



**REPUBLIC OF KENYA**

**INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2309 OF 2014**

***(Before D. K. N. Marete)***

**KENNEDY KIMAIYO KIPLAGAT.....CLAIMANT**

**VERSUS**

**CO-OPERATIVE BANK OF KENYA LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter was brought to court vide a Statement of Claim dated 22nd December, 2014. It does not disclose an issue in dispute on its face.

The respondent in a Reply to Claim dated 3rd March, 2015 denies the claim and prays that it be dismissed with costs.

The claimant in a Reply to the Respondent's Reply to Claim dated 20th November, 2016 further builds up her case in response to the Respondent's Response.

The claimant's case is that he was employed by the respondent as a clerk on 2nd April, 2002 on an 18 months contract and was posted to the respondent's card centre.

The claimant's further case is that on 17th February, 2003, the respondent reviewed the claimant's terms of service from 18 months contract to 6 months probation. On 1st March, 2003, this was again changed to permanent and pensionable and a confirmation issued to this extent.

The claimant's other case is that he performed his duties with utmost professionalism, expertise, diligence and dedication and was entrusted with more responsibilities through meritorious promotions. He was appointed to key management and strategic committees in recognition of his exemplary service, scales and expertise. He was also feted through commendations and monetary rewards.

The claimant's further case is that at all times he performed the functions of his office in accordance with the Respondent's Property and Supplies Operating Manual Volume II and until 23rd May, 2014, his stint of service was blemish free.

The claimant's avers that on 28th May, 2014, without any substantiation or detail, he was suspended from duty. On the following day, he was requested to show cause why disciplinary actions should not be taken against him for negligent procurement that resulted in a loss of Kshs.17,133,362.25 to the respondent.

He recorded a statement with the respondent's security office giving details of his specific role in the procurement of the impugned procurements. This, he said, was limited to coordination of the process and not decisions of a bidding nature as alleged by the respondent.

The claimant avers that it was the sole responsibility of the respondents Expenditure Management Committee to review, verify and ascertain that the procurement was in accordance with the respondent procurement policies. This committee and its managing director had unconditionally approved the impugned procurement.

The respondent issued the claimant with a further show cause letter on 19th June, 2014 and on 4th July, 2014, he answered that he was never negligent and that all the procurements in question had been approved by the Expenditure Management Committee.

His further case is that on 3rd July, 2014 he was invited to a disciplinary committee meeting to which he appeared on 9th instant and defended his case. On 14th July, 2014, the respondent summarily dismissed the claimant.

The claimant avers that the disciplinary committee was conflicted and violated the rules of natural justice by presiding over a procurement process duly approved by some of its members who also served as members of the respondent's expenditure committee. This is as follows;

26. The Claimant avers that the Respondent's Expenditure Management Committee was constituted of the following members:

- a) Patrick Nyaga (Director Finance) Chairman
- b) Anthony Mburu (Director Credit) Member
- c) Samuel Birech (Director Retail Banking) Member
- d) Catherine Muchiri (Director Customer Service) Member
- e) Zachary Chianda (Director Operations) Member
- f) Lydia Rono (Director CIBD) Member
- g) Rosemary Githaiga (Company Secretary) Member
- h) Titus Karanja (Director Co-operative) Member Again,

27. The Claimant avers that the Respondent's Disciplinary Committee was constituted of the following members:

- a) Anthony Mburu (Director Credit) Chairman
- b) Samuel Birech (Director Retail Banking) Member
- c) Samuel Kibugi (Alt. to Company Secretary) Member
- d) Caroline Karimi (Manager – Cost) Member
- e) Edwin Karuri (Head Security) Member
- f) Joseph Gatuni ( Internal Auditor) Member (Convenor)
- g) Elizabeth Ndemo (Alt. to Director CIBD) Member
- h) Weda Welton (Director HRD) Member

Anthony Mburu and Samuel Birech did not declare their conflict of interest in the impugned procurement and therefore lacked objectivity and independence.

It is his further case that the suspension from duty, the entire disciplinary proceedings and the summary dismissal were discriminatory, contrary to the rules of natural justice. These were also unfair, unprocedural, unlawful and unconstitutional and therefore null and void and of no effect.

His other case is that the summary dismissal was premised on a purported internal audit which was a total stranger to him as he had been given an opportunity to review the same. The process was therefore flawed and tantamount to being condemned and heard. The dismissal was altogether inaccurate and malicious. The loss of Kshs.17,133,362.25 has so far not been declared in any of the respondents audited financial report.

The claimant avers that on 21st July, 2014 he appealed against the summary dismissal but this was not responded or attended to.

