



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 39 OF 2014

JOSEPHAT NYAKUNDI OMWERI..... CLAIMANT

v

K-REP BANK LTD.....RESPONDENT

JUDGMENT

1. Josephat Nyakundi Omweri (Claimant) was employed by K-Rep Bank Ltd (Respondent) as a Bank Clerk-teller on one year fixed term contract effective 4 September 2006. The contract was renewable on mutual agreement.
2. On 11 August 2008, the Respondent promoted the Claimant to the position of Cash Officer.
3. The Respondent, through a letter dated 20 May 2010 informed the Claimant that he was being summarily dismissed after carrying out investigations which established the loss of Kshs 1,900,000/-. The dismissal letter specifically detailed 4 instances of fraudulent activities, which in its view amounted to gross misconduct.
4. The Claimant was aggrieved with the dismissal and on 19 February 2014, he lodged a Memorandum of Claim in Court against the Respondent alleging unfair/unlawful termination of employment and seeking a declaration that the termination of his employment was unfair and illegal, damages for unfair and unlawful termination, three months' salary in lieu of notice and gratuity/severance pay.
5. Together with the Memorandum of Claim, the Claimant filed a Bundle of Documents.
6. The Respondent was served and on 1 April 2014, it filed a Response to the Claim and its Documents. The Claimant filed a Reply to the Response on 8 May 2014.
7. The Cause was heard on 25 November 2014 and 19 January 2015. On 12 February 2015, the Claimant filed his submissions (the submissions should have been filed before 30 January 2015). The Respondent's submissions were filed on 13 February 2015.
8. After considering the pleadings, documents, testimonies by witnesses and the submissions, the Court has identified the issues arising for determination as, *whether the dismissal of the Claimant was unfair, effect of Claimant's acquittal before the Magistrate's Court, right to fair administrative action, effect of a parallel suit and appropriate remedies.*

Whether the dismissal was unfair

Procedural fairness

9. Section 41 of the Employment Act, 2007 provides for the procedural steps that an employer should comply with before taking the decision to terminate the services of employee on the grounds of *misconduct, poor performance and physical incapacity*. Summary dismissals are also subject the statutory procedural fairness dictates of the law.
10. The Claimant pleaded that he was not given notice of termination of employment.

11. In his testimony, the Claimant stated that on 10 May 2010, the Respondent's Bank Manager informed him of an attempted robbery at its facility in Eldoret and that after carrying out reconciliation of cash in the ATM, about Kshs 1,200,000/- was found missing.
12. In the course of the morning he was taken away by the Police and he was detained for 5 days and later charged in Court with stealing by servant in Eldoret Chief Magistrate's Court Criminal Case No. 2823 of 2010. He was released on bond.
13. The Claimant stated that after about 2 months he sought to know about his fate (dismissal letter) from the Respondent's head office but he was referred to the Eldoret Branch and a security guard handed him a dismissal letter dated 20 May 2010.
14. He also stated that he had not been issued with a show cause letter prior to dismissal and that he was not afforded a hearing before the decision to dismiss was made.
15. In cross examination, the Claimant acknowledged that the contract of employment provided for summary dismissal without notice and that the Respondent's Head of Security as well as the Police carried out investigations and that he recorded a statement with the Police.
16. He also stated that the Respondent's Auditor, Peter Karichu prepared an audit report after his acquittal but it was backdated.
17. The Respondent on its part pleaded that the decision to dismiss the Claimant was informed by an audit carried out by its Internal Audit Department and which report blamed the Claimant.
18. It called its Human Resources Manager to testify on its behalf. She stated that the Claimant was summarily dismissed on 10 May 2010 (the dismissal letter is dated 20 May 2010) and the reasons were given in the dismissal letter, though the Claimant was not given notice of termination of employment.
19. She also stated that the dismissal was in compliance with section 44(4) (g) of the Employment Act, 2007 and that the Respondent had Disciplinary Procedures which provided for appeal but the Claimant did not appeal.
20. In cross examination, the witness stated that before dismissal, the Claimant was sent on compulsory leave and that the dismissal letter referred to a letter dated 10 May 2010 (the letter was not produced) and that she was not aware whether the Claimant was asked to show cause.
21. The witness maintained that the dismissal was lawful and procedures were followed.
22. In the submissions, it was urged that the Claimant was asked to show notice but he did not respond and reference was made to appendix 5 (this was a court charge sheet and not a show cause notice).
23. An employer has statutory backing to dismiss an employee without giving notice or by giving less notice than required by statute or contract where an employee has fundamentally breached his contractual obligations as stipulated in section 44(4) of the Employment Act, 2007.
24. Among the grounds enumerated by the section is the employee committing or the employer having reasonable and sufficient reasons to suspect the employee has committed a criminal offence. That is the ground the Respondent alleged herein.
25. Commission of a criminal offence or any such conduct would amount to misconduct and therefore section 41 of the Employment Act, 2007 becomes implicated but an employer should comply with its requirements before taking the decision to dismiss.
26. By virtue of section 41(2) of the Act, the employer must hear and consider any representations to be made by an employee before summarily dismissing him/her.
27. To my mind, section 41(2) of the Employment Act, 2007 leaves no doubt that even in cases of summary dismissal or *instant* dismissal, a hearing is necessary.
28. And for the hearing to be fair, the employer must inform the employee of the allegations being contemplated to be used to dismiss and to hear and consider any representations made by the employee.
29. In the present case, the Respondent did not disclose to Court that it informed the Claimant of the allegations of fraud on 18 March 2010, 26 March 2010 and 7 May 2010 and that it was contemplating taking disciplinary action against him.
30. The Court was not informed of who informed and heard any representations made by the Claimant, where the hearing took place and who was present.
31. The investigations carried out by the Respondent's Internal Audit Department and Head of Security were to establish the facts upon which the Respondent would consider commencing disciplinary action against the Claimant. The same could not substitute or meet the threshold of a

hearing.
32. It would be apposite to repeat what I stated in the case of *Samuel Muchiri Gikonyo v Henkel Chemicals (EA) Ltd* (2014) eKLR that

38. In my view, an audit or investigation within the employment relationship is to gather the facts to establish whether there are grounds for a disciplinary action and after the facts have been established the employer should inform the employee of the allegations or facts and give the employee time to make a response.

39. The purpose of a disciplinary hearing on the other hand is to objectively enquire whether an employee is guilty of *misconduct*, *poor work performance* or has some *incapacity* that lessens his ability to perform the job functions to the employer's standard, and for which a sanction such as a warning, suspension or dismissal may be given.

40. To my mind, an audit or investigation, like the one carried in the instant case cannot substitute a disciplinary hearing contemplated by section 41 of the Act because an employee normally does not have the right to bring a colleague/union representative to an audit/investigative interview.

33. The conclusion the Court reaches is therefore that the summary dismissal of the Claimant was procedurally unfair. With this conclusion, it is not necessary to discuss whether the reasons for the dismissal were proved and proved as valid and fair reasons.

Effect/implications of the acquittal

34. With the conclusion reached, it is not necessary to discuss this issue.

Right to fair administrative action

35. In his submissions, the Claimant brought up the issue of the right to fair administrative action in Article 47 of the Constitution.

36. The Respondent also briefly responded to the submission on this issue.

37. The Cause was not pleaded or prosecuted as one involving the right to fair administrative action and the Court declines to consider the issue.

Existence of a parallel suit

38. The Respondent pleaded and testimony was led that the Claimant had sued the Respondent and the Attorney General in Eldoret Chief Magistrate's Court Civil Case No. 748 of 2011. Copies of the Plaintiff and Defence were annexed herein.

39. The Court has perused the pleadings and without attempting to prejudge the same, notes that the cause of action therein is jumbled as both malicious prosecution and unlawful dismissal (paragraph 12 of the Plaintiff).

40. The Respondent may therefore make an appropriate application before that Court on the basis that the dismissal case has been determined herein.

41. However, before examining appropriate relief, the Court wishes to observe that the Respondent and its witness were hesitant to disclose information which may have appeared relevant.

42. The Court further wishes to observe and it has noted a trend where big institutions rush to dismiss employees on what appear to be very valid and fair reasons without bothering with the procedural fairness. Such employers proceed at their own risk to pay substantial compensation.

Appropriate relief

Damages for unfair and unlawful termination

43. One of the primary remedies where the Court finds unfair termination is the equivalent of not

