



**Mutisya v Co-operative Society Limited (Cause E6534 of 2020)
[2022] KEELRC 12721 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12721 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E6534 OF 2020
M MBARŪ, J
SEPTEMBER 29, 2022**

BETWEEN

JAMES MUTUA MUTISYA CLAIMANT

AND

CO-OPERATIVE SOCIETY LIMITED RESPONDENT

JUDGMENT

1. On February 26, 2020 the respondent terminated the claimant's employment unfairly without due cause or procedure leading to loss and damage and the claimant is seeking the following dues;
 - a. Notice pay Ksh.92,705.18;
 - b. Compensation for 12 months ksh.1,112,462.16;
 - c. Accrued overtime from 2016 to 2019 Ksh.172,775.04;
 - d. 11 days leave Ksh.46,352.59;
 - e. Severance pay at 15 days for each year Ksh.374,286.30;
 - f. Unpaid salary balance Ksh.139,057.77.
2. The claimant is seeking for an order of reinstatement and re-deployment to his employment without loss of benefits and in the alternative payment of his terminal dues with costs.
3. The claimant testified that upon employment he undertook his duties diligently and on November 25, 2019 he was summoned by the customer services manager over an alleged activation of an account belonging to a member of the respondent. On December 5, 2019 the claimant was suspended from duty for two weeks and on January 5, 2020 when he reported back to work he was informed by the human resource manager that investigations had been initiated and that he would be informed once they were completed.



4. The claimant testified that on February 17, 2020 he had a meeting with the human resource manager and he requested for statements which had been recorded with regard to the allegations made against his of activation of an account but was informed that the investigation were on-going.
5. While on suspension, the claimant was called to collect a letter which was termination of employment through summary dismissal. No notice to show cause issued or a hearing called and the alleged investigations were still on-going. The claimant was not given a chance to defend himself or paid terminal dues and his claim should be allowed as pleaded.
6. Upon cross-examination, the claimant testified that on April 7, 2021 he recorded a statement with Banking Fraud Unit and on February 17, 2020 when he held a meeting with human resource officer he was informed that investigations were on-going. At the time he was on suspension from December 5, 2019 which was later extended. He was never called for a hearing but got issued with letter of summary dismissal.

Response and Counter-claim

7. In response, the respondent's case is that the claimant was terminated in his employment for carrying out his duties under fraudulent activities that resulted in substantial detriment of the respondent and its property. The claimant submitted false and forged documents for reactivation of dormant account belonging to respondent's deceased member No.1550 with the sole intent of defrauding the respondent of money on the deceased number account. The claimant purported to contact the deceased member for account activation without authorisation which is a preserve of data clean up team and customer care team when the claimant was a clerk in the respondent's credit department.
8. The fraud arose from the claimant aiding and abetting an impostor claiming to be respondent's deceased member with the sole intent to commit fraud.
9. On November 29, 2019 upon learning of the claimant's fraudulent activities, the respondent wrote to the claimant calling for an explanation on the allegation of fraud where the claimant purported to contact the deceased member for activation of a dormant account. The claimant responded and confirmed that he had contacted the deceased member personally for activation of the account whereas at the time such member was deceased. The claimant acted negligently without due care and attention of a clerical staff on purported instructions from the respondent's supposed deceased member.
10. He failed to establish the identity of the persons purporting to be member when such member was deceased. He availed documents for activation of dormant account belonging to a deceased member No.1550 and allowed an impostor to withdraw Ksh.121, 084 on the deceased account while knowing or having reason to believe that the member was deceased.
11. On December 5, 2019 having found the claimant's explanation for negligence and fraud unsatisfactory he was suspended from duty to allow for investigations. The suspension was extended to December 20, 2019.
12. On February 26, 2020 having carried out investigations and a conclusive report prepared by banking Fraud Unit the claimant was found liable for gross misconduct and employment terminated on February 27, 2020. All his terminal dues were paid and the claims made should be dismissed with costs.

Counter-claim

13. On the counter-claim, the respondent's case is that upon employment the claimant had a contract with terms and conditions of service which he failed to adhere to. On 13th September, 2019 he availed



