



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.510 OF 2014

JOSIAH MAGENACLAIMANT

VERSUS

WAKENYA PAMOJA SACCO SOCIETY LIMITEDRESPONDENT

JUDGEMENT

1. The claimant was employed by the respondent in 1998 as a Savings Clerk. He rose through the ranks to a Branch Manager earning Kshs.41, 964.00 per month.

On 27th November, 2013 the claimant who had been placed on suspension was issued with a letter terminating his employment with immediate effect for alleged disobedience to apply the laid down operational procedures of the Sacco. There was no hearing or investigations over the allegations made.

2. The claim is that the termination of employment was unfair. Upon termination of employment the terminal dues were delayed without justification and this amounted to discrimination against the claimant. The claimant had been suspended for 7 months without pay from 1 April to November, 2013.

3. The claims are for

- a) 3 months' notice pay
- b) 7 months' salary for the period of suspension
- c) Shares contribution
- d) Unpaid accrued leave
- e) Severance pay for 15 years worked

4. The claimant testified in support of his claim. On 21st May, 2013 the claimant was suspended from duty on allegations of disobeying procedures in reconciliations of accounts. the suspension was extended to 7 months and then terminated in his employment on 27th November, 2013.

5. The allegations facing the claimant were that an assistant Mpesa agent disappeared after defrauding the respondent of money. The head office added the agent more float, money available to the agent, and thus gave the agent rights to transact at night without the knowledge of the claimant. The mpesa agent was reporting to the claimant and to the e-banking manager. Money sent to the Mpesa was from the head office but the correct procedure was for the agent to do a requisition at the branch level with the manager

but in this case it was not done. The claimant only got to know of the transactions when he got a statement from the head office. When he did his reconciliations he realised the figures were not adding up. The agent had disappeared with fund not accounted for. the matter was reported to Keumbu Police station.

6. The claimant also testified that the mpesa agent has not been arrested but his father and relatives who got paid a total sum of Kshs.60, 000.00 were arrested. When the theft occurred the claimant did due diligence. The respondent failed to give him a hearing in the matter and proceeded to suspend and then terminate his employment. Half of his salary was not paid during the suspension period.

Defence

7. The respondent in defence states that as a registered Co-operative Society they employed the claimant as the branch manager. He however was grossly negligent in his duties where he was required to ensure responsible mpesa payments but he failed. He failed to countercheck all reconciliations daily and monthly or to ensure the proper handling of cash at all time. By virtue of section 44(1) (4) (c) of the Employment Act, 2007 the respondent had power to summarily dismiss the claimant on account of wilful neglect of work.

8. On 27th July, 2012 a show cause letter was written to the claimant where he was accused of using derogatory language and arrogance to other officers; the claimant at one point lost safe keys exposing he respondent to possible loss of property; the claimant organised and participated in a staff strike and organised to fight staff who failed to participate in the illegal act; an on 25th July 2005 the claimant was suspended.

9. During the illegal strike, the claimant neglected duty which was in breach of his employment contract. The dismissal of the claimant is justified under the provisions of section 44(a) (c) and (e) of the Employment Act, 2007 and for the fact that he failed to perform his duties properly as a public officer as stipulated under section 9(e) of the Public Officer Ethics Act. The claim should be dismissed with costs.

10. In evidence the respondent witness was Fred Nyauke the Human Resource Manager for the respondent. the claimant was terminated from his employment due to gross misconduct following negligence of duty when he failed to ensure reconciliations that were to be done daily for all branch transactions. As the branch manager, the claimant was the custodian of all monies in the branch together with the operations manager. He was to ensure the morning and evening transactions were reconciled. All records for the day were returned to him. The mpesa agent had to return the phone.

11. In March, 2013 it was found out that an agent went home with the office phone. he made transactions by sending cash at night to his relatives. Where the claimant had undertaken daily reconciliations, these omissions should have been discovered. In this case, fraud was detected from the head office and he claimant was asked to investigate. He confirmed there was fraud. The mpesa agent disappeared from his office and has not been traced. The investigations report is signed on 4th April, 2013.

At the respondent branch, the mpesa agent was supposed to get a cash float in the morning and use the phone at the office. In the evening the phone was supposed to be returned and all cash transactions reconciled. Transactions were to start at 8.30am and close at 4pm. When the respondent conducted internal audit it was discovered that there were payment at night on 11th January, 2013 at 22:12 hours where Kshs.200, 000.00 to Nyaboke was done. This meant the mpesa agent had the office phone at home. Other night transactions were;

At 7.31pm a transaction by Otwoli Momanyi for Kshs.30, 000.00

On 1st February, 2013 at 9pm hours cash transaction by Nyaboke

On 11th March, 2013 at 9.30pm a transaction of Kshs.200, 000.00

On 25th March, 2013 a transaction on the phone by a third party.

