



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NUMBER 1639 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

BANKING INSURANCE FINANCE UNION (K).....CLAIMANT

VERSUS

CO-OPERATIVE BANK OF KENYA LTD.....RESPONDENT

JUDGMENT

On 17th September 2014, the Claimant filed its Memorandum of Claim dated 15th September 2014 suing the Respondent for unfair, unlawful summary dismissal of employment of Daniel Kenyani Iladiva. The Claimant seeks the following reliefs:

- a. That the Court do order the Respondent to reinstate Mr. Daniel Kenyani Iladiva back to his former position without loss of employment benefits and seniority in service.
- b. That the Court do order the Respondent to pay the grievant all the salaries and allowances and any other employment benefits which the grievant may have lost as a result of this unfair dismissal from the date of his dismissal to the date of reinstatement at the rate of Kshs.106,915.68 (Basic salary) + Kshs.8,500.00 House allowance = 115, 416 x No. of months the grievant has been out of employment.
- c. That in the absence of reinstatement, the Court to order for 12 months' gross salary compensation to the grievant for having suffered unfair and unlawful summary dismissal at the rate of Kshs.106,915.68 + 8,500 = 115,416 x 12 = 1,384,992.00.
- d. That in the absence of reinstatement, the Honourable Court to order the Respondent to pay for the damages the grievant has suffered at the rate of Kshs.1,500,000.00.
- e. That the Respondent pays to the grievant gross 1 months' salary of Kshs.115,416.00, in lieu of notice.
- f. Any other that the Honourable Court may find tenable and justifiable.

On 23rd October 2014, the Respondent filed its Statement of Response dated 22nd October 2014 denying the averments in the memorandum of claim and seeks to have the Claimant's Memorandum of Claim dismissed with costs.

Claimant's Case

The grievant was first engaged by the Respondent on 24th April 2008 as a casual employee. He worked diligently and industriously without any cases of indiscipline. He was a member of the Claimant, whose terms and conditions of employment were governed by the CBA in force at the time.

The grievant was advised by a colleague to invest in online forex shares trading for higher returns. He invested Kshs.85,000.00.

The grievant was invited to a disciplinary hearing on 13th January 2014, his

explanation notwithstanding. He attended the hearing but had no representation at the hearing.

It is the Claimant's case that the grounds of appeal have not been canvassed on merit to date. Instead, the Respondent relayed information to its employees that the grievant was no longer an employee.

The Claimant avers that the Respondent failed to attend the conciliation meetings with no communication or explanation given for such failure. Consequently, a certificate of unresolved dispute was issued to refer the dispute to court.

During examination in chief, the CW1 reiterated the averments made in the Memorandum of Claim.

Upon cross examination, CW1, the grievant in this case, admitted that employees were not allowed to borrow or lend money without the manager's approval. He also admitted that his duties in the bank included marketing products like business loans. The grievant conceded that for one to trade in shares, one had to open an account with a licensed broker. He also admitted that his actions had an impact on the bank and any dishonesty on his part had the ability to damage the Respondent's business.

It was the grievant's case that the money lent to the customer was to be returned with an interest of KShs. 42,500.00 which was 40% of the principal amount. It was also his testimony that if interest was above the market rate, then it was deemed to be exorbitant. According to him, the market rate at that time was 25%.

The grievant conceded that he did not have any document to prove shares had been bought. He also admitted that the requirement of being accompanied to the disciplinary hearing was communicated to him and he was accompanied by a colleague.

He denied being paid terminal dues but admitted being paid salary for the days worked and pay in lieu of leave days. He further testified that his debt was offset by what was due to him.

Respondent's Case

It is the Respondent's case that the grievant's good performance rating was not unusual as this is what was expected of him.

The Respondent avers that the terms and conditions of the grievant's employment did not allow the grievant to carry on any business that would generate conflict of interest. By investing in the online forex trading, the grievant contravened the said terms and conditions.

The Respondent in its statement of Response produced the agreement between the Grievant and its customer, one **Isaack K. Njihia**, dated 3rd September 2013. The said agreement reads as follows

"I Daniel Iladiva ID No. 23456732 have agreed to give Kshs.85,000 to Mr. Isaack K. Njihia ID No. 24087506 in return of Kshs.21,250 every fortnight for a period of 3 months in the presence of Lilian Ndwiga Id No. 24051335.

