



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 41 OF 2012

(Formerly Cause No.1935 of 2012 at Nairobi)

JANE KARWITHIA KWARIA.....CLAIMANT

VERSUS

MERU FARMERS SACCO SOCIETY LIMITED... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 15th May, 2015)

RULING

The claimant Jane Karwithi Kwaria filed on 27.09.2012 the memorandum of claim through Ashfords and Company Advocates. The claimant filed the amended memorandum of claim on 22.02.2013. The claimant prayed for judgment against the respondent for:

- a. General damages for unlawful and unfair dismissal from employment.
- b. In the alternative special damages of Kshs.2,645,312.50.
- c. Costs of this suit.
- d. Interest on (a), (b) and (c).
- e. Any other remedy that this honourable court may deem just and expedient to grant.

The respondent Meru Central Farmers SACCO Society Limited filed on 25.10.2012 the statement of defence and counterclaim through Mwenda Mwarania, Akwalu & Company Advocates. The amended statement of defence and counterclaim was filed on 10.07.2013. The respondent prayed that the claimant's claim be dismissed with costs and judgment be entered for the respondent against the claimant for:

- a. Kshs.809,000.00.
- b. Interest thereon at court rates from 09.05.2012 till payment in full.
- c. Costs of the main suit and those of the counterclaim.
- d. Interest on the costs from the date of filling the counterclaim till payment in full.

The case was heard by the court on diverse dates ending on 18.12.2014. Parties' advocates agreed to file written submissions. The respondent filed the submissions on 08.05.2015. Despite repeated opportunity to file the submissions the claimant's counsel failed to do so.

The facts of this case are clear. The claimant was employed by the respondent with effect from 4.05.1987 as a paying and receiving cashier or a teller as is commonly known. At termination the claimant was earning Kshs.29,874.00 per month.

On 09.05.2012 the claimant was on duty and after work the claimant's records for money received and paid out failed to balance with the consequence that Kshs. 809, 000.00 was missing. It was late in the evening and the claimant offered to make the reconciliation to her supervisor the following morning and after going through the entire documentation of the vouchers for 09.05.2012.

On 10.05.2012 when the claimant was required to make an explanation about that shortage of Kshs.809,000.00, she stated that a person pretending to be a genuine customer had given her a note and she had paid out the missing money to that person. The claimant's statement to respondent's management dated 10.05.2012 explaining the shortage stated as follows:

“It was around 50 minutes to 1p.m when one customer and greeted me and asked me, are you Janet? I told him yes. He said this letter is for you, read it and do the needful. I opened it and inside there was a substance in powder form which poured on my skirt. The letter was asking for 1 million. I asked him whose money you are asking for. He replied I have been send and don't waste my time. I felt as if I am feeling dizzy and very week.

He didn't want any argument. All he needed is money. I gave him 1000 notes and 500 notes totalling to 800,000. He had a small bag and when leaving he threatened to come for the remaining. He also demanded the letter back he had given me. The letter was written by ABUNDALLA.”

By the letter dated 14.05.2012 the respondent suspended the claimant from duty without pay with effect from 14.05.2012 because in the respondent's view the events of 09.05.2012 were fraudulent and criminal acts on the part of the claimant. By the letter dated 18.06.2012 the respondent dismissed the claimant from employment by reason of a report and resolution by the respondent's board at the meeting held on 14.06.2012 because the events of 09.05.2012 were criminal and the claimant was summarily dismissed from employment as per section 44(4) (g) of the Employment Act, 2007.

By the letter dated 29.06.2012, the claimant's advocates Ashfords & Company Advocates wrote stating that the claimant's dismissal was unfair because the claimant had been charged in the criminal court and she had not been given an opportunity to defend herself. The dismissal, it was stated, offended Articles 47(1) and 50 of the Constitution as well as the Employment Act, 2007 and the principles of natural justice. The respondent's advocates on record replied to that letter by the one dated 11.07.2012 requesting for time to enable the respondent to address the claimant's concerns.

By the letter dated 14.05.2012, the claimant's suspension was lifted as conveyed in the letter dated 14.05.2012. By the respondent's further letter dated 16.07.2012 the respondent lifted or set aside the summary dismissal as communicated in the earlier letter of 18.06.2012. The claimant was asked to remain on suspension awaiting further communication from the respondent.

By the letter dated 16.07.2012 the respondent conveyed to the claimant that she was on suspension with effect from 14.05.2012 and in view of the events of 9.05.2012, she would be informed when to appear before the board of directors in self defence.

The respondent's advocate wrote the letter dated 7.08.2012 to the claimant's advocate and attached the respondent's letter dated 02.08.2012 inviting the claimant to attend for a hearing before the respondent's board at the meeting scheduled for 15.08.2012 to interrogate the suspension and the allegations as levelled against the claimant. By the letter dated 13.08.2012, the claimant's advocates wrote to the respondent's advocates conveying that the respondent be informed that the claimant would not attend the meeting scheduled for 15.08.2012.

The board met as scheduled in absence of the claimant, deliberated the allegations against the claimant about the missing 809,000.00 and resolved to summarily dismiss the claimant from employment with effect from 15.08.2012 because of the gross misconduct. The respondent issued the claimant's certificate of service dated 21.08.2012 stating that the claimant served the respondent as a bank clerk from 4.05.1987 to 21.08.2012 being 25 years and 3 months.

The issues for determination in this case are as follows:

1. Whether the dismissal was unfair.
2. Whether the claimant is entitled to the prayers made in the amended memorandum of claim.
3. Whether the respondent is entitled to the prayers made in the defence and counterclaim.

The court has considered the pleadings, the submissions and the evidence. The court makes the following findings on the issues in dispute.