12. Had the claimant undertaken his work with diligence, all these transaction should have been detected on a daily basis during the daily reconciliations. The claimant was thus suspended. On 20th May, 2013 the claimant met with the Finance and Administration Committee where he was given a chance to give his explanations which were not found satisfactory. On 9th July, 2013 the claimant was called again by the committee but the promise by the claimant to get the culprit and the missing mpesa agent had not borne fruit. On 13th August, 2013 the claimant met with the committee again but there was no progress. Noting the gross misconduct, the claimant was terminated from his employment. He was paid his terminal dues. Noting the work history was chequered with misconduct, the termination of employment was justified.

13. Both parties filed written submissions.

Determination

14. It is common ground that the claimant was employed by the respondent and his last position was Branch Manager, Keroka. On 21st May, 2013 the claimant was suspended from duty following an audit report of 5th April, 2013 which revealed fraud and had found the claimant was negligent in his duties in failing to reconcile daily transactions. There was thus a loss of Kshs.997, 815.00

15. The claimant had appeared before executive committee on 20th May, 2013.

16. The letter of suspension noted above had a rider to it;

SUSPENSION

...

... you are hereby suspended for one month. During this time of suspension please ensure that the lost money is recovered.

Meanwhile you are asked to hand over your duties to Florence Angwenyi. ...

17. The suspension was subsequently extended on the grounds that the claimant had asked to be given time to look for the disappeared mpesa agent;

On 11th July, 2013 suspension extended;

On 13th August, 2013 suspension extended;

On 19th September, 2013 suspension extended; and

27th September, 2013 suspension extended.

18. During the duration of the suspension, the claimant had appeared before the Finance and Administrative Committee on 20th May, 2013 which resulted in his suspension; on 9th July, 2013 time was extended for him to look for the disappeared mpesa agent; and on 13th August, 2013 when again the claimant asked for more time.

19. The respondent then met on 25th November, 2013 and the committee decided to hand over the matter to the respondent board. On 27th November, 2013 the claimant was issued with his letter of termination of his employment.

20. Section 41 of the Employment Act, 2007 gives the parameters for procedural justice to an employee faced with possible termination of his employment due to misconduct of gross misconduct.

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.

21. On the one part where an employee is suspected of misconduct, the employer shall before terminating the employee explain to the employee the reason(s) for which the employer is considering terminating the employment. The condition upon such notification is to have the employee attend and give his explanations in the presence of another employee of his choice.

22. The other part is that even where an employee has grossly misconducted himself and warrants a sanction of dismissal, the law contemplates issuance of notice by the employer giving the reason(s) as to why the employee should be dismissed. Where the circumstances prevailing are of the nature that the requisite notice or hearing is not possible, the circumstances leading to the non-issuance of notice in terms of section 41(2) must be demonstrated by the employer.

23. In this case, the claimant was suspended from his employment upon the discovery of fraud and after he was called to give an explanation. He was thus not dismissed upon the discovery of fraud. The respondent opted to suspend his employment.

24. In the case of **Sabina Mutua versus Amedo Centre Kenya Limited, Cause No.1630 of 2013** the court held as follows;

Ultimately, section 41 and 44 of the Employment Act, 2007 requires that where an employee has misconducted herself or grossly misconducted herself, there must be a hearing and at such hearing, there are mandatory safeguards to be guaranteed as follows; ...

26. In arriving to the above findings, the court put into account the case of **Paul Mwaura Mbugua Versus Kagwe Tea Factory Ltd & Another [2012] eKLR** the court held that

An employee on suspension has a legitimate expectation that at the very least, they will be afforded an opportunity to defend themselves against any adverse findings that may arise from investigations carried out during their suspension. To keep an employee on suspension, without pay for over 7 months, waiting for them to blink first is not only unlawful but also inhumane.

27. The rationale is that a suspension must be clear as to its purpose. It must be clear as to whether a sanction or an interim measure is to allow for investigations. Once the purpose of the suspension is addressed, the employee must be taken through the motions of section 41 of the Employment Act, 2007. In **Fredrick Saundu**

Amolo versus Principal Namanga Mixed Day Secondary School & 2 others [2014] eKLR that;

It is important to note that there can be preventive interdicts or punitive interdicts. On the one part being an interdict that is done in the context of allegations of misconduct prior to finding of guilt and the other interdict is implemented as a sanction after the finding of guilt. A Punitive interdict can only issue in circumstances where the employment contract, the employer code of conduct, the Collective Bargaining Agreement or the law allows for it as a sanction, a good example being what

would fall under the provisions of section 44 of the Employment Act in cases that warrant summary dismissal and are outlined therein. Whether it is preventive of punitive, the interdict, suspension, dismissal or a termination the same to be valid must meet the requirements of substantive and procedural fairness.

