



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 545 OF 2014

J M D.....CLAIMANT

VERSUS

NACICO SACCO SOCIETY LIMITED.....RESPONDENT

JUDGMENT

1. The claimant commenced these proceedings by a Statement of Claim dated 27th March 2014, in which she alleged unlawful and unfair termination of her employment on 31st December 2012 and non-payment of her terminal dues and compensatory damages.
2. The claimant claims that her termination from the respondent's employment was unfair and unlawful. It is alleged that she was terminated from employment without notice or a hearing and contrary to the provisions of the Employment Act.
3. The claimant alleges that there was no valid reason for the termination of her employment.
4. By a Memorandum of Reply dated 1st October 2014 and filed on 2nd October 2014 the Respondent opposed the claim on grounds that the claimant is not entitled to any relief, compensation or damages as her termination from employment was proper and lawful.
5. The respondent stated that the claimant is not entitled to the claim for compensation for unfair termination as the respondent complied with the provisions of the Employment Act, 2007 while terminating the claimant's employment.
6. At the hearing the claimant reiterated most of the averments in the memorandum of claim and further averred that on 21st August, 2008 she was called by the Chief Executive Officer at around 8.30 a.m. and found him with three people. She was informed that she assisted a client to withdraw money but did not remit the full amount. She was eventually suspended without pay. She responded to the allegations in the suspension letter denying them. She did not receive salary during suspension.
7. It was her evidence she said that sometime in October, she was called by the chairman to his office and found him with the client she was alleged to have given less money than withdrawn (Mr. Musumba). She was asked to speak to Musumba to save her job but Musumba asked her to speak to the Chairman instead. She later received a letter of withdrawal of complaint by Musumba from the Chief Executive Officer's Secretary and gave a copy to the chairman. She was all the same terminated.

8. According to her she never underwent any disciplinary hearing prior to termination. According to her, the report of the supervisory committee stated that she was not given a fair hearing. It was her evidence that the chairman made sexual advances to her which she refused.
9. In cross-examination, she stated that there was a Collective Bargaining Agreement between the respondent and her union which allowed for non-payment of salary during suspension. She further stated that she never reported the issue of sexual harassment to anyone in the office but he informed the union.
10. The respondents' witness Mr. Kiiro stated that in 2012 a customer complained of withdrawal from his account which appeared unauthorized. Investigations revealed that the claimant was responsible. The claimant and union representatives were called and the claimant asked to respond to the allegations. A decision was reached to suspend her. The matter was investigated further and a report sent to the Board which recommended her termination. She appealed against the decision but the dismissal was upheld. According to him the claimant was given a fair hearing and that the respondent was justified in dismissing the claimant.
11. In cross-examination, he stated that he did not have the documents of the complaint in Court. According to him the claimant was given oral hearing when she was called by the Chief Executive Officer.
12. In his closing submissions, Mr. Munoru for the claimant submitted that the policy of the respondent was that an employee on suspension was paid full salary and benefits despite the fact that the Collective Bargaining Agreement for 2009/2011 and 2011/2013 provided for no pay during suspension.
13. On the reason for dismissal, Mr. Munoru submitted that the alleged complainant wrote a letter to the Chief Executive Officer withdrawing the complaint and apologizing to the claimant yet the respondent still went ahead and dismissed her. Mr. Munoru contended that after withdrawal of the complaint it was wrongful to dismiss the claimant for the same reason. According to Mr. Munoru, the claimant was terminated allegedly for serious misconduct. The letter of termination was however clear that the reason for termination was that the claimant collected the withdrawn amount on behalf of the complaint which action did not constitute a fraudulent activity.
14. Mr. Munoru further submitted that the supervisory committee also found the claimant innocent and recommended the review of the termination as there was no fair hearing and investigations were not conclusive. The termination letter referred to a meeting where the claimant was called to collect a suspension letter but does not refer to any Board meeting or disciplinary hearing meaning none was conducted.
15. Mr. Ochieng for the respondent on his part submitted that there were valid grounds for terminating the claimant's employment. According to Counsel, the claimant who was an accounts clerk used to assist a customer in withdrawing money from his account and committed a fraud against the customer in the process. Investigations revealed that on several occasions the claimant signed for and collected funds on behalf of the member. According to counsel, these allegations were serious since they involved mishandling of funds belonging to a customer. These according to counsel were sufficient grounds for terminating the claimant's services.
16. Regarding the procedure on termination, counsel submitted that the respondent's Chief Executive Officer Mr. Petroba Okello explained the reasons why it was considering the termination of the claimant's employment during the meeting held on 21st August, 2012, required the claimant to show cause why disciplinary action should not be taken against her and detailed the accusations against her. The claimant responded to the show cause letter on 22nd August, 2012. According to counsel therefore this amounted to a reasonable opportunity to respond to allegations against her.
17. Dismissal from employment must be for valid and or justifiable reasons and such dismissal must be carried out through fair procedure, failure to which the Court shall find the dismissal unfair.

18. The reason for which the claimant herein was dismissed was allegation of involvement in fraud. That is to say she was accused of collecting withdrawals of money on behalf of a customer. As per the evidence on record, the customer concerned had complained of withdrawals of money from his account which he could not understand. No letter or memorandum of complaint from the customer concerned was however produced before Court. RW1 informed the Court that the complaint was made verbally.

19. The claimant in show cause letter denied involvement in fraud and further stated that the customer concerned was the one who used to complain of painful legs and occasionally sought assistance from her. She could collect the money on his behalf as per the signed voucher. The respondent found the explanation unsatisfactory and dismissed the claimant.

20. Upon dismissal, the claimant appealed against the same and additionally attached a note purportedly from the said customer exonerating the claimant from any fraud and apologizing to her for any inconvenience caused. This note was neither responded to in the pleadings nor contested during the trial. The claimant further produced a report of the respondent's supervisory committee in which the committee alluded to the matter by saying that the staff concerned were never accorded a fair hearing.

21. The onus of justifying and proving reasons for dismissal or termination rests with the employer while the burden of showing the dismissal was unfair is on the employee.

22. The charge against the claimant was that she was involved in fraud. To wit collecting money on behalf of a customer. There were no allegations that the customer concerned never received the money. Further the customer concerned was not called to give evidence over the matter. This aspect coupled with the fact that the said customer later on wrote exonerating the claimant and further the fact that the respondent's supervisory committee felt the claimant was not given a fair hearing weakens considerably the reasons for which the claimant was dismissed. To argue that the supervisory Committee Report did not mention the claimant by name does not help the respondents case for nothing prevented the respondent from calling any member of the committee to clarify who the report referred to.

23. The Court in the circumstance finds that there were no reasons or justifiable reasons for terminating the claimant's services and hereby declares the termination unfair and orders as follows:-

- (a) Payment three months salary in lieu of notice.
- (b) Ten months salary as compensation for unfair dismissal.
- (c) Costs of the suit.

24. Parties to liaise with the Deputy Registrar of the Court for computation of the actual figure of the award.

25. It is so ordered.

Dated at Nairobi this 3rd day of June 2016

Abuodha Jorum Nelson

Judge

Delivered this 3rd day of June 2016

In the presence of:-

.....for the Claimant and
.....for the Respondent.

Abuodha Jorum Nelson

Judge