Claimant was appointed to the position of Teller effective July 2015 as he was a trained Teller.
22. The witness stated that as a Teller, his role entailed, service delivery which included paying cash of all currencies, receiving cash deposits of all currencies, cheque encashment of all currencies, processing of Mpesa and Zap transactions, receiving and posting both deferred and inhouse cheques, issue Banker's cheques.
23. The witness stated that on 21st December 2015 the claimant incurred a shortage of Kshs 100,000, an amount which he was unable to account for and proceeded to declare a cash shortage on the 23rd December 2015. A follow up by the Respondent's Reconciliation and Monitoring Department confirmed that there were no system issues that could have caused the teller shortage. The same amounted to a physical cash shortage.
24. The Claimant was issued with a notice to show cause letter dated 5th January 2016, for incurring a cash shortage of Kshs.100,000.00. In

his response admitted having incurred the shortage which he was unable to trace.

25. He was subsequently invited for a disciplinary hearing on the 1st February 2016, hearing to which he was accompanied by a Central Staff Union Official, one Bethwel Komen. During the hearing it emerged he could not account for the cash. A decision was made to terminate his employment. The decision was communicated through the Respondent's termination letter dated 22nd February 2016.

26. She stated that in deciding to terminate, the panel considered provisions of the Bank's Staff Manual part 10.9 which provides for summary dismissal and the offences on the part of the employee that can constitute gross misconduct and or serious neglect that can form a summary dismissal. This includes failure to account for monies received or held on behalf of the bank or where an employee, wilfully or by negligence allows or facilitates loss or destruction or damage of any bank property or asset.

27. It was further stated that the claimant appealed against the decision to terminate his employment on the 10th March 2016, the appeal was dismissed, and a decision to that effect communicated to him through the Respondent's letter dated 29th March 2016.

28. The Claimant subsequently reported a trade dispute through the union and a conciliator N. Muli was appointed. The conciliator did not fault the Respondent on the decision to terminate the Claimant's employment. She directed that he be paid a one month's salary in lieu of notice and any pending leave dues. The same was duly paid.

29. The witness stated that contrary to what the Claimant alleged, the shortage was not an operational shortage but a physical cash shortage which he was unable to account for.

30. The respondent submits that the claimant's salary at the time of termination was Kshs 72,991 and not Kshs 84, 766 as submitted by the claimant.

31. The Respondent stated that the claimant was paid all his dues that were duly computed and amounted to Kshs. 45,732.00, and issued with a certificate of service dated 1st March 2016.

32. The Respondent stated that the claimant committed a breach of security affecting the banks business and his termination was effected in accordance to the terms of his employment and procedurally done in accordance to the Banks Disciplinary procedure as per the Banks staff manual.

33. In her evidence under cross examination, the witness stated that Para. F of the manual proposes that loss can occur in the course of an employee's duty.

34. She further stated that according to the termination letter, the Claimant's employment was terminated in accordance with the stipulations of the Collective Bargaining Agreement. That though the agreement provided for a warning, this was not a matter that would allow the same.

35. The witness asserted that the Claimant was not summarily dismissed, but he was terminated.

36. In her evidence in re-examination the witness stated that the Claimant was supposed to be summarily dismissed but the Bank opted to terminate his employment.

Claimant's Submissions

37. The Claimant's Counsel identifies two broad issues for determination in this matter thus; whether the termination of the Claimant's employment was unfair and whether the Claimant is entitled to the reliefs sought. On the first issues he submitted that section 41 of the Employment Act provides for a procedure that must be followed before an employee can be dismissed or terminated on grounds of misconduct, poor performance or physical incapacity. The procedure entails explaining to the employee in a language that he understands the reasons for which the employer contemplates the termination or dismissal, giving an opportunity to the employee to be heard, and considering the employee's explanation.

38. It was submitted that though the Claimant was given a hearing, the Respondent did not consider his representation before termination. He was a bulky/executive teller dealing with millions of shillings and he did testify that he may have overpaid a customer and therefore incurred a shortage in the discharge of his duty.

39. It was argued that the Collective agreement provided for instances when an employee could be dismissed after warning. That the circumstances of the matter placed it under the realm of those that under clause A5[b] of the CBA as read with A5[b][iii] would only attract the sanction of a warning.

