



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1681 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

ROBERT MOFAT ODHIAMBO.....CLAIMANT

VERSUS

HARAMBEE SACCO LIMITED.....RESPONDENT

JUDGMENT

The claimant was employed by the respondent, a savings and credit co-operative society registered and operating in Kenya, as Senior Security Officer on 19th May 2003. His employment was terminated on 2nd March 2015. The claimant's last salary was Kshs.101,706/=.

The circumstances leading to the dismissal of the claimant were that on 5th August 2014 the respondent discovered that cash was being deposited irregularly into some members' accounts. The cash deposits were not from loans, dividends or refunds.

Besides being an employee, the claimant was also a member of the co-operative and his salary account No. 5022010022400 was one of the accounts into which the unexplained cash deposits were made. A sum of Kshs.30,000 was deposited into the claimant's account on 16th July 2014 and the claimant proceeded to withdraw the said amount from his account in several withdrawals.

On 7th August 2014, the respondent wrote to its software service provider Craft Silicon Limited to report the suspicious deposits and requested the provider to investigate the source of the funds.

On 8th August 2014, the claimant wrote to the respondent indicating that he had been notified of a deposit of Kshs.30,000 in his FOSA Savings Account, which he had not authorised. He requested that the deposit be reversed.

The respondent suspended the claimant from service by letter dated 12th August 2014 pending full investigations. On the same day Craft Silicon Limited responded to the respondent's inquiry informing the respondent that it had identified 64 suspect entries in 42 accounts involving Kshs.4,225,000 which was suspected to have been effected by inserting data through what was referred to as backend. Since access to data was limited to only five computer workstations, it was recommended that the users of those computers be probed.

By letter dated 4th September 2014, the respondent sought the assistance of Banking Fraud Investigations Department to investigate the accounts affected. While the investigations were ongoing, the claimant filed the present suit and obtained ex-parte stay orders on 30th September 2014. Respondent was aggrieved by the stay orders. It filed an application dated 16th October 2014 and obtained an order suspending the same on 17th October 2014.

By letter dated 30th October 2014, the claimant was invited for a disciplinary committee meeting on 4th November 2014. According to the letter the claimant was accused of gross misconduct arising from the withdrawal of Kshs.30,000 from his account whose source was fraudulent or irregular.

On 5th November 2014, the respondent sent the claimant a show cause letter requiring him to respond by 10th November 2014. The claimant wrote back on 10th November seeking clarification if he should respond to the show cause letter in view of the case he had filed in court. The respondent responded to the effect that he should respond by 19th November 2014, as he did not have any orders staying disciplinary action. The claimant was thereafter invited to attend a disciplinary hearing on 21st November 2014. The claimant did not show up for the hearing. He was invited again to attend a disciplinary hearing on 12th February 2015 and reminded to respond to the show cause letter dated 5th November 2014. The claimant did not comply with either.

On 27th February 2015, the respondent's Board of Directors decided that the claimant be summarily dismissed from employment and a letter of summary dismissal dated 2nd March 2015 was sent to the claimant.

It is the claimant's case that the respondent's application dated 16th October 2014 was dismissed on 17th April 2015 thus reverting to the orders granted to the claimant on 30th September 2014, that the application has not been appealed, varied or set aside and remains in force. It is submitted for the claimant that the respondent failed to reinstate him or pay his salary from 12th August 2014. He submits that the respondent is in contempt of the said orders and should be ordered to lift the suspension, reinstate the claimant and pay his dues to date.

In his amended memorandum of claim filed on 7th August 2014, the claimant seeks the following orders –

- a. Payment of salary and benefits during the suspension period.
- b. Salary for the contractual period ending 26/05/2015..... Kshs.1,682,060
- c. Access to all the benefits to which the claimant is entitled to.
- d. Salary for the contractual period of 3 years
beginning the 26/05/2015 to 26/05/2017-..... Kshs.6,055,416
- e. Cost of the suit.
- f. Leave allowance for 3 years $110,706 \times 3$ Kshs.336,118
- g. Salary in lieu of notice $168,206 \times 2$ Kshs.336,412
- h. Severance pay $110,706 \times 12$Kshs.1,328,472
- i. Without prejudice to prayer (b - h) payment for unexpired period
of contract of 3 years to the retirement age.....Kshs.18,144,607
- j. Gratuity for the unexpired period of 3 years to
the retirement age.....Kshs.700,000
- k. Leave allowance of unexpired period.
l. 3 years to the retirement age $332,118 \times 3$Kshs.996,354
- m. Severance pay for the unexpired period of 3 years
to retirement $110,706 \times 12$ Kshs.1,328,472
- n. Loss of medical cover for unexpired period of 3 years.... Kshs.130,000
- o. Damages for malicious termination of contract

The respondent filed a memorandum of defence and counterclaim. It denies that the dismissal of the claimant was unfair. The respondent further denies that the claimant is entitled to the prayers sought in the amended claim. The respondent counterclaims for Kshs.981,057.71 being monies owed by the claimant to the respondent in the form of unpaid loans.