28. Following various meetings with the claimant at the level of Finance and Administrative Committee, the decision to hand over the matter to the board was taken. What followed was the letter of termination. Despite the purpose of extending the suspension on the promise by the claimant to bring the culprit with the lost huge sums of money, the duty is vested upon the employer to ensure procedural justice to an employee who is facing termination of employment due to misconduct.

29. Termination of employment cannot be justified on the grounds that the employee made a promise to correct the error or that the employee held meetings with an internal committee. Ultimately the provisions of section 41 of the Employment Act, 2007 are mandatory and where there is an iota of evidence that these procedural safeguard were not followed, even where the employer had good basis to dismiss the employee following fraud, then the court is bound to make a finding of procedural unfairness.

Remedies

30. In submissions, the respondent admit that the claimant is entitled to notice pay of one month. Such is confirmed save that the gross wage applicable is not Kshs.25, 892.00 but Kshs.41, 964.00 in accordance with section 49(1) (c) of the Employment Act, 2007.

31. Other claims are contested.

32. The claim for leave days due at 276 days is challenged on the grounds that the human resource manual only allowed a carryover of any due leave days with consent of the respondent. there was also the option to commute leave days into cash with approval. Section 28(5) of the Employment Act, 2007 allow an employer and employee to agree on how to address accrued leave in excess of what is allowed in any given year. The right to take annual leave is secured under section 28(1) (a) and with it the employer cannot seat back and state that the employee failed to take annual leave. It is upon the employer to ensure that each employee is able to take their annual leave when due. see **Barasa & Others versus Kenya Meat Commission [2015] eKLR**. the duty to keep an annual leave schedule is upon the employer. Such leave must be taken as directed by the employer.

33. Where there is a contest as to the number of leave days due and owing to the claimant, the respondent failed to abide the provisions of section 10(6) of the Employment Act, 2007. Without the relevant work schedule, I take the evidence by the claimant that he was entitled to 276 days of annual leave as true. The claimant is awarded pay in lieu of taking annual leave all at Kshs.386, 068.80 and based on the gross wage per month.

34. Claim for severance pay is on the evidence that the claimant served the respondent for 15 years. Severance pay is however only available in cases relating to the provisions of section 40 of the Employment Act, 2007. This did not stand out as a case for redundancy and severance pay is not available to the claimant.

35. Claim for shares held by the co-operative society are claimed on the grounds that the claimant had made this contribution and it should be paid to him. Where the claimant is a member of a Co-operative Society and his employment with the respondent has ceased, there are separate rules and regulations governing co-operative societies as such monies should be essentially held separate and managed by an entity other than the employer. Such c claim does not arise herein. This is declined.

36. Claim for salary due during the suspension period is claimed. The defence is that the respondent paid half salary during the entire period of termination.

Termination of employment ended upon the issuance of letter dated 27th November, 2013. The claimant

remained the employee of the respondent for the entire period of his suspension and under the terms of the same was required to attend work or help with investigations as and when required by the respondent. the option to prolong the suspension period to period longer than one months and going into 7 months cannot justify the denial of due salary owing to the claimant. Where such salary is not paid, the half unpaid is due to the claimant taking into account the gross monthly wage is kshs.41, 964.00

37. From the documentation available, the pay slips and statements on the claimant's salaries, various monies were paid to him while he was on suspension. The payments relate to salary advances made to the claimant. Great effort to do reconciliation without the exact payments to the claimant during the period of his suspension has not borne fruit on my part.

38. Taking into account the finding that the claimant is entitled to the unpaid half of his salary during his suspension, the respondent shall compute the same and confirm within 14 days from the date hereon.

39. On the finding that the claimant was not accorded procedural justice leading to his loss of employment, compensation is due. to assess the computation of compensation due to the claimant, section 45(5) requires the court to take into account the conduct and capability of the employee up to the date of termination and the existence of any pervious warning letters issued to the employee. The respondent has submitted a litany of work records relating to the conduct of the claimant which reflect he had a chequered record. This coupled with the losses incurred through fraud and leading to his loss of employment taken into account, to give compensation would be to reward misconduct. The award of compensation being dictionary and based on the evidence before court, no compensation is awarded.

Accordingly, judgement is entered for the claimant against the respondent for notice pay at Kshs.41, 964.00; accrued leave pay Kshs.286, 068.80; and costs of the suit.

Delivered in open court at Nairobi this 7th day of November, 2017.

M. MBARU JUDGE

In the presence of:

David Muturi & Nancy Bor – Court Assistants

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