



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI
CAUSE NO. 725 OF 2012

SAMUEL MWANGI MARAGUA.....CLAIMANT

VERSUS

CO-OPERATIVE BANK SAVINGS AND CREDIT SOCIETY LTD.....RESPONDENT

M/s Mburu Advocate for Claimant

Mr Ayisi for Respondent

JUDGEMENT

1. The suit was brought vide a Statement of Claim filed on 2nd May 2012. The Claimant seeks payment of terminal benefits including;
 - i. One month's salary in lieu of notice Kshs 11,700
 - ii. In lieu of 11 days leave Kshs 42,900 and
 - iii. Payment of General and punitive damages for unlawful and unfair termination of employment,
 - iv. Costs and interest
2. The Respondent filed a memorandum of response on 30th July, 2012 in which it denies all the particulars of claim and prays that the suit be dismissed with costs.

Facts of the case

3. The claimant was employed on 2nd December, 1991 as a subordinate staff. The letter of employment was produced and marked '*smula*'. He was confirmed in his employment on 12th March 1992 and promoted to the position of Clerical Officer on 22nd May, 1992. On 16th March 1998 he was promoted to Senior Bank Keeper in recognition of good work. He received various salary increments and awards in recognition of good service to the Respondent.
4. On 3rd May, 2010 he was appointed SACCO Manager with effect from 22nd April, 2010.
5. On 2nd December, 2010 the Claimant was served with a show cause letter for unsatisfactory work performance in that on 1st March 2010 a loan of Kshs 1,030,000 was issued and disbursed to

- member No 532 Edith K Ncheeri and that as of 31st October 2010, the recovery of principal loan had not commenced.
6. Respondent alleged that failure to commence recovery for the facility over (7) months amounted to negligence and had resulted in exposure of the society.
 7. The claimant was to respond to the allegation in writing by 3rd December, 2010. The claimant sent a response to the Treasurer Co-operative Bank on 3rd December, 2010.
 8. The claimant started by apologizing to the SACCO board Management for recovery of Kshs 6,581 instead of Kshs 40,858 loan repayment from April to September, 2010. The claimant said that this was purely human error of not replacing the old loan repayment with the new one.
 9. In mitigation the claimant explained that he was in charge of the preparation of the SACCO monthly loans recovery schedule and has been doing so accurately and with dedication. That the schedule is done manually and not generated automatically hence the error.
 10. The Claimant cited work pressure during the period to have contributed to the oversight. That he had rectified the error in October upon realizing the recovery was underquoted.
 11. The Claimant was issued with a first warning letter on 8th February, 2011 for the omission.
 12. On 24th February, 2011, the Claimant was confirmed to the position of SACCO Manager with effect from 3rd November 2010. On 22nd March 2011 the Claimant was awarded a bonus reward of 2010 of annual salary (24,480) due to the good performance of the SACCO in the year 2010.
 13. On 19th July 2011, the Claimant was served another show cause letter for unsatisfactory recovery of various members' loans. The Claimant responded to the letter on the same date detailing the steps taken to recover the loans as earlier explained in an email to the Treasurer dated 18th July, 2011. The Respondent while admitting the oversight in the delayed recovery of loan repayment explained the circumstances that exonerated him from taking the blame.
 14. On the same date the claimant received a letter asking him to explain why two staff members, Mrs Munyiri and Mr Birech were not paid their Co-op holding shares dividend on 7th July, 2011 until 19th July 2011. This was an oversight and the claimant apologized on behalf of the office.
 15. On 9th April 2011, the Chairman of the Board gave the Claimant a 2nd warning because the Board was not satisfied with the explanation made by the claimant on 19th July, 2011 in response to the notice to show cause. He was accused of gross negligence of duty.
 16. On 11th August, 2011 the Chairman of the Board wrote a 3rd show cause letter to the claimant for violation of credit procedure in respect of member No 1128 June Keriri. The member had been granted loans on diverse dates but the recovery was not done as expected.
 17. On 17th August, 2011 the claimant responded to the show cause letter in detail. The Claimant while accepting the overall responsibility put the blame on the Accounts department staff. As a result recovery of interest was delayed but promised to remedy the situation.
 18. On 12th August, 2011 the claimant received a further letter of suspension with immediate effect as per section 6.5 of the Co-op Bank Sacco Society's Human Resource Policy. The suspension was on half basic pay. On the same date the claimant received another letter recalling him back from suspension with effect from 15th August, 2011.
 19. By a letter dated 27th September, 2011 the claimant was summarily dismissed for "*negligence of duty and fraudulent posting in respect of June Keriri PF No. 1128*".
 20. This was pursuant to an audit undertaken on the SACCO Accounts and the various written explanations by the claimant on the matter. The claimant in the final analysis was blamed for:
 - Neglecting duty by failing to set control mechanisms to note the lapses that had occurred in the members' accounts over a long period of time.
 - Fraudulently posting payment into member's account while no repayment had been recovered from the member.
 - Fraudulently posted boosting of shares when no money had been received from the member.
 21. The Respondent found that the explanation by the claimant did not exonerate him from the said failings hence the summary dismissal.
 22. The claimant had outstanding loans with the Bank which commenced attracting commercial interest rates upon dismissal

