



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF

KENYA AT NAIROBI

CAUSE NUMBER 250 OF 2012

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS.....
CLAIMANT**

VERSUS

**MWALIMU CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED.....
RESPONDENT**

JUDGMENT

1. This claim was brought by the claimant union on behalf of the two grievants namely Kirimi Kanake and John Kihiko Kariu. Kirimi Kanake was employed on 5th March 1992 as a clerical officer at a monthly salary of Kshs.2,880/= and a housing allowance of Kshs.1,150/= per month.
2. In the year 2003, Kanake was transferred to customer care centre where he would advice members on the position of their loans, receiving mail and any other work assigned to him.
3. On 11th November 2003, Kanake received respondent's mail including ordinary letters and incoming cheques and recorded them in the register. After recording the mail, the letters would be taken to the departments concerned while cheques would be booked and taken to the cash office. According to the claimant union, on this particular day, Mr. Kanake, a few minutes as he was preparing to take the cheques to the cash office realized that one cheque for Kshs.177,060/= had disappeared from his custody. He immediately informed his supervisor who mobilized the staff within customer care to look for the cheque but was not found. The matter was reported to the auditor and asked to stop payment of the cheque. This was done and the member who drew the cheque replaced it with another.
4. According to the claimant union, despite the stop order, the cheque was presented for payment at KCB Eldoret Branch five months later and the person who presented it was arrested and charged.
5. On 24th October 2003, Kanake received once again a parcel from the Post Office, he opened the letters and among them was a loan application form which he booked and presented as required. According to the respondent, the same parcel contained a cheque no.3169 for Kshs.115,525/= drawn in favour of the respondent but Mr. Kanake did not book the same and take it to the cash office as required. Mr. Kanake denied seeing the said cheque. This cheque was cashed at KCB Eldoret Branch.
6. On 12th September 2005, Mr. Kanake was interdicted and accused of negligence, loss of said cheque and colluding with fraudsters which led to the loss of Kshs.115,525.70/=. On 30th September 2005, Mr. Kanake responded to the allegations against him.

7. According to the claimant union, Mr. Kanake was not invited to appear before the respondent's board to answer to the allegations before his arrest and court charges. Further, according to the union, the respondents knew too well that Kanake was facing criminal charges yet chose to invite him to appear before the board to answer to the allegations.
8. On 28th November, 2007, Mr. Kanake's advocate wrote to the respondent informing them that the subject matter for which they were summoning the grievant was pending before the Chief Magistrate Court and that any parallel proceedings would be *subjudice*. On 5th October 2009, the respondent terminated Mr. Kanake's services for failing to attend all the scheduled hearings since interdiction.
9. Mr. John Kihiko Kariu averred that he was employed on 19th April 1995 as a clerical officer in the accounts department. On 17th February 2003, he was transferred from the registry to customer care centre where his duty was to open all letters brought to the department and book them in the register.
10. On 17th March, 2004, the respondent accused Mr. Karui of having booked only eleven parcels out of twelve delivered and that parcel number 41340 which contained cheque number 8593 for Kshs.68,443/= was not booked.
11. Further on 8th February 2004 cheque number 87505 for Kshs.11,650/= contained the parcel no.630 was not booked out of the twelve delivered. On 18th February 2004, six parcels were allegedly delivered containing various cheques but were not booked.
12. These cheques subsequently got lost while some were cashed through a fraudulent bank account. According, to the claimant union, Mr. Karui was consequently accused of negligence, loss of cheques and colluding with fraudsters.
13. On 21st January 2006, Karui was arrested and charged with theft and on 17th June 2009, he was invited to appear before the respondent's board on 20th June 2009. Mr. Karui did not attend because the matter was already in court and would have amounted to *subjudice*. The respondent subsequently terminated Mr. Karui's service. His terminal dues were calculated at Kshs.30,081.70/= against liability of Kshs.63,885.55/=.
14. During the oral hearing, only the grievants testified and reiterated most of the averments in their statement of claim. The respondent opted not to call any witnesses and proceeded to file submissions.
15. It is not in dispute that the grievants were the respondent's employees. It is further not disputed that the two grievants handled at some point, the cheques which eventually got lost or were encashed by fraudsters. The grievants were eventually charged with stealing the said cheques in a criminal court. During the pendency of the criminal charges the respondents invoked the disciplinary process for the same reasons the grievants were facing prosecution. The grievants declined to attend the disciplinary hearing arguing the matter was already in court and it would amount to *subjudice* if they attended the disciplinary hearing. The respondent consequently terminated the grievants' services.
16. Termination of employment contract under our current law is a two-step process. First, there must exist a valid and or justifiable reason for termination and once this is established, the termination must be carried out through a fair procedure. Fair procedure here refers to adherence to the procedure laid down in the Employment Act and rules of natural justice generally. That is to say, the employee must among others be accorded an opportunity to be heard and call witnesses if any.
17. Accusation of theft is a valid reason for termination of contract. The respondent lost cheques and money. The cheques were at some point handled by the grievants. The respondent thought the grievants were either complicit or negligent.
18. Section 43 (2) of the Employment Act provide that the reasons for termination of a contract are 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. What this section implies is that the allegations against the employee if they result in criminal prosecution do not have to await the outcome of the criminal trial. An employer is not barred to invoke the disciplinary procedure against such employee for the same reasons and eventually dismiss such employee.

19. The contention by the grievants that attending the disciplinary hearing would have amounted to *subjudice* does not therefore hold any water.

20. The court therefore reaches the conclusion and holds that there existed valid and justifiable reasons for which the grievants services were terminated and that they were accorded an opportunity to defend themselves but failed to do so. The court therefor dismisses and does not make an order for compensation for unfair termination of employment as prayed by the grievants.

21. Concerning other statutory terminal benefits, the court has reviewed and considered the terminal benefits as calculated by the respondent vis-à-vis the computations by the claimant union and is persuaded that the computation by the respondent is accurate and in accordance with the Employment Act. The court therefore orders that such dues be paid as computed if not paid already.

22. There will be no order on costs.

23. It is so ordered.

Dated at Nairobi this 16th day of June 2017

Abuodha J. N.

Judge

Delivered this 16th day of June 2017

In the presence of:-

Otieno for Nyumba for the Claimant

No appearance for the Respondent

Abuodha J. N.

Judge