



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 364 'B' OF 2014**

**DOMINIC MUTHUSI MBITHI.....CLAIMANT**

**VERSUS**

**KENYA POST OFFICE SAVINGS BANK.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This action is brought by Dominic Muthusi Mbithi against his former employer, Post Office Savings Bank. The claim is documented by a Statement of Claim dated 10<sup>th</sup> March 2014 and filed in court on 11<sup>th</sup> March 2014. The Respondent filed a Statement of Response on 11<sup>th</sup> April 2014.

2. When the matter came up for hearing, the Claimant testified on his own behalf and the Respondent called Isaac Koech, George Onyango and Thomas Kandie Bett. Both parties also filed written submissions.

**The Claimant's Case**

3. The Claimant was employed by the Respondent as a Clerical Officer on 27<sup>th</sup> October 1986. He rose through the ranks to a managerial position as at 30<sup>th</sup> November 2010, when he was summarily dismissed.

4. On 8<sup>th</sup> July 2008, the Respondent accused the Claimant of incurring a shortage of and failing to account for Kshs. 70,000. The Claimant responded to the allegations by his letter dated 9<sup>th</sup> July 2008. He was subsequently interdicted for ten (10) months to allow for investigations. During this period part of the Claimant's salary was withheld.

5. On 14<sup>th</sup> May 2009, the Claimant's interdiction was lifted and he was issued with a written warning. He was also surcharged with the amount of Kshs. 70,000. He states that he was not made aware of the findings of any investigations into the matter.

6. On 1<sup>st</sup> November 2010, the Claimant was asked to show cause why disciplinary action should not be taken against him, for disobeying instructions on transfer of station. The Claimant responded on 4<sup>th</sup> November 2010, stating that he had asked for the transfer to be deferred pending resolution of related issues. The Claimant was interdicted on 9<sup>th</sup> November 2010 and thereafter summarily dismissed on 30<sup>th</sup> November 2010. The Claimant's appeal against the dismissal was dismissed on 13<sup>th</sup> June 2011.

7. It is the Claimant's case that prior to the summary dismissal, he had a right to be informed of the

outcome of investigations and the subsequent charges against him. He was also entitled to be heard before any adverse disciplinary action could be taken against him. The Claimant contends that his interdiction and subsequent dismissal offended the provisions of the Respondent's Code of Conduct, the Employment Act and the principles of natural justice.

8. The Claimant's claim is as follows:

- a) Kshs. 112,160 being pay in lieu of notice;
- b) Kshs. 280,000 being his withheld salary for ten (10) months;
- c) Kshs. 70,000 being the sum illegally surcharged against him;
- d) Kshs. 1,345,927 being 12 months' salary in compensation for unlawful dismissal;
- e) Certificate of service;
- f) Costs plus interest.

### **The Respondent's Case**

9. In its Statement of Response dated 11<sup>th</sup> April 2014 and filed in court on even date, the Respondent admits having employed the Claimant as pleaded in the Statement of Claim.

10. The Respondent avers that on 8<sup>th</sup> July 2008, the Claimant was asked to show cause why disciplinary action should not be taken against him on the following accounts:

- a) A shortage of Kshs. 70,000 on operational cash which was discovered after a month;
- b) An encased cheque of Kshs. 10,000 which the Claimant had withheld for 3 months;
- c) Mishandling of staff;
- d) Lack of team work in his operations;
- e) Mishandling of cash.

11. The Claimant responded on 9<sup>th</sup> July 2008 but his explanation was not adequate, hence his interdiction on 16<sup>th</sup> July 2008. Following an appeal by the Claimant, his interdiction was lifted on 4<sup>th</sup> May 2009. The Respondent's management however held that there was some irregularity on the part of the Claimant and therefore issued him with a warning letter. He was also re-deployed from his position as Officer-In-Charge, Kikuyu Branch to the position of Assistant Operations Officer in Mwingi Branch.

12. The Claimant was instructed to report to the Manager, Nairobi North Region for further instructions, upon receipt of the letter of re-deployment, but did not do so. Instead he wrote to the Managing Director on 30<sup>th</sup> May 2009, appealing against the re-deployment. By letter dated 26<sup>th</sup> June 2009, the Managing Director notified the Claimant that his appeal had been rejected.

