



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO 1918 OF 2013**

**DUNCAN MBATHI MULEVI.....CLAIMANT**

**VERSUS**

**WANANDEGE COOPERATIVES**

**SAVINGS & CREDIT SOCIETY LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claimant brought this suit on 29.11.2013 alleging that he was unfairly dismissed from employment by the respondent and prayed for the following reliefs:-

- a) 12 months' salary for unfair termination .....Kshs.1,117,320.00
- b) 3 months' salary in lieu of notice .....Kshs.279,330.00
- c) General damages for unfair termination
- d) Costs and interest

2. The respondent filed defence on 26.7.2016 denying the alleged unfair termination. She averred that the claimant was dismissed fairly for a valid reason under section 44(4) (c) and (g) of the employment Act and after following the fair procedure laid down by section 41 of the Act. She therefore prayed for the suit to be dismissed with costs.3. The suit was heard on 18.9.2018 and 25.9.2018 when the claimant testified as Cw1 and the respondent called her CEO Mr. Boniface Muthama to testify as Rw1. Thereafter none of the parties filed submissions as directed by the court.

**Claimant's case**

4. Cw1 testified that he joined the respondent on 2.6.1992 as an Accounts Clerk but later he rose the ranks to become the Chief Accountant earning Kshs.93,110 per month. In November 2010, he was away on his annual leave when he was called by phone to attend a meeting with the respondents staff committee where he also found other members of staff invited. The agenda for the meeting was not communicated but at the meeting allegations were made against him including the loss of Kshs.105,000 and poor performance.

5. He however denied all the allegations. However, he explained that he wrote the letter dated 22.11.2010 admitting liability to pay the Kshs.105,000 because it was a debt and not defrauded money. He further contended that the meeting with the staff committee was not a disciplinary hearing because he was not notified before hand that the proceedings could led to disciplinary action and he was not allowed to call any witness to accompany him.

6. Cw1 further testified that after the said meeting he received a dismissal letter dated 29.11.2010. He described the summary dismissal as unfair because it was done without being serviced with any show cause letter or fair hearing. He further denied the valid of the reasons cited including poor performance contending that he was last evaluated in June 2009 for the period 1.1.2008 to 31.12.2008 and he scored 71%.

7. He contended that since then he was not evaluated again and dismissed the Performance Appraisal forms for 1.1.2009 – 31.12.2009 scoring him 39% as a invalid because they were not signed by both himself and the appraiser (his supervisor). He further denied that he was responsible for the loss of Kshs.940,482 and contended that the said figure was an after thought. He contended that the only money discussed during the committee meeting on 22.1.2010 was Kshs.105,000 and which he admitted liability to pay.

8. On cross examination, Cw1 admitted that the reason for his dismissal were cited as anomalies in entries and failure to perform his duties. He further admitted that he had received warning letters before including 3.9.2007 and 1.11.2007 for failure to bank cheques and failure to

complete reconciliation. He further admitted that on 22.11.2010 he was invited to meet the staff committee where he was shown a paper containing allegations against him.

9. He however denied being told to defend himself. He further denied that he admitted having failed to account for Kshs.105,000 during the meeting and maintained that he never owed any debt to the SACCO. He admitted that he signed the letter dated 22.11.2010 to Provident Fund to pay the SACCO Kshs.105,000 under pressure. He however admitted that he never complained anywhere that he was forced to write the said letter.

10. He further admitted that he had a secret password to access computer but denied knowledge that it was used for fraudulent transactions at the SACCO. Finally, he admitted that the minutes of the staff committee meeting of 22.11.2010 recommended for his dismissal but maintained that the said action was unfair because he was not notified that the meeting was a disciplinary process where he could come with a companion.

### **Defence Case**

11. Rw1 joined the respondent in July 2015 as the CEO. He confirmed that the claimant was the Chief Account for the Respondent until

29.11.2010 when he was dismissed after investigations done in 2010 revealed that his password was involved in fraudulent transaction on members accounts and the SACCO inter control accounts.

12. Rw1 further testified that the claimant was also found to have neglected his duty to reconcile inter-activity accounts despite previous warning letters having been served upon him costs.

13. On cross examination Rw1 admitted that whereas the Appraisal forms for 2008 were signed by both the claimant and his appraiser, the 2009 were not signed by any one. He further admitted that the claimant was called from leave to appear before the staff committee on 22.11.2010 but denied knowledge whether the caller gave the claimant the agenda for the said meeting. He however contended that staff committee deals only with staff matters and the claimant knew he was attending a hearing.

14. He contended that the claimant never denied that his password was used in fraudulent transactions. He further contended that fraudulent transactions where claimant's password No. 131 was used totaled to Kshs.940,482.78 but admitted that the claimant admitted liability for only Kshs.105,000 and authorized for its recovery from his benefits.

### **Analysis and determination**

15. There is no dispute that the claimant was employed by the respondent as the Chief Accountant until 29.11.2010 when he was summarily dismissed. The issues for determination are:-

- a) whether the dismissal was unfair;
- b) whether the reliefs sought should be granted.

### **Unfair dismissal**

16. under section 45 (2) of the Employment Act, termination of employees contract is unfair if the employer fails to prove that it was grounded on a valid and fair reason(s) and that it was done after following a fair procedure. A valid and fair procedure is one that relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements. Fair procure on the hand is one that accords to justice and equity and basically it relates to according the employee a fair hearing before terminating his services.