This contract for investment was made this 3rd day of Sept 2013 between Isaack Kinyanjui Njihia ID no. 24087506 Signature (Signed) and Daniel Kenyani Iladiva ID No.23456736, Signature (signed) in the presence of Lilian Ndwiga Id NO 24051335 Signature(signed) at Gatundu."

RW1 in his evidence was also emphatic that the said agreement constituted shylocking in that the return on the amount of Kshs.85,000/- given by the Grievant was pre-determined at the rate of Kshs.21,250/- per fortnight for 3 months, which would otherwise not have been the case if it was an online Forex Trading business as alleged by the Grievant.

RW1 also testified that the Respondent duly followed the laid down procedure for termination of employment in that after the Grievant was served with the said Notice to Show Cause, he was subsequently invited for a disciplinary hearing vide an email of 8th January, 2014 as his letter of 31st December, 2013 in reply to the show Cause letter was found not satisfactory. Copies of the said email and the letter were produced as exhibits **CBKL-6 and CBKL-5(b)** respectively and appear at page 11 and 9 respectively of the Statement of the Response.

RW1 further testified that the Grievant appeared before the disciplinary hearing on 13th January, 2014 as scheduled accompanied by a colleague, one **Ephantus Mwangi**, of Kibera Branch at the time. Copies of the disciplinary minutes are produced as Exhibit 7 and appear from page 12 to 15 of the Respondent's Response and the proceedings in respect of the Grievant are at page 14 thereof referenced as Min. No. 03/2014.

The Respondent avers that it conducted a disciplinary hearing because it found the grievant's response to the show cause unsatisfactory. The grievant was informed of his right to be accompanied by an employee of his choice and was indeed accompanied by a unionisable member of staff. At the disciplinary hearing, the grievant's actions were found to have been in breach the Bank's Operating Staff Manual and the Business Code of Conduct.

The Respondent avers that the grievant's summary dismissal was justified and lawful. The Respondent further avers that the grievant's letter of appeal was found lacking in substance to warrant the Respondent to reconsider its decision or constitute an independent committee to hear the same.

The Respondent avers that the grounds for appeal were lacking in merit and did not raise anything new from what was considered at the disciplinary hearing.

It is the Respondent's case that once a conciliator was appointed, it submitted its response. The Respondent avers that it communicated to the Chief Industrial Relations Officer the reasons for not attending the conciliation meeting and further communicated its intent to attend the reconciliation meeting. It is the Respondent's position that the issuance of a certificate for unresolved dispute was unjustified.

The Respondent avers that there is serious breach of trust between the grievant and the Respondent and it would therefore be impractical to reinstate the grievant.

During examination in chief, RW1 Simon Muriithi Maina reiterated the averments made in the Respondent's response. He further testified that on 23rd December 2013, they received an investigation report touching on the matter and they consequently issued the grievant with a show cause letter. It was also his testimony that because of the grievant's dealings, the Respondent was exposed to reputational risk and conflict of interest.

It was also his testimony that the shylocking business was conducted during working hours using the Respondent's email, with no gains to the Respondent.

RW1 testified that Kshs.51,735.65 was deposited in the grievant's account after lawful deductions had been made.

Submissions by the Parties

The Claimant in its written submissions dated 13th August 2018 and filed on 8th August 2018 framed the following issues for determination: whether the Respondent followed due process in the summary dismissal of the Claimant, whether the Respondent had legitimate, valid and justifiable cause to summarily dismiss the Claimant from employment, whether the alleged reasons were proven or not and whether the reliefs sought by the Claimant are tenable.

It is the Claimant's submissions that the Respondent did not follow the law or rules of procedure in summarily dismissing the grievant. The Respondent did not follow the procedure as laid down in Clause A5 of the CBA that requires an employee to be issued with a warning before being summarily dismissed. The Claimant relies on the cases of *Mary Chemweno Kiptui vs. Kenya Pipeline Company [2014] eKLR* and *Kenfreight (E.A.) Limited and Benson K. Nguti [2016] eKLR* where the court stated that an employer must prove the reasons termination. The Claimant also relied on the case of *Bamburi Cement Limited vs. William Kilonzi [2016] eKLR* where the court was of the opinion that the test of whether an employer is justified in dismissing an employee for dishonesty, is whether the employee's dishonesty led to a breakdown in the employment relationship.