13. On 8<sup>th</sup> July 2009, the Claimant wrote another letter veiled as an appeal on his withheld salary and surcharge. In its response dated 16<sup>th</sup> July 2009, the Respondent informed the Claimant that the issues he had raised had been accorded due consideration and that his reinstatement to duty did not amount to an exoneration. The Claimant was further advised that as per policy, the withheld salaries and transfer allowance were not payable and that the surcharged amount was not refundable.

14. On 9<sup>th</sup> September 2009, the Claimant lodged a fourth appeal with the Managing Director, by asking

for a review of his case and on 5<sup>th</sup> October 2009, the Respondent reiterated its earlier position.

15. The Respondent avers that on 10<sup>th</sup> October 2010, the Claimant was transferred from Mwingi Branch to Rift Valley Regional Office but he declined to proceed on the transfer. By letter dated 13<sup>th</sup> October 2010, he was reminded of the lawful instruction to transfer him from Mwingi to Rift Valley Region and that his transfer allowance had been credited to his account.

16. The Claimant was asked to hand over immediately and report to his new station on 14<sup>th</sup> October 2010 but he revived the old disciplinary issue by engaging in email correspondence. On 25<sup>th</sup> October 2010, the Claimant was further instructed to report to his new station and on 1<sup>st</sup> November 2010, he was issued with a show cause letter on account of disobeying lawful instructions.

17. The Claimant wrote back on 4<sup>th</sup> November 2010 asking that his transfer be deferred pending resolution of the issues raised by him which he reckoned were directly related to the transfer. The Respondent reacted by interdicting the Claimant on 9<sup>th</sup> November 2010, pending investigation into his conduct. The Claimant was finally dismissed on 30<sup>th</sup> November 2010 for reasons of insubordination and defiance of instructions. His appeal against the dismissal was rejected on 13<sup>th</sup> October 2011.

### **Findings and Determination**

18. There are two (2) issues for determination in this case:

- a) Whether the Claimant's dismissal was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Dismissal**

19. The Claimant was dismissed by letter dated 30<sup>th</sup> November 2010, stating as follows:

**“RE: DISMISSAL FROM SERVICE”**

*Following your interdiction from duty on 9<sup>th</sup> November, 2010 the management has reviewed your case and decided that you be dismissed from the Bank service with effect from 30<sup>th</sup> November 2010.*

*You will recall that you were transferred from Mwingi Branch, Nairobi Region to Nakuru Branch, Rift Valley Region on 10<sup>th</sup> August, 2010 but you failed to honour the transfer instructions despite various reminders on the same. It is noted that even after interdiction from duty, you have continued to report to the office contrary to the specifications in your letter of interdiction issued on 9<sup>th</sup> November, 2010. The noted acts of deviance to the instructions of the Controlling Officer is an act of serious insubordination which within the provisions of the Bank's code of conduct section 6.3.6 is treated as serious offence and calls for summary dismissal from service.*

*Our records indicate that you have outstanding bank liabilities (Schedule A attached) as at 30<sup>th</sup> November, 2010 which become payable immediately, and you are required to advise on how the same will be liquidated.*

*As a member of the pension fund, the trust deed regulations clause 23(c) provides that a member is entitled to benefits of leaving service which will be payable under one of the options as per Schedule (B) attached. Please indicate the option you prefer in relation to the handling of your pension benefits and advise as appropriate for our further relevant action.*

*Please arrange to surrender your employment card to Human Resource Department and collect clearance forms for your formal discharge from service.*

**T.K. BETT AG. SENIOR MANAGER/HUMAN RESOURCES”**

20. Prior to his dismissal, the Claimant had faced other disciplinary action. First, he was surcharged the sum of Kshs. 70,000, being an operational cash shortage incurred when he was Officer In-Charge, Kikuyu Branch. He was also interdicted twice; on 16<sup>th</sup> July 2008, on account of operational cash shortage of Kshs. 70,000 and on 10<sup>th</sup> November 2010, on account of failure to take up a transfer.

