



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 52 OF 2017**

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

**MARY KEMUNTO ONTITA .....CLAIMANT**

**VERSUS**

**WAKENYA PAMOJA SAVINGS CREDIT**

**CO-OPERATIVE SOCIETY LIMITED.....RESPONDENT**

**JUDGEMENT**

This matter was originated by way of a Memorandum of Claim dated 27th November, 2017. The issues in dispute are therein cited as;

- a) *Breach of Employment Contract.*
- b) *Unpaid Terminal dues and other allowances.*
- c) *Whether the Claimant was unlawfully, unprocedurally and unfairly summarily dismissed from employment by the Respondent.*
- d) *Whether the Claimant is entitled to compensation for unfair termination from employment.*
- e) *Whether the Claimant is entitled to an award of Certificate of Service.*
- f) *Whether the Claimant is entitled to an award of compensation for breach of contract; and*
- g) *Who should pay for the costs of this suit.*

The respondent in a Statement of Defence dated 19th December, 2017 denies the claim and prays that the same be dismissed with costs.

The claimant thereafter filed a Reply to the Respondent's Statement of Defence in which she reiterates and reinforces her case as set out in the claim.

The claimant's case is that on or about 30th December, 2005, she was employed by the respondent. This continued until 5th December, 2016 when she was irregularly, illegally and unprocedurally dismissed from employment on unfounded and baseless unsubstantiated claims.

The claimant's further case is that she worked under a continuous, permanent and pensionable terms having had such confirmation on 21st August, 2015. She rose through the ranks from an Office Messenger to an Operations Manager, Systems Administrator and several other positions summing up with that of Microfinance Officer at the time of termination. At this time, she was entitled to the following benefits;

- i) *Basic salary of Kshs.18,092/= per month*
- ii) *House allowance of Kshs.5,000/= per month*
- iii) *Medical allowance of Kshs.4,034 per month*

iv) Subsistence allowance of Kshs.1,320/= per month

*Making an aggregate salary of Kshs.28,446/= per month. And;*

v) Annual leave allowance of Kshs.12,000/=

vi) Thirty (30) working days leave.

The claimant's other case is that her duties and functions were well laid out in her letter of appointment dated 24th January, 2014. Again, her performance record was blemish free and evidenced by her various rise through the works of the respondent.

The claimant's further case is that on 8th March, 2016, she was issued with a letter from the Human Resource Manager indicating that she had defrauded the respondent of a sum of Kshs.81,860.00 through unprocedural and fictitious withdrawals. She was required to show cause as to why disciplinary action ought not to be taken against her.

Her further case is that the allegations raised did not fall under her scope of duty and further, this was a diversionary tactic to implicate her in wrong doing in areas outside her scope of work.

The claimant's further case is that upon receipt of the notice to show cause, she was invited to the CEO's office and forced to admit liability and offer a proposal for repayment which she did with a view to securing her employment.

The claimant avers that there was no further conversation on the subject save for a letter of suspension which raised the figure in issue to Kshs.120,505.00. She was, on the respondents instigation arrested and arraigned at Ogembo Police Station but released on a bond of Kshs.5,000.00.

Despite her monthly reports to her place of work as instructed in the letter of suspension, she was not paid anything notwithstanding the provisions of clause 10(b) of the subsisting CBA between her union and the respondent. Her suspension was always extended in writing on a month to month basis.

She claims as follows;

*i) A declaration that the termination was wrongful, unfair and unlawful and thus for an order for payment of all terminal dues and benefits owed and full compensation for wrongful dismissal from employment as particularized hereunder;-*

*a. 12 months pay as compensation and damages for unlawful termination (Kshs.341,352/-)*

*b. Kshs.170,676/= being severance pay tabulated as;-*

*Kshs 28,446 x 15 days x 12 years (Kshs.170,676/=)*

30

*c. Kshs.77,662/= being salary for days worked less advance*

*d. Unpaid salary of Kshs.28,446/= per month x 19 months (since March 2016 to date) = Kshs.540,474/-*

*e. House allowance of Kshs.5,000 per month x 19 months (since March 2016 to date) = Kshs.95,000/=*

*f. Medical allowance of Kshs.4,034 per month x 19 months (since March 2016 to date)= Kshs.76,646/=*

*g. Subsistence allowance of Kshs.1,320/= per month x 19 months (since March 2016 to date) = Kshs.25,080/=*

*h. Leave allowance (earned but not paid) of Kshs.28,446/= x for 7 years tabulated as;-*

*Gross salary x years never gone for leave = Kshs.199,122/=*

**GRAND TOTAL = KSHS.1,526,012**

*ii. Certificate of Service as per Section 51 of the Employment Act.*

*iii. Costs and Interests of this suit from the time of filing until its conclusion.*

The respondent's case is that the claimant was working as a teller at Ogembo Branch and assigned code number Teller 01. She involved in making fictitious entries in the respondent's customer's accounts between 1st February, 2016 and 10th February, 2016.

The respondent's further case is as follows;

3. *The Respondent contends that when the fictitious and fraudulent transactions come to the knowledge of the Respondent he conducted an internal audit, then report compiled disclosed that Teller 01 the Claimant herein made unprocedural and fictitious withdrawals between 1<sup>st</sup> February and 10<sup>th</sup> February 2016 in the course the Respondent lost total sum of Kenya shillings One Hundred and Twenty Thousand Five Hundred and Five (Kshs.120,505/-)*

#### **PARTICULARS OF FRAUD**

- i. The Claimant made payment without any support document particularly hard print out of cash payment vouchers.*
- ii. The Claimant made withdrawals of customer's account that had no balance and had already been withdrawn.*
- iii. The cash payment vouchers had been transacted by more than one Teller on the same day.*

She admitted this vide a letter dated 3rd March, 2016 and sought forgiveness on grounds of her good record. This record is however denied on grounds of frequent absenteeism which is on record.

