



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2072 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

BANKING INSURANCE AND FINANCE UNION (KENYA)..CLAIMANT

VERSUS

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

JUDGMENT

By Memorandum of Claim dated 5th October 2012, filed by the Claimant Union on behalf of Michael Ongoro, alleges wrongful dismissal of Michael Ongoro's employment by the Respondent and seeks the following remedies:-

- a) That this Honorable Court finds the dismissal wrongful and order re-instatement of the grievant to his former position without any loss of employment benefits or seniority.
- b) That the Honorable Court should also order the Respondent to pay to the grievant all the pecuniary loss in salaries and allowances due to this wrongful, unjust and unlawful dismissal.
- c) Costs for this suit.

The Respondent a limited liability company and operating as a financial institution under the provisions of the Banking Act filed a Memorandum of Reply and Counterclaim dated 15th May 2013 in which it avers that the grievant was summarily dismissed following due process and after conclusion of investigations on conduct of the grievant.

Claimant's Case

The grievant **MICHAEL ONGORO (CW1)** testified on 12th June 2016. He stated that he was employed by the Respondent bank from 1st August 1994 in the position of a clerk and posted to the Ukulima Branch. Further that during his years in employment he was transferred to University Way Branch (July 2008), Kisumu (February 2003), Security Services Department (March 2010) and Documents and Voucher Processing Department (March 2011). It was his evidence that the last position held was Clerk, Documentation Centre Nairobi, Industrial Area.

It was further his evidence that he was terminated by the Respondent on 29th June 2011. Further that he was served with a Notice to Show Cause letter in 2008 while working at the Respondent's Kisumu branch (3 years prior to the letter of termination).

CW1 testified that the Show Cause was on misposting into an account and that he did respond to the Show Cause Letter vide the letter dated 20th February 2009 and was issued with a warning letter.

CW1 Further testified that on 26th April 2011 he was issued with another Show Cause Letter on the same issue raised in the show cause letter dated 20th February 2009 and that in his response he indicated that the matter was previously handled and settled by the Respondent.

CW1 stated that he was subsequently invited for a disciplinary hearing on 17th June 2011 at 2.30 pm and that he explained that the misposting was reversed and that this was well within the knowledge of the Respondent's Kisumu Branch Manager.

Further, that the affected customer had admitted liability and was willing to settle the amount wrongly debited into his account. It was CW1's

evidence that he was not treated fairly as the termination amounted to double punishment, the matter having been previously dealt with and concluded.

CW1 testified that he was also served with a show cause letter while he was attached to the security department, radio room of the Respondent Bank in which he was accused of exposing the Respondent Bank to security risk. Similarly, he did respond indicating that the door was faulty, a fact that he had brought to the attention of his supervisor. It was his evidence that no action was taken against him by the Respondent on that particular occasion.

It was CW1's evidence that he was a victim of the Respondent's witch hunt as the process of the disciplinary hearing was not prompt, fair and firm.

CW1 avers that he was wrongfully dismissed and that he seeks reinstatement and pecuniary loss in salaries and allowances due for wrongful dismissal as per recommendation of the labour officer at annexure 8 of the Memorandum of **Claim**.

On Cross examination CW1 averred that he was not informed of the reason for his termination from the Respondent Bank's employment but admitted having been issued with a letter of termination.

CW1 admitted having misposted by debiting the account number 012400000336 (Kisumu Branch Check off Account) with Kshs. 194,000/- and credited account number 01109013141000 belonging to Lutgard Aluoch Oketch and that a reversal was done and the customer made a commitment to refund the money. CW1 denied knowing the account holder (Lutgard Aluoch Oketch).

On further cross examination CW1 stated that the disciplinary hearing though conducted was not fair as he was not given a chance to be accompanied by anyone and was present alone. It was his evidence that the letter inviting him for the disciplinary hearing did not make provision for him to be accompanied by anyone for the hearing.

CW1 further testified that he was not aware if the Respondent Bank had been able to recover the amount of money lost in the misposting.

Respondent's Case

The Respondent's case was heard on 10th November, 2016. RW1 (**SAMUEL OSERO**) Head of Security with the Respondent Bank testified for the respondent.

It was RW1's evidence that he investigated this matter and prepared a report on the same which was presented to the Respondent Bank.

It was his further evidence that he did record statements from Lutgard Aluoch Oketch and noted that the misposted amount of Kshs.194,000/- was reversed but overdrawn based on the account statements of the customer (produced in Court). The said customer confirmed having known the grievant on a personal level and that the grievant had indicated that once she withdraws the monies she would hand him Kshs. 150,000/-.

RW1 further testified that in conclusion to his investigations he did recommend to the Respondent Bank that there was fraud committed on the part of the grievant and that disciplinary action be taken against him. Further, that the overdrawn amount remained unpaid.

A copy of the report was produced as evidence in Court.

On cross examination RW1 testified that the grievant worked under him and had other disciplinary issues with the Respondent Bank.

RW2 (**SIMON MUREITHI MAINA**) the Employee Relations Manager at the Respondent Bank, testified on 26th September 2018 that the grievant was taken through a disciplinary process and was found culpable. That he was terminated in accordance with provisions of the staff manual and the CBA.

RW2 testified that the grievant was given a fair hearing and was given an opportunity to defend himself accompanied by a colleague, bring evidence and to appeal. That no appeal was preferred by the grievant following the Respondent Bank's decision to terminate his services.

