



REPUBLIC OF KENYA



KENYA LAW
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**Malel v Stima Sacco Society Ltd (Cause 21 of 2020)
[2022] KEELRC 1778 (KLR) (9 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1778 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE 21 OF 2020
ON MAKAU, J
JUNE 9, 2022**

BETWEEN

TIMOTHY KIPRONO MALEL CLAIMANT

AND

STIMA SACCO SOCIETY LTD RESPONDENT

JUDGMENT

Introduction

1. The Claimant was employed as Credit Officer by the Respondent for an aggregate period of five (5) years. On 30th March, 2020 the Claimant received a letter from the Respondent summarily dismissing him from employment. The Claimant alleges that the summary dismissal was not justified and was without adherence to due process and therefore wrongful, unfair and unlawful. By the Memorandum of Claim dated 26th August, 2020 he seeks the following reliefs: -
 - a. Damages and terminal dues amounting to Kshs.2,601,400/-
 - b. General damages for unlawful termination and dismissal from employment
 - c. Unconditional reinstatement
 - d. Certificate of service
 - e. Costs of the suit
2. The Respondent filed Statement of Defence dated 17th September, 2020 admitting that it employed the claimant and averred that sometime in March 2020 it realized that the Claimant recommended three (3) loan applications for approval without complying with the laid down policy and procedures. The funds were subsequently disbursed to applicants Enock Cheruiyot Ng'eno, Ayub Peter Awour and



Daisy Cherotich resulting in loss of the disbursed money amounting to an aggregate of Kshs. 2,635,840 plus reputational loss.

3. The Respondent further averred that it accorded the Claimant a hearing and after considering his defense, it found the same unsatisfactory and summarily dismissed him for negligence in recommending disbursements of the various loans in breach of its policies. Therefore, the Respondent averred that there was a good cause for dismissing the claimant and it observed due process by affording him an opportunity to be heard before summarily dismissing him.

Evidence

4. The claimant testified as CW-1 and basically adopted his written statement dated 26th August, 2020 as part of his evidence in chief. He further produced the bundles of documents dated 26th August, 2020, 4th February, 2021 and 23rd March, 2021 as exhibits.
5. In brief he contended that he was unfairly dismissed and deprived of his right of appeal. He further averred that some of the reasons for the dismissal were not part of his responsibilities and duties as a Credit Officer. He contended that his duties included processing and recommending loans for approval, and therefore it was not his duty to approve and disburse loans.
6. On cross examination he stated that he was transferred to Nairobi CBD in 2019 as Credit Officer vide a letter of appointment dated 30th September, 2019 and his key responsibilities included processing loans, ensuring accuracy of information in loan application forms and customer relations.
7. He stated that he received a dismissal letter dated 30th March, 2020 citing the reason as negligence and fraud. The letter accused him of unprocedural loan approval and subsequent disbursement of funds to Enock Cheruiyot Ng'eno, Ayub Peter Awour and Daisy Cherotich. He admitted that he did the loan approvals but maintained that he was not responsible for due diligence and subsequent disbursement of funds that was done via a marker checker process.
8. He further admitted that he was served with the show cause letter dated 18th March, 2020 accusing him of fraud in respect of the said three (3) loans and he responded to the show cause letter. However he denied ever signing documents any in which he admitted negligence.
9. He admitted that he underwent a hearing before a disciplinary committee on 24th March, 2020 and signed a copy of the proceedings of the disciplinary hearing committee. He contended that after the disciplinary committee rendered its decision, he lodged an appeal on 9th April, 2020 to the respondent's CEO which was within the stipulated time frame of fourteen (14) days.
10. On further cross examination, he admitted that he had no certificate from the internet service to prove that he emailed the said appeal as alleged but observed that Miss. Olang has in her written statement admitted that she received the said email.
11. He further admitted that he is indebted to the Respondent, he had not requested for his certificate of service and had not cleared with the Respondent as his appeal was yet to be heard and determined.
12. On re-examination he reiterated that the disciplinary process was not completed since his appeal was never heard. He also reiterated that he did not have a certificate from the internet service provider to prove that his email preferring the appeal was received by the Respondents. Finally, he admitted that he had a loan from the Respondent which had stopped repaying due to the lack of income.



