



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 449 OF 2013

ONESMUS OMWENGA MAROKO.....CLAIMANT

VERSUS

CO-OPERATIVE BANK OF KENYA LTD.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent his erstwhile employer and sought reliefs as follows:
 - a. One month salary in lieu of notice Kshs. 87,877/-
 - b. 5 months balance of $\frac{1}{2}$ salary Kshs. 219,262.50
 - c. Service pay for 4 years of completed service at rate of 30 days pay for each completed year Kshs. 351,508/-
 - d. 1 year salary as compensation for unfair termination Kshs. 1,054,524/-
 - e. Cheque for CIC personal injury cover Kshs. 220,795/-
 - f. 42 unutilised leave days Kshs. 175,754/-

The Claimant averred that he was charged on allegations of stealing by servant and the case was withdrawn under Section 87(a) of the Criminal Procedure Code.

2. The Respondent filed a Memorandum of Reply on 22nd May 2013. In it the Respondent pleaded that a sum of 11 million was lost and or stolen while the Claimant was working in the Department of Mobile Banking and that the Claimant was summarily dismissed for approving a fraudulent M-pesa transaction. It was averred further that the Claimant was suspended to allow investigations and the investigations revealed culpability in the loss of 11 million. The Respondent averred that the Claimant made the medical claim in August 2011 by which time he had ceased being an employee. The Respondent averred that the Claimant was not entitled to the prayers sought.
3. The Claimant's claim was that he was dismissed without cause. The Respondent on the other hand states the Claimant was dismissed for just cause due to the loss of Kshs. 11 million through a fraudulent M-pesa transaction.
4. The Judgment entered against the Respondent by Marete D.K. Njagi J. was set aside by consent and parties agreed to highlight the submissions filed and obtain a judgment from this Court.
5. Counsel for the Claimant Mr. Kariuki submitted that the claim was premised on the Memorandum of Claim filed on 4th November 2012. In that Claim it was pleaded that the Claimant was employed by the Respondent and his services terminated on alleged fraud. The Claimant was

charged before the Makadara Law Courts and the prosecution withdrew the case under Section 87(a) as the prosecution could not secure witnesses. He submitted that the Claimant's termination was not in accordance with the law. The Claimant was not accorded a fair hearing hence the termination was unlawful. The Respondent did not annex proof of the investigations carried out and there was no hearing that took place before the dismissal of the Claimant. It was submitted that there was no proof the Claimant was invited for hearing or evidence to show that any hearing took place. Mr. Kariuki submitted that the Respondent did not follow proper procedures to terminate the Claimant's services and moreover did not demonstrate that the Claimant committed any act to warrant summary dismissal. He submitted that the Claimant was injured and submitted a claim for compensation under insurance benefit provided by the Respondent and the request was submitted in February 2011 while the Claimant was still in employment and CIC forwarded the cheque and the Respondent declined to pay it out to the Claimant. He submitted that it was the Respondent that withheld that amount and not CIC. He relied on the case of **Alphonse Muchanga v Operation 680 Ltd** and submitted that one has to be invited for disciplinary meeting, hearing conducted and decision made. He submitted there was no meeting called and the Claimant's thus succeeds and at the time of dismissal was earning Kshs. 87,877 and not 54,704/- as alleged by the Respondent. He thus urged the Court to award the Claimant as prayed in the Memorandum of Claim.

6. Mr. Lusi submitted on behalf of the Respondent. He submitted that the Respondent relied on the Reply to Claim dated 22nd May 2013 and the written submissions dated 29th September 2014 as well as the CBA dated 14th October 2011. He submitted that the issues for determination were:-
 - a. Whether the Claimant is culpable for any of the actions set out in Section 44 to amount to grounds for summary dismissal for gross misconduct
 - b. Whether the Respondent in observance of the Employment Act invited the Claimant to respond to the findings of the investigation
 - c. Whether the claim against Cooperative Insurance is rightly put against the Respondent.