- documents to the customer care clerk one Isabella Farrar claiming to have received them from the deceased member No.550 and included instruction letter to debit FOSA account number xxxx and credit main scheme shares account number xxxx dated September 13, 2019. He also issued FOSA standing order form for the same and a request for update of records from account 1550 belonging to the deceased member dated September 13, 2019.
14. On 20th, 23rd and September 24, 2019 the respondent availed mobile banking services form from initial registration to the customer care clear and the claimant incessantly asking that the supposed member's instructions be actioned. Acting on the same the clerk approved the funds transfer and activated mobile banking services for the alleged member on telephone number xxxx.
 15. These transactions resulted in fraud where the claimant allowed the submission of false and forged documents for reactivation of dormant account belonging to respondent's member no.1550 with the same intent of defrauding the respondent of money on the said deceased member account.
 16. Upon learning of the fraudulent actives, on November 29, 2019the respondent wrote to the claimant for an explanation but the same was found unsatisfactory leading to termination of employment on justified grounds of fraud and negligence of duty. Such fraud led to loss of property as the impostor accessed he account and withdrew a total of Ksh.121, 084 made up as follows;
 - a. On September 24, 2019 two withdrawals of Ksh.60,064 from FOSA account to xxxx;
 - b. On September 27, 2019Ksh.15,064 from FOSA account to xxxx;
 - c. On September 27, 2019Ksh.15,064 from FOSA account to xxxx;
 - d. On October 3, 2019Ksh.10,764 from FOSA account to xxxx;
 - e. On October 9, 2019the impostor applied for a loan of ksh.30,000 which was credited to the FOSA account and the impostor thereafter made a withdrawal of the same on October 10, 2019
 17. On these grounds the claim is for Ksh.121, 084 together with interests and costs.
 18. In evidence, the respondent called Frederick Wekesa the administration manager who testified that he has served the respondent as the human resource for many years. He worked with the claimant who was dismissed form his employment for gross misconduct and fraud leading to loss ofksh.122, 000 and under the law, summary dismissal is justified.
 19. When the respondent noted that there was fraud, internal investigations were conducted and the claimant was allowed to respond. The Banking Fraud Unit was called to investigate and it was established that the claimant confirmed the identity of the person who gave him documents purporting to be member number 1550 leading to fraudulent transaction and loss of Ksh.122, 000. The claimant was suspended and later issued with letter of summary dismissal on good grounds.

The counter-claim should be confirmed with costs.

20. On cross-examination, Mr Wekesa testified that upon the initiation of investigations against the fraudulent activities and the suspension of the claimant no notice to show cause issued of a disciplinary hearing called. The claimant was served with a memo and he responded and such responses were found unsatisfactory. The fraud related to identity theft. The claimant had colleagues who trusted him and they acted on his instructions. Investigations found that three employees conspired to defraud the respondent leading to loss of Ksh.122, 000 which should be repaid.
21. At the close of the hearing both parties filed written submissions.



Determination

22. On the pleading, evidence and written submissions the issues which arise for determination are;
Whether employment terminated unfairly;
Whether the remedies sought should issue;
Whether the counter-claim has merits; and
Who should pay costs.
23. The claimant was employed by the respondent as a clerical officer and following alleged fraud with regard to respondent's member number 1550 and loss of Ksh.121,084 the claimant was suspended from duty to allow for investigations and based on which he was issued with letter terminating his employment through summary dismissal on February 17, 2020.
24. The response is that the claimant as the clerical officer was discovered to have engaged in fraudulent activities relating to loss of substantial amount of money having acted negligently to the detriment of the respondent. The claimant was suspended from duty to allow for investigations, Banking Fraud Unit was called to undertake investigations and in a report of February 17, 2020 established that the claimant was liable for the loss of Ksh.123,684 the property of the respondent. Such was gross misconduct and justified summary dismissal and a counter-claim for the loss.
25. In employment and labour relations, the employer is allowed to suspend the employee on good basis and to allow for investigations into the employee's conduct. Such is to allow the removal of the employee from the shop floor for the purpose of conducting investigations without interference by the subject employee.
26. A suspension in itself is not punitive. It is and should be an administrative action intended to remove the employee from the workplace for the given reasons and in this case to allow for investigations. It is therefore a temporary but justified disruption of the contract of service pending finalization of the proposed investigations and or disciplinary process.
27. At the end of the investigations, the employee must be recalled back to the workplace and allowed the motions of Section 41 of the *Employment Act*, 2007. In a case where termination of employment may be the result, Section 41(1) requires that the employee be issued with notice and invited to defend himself;

(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 a shop floor union representative of his choice present during this explanation. (
28. The employer must ensure the due process by applying the outcome to the investigation into a notice to show cause to the employee and then invite the employee for a representation in the presence of a fellow employee of choice.
29. Even in a serious case which justifies summary dismissal, the motion of Section 41(2) is mandatory.

(2) Notwithstanding any other provision 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.

30. In *Thomas Sila Nzivo v Bamburi Cement Limited* [2014] eKLR, the court held that;
31. The Respondent had reasonable and sufficient grounds to suspect the Claimant of having acted to the substantial detriment of the Respondent and its property, and was justified in summarily dismissing the Claimant under Section 44 [4] [g] of the *Employment Act* 2007. The Employer was not required to have conclusive proof of the Claimant's involvement; it was only expected to have reasonable and sufficient grounds. The physical audit, the discovery that no oil was available even as the Claimant protested he received such oil.....all gave the Respondent reasonable and sufficient grounds to act against the Claimant.
32. In *Bernard Mwaura Mbutia v Nyabururu Water & Sanitation Company Limited, County Government of Laikipia (Interested Party)*[2019] eKLR, the court held that;

