



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 255 OF 2013

(Before Hon. Justice Mathews N. Nduma)

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

VERSUS

UKULIMA SACCO SOCIETY LIMITED.....RESPONDENT

JUDGMENT

1. The suit was brought on behalf of three grievants namely Peter Musekali; Dickson M. Mwanje and the late Patrick Kipchumba by the claimant union. The issue in dispute is wrongful summary dismissal of the grievants by the respondent.
2. The claimant prays for reinstatement of the grievants. Two grievants Pweter Sehenyi Musakali (CW1) and (CW2) Patrick Kipchumba testified in the matter in support of the claimant's case whereas Grace Njine (RW1) testified for the Respondent.
3. The grievants were dismissed under different circumstances but the suit was initially filed as one and later amended to cause No. 255 of 2013 and 255B of 2014 filed on 17th June 2014 and 22nd July 2014 respectively. The claimant prays for payment of terminal benefits and compensation for unlawful dismissal.

Peter Musakali – 1st grievant.

4. The 1st grievant testified as CW1 and was employed by the respondent on 28th July 1997 as a senior computer operator and was transferred to accounts general section on 27th May 2005. On 5th February 2010, the grievant was promoted to Information Technology Supervisor. The employment of the grievant was terminated on 3rd May 2012.
5. The claimant's case is that the grievant applied for leave from 19th October 2010 to 8th November 2010. The leave was granted. While on leave and travelling from Mombasa, he was hijacked and robbed.
6. The grievant was suspended on 8th November 2010 on grounds of absenteeism and irregular business transactions. The grievant responded to the notice to show cause on 17th November 2010 explaining that his absenteeism was caused by the hijacking and robbery in Tsavo National Park on his way to Nairobi from Mombasa. The grievant stated that the issues regarding irregular business transactions were personal matters and had nothing to do with the office. The grievant explained that he had served the respondent for 13 years and prayed that he be not dismissed from employment.

Dickson Mwanje – 2nd grievant

7. The 2nd grievant was employed on 26th November 2001 as a Book Keeper. He was promoted on 5th February 2010 to accounts assistant and transferred to Mombasa as Chief cashier.
8. On 30th December 2010, the grievant was suspended on grounds of fraudulent and irregular transactions concerning advances. The grievant responded to the notice to show cause on 6th January 2011 stating that he had acted in obedience to lawful instructions from the acting branch manager who was the substantive branch accounting officer. That the 2nd grievant was exonerated and the suspension lifted on 3rd November 2011. On 12th January 2012, the 2nd grievant was issued with surcharge notice in respect of the fraudulent transactions in respect of which the suspension had been lifted. It was alleged that the lifting of the suspension was on a personal undertaking by the 2nd grievant to repay Kshs. 471, 250 being a third of the lost funds. That the 2nd grievant went ahead to borrow Kshs. 1,300,000 top-up loan on 6th June 2011 which loan was granted but the 2nd grievant did not repay the lost funds as agreed. The 2nd grievant was requested to show

cause why disciplinary action should not be taken against him. The 2nd grievant was invited to a disciplinary hearing on 17th February 2012 after he had responded to the show cause letter indicating that he had now deposited Kshs. 10,000 in the Mombasa FOSA branch Account and undertook to repay the balance by depositing Kshs. 5,000 on 25th January 2013 and thereafter in instalments of Kshs. 4,000 every 25th day of the month until the surcharge is repaid.

9. 2nd grievant was issued a further show cause letter dated 21st February 2012 upon his appearance before the staff disciplinary committee on 20th February 2012. The 2nd grievant responded to the notice to show cause on 28th February 2012 explaining that he had started to repay the surcharge and had paid Kshs. 4,000 and authorized the payroll accountant to deduct Kshs. 4,000 monthly. He requested to be given 15 months to clear the outstanding balance.

10. On 12th March 2012, the 2nd grievant received letter of termination. The disciplinary committee and Board of Directors were not satisfied with the explanation given by the 2nd grievant. The 2nd grievant was to be paid accumulated pension and be given a certificate of service.

Patrick Kipchumba – 3rd grievant.

11. The 3rd grievant testified before court as CW2 but has since died. That he was employed by the respondent as a driver grade II on 27th June 1996. That on 17th October 2011, the 3rd grievant was served with a show cause letter to explain an accident he was involved in on 8th October 2011 at 4.30 p.m along James Gichuru Road. 3rd grievant was accused of working out of the stipulated place of work according to the work ticket. That the 3rd grievant was blamed for causing the accident by driving on the right side of the road. That the 3rd grievant was drunk. That the 3rd grievant did not report the accident to the insurance within 24 hours. That the 3rd grievant hired a breakdown to tow the car to the garage without authority despite that the respondent is registered with AAK which provide that service. As a result the respondent incurred Kshs. 4,000 loss. That on 13th October 2011, the 3rd grievant claimed overtime for hours spent on official duties which was dishonest and lacking in integrity.