23. The claimant in his pleadings, oral and documentary evidence and written submissions deny that the respondent had any lawful reason to summarily dismiss him from service. Instead he painted a picture of a diligent and committed employee who rose from the ranks to the highest position in the bank on merit.
24. That upon being appointed as the overall Manager following a popular demand by the shareholders some of the Board members including the Chairman of the Board who was openly not in favour of his appointment embarked on a campaign to bring the claimant down.
25. That the various written warnings in a space of a short time was part of this concerted effort to get rid of the claimant.
26. That the audit conducted was done by bank officials who were biased against the claimant and had a mission to paint the claimant as a failure.
27. The claimant added that he had helped to build the SACCO from zero to where it was now upon being employed as a subordinate staff on 2nd December 1991. That they were only two (2) members of staff then, himself and the manager. He did the bulk of the work hence his promotions upto the position of acting manager on 3rd May, 2010 with effect from 22nd April, 2009 upon exit of the serving manager. He worked with a clerk and secretary. The SACCO had introduced a new software called E - Horizon.
28. While he was Acting Manager, a young manager was employed, he served for a short time and was sacked between October and December 2010. In April 2010 the SACCO had held an Annual Delegates Meeting (ADM) all over the country. At the delegates meeting in Kakamega it was proposed that the claimant be appointed manager of the SACCO. All delegates rose in approval. The claimant was then appointed on 3rd May, 2010.
29. The appointment was against the will of the management committee. The claimant traces all his frustrations and tribulations from this occurrence.
30. On 11th August 2011 the Chairman summoned him by phone to attend a Central Management meeting within two (2) hours together with the loans manager, Rosemary Irungu. There was no written notice and Agenda of the meeting. The meeting started at 7 pm in the evening. The Chairman informed the claimant that it was a disciplinary hearing. The claimant was accused of posting two (2) items in the Account of June Keriri member No 1128. Kshs 60,000 was posted to the share account and 160,000 to reduce her loan account. This was alleged to be fraudulent. The claimant told the court that he had no paper work with him, was unprepared and was unstable to defend himself. The claimant however explained what he knew generally and the loans manager did the same. This was followed by the suspension and subsequent recall.
31. The Chairman thereafter appointed employees of the Co-operative Bank to Audit the Bank. This was unlawful and procedural since the sacco was ordinarily audited by auditors from the Ministry of Co-operative and marketing. The Sacco already had audited accounts. The claimant protested the imposed auditors since the employees of the co-operative Bank who were members of the sacco could not audit their own sacco. The Chairman told the claimant to co-operate with the auditors. The claimant assisted the auditors form one month. The claimant did not receive an audit report.
32. On 15th September, 2011 the same allegations concerning the account of June Keriri was made by the Auditors. The two postings were not done by the claimant and the Head of the audit team upon reviewing the matter gave the claimant a letter exonerating him from blame with regard to the two transactions in this account.
33. On 27th September, 2011 at 5 pm the Chairman served the claimant with the dismissal letter. The claimant stated that the summary dismissal was substantively and procedurally unfair.