... Sending of an employee on compulsory leave where the circumstances warrant it and provided it is an interim measure is within the purview of the employer. Such action only removes the employee from the workplace temporarily without interfering with his terms of service. Where the employer finds it necessary to thus remove the employee from the workplace to undertake comprehensive investigations into a matter or alleged misconduct, by allowing the same to conclude could vindicate the employee or allow for him to be invited to show cause over specific allegations following the investigations.
33. The Court of Appeal in the case of *Mutwol v Moi University* (Civil Appeal 118 of 2019) [2022] eKLR held that;

... it was necessary to have the appellant sent on compulsory leave to enable the respondent to carry out meaningful investigation. It is not possible for an employer to carry out effective investigations against an employee who, in spite of accusations of wrong doing, continues to occupy her/his office. In any case, looking at the circumstances of this matter, the appellant was informed and understood that she was being placed on compulsory leave to allow for investigations and she was given the opportunity to show cause why disciplinary action should not be taken against her. We do not find any good grounds to impugn the decision of the respondent which in our view was fair, reasonable and justifiable.
34. Such decisions and the facts herein put into account, upon the suspension of the claimant by the respondent, based on the outcome of the investigations, fair and reasonable expectation was that he be issued with notice and invited to defend himself however hopeless the respondent thought his responses were. Such right to attend and give a representation is secured in law under Section 41 of the *Employment Act*, 2007 read together with Section 44 thereof. Where such notice and hearing were not possible or impractical, the burden was on the respondent to demonstrate to the court the exceptional circumstances of the case, which the respondent failed to do.
35. The resulting finding is that there was no due process and employment terminated contrary to the provisions of Section 41 of the *Employment Act*, 2007 and such amounted to procedural unfairness. Whatever matter the respondent felt existed to justify termination of employment, for lack of due process, the same negated the same.
36. The summary dismissal of the claimant was unlawful. Notice ought to have issued.
37. The claimant is seeking reinstatement back to his position without loss of benefits.



38. Employment terminated on February 26, 2020 and even though the remedy of reinstatement is available as the primary prayer, the matters between the parties put into account, the sector within which the respondent operates, such a remedy would only return the claimant to a hostile work environment and shall not issue. In his evidence, the claimant did not outline the factors to be considered in addressing this remedy and the alternative prayer of compensation shall issue.
39. The claimant served the respondent from the year 2013 to 2020 a period of 7 years. he was earning ksh.92,705.18 as his last salary and a compensation equivalent to 6 months gross salary is hereby found appropriate all at Ksh.556,231.08.
Notice pay equivalent to one month gross salary is Ksh.92,705.18.
40. On the claim for accrued overtime, the claimant did not go over this particular evidence as to how such matter arose and the approval by the respondent. on the pleadings, the court finds no evidence to support such claims.
41. On the claim for 11 days leave pay for the year 2019 and 4 days in the year 2020, the right to leave days is secured under Section 28 of the *Employment Act*, 2007. Where an employee is entitled to annual leave, the employer must ensure such time is taken off or payment in lieu thereof. There is no evidence on record that the claimant took his 11 days leave in the year 2019 and 4 days in 2020.
The claim for leave pay at ksh.46,352.59 is justified.
42. On the claim for severance pay, the claim herein relates to termination of employment through summary dismissal and not a matter under a redundancy. A claim for severance pay is not justified in this case.
43. On the claim for unpaid salary for the duration of suspension, the claimant remained in the employment of the respondent until February 26, 2020 when employment terminated. The unpaid half salary during suspension is due at the end of his employment all at ksh.139,057.77.

Counter-claim

44. On the claim for payment of ksh.121,084 in the counter-claim, on the finding that the claimant was denied the right to a hearing, had such matter been so addressed, the claimant would have had a fair chance to explain himself and how the alleged loss of Ksh.121,084 arose. Without due process, to allow the counter-claim would be to visit injustice upon the claimant.
45. Further to the above findings, the witness called by the respondent asserted that the respondent lost ksh.122,000 in collusion with 2 other employees. were such loss to be thus addressed, the loss shared, obviously the claimant should not be made to pay for the entire loss, if at all.
46. In the written submissions, the respondent asserted that it lost a total sum of ksh.123,644 following the alleged fraud and negligence of the claimant. The changes in the figures without giving the claimant a fair chance to defend himself defeat the very purpose of the counter-claim which is hereby found without merit.
47. On costs, such an award is discretionary. On the findings above, it is only fair that each party should bear own costs.
48. Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;
- a) A declaration that employment terminated without the due process and is therefore unfair;



- i. Compensation awarded at ksh.556,231.08;
 - ii. Notice pay ksh.92,705.15;
 - iii. Leave pay Kshs. 46,352.59;
 - iv. Unpaid salaries Ksh.139,057.77;
- b) Counter-claim is hereby dismissed; and
 - c) Each party shall bear own costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2022.

M. MBARU

JUDGE

In the presence of: Court Assistant Okodoi

..... and

