



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 857 OF 2011

COSMAS OTIENO MAGOGO..... CLAIMANT

VERSUS

AGRICULTURAL FINANCE CORPORATION RESPONDENT

Mr. Isiah Kubai for Claimant

Mr. Rashid Ngaira for Respondent

JUDGMENT

1. The Claimant herein is now deceased and his name was substituted with the name of Flora Muzalika Kagali as the administrator of the Estate of the Late Claimant.
2. The suit was commenced vide a statement of claim on 3rd June 2011 and the Respondent filed a statement of reply on 23rd June 2011.

Claimants Case

3. The Claimant was employed by the Respondent on 29th November 1993 as a watchman and posted to Nakuru branch. On 27th November 2007 the Claimant was assigned new responsibilities as a clerical officer in the branch with effect from 3rd December 2007. On 15th August 2008 the Claimant was promoted to the position of Driver/Customer representative (trainee) in job group G1 at the same branch.
4. On 21st May 2009 a customer by the name Tobiko Ole Ikayo made a loan repayment of Kshs 400,000. The branch cashier who was also acting accountant received the money and receipted it himself but signed on the space marked 'checked by and date', and asked the Claimant to sign for him on the column reserved 'for Agricultural Finance Corporation' since checks and balances demanded that one person cannot sign on both columns.
5. On 22nd May 2009 the said cashier/acting accountant Mr Rogers Chemitei handed over to the Claimant five loan receipts Nos 2913307 to 2193312 with Kshs 70,450 but withheld the loan receipt No. 2193308 and its amount of Kshs 400,000.
6. Upon inquiry, the acting accountant told the Claimant that the customer had agreed with the branch manager Mr Kigen that he be loaned Kshs 660,000 under scheme 48 in order to clear on 21st May 2009 the entire outstanding loan since 2006 under scheme 44 of Kshs 594,000 but he had instead chosen to partially clear Kshs 400,000 leaving the balance of Kshs 194,000 and since the branch manager was not happy he had instructed Chemitei to withhold the banking of Kshs 400,000 until the customer paid the balance.

7. The Claimant was satisfied with the explanation and went ahead to fill in the batch control sheet on 22nd May 2009 for the banking of Kshs 70,450 and he signed the same. It was checked by Mr Chemitei and approved by Mr Kigen.
8. Ten (10) months down the line and on 25th March 2010, the claimant received a show cause letter from the Managing Director of the Corporation in Nairobi through the branch manager in which he was charged for misappropriation of loan collection of Kshs 400,000. He was to explain what he did with the money received and why he should not face severe disciplinary action.
9. The Claimant made the aforesaid explanation but he was called to a disciplinary hearing on 8th April 2010 and thereafter he was sent on leave pending the outcome of the matter. On 30th April 2010 the Respondent terminated the employment of the Claimant with effect from 8th April 2010 for failure to explain the whereabouts of the Kshs 400,000 from the customer Tobiko Ole Ikeyo and inconjunction with his supervisors.
10. On 7th June 2010, aggrieved with the Respondent's decision the Claimant appealed the termination of his employment. On 29th October 2010, the Claimant was invited to appear before the appeals committee on 10th August 2010. The Claimant duly appeared and made his explanation. On 30th September 2010, the Claimant was informed his appeal was not successful.
11. On 15th October 2010 the Claimant made a further appeal. This was not acted upon. The Claimant wrote a demand letter on 20th December 2010 but same was not heeded to hence this suit. The Claimant was a member of BIFU (K) and the collective bargaining agreement was applicable to him.
12. The Claimant states he was wrongfully and unfairly terminated from his employment and seeks the reliefs set out under paragraph 4 of the statement of claim stating in the main that he had no ability to question the authority of his superiors and therefore was not liable for the loss.

Respondent's Case

13. The Respondent admits all the particulars of employment of the Claimant. The Respondent adds that the Claimant was for a long time employed as a clerical officer by the respondent and it is clear that the Claimant was an experienced officer. The Claimant had accepted his performance contract and subsequent evaluation for the same and he was performing well. The Claimant was well educated upto form four level and had a certificate in computer studies and had passed with distinction. The Claimant is clearly an intelligent person and therefore he worked as an effective clerk for the respondent.
14. This being the case, the circumstances under which he signed and supposedly failed to receive Kshs 400,000 paid in by a bank customer is not reasonable. The Claimant could not hide behind his supervisors even if his narration is true because he had personal responsibility for the money he had signed for and ought to have reported the failure by his superiors not to bank the money if he was not in cahoots with the two. The slot he signed for meant he had received the money, a fact he knew very well as an experienced clerk. The Claimant did not complain in writing or at all and this is indicative of his collusion in the fraudulent scheme.
15. The Respondent's case is that the explanation by the Claimant was not probably reasonably true and urges the court to find that he was a co-perpetrator and was relieved of his employment lawfully and in terms of a fair procedure because he was given a show cause letter to which he responded. He appeared before a disciplinary committee where he made oral explanation which was found wanting and was allowed to appeal upon termination. He appeared before the appeals committee and again his explanation was found wanting.

Determination

16. The issues for determination are as follows;
 - i. Was the employment of the Claimant terminated for a valid reason and in terms of a fair procedure.
 - ii. What remedies if at all are available to the Claimant
17. Upon careful analysis of the pleadings by the parties including the documentary evidence

presented before court, the oral testimony by the Claimant, the Respondent having failed to present any witness before court and the written submissions by the parties, Claimant has failed to discharge the onus placed on him under section 47(5) of the Employment Act 2007 to demonstrate that the termination of his employment was wrongful and unfair.

18. Quite to the contrary the Respondent has demonstrated that the termination of the employment of the Claimant was for a valid reason as the respondent is obliged to do under section 43(1) and therefore the termination was justified in terms of section 47(5) of the Act.

19. In the final analysis the requirement under S41(1) & (2) as read with S45(1) & (2) of the Act, is satisfied and the court is of the unequivocal conclusion that;

- i. The Claimant was an experienced banker of reasonable education and intellect
- ii. The Claimant wilfully collaborated with his supervisors to defraud the bank of Kshs 400,000 presented by a customer but not banked
- iii. The Claimant failed to disclose the failure to bank the money until when he received a show cause letter
- iv. The explanation by the Claimant to the respondent and before court was not probably, reasonably true and therefore the court is satisfied that the termination was not only for a valid reason but the same was arrived at in terms of a fair procedure.

20. The suit by the Claimant lacks merit and same is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 18th day of March 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE