



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1540 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 1st February, 2017)

JUSTUS A. M. SIGAH CLAIMANT

VERSUS

JUMBO SAVINGS & CREDIT CO-OPERATIVE

SOCIETY LIMITED..... RESPONDENT

JUDGMENT

1. The Claimant filed suit on 3.9.2014 through a memorandum of claim dated 15.8.2014, through the firm of Enonda, Makoloo, Makori and Company seeking damages for unfair an unlawful termination having been employed by the Respondents on 1st January, 2008 upto 9.6.2014.
2. It is the Claimant's contention that he was employed as an office assistant and rose through the ranks to the position of Operations Officer. He states that at all times he diligently worked for the Respondent until 31.1.2014 when he was suspended from duty for allegedly withdrawing Kshs. 50,000 and thereafter on 9th June, 2014, he received a letter of termination backdated to 31.3.2014. At the time of termination he was earning a gross salary of Kshs. 55,055.
3. The Claimant avers that he was not given a fair chance to defend himself against the allegations contained in his letter of termination and neither was he paid his terminal dues. He prays for judgment against the Respondent for unfair termination and to be paid damages.
4. The Respondent filed a Memorandum of Reply on 17th February, 2015, wherein they admit having employed the Claimant on 18th April, 2008, at a monthly salary of Shs. 24,000/= and that the Claimant rose through the ranks to the position of Operations Officer.
5. They state that the Claimant was suspended from duty on 31.1.2014 pending further investigations for fraudulently withdrawing Kshs. 50,000/= from the Respondent's bankers in excess of the amount approved by the Respondent's executive Committee for disbursement. He was asked to re-bank the said amount of Kshs. 50,000/= which he did on 4.2.2014.
6. The Respondent deny that the Claimant's termination was without regard to the Constitution and or the Employment Act or that it by way of a backdated letter of 31.3.2014 received by the Claimant on 9.6.2014.

7. They aver that that the Claimant was served with the termination letter on 31.3.2014 but he refused to acknowledge receipt until 9.6.2014 stating that he would only sign for it if he was agreeable to the calculation of his terminal benefits and as such they contend that the Claimant was aware of his termination as from 31.3.2014.
8. They admit that the Claimant's salary as at the time of termination was Kshs. 55,055 but state that half of it Kshs. 27,527.50 was payable during the period of his suspension which was in accordance with the Respondent's Personnel Policy Manual.
9. The Respondent deny that the termination was unfair as on 7.2.2014 the Claimant was present at their management committee meeting where the issue of the fraud was raised and the Claimant responded to the same.
10. It is the Respondent's further contention that the Claimant's terminal dues of Shs. 367,929 were paid to him including an overpayment of Kshs. 108,883/= applied to the payment of his loan dues, which amount was paid as gratuity whereas it was not payable as they claim he was a member of NSSF.
11. The Respondent filed a counterclaim in their amended defence wherein they state that they are entitled to a refund of the said Kshs. 108,883/=. They pray for the Claim to be dismissed with costs.
12. The matter was disposed of by way of written submissions in which the Claimant sets out the only contentious issue to be whether the termination of the employment contract was unfair and unprocedural.
13. He states that there was no basis for the Claimants' termination of employment and as such it was contrary to the law and an infringement on the Employment Contract, the applicable employment laws and constitutional rights.
14. The Claimant submits that the Respondent's actions were contrary to Section 41 and 42 of the Employment Act. The Claimant states that he was never issued with a show cause letter and neither was he informed to attend a disciplinary meeting to defend himself.
15. He urges the Court to find that he was unfairly and unlawfully terminated and cite the case of **Frederick Were Vs MK. Jeffery's Hauliers (2013) eKLR** where it was held:
- "... the days when employers treated their employees with disrespect are gone with the enactment of the Employment Act, 2007. This law grants rights to an employee who is terminated without due regard to due process and the applicable law. Apart from such an employee claiming their terminal dues, such an employee can also claim compensation for unfair termination and on support of such claim the Court can grant such termination."***
16. The Claimant submits that he has proved his case on a balance of probabilities and prays for the Claim to be allowed as drawn.
17. The Respondent submits that the Claimant's termination was lawful and fair as proper procedure was followed. They state that the Claimant withdrew Kshs. 50,000/= in excess of what had been authorized by the Respondent's Executive Committee which led to his suspension. He was ordered to re-bank the money within 12 hours which he did on 4th February, 2014. Prior to this the Respondent submit that the Claimant had received several warning letters relating to withdrawing unauthorized funds. The Respondent thus is of the view that there was a fair and valid reason for terminating the Claimant's employment.
18. The Respondent further maintains that due process was followed in termination of the Claimant. They state that according to Clause 15.5 of their Policy Manual they conducted an inquiry by holding a meeting on 7th February, 2014, where the Claimant was informed of the allegations made against him, the Claimant gave his response after which the Respondent resolved to hold another meeting to deliberate on the matter.

19. They state that the Claimant had ample time between 31st January, 2014, to 7th February, 2014, to make representations to the Respondent on the charges he faced which he failed to do. It is their contention that he was given ample time to prepare his defence and thereafter heard before the decision to terminate was made. They pray for the Claim to be dismissed with costs.

20. Upon hearing he parties herein, the issues for determination by this Court are as follows:

- 1. Whether there were valid reasons to terminate the employment of the Claimant.**
- 2. Whether due process was followed before the Claimant was terminated.**
- 3. Whether the Respondent have proved the Counter-Claim against the Claimant.**
- 4. What remedies to grant in the circumstances.**

21. On the 1st issue, the letter terminating the Claimant is dated 31.3.2014 and received by the Claimant on 9.6.2014. The letter states as follows:

“Further to our letter dated 31st January 2014 and your subsequent appearance during the Joint Board Meeting of 14th February 2014, the Board has taken the decision to terminate your employment contract effective 31st March 2014.