40. The Respondent did not adhere to its own Disciplinary policy and procedure as it summarily dismissed the Claimant on a matter that would not warrant a summary dismissal under the policy and disciplinary procedures. This was in contravention to the provisions of section 12 of the Employment Act.

41. Counsel submitted that Clause 10.6 [b][viii] provided that dismissal/termination would only be justified only if an employee had been given two warnings commits a third offence. The Claimant had not received a single warning letter, prior to his termination. This exhibited bad faith on the part of the Respondent.

42. It was submitted that at the time of termination, the Claimant was earning a basic salary of Kshs.72,991 plus house allowance of Kshs. 8,500 per a month.

43. The claimant submits that there is overwhelming evidence that that the respondent fundamentally breached its obligations under the Constitution, Employment Act, CBA, Human resource Disciplinary policy and procedures in terminating the services of the claimants when the grounds of termination were unreasonable and insufficient.

44. The claimant submits that failure by an employer to observe its own disciplinary procedure may amount to repudiation of contract leading to a conclusion that an employee's termination or dismissal from employment unfair and un-procedural. He buttressed this submission by the holding in **Kenya plantation and Agricultural Workers Union vs Finlays Horticultural Kenya Ltd (2015) Eklr.**

45. The claimant submits that he is entitled to the remedies under section 12, 49 and 50 of the employment Act which include reinstatement, re-engagement, compensation, damages and other reliefs and cites the decision in **Civil Appeal No. Telkom Kenya Limited versus Paul Ngotwa.**

46. The Claimant urges the court to be persuaded by the holding in cases of **Banking Insurance and Finance union vs Co-operative Bank of Kenya Limited (2015) and Charles Kinyua and another vs Meru Central Dairy co-operative Union Limited (2015) eKLR,** to order that he be re-engaged.

Respondent's Submissions

47. The Respondents in its submissions submit that the claimant's services were terminated because of incurring shortage of money as a cashier. He was issued with a notice to show cause, and therefore a chance to explain the shortage but he never raised any substantial defence or explanation. That its witness gave evidence and referred to various documents including the staff manual and the CBA, demonstrating that the decision was justified as the Claimant failed to give any plausible explanation as to the whereabouts of the money.

48. The Respondent relies on the holding in **Rand water Vs Johan stoop & Another JA 78/11** where it was held;

“it's an implied term of the contract of employment that an employee will act in good faith towards his employer and that he will serve his employer honestly and faithfully..... The relationship between employer and employee has been described as a confidential one [Robb v Green at page 319]. The duty the employee owes his employer is a fiduciary one “which involves an obligation not to work against his master's interests” [Premier Medical and Industrial Equipment Ltd v Winker at 867; Jones v East Rand Extension Gold Mining Co Ltd 1917 TH 325 at 334] If an employee does “anything incompatible with the due of faithful discharge of his duty to his master, the latter has a right to dismiss him. “Pearce v Forster at 359. In Gerry Bouwer Motors[pty]Ltd v Preller it was held at page 133; “I do not think it can be contended that where a servant is guilty of conduct inconsistent with good faith and fidelity and which amounts to unfaithfulness and dishonesty towards his employer the latter is not entitled to dismiss him.....”

49. The Respondents submit that the claimant committed a breach of security relating to a matter affecting the banks business and his termination was effected in accordance with the terms of employment and clause A5 of the collective agreement. It put reliance on the holding in **Gerry Bouwer Motors(pty) ltd vs Preller** where it was held;

“I do not think it can be contended that where a servant is guilty of conduct of inconsistent with good faith and fidelity and which amounts to unfaithfulness and dishonesty towards an employer the latter is not entitled to dismiss him”

To buttress this submission.

50. It was further submitted that the claimant's argument that he was not dismissed under a correct clause stretched would mean that all employees in the bank can mis-handle money and ask for a warning letter and this argument does not meet the business ideals and it violates the essence of employment contract. Policy is supposed to guide the employees in carrying out duties. The CBA is about terms and conditions. Where the interest of the employer is jeopardized, then a dismissal can occur.

51. The Respondent submits that the claimant entered into a contract to serve the Respondent in good faith, honestly and faithfully but he failed to honour his part of the bargain and the evidence submitted before the disciplinary committee was sufficient to conclude that the claimant breached the terms of employment.