12. The 3rd grievant responded to the show cause letter on 19th October 2011 in which he explained that the accident happened on his way to pick the CEO from his house where he had passed by to remove his clothes. That the accident was not caused by his negligence but the wheel ball joint on the right side broke down and the vehicle swerved to the right side of the road. That he was not drunk at the time and he was not charged for drunk driving by the police officers who visited the scene. That the 3rd grievant reported the accident and towing to the CEO. That the police ordered for a breakdown to remove the vehicle from the scene of accident to the police station and not the 3rd grievant. That the 3rd grievant was not aware of the contract with AAK. The 3rd grievant states that he was on duty at all material times.

13. The 3rd grievant was interdicted from duty by a letter dated 21st October 2011. The 3rd grievant was invited to a disciplinary hearing by a letter dated 17th February 2012. On 20th February 2012, the 3rd grievant appeared before the staff matters sub-committee of the board where he was granted opportunity to defend himself.

14. The board was not satisfied with the explanation given by the 3rd grievant and he was dismissed by a letter dated 12th March 2012. 3rd grievant was to be paid accumulated pension and other final dues less any liabilities to the society.

Defence

15. As indicated earlier in the judgment, the respondents responded to the case put forth by each of the grievants in their statement of claim and amended statements of claim and the oral testimony by CW1 and CW2.

16. RW1 Grace Njine testified that she was the Human resources and Administration Manager of the respondent for a period of four (4) years. That she joined the SACCO in January 2010. That RW1 knew the 1st grievant Peter Musakali and confirmed that he was employed by the respondent on 28th July 1987 as senior computer operator. That he worked in the loans recoveries office. That the respondent operated like a bank. That the 1st grievant applied for leave on 19th October 2010 for 13 days. It was an emergency leave. He was to return on 8th November 2010. The leave was approved. However by the time the approval was done by Human Resource department, only 9 leave days were left hence approval was for 9 days only. He produced the leave documents. That the 1st grievant was to resume work on 2nd November 2010. RW1 stated that Human Resource did not manage to communicate to the 1st grievant that he had 9 days only. He had already left by the time final approval was granted. RW1 stated that it was assumed that the applicant had to collect copy of the approved leave form from the Human Resource office. The 1st grievant came back on 8th November 2010 instead of 2nd November 2010. He absconded duty in terms of clause 10(c) of the CBA for 2012/2013. This amounts to gross misconduct and called for summary dismissal. That 1st grievant was given show cause letter, suspended, brought before a staff disciplinary committee which found him guilty.

17. That in addition the 1st grievant was involved in fraudulent business transactions with 3rd parties which brought the respondent to dispute. Complaints had been made by 3rd parties to the respondent. These charges were put forth to the 1st grievant in the notice to show cause. That on 4th November 2010, a police officer visited the respondent with a view to arrest the 1st grievant. RW1 testified that these were embarrassing matters for the respondent.

18. The explanation by the 1st grievant that these were his personal affairs was not satisfactory. The 1st grievant was accompanied by a shop steward at the disciplinary hearing. The disciplinary committee recommended to the board that the 1st grievant was guilty as charged and that he be summarily dismissed. The 1st grievant appealed the decision but the same was dismissed.

19. RW1 insisted under cross examination that the charges against the 1st grievant were serious. That the disciplinary procedure was followed and the dismissal was lawful and fair. That the suit by 1st grievant be dismissed.

20. With regard to the 3rd grievant, RW1 testified upon being recalled that Patrick was to pick the CEO from Embakasi Nyayo Estate and take him to Agakhan Hospital for dialysis. That the CEO had been a diabetic for 5 years and his condition had deteriorated. That the CEO's wife usually accompanied him. That upon dropping the CEO at the hospital, the driver was supposed to go back to the office as usual and wait for the CEO to be released and drop him home. That on the material date that did not happen. That the wife of the CEO telephoned the driver at 6 pm but he did not pick the call. The driver later informed her that he had been involved in a road traffic accident along James Gichuru road and the motor vehicle was at Spring Valley Police Station. RW1 produced the police abstract. RW1 knew about the accident the following day on the 10th.