13. Miss Brenda Abwavo, the respondent's Human Resource and Administration Manager, testified as RW-1. She adopted as her evidence the verifying affidavit she swore on 18th September 2020 plus the bundle of documents filed by the respondent.
14. In brief, she stated that there was justifiable cause for terminating the Claimant and that due procedure was followed as per the Human Resource Policy and the *Employment Act*. During cross examination she stated that the CEO constituted a disciplinary committee to hear the Claimant but she was only an ex-officio and not a member of the committee. She further stated that the Claimant's appeal was received out of time and as a result the appeal was not heard. She contended that the Claimant should have preferred his appeal through the office of the CEO.
15. Miss Beryl Akoth Olang, the Human Resource Officer testified as RW-2 and also adopted her written statement dated 3/3/2021 as her evidence. She stated that bolang@stimasacco.com is her official email and that she never received the appeal from the Claimant on 9th April, 2020. She further stated that the email could have gone to junk mail which deleted and/or cleared automatically.
16. She further stated that the appeal was drawn to her attention through a call from the Claimant on 29th June, 2020 upon which she requested him to forward a hard copy to her. She stated that the appeal should not have been sent through her email address but to the CEO directly.
17. She confirmed that she was a member of the disciplinary committee that heard the Claimant's case. She reiterated that the appeal was time barred and was never heard since it was received two (2) months out of time.
18. Evans Yaola, head of security and investigations for the Respondent, testified as RW-3 and like his colleagues adopted his written statements as his evidence.
19. He testified how he conducted investigations after he received audit reports indicating that there were loans that were given irregularly contrary to SACCO policy. As part of his investigations he recorded statements from the Claimant and other officers. He found that there were three (3) loans that were irregularly disbursed and that it is the Claimant who had processed the loan applications and recommended the said loans for approval. He then recommended disciplinary action against the Claimant and reported the matter to the Bank Fraud Investigation Department.

Submissions

20. The Claimant submitted that being aggrieved by the decision rendered by the Respondent's Disciplinary Committee he lodged an appeal on the 9th April, 2020 via email to bolang@stimasacco.com. He maintained that the appeal was lodged within the fourteen (14) day period provide by Clause 16.3 of the Respondent's Human Resource Policy.
21. The Claimant further submitted that RW-2 affirmed during trial that she received the said email in her junk mail thus giving credence to the assertion that he lodged the appeal within the stipulated timeframe. He contended that the appeal ought to have been determined in the next board meeting as per the Human Resource Policy.
22. The Claimant submitted that he wrote a follow up letter dated 31st May, 2020 enquiring about the status of the appeal but there was no response. He cited the case of Joel Ndung'u Bedan vs. Principal Secretary Ministry of Interior and Coordination of National Governance & Anor [2020] eKLR whereby the Court entered judgment in favour of the petitioner, who had appealed against the dismissal but five (5) months after lodging the appeal there was no communication. The Court further



- found that the petitioner's right to fair administrative action under article 47 of the Constitution had been violated.
23. The Claimant further submitted that the actions and/or omissions of the Respondent were arbitrary and that it was vital that due procedure ought to be followed for the termination to be considered just and fair.
 24. The Claimant asserted that his termination was unfair because his appeal which was lodged within the stipulated timelines had not been heard or determined.
 25. The Claimant sought the following reliefs; salary in lieu of notice, compensation for twelve (12) months unlawful termination, allowances, unpaid leave days, service pay and costs of the suit. He relied on Section 49 of the Employment Act which sets out the remedies available to an employee whose termination is adjudicated as unfair and wrongful. He further cited the case of Bamburi Cement Limited vs. William Kilonzi [2016] eKLR.
 26. On the other hand, the Respondents submitted that it had a good cause for dismissing the Claimant from employment because its internal audit reports highlighted serious breaches of policies and criteria by the Claimant on loan appraisal and disbursement to three (3) members namely Enock Cheruiyot, Ayub Peter Omolo and Daisy Cherotich.
 27. Following the irregularities revealed by the audit reports, the Respondent's CEO instructed Evans Yaola, head of security to conduct further investigations on the loan appraisal process and disbursement to the aforesaid members.
 28. Some of the irregularities included incomplete and inaccurate/false information provided by the loan applicants such as place of work and guarantors, a breach on the requirement on the minimum share capital a member was supposed to have contributed in order to qualify for a loan and forgeries of documents given by the loan applicants in support of their applications. Whilst conducting the investigation the Head of Security interrogated the Claimant and had him record a statement dated 19th March, 2020 in which he admitted fraud and negligence in approving the loans. He recommended for disciplinary action against the Claimant.
 29. It was further submitted that the Claimant gave unsatisfactory response to a notice to show cause letter dated 18th March, 2020 and was subsequently invited to a disciplinary committee hearing on 24th March, 2020 where he termed the said irregularities as mere oversight. He further admitted to having an intimate relationship with Daisy Cherotich one of the borrowers which raised an issue of conflict of interest.
 30. The Respondent reiterated that it had a good cause for terminating the Claimant's employment and that the standard proof in employment disciplinary proceedings is one of balance of probabilities and not beyond reasonable doubt. For emphasis reliance was placed on the Court of Appeal's decision in the case of Kenya Power & Lighting Company Limited vs. Aggrey Lukorito Wasike [2017] eKLR.
 31. The Respondent submitted that it observed due process prior to termination of the Claimant's employment by serving a show cause letter dated 18th March, 2020 followed by a disciplinary committee hearing on 24th March, 2020 in which the Claimant was afforded a reasonable opportunity to respond to the allegations made against him. The disciplinary committee then considered the Claimant's employment history and noted that he had previously been issued with a first warning letter after being found culpable for similar negligence in regard to unprocedural processing of three (3) loans of substantial amounts.



