



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1978 OF 2012

NOAH SIRENGO CHELOTI.....CLAIMANT

VERSUS

POSTBANK SAVINGS BANK.....RESPONDENT

JUDGMENT

1. The Claimant filed suit on 3rd October 2012 seeking resolution of an issue he framed as unlawful termination of employment. In his suit he pleaded that he was employed by the Respondent in 1997 and was on probation until 1st April 1998 when he was employed on permanent basis. The Claimant averred that he served the Respondent diligently and was promoted to the position of Assistant Accounts Officer. On 9th December 2009 he was asked by the Respondent to explain the circumstances under which various unusual deposits were made on his personal accounts at the Respondent's headquarters. He was interdicted on 11th December 2009 and eventually dismissed from the Respondent's employ on 10th May 2010. The Claimant averred that the dismissal was unlawful and without any reasonable and/or probable cause. He sought medical allowances entitlement of Kshs. 30,000/- for 12 years – Kshs. 360,000/-, leave allowance entitlement per year at Kshs. 6,400/- for 12 years – Kshs. 76,800/-, one month gross salary for each year worked at Kshs. 64,205/- a month – Kshs. 770,460/-, salary withheld during interdiction Kshs. 136,709.10 and three months salary in lieu of notice Kshs. 192,615/-. The Claimant also sought reinstatement with all benefits, costs of the suit and interest on the sums claimed.

2. The Respondent filed a Memorandum of Response on 7th November 2012. In the memorandum, the Respondent averred that the Claimant was diligent and honest only for a limited time before he begun engaging in unscrupulous actions which necessitated the issuing of a show cause letter dated 9th December 2009. The Respondent averred that the Claimant was properly and legally terminated and that he was aware of the reasons for his termination indicated in his dismissal letter dated 10th May 2010, he was given a chance to be heard in the show cause letter. The Respondent averred that the Claimant was not entitled to the claims contained and particularized in his memorandum of claim. The Respondent averred that the Claimant is not entitled to reinstatement as his appointment was lawfully terminated. The Respondent sought the dismissal of the claim and costs be provided for.

3. The Claimant was led in his examination-in-chief on 31st July 2014 by his lawyer Mrs. Keah and he testified that he was not currently employed. He testified that the Respondent had been his employer for 12 years from 1998 till May 2010. He was employed as a clerical officer on 7th February 1998 and was

promoted to accounts officer on 25th January 2006. He earned a gross salary of 64,205/- at the time of leaving the Respondent. The Claimant testified that from date of interdiction he was placed on half pay for six months until his dismissal. He was given a show cause letter on 9th December 2009 and he responded on 11th December 2009 and was interdicted on 14th December 2014. He wrote an appeal letter on 29th December 2009. He testified that he was summarily dismissed after the appeal. The dismissal letter of 10th May 2010 gave the reason for dismissal as an operational irregularity and failure to adhere to operating procedures. He stated that he did not know what to distinguish between unusual deposits and usual deposits. He received letter of recommendation dated 18th May 2010. He was not paid after dismissal and thus sought for payment through his lawyers at the time. The lawyers wrote a demand letter and there was no reply to it hence the suit. He testified that he was not reprimanded or charged or warned. He testified that other than the letters he was not given a chance to defend himself. He testified that the Respondent was not justified to dismiss him.

4. The Respondent's counsel Mr. Kalii asked some questions in cross-examination and the Claimant testified that he was not given an opportunity to be heard. He was given a show cause letter which invited his remarks and he wrote a letter of appeal as well. He testified that he wrote a statement on 1st July 2009 and explained the issue of the deposits in his account. He stated that he was called by the Finance Manager of the bank who told him that as finance department they were of the view that he was innocent but the disciplinary committee was of the view that he should be dismissed. The Claimant was asked whether the 2 letters, appeal and the oral discussion were not hearings and he responded that those were just communication between the bank and himself. He stated that there is a disciplinary committee of the bank. He testified that he was given time to respond to the allegations but the 48 hours were too short and it should at least have been 72 hours. The Claimant replied to the show cause letter the same day. He admitted that in his reply he did not state that the time was too short. He however disagreed that he did not need more time to respond. He signed a statement recorded by the security manager. He stated that he did not know the charges facing him. He recalled a colleague by the name Gitahi James who worked in Kakamega. He testified that Gitahi was not involved in his dismissal. He admitted that Gitahi deposited into his account. He could not recall how many times. He did not know if Gitahi was involved in swindling the bank. He said it was not correct to say he was an accomplice to Gitahi. He could not recall a deposit of 100,000/- and recalled being asked about Rashid and stated that he was to relay the cash to Rashid. He could not remember how many times he gave Rashid funds. He stated that he had no relationship with Gitahi. He testified that he gave an explanation for the deposits and his response was not vague. He sought the half salary for the period he was under interdiction. He stated the interdiction was not lifted and he was not reinstated. He testified that the code of regulations provided that only if the interdiction was lifted would the half salary be payable. He stated that he did not know what inchoate pay is as it is not a finance term. He testified that he made a choice of the option on his pension and did not have any complaint on the pension at all. He stated that the Respondent was very unfair and the charges were not specified. He said there were no justified reasons and the Respondent did not follow procedure.

