



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 22 OF 2017

(Before D. K. N. Marete)

VITALIS OMWOMA NDEMO.....CLAIMANT

VERSUS

WAKENYA PAMOJA SAVINGS CREDIT

COOPERATION SOCIETY LIMITED.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Statement of Claim dated 10th April, 2017. It does not disclose any issue in dispute on its face.

The Respondent in a Memorandum of Reply dated 7th June, 2017 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material time he was the respondent's permanent employee having risen through the ranks of a clerk, Job group 9 to the position of Branch Assistant. This employment is, in his contention, still subsists.

The claimant's further case is that in the month of September, 2015, the respondent without any due justified cause, or notice prematurely and unprocedurally terminated the claimant's employment in contravention of Sections 41, 43, 44 and 45 of the Employment Act, 2007. This occasioned the claimant to suffer loss and damages and the grievant now seeks an order of reinstatement without loss of benefits.

It is the claimant's other cause that in his stint of service, he discharged his duties with due diligence and scale prompting his rapid promotions and has neither willfully neglected to perform any work which it was his duty to perform no carelessly or improperly performed any work which from its nature it was his duty to perform.

It is his further case that he did not functionary breach any of his contractual obligations nor was he involved in any misconduct warranting dismissal.

He prays as follows;

a) A declaration that the Claimant's dismissal from employment was unfair and unlawful hence null and void and thus an order to issue for his reinstatement to his employment without loss of

benefits.

b) An order of payment of loss of remuneration calculated at the rate of the claimant's remuneration of Kshs.28,000/= per month from the month of September 2015 till the date of reinstatement and or full payment.

c) Costs of the claim together with interest at court rates.

d) Any other relief that this honourable court may deem fit and just to grant.

The respondent's case is a denial of the claim, almost in entirety.

She responds to paragraphs 4, 5 and 6 of the claim as follows;

a) The Claimant was employed by the Respondent on 4/4/2011 with specific terms that he had to perform in his area of engagement with high degree of integrity, efficiency and honesty.

b) The Respondent states that the Claimant was deployed at Kebirigio branch where he was serving as an assistant systems administrator and subsequently he was involved in a misconduct as a result of which he was placed on suspension on 24th September, 2015 for a period of one month.

c) The allegations giving rise to his suspension are as follows;

i) On 31st December, 2014 Kshs.80,000/= was transferred from General Ledger Account No.000-684-389 to saving Account No.9369-001-01793 under the name Caroline Kemuma Guto who is the wife of the Claimant. The Claimant personally withdrew the sum in diverse dates.

ii) On 1st March, 2012 Kshs.96,910 was transferred to Biashara Loan Accrued Interest Account No.9369-001-01793 which again belongs to his wife Caroline Kemuma Guto. The Claimant personally withdrew the said sum.

iii) On 17th October, 2014 and 8th January, 2015 the Claimant forced the Tellers to pay him Kshs.72,000/= and Kshs.250,000/= respectively through vouchers allegedly as Tea Cash Contract under payment to customers. This was an illegal transaction as no such claims arose.

iv) The Claimant failed to ensure refunds and reconciliation of imprest given to agents on 24th and 29th December, 2014 arising through Voucher No.2329 and 2339 of Kshs.270,000/= and Kshs.250,000/=.

v) The Claimant being the custodian of all the payment voucher documents took the advantage and destroyed the said vouchers.

vi) The claimant failed to explain the payments paid to him through Nyamira paypoint Mpesa float on various dates.

The respondent's other case is that from the foregoing, the claimant was placed on suspension on 24th September, 2015 and directed to report to the respondent's offices for further directions and instructions in a months time but failed to heed the directions. He also failed to appear before the BIFU and Finance and Administration Committee (FAC) on 13th October, 2015 and 12th November, 2015 but again he refused to heed resulting to his dismissal on 8th March, 2016.

The respondent further avers that the claimant did not perform his duties as expected as he had misappropriated and embezzled the respondent's at Kebirigio Branch as was revealed by the Auditors

Report. He thereafter ran away from work and refused to appear for the disciplinary hearing despite various reminders.

The respondent's other case is that this matter was reported to the Criminal Investigations Department at Keroka and on investigation it was established that an amount of Kshs.3,194,155 was stolen with the involvement of the claimant in this fraud and criminal activity.

The respondent penultimate case is that there was no dismissal for the claimant. The claimant merely refused to attend disciplinary proceedings and involved himself in absconding duty well knowing of the consequences of such non attendance and abscondment.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful? The claimant in his written submission dated 9th December, 2017 seeks to rely on the authority of section 41 (1) and (2) and 45 (1) and (2) of the Employment Act, 2007 in laying a case of substantive and procedural unfairness in his termination. This is as follows;

41 (1) Subjection 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 in 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 provisions 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, chose by the employee within subsection (1).