In view of the above, your termination package has been computed as follows:

- Severance pay at the rate of fifteen (15) days pay for each completed year of service.***
- One (1) months basic salary in lieu of notice.***
- Pay for any outstanding leave days payable or due from you to the SACCO.***
- Pension contributions subject to relevant legislation.***
- Statutory deductions and any outstanding amounts due from you to the SACCO as an employee and as a member.***

The above amount have been quantified in a separate Discharge Voucher which you are required to sign and return to the undersigned.

On behalf of the management, we wish to take this opportunity to thank you for services rendered to this SACCO during your employment with us and to wish you every success in your future endeavours.

Yours faithfully,

SIGNED

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22. The letter dated 31st January 2014 was on suspension from duty of the Claimant where it was stated:

“We have noticed with concern that on 29th January 2014, you fraudulently withdrew Kshs.50,000/= (shillings fifty thousand only) from the Bank in excess of the amount approved by the Executive Committee for disbursement through misrepresentation.

As this borders on gross misconduct, the Executive Committee has carefully analyzed your behavior and has decided to suspend you from duty with immediate effect pending further investigations. You will be eligible for half month’s pay during the period that you will be under suspension.

Meanwhile, you are hereby advised to make arrangements to re-bank the said amount within 12 (twelve) hours failure of which you will be liable to prosecution.

Kindly handover to Jumbo Office Administrator all the SACCO's documents/equipment, files (hard and soft), passwords, petty cash and any other items that have been under your custody by virtue of being an employee of the Society.

Any other pending clearance issues will be handled in due course.

Yours faithfully

Signed

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23. The termination letter therefore categorically omits to state the reason for the termination but refer to the letter of suspension which states that the reason for the suspension is failure to bank the 50,000/=.

24. Assuming that failure to bank the 50,000/= was the reason for the termination, this Court has to determinate if it was a valid reason.

25. Under Section 43 of Employment Act:

“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

26. A reason for termination must therefore be one that exists which would prompt the employer to terminate the services of the employee. The Respondents have submitted that this reason did exist and was presented to the Claimant.

27. The Respondent's letter terminating the services of Claimant refer to their Management Meeting held on 14.2.2014. The Minutes of the meeting held on 14.2.2014 have however not been submitted to this Court and whether this reason is valid or not is not clear.

28. It is also apparent that from the termination letter without reasons for the termination being expressly stated the Respondents opted to declare the Claimant redundant hence the offer to pay him severance pay of 15 days for each year worked. This reason is also echoed in their own bundle of documents being Minutes of the Management Committee held on 7.2.2014 at Minute No. 4/07/02/14(4) where it is stated:

“Simon: Apologized for coming for the meeting late and requested for a meeting through the Board Secretary to have the entire Board members discuss Justus' retrenchment. He also inquired on the presentation of financial accounts and schedule of meeting for the Annual General Meeting's (AGM) preparations-----”.

29. So whether the reason for termination was due to retrenchment or failure to bank 50,000/= as alleged is unclear and from Respondents own documents – it is contradictory and therefore I find that there was no valid reason to terminate the services of the Claimant.

30. The next issue is on due process. The termination letter refers to a Joint Board Meeting of 14.2.2014 which took the decision to terminate the Claimant's services with effect from 31.3.2014. The Respondents have insisted that the Claimant was subjected to due process. The process envisaged is the

one provided under Section 41 of Employment Act which states as follows:

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.

31. Reference is made to a meeting of 14.2.214 but there is no indication that the Claimant was subjected to any disciplinary process. There is no letter inviting him to any disciplinary hearing.

32. If I assume, the process was for redundancy the. Section 40(1) of Employment Act which states as follows come into focus:

1. “An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

(a) Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) The employer has paid an employee declared redundant not less than one month’s notice or one month’s wages in lieu of notice; and

(g) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service”.

33. None of the provisions above were complied with. It is therefore my decision that the termination of the Claimant was unfair and unjustified as provided for under Section 45(2) of Employment Act which states as follows:

2. “A termination of employment by an employer is unfair if the employer fails to prove:

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

34. Now concerning the Counter-Claim, the Respondent aver that the Claimant was overpaid by 108,883/= as terminal dues on account of gratuity which was neither provided for in the contract of service nor could the Claimant be entitled to because he was a member of NSSF.

35. In his termination letter, the Claimant was informed that he would be paid service pay at the rate of 15 days for each completed year of service among others. There was no provision for gratuity in the said letter. However in the discharge voucher produced by the Claimant – Appendix G – there is a payment of Gratuity for 108,883/=. However the promised service pay was never paid as promised. What was paid was gratuity at 15 days for each year worked.

36. Assuming gratuity was not payable, the Claimant was expected to be paid 20 days salary for each year worked and this is provided for in Respondents own Personnel Policy Manual and this comes to $20/30 \times 55,055 \times 6 = 220,220/=$ less what was paid as gratuity (instead of severance pay 108,883) = **111,337/=**.

37. The over payment as per the Counter-claim does not therefore arise and the same is dismissed.

38. Other than this, I find that the Claimant having been unlawfully terminated is also entitled to 12 months' salary for unfair termination = $12 \times 55,055 = 660,660/=$.

39. Other awards include payment for 52 days leave = **95,429/=**

40. Salary for May to 9th June 2014 when Claimant was served with a termination letter = **110,110/=**

TOTAL AWARDED = 977,536/=

Less statutory deductions

41. Plus costs and interest to run with effect from the date of this judgment.

Read in open Court this 1st day of February, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kibanya for Respondent - Present

Enonda for Claimant – Present