



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE. NO. 942 OF 2014

MOSES O. OGILA.....CLAIMANT

VERSUS

MWALIMU CO-OPERATIVE SAVINGS & CREDIT SOCIETY LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This is a claim for terminal dues plus compensation for unfair termination of the claimant's contract of service by the respondent by the letter dated 12.1.2012. It is the claimant's case that he was terminated for no just cause and without following a fair procedure. In total he pray for Kshs.3,653,820.14 plus costs and interest. He also prays for certificate of service.

2. The respondent has denied the alleged unfair termination and averred that the claimant was terminated for fraud and tampering with documents, and after being accorded disciplinary hearing. She further denied the claim for terminal dues and averred that the same was calculated after the dismissal and applied for settle his outstanding liabilities. She therefore prayed for the suit to be dismissed with costs.

3. The suit was heard on 24.11.2016 and 19.2.2018 when the claimant testified as Cw1 and the respondent called her HR Manager Mr. Robinson Otieno as Rw1. Thereafter both parties filed written submissions.

Claimant's Case

4. Cw1 testified that he was employed by the respondent on 8.5.1998 as a Clerical Officer and later he was promoted to Senior Clerical Officer earning a gross salary of Kshs.34,220 per month. His duties included refunds and reconciling of Members Accounts. He was a member of union (KUCFAW).

5. On 3.5.2009, he was served with a show cause letter accusing him of irregular refunds to 2 members and he responded on 4.5.2007 as directed, denying all the allegations. Thereafter he was interdicted on 11.5.2007 for the same allegations. Clause 9.2 of the Collective Bargaining Agreement (CBA) provided for payment of half pay while on interdiction but the same was never paid to him.

6. On 6.12.2007 he was called for a disciplinary hearing but the charges he faced were not the same as set out by the show cause letter and he was therefore asked to give a fresh defence in writing which he did on 4.12.2007. He stated that he refunded George Mutura after he wrote a demand letter and reconciliation confirmed that there was refund due to him. He maintained that he refunded the money based on the demand letter and conciliation. He further stated that refund due to Christina Njenga was for March, April and May but he wrote August, September and October which he explained in his defence.

7. He explained that he followed process of refund by producing statement, then prepared refund sheet which he forwarded to his supervisor for Approval then forward to Audit to audit the information after which payment was done. He denied that he required the personal files for the said member to do the refund and therefore further denied the alleged removal of documents from the said files including by-products (Documents from the TSC).

8. He contended that the hearing on 6.12.2007 was not conclusive and it was adjourned for the respondent to avail further information. The hearing was thereafter scheduled for 20.6.2009, 27.8.2009, 13.10.2009 and 1.8.2011 but non took place and he was shocked to receive a termination letter dated 21.1.2012 terminating his services with effect from 11.5.2007

9. He contended that the termination was unfair because he was not accorded a fair hearing and the reason for the termination were not valid. He further contend that the interdiction of 6 years was also in breach of clause 9.2 of the CBA which provided for maximum period of 3 months. He further contended that the termination letter was never preceded by a notice of one month as provided by the CBA and the termination letter never mentioned his terminal benefits.

10. On cross examination Cw1 admitted that he refunded George Njenga Kshs.85,157 after initiating the refund process. He further contended that he never needed members files to process refunds but used the members statement in the computer. He further contended that he never needed written instructions or approval to do a refund.

11. He however admitted that he attended disciplinary hearing on 30.6.2008 and the amended charges were put to him and he was given a chance to give his explanation. He however mentioned that the hearing was not concluded as the respondent adjourned it to get the By-products for George and Christine and requisition for their files. He further admitted that he had 4 loans running at the time of his termination. He concluded by contending that his last salary in April 2007 was Kshs.43,850.

Defence Case

12. Rw1 testified that the claimant was employed by the respondent from 2006 as a Senior Clerical Officer dealing with computation of Members refunds among other duties. He further stated that the claimant's gross pay was Kshs.39,172 gross per month but he was dismissed for irregular refunds to Mr. George Njenga and Christina Gatura. Before the dismissal, he was served with a show cause letter and invited to a disciplinary hearing where he attended with his shop steward.

13. Rw1 explained that in case a member had overpaid his loan, the member wrote a letter claiming refund and attaching thereto a payslip and any other information to prove the alleged overpayment. The said letter goes to the customer care desk then forward to Accounts department for verification. If the overpayment is verified, the amount is computed by the clerk after which he takes it to supervisor to authorize the refund through the Member's Fosa Account.

14. Rw1 contended that during the hearing, the claimant admitted the offences charged and apologized but he was never the less found guilty and eventually terminated. He contended that by letter dated 8.11.2006, Mr. George Njenga claimed refund for September and October, but the claimant refunded for September 2006, February 2007. He further contended that Christina Gatura never applied for any refund but the claimant computed refund for august to October 2006 totalling to Kshs.27,840. As regards the removal of documents from the said member's files Rw1 alleged that the investigating office found that the files for George and Christine where returned to the registry by the claimant without the By-products (Documents from TSC demonstrating the refund sought had indeed been deducted from salary).

15. As regards the claim for terminal dues, Rw1 contended that the same was calculated including leave and salary for May 2007 and set off against his liabilities.

16. On cross examination Rw1 admitted that the claimant was employed in May 1998 and confirmed on 9.3.1999. He further admitted that the claimant was a union member and there was a CBA in force. He further admitted that the claimant was interdicted without pay from 11.5.2007 and maintained that it was the policy of respondent to do so if the interdiction was on account of fraud. He further admitted that the minutes of the disciplinary hearing were never signed by the members of the committee and that the hearing was never concluded as further witnesses were to be called. He further admitted that the claimant continued being invited to disciplinary hearings until 1.8.2011 but the meeting never took place until the termination letter dated 12.1.2012 was written to the claimant. He also admitted that there was no Audit or investigations report to verify the charges against the claimant although he was interdicted to pave the way for investigations. He admitted also the refund sheets for George and Christine were authorized by the supervisor by signing and forward to the Audit for verification after which the refund was paid.