32. The Respondent reiterated that it acted reasonably and was justified in summarily dismissing the Claimant. It urged that it has discharged its burden of proof by demonstrating that it acted fairly by observing the due process set out by Section 45 of the *Employment Act*, 2007 and its Human Resource Policy Manual before terminating the Claimant's employment. For emphasis it cited the case of *Cooperative Bank of Kenya Limited vs. Banking Insurance & Finance Union (K)* [2017] eKLR where the court held that in cases where an employer's code of conduct provides what amounts to gross misconduct and subject to summary dismissal, a court can only interfere in an employers' decision if they acted unfairly.
33. The Respondent submitted that it received the Claimant's appeal on 30th June, 2020, which was out of the time provided in its Policy manual and therefore it was not obliged to hear the appeal. Furthermore, the Respondent did not follow the right procedure when lodging his appeal, as all appeals were to be lodged through the CEO.
34. The Respondent found it suspect that the Claimant opted to send his appeal addressed to the CEO through a junior officer yet he was aware of the procedure of sending out formal documents to the Respondent including registered post or the official email address of the Respondent or the nearest branch of the Respondent as it is an organization with branches countrywide.
35. The Respondent took further issue with the mobile phone screenshots adduced as evidence by the Claimant contending that he did not file a certificate from the internet service provider as required by section 106B of the *Evidence Act*. It cited the case of *Racheal Njoki Kahara vs. Gideon Migiro Nyambati* [2020] eKLR and *Samwel Kazungu Kambi vs. Nelly Ilongo the Returning Officer, Kilifi County & 2 Ors* [2017] eKLR for emphasis.
36. The Respondent submitted that the Claimant is not entitled to general damages since his constitutional right to a fair hearing was not breached. Further, the Respondent submitted that reinstatement is a common law remedy of specific performance, which can only be given in special circumstances when damages are not a sufficient remedy. It therefore submitted that the Claimant has not proved that his is a case of exceptional circumstance warranting an order for reinstatement.
37. The Respondent further submitted that the Claimant was not entitled to special damages in the sum of Kshs. 2, 601, 400/- as he has failed to prove that he was unlawfully/unfairly dismissed. It was further submitted that he was the one indebted to the Respondent for a sum of Kshs. 2,894,950.58/- and had not visited their office to discuss the modalities of settling the same. Finally, the Respondent contended that it had no basis whatsoever to withhold the Certificate of Service once the Claimant clears with it.

Issues for Determination and Analysis

38. I have carefully considered the pleadings, evidence and submissions presented by the parties. There is no dispute that the Claimant was employed by the Respondent for an aggregate period of five (5) years until the 30/3/2020 when he was summarily dismissed from employment for alleged misconduct.
39. Under Section 45 of the *Employment Act*, termination of employment is unfair if the employer fails to prove that the reason for termination is valid and fair and that the termination was done in accordance with fair procedure. Therefore the issues for determination in this suit are as follows:-
 - i. Whether the Claimant's summary dismissal was grounded on a valid and fair reason
 - ii. Whether fair procedure was followed before the dismissal.
 - iii. Whether the reliefs sought should be granted.



Reason for the dismissal.