He submitted that on or about 11th February 2011 certain sums amounting to Kshs. 11 million shillings were fraudulently transferred using some MPESA transactions which transfers the Respondent established were approved by the Claimant. He submitted the Claimant actively approved the transactions and the Claimant was suspended in accordance with CBA and the Employment Act. He submitted that during suspension the Claimant was paid half his pay to allow for investigations and the Claimant was invited to respond to the findings of the investigation by letter dated 26th July 2011. He submitted that the then advocate for the Claimant refused on behalf of the Claimant to attend to the fair hearing which the Respondent had accorded the Claimant under the law. He submitted that it was indeed true that no hearing took place and there was no record of minutes as the Claimant refused and decided to forego that right. The Respondent acted in pursuance of the Employment Act to dismiss the Claimant summarily and the outstanding dues paid to the Claimant. He submitted that the law allows an employer to dismiss for good cause. As to why the prosecutions chose to withdraw the case at Makadara Law Courts, he submitted that the office of the Director of Public Prosecutions is an independent body and it does not take directions from anyone. He submitted that the Respondent was not privy to the decision to withdraw that case and the fact that there was a withdrawal under Section 87(a) does not mean the Claimant was innocent or that the Respondent did not have reasonable grounds in accordance with Section 44 to suspend the Claimant and consequently to dismiss the Claimant. He submitted there was no basis for a malicious termination of employment. He submitted that the question of personal accident related to a separate legal entity and if there were payment due these were between the Claimant and that entity. He submitted that no evidence was tabled that the cheque was released to the Respondent. He thus urged the Court to dismiss the Claim with costs to the Respondent.

7. The Respondent relied on the cases of **Banking Insurance & Finance Union v Cooperative Bank of Kenya Ltd [2014] eKLR**, **Teachers Service Commission v Sarah Nyanchama Ratemo [2014] eKLR** and **Said Hemed Said v Emmanuel Karisa Maitha & Another [2000]**

eKLR.

8. The claim relates to the abrupt termination of employment of the Claimant. The issues I have distilled for determination are as follows:-
- a. Was the Claimant terminated for lawful cause?
 - b. Was the Claimant accorded a fair hearing as provided in law?
 - c. Is the Claimant entitled to any remedies if there was any breach of a) and b) above?
 - d. Who is to bear the costs of this suit?
9. The Claimant was alleged to have been involved in fraudulent transactions leading to loss of 11 million shillings. From the evidence adduced there is nothing to show that there was evidence that points to the Claimant. Except for a table with some analysis contained in submissions there is no report or extract from Safaricom on the suspect transactions. The Criminal case before the Magistrate was not proved and it remains unclear what the Claimant's role was, if any, in the fraudulent transactions. The investigation report was not availed to clear the air. If there was cause to terminate, would termination for fraud be good cause? That would be in order but as I have found there was nothing to suggest in the case before the Court that there was good cause to terminate.
10. The Respondent asserts that the Claimant was invited to give explanation but he declined through his former advocate. No evidence of this was availed. Indeed the Respondent's pleadings did not advert to this issue. It was only raised in submissions by counsel for the Respondent. There was no procedural fairness as contemplated by Section 41 of the Employment Act and therefore the termination was unfair and unlawful.
11. The Claimant is entitled to remedies for the dismissal of his services. He claimed Kshs. 87,877/- per month as salary. He would be entitled to notice of one month and for failure to adhere to the provisions of Section 41 I will award him 6 months compensation. He is not entitled to severance pay as he is covered under Section 35 of the Employment Act.
12. Regarding the CIC cheque payment, it is incumbent on the Respondent, if it is an agent of the CIC to pass the cheque to the Claimant. But no orders can be directed to the Respondent as the CIC were not a party to the suit and there is a distinction between the entities.
13. In the final analysis I will enter judgement for the Claimant for:
- a. Kshs. 87,877/-
 - b. Kshs. 527,262/-
 - c. Costs of the suit
 - d. Interest of a) b) and c) above at Court rates from date of judgment till payment in full.

Orders accordingly.

Dated and delivered at Nairobi this 10th day of February 2015

Nzioki wa Makau

JUDGE