



Kenya Union of Commercial Food and Allied Workers v Eco-Pillar Sacco Society Limited (Cause 52 of 2020) [2022] KEELRC 1128 (KLR) (8 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1128 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 52 OF 2020
NJ ABUODHA, J
JULY 8, 2022**

BETWEEN

**KENYA UNION OF COMMERCIAL FOOD AND ALLIED
WORKERS CLAIMANT**

AND

ECO-PILLAR SACCO SOCIETY LIMITED RESPONDENT

JUDGMENT

1. The claimant union through a memorandum of claim date 21st August, 2020 of claim dated 21st August, 2020 impleaded the Court that the grievants were employed by the respondent in various position and on various dates stated in the memorandum of claim.
2. The claimant union further pleaded that on various dates between January and April, 2018, the grievants were accused of fraudulent activities through their account amounting to Ksh.340,000/=.
3. The grievants were consequently given two weeks compulsory leave ending on 8th May, 2018 and on 9th May, 2018 the grievants were asked to a meeting with the Board and submit their written reports. However, on this date the Board did not sit but later sat on 16th May, 2018.
4. According to the claimant Union, on 9th May, 2018 the grievants were told by the chairman of the Board that there was no need of leaving written submissions and that they should talk to the accountant who was present, to apply for salary advance and put the money together and divide among themselves so as to clear the issue in question and settle immediately. At the Board meeting of 16th May, 2018 the grievants asked if they could be allowed to have a witness in the proceedings but the chairman declined. The grievants took the advise of the chairman and the accountant and applied for salary advance.
5. On 16th May, 2018 the grievants attended the meeting with the chairman who told them he was happy the monies they applied for had been received and advised them to write apology letters but in the



- format the chairman had approved. The grievants were after writing the apology letters asked to go home and await communication.
6. The claimant union further pleaded that as the grievants were waiting for communication they received backdated letters dated 6th May, 2018 extending their compulsory leave for extra three weeks. On 9th June, 2018 the grievants reported back to work and worked until evening when the respondents were issued with further suspension letters with effect from 12th June, 2018 citing the Boards decision.
 7. The claimant union further stated that on 24th September, 2018 the respondent verbally, summarily dismissed the grievants citing the decision of the Board of Directors meeting on 22nd September, 2018.
 8. The claimant union, upon termination of the grievants invoked provisions of section 62 of the Labour Relations Act and reported the dispute to the Chief Industrial officer who appointed Mr. Elisha Tiktick of Kitale Labour office as conciliator. He invited parties for several conciliation meetings but the respondent ignored all of them. On 7th December, 2019, the conciliator released his report and declared the dispute unresolved recommending that the parties proceed to the next level. The claimant union thus filed the claim before the Court seeking among others an order of reinstatement and or an order re-engagement in the alternative an order for compensation for unfair termination as set out in the statement of claim.
 9. The respondent entered appearance on 19th January, 2021 and pleaded among others that in 2018, it discovered that fraudulent transactions had been created by the grievants leading to loss of funds. The grievants were suspended to pave way for investigations and were called upon to give their written explanations on the fraudulent transaction. According to the respondent, the grievants wrote to the respondent admitting that they had conspired and defrauded the respondent of funds and that the grievants refunded the lost funds.
 10. The respondent further pleaded that under clause 15.6(g) of the terms and conditions of service and staff policy, an employee could be summarily dismissed if they committed a criminal offence against or to the substantial detriment of the respondent or its property and considering the admission of fraudulent conduct by grievants which conduct was contemplated at clause 15.6(g) of the respondents terms and condition of service and staff policy, the respondent summarily dismissed the grievants for gross misconduct.
 11. The respondent denied the grievants were coerced to admit the fraud and said it was an afterthought. The respondent further stated that they cooperated and duly informed the claimant and labour officer that given the nature of the misconduct for which the grievants had been dismissed, reinstatement which was being sought by the claimant was not available to the grievants.
 12. The respondent therefore stated that the claimants were not entitled any of the reliefs sought since the respondent dismissed the grievants for valid reasons and that right procedure was followed.
 13. At the oral hearing, the 1st grievant, Peter Merphus stated that he was employed on 5th May, 2014 as a teller and that the contract was for three years renewable and that he was terminated on the second contract.
 14. It was his evidence that on 25th April, 2018, he was at work as usual and at round 3 pm he was asked to see the CEO where he was handed a letter of two weeks compulsory leave. According to him, he never understood why and the allegations against him were strange. He was however asked to respond to them which he did. He went with his response to the CEO on 9th May, 2018 but he rejected them and was informed there was no need for the response. He was informed that the Board had decided that he and his colleagues implicated, refund the money. The CEO informed him some money had



been lost through a certain account and that the issue should be sorted as a family. They were asked to refund the lost money. The Board was to meet on 16th May, 2018 and he attended the meeting. The chairman also told them that the issue should be sorted as a family. The chairman further advised them to write apology letters in a particular way. At first he was reluctant but was reminded he had his job to protect so he wrote the letter and after writing the letter their compulsory leave was extended for three weeks. They returned to work on 9th June, 2018 and on 11th June, 2018 they were given letters extending their leave for another three months. And were to return to work on 24th September, 2018. When they returned, they never worked. They were asked to wait for further communication from the CEO. He later on 29th April, 2019 received a letter of summary dismissal.

