



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 686 OF 2010

(Before Hon. Justice Mathews N. Nduma)

KENYA UNION OF COMMERCIAL

FOOD AND ALLIED WORKERS (KUCFAW).....CLAIMANT

VERSUS

MWALIMU COOPERATIVE SAVINGS &

CREDIT SOCIETY LIMITED.....RESPONDENT

JUDGMENT

1. The two grievants Samwel M. Nzioki and Lincoln K. Njeru were employed by the Respondent.
2. On 8th September, 2006 the two grievants were interdicted from employment and then employment terminated on 20th April, 2011.
3. The two grievants were accused as follows:-

That on 1st August 2006, the 1st grievant transferred Kshs.2 Million from a fixed deposit account of a customer by the name Rose W. Ngure without her authority to her savings account No. 502-0-1848. Thereafter the 1st grievant raised 4 cheques Nos. 9359, 9360, 9361 and 9362 of Kshs.500,000 from the said customer (Rose W. Ngure) account.
4. The 1st grievant then allowed a stranger one Esther N. Mugo to collect the 4 cheques, without the authority of Rose.
5. The 2nd grievant then banked two of the 4 cheques in an account belonging to one Jonathan J. Kahihu account No. 502-0-1846 instead of account no. 502-0-1848 belonging to Rose Ngure.
6. The other two cheques were banked at Finance Bank but were stopped before withdrawal.
7. The two grievants were charged in a criminal court but were acquitted of charges of fraud.
8. On 21st November, 2000, the Respondent wrote show cause letters to the grievants.
9. On 23rd November, the Union wrote to the Respondent stating that it had taken up the matter. The union reported the dispute to the Ministry of Labour.
10. The 1st grievant did not respond to the show cause letter. The 2nd grievant responded to the show cause letter on 23rd November, 2006.
11. The Ministry of Labour instituted investigations into the matter. The investigation went on upon the parties filing Memoranda. The Ministry of Labour prepared a report with recommendations to the effect that the 1st grievant be accorded normal termination of employment and be paid terminal benefits and the 2nd grievant be reinstated.
12. The two grievants communicated to the Respondent accepting the recommendations by the Ministry of Labour.

13. On 9th September, 2009 the two grievants were acquitted by the criminal court.

14. The grievants state that they transacted in the alleged case, in the normal course of employment. That they did not deviate from the normal banking procedure. That they were not guilty of any wrong doing. That they were not accorded proper disciplinary hearing before the termination. That they were vindicated by the criminal court which acquitted them of any wrong doing.

15. The Claimant prays that:-

(i) The grievants be reinstated to their work without loss of benefits.

(ii) In the alternative the termination of the employment of the grievants be declared unlawful and wrongful and the grievants be paid maximum compensation for wrongful loss of employment.

(iii) The grievants be paid all terminal benefits set out in 3.0 of the Memorandum of Claim including the days worked up to the date of termination on 20th April, 2011.

Response

16. The Respondent filed a Memorandum of Response with list of documents on 19th November, 2013. The Respondent participated in the trial but did not call any witness in support of its case and to produce to court the documentation it relies on in the matter. There was no agreement by the parties to waive oral testimony. The testimony by CW1, Samuel M. Nzioki, the 1st grievant remains completely un rebutted.

17. The Respondent filed written submissions in which it prays that the suit be dismissed as the grievants termination was lawful and fair.

Determination

18. The issues to determination are as follows:-

(i) Whether the termination of employment of the grievants was for a valid reason and in terms of a fair procedure.

(ii) Whether the grievants are entitled to the reliefs sought.

Issue i

19. The court has considered the pleadings by the parties and the testimony by CW1. The court has also taken into consideration the report by Mr. P. N. Macharia, the labour officer who investigated the matter. The investigator recommended that the 1st grievant be accorded a normal termination in accordance with the parties CBA and that the 2nd grievant be reinstated to his work.

20. The grievants accept the recommendations by the Principal Labour Officer.

21. A careful analysis of the charges levelled against the grievants leads the court to the conclusion that there were errors of judgment by the grievants in discharge of their work, which did not amount to misconduct or gross misconduct. The officers followed routine instructions in the course of their employment which led to transfer of money to the wrong accounts. The grievants did not commit any theft, fraud nor was there any evidence of collusion with the 3rd parties who benefited from the errors that occurred.

22. The grievants as observed by the labour officer were long standing officers of the Respondent with good record. The 1st grievant did most of the impugned transactions and the 2nd grievant merely concluded the same. This was the reasoning behind the labour officers recommendation for a normal termination and a reinstatement respectively.

23. The cause of action in this matter arose before the coming into effect of the current Employment Act, 2007. The Law applicable to the case is therefore the Employment Act, Cap 226 Laws of Kenya.

24. Having failed to testify in this matter, the Respondent has failed to provide any valid reasons for the termination of the employment of the grievants. Accordingly, the Claimant has proved on a balance of probabilities that the grievants employment was terminated for no valid reason and that it was not in accordance with the laid down procedures of the Respondent and the law applicable at the time. The court finds accordingly.

Issue ii

25. Having found that the termination of the employment of the grievants was wrongful and unfair. The court does not consider reinstatement of the grievants to be the appropriate remedy in the circumstances of the case. The grievants held positions of trust. This trust has been eroded by the allegations made against them. The case has taken long to conclude and the circumstances of the Claimants and Respondent have changed. The court has found that the grievants made errors of judgment in their normal course of duty and contributed to their termination of employment.

26. Accordingly, the court makes a finding that the 1st and 2nd grievants be accorded normal termination and be paid terminal benefits in terms of the parties' Collective Bargaining Agreement.

27. In the final analysis judgment is entered in favour of the grievants as against the Respondent as follows:-

(i) The grievants be paid all outstanding wages, leave pay and allowances as at the date of termination in terms of the parties' Collective Bargaining Agreement.

(ii) The grievant be paid in lieu of notice in terms of the Collective Bargaining Agreement.

(iii) The grievants be paid severance pay in terms of clause 13.0 of the Collective Bargaining Agreement.

(iv) The awards in (i) (ii) & (iii) above be computed, filed and served by the Claimant within 30 days. Respondent to file any comments thereof within 14 days of service. Judgment on computation be delivered by the principal judge at Nairobi on a date to be given in court.

Dated and Signed in Kisumu this 31st day of July, 2018

Mathews N. Nduma

Judge

Delivered and signed in Nairobi this 10th day of August, 2018

Maureen Onyango

Judge

Appearances

Mr. John Owiyo for Claimant Union

M/s Kanyiri for Respondent

Anne Njung'e – Court Clerk