Her case is further expressed as follows;

*12. Paragraph 13 of the statement of claim the Respondent contends that during the claimant's suspension period she was throughout paid half salary. The allegation that she was not paid any money is untrue and is merely meant to mislead this Honourable Court.*

*13. Paragraph 14 of the statement of claim the Respondent contends that the claimant was invited to attend disciplinary committee meeting vide a letter*

*dated 6<sup>th</sup> June 2016. The meeting was scheduled on 13<sup>th</sup> June 2016. That on 13<sup>th</sup> June 2016 the claimant attended the meeting and made representation. Minutes for the meeting of 13<sup>th</sup> June 2016 are clear of what happened. The meeting was also attended by two union representatives.*

*18. Paragraph 20 of the statement of claim the Respondent contends that from the foregoing paragraphs the Claimant was aware of the allegations against her. The Claimant in response to those allegations wrote a letter of apology to the Respondent. The Claimant further wrote other letters to the Respondent making proposals on how to put the matter to rest. It is therefore not true that the Claimant dismissal was mooted with malice or unfounded claim.*

The respondent's other case is that the extension of the claimant's suspension was intended to give room for investigations into the allegations against the claimant and four others. Out of these five, the claimant and two others would not exonerate themselves and were dismissed while the other two were retained as their cases were explicable.

It is the respondent's penultimate case that the claimant's dismissal was regular and unbiased. Her dues are still owed because she has not acceded to the clearance process which would enable computation and payment of her terminal dues.

The matter came to court variously until 2nd July, 2018 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
2. Is the claimant 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 wrongful, unfair and unlawful. The claimant in her written submissions dated 12th July, 2018 reiterates and submit her case of unlawful termination of employment.

On this, she seeks to rely on the authority of Samuel **Kipchumba Kaptoge v Moi Teaching & Referral Hospital [2015] eKLR** where the court observed as follows;

*...keeping the claimant for 5 years on suspension and without salary was unconscionable and although the contract appeared to have been followed, this was unconscionable and unfair conduct on the part of the Respondent.*

*Further, not concluding the process expeditiously and fairly considering the changed statutory framework was unfair labour practice...*

This was in addition to the authority of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** where under similar

circumstances, the court held that the employer had failed to prove that the termination was valid.

At the close of the day, the claimant avers that her dismissal was unlawful for the following reasons;

- a) *The Respondent did not issue the Claimant Termination Notice as provided for under Section 35 (1) (c) and Sec. 36 of the Employment Act.*
- b) *The Claimant was placed in an inordinately long suspension without pay.*
- c) *The Respondent failed to give the Claimant a Certificate of Service contrary to section 51 of the Employment Act.*
- d) *The Claimant was never accorded a hearing nor an opportunity to call her witnesses or a Union Representative in her defense as provided for under Section 41 and 44 of the Employment Act.*

The respondent's submissions dated 6th July, 2018 echo and submit a case of lawful termination of employment. She particularly seeks to rely on section 44 (4) (c) and (g) of the Employment Act, 2007 which provides the grounds for summary dismissal as follows;

*44 (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (32) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-*

a. ...

b. ..

*c. an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;*

d. ...

e. ...

f. ..

*g. an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property*

It is her submission that the termination of the employment of the claimant was occasioned by her gross misconduct and therefore was made on lawful cause. It was fair and valid and related to the employees conduct as enunciated under section 45 (2) (a) and (b) of the Employment Act, 2007.

The respondent further sought and submitted the reliance on the authority of **Sarah Wanyaga Muchiri v Henry Kathii & Another, (2014) eKLR** where Abuodha, J. in an elaboration of the meaning of unfair termination of employment utilized the dictum of Lord Denning in the authority of **British Leyland UK Ltd v. Swift [1981] IRLR 91** as follows;

*“The correct test is: Was it reasonable for the employers to dismiss him” If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him”*

The respondent further submits a case of fair termination of employment in that the claimant was invited and participated in disciplinary proceedings held by herself. This is evidenced by Minute No. 02/13/06/2016. This satiated the requirements of Section 41 of the Employment Act, 2007 thereby resulting in an outright case of fair and lawful dismissal of the claimant.

Overall, the respondent's case overwhelms that of the claimant in terms of evidence. It would appear that the claimant's case is founded on misrepresentations and is utterly untruthful. The respondent has adequately adduced documentary evidence of the reasons and process of the termination of the employment of claimant. This is not controverted by the evidence of the claimant.

Section 47 (5) of the Employment Act, 2007 is mastery on the issue of burden of proof in employment cases. This is as follows;

*47 (5) “For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer”*

In this case, the claimant has failed to discharge the burden of proving a case of unlawful termination of employment. I therefore find a case of lawful termination of employment and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is not. Having lost on a case of unlawful termination of employment, she becomes disentitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their costs of the same.

**Delivered, dated and signed this 9th day of October, 2018.**

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr.Koech instructed by Bett & Company Advocates for the claimant.
2. Mr. Orina instructed by E. M. Orina & Company Advocates for the respondent.