5. The Respondent sought to introduce documents after the testimony of the Claimant was taken and the Court made a Ruling permitting the counsel for the Claimant to first have a look at the documents before the Court could consider admitting them. This was done and the Claimant had no objection to the documents being filed. The Respondent filed the documents on 4th November 2014.

6. The Respondent called Mr. George Onyango the Assistant Manager in charge of investigations at the Respondent. He testified that he knew the Claimant who was an Assistant Manager of the Respondent at the material time. He testified that he had investigated the circumstances related to this claim. He stated that there was fraud that took place in Kakamega involving an officer David Gitahi a teller at the branch. He testified that miscellaneous receipts were forged and misrepresented as payments from Nairobi. Using the copies of documents filed by the Respondent he demonstrated how the miscellaneous receipts were forged and used to make fraudulent payments of over 12 million. He testified that he commissioned an audit to be undertaken by the Regional Manager in Western and a report made. He testified that from the investigations it was clear the Nairobi office where the Claimant worked was involved. He testified that looking at a copy of the Claimant's statement account, there was proof of many deposits. The first deposit on 1st March 2008 was for 24,700/-, second one was for 18,400/- and the third was for 500 made on 17th

March. 2008. The basis of suspicion was the deposit made of 90,000/- and 50,000/-. On 30th September there were two deposits made of 1,500/- and on 3rd October 2007. On 18th November 2008 there was a deposit of 30,000/- and then 3 deposits of 50,000/- on 25th November, 100,000/- on 2nd December and 3,200/- on 8th December 2008. A further deposit of Kshs. 10,200/- was made on 25th March plus a deposit of Kshs. 5,000/-. He testified that in the other account 5 deposits were made on 21st February 2008 Kshs. 5,980/-, on 8th May 2008 Kshs. 14,000/- on 28th May 2008 21,550/- and on 8th October and 16th October 2008 deposit of Kshs. 100,500/- and 30,000/- respectively. He stated that there was a nexus in that the forged receipts issued to Kakamega were parallel to receipts issue to Finance but were cancelled. The fraud in Kakamega was from 2007 to 2009. There must have been a relay from payments to the person for him to generate parallel receipts there must be information. He testified that the receipts issued in Kakamega were not parallel to receipts issued in 2007 but to time the Claimant worked in the branch. Having made a nexus the account was receiving money this became part of investigations and he sought explanation for these anomalies. He interviewed the Claimant and a statement was recorded which the Claimant signed after reading. The Claimant admitted that Gitau sent the Claimant money into his account to buy Gitau a suit case, to pay for VISA card, to give money to Gitau's sister and payment to Gitau's friend Rashid, a soft loan to the Claimant. He sought to get contacts so that he could talk to them but the Claimant stated that he had deleted Gitahi and Rashid's numbers. He testified that there was reasonable cause to suspect the Claimant as an accomplice. Gitahi was charged and convicted.