17. Rw1 contended that before file leave the registry, a requisition must be made. He however admitted that there was no requisition from the claimant requesting for the files for George and Christine. On being shown the letter by James Mutula dated 18.7.2008, Rw1 admitted refund can be made without a demand letter from the members. He further admitted that the CBA limited the period for concluding disciplinary process to 3 months.

Analysis and Determination

18. There is no dispute that the claimant was employed by the respondent until 12.1.2012 when he was terminated. The issues for determination here are

- (a) Whether the termination was unfair.
- (b) Whether the reliefs sought should be granted.

Unfair termination

19. The termination of the claimant's service was decided and communicated by the letter dated 12.1.2012. The law in force then was the Employment Act 2007 which barred employer from terminating his employee's services unfairly. Section 45(2) of the Act deems termination unfair if the employer fails to prove that it was grounded on a valid and fair reason and that it was done after following a fair procedure. In this case the reasons cited in the termination letter were:

- (a) Initiating refund of Kshs.85,155 to Mr. George Njenga TSC No. 349,788 which was not due to him
- (b) Initiating refund of Kshs.27,840 to Christina Njenga TSC No. 336327 which was not due to her
- (c) Removal of documents from members files.

(d) Loss of by-products in his custody for the period July 2006 – March 2007.

20. The claimant denied the said charges in his written defence dated 4.12.2007, during the disciplinary hearing by the respondent and in his evidence herein. Rw1 in his evidence alleged that the claimant admitted his offence and apologized but the respondent's Board found him guilty and dismissed him. However on a careful consideration of the evidence presented, I did not see the alleged admission by the claimant of irregular refund that was not due or removal of documents from members files or loss of by-products in his custody. All what the claimant acknowledged was reference to the wrong month for refund but maintained that he refund was regular and due to the members. If anything the proceedings produced are at best a mere draft by the person who was recording but they were never read and confirmed by the subsequent Board because all the subsequent Board meeting for purposes of this case never took place. Consequently, the alleged finding of guilt on the part of the claimant is wishful thinking by the Rw1.

21. In addition to the foregoing failure to prove the reasons for the termination of the claimant's service, it is also obvious that the respondent did not follow a fair procedure before the said termination. Rw1 admitted during cross examination that the disciplinary hearing was never concluded on 30.6.2018 but it was adjourned mid way till the following week. He further admitted that there was no other meeting held according to the termination letter and the various other letters which invited the claimant to further hearing, the last one being dated 1.8.2011. In my view, the respondent tried to follow fair procedure before terminating the claimant's services but suddenly abandon the process and capriciously terminated the claimant's services.

22. Under section 41 of the Employment Act, the employer has an obligation to hear and consider the representations by the employee and his chosen companion before deciding to dismiss the employee for cited misconduct. It is therefore an unfair process for the employer to adjourn proceedings to avail further evidence for 4 years and then abandon the process and terminate the employee's services. The process was also made unfair by the delay in finalizing the hearing beyond the 3 months provided by the CBA. The said delay prolonged the claimant's suspension for 6 years without pay which was inhuman.

23. Having considered all the material presented to the court and more so, the scanty evidence by the defence, I find that the respondent has not discharged her burden of proving valid and fair reasons for terminating the claimant's services, and that she followed a fair procedure. Consequently, I find and hold that the termination of the claimant's services was unfair with the meaning of section 45 of the Act.

Reliefs

24. In view of the foregoing finding, I make declaration that the termination of the claimant's services was unlawful and unfair as prayed.

25. Flowing from the said declaration and as provided by section 49 of the Act, I award the claimant Kshs43,850 being one month salary in lieu of notice plus Kshs.526,200 being 12 months' salary compensation for the unfair termination. The salary is based on the CBA for 2012/2013, which commenced on 1.1.2012 and the respondent has not disproved the same by records. In making the said award, I have considered the claimant's long service.

26. I also award the claimant 11 days salary for May 2007. Hence $Kshs.39,172 \times 11/26 = Kshs.16,572.76$, but he has pleaded for only Ksh.16,078.26 which is the amount he will get.

27. The claimant has prayed for 168 leave days but no particulars were given and as such, that claim must fail. Likewise, the claim for leave allowance for 6 years is also dismissed for lack of particulars and evidence of the time when the claimant went for the leave and was denied the leave allowance.

28. The claim for unpaid salary during the interdiction is however allowed because although the termination letter purported to back date the termination to 11.5.2007, it cannot be denied that the employment relationship between the parties herein persisted until 12.1.2-012 when the termination letter was addressed to the claimant. It is mischievous for the employer to try to evade his obligations under the contract of service by back dating termination date. I say so because until the termination letter was addressed and served on the claimant, it was not rational to expect the claimant to look for another job. He remained bound by the contract between him and his employer. Consequently, I award him the full salary being $Kshs.39,175 \times 55 \text{ months} = 2,154,460$. The said salary is the one which was in force before CBA for 2012/2013 came into force on 1.1.2012. The claim for salary increments is declined because the claim for salary arrears is based on a flat figure of the salary admitted by Rw1.

Conclusion and Disposition

29. For the reasons that the claimant was unfairly terminated, I enter judgment for him in the sum of Kshs.2,740,588 plus costs and interest at court rate from the date hereof till payment in full. The sum shall be subject to statutory deductions.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of July, 2018

ONESMUS N. MAKAU

JUDGE