21. RW1 was informed by a customer who cited the motor vehicle being towed. The motor vehicle was taken by the grievant to CIC Insurance Company and the grievant had signed the report of the accident. The report did not show that the ball-joint had snapped. The vehicle had front bumper, front head light, front wing and right door damaged. RW1 produced the pay slips and police abstract to this effect. The SACCO paid excess in the sum of Kshs. 38,000 and Kshs. 4,000 tow charges. That the grievant did not bring the police abstract to the respondent. That the grievant was guilty of gross misconduct and his dismissal was lawful and in terms of a fair procedure since a show cause letter was given on 17th October 2011. He responded to it on 19th October 2011. He was interdicted on 21st October 2011. He appeared before a disciplinary committee. His explanation was not satisfactory and he got a letter of dismissal on 12th March 2012, in terms of *Section 44 of the Employment Act, 2007 and clause 10 (a) of the CBA*.

22. The 3rd grievant was paid Kshs. 30,407 in lieu of notice, Kshs. 17,230 in lieu of 18 days leave; Kshs. 30,419 for 21 days worked in October 2011 and in respect of accumulated shares, Kshs. 303,600 less liabilities owed by the grievant. RW1 stated that the pension dues to the 3rd grievant were paid in full in the sum of Kshs. 614,405. RW1 prays the suit be dismissed with costs.

Determination

23. The matter was placed before me during service week on 3rd April 2019. Since I had been transferred to Kisumu in October 2017 and left this matter part heard, I made a note to the Principal Judge, enquiring whether the parties had dispensed with the earlier indication to call the 2nd grievant and to have RW1 testify in respect of the intended testimony by the 2nd grievant. Copy of proceedings before Hon. Radido J. were then introduced in the file and same was returned to me to write a judgment since the parties had closed their respective cases and filed written submissions on 19th February 2019 and 28th February 2019 respectively. I was left with no choice but to deal with the matter in terms of the testimony by CW1, CW2 and RW1 in respect of the 1st and 3rd grievants. The 2nd grievant did not testify at all, nor did RW1 testify in respect of the case by the 2nd grievant as per the record before me.

24. I have carefully considered the testimony by CW1, CW2 and RW1 and come to the following conclusions of fact and law.

(a) The respondent had justifiable cause to dismiss CW1 and CW2 from employment in that CW1 engaged himself in activities that impacted negatively on the reputation of the respondent. The activities by CW1 were legitimately reported by complainants to the SACCO and the same constituted valid reasons in terms of *Sections 43, 44 and 45* to dismiss CW1 from employment.

(b) With regard to CW2, the evidence before court clearly shows that CW2 was assigned to pick the CEO of the respondent from his home at Nyayo Estate Embakasi to hospital and back but went out of the designated route. CW2 had no business being along James Gichuru Avenue where an accident took place at the material time involving the company vehicle and a 3rd party. Clearly, CW2 was on a fornic of his own and the respondent had a valid reason to dismiss him from its employ. The respondent followed a fair procedure in terms of Section 41 of the Employment Act, and the CBA between the claimant union and the respondent in effecting the dismissal. Accordingly the dismissal of the claimant was lawful and fair and in accordance with *Sections 41, 43, 44 and 45 of the Employment Act, 2007*.

(c) With regard to Mr. Dickson Mwanje the 2nd grievant, there is no evidence before court to substantiate the claim that his termination from employment was wrongful. Mr. Dickson has failed to discharge the onus placed on him in terms of *Section 47(5) of the Employment Act, 2007 read with Sections 107 and 108 of the Evidence Act, Cap 80 laws of Kenya*. The primary onus of establishing a probable case is with he who alleges. The respondent bears the onus of justifying the reason for the termination in terms of *Section 43 and 47 (5) of the Employment Act, 2007*.

25. There being no evidence before court that the termination was wrongful, the claim lacks merit and is dismissed.

Terminal benefits

26. Testimony by RW1 clearly demonstrates that the two (2) grievants were paid terminal benefits including salary for days worked; in lieu of leave days not taken; notice pay; refund of share capital and payment of pension dues less liabilities owed by each of the grievants.

27. There is no tangible evidence before court that the 1st, 2nd and 3rd grievants were owed any further terminal benefits as claimed or at all. Accordingly, the claims for payment of terminal benefits by the 3 grievants is dismissed.

Costs

28. The issue of payment of costs is at the discretion of the court guided by the Civil Procedure Act and the rules of the court. This suit has

taken many years to conclusion due to no fault of either of the parties. The suit is brought by the union on behalf of the grievants one of whom is now deceased. The claimant union and the Respondent have a Recognition Agreement and CBA which provide for dispute resolution among other matters.

29. The court considers this to be appropriate case where the claimant union and the Respondent bear their own costs of the suit.

Dated and Signed in Kisumu this 14th day of November, 2019

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 22nd day of November, 2019

Maureen Onyango

Judge

Appearances

Mwaura Ngagi for Claimant union

FKE for Respondent

Chrispo – Court Clerk