He prays as follows;

- a) A declaratory order that at all times material the Claimant was and still is entitled to the full unlimited enjoyment of the rights and fundamental freedoms guaranteed under Article 27 (1), 35 (1) (b) & (2), 41 (1) & (2) (a) and 50 (1) of the Constitution of Kenya, 2010.
- b) A declaratory order that at all times material the Claimant was and still is entitled to the full and unlimited enjoyment of the statutory rights secured under the Employment Act, 2007.
- c) A declaratory order that the Respondent contravened the Claimant's fundamental rights and freedoms guaranteed under Article 27(1), 35(1) (b) & (2), 41(1) & (2) (a) and 50 (1) of the Constitution of Kenya, 2010.
- d) A declaratory order that the Respondent violated Article 2 (1) & (4), 3 (1) and 10 of the Constitution of Kenya, 2010.
- e) A declaratory order that the suspension, the subsequent disciplinary proceedings and the summary was unconditional, unlawful,

*contrary to rules of natural justice, un-procedural, unfair null and void and therefore no effect.*

- f) An order to nullify the suspension, the disciplinary proceedings and the summary dismissal.*
- g) An order to compel the Respondent to unconditionally reinstate the Claimant without loss as to his salary, benefits, rights, powers and privileges thereof.*
- h) In the alternative to (g), an order to compel the Respondent to pay the Claimant 12 months salary in compensation for unfair dismissal.*
- i) An order to compel the Respondent to pay the Claimant in compensation for violation of his constitutional rights.*
- j) An order to compel the Respondents to pay the Claimant in compensation for discrimination and harassment in respect of the interdiction, the disciplinary proceedings and summary dismissal.*
- k) Mesne profits.*
- l) General damages*
- m) Interest on (i), (j), (k), (l) and (m) above until payment in full.*
- n) Costs of the Claim plus interest until payment in full.*
- o) Any other order the court may deem fit to grant.*
- p) Any other further or better relief that his honourable court may deem fit.*

The respondent's case is that the claimant served in its Property and Supplies Department since 25th August, 2003 and had a specific job description in terms of technical and business aspects. To this extent, the respondent expended on his training as follows;

- a. Training on effective negotiations 30.06.2005 to 01.07.2005*
- b. Workshop at the Kenya Institute of Supplies 31.03.2009 to 03.04.2009;*
- c. Diploma from the Chartered Institute of Purchasing & Supply from the Chartered Institute of Purchasing & Supply;*
- d. Advanced Diploma in Purchasing & Supply from the Chartered Institute of Purchasing & Supply;*
- e. Diploma in Supplies Management from KNEC. Annexed hereto and marked CBK-2 to CBK-15 are copies of the claimant's documents relating to his academic credentials in that respect.*

The respondent's other case is a denial of the diligence of the claimant in the performance of his duties. She avers that the claimant in the instant case had failed to follow laid down rules and procedures in the operating manual and further that in 2009, he had a disciplinary matter relating to loss of computers in the store and was issued with a show cause letter dated 10th July, 2009.

The respondent's further case is a justification of the suspension and show cause as necessary disciplinary processes in accordance with the Personnel Manual governing all employees. Further, the claimant was bound to ensure a cost effective acquisition of materials through competitive tendering by virtue of terms set out in his role profile as follows;

- a. Negotiation of better contractual terms;*
- b. Tender analysis*
- c. Carrying out market research on product development and better sources supply;*
- d. Keeping records accurate and up-to-date.*

The respondent avers that the claimant failed to carefully and properly perform his roles and failed to do this as follows;

- a. Negligently preparing analyses for the purchase of computers;*
- b. Irregularly preparing an analysis to award a tender for purchase of furniture;*
- c. Failing to maintain proper records and monitor the movement of stock from the stores;*

d. *Failing to carry out market surveys with regard to the purchase of printers.*

The respondent's further case is that the claimant should not shirk and pass responsibility for his failure on the Executive Management Committee as his responsibility rested in the middle of procurement and it was incumbent upon him to advise the Executive Management Committee and the managing director on the best way forward in such endeavour. This is, *inter alia*, as follows;

14. *The respondent further denies what is claimed at paragraph 18 of the claim that it was the sole responsibility of the Expenditure and Management Committee as well as the Managing Director to review, ascertain and verify the procurement this is because of the specific job description, expertise as well as the laid down process in the manual the claimant is required to present properly analyses within his core duties to the EMC so that committee that is solely concerned to make decision with regard to cost implication is properly advised by the claimant that is expected at the stage of presenting his analysis prudently and properly carried out all necessary checks given the fact that he had the full benefit of all documents presented in the procurement by the suppliers and is required to be well versed with the prevailing market prices and informed by the survey.*

The matter came to court variously until the 18th April, 2018 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are

1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful?
2. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in her written submissions dated 28th May, 2018 submits that he was entitled to fair administrative action as stipulated in Articles 27 (1), 41 and 47 of the Constitution of Kenya, 2010. Again, section 41 (2) of the Employment Act, 2007 provides that;

*41 (2) 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.*

This was not complied with.

The claimant further submits that his dismissal was not in tandem with section 44 of Employment Act, 2007 and also that the respondent's burden of justifying lawful termination of employment as required by section 47(5) of the Employment Act, 2007 is not met.

