



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 956 OF 2011

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS.....
.....CLAIMANT**

VERSUS

**KENYA BANKERS SAVINGS AND CREDIT SOCIETY LIMITED.....
RESPONDENT**

JUDGMENT

1. The claimant averred that he was employed by the respondent in 2004 as a messenger and worked until 20th May, 2010 when his services were terminated. At the point of termination he was earning Kshs.24,000/= per month and a house allowance of Kshs.3,200 per month.
2. His services were terminated on the grounds of poor performance after he had been guided and counseled on various occasions. The claimant contested his termination and sought the order of this Court to compensate him for wrongful and unfair dismissal.
3. The respondent on the other hand defended the dismissal stating that the claimant received several cautions on his unbecoming conduct but failed to change. The respondent further stated that it followed all the laid down procedures and Employment Act in dismissing the claimant. Further, in keeping with the Collective Bargaining Agreement, upon termination, the respondent paid the claimant one month's salary in lieu of notice and all dues owing to him as per the termination letter.
4. At the hearing the claimant stated that on the material day he picked letters from Nairobi Branch for delivery to Head Office. One month later he was told there was money which was enclosed in one of the letters and it was missing. It was his evidence that the letters were so many and he could not possibly know any contained money. He stated that he was dismissed as a result of the loss and was issued with a termination letter without being called for any disciplinary hearing.
4. In cross-examination he admitted that in 2005 he had family problems and asked for assistance from one of the Board members. He was warned about it and apologized. He further stated that in 2006 he had family pressure and took a cheque of one of his colleagues and

attempted to encash it.

5. The respondent's witness Mr. Fredrick Wanjala informed the Court that it was improper for the claimant present his personal problems to a Board member. He should have raised issues through his supervisor. He further stated that in 2005 September, the claimant was given a cheque to deliver to a member but instead attempted to cash the cheque. It was further his evidence that in 2007 and 2009 the claimant was appraised and his performance found unsatisfactory and was issued with a letter calling on him to improve. Regarding the missing application fee, it was his evidence that the claimant knew the contents of the letter and hence it was justifiable to dismiss the claimant for misappropriating the money.

6. Mr. Egesa for the respondent submitted that the claimant was unlawfully terminated by the respondent since relevant provisions of the Collective Bargaining Agreement and Employment Act were not observed. It was his submissions that someone earning Kshs.27,000/= per month could not risk his job for Kshs.500/=. The respondent's action was therefore harsh and the claimant ought to have been warned instead of dismissal. According to counsel provisions of the law especially section 41 of the Employment Act were not complied with hence the dismissal was arbitrary and the respondent acted upon the matter without any attempt for consultation. This according to him infringed on the claimant's fundamental right to representation and fair adjudication.

7. Mr. Abuya for the respondent on the other hand submitted that the claimant received a caution for his unbecoming conduct in 2005 May and responded with an apology. He further submitted that in February, 2006 the claimant tried to cash a cheque belonging to his colleague. In April, 2010 the claimant received an enclosed envelope addressed to Operations Manager to be delivered by 27th April but the envelope did not reach the Operations Manager until 4th May, 2010 and when received, was discovered open. Counsel further submitted that in 2006 the claimant was appraised and his performance was noted as unsatisfactory. In view of the all these, Counsel submitted that the respondent being a credit taking institution required that all its employees be honest and trustworthy. The claimant's behavior according to Counsel was unbecoming of an employee and threatened to bring the respondent's good name into disrepute. The claimant's behavior further undermined the trust and confidence the respondent had in him.

8. Regarding procedure followed in terminating the claimant, counsel submitted that following the claimant's previous record, the Board of Directors of the respondent decided to terminate the claimant's services in accordance with section 44 of the Employment Act and clause 24 of the Collective Bargaining Agreement. According to Counsel Clause 24 permitted the respondent to summarily dismiss an employee who misappropriated any funds or property of the respondent. The respondent therefore did not disregard any of the provisions of the Employment Act.

9. The Court has reviewed the pleadings, documents, witness testimony as well as submissions by both sides and is reasonably persuaded that the respondent had justifiable cause to terminate the claimant's services. For instance, admission of an attempt to encash a colleague cheque was outright theft which ought to have earned the claimant summary dismissal without more. The claimant during the material time leading to his dismissal had exhibited character and behavior of a person who is dishonest and could not be trusted.

10. However, as this Court has held severally before, dismissal or termination from employment is a two tier process. That is to say, there must be a valid and justifiable reason for dismissal or termination must be done in accordance with a fair procedure. Fair procedure is partly provided for under section 41(1) of the Act which requires among others that the employee is given an explanation in the language such employee best understands, the reason for which termination is being considered and the employee is entitled to make representations either personally or through a representative of his or her own choice. I have perused the pleadings and supporting document in his suit but I have not come across any evidence or allegation that this procedure was followed prior to dismissing the claimant. In the circumstances the Court finds the dismissal unfair on

account of procedure only and awards the claimant nominal damages of one month's salary as compensation for unfair termination of services.

11. There will be no order on costs.

12. It is so ordered.

Dated at Nairobi this 23rd day of October 2015

Abuodha J. N.

Judge

Delivered this 23rd day of October 2015

In the presence of:-

..... **for the Claimant and**

.....**for the Respondent.**

Abuodha J. N.

Judge