



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT MERU

CAUSE NO. 3 OF 2019

KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS...CLAIMANT

VERSUS

ISIOLO TEACHERS SACCO SOCIETY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent on behalf of its members who were Mary Pali Pali Mathenge, Lucy Mwangi, Christine Kinya, Edwin Manene Njagi and Hadija Gabarticha. The Claimant averred that the Grievants were terminated on 21st November 2014 after a special general meeting where the members of the Respondent made a resolution to dismiss all the staff of the SACCO. The Claimant averred that after the Respondent's members dissolved the board, the interim chairman sent 5 employees home on compulsory leave. The Grievants successfully challenged the compulsory leave in the Employment & Labour Relations Court and on 5th March 2015 the Respondent replaced the compulsory letters with suspension letters to them. The Claimant averred that the inquiry report that was undertaken upon the Grievants suspension did not call for a surcharge the Grievants but instead the Respondent was to blame throughout. The Respondent issued dismissal letters on 27th July 2017 and on 12th April 2018, the Secretary General of the Claimant reported the existence of a trade dispute with the Respondent to the Ministry of Labour and Social Protection. The Conciliator appointed was not able to resolve the dispute. The Claimant sought payment of half salaries from March 2015 to 2017, house allowance, terminal benefits per the CBA, leave due and not taken, one month in lieu of notice and costs of the suit.

2. The Respondent denied the existence of a collective bargaining agreement or at all. The Respondent denied that the Grievants were members of the Respondent. The Respondent averred that the special general meeting of 21st November 2014 was premised on the inspection report on the way forward and it denied the alleged resolution to dismiss the staff and averred that the subsequent dismissal of the staff was procedural. It averred that the issue of suspension of the Grievants was conclusively determined by Nyeri ELRC 12 of 2015 and thus does not arise in these proceedings as it is *res judicata*. The Respondent averred that it issued the termination letters following procedure and after issuance of show cause letters to which the Grievants failed to respond. The Respondent averred that the Grievants were not entitled to any payments from the Respondent as particularized in the claim whatsoever.

3. The Claimant called its witness Mary Palipali Mathenge at the hearing and the Respondent called one witness. The 1st Grievant testified that the Respondent dismissed the Grievants from service callously and without adherence to the law. She testified that she was a teller in the Respondent's front office. She stated that members called for a special general meeting and at the meeting the members removed the management committee and the teachers agreed that all the staff should be removed. The meeting was chaired by the District Co-operatives officer and the CEO took the minutes. She stated that the teachers elected an interim committee and that of the entire compliment of staff, the members only sent away the five Grievants who were not reabsorbed. She testified that they did not know what they had done to deserve the gross misconduct allegations. She stated that she had not signed for the loans and there was no authority from her. She prayed for the payment of their dues and a deduction of the loan from what is owed to them and pay them the balance. She said that they went to the Ministry of Labour and the Respondent wanted to pay them but she did not know what happened as the Respondent did not pay. In cross-exam she stated that she had a loan with the Respondent and could not tell the sum owed unless she saw the statement. She stated that she was aware of the code of conduct but maintained that it was not signed and that she was not shown the code when she was employed. She testified there were sanctions for misconduct such as conducting any business or unauthorized transaction while on duty at the society premises. She stated she did not undergo any disciplinary process prior to dismissal. She said that she was not aware of any show cause letter issued to her or her co Grievants. She stated they did not oppose the show cause and that they did not appeal against dismissal. She testified that they were paid half salary. She confirmed that they owed loans to the Respondent and the repayment period was 72 months. She stated the inquiry surcharged the directors for over-lending them. She said that she did not know if she took a loan over the limit. In re-exam she stated that the conclusion of the inquiry report was that the officers failed to conduct the affairs of the society properly. She said that they were issued the letters for show cause as they were being told to leave. She testified that the meeting called was on account of loans and financial mismanagement. She stated that she applied for loans and the loans were issued.

4. The Respondent's witness Naftali Kihungu Macharia testified that he was the current chair of the board of directors. He said that he was aware of the issues surrounding this case and that he knew the Grievants well. He testified that the Respondent had undergone tough times