21. Further to an appeal by the Claimant, the first interdiction was lifted on 14<sup>th</sup> May 2009. However, the letter lifting the interdiction also subjected the Claimant to further disciplinary action in the nature of a warning and re-deployment from the position of Officer In-Charge, Kikuyu Branch to the position of Assistant Operations Officer at Mwingi Branch.

22. With regard to the second interdiction which eventually led to his dismissal, the Claimant testified that he had asked for a deference of the transfer from Mwingi to Rift Valley because he felt that there were unresolved issues directly related to the transfer.

23. Regarding the offence of incurring a shortage of Kshs. 70,000, it emerged that the Claimant was subjected to four penalties being; interdiction, surcharge, warning and re-deployment. The Court did not find the basis for the multiple disciplinary actions which essentially subjected the Claimant to multiple jeopardy.

24. The Respondent's 2<sup>nd</sup> witness, George Onyango, who conducted investigations into the cash shortage told the Court that segregation of duties at the Branch had been compromised, as the Claimant who was the Branch Manager, was forced to undertake teller duties due to shortage of staff. What this tells the Court is that there were systemic weaknesses within the Respondent. This would have been a mitigating factor in favour of the Claimant had he been heard.

25. In *Kenya National Library Services Board v Beatrice N Ayoti [2014] eKLR* this Court held that surcharge is a serious disciplinary action to be taken pursuant to due procedure. In the instant case, the decision to surcharge the Claimant was made in great haste, without affording him an opportunity to be heard. The Claimant insists that there was in fact no loss incurred by the Respondent and in the absence of due procedure, the Court could not tell if indeed, such loss had occurred. In the circumstances, I find that the surcharge of Kshs. 70,000 made against the Claimant was unlawful.

26. On the 10 month's interdiction, I have this to say; a recommendation for its lifting had been made as early as July/August 2008 but the Respondent did not act until May 2009. And even when it did so, it unilaterally found some fault with the Claimant and subjected him to disciplinary re-deployment and a warning. The Court found no basis either in law or in the Respondent's internal rules for such action. In light of this, the Court has reached the conclusion that this interdiction was unlawful and unfair.

27. Moreover, although the Respondent alludes to some investigations, there was no evidence of the Claimant's involvement therein. At any rate, no investigation report was supplied to the Court. It seems reasonable therefore that the Claimant would have legitimate questions regarding the multiple disciplinary processes he had been subjected to. Instead of answering these questions, the Respondent chose to keep transferring the Claimant.

28. Transfers are normal management prerogatives with which the Court will not normally interfere. They cannot however be used to camouflage or compound disciplinary processes gone awry. This is what happened in this case and the Court faults the Respondent's actions at every turn. The Respondent not only failed to address the issues raised by the Claimant regarding the multiple disciplinary processes and their outcomes but also ignored the dictates of Section 41 of the Employment Act, 2007 on the right to be heard.

**Remedies**

29. For the foregoing reasons, I award the Claimant twelve (12) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service coupled with the Respondent's conduct. I further award the Claimant one (1) month's salary in lieu of notice.

30. In light of the finding that the Claimant's interdiction was unlawful, I award him his salary withheld during this period. For similar reasons, I order a refund of the sum of Kshs. 70,000 surcharged against the Claimant.

31. Finally, I enter judgment in favour of the Claimant in the following terms:

- a) 12 months' salary in compensation.....Kshs. 1,345,920
- b) 1 month's salary in lieu of notice.....112,160
- c) Withheld salary for 10 months.....280,000
- d) Unlawful surcharge.....70,000
  
- Total.....1,808,080**

32. This amount, which is subject to statutory deductions, will attract interest at court rates from the date of judgment until payment in full.

33. The Claimant is also entitled to a certificate of service and costs of the case.

34. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 4<sup>TH</sup> DAY OF JANUARY 2018**

**LINNET NDOLO**

**JUDGE**

**DELIVERED IN OPEN COURT AT NAIROBI**

**THIS 19<sup>TH</sup> DAY OF JANUARY 2018**

**MAUREEN ONYANGO**

**JUDGE**

Appearance:

Mr. Esmail for the Claimant

Miss Mbembela for the Respondent