The respondent prays for orders as follows –

1. That the Court finds that the Claimant herein owes the Respondent outstanding loan amounting Kshs.981,057.71
2. That the Court orders the Claimant to pay the Respondent as follows;
 - a. Outstanding loan amounting Kshs.981,057.71.
 - b. Interest on (a) above at Court rates.
 - c. Any other relief that the court may deem just and fit to award the respondent.

Claimant's Case

It is the claimant's case that even before his employment was terminated his position was advertised on 18th July 2014, an indication that the respondent had already decided to terminate the claimant's contract before the issue of deposits into his account arose on 7th August 2014. It is further the claimant's position that the fraudulent deposits affected many accounts other than his and that other employees were treated differently by the deposits being converted to a loan while in the claimant's case which was one of the lowest deposits his employment was terminated.

It is further the claimant's position that he is the one who blew the whistle and that after being informed of the fraudulent deposits in his account the claimant wrote to the Acting Chief Executive Officer asking that the deposit be reversed.

It is further the claimant's submission that the disciplinary process was illegal as the claimant had already moved to court to stop the process and that the letter inviting him for disciplinary hearing did not state the charges against him. The claimant submits that he was invited for a disciplinary hearing on 4th November 2014 but on the morning of the hearing was called and advised that the disciplinary hearing had been postponed.

That the notice to show cause and the letter extending the suspension were written on 5th November 2014. It is submitted that the extension was outside the three months period limited by the SACCO regulations within which disciplinary proceedings must be concluded. It is further submitted that the claimant was invited for disciplinary hearing by sms, which is not a recognised mode of communication.

It is further submitted that there was malice in the termination of the claimant's employment, that the court made a ruling reversing the suspension of the claimant which was not complied with and that the respondent has been interfering with the claimant's employment since his leaving service.

The claimant relied on the case of **ALFRED OMOMBO -V- LAKE VICTORIA NORTH WATER SERVICES BOARD AND ANOTHER** and the case of **HUMPHREY AYIRO ONGAYA -V- MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY** both of which concerned suspension from employment where the court found the suspension unlawful, lifted the suspensions and reinstated the claimants back to work.

Respondent's Case

The respondent submits that Section 44(4)(g) allows an employer to summarily dismiss an employee for committing or being suspected of committing a criminal offence against the employer. It is submitted that the respondent had valid reason to dismiss the claimant from service.

It is further submitted that the respondent's Human Resource Manual allows summary dismissal in similar circumstances as Section 44(4)(g) of the Employment Act at Clause 30.1 and Clause 30.3(i) of the Human Resource Manual further permits dismissal of an employee on grounds of theft of property and fraud.

It is further submitted that the respondent complied with fair procedure in dismissing the claimant as provided under Section 41 of the Employment Act. It is submitted that the orders staying the claimant's suspension were suspended on 17th October 2014 and the ruling delivered on 17th April 2015 came after the dismissal of the claimant.

It is submitted that the claimant failed to attend disciplinary hearing, that the claimant does not deny receiving the sms but only states it was not responded to, that the claimant received the sms but ignored it in order to sue that fact to his advantage. It is submitted that the claimant did not deny owing the sums claimed in the counterclaim.

Determination

I have considered the pleadings, evidence and submissions. The issues arising for determination are whether the dismissal of the claimant was fair and if he is entitled to the prayers sought.

Fair Dismissal

Fair dismissal encompass fair hearing as provided in Section 41 and valid reasons as provided in Section 43 of the Employment Act.

In the present case the claimant was suspended, then invited for hearing but did not attend.

It is not denied that the claimant went to court upon suspension and obtained orders staying the suspension on 30th September 2014. These orders were however stayed by the court on 17th of October 2014. At the time disciplinary action was taken against the claimant there were no orders staying the suspension. The court's ruling of 17th April 2015 came after the disciplinary process had been concluded and the claimant dismissed.