15. According to him, they were never invited to the Board meeting where the decision to dismiss them was made.
16. In cross-examination he stated that before 2018 he had shortages in his teller account. In 2018 he was coerced to write an apology letter. He further stated that in 2018 he was a teller and honesty was a requirement for his position. He further stated that he was able to read and understand his suspension letter but was not given an opportunity to shed light on the allegations in the letter.
17. The second grievant Mr. Anthony P. Toome stated that he joined the respondent on 4th March, 2015 as a loans clerk and that his contract was renewable. He was on his second contract when he was dismissed.
18. On 25th April, 2014 he was away on official duty when at around 4.00 pm he received a call that a messenger had been sent to his home with a letter. He received the same and signed for it. The letter asked him to shed light on loss of money from member's accounts. The accounts concerned were dormant accounts. A dormant account was to be activated by management.
19. It was his evidence that he responded to the accusation and took his response on 9th May, 2018 but was told his response was not necessary. They were instead asked to divide the amount involved among themselves and refund. It was his evidence that they told the respondent that they had no money to refund but were told they could be allowed loans. They were further encouraged to resolve the issue internally to save their jobs. They later met the Board and were told the money had been received and that they should write an apology letters in a particular way.
20. On 16th May, 2018 they were given letters extending their compulsory leave. They reported to work after the end of the extended compulsory leave and on 12th June, 2018 they received letters of suspension for three months.
21. In cross-examination he stated that he was a recovery clerk and that integrity was an important requirement.
22. He further stated that he repaid part of the lost money and that it was on instruction of the management.
23. The respondents' witness Mr. Richard Achaki stated that he was the chairman of the respondent and that he wrote a statement on 15th January, 2021 which he adopted as his evidence in chief. He also adopted documents filed with the claim.
24. It was his evidence that the grievants were never coerced and that they wrote the statements willingly. According to him it was not possible to reinstate the grievants because the position they held required integrity and trust that had been lost.
25. It was further his evidence that the grievants had no clean record. Merphus had two warnings prior to 2018 and Toome had a lot of challenges in his work. He was redeployed several times to assist him



- work better but he never improved. He further stated that the grievants were heard before termination. The CEO had enough time with them and when the fraud was discovered the grievants accepted and agreed to refund the money. The grievants also appeared before the Board and were heard.
26. In cross-examination he stated that the fraud was discovered after the CEO reported to the Board.
 27. It was his evidence that an account was declared dormant after six months and that the grievants were showed the evidence by the CEO and accepted the fraud. They were suspended and agreed to return the money which they did. The suspension was to allow investigation internally.
 28. Mr. Achaki further stated that the grievants were invited for disciplinary hearing but that the minutes were not before the Court however, according to him this was not necessary because the grievants admitted the fraud. He further stated that the grievants were not invited for the Board meeting on 9th and that the Board reviewed all the processes and there was no need to meet the grievants as they had been given a chance earlier. The CEO, the signatories and the Board heard the grievants.
 29. Under section 47(5) of the *Employment Act*, the burden of proving that an unfair termination of employment has occurred rests with the employee while the burden of proving the reason or reasons for termination shall rest with the employer.
 30. The respondent accused the grievants of engaging in fraudulent activities. That is to say they colluded to defraud the Society of Ksh.340,800 through fraudulent transactions on members' accounts.
 31. The grievants were consequently placed on compulsory leave to enable investigations. In the meantime, they were called upon to tender their written explanation by 9th May, 2018 when they were to meet with the Board. According to the grievants, they prepared and came with their written submissions on 9th May, 2018 but were informed that the Board would not be sitting then but on 16th May, 2018. They further claimed that the chairman of the Board told them that their written submissions would not be necessary and together with the accountant who was present, advised them to apply for salary advance and put the money together and clear the issue in question. The grievants took the advise and applied for salary advance. The grievants were subsequently asked to write apology letters which they did but claimed the chairman dictated the format and wording of the apology letters should take.
 32. The incident subject of the suit which led to the dismissal of the grievants was first brought to their attention on 28th April, 2018 when they were sent on compulsory leave to allow for further investigations. Their dismissal came on 24th September, 2018. This was some four months later. During this period, the grievants neither brought the issue to the attention of the claimant union nor recanted their admission and payment of the funds claimed to have been embezzled by them. Whereas the grievants alleged that they were coerced to pay the money and write the apology letters the evidence and material on record point to the contrary.
 33. *Blacks Law Dictionary* describes undue influence which is same as coercion alleged by the grievants as:

“Persuasion, pressure or influence, short of actual force, but stronger than mere advice, that so overpowers the dominated party’s free will or judgment that he or she cannot intelligently and voluntarily, but act instead subject to the will or purpose of the dominating party.”
 34. The grievants had the option to refuse the advise offered by the respondent’s chairman to take salary advance and pay the sums claimed they embezzled. They had every opportunity to seek the intervention of their union if they honestly believed they were being wrongly accused and made to pay funds they never embezzled. The claimant union only became involved after the dismissal had taken place.



35. To this extent, the grievants having admitted the accusation against them, made good the loss and tendered an apology cannot be heard to put up a claim for unfair termination.
36. Theft is a valid ground for summary dismissal and the grievants having admitted the same and paid the sums embezzled, the Court holds and finds that the summary dismissal was justified in the circumstances. The claim is therefore found without merit and is hereby dismissed with costs.
37. It is so ordered

DATED AT ELDORET THIS 8TH JULY, 2022

DELIVERED AT ELDORET THIS 8TH JULY, 2022

ABUODHA JORUM NELSON

JUDGE