The **1st issue** is whether the dismissal was unfair. A dismissal is unfair if the employee is denied a notice and a hearing as envisaged in section 41 of the Employment Act, 2007 or if the employer fails to establish a genuine reason for the termination of employment as envisaged in section 43 of the Act.

In this case, the respondent, upon intervention by the claimant's advocates, decided to reverse all the offending steps in the administrative disciplinary process. The respondent then gave the claimant an opportunity to appear for the disciplinary hearing before the board. The claimant failed to do so. In the opinion of the court, the claimant was accorded a notice of the allegations that confronted her and was given an opportunity to be heard. The court finds that the respondent complied with the due process of notice and a hearing as envisaged in section 41 of the Act.

The next sub-issue is whether at the termination the respondent had a valid or genuine reason to terminate the claimant's employment. The court has considered the claimant's explanation of the events of 9.05.2012 and as documented in her statement as reproduced earlier in this judgment. The events are ghostly as they are magical. They beg many unanswered questions. The alleged letter or note by Abudalla was returned to the alleged customer. The alleged powdery substance was never reported to the respondent's management. The claimant continued to serve other customers without reporting the alleged events to the management. All the flow of events point that the claimant concealed the truth about the reported shortage of 809,000.00 on 09.05.2012 and she was solely responsible for the loss which she sought to show was ghostly and magical in obvious total breach of her duties as a teller. The court therefore finds that the respondent had a genuine or valid reason to dismiss the claimant. The court finds that even in absence of the elaborate notice and hearing, very early in the inquiry about the shortage the claimant had written acknowledging and taking responsibility of the shortage.

Thus, to answer the 1st issue for determination the court finds that the termination was not unfair. While making that finding the court has considered the principles that should guide employers in disciplinary cases at the work place entailing a criminal element. The court upholds its opinion in disciplinary cases against employees where in the opinion of the employer there exist a criminal element as set out in the guiding applicable principles in the case of Mathew Kipchumba Koskei –Versus- Baringo Teachers SACCO [2013] eKLR, Industrial Cause No. 37 of 2013 at Nakuru. The court stated as follows:

“Nevertheless, such circumstances have never ceased to occasion complex considerations that must be taken into account to ensure that justice is done in every individual case. It is the opinion of the court that the following general principles would apply in assessing the individual cases:

- a. **Where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer may initiate and conclude the administrative disciplinary case and the matter rests with the employer's decision without involving the relevant criminal justice agency.**
- b. **If the employer decides not to conclude the administrative disciplinary case in such matters and makes a criminal complaint, the employer is generally bound with the outcome of the criminal process and if at the end of the criminal process the employee is exculpated or found innocent, the employer is bound and may not initiate and impose a punishment on account of the grounds similar to or substantially similar to those the employee has been exculpated or found innocent in the criminal process.**
- c. **If the employer has initiated and concluded the disciplinary proceedings on account of a misconduct which also has substantially been subject of a criminal process for which the**

employee is exculpated or found innocent, the employee is thereby entitled to setting aside of the employer's administrative punitive decision either by the employer or lawful authority and the employee is entitled to relevant legal remedies as may be found to apply and to be just.

- d. **To avoid the complexities and likely inconveniences of (a), (b) and (c) above, where in the opinion of the employer the employee's misconduct amounts to a criminal offence, the employer should stay the administrative disciplinary process pending the outcome of the criminal process by the concerned criminal justice agency. In event of such stay, it is open for the employer to invoke suspension or interdiction or leave of the affected employee upon such terms as may be just pending the outcome of the criminal process."**

In the present case the claimant initiated the present suit despite the pending criminal case surrounding the allegations as leveled against the claimant. The respondent on the other hand decided to conclude the disciplinary case despite the pending criminal case. The details or status of that pending criminal case were not provided to the court. In the opinion of the court the role of the judgment in the criminal case in cases of unfair dismissal like in the instant case is to establish the reason for the termination, usually beyond reasonable doubt. The court has considered the claimant's written explanation about the events of 9.05.2012 and in absence of any other material, the court finds that the respondent acted in good faith as it had a genuine reason to terminate the employment of the claimant on account of the missing 809,000.00 as the shortage was solely attributable to the claimant as a teller.

The **2nd issue** for determination is whether the claimant is entitled to the prayers made in the amended memorandum of claim. The court makes findings as follows:

1. The respondent has stated that the claimant has failed to collect her earned salary and leave. Thus the court finds that the claimant is entitled to **Kshs.29,874.00** being pay for annual leave as claimed and **Kshs.8,962.00** being salary for 9 days worked in May, 2012.
2. The dismissal was on account of gross misconduct and the court has found that the same was not unfair. Under the collective agreements filed in court, the claimant is not entitled to the provident fund payments in view of the gross misconduct. Further, the court finds that the claimant is not entitled to the service pay and pay in lieu of the termination notice as prayed for. The court finds that the provisions of the collective agreement are binding upon the parties in that regard.

The **3rd issue** for determination is whether the respondent is entitled to the prayers made in the defence and counterclaim. The court finds that the respondent has by evidence established that the loss of **Kshs.809, 000.00** was solely attributable to the claimant. The court finds that the respondent is entitled to that cash as prayed less **Kshs.38,836** making **Kshs.770,164.00** due to the respondent from the claimant.

In conclusion, judgment is entered for the respondent against the claimant for:

- a. **The dismissal of the claimant's claim.**
- b. **The claimant to pay the respondent Kshs.770,164.00 by 1.08.2015 in default interest at court rates to be payable thereon at court rates from the dated of this judgment till full payment.**
- c. **The claimant to pay 90% of the respondent's costs of the suit.**

Signed, dated and delivered in court at Nyeri this **Friday, 15th May, 2015.**

BYRAM ONGAYA

JUDGE