52. The respondent urges the court to dismiss the claim with costs.

Analysis & Determination

53. From the material placed before me, the following three broad issues emerge for determination, thus;

I. Whether the dismissal of the Claimant from employment was substantively fair.

II. Whether the dismissal of the Claimant from his employment was procedurally fair.

III. What remedies are available to the Claimant, if any in the circumstances of this matter?

IV. Who should be condemned to pay costs for this claim.

Whether the dismissal of the Claimant from employment was substantively fair.

54. From the Claimant's pleadings and submissions, one gathers an impression that according to him, the separation between him and the Respondent came about as a result of a summary dismissal. On the other hand, as can be discerned from the evidence of its witness, the Respondent took a position that there was no summary dismissal but a termination.

55. Section 44[1] of the Employment Act stipulates when a summary dismissal shall be taken to have occurred, thus;

“Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled to by any statutory provision or contractual term.”

56. Clause 5[d] of the Collective Bargaining Agreement provided that *“the notice period shall be one month's notice on either side in writing or payment of one month's salary in lieu thereof by either party, subject to the reasons for the termination being included in the letter of termination.”* This was the contractual term. The termination letter was clear, the termination was with immediate effect, and in accordance with Clause A5 of the agreement. This spoke to summary dismissal.

57. Section 43 of the Employment Act places a burden upon an employer to prove the reason[s] for termination, and where the employer fails to do so the termination shall be deemed unfair in terms of section 45.

58. To discharge this burden, the Respondent in its pleadings and through its witness's evidence stated that the Claimant was dismissed for incurring a shortage of Kshs. 100,000 [one hundred thousand], a shortage that he failed to give an account of. The Claimant all through was in admission that the shortage occurred in the course of his duty as a teller. I am of the view that the Respondent, in the circumstances of the matter was able to discharge the legal burden under this provision.

59. However, the burdens placed upon an employer do not end at section 43 of the Act. There are further burdens placed upon the employer by other stipulations within the Act. Closely allied to the burden under Section 43 is that under section 45 of the Act, section which provides;

“[1] No employer shall terminate the employment of an employee unfairly.

[2] A termination of employment by an employer is unfair if he fails to prove-

[a]. that the reason for termination is valid;

[b]. that the reason for termination is a fair reason-

[i] related to the employee's conduct, capacity or compatibility; or

[ii] based on the operational requirements of the employer; and

[c] that the employment was terminated in accordance with fair procedure.”

60. I now turn to consider whether the Respondent did discharge the burden under this provision, to be more specific whether the it did prove that the reason was valid and fair. From the onset it should be stated that in order to gain a proper view as to whether the burden has been discharged in a matter where there was a summary dismissal, the starting point should be a consideration of the provisions of section 44 of the Act, then weigh them against the circumstances of the matter.

61. Section 44[3] of the Act provides;

“Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligation arising under the contract of service.”

Section 44[4] provides for actions and inactions on the part of an employee that may amount to gross misconduct so as to justify his/her summary dismissal. However, it is imperative to state that the list is not exhaustive.

62. The Respondent asserted that in dismissing the Claimant, the provisions of clause 10.9 of Appendix 14 of the Bank's Staff Manual which I note provides;

“Any of the following offences on the part of an employee shall constitute gross misconduct and or serious neglect and shall justify summary dismissal.....

[iii]. If an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly or improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly.

[vi] If an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer's property in that he/she steals, illegally appropriates for her or himself, illegally or improperly uses or illegally destroys, damages or deals with or uses property of the bank in such a manner that it may be or is detrimental to the bank.

[viii]. If established or found guilty of misappropriation of any funds or property belonging to the bank or belonging to any party having business with the bank or its subsidiaries;

[x]. If an employee fails to account for monies received or held on behalf of the bank;

[xii]. If an employee either wilfully or by negligence allows or facilitates loss, destruction or damage of the bank property/cash.

63. It was further contended by the Respondent that dismissal was justified and anchored on the Collective Bargaining Agreement Clause A5. The Claimant was guilty of one or more of those acts that constituted gross misconduct and attracted a summary dismissal.

64. The stipulations of the manual and the agreement are substantially in sync with the provisions of section 44[4], in my view.