The Respondent in its written submissions dated 25th September 2018 and filed on 26th September 2018, isolated the issues for determination as follows: whether the agreement between the grievant and the Respondent's customer constituted a shylocking business, did the Respondent have legitimate, valid and justifiable cause to summarily dismiss the grievant from employment, whether the said action of the grievant amounted to a gross misconduct and whether the grievant is entitled to the remedies sought.

The Respondent submits that the grievant was engaged in shylocking business and not online forex trading because he charged interest for the money he lent and the sum given was specified and not speculative. Further, section 3 (1) of the Capital Markets Authority Act requires an online foreign exchange broker to be licensed.

The Respondent submits that the grievant breached the terms of his employment by engaging in the shylocking business. Further, the agreement in question was in conflict with the grievant's position in the bank as a loans officer. The Respondent further submits that the actions of the grievant amounted to gross misconduct thus the reasons for his termination were fair, reasonable and valid. The Respondent relies on the case of *Sotik Highlands Tea Estates Limited vs. Kenya Plantation and Agricultural Union [2017] eKLR*.

It is the Respondent's submissions that the Respondent complied with the provisions of section 41 of the Employment Act and accorded the grievant due process. The Respondent relies on the case of *Thomas Sila Nzivo vs. Bamburi Cement Limited [2014] eKLR* and *Sotik Highlands Tea Estates Limited vs. Kenya Plantation and Agricultural Union*.

The Respondent submits that it would be impractical to have the grievant reinstated because it will be impossible for him to work with other employees for want of integrity and trust. The Respondent relies on the case of *Peter Otieno Opollo vs. Board of Governors Kisumu Polytechnic College & Another [2013] eKLR*.

The Respondent also submits that a claim for compensation and pecuniary loss in terms of loss of salaries and allowances for unfair and unlawful termination is not available. That the Respondent had valid reasons for the summary dismissal. The Respondent relies on the case of *George Kariuki Ngugi & 2 Others vs. Brolaz East Africa Limited [2014] eKLR* and *Thomas Sila Nzivo vs. Bamburi Cement Limited [SUPRA]*.

Determination

After considering the evidence adduced by the parties, I am of the opinion that the following are the issues for determination:

1. Whether the Claimant's employment was unfairly and unlawfully terminated.
2. Whether the Claimant is entitled to the reliefs sought.

Whether the Claimant's employment was unfairly and unlawfully terminated

The Reason for Termination

The grievant's employment was summarily dismissed because he was found to have engaged in shylocking business. However, it is the

Claimant's case that he was in the business of forex online trading. The Claimant submitted that the Respondent did not prove its reason for terminating his employment because he was not engaging in shylocking business.

The grievant's letter of appointment dated 7th July 2008 provided for the following as a term of the employment:

"The borrowing and lending of money without consent in writing of the Managing Director of the Bank is strictly prohibited."

This fact was confirmed by RW1 and admitted by the grievant himself. The position of the grievant was a fiduciary one based on trust and good faith. The grievant was required to act in the interest of the bank at all times. He admitted in evidence that he was tasked with the duty of marketing the bank's products such as loans. Lending money to a customer of the bank and at almost 50% interest posed serious conflict of interest contrary to the Business Code of Conduct and Ethics. It was highly unlikely that the grievant would perform his duties to the Respondent if he was at the same time offering parallel lending services during working hours using the facilities of the Bank.

To this end, the Respondent has proved its reason for termination.

Due Process

It is the Claimant's submissions that the Respondent did not follow the procedure as laid down in Clause A5 of the CBA. On the other hand, the Respondent submits that it complied with the provisions of section 41 of the Employment Act and accorded the grievant due process.

Section 41 of the Employment Act provides as follows:

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.

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.

The grievant was issued with a letter to show cause, he responded, his response was found to be wanting, he was called to a disciplinary hearing, his case heard and thereafter his employment summarily dismissed. He appealed the decision, and the appeal was declined. I find that the Respondent has proved that the grievant was accorded a fair hearing hence his summary dismissal was fair, lawful and justified.

Whether the Claimant is entitled to the reliefs sought

The Claimant prayed for reinstatement of the grievant to his former position. Having found the summary dismissal of the grievant to have been lawful and fair, he is not entitled to the remedy of reinstatement. He is not entitled to any terminal dues as this was paid upon his dismissal. He is further not entitled to compensation or pay in lieu of notice for reasons that the summary dismissal was not unfair.

Having found the dismissal fair, the claim is dismissed with orders that each party shall bear its costs

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF FEBRUARY 2019

MAUREEN ONYANGO

JUDGE