7. He was cross-examined by Mrs. Keah and testified that he was the Assistant Manager in charge of investigations and that the teller was David Gitahi and the Claimant never worked in Kakamega. James Rono an accounts officer in Reconciliation at head office was the whistleblower. He was referred to the forensic audit and stated that he gave instructions and the report was directed to the Managing Director. It was undertaken by Kavena Wanzala presently the head of audit at Kenyatta University. He stated that his evidence was based on his investigation. He testified that there was the audit report and he also undertook investigations. He considered the taking of an audit necessary when the suspicions were brought to him. James Rono was doing branch reconciliation for western region which has 20 branches and comprises Western, Nyanza and Kericho. He testified that at the office where the Claimant was, there are about 30 employees and he questioned 5 in finance in terms of relevance and the 5 included the Claimant. He questioned Rono, Edith Wamalwa and the Claimant. He zeroed in on the Claimant. He established a nexus between fraud in Kakamega and fraud at the head office. Counterfeit receipts used to give value to certain accounts or similar serial numbers would cancel receipts in the payment section and on that basis there had to be communication from payment section to prepare counterfeit receipts in Kakamega. The Claimant took part in reconciliation of cash account in head office. He testified that the payments were disguised as pension payments. He testified that the receipts were for previous years and were not current. He stated that the Claimant was given a notice to show cause. He testified that the Claimant was given an opportunity to show cause. He was given opportunity to respond and there was a disparity from what the Claimant wrote in the letter and what he recorded in the statement. He testified the investigations were expansive and he investigated in Kakamega, Kisumu and head office. He testified that the investigations were not carried out in a vacuum and the Claimant could not explain the cash in his account and the relationship with the suspect. He stated that the Claimant could not complain as he was connected to the offence.

8. In re-examination by Mr. Kalii, he testified that the receipts did not come from Finance. The receipts were fake. He testified that the Claimant had conceded in his statement that Gitahi had initiated contact in 2007. He stated that during the subsistence of that relationship huge deposits were made into the Claimant's account at Kakamega. The Claimant was not able to explain the nature of the deposits. He testified that the Claimant deleted the numbers on his phone and his demeanor, conduct after the offence, nature of interaction with Gitahi all pointed to the Claimant's involvement and that separated the Claimant from all the others and was not a scape goat. He testified that Noah and David were accomplices and transfers were made to Noah and the deposits were in the statement of account of the Claimant.

9. The parties filed written submissions. The Claimant filed submissions on 9th April 2015 and the Respondent filed submissions on 29th April 2015. In his submissions the Claimant submitted that the issues for determination were two:-

- (i) Whether the interdiction and subsequent termination of the Claimant was procedural and lawful
- (ii) Whether the Claimant is entitled to the reliefs sought

The Claimant submitted that testimony reiterated the events from his appointment up to his ill fated dismissal characterized by the lack of an opportunity to be heard, lack of reasons to justify termination and the total disregard by the Respondent on the right of appeal as specified by the Respondent's code of conduct. The Claimant submitted that his termination did not meet the threshold of the dictates of the law under Sections 41 and 43 of the Employment Act. He submitted that he was issued with a show cause letter dated 9th December 2009 which accused the Claimant of making various unusual deposits into his two accounts and asked the Claimant to show cause within 48 hours. The Claimant submitted that he complied in haste stating that the deposits were genuine. He submitted that in keeping with the regulations of the Respondent he appealed but his appeal was not heard. The Claimant relied on the cases of **Catherine Wanja Njeru v Kenya Post Office Savings Bank Cause No. 53 of 2011**, **Alphonse Machanga Mwachanya v Operation 680 Limited [2013] eKLR**, and the decision in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** where the Court held that for a termination of employment to pass the fairness test there must be both substantive justification and procedural fairness. The Claimant submitted that he was never given the reason for his termination aside from the blanket statement of unusual deposits in his accounts. The Claimant submitted that he was not availed of the right to be heard and that the requirement of the Code of Conduct that the employee has to make a request to be heard was unconstitutional. He relied on the case of **Kenya National Examination Council v Republic ex parte Gathenji and Others Civil Appeal No. 266 of 1996** and **Joseph Omwenga v Kenya Revenue Authority Cause No. 811 of 2011**. The Claimant submitted that he was entitled to an oral hearing before summary dismissal as held in the case of **Dishon Onkaba v Factory Guards (Msa) Limited Cause No. 430 of 2013** and **John Kennedy Ongadi v Kenya Power & Lighting Co. Ltd Cause No 50 of 2012**. The Claimant submitted that he is entitled to the reliefs sought and stated that the medical allowance entitlement was for the out-patient medical allowance of Kshs. 30,000/- and in-patient refund limit of 1,100/- per day. He submitted that he was entitled to Kshs. 330,000/- for the 11 years worked. The Claimant submitted that he was entitled to leave allowance for the 10 completed years of service making Kshs. 64,000/- at the rate of 6,400/- per year. He sought compensation for the unfair termination made up of Kshs. 64,205/- for the 11 years worked making a total of 706,255/-. The Claimant also sought a refund of the half salary withheld during the interdiction period. He relied on the case of **Grace Gacheru Muriithi v Kenya Literature Bureau [2012] eKLR** which held the employee has legitimate expectation that if he is exculpated that the salary withheld would be paid. The Claimant also submitted that he was entitled to three months salary in lieu of notice.