Further, section 45 is as follows;

45 (1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove-

a) That the reason for termination is valid;

b) That the reason for the termination is a fair reason –

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and that the employment was terminated in accordance with fair procedure

The claimant further seeks to rely on the authority of **Walter Ogal Anuro Vs Teachers Service Commission (2013) eKLR** where 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 in effecting the termination.”

It is his submission and case that he was treated to unfair termination of employment through dismissal which was in violation of the tenets of substantive and procedural fairness as required by the law.

The respondent in her written submissions dated 6th November, 2017 and in reiteration of her case of lawful termination of employment comes out with an analysis of the process and reasons for dismissal of the claimant. It is her submission that the claimant was dismissed lawfully for fraud and embezzlement of the respondents funds which came into his possession by virtue of his employment. This amounted to gross misconduct and the claimant was subjected to the procedural aspects of suspension and disciplinary proceedings the latter of which he ignored. He was thereby dismissed from employment in accordance with the law.

Her further submission is that the acts of fraud were investigated by the Criminal Investigations Department and culpability on the part of the claimant established. It was recommended that the claimant and others be charged with stealing by servant fraudulent and false accounting *et al.* This is as follows;

...,we wish to further state that the Respondent immediately upon suspension of the claimant, it reported the incidence to Nyamira CID office and the claimant was subjected to police investigations. The said investigation were completed with a verdict that the claimant ought to be charged. The advisory letter from the office of the Director of the Public Prosecutor Nyamira County to the DCIO Keroka Police Station is also contained in the Respondent list of documents and in specific it's at page 28. The said letter reads in part as follows;

“We have received further directions on this matter that criminal proceedings to be instituted against Vitalis Ndemo, Kefa Charana and Eunice Agwata.

Your are hereby directed to proceed as follows;

a) Arrest Vitalis Ndemo and have him arraigned in court to face the charges of stealing by servant C/S 281of the penal code.

b) Arrest Kefa Charana and Eunice Agwata and together with Vitalis Ndemo have them charged with various counts of fraudulent false accounting C/S 330 of the penal code.

Urgently deal.

Your duplicate police file is hereby returned”

In further support of her case, the respondent seeks to rely on the authority of **Thomas Sila Nzivo – vs – Bamburi Cement Limited (2014) eKLR**, where Rika, J. had this to say;

“The Respondent had reasonable and sufficient grounds to suspect the claimant of having acted to the substantial detriment of the Respondent and its property, and was justified in summary dismissing the claimant under Section 4(g) of the employment Act, 2007. The employer was not required to have conclusive proof of the claimant’s involvement, it was only expected to have reasonable and sufficient grounds...”

“Disciplinary proceedings at the employment place are not an exact fit of other proceedings. The employer invariably is the complainant and has the responsibility to investigate, hear the employee and make a decision. There are employment places with limited number of personnel, to enable different and independent managers undertake different roles in the disciplinary process. Employers are only required to meet the minimum statutory procedure on fairness as prescribed under Section 41 and 45 of the Employment Act 2007. There was no fundamental flaw in the procedure adopted by the Respondent.”

The respondent in her submissions justified lawful termination of employment in the circumstances as provided by section 44 (4) (c) and (e) as follows;

44 (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (32) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

a) ...

b) ...

c) An employee willfully to perform any work which it was his duty of 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.

d) ...

e) An employee knowingly fails, or refuses to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person in authority over him by his employer.

The respondent in the penultimate submits a case of lack of proof of unlawful termination in terms of section 47 (5) of the Employment Act, 2007 as follows;

47 (5) “For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer”

It is her case that having elaborately established a case of lawful termination of employment including massive misconduct through fraudulent activities by the claimant, it was his onus to rebut this in evidence thereby establishing a case of unlawful termination. The burden of proof of unlawful termination of employment was always in his hands. He has failed so to do and therefore the claim is not sustainable.

I agree with the respondent. The respondent’s case overwhelms that of the claimant. It is a wholesome rendition of gross misconduct leading to dismissal. In all this, disciplinary process was preferred but the claimant *in toto* ignored all invocation to participate. I therefore find a case of lawful termination of employment and hold as such.

On a finding of a case for lawful termination of employment, the claimant is disentitled to the relief sought.

I am therefore inclined to dismiss the claim with costs to the respondent.

Delivered, dated and signed this 15th day of December 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Orina instructed by E.M. Orina & Company Advocates for the claimant.

2. Mr.Obosso holding brief for Getange instructed by BW'oigara, Getange & Company Advocates for the respondent.