Terminal Benefits

34. The Claimant was not paid any terminal benefits and did not get a certificate of service. His gross salary at the time of dismissal was Kshs 117,000. He denies that he owes the Respondent any money since his SACCO loan is guaranteed by members. He prays for:
 - a. One month salary in lieu of notice in the sum of Kshs 117,000
 - b. Lost income for 12 years he would have worked upto retirement age. He was 48 years at the time of dismissal having been born in 1963.

- c. Payment in lieu of leave days in the sum of Kshs 42,900.
 - d. General and punitive damages for the dismissal
 - e. Costs and interest
35. In the alternative the Claimant seeks to be reinstated without loss of income as it was difficult to get another job without a certificate of service especially in the finance sector.

Respondents Case

36. RW 1 was Jane Kaimuri the General manager of the Sacco. She said that the General Manager has overall responsibility to recover loans given to members. The claimant bore this responsibility whether or not he was directly involved in the questionable transactions.
37. He was given three show cause letters and three warnings in a span of one year. The claimant had responsibility of ensuring that all members got their rightful dividend on time and also to ensure timely recovery of loans by timely instalments. Also the claimant had responsibility of ensuring that no undeserved or fraudulent payments were made to members. It was her evidence that the claimant had failed in these respects hence the consecutive 1st, 2nd and 3rd warnings followed by a summary dismissal.
38. On the issue of a fair hearing, RW 1 told the court that the claimant discussed the issue that led to his dismissal with the Board of Management. That he was given a chance to explain himself at the meeting and in writing.
39. That the Board had sanctioned the audit that took place. She denied that the Audit was done irregularly. The audit revealed fictitious payments in the account of Jane Keriri, Pil Mwangi and Richard Murigi among others. The audit also revealed partial payment of loan and non-payment of loans by Pithon Mwangi, Zachary Kipus and June Keriri.
40. Thirdly the auditors found same category of loans running co-currently in respect of Zachary Kipus and Pithon Mwangi contrary to SACCO policy. The SACCO lost 3 – 4 million in respect of Jane Keriri's account alone.
41. That the Auditors report was discussed at a meeting held on 27th September, 2011. The claimant did not attend the meeting. This led to the decision to dismiss the claimant. The letter of dismissal is signed by the Chairperson, Treasurer and Vice-Chairman.

42. Determination

- i. Was the claimant summarily dismissed for a valid reason(s)?
- ii. Was the summary dismissal done in terms of a fair procedure?
- iii. What remedy if any is available to the claimant?

43. The Respondent in the letter of summary dismissal provided reasons for the action taken by the Respondent against the claimant. The claimant had defended himself against these allegations made against him but has fell short of proving on a balance of probability that a wrongful dismissal took place as is required of the claimant under section 47(5) of the Employment Act, 2007.
44. To the contrary, the Respondent has made reasonable justification for terminating employment of the Claimant but not for the summary dismissal as is required under section 47(5) as read with section 43 (1) and (2) of the Employment Act. The Respondent also followed section 41 of the Employment Act, in effecting the dismissal.
45. However, given the long and dedicated service the claimant had rendered the SACCO, the court deems it fair and just to commute the summary dismissal to a normal termination of employment. Accordingly, the claimant is entitled to;

(i) one month's salary in lieu of notice in the sum of Kshs 117,000

(ii) to be paid Kshs 42,900 in lieu of leave days not taken, and

(iii) to be paid any other benefits that may have been withheld only on the basis that the claimant was summarily dismissed and not subjected to termination of employment in terms of employment in terms of the Respondent's terms and conditions of employment.

Computation if any to be filed within 30 days from date of this judgement.

46.Total award is Kshs 159,900

47.The award is payable with interest at court rates from date of judgement till payment in full.

48.The Respondent is to provide the claimant with a certificate of service within 14 days from the date of this judgement.

49.Each party is to bear their own costs of the suit as the claimant was partly successful.

Dated and Delivered at Nairobi this 22nd day of May 2015

MATHEWS N. NDUMA

PRINCIPAL JUDGE