On cross examination RW2 stated that the Bank discovered the misposting in 2008 and investigations in the matter were concluded in 2011.

On further cross examination RW2 testified that the officer who is supposed to initiate the disciplinary process is the Human Resource Officer after investigations are concluded which is what happened in the instant case.

On Re-examination RW2 indicated that it was not true that the matter of the misposting was concluded in 2008 as the operations manager of the Kisumu branch requested for investigations in the matter in April 2011.

The parties thereafter filed and exchanged written submissions.

Claimant's Submissions

In the written submissions the Claimant reiterated the contents of the Memorandum of Claim and the grievant's oral evidence in Court.

The Claimant submitted that re-instatement, re-deployment or re-engagement are remedies available in law and the parties CBA. The Court therefore has power to order for any of these remedies or even compensation as remedies for unfair labour practice which is a violation of the constitutional rights under Article 41.

The Claimant relied on **Cause Number 213 of 2015, Banking Insurance and Finance Union versus Co-operative Bank** and **Cause Number 2071 of 2012, Banking Insurance Finance Union Versus Co-operative Bank**.

The Claimant submitted that the instant cause be allowed as prayed.

Respondent's Submissions

The Respondent submitted that the grievant's termination was done in accordance to Section 45 (1) and (2), Section 41 of the Employment Act,

The Respondent further submitted that the grievant never denied having effected the transaction subject of the complaint. That the grievant admitted to misposting due to pressure of work and that although he alluded to a warning letter having been issued no evidence was adduced to support the same.

The Respondent places emphasis on the authority of **Mombasa Civil Appeal No. 3 of 2014 CFC Stanbic Bank Limited Versus Danson Mwakuwona (2015)eKLR** that relied on the Halsbury's Laws of England, 4th Edition, Vol. 16 (1B) paragraph 642:

"In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it has dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts."

The Respondent further relied on the case of **Earl Versus Slater & Wheeler (Airlyne) Limited (1973) 1 All ER 145** where the English Court in considering whether the employer acted reasonably in dismissing the employee stated:

"The question in every case is whether the employer acted reasonably or unreasonably in treating the reason as sufficient for dismissing the employee and it has to be answered with reference to the circumstances known to the employer at the moment of dismissal."

On the issue of reliefs sought the Respondent submitted the Court should dismiss the prayer for re-instatement of the grievant and relied on the case of **Kenya Airways Limited Versus Allied Workers Union Kenya & 3 Others (2014) eKLR** where Maraga J.A (as he was then) stated that re-instatement is not an automatic right of an employee; it is a discretionary remedy and as a principle of common law, it should not be forced against the will of either party. Further, the Respondent relied on the case of **Kenya Power and Lighting Company Limited Versus Aggrey Lukorito Wasike (2017) eKLR**.

The Respondent further submitted that the prayer for payment for all pecuniary loss in salary and allowances has no basis as the same would amount to unjust enrichment by the Claimant. The Respondent relied on the case of **Barclays Bank of Kenya Limited & Another Versus Gladys Muthoni & 20 Others (2018) eKLR** upheld the decision in Rika J. in **Abraham Gumba Versus Keny Medical Supplies Authority (2014) eKLR** and stated as follows:

"The employment relationship is not a commercial relationship, but a special relationship, which must be insulated from the greed associated with profit making motives, inherent in commercial contracts."

The Respondent submitted that the Claim be dismissed with Costs and that its counterclaim be allowed as prayed.

Determination

Having considered the pleadings, evidence, submissions and authorities cited by the parties, the following are the issues for determination:

1. Whether the termination of employment of Michael Ongoro was valid both procedurally and substantively
2. Whether the Claimant is entitled to the reliefs sought
3. Whether the Respondent is entitled to the counterclaim

Whether the termination was unfair

Section 41 of the Employment Act provides for the procedure for termination while section 43 of the Employment Act provides that the employer must prove valid reason.

In the case of **Walter Ogal Anuro –v- Teachers Service Commission (2013) eKLR** the Court held that:

"... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness."

Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

The grievant admits having been issued with a notice to show cause letter in 2008 following the misposting. He was invited for a disciplinary hearing on 17th June 2011 after investigations were conducted in the matter and recommendation indicated that the disciplinary process be conducted against the grievant see annexure 4. In the letter the grievant was allowed to come with a member of staff to the hearing. The hearing was conducted and minutes of the same produced in court as annexure 6.

I find that there was valid reason for termination as the grievant admitted the misposting and the client whose account the money was posted to stated that she knew the grievant who had planned to have Kshs.150,000 withdrawn and sent to him. This was evidence of fraud which the grievant did not controvert.

Further, the grievant was taken through a fair procedure having been informed of the charges against him, taken through a disciplinary hearing and given an opportunity both to be accompanied and to submit evidence as well as to appeal against the decision to terminate his employment.

Remedies

The grievant's prayer for reinstatement must fail as he did not prove unfair termination. So would the prayer for payment of pecuniary loss of salaries and allowances due to wrongful, unjust and unlawful dismissal.

Counterclaim

The claimant did not file any defence to the counterclaim. From the evidence on record the grievant admitted the improper debiting of a customer's account and even refunded the sum of Kshs.25,000 as reflected in the deposit slips at Appendix 9 of memorandum of reply. He is therefore liable to refund the balance of Kshs.169,000 claimed in the counterclaim.

Conclusion

In conclusion I dismiss the claimant's claim herein and enter judgment for the respondent in the sum of **Kshs.169,000** with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE