



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO 1817 OF 2011

PITHON MWANGI NJOROGE CLAIMANT

VERSUS

CO-OPERATIVE BANK OF KENYARESPONDENT

JUDGEMENT

Issues in dispute:

1. Unlawful termination
2. Refusal to pay terminal dues to the claimant

1. On 28th October 2011, the Claimant Pithon Mwangi Njoroje filed his claim against the respondent, Co-operative Bank of Kenya. Defence was filed on 11th July 2013 admitting the Claimant is a former employee of the Respondent but was lawfully summarily dismissed due to gross misconduct. At the hearing, the Claimant was called in evidence while the Respondent called Simon Mureithi Maina as their sole witness. At the close of hearing on 17th July 2013, both parties were directed to file their written submissions, only the Claimant filed his on 12th August 2013.

2. The claim is that on 18th June 1992 the Claimant was employed by the Respondent as a Bank Clerk; he was promoted through the ranks until 3rd October 2011 when he was summarily dismissed. At the time of dismissal the Claimant was a Supervisor, earning kshs.154, 926.00 as monthly salary.

3. The Respondent is a banking business incorporated under the Company's Act and licenced to do banking business under the Banking Act. Initially the Respondent was registered under the Co-operative Societies Act from 1965 until 27th June 2008 when it was resolved to list the company at the Nairobi Stock Exchange and it then went public on 22nd December 2008. The Respondent bank now runs two subsidiaries;

1. Kingdom Securities Limited, a stock-broking firm with the bank holding controlling 60% stake;
2. Co-op Trust Investment Services limited, the fund management subsidiary wholly owned by the bank; and
3. Co-operative Consultancy Service (K) Limited, the corporate finance, financial advisory and capacity building subsidiary wholly owned by the bank.

4. On 28th September 2011, the Respondent issued the Claimant with a charge sheet detailing allegations all relating to the relationship between him and Co-operative Bank Savings & Credit Society limited and in reply the Claimant outlined all monies loaned to him and noted monies paid and those

outstanding. On 27th September 2011 the Respondent wrote to the Claimant indicating that their investigations revealed 4 counts of misconduct and demanded show cause within 14 days. On 3rd October 2011, the Claimant was served with a notice of summary dismissal and the immediate payment of Kshs.9,872,947.00 that was said to be owed to both the Respondent and Co-operative Bank Savings & Credit Society Limited. The Respondent threatened the Claimant to levy interest over the same at commercial rates until payment in full.

5. The claim also outlines that the Claimant was only a customer with the Co-operative Bank Savings & Credit Society Limited and had no internal control of its operations. By being a customer, he did not breach the terms of his employment contract with the respondent. The dismissal by the Respondent was therefore wrong and unfair. The Claimant is seeing for gratuity/ service pay for the 19 years served; compensation; notice pay at 12 months; leave due all dues amounting to Kshs.5,322,944.70. The Claimant is also seeking for a declaration that his dismissal was unfair; he should be re-engaged or reinstated and granted costs herein.

6. In evidence, the Claimant stated that upon his employment by the Respondent as a Clerk, he moved through the ranks to become a Head Supervisor. His last station was Kerugoya. On 27th September 2011 he was accused in 4 charges of misconduct against the Sacco where he had various loans from 2009. He was told to explain as a show cause letter was issued. He had one (1) day to reply as required by the head office and he complied. Immediately he got on 28th September 2011 he got a letter that there was a disciplinary committee on 29th September 2011 and he was required to attend at the head office in Nairobi. On 30th September he had managed to travel overnight to be at the disciplinary hearing. He had no time to prepare his defence and eventually when he appeared before the committee, the issues raised in the show cause letter were different from what the committee addressed. There were difference charges and different figures as noted in the show cause. He therefore did not have enough time to prepare. The loans he had taken were historical and he needed to go into the archives to trace them. He requested for more time from the committee to be able to prepare his case and so the hearing was rescheduled to 5th October 2011. However on 3rd October 2011 he got a letter of summary dismissal. At the time he was preparing for his defence at the Industrial Area Branch where most of his records were. The manager called him and advised him not to bother looking for evidence as he had already been dismissed.

7. The Claimant also gave evidence that he was accused of defrauding the Sacco. The Sacco has never levelled any complaints against the claimant. There was no complaint that he had been unable to pay for his loans. No fraudulent case has ever been reported against the Claimant to the Sacco or the police. He is still a member of the Sacco but does not make contributions. He had a case with the Sacco and he took it to the Tribunal.

8. The Claimant also testified that his claim is for reinstatement to his position or payment of terminal dues as claimed.

9. In cross examination the Claimant confirmed that he was called by the disciplinary committee for hearing of his case where he requested for more time to prepare for his defence. He was heard on 30th September 2011 and it was agreed he would be heard next on 5th October 2011. He was however dismissed on 3rd October 2011 before he could be heard. He had loans with the Sacco and some were not fully paid at the time of dismissal. He did not appeal against the dismissal since he did not know of the right of appeal. His loans to the Sacco amounted to 2.8 million shillings but the Sacco investment was 3 million shillings.

10. In defence, the respondent's case is that on 27th September 2011 the Claimant was called to Respondent to the finding of investigations that disclosed that he was involved in a series of fraudulent transactions. He replied on 29th September 2011 and was then invited before the disciplinary committee on 30th September 2011 where he could be heard. The Claimant was informed that allegations against him were in contravention of the Staff Manual in that he was not supposed to engage in private business

for monetary gain or commercial gain or in behaviour which was in conflict with his position in the bank and likely to affect his productivity in his duties. Upon hearing by the disciplinary committee, there were deliberations where the Claimant was found culpable of conduct in breach of his terms of service and summary dismissal was recommended and the Claimant was notified on 3rd October 2011.

11. The Respondent disputes the outlined claims noting that severance pay is not due as this was not a case of redundancy; there is no service pay due as all statutory dues were remitted; there was no wrongful dismissal to warrant payment of compensation; and the law was followed in dismissing the Claimant thus justified. The claim should therefore be dismissed with costs.

12. In evidence, Simon Mureithi Maina the Human Resource Relations Manager of the Respondent testified that the Respondent has a Staff Manual with a clause on how disciplinary proceedings against staff should entail. A show cause has to issue, the employee must reply and the matter is concluded. When the disciplinary committee is convened, the employee is invited to have a chance to be heard accompanied by a representative of his choice and once hearing is concluded, the Respondent has a right to take appropriate action.

13. In this case a show cause was issued to the Claimant on 29th September 2011 and he was invited to the disciplinary committee on 30th September 2011 for hearing. The Claimant never expressed any difficulties in attending at his hearing. He was informed of his right to have a representative present.

14. Upon dismissal, all terminal dues owing were paid to his account. The Claimant had 27.11 days of leave which were commuted and paid at KShs.138, 115.70; leave allowance at KShs.6, 027.20; and 2 days worked in October 2011 at KShs.10, 139.30.

15. There is a right of appeal as per the Staff Manual with 21 days of dismissal but the Claimant did not file an appeal.

16. The case against the Claimant related to fraud against the Sacco where loans were taken and alleged to have been paid or off-set but this was not the case. There were issues of conflict of interest, questions of integrity which concerns the Respondent as the Claimant had violated and breached his terms of contract. There was evidence that the Claimant had behaved in a manner in conflict with the Respondent bank policy. This was gross misconduct subject of summary dismissal.

17. In cross examination, the witness confirmed that the minutes taken at the disciplinary committee hearing were not submitted in full and that is before Court is an extract. The Claimant was in collusion with Sacco staff to defraud it. He did not repay his loans but in the system he was cleared as having paid which was fraudulent. The fraud related to the Sacco and not the respondent. The Sacco was to deal with any criminal charges. The evidence against the Claimant was from the audit report but not produced in court. The disciplinary committee gave the Claimant time to prepare for his defence from 30th September to 5th October but dismissal was on 3rd October 2011.

18. The witness also confirmed that the Claimant was taken through a fair process. After hearing him in defence a decision was taken to dismiss him. Despite being advised to go look for more evidence on 30th September 2011, and to appear before the committee on 5th October 2011, his dismissal was effective from 3rd October 2011.

Submissions

19. In submissions, the Claimant stated that this was a case of both procedural and substantive unfairness as there was no due process or reasons given for the summary dismissal. The Claimant was taken through a rushed process of hearing all meant to dismiss him. Even where he was advised to go and prepare his defence, the Respondent issued dismissal letter without giving him a chance to defend himself. The Claimant had served for 19 years without any record of misconduct; charges made against him were rushed in a grossly unfair process. The Claimant has never been charged with fraud and the Sacco has not

lodged any complaints against him. Any investigations conducted by the Respondent into the alleged fraud were never produced in evidence. The Claimant is therefore entitled to his claims as pleaded.

20. The question of summary dismissal is regulated under section 44 of the Employment Act. Summary dismissal in its nature envision a swift and instant action but the law applicable has since changed and built inherent parameters within which an employer must address before issuing that notice of summary dismissal. It is not a case of waking up and looking for fault with an employee and then issue summary dismissal. There is now a shift that each employer should embrace. The doctrine of natural justice or procedural fairness is now an essential part of the employment relationship. An employer must comply with the procedures set out in section 41 of the Employment Act even in circumstances where summary dismissal or what the Respondent referred to as a decision of the disciplinary committee to issue summary dismissal was agreed upon. An employer who resorts to summary dismissal is required to demonstrate that the summary dismissal meets the requirements of sections 43 and 45 by proving the reasons for dismissal and beyond such prove, demonstrate that such reasons are valid and fair, particular where an employee challenges the summary dismissal.

21. Section 41 of the Employment Act requires an employer to establish that there has been procedural fairness. In this regard, an employer must demonstrate as a matter of fact that it;

- a. Explained to the employee in a language the employee understood the reasons why it was considering the termination;
- b. Allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons;
- c. Heard and considered any explanations by employee or his representative; and
- d. Where the employer has more than 50 employees as required by section 12 of the Employment Act that it had and complied with its own internal disciplinary rules.

22. In this case the Respondent admitted that on 27th September 2011 they issued the Claimant with a notice of disciplinary inquiry and to give a reply by close of business on 29th September 2011. The next day 28th September 2011, a notice of misconduct invoking the Co-op Sacco was issued to the claimant. The Claimant made effort and replied immediately. On the afternoon of 29th September 2011 when the Claimant was to respond to his charges, he was called from Kerugoya to attend to his disciplinary hearing the next day on 30th September 2011. The Respondent witness admitted that they allowed the Claimant time to prepare his defence but at the end of their proceedings, a decision was made to dismiss him on 3rd October 2011 despite inviting him of hearing on 5th October 2011.

23. Did the Respondent therefore have reasons so as to dismiss the claimant? The Claimant was accused of committing fraudulent transactions together with Sacco employees where loans not repaid were cleared as paid. I find no evidence to suggest such evidence existed. In any case the minutes of the disciplinary hearing are incomplete and even the pieces of information shared does not give such evidence. The Respondent being a commercial entity as well as the Sacco dealing with accounts, monies, and the best evidence should have been such accounts, records of transactions or the audit reports. Beyond this, the alleged investigations that were conduc5ed so as to arrive at the show cause letter issued to the Claimant was not given in evidence. The Claimant was also not issued with this report so as to be able to reply to it. This is find to be fundamental flaw in law and practice that led to an unfair outcome of summary dismissal.

24. Beyond the proof of reasons, section 41 of the Employment Act requires that the employer must demonstrate that the employee was advised on his right to bring a representative of his choice. This is not just for information purposes but must be guaranteed in actions. It is apparent that Kerugoya and Nairobi are ways apart. To travel from Kerugoya to Nairobi required the Claimant several hours. In this case the Claimant gave evidence that he was forced to travel at night so as to be before the disciplinary committee hearing on the 30th of September 2011. Even in a case where he appeared and was only informed on the morning of the hearing that he had a right to have a representative of his choice, practically such a right was far from being achieved or enjoyed. The claimant's branch office was in Kerugoya where I suppose

he had his work colleagues and friends. To be far from his work station and for a disciplinary hearing without prior preparation is distressful enough so as to cause him anxiety. The added burden of suddenly being required to answer to charges of fraud and to be able to look for a representative in such circumstances is simply ambitious of the Respondent and far from what is contemplated under section 41. I find the explanation of the Claimant reasonable that he requested for more time to be able to prepare for his defence. Such time was allowed, but alas! It was immediately taken away.

25. The Respondent witness confirmed that the Claimant was given more time upon request to prepare for his defence. But while he was away at Industrial Area Branch delving into this task, he was called and advised to look no more. He had been summarily dismissed. This is what fraud is. This can only be described as capricious. It is tantamount to robbery of good reason. This is so on simple facts, that the Respondent as the employer and contrary to all what is fair and just, what is reasonable and humane, they led the Claimant to believe that he had been given more time to look for his past records so as to prepare for his defence and come later on a scheduled date to submit such evidence. Unknown to the claimant, the dice was already cast. He was summarily dismissed as he buried himself into the archives looking for evidence. This is grossly unfair. It should not be made to happen to any employee however gross the conduct is. It is contrary to all principles fair. It goes contrary to fair labour relations as under Article 41 of the Constitution. The resultant dismissal was therefore wrong in substance and procedure and amount to unfairness as under section 45 of the Employment Act.

Remedies

26. The Claimant is seeking re-engagement or reinstatement. These are specific performance prayers and where claimed, a party must outline the same in clear and no uncertain terms. I did not get emphasis here in this regard. To direct specific performance in this regard and the current context of evidence before Court is found not appropriate. Other remedies will be considered.

27. Notice pay is due in a case of summary dismissal. Where the notice period is not outlined in the employment contract or any subsequent document agreed upon by the parties, section 35 and 36 of the Employment Act apply. The claim is awarded one (1) months' pay at kshs.154,962.00

28. The Claimant was terminated on 3d October 2011. The Respondent witness stated that the dues computed for the Claimant were for 2 days worked in October. I find not basis to deny the Claimant the one (1) plus day he remained the employee of the respondent. The Claimant is awarded kshs.5,165.40.

29. Gratuity/service pay was claimed. The Claimant did not controvert the evidence by the Respondent that he was registered with the NSSF and NHIF. In view of such membership, service pay is not due as the Respondent was in compliance with section 35(6) of the Employment Act.

30. Leave has already been paid at 27.11 days. This prayer is thus declined.

31. Compensation is due noting the prayer for re-engagement or reinstatement has been declined and based on the finding that this was a case of unfair termination. The Claimant had served well into hi near retirement and maximum compensation is found appropriate at 12 months' salary. This is awarded at Kshs.1, 859,544.00.

In conclusion, judgement is hereby entered for the Claimant against the Respondent in the following terms;

- a. **A declaration that the summary dismissal was unfair;**
- b. **Composition at kshs.1,859,544.00;**
- c. **Notice pay at kshs.154, 962.00**
- d. **One day pay due in October 2011 at kshs.5,165.40.**
- e. **The Claimant is awarded costs herein;**
- f. **Monies due under (c) and (d) shall be paid with interest at Court rates;**
- g. **Certificate of Service be issued unconditionally within 7 days.**

Delivered in open Court, dated and signed at Nairobi on this 28th day of May 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

.....

.....