10. The Respondent submitted that the real controversy was whether the Claimant's employment was terminated on justifiable grounds, whether he knew the charge against him and whether he was afforded a hearing. The Respondent submitted that the Claimant was given a notice to show cause and he was required to explain the circumstances under which certain unusual deposits were made into his account. The Respondent submitted that the Claimant could not have been in doubt what the unusual deposits were as he had prior to the notice to show cause recorded a statement with the Respondent's investigator Mr. George Onyango. The Respondent submitted that the character of every act depends on the circumstances in which it is done and the Claimant cannot say he did not know what the show cause letter meant. The Respondent submitted that it had justifiable reasons to terminate the Claimant's employment as the case for fraud by the Claimant was rather insuperable. The Respondent relied on the provisions of Section 47(5) and 43(2) of the Employment Act 2007. The Respondent submitted that the Claimant was granted various hearings as hearing can either be oral or written. The Respondent relied on the case of **Jane Frances Angalia v National Cohesion & Integration Commission Cause No. 1647 of 2012** for the submission that a written hearing cuts as much ice as an oral hearing without the need for both. The Respondent submitted that the Court of Appeal cases cited by the Claimant were all prior to the Employment Act 2007 coming into effect. The Respondent submitted that substantive justice was accorded to the Claimant and it was Pharisee like to insist that each tenet of the law must have been followed as the law requires the Court to consider the extent to which the Respondent complied with the law. The Respondent submitted that the salaries withheld are only payable in cases where the employee has been found innocent and the notice pay demanded was not payable as the Claimant was summarily

dismissed.

11. The Claimant's case is that the dismissal by the Respondent was unprocedural and unfair. The Respondent's case is that the dismissal was for just cause. In brief, the uncontested facts are that the Claimant was employed by the Respondent and that he was given a show cause letter, placed on interdiction and subsequently dismissed by the Respondent. The Claimant was given a show cause letter which sought an explanation for the unusual deposits into his account. He had prior to this show cause letter been interrogated by the Respondent's witness George Onyango. The Claimant asserted shortness of time to respond to the letter of show cause but nevertheless responded to the show cause letter in writing.

12. The Employment Act makes provision on the respective burdens of parties. Section 47(5) of the Employment Act provides as follows:-

47. (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

13. The Claimant was required to prove unfair termination or wrongful dismissal while the Respondent is required to justify the grounds for the termination or wrongful dismissal. The Claimant had two accounts into which some deposits were made by one Gitahi who was suspected to have been in cahoots with the Claimant. From all accounts the Claimant was one of the beneficiaries of a series of deposits made into his account by Gitahi. The Claimant failed to adequately explain why the deposits were made into his account. These were sums he said were deposited for the purpose of making payments on a VISA card on behalf of Gitahi, to pay Gitahi's sister and a soft loan to the Claimant. If he was not an accomplice he handled stolen money and this was sufficient cause for dismissal. The Claimant asserts he was not heard. The Respondent's code of conduct had a provision that the Claimant was to seek an oral hearing if he was to have one. He did not. The challenge that the provision is unconstitutional does not hold as the Constitution does not envision a situation where each time an employee is to be dismissed only after an oral hearing. Whereas it is ideal for an oral hearing at instances where termination for misconduct is contemplated, the hearing that took place in this case was sufficient. The Claimant was given opportunity to respond to the allegations, he was given a forum to explain why he had unusual deposits in his two accounts. He recorded a statement but he did not dislodge the suspicions around the deposit and was properly dismissed from service.

14. The medical claim is one that is concomitant with his employ. If he was not in employment he cannot recover medical dues and as such he was not entitled to receive dues for a medical benefit in retrospect. The Claimant also sought notice. Notice is not payable in summary dismissal cases. The Claimant also sought payment of the salary withheld during his interdiction. The interdiction was not lifted and on the strength of the case cited by the Claimant being the case of **Grace Muriithi v Kenya Literature Bureau** it is clear the same was only payable if the interdiction was lifted. The upshot of the foregoing is that the Claimant has not proved his case and it is dismissed with costs.

Orders accordingly.

Dated and delivered at Nairobi this 16th day of June 2015

Nzioki wa Makau

JUDGE