### **Reasons(s) for dismissal**

17. In this case the reason cited for dismissing the claimant is captured in the dismissal letter dated 29.11.2010 as follows:-

***“This is to inform you that following your involvement in the anomalies on member's account which you agreed to during investigation meeting with staff subcommittee and failure to perform your duties, the Central Management Committee has decided to summarily terminate your services with society as from 29th November 2010.”***

18. The foregoing excerpt from the dismissal letter means that the claimant was dismissed for being involved in wrong entries on a member's account and he admitted the same during the investigations by the staff subcommittee. The letter also stated that the claimant failed in performance of his duties. The claimant denied the alleged involvement in the fraudulent entries and denied liability for any losses related to the said fraudulent transactions.

19. The respondent has produced the claimant's letter dated 22.11.2010 by which, the claimant admitted owing Kshs.105,000 to the SACCO and authorized its recovery from his provident Fund benefits. The respondent contended that the said letter was a voluntary admission by the claimant that he was involved in the fraudulent transactions. The claimant has contended that he wrote the letter under pressure although he never lodged complaint anywhere after that.

20. The letter in issue states as follows:

**“RE: AUTHORITY TO RECOVER KSH.105,000**

*Thereby authorize you to recover the sum on Kshs.105,000 from my Provident Fund being a debt owed to the society and any other amount that may be owed.*

*Yours sincerely*

*DUNCAN MBATHI.”*

21. The question that arises is whether the said letter contains any admission of liability to the alleged fraudulent transactions. To the best of my interpretations, the letter does not admit liability for any fraudulent transactions. Even if one was to say that the letter was written from a certain context related to investigations by the staff subcommittee, the minutes of the committee do not mention such money. Consequently, I find that the respondent has not proved on a balance of probability that the claimant admitted his involvement in fraudulent transaction to the tune of Kshs.105,000 or at all since the letter dated 22.11.2010 never admitted such fraudulent transaction.

22. As regards the offence of failure by the claimant to perform his duties, the respondent relied on the show cause letter dated 1.11.2007 which accused the claimant of failure to finalize pending Bank Reconciliation issues. She also relied on the claimant's letter dated 6.5.2010 by which he acknowledge his failure to reconcile inter-current accounts and requested to do it in June/July 2010 after his annual leave. He also requested for 2 casuals to be hired to assist him. She further relied on her letter dated 10.5.2010 which responded to the said request for the 2 casual employees and gave the claimant a deadline of 1.8.2010 to finalize the reconciliation exercise.

23. The claimant has admitted the said correspondences between the employer and himself in relation to the delayed reconciliation of bank accounts. I therefore find and hold that the respondent has proved that the claimant failed to perform his duties to the required standards. Although he contended that his performance was good as per the last performance appraisal for the year 2008, the fact remains that he admitted in evidence and by his letter dated 6.5.2010 that he had failed to perform his duty as required forcing the employer to extend the deadline and to hire casual to assist him.

24. The said careless, negligent, or poor performance constitute a valid and fair reason for summary dismissal of the claimant under section 44(4) (c) of the Employer Act. The said provision entitles the employer to dismiss summarily his employee if the employee:-

***“.....wilfully 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.”Procedure followed***

25. Under section 41 of the Act, before terminating the employee's contract on ground of misconduct or poor performance, the employer is enjoined to first explain the reason to the employee in a language he understands and in the presence of another employee or shop floor union official of his choice. Thereafter the employee and his chosen companion are entitled to a chance to air their representations, which must be considered before the dismissal is decided. The said provision is coached in mandatory terms and leaves no option to the employer.

26. In this case, the claimant contended that he was never accorded any hearing as contemplated by the said section 41 of the Act. He further contended that the meeting with the staff subcommittee on 22.11.2010 did not constitute a disciplinary hearing because he was never notified that it could lead to his dismissal. He further contended that he was never accorded a chance to call witness to accompany him to the said proceedings.

27. The said contention is corroborated by the excerpt from dismissal letter reproduced above. The said letter acknowledged that the claimant appeared before the staff subcommittee during investigation meeting as opposed to disciplinary hearing. The proceedings of the investigatory committee did not therefore fit within the statutory meaning of a fair hearing. The claimant was never notified that the proceeding before the staff subcommittee on 22.11.2010 was disciplinary hearing, which could lead to his dismissal. He was also not granted the right to call a fellow employee of his choice to accompany him to the proceedings. The said investigatory proceedings cannot be described as being a hearing that is in accordance with justice and equity. Therefore, I return that the respondent has failed to prove that she followed a fair procedure before dismissing the claimant and as such, the summary dismissal was rendered unfair within the meaning of section 45 of the Employment Act.

### **Relief**

28. Under section 49(1) read with section 50 of the Act, I award the claimant one month salary in lieu of notice plus 6 months' salary compensation for unfair termination of his contract. The claimant did not produce any evidence to prove that he was entitled to 3 months' notice before termination. In awarding the compensation of 6 months' salary, I have considered not only his long service of 18 years but also the fact that he contributed to the dismissal through misconduct.

29. The claim for general damages for unfair termination is dismissed because it would amount to double benefit to the claimant in view of the award of compensation above.

### **Conclusion and disposition**

30. I have found that there was a valid and fair reason to warrant summary dismissal of the claimant. I have however further found that the dismissal was rendered unfair by the failure by the respondent to follow a fair procedure.

Consequently, I enter judgment for the claimant in the following terms:-

(a) Notice..... Kshs. 93,110 (b) Compensation ..... Kshs. 558,660

**Total .....Kshs.651,770**

The claimant is also awarded costs and interest at court rates from the date hereof. The decreed sum will however be paid less statutory deductions.

**Dated, Signed and Delivered in Open Court at Nairobi this 19th day of December, 2018**

**ONESMUS N. MAKAU JUDGE**