The order of the court lifting the suspension and reinstating the claimant came too late. At the time of the order there was no suspension to be lifted as the claimant's employment had already been terminated. This informed the amendment of the claim, and it is the prayers in the amended claim that are before the court for determination. There is no prayer for lifting of the suspension or any prayer relating to the suspension except the payment of salary withheld during the suspension.

The submissions about the claimant having been discriminated in the treatment is not substantiated by any evidence. There is no evidence that all other employees whose accounts were credited with the monies irregularly were converted into loans while the claimant was the only one disciplined. These are averments that should have been made in pleadings or affidavits as submissions are not pleadings and cannot be the basis for evidence on facts.

What is factual is that there was money deposited into the claimant's account irregularly and he withdrew the money. He did not report the irregular deposit until after the respondent had discovered the irregularity and commenced investigations. The claimant's averments that he was a whistle blower are hard to believe in the circumstances.

The claimant's position as a Security Officer put him under a higher platform than other employees as he was supposed to be part of the investigations team or in the least report or investigate why there was money in his account which he had not deposited. Instead he helped himself to the money. I do not believe the claimant when he states he innocently used the money in his account.

The claimant alleged that the decision to terminate his services were hatched before the issue of the irregular deposits arose, when his position was advertised on 18th July 2014. The court is concerned that the newspaper copy attached to the claimant's amended claim is selectively faint and illegible on the position he alleges was to replace him. I have had to confirm from records in the respondent's bundle, the minutes of the Board meeting, that the position advertised was for Security and Investigations Manager while the claimant's position was Senior Security Officer. It is therefore evident that the position advertised was not the claimant's and that he deliberately made the copy of the advert illegible to deceive or confuse the court. A litigant who sets out to mislead the court cannot earn the sympathy of the court.

I find that there was valid reason to subject the claimant to a disciplinary process.

The claimant avers that he was served by sms. I have checked the claimant's bundle and it is clear he was called and advised to pick his letter but he requested that the letter be delivered to his advocates, which the person calling him declined to do. He was thus aware that there was a letter to him in the office.

Secondly the sms sent to the claimant which he does not deny receiving was as follows –

“Good afternoon Mofat. I trust you are keeping well. Kindly pick a letter from Mwaluma inviting you to attend a disciplinary hearing on Fridays 21.11.2014 at 12.00 pm. Sarah Chege.”

The message is clear that there is a letter inviting him for a disciplinary hearing. There is a date and time. The claimant chose not to respond to the message or pick the letter. He cannot mourn about having been served by way of sms because he was not. He ignored the sms but was well aware about its contents, which was that here was a letter inviting him for a disciplinary hearing. The claimant did not attend the hearing of 21st November 2014 whose message was sent by sms. He again did to attend the hearing of 12th January 2015 which was delivered to him through registered email and which he has not denied receiving.

I find that the claimant was given an opportunity to be heard at a disciplinary hearing but decided not to present himself for the same. What an employer is obliged to do is to give the employee the opportunity to be heard. If the employee decides not to take up the opportunity, the employer is under no obligation to wait for the employee until the time he chooses to present himself.

In this case, I find that the claimant was given an opportunity to be heard. The respondent thus met the threshold for a hearing as provided under the Employment Act.

For these reasons I find that there was valid reason to discipline the claimant and that he was given an opportunity to present himself before the disciplinary committee, which he squandered. The summary dismissal was therefore for valid reason and with fair procedure. It is therefore regular.

Remedies

The claimant prayed for salary up to 26th May 2015. Having been dismissed on 2nd March 2015, he is not entitled to salary up to May 2015.

The claimant is further not entitled to salary for the period during suspension as the respondent's terms provided for no salary during the period of suspension.

The claimant has not shown that his terms of employment provided for payment of gratuity. The prayer for the same is thus not proved and is dismissed. The claimant is further not entitled to future earnings, as the same is not provided for in his contract or by law.

The claimant did not deny owing the respondent the amount claimed as outstanding loan in the counterclaim. I therefore find that the claimant owes the sum claimed in the counterclaim.

Conclusion

Having found that the summary dismissal of the claimant was regular, the claim is dismissed and judgment entered in favour of the respondent in terms of the counterclaim in the sum of **Kshs.981,057.71/=**.

There shall be no orders for costs

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF AUGUST 2018

MAUREEN ONYANGO

JUDGE