The claimant in such submissions seeks to rely on the authority of **Mc Kinley v B.C Tel. (2001) 2 S.C.R 161** where the Canadian Supreme Court observed as follows;

*Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.*

The respondent in her written submissions dated 10th July, 2018 elaborately submits in support of her case of lawful termination of employment. On this, she seeks reliance on the provisions of **Hasbury's Law of England** which unfortunately she does not offer a complete citation. This is as follows;

*An employer has a common law has a common law right to dismiss an employee without notice on the grounds of the employee's gross misconduct, and such a dismissal is not wrongful. Originally this right was explained as a legal incident of the status of master and servant but, in line with the modern contractual analysis of the employment relationship, it is now explained in contractual terms, as the acceptance by the employer of a repudiation of the contract by the employee. Alternatively, gross misconduct justifying summary dismissal may be seen as conduct so undermining the trust and confidence which is inherent in the particular contract conduct so undermining the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment*

The respondent further seeks to buttress her case by relying on the authority of **Nicholas Otinyu Muruka v Equity Bank Limited (2013) eKLR** where the court observed as follows;

*"Every employer has a right to discipline their employee on good reason or reasons where an employee is found to have committed any acts of gross misconduct or acted in a manner putting the employer into loss."*

Further, she sought to rely on the authority of **Eric Karanja Gakenyo & Another vs. Samson Gathimba (2011)eKLR** where the court again provided as follows;

Summary dismissal usually connotes dismissal of an employee, without giving the notice to which the employee is entitled by the contract of employment. In the case of the relationship of employee and employer, suspicion lead to erosion of confidence and trust by the employee and in the case of suspicion of loss or theft of property of the employer, it may lead to summary dismissal without notice.....”.

In further demonstration of her case of lawful termination of employment the respondent sought to rely on the authority of **George Onyango Akuti v G4S Security Services Kenya Ltd [2013] eKLR** (“the G4S Case”) where the court observed thus:

“ An employee, therefore, has the burden of proving that an unfair termination of employment has occurred. An unfair termination could be because no notice was given as required by section 35(1); no reasons were given or because the employee was not afforded a hearing as required by section 41 of the Act. The reasons can be various based either on failure to comply with the statute or the terms of the actual employment contract. The obligation on an employee is not as onerous as the obligations on an employer. On the side of the employer, apart from the requirement in section 45(5) of the Employment Act to justify the grounds of termination, while section 45(2) (a) and (b) require an employer to prove that the reasons for termination were valid and fair reasons. And if it is a case of summary dismissal for fundamental breach of contractual obligations or gross misconduct, section 41(2) of the Employment Act obliges the employer to hear and consider any representations which the employee may wish to make.”

Overall, this matter tilts in favour of the claimant. This is because he presents a case of no compliance with the requirements of substantive and procedural fairness in the conduct of his disciplinary proceedings. Firstly, the claimant challenges the reason or reasons for his dismissal. It is his position and submission that this was flawed in that it was not entirely his responsibility to execute purchases and in any event, this was done on the authority of the Executive Management Committee and its chair. This is not adequately rebutted by the respondent. She merely issues and submits a denial of the same.

The claimant frontally raises issues with the composition of the disciplinary committee. It comprised of parties who were also involved in the procurement of the good and materials leading to this dispute. He submits a case of conflict of interest on the part of Anthony Mburu and Samuel Birech. This is again not addressed by the respondent. I find that the conflict of interest complained of by the claimant was fatal to the conduct of such proceedings. The issue of fairness was compromised and therefore the claimant has every reason to complain of unfair termination of employment. This is aggravated by the respondent’s reaction to his appeal. No action: dead silence.

The culmination of this failure by the respondent in conducting appropriate and open disciplinary proceedings in accordance with section 41, Employment Act, 2007 is a case of unlawful termination of employment and I find as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is. Having won on a case of unlawful termination of employment, he becomes entitled to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

i. A declaration that the disciplinary proceedings and consequential summary dismissal of the employment of the claimant by the respondent was unfair, unprocedural,unlawful, unconstitutional and contrary to the rules of natural justice.

ii. One (1) months pay in lieu of notice.....Kshs.134,339.00

iii. 6 months compensation for unlawful termination of employment Kshs.134,339 x 6months=.....  
.....Kshs.806,034.00

Total Claim.....Kshs.940,343.00

iv. The cost of this application shall be borne by the respondent

Dated and signed this 19th day of July, 2018.

**D.K. Njagi Marete**

**JUDGE**

Delivered and signed this 20th day of July, 2018.

**Maureen Onyango**

**PRINCIPAL JUDGE**

Appearances

1. Mr. Wafula holding brief Mr. Gachuba instructed Onyoni Opini & Gachuba Associates for the claimant.
2. Miss Muthee instructed by Ochieng, Onyango, Kibet & Ohaga Advocates for the respondent.