around 2013-2014 and that the members approached the then District Cooperatives officer to carry out an investigation to find out what was happening. An investigation was carried out and a report given in November 2015. He stated that the members resolved that all members of staff be sacked, the directors and an interim board was elected. He said that there was a special meeting in April 2016 and the inquiry report was very thorough as to the roles the Grievants played. He stated that Palipali was an office manager and at time of inquiry was a cashier, Lucy was a manager/typist and at time of inquiry was a loan officer, Christine was a tea girl and at time of inquiry an office assistant, Edwin was a guard and by time of inquiry was a receptionist, Gabarticha was an office assistant and at the time of inquiry was a receptionist. He testified that the inquiry focused on financial management and loans disbursement. He stated the report established there were irregularities in the disbursement of loans to the staff and directors. He said that the inquiry officer established that a loan could be initiated as a loan for Kshs. 200,000/- and by the time of approval it would be Kshs. 400,000/-. He said there was a policy that for a loan it was to be repaid within 1 year, for salary advance within 4 months and for school fees within 1 year. He said that the staff abused this and would disburse to themselves loans frequently and ended up over loaning themselves. The inquiry recommended that they take action against the staff adversely mentioned and the Grievants were not discriminated against. He stated that there were others who did not come to court. He said that they followed procedure and that the staff were placed on half salary during suspension until termination. He testified that they paid salary inclusive of house allowance and that the Grievants were invited to come and defend themselves. He testified that the Grievants were to show cause per the letters issued and were to present themselves at the staff advisory board with a fellow staff member or a union representative. He said the Grievants collected the letters from the office but none of them appeared at the hearing. He said that after the Grievants failed to turn up they were issued with termination letters and that the code of conduct provided for an appeal process at page 84 under para 11. He stated that none of the Grievants utilized this. He stated the Grievants did not come to claim any leave they had not taken. He testified that as at 2016 the Grievants owed Kshs. 8,017,461.18. In cross-examination he stated that the normal procedure for loans is that one fills the loan application form and once it is received it is taken to the loans officer's desk. Once it is ascertained that the member has capacity to pay the loan the matter is referred to the credit control which approves or disapproves the loan. He stated that this was in line with the policy and that the responsibility of the Grievants was to follow procedure to the letter. He said that the Grievants had become members of the SACCO and were to apply for loans just like any other member. He said that the inquiry showed that this was not done and the process of approval was not completed. He said not all the staff were sent away as there would be a vacuum and that they were given 14 days in which they were to give their defence. He said the Grievants were under suspension from 2016 and were called for the show cause letters which they collected. He said that he personally gave the union copies of the show cause letters though the show cause letters were not copied to the union. He stated he could not say the Grievants were not paid. He testified that the collateral for the loans was the salary and that the Grievants had borrowed up to 8 million which they should have been repaying from their investments. He said one cannot claim to have paid school fees of 8 million while members are languishing and not getting loans. He stated the board had a case for surcharge before the tribunal and that the Grievants should have sought to pay the loans. He denied that the show cause was only availed for this case and stated that the Grievants failed to come and defend themselves. He stated that the Grievants declined to clear with the board. In re-examination he stated that the issuance of loans had a process and that the Grievants did not follow it. He stated the Grievants were dismissed after failing to defend themselves. That marked the end of oral testimony and the parties were to file submissions.

5. The Claimant submitted that the inquiry was undertaken but at the point of the close of the inquiry is when a caretaker committee would have been established and receive the report. The Claimant submitted that the inquiry report was given in April 2016 and the Grievants issued with show cause letters in May 2017 one year down the line. The Claimant submitted that the procedure of the removal of the Grievants was unfair and unprocedural. The Claimant submitted the Grievants were entitled to compensation and relied on the case of **Violet Shivachi v Selecta Kenya-GMBH & Co. KG Limited [2016] eKLR**. The Claimant submitted that the Respondent was weak and failed to adhere to the financial management, risk management and loan administration for proper execution of its mandate. The Claimant submitted the Grievants were entitled to recover for the unprocedural and unfair dismissal a cumulative amount of Kshs. 13,225,879.06 as well as an order for payment of the contribution to the provident fund.

6. The termination of the Grievants followed an inquiry into the affairs of the Respondent. It is upon the parties to show their discharge of obligations under the Employment Act Sections 41 (fair hearing), 43 (proof of reasons for dismissal) and 45 (what amounts to unfair termination). Section 43 of the Employment Act, 2007 provides that:

43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Section 45 (2) of the Act provides that:

45.(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the 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

Without rehashing the provisions of Section 41, the employer is supposed to hear an employee in the presence of a representative of the employee's choice prior to terminating for misconduct.

7. In this case, the inquiry report fingered the Grievants as part of the culprits. The Grievants were issued with show cause letters but they failed to appear to defend themselves. It would seem from their submissions that they take umbrage the show cause letters were issued a year down the line instead of immediately the inquiry report was made available to the Respondent. The Respondent as employer was required to avail the Grievants an opportunity to defend themselves against the accusations and the show cause letters were the opportunity. It is curious the Claimant disavows receipt of the letters but produced them as part of its evidence on behalf of the Grievants. If indeed the Claimant was diligent in its defence of the members why did it take so long to report a trade dispute? The Grievants were dismissed on 27th July 2017 and on 12th April 2018, the Secretary General of the Claimant reported the existence of a trade dispute with the Respondent to the Ministry of Labour and Social Protection. This was contrary to the provisions of the Labour Relations Act as the union should report a dispute within 60 days. In any event it seems there was no basis for the dispute before the court as the Grievants were accorded an opportunity to defend themselves and they declined to present themselves. They cannot therefore complain they were not accorded a hearing or that their termination was unlawful or unfair. The Grievants were to clear with the Respondent which they have failed to further indicating their disregard to process at the Respondent. Their dismissal was for just cause and the Respondent followed the law in terminating their services. They did not prove non-payment and their suit is devoid of merit only fit for dismissal. Due to the nature and origin of the dispute there will be no order as to costs.

It is so ordered.

Dated and delivered at Meru this 5th day of March 2020

Nzioki wa Makau

JUDGE