40. Under Section 43(1) of the *Employment Act*, the burden of proving that there existed a valid and fair reason to justify termination of employee's contract of employment lies with the employer in any legal proceedings challenging the termination. In this case, there is no dispute that the reason(s) cited for the Claimant's dismissal was negligence and fraud. The dismissal letter dated 30th March, 2020 stated as follows in part: -

“Reference is made to the show cause given to you dated 18th March 2020 and your response dated 20th March 2020 and further Disciplinary Committee meeting on Tuesday 24th March 2020 to respond to allegations on unprocedural appraisal and disbursement of:

...

After careful consideration of your explanations and your acknowledgment of negligence during appraisal of the said loans, your response has been found unacceptable.

In light of above, we note that you acted fraudulently and negligently causing the Society financial and reputational loss. Consequently, you have been summarily dismissed from employment with effect from 30th March 2020 ...”

41. The Claimant admitted in his response to the show cause letter that he did the appraisal of the loan applications documents but stated that the documents did not appear to be falsified or whether the loan was fraudulent. He denied that there was any fraudulent intent on his part and maintained that the laid down procedure of maker checker process was followed. He further contended that the loans were fully secured by guarantors and none of them registered any complaint about the loans which they are servicing after the borrowers defaulted.
42. During the disciplinary hearing, he also admitted that he appraised and recommended the three (3) loan applications for approval and the funds were subsequently disbursed to the applicants Enock Cheruiyot Ng'eno, Ayub Peter Awour and Daisy Cherotich. He further admitted that the loan applications neither met criteria nor complied with the Respondent's policies and procedures since the members had not paid share capital.
43. He admitted that he recruited the said members and they were his relatives or people from his home area. One of them, Daisy Cherotich, was in fact his girlfriend or spouse with whom they had a child. He admitted that the borrowers defaulted and their guarantors were forced to assume the obligation to service the loan. However, he denied that there was conflict of interest or bias when he appraised and recommended the loan applications for his girlfriend and relatives without share capital.
44. As a result of the above matters, the respondent felt that it stood the risk of losing the disbursed money totaling to Kshs. 2,635,840. Further the Respondent stated that it suffered not only financial but also reputational loss as a result of the Claimants actions. As a consequent of the foregoing matters and after considering the explanation given by the claimant, the respondent formed the opinion that the claimant had performed his duties negligently and summarily dismissed him.
45. In this case, the claimant admitted that it was his duty to ensure the accuracy of the information in the loan application forms. He further admitted that he did the appraisals for the said three loans and that the loan applications forms had lapses according the documentary evidence presented to the court as exhibits. The claimant was the one obliged to detect the lapses and decline to recommend the loan applications for approval and disbursement of funds. However, he neglected that role due to the said bias and as result money was disbursed to the borrowers who did not qualify and they defaulted.



46. Section 44(3) and 44(4) (c) of the *Employment Act* entitles the employer to dismiss an employee summarily if: -

“44(3) ... the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.”

“44(4) (c) an employee willfully neglect to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty under his contract, to have performed carefully and properly.”

47. Further Clause 16.1 (3) of the respondent’s HR Policy and Procedures Manual sets out gross misconduct offences which attract summary dismissal including: -

“(d) Willfully neglecting to perform official duties or to carelessly and improperly perform any work which is in the employees’ line of duty.”

48. In view of the admission of the glaring lapses in the three loan application forms and the subsequent default by the borrowers who were claimant’s relatives and a mother of his child, I find that the actions by the claimant amounted to gross misconduct under Section 44 (4) (c) of the *Employment Act* and Clause 16 1 (3) (d) of the HR Manual. He willfully performed his work under his contract of service negligently by failing to uphold the standards provided by the employer’s Policy and procedures when he appraised and recommended the said loans for approval and disbursement.

49. He was also biased when he recommended the said loans to relatives and his girlfriend when they had not met all the requirements like share capital. Consequently, I find and hold that the respondent has discharged its burden of proving that the reason for dismissing the claimant was valid and fair as required by Section 43 and 45 of the *Employment Act*.

The procedure

50. Section 41 of the *Employment Act* provides that: -

“41(1) Subject to section 42(1), An employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provisions of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

51. In the case of *Kenfreight (EA) Limited V. Benson K. Nguti* [2016] eKLR, the Court of Appeal held that: -

“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee’s conduct, capacity and compatibility or is based on the operational requirements of the



employer. The employer must also prove that the termination was in accordance with fair procedure...

Apart from issuing proper Notice according to the contract (or payment in lieu of Notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service”.