65. Critically looking at the provisions of Section 44[3] of the Act, it can be safely stated that it is not enough for an employer to cite that an employee has committed one or more of those acts or omissions obtaining in the list provided for in section [44][4] of the Act, or its Human Resource Manual, or Collective Bargaining Agreement. An employee's misconduct does not inherently justify a summary dismissal unless it is "so grave" that it intimates the employee's abandonment of the intention to remain in employment. In **Laws v Landon Chronicle Limited [1959]2 ALL L.R** it was held at page 287;

"Since a contract of service is but an example of contracts in general, so that the general law of contract will be applicable, it follows that, if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service."

66. Whether an employee's misconduct attracts dismissal requires an assessment of the degree and the surrounding circumstances, the contextual approach. In **McKinley v BC Tel.** the Supreme Court of Canada held, and I agree:

"29. When examining whether an employee's misconduct justifies his or her dismissal, Courts have considered the context of the alleged insubordination. Within this analysis, a finding of misconduct does not, by itself, give rise to a just cause. Rather, the question to be addressed is whether, in the circumstances, the behaviour was such that the employment relationship could no longer viably subsist."

39. To summarise, the first line of case law establishes that the question whether dishonesty provided just cause for dismissal for summary dismissal is a matter to be decided by the trier of fact, and to be addressed through an analysis of the particular circumstances surrounding the employee's behaviour. In this respect, Courts have held that factors such as the nature and degree of the misconduct, and whether it violated the "essential conditions" of the employment contract or breaches an employer's faith in an employee, must be considered in drawing a factual conclusion as to the existence of the just cause."

67. The Claimant through his pleadings, evidence and submissions contended that the sanction by the Respondent on was unfair. The circumstances of the matter could have attracted a warning not a summary dismissal. I have considered the circumstances of the matter including the industry in which he was working in, the role that he was assigned by the Respondent as a teller, what the role entailed as was brought out in the evidence of the Respondent's witness, the act of incurring a shortage that he failed to give an account of, the fact that the act of failing to account and on neglect of carelessly discharging his duties was an act that would justify a summary dismissal under the CBA, the manual, and the Employment Act and that the reconciliation by the Respondent revealed that the shortage was a physical shortage not an operational shortage, and draw a conclusion that the dismissal was on a valid and fair ground.

68. The failure to account for the shortage owing to the position that the Claimant was holding, which would attract handling of millions of shillings per a day as his counsel submitted, could definitely breach the Respondent's faith in the Claimant.

69. In the upshot I find that the dismissal was substantively fair.

Whether the dismissal was procedurally fair.

70. Counsel for the Claimant rightly submits that section 41 of the Employment Act provides the procedure that must be complied with by an employer contemplating to terminate an employee's employment or summarily dismiss him. The provision is mandatory. I have considered how the disciplinary process against the Claimant was conducted, therein one is able to see the information component, the Claimant was informed in detail what accusation was being levelled against him, the hearing component, the Claimant was given an opportunity to explain himself on the shortage, and the consideration component, the Respondent considered the Claimant's explanation which they found unsatisfactory. Up to here it is not difficult to conclude that the procedure contemplated under section 41 of the Act was complied with.

71. Counsel for the Claimant submitted that the Respondent had a manual policy and Collective Bargaining Agreement, which provided that in circumstances of the matter the Claimant was entitled to be sanctioned by way of a written warning. That the Respondent ignored its own policy and procedures. That the Respondent breached the termination/dismissal procedural stipulations of the CBA. I have carefully considered the CBA provision that counsel has placed reliance on, Clause A5[b], and disagree with him that in the circumstances of this matter, the clause is applicable. I am of the view that with due respect out of deliberateness or ignorance, Counsel failed to discern that

Clause A5 provided for acts that would amount to gross misconduct that would attract a summary dismissal. It is this clause that the Respondent invoked in its action against the Claimant.

72. I am unable to see a stipulation in the manual that would bind the Respondent not to proceed to summarily dismiss an employee where his action or inaction warrants such a dismissal, if a warning had not been given.

73. By reason of the premises, I find that the dismissal was procedurally fair.

Of the Reliefs

74. Having found that the dismissal was both procedurally and substantively fair, I hold consequently that the Claimant is not entitled to the reliefs sought or any or at all.

75. In the upshot, the Claimant's claim is dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF MARCH, 2022.

OCHARO KEBIRA

JUDGE

Delivered in presence of:

..... for the Claimant.

.....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