52. Again the Court of appeal in the case of Kenya Power & Lighting Company Limited vs. Aggrey Lukorito Wasike [2017] eKLR, cited with approval the decision of the South African Labour Court in the case of *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others* [2006] 9 BLLR 833 (LC) that: -

“In disciplinary proceedings, all an employer needs to do is conduct investigations, give the employee or his representative reasonable opportunity to respond to the allegations after a reasonable period, and take a decision with notice to the employee. Moreover, and significantly, if an employee is charged with misconduct for being an accomplice in theft, the standard of proof is on a balance of probabilities.”

53. Having considered the material presented to this court by the parties I find and hold that the employer followed a fair procedure before dismissing the claimant for the said misconduct. The claimant was served with a show cause letter setting out accusation of negligence and fraud and he responded in writing. Thereafter he was invited to an oral hearing before a Disciplinary Committee accompanied by another employee of his choice. During the hearing he was asked questions and he freely responded.
54. After the hearing he verified the accuracy of the typed proceedings of the hearing by signing. Thereafter the employer considered the representations made by the claimant before reaching the decision of summary dismissal. The decision was conveyed promptly vide the letter dated 30th March 2020.
55. What seems to have aggrieved the claimant is the failure by the employer to hear his appeal contained in the letter dated 9th April 2020. The respondent contends that the appeal was not received within the required 14 days from the date of receipt of the dismissal letter. The claimant alleged that he dispatched the appeal through the email of the RW2 being bolang@stimasacco.com but RW-2 has denied receipt of same contending that if indeed it was sent, it went to her junk folder and was automatically deleted by the system.
56. Further, RW-2 contended that after the claimant alerted her of the appeal on 29th June 2020, she asked him to avail a hard copy to her which he did but it was already two months late. She contended that the claimant was not supposed to send the appeal through her but to the CEO directly or through the respondent’s official email address.
57. Clause 16.3 of the HR Policy Procedures manual provides as follows:
- “Employees have the right to appeal to the board through the CEO against any form of disciplinary action. An appeal must be submitted within 14 days from the date of receipt of the letter conveying the disciplinary decision. The appeal shall be in writing and determined in the next board meeting and the decision of the board shall be final.
58. I have considered the alleged appeal and noted that it did not comply with the above provision of the HR Policy and Procedures Manual. First it was addressed to the CEO and not the Board. Second, it



was allegedly sent through the email address of the RW-2, HR Officer and not through the CEO. The alleged appeal was therefore procedurally incompetent because it did not comply with the enabling provision of the HR Policy Procedure Manual. The manual does not provide for any appeal to the CEO through the HR Officer. For an appeal to be competent, it ought to be addressed to the Board through the CEO for determination in the next Board meeting. Consequently, I agree with the respondent that it had no obligation to consider the said incompetent and late appeal.

Reliefs

59. In view of the finding above that the employer has proved that the reason for dismissing the claimant was valid and fair and that a fair procedure was followed, I must hold that the dismissal was justified and fair within the meaning of Section 45 of the *Employment Act*. The corollary to the foregoing is that the Claimant has failed to discharge his burden of proving unfair termination as required by Section 47(5) of the Act.
60. Flowing from the foregoing, the court finds that the claimant is not entitled to salary in lieu of notice and compensation under Section 49 (1) of the Act. For the same reasons, the prayer for reinstatement must fail.
61. The Claimant prayed for leave of one month but the respondent offered 12 days in the dismissal letter. The claimant did not state the basis upon which the claim for one month leave is founded nor did he tender any evidence to substantiate. The appointment letter is silent on the leave entitlement. Consequently, I find that the claimant is entitled to the 12 days acknowledged by the respondent equaling to Kshs. 46,301. Since the said amount was not denied and that was credited to the claimant's loan account which still has an outstanding loan balance, he has in the circumstances of this case, no basis claiming it again.
62. Likewise, the claim for allowances totaling to Kshs830,400 lacks particulars and no evidence was tendered in support. Consequently, I decline the same.
63. The claim for service pay, is not merited. An employee is disqualified from service pay under section 35(6) of the *Employment Act* if it is shown by evidence that he was a member of NSSF, a gratuity scheme or pension scheme. The claimant filed his pay slips as document number (e) in his Further List of Documents dated 23rd March 2021 showing that he was a contributing member of the NSSF and staff pension. Therefore I decline the claim for service pay.
64. In conclusion I find the suit to be without merits and is dismissed with costs save for the direction that the claimant be issued with a Certificate of Service forthwith, as provided under section 51 of the *Employment Act*.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 9TH DAY OF JUNE, 2022.

ONESMUS N MAKAU

JUDGE

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU



JUDGE

