



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**CAUSE NO. 74 OF 2013**

**KENYA UNION OF COMMERCIAL FOOD**

**AND ALLIED WORKERS ..... CLAIMANT**

**VERSUS**

**MERU NORTH FARMERS**

**SACCO LIMITED ..... RESPONDENT**

**JUDGEMENT**

1. The claim dated 18<sup>th</sup> January 2013 was filed by the claimant union for Stanley Kathiari Muketha their member (grievant) for unfair dismissal by the respondent Meru North Farmers Sacco Limited. The defence was filed on 28<sup>th</sup> February 2013 admitting that the grievant was their employee but was dismissed for dishonest conduct and thus deny the claim in total. In evidence, the grievant support his claim while the respondent called two witnesses, Caroline Mwathimba and Titus Munjori. At the close of hearing both parties agreed to file their written submission filed on 29<sup>th</sup> January 2014 and 20<sup>th</sup> January 2014 for the claimant and respondent respectively.

**Claimant's case**

2. The claimant union has a Recognition Agreement and a Collective Agreement with the respondent and thus their representation herein for and on behalf of the grievant. On 8<sup>th</sup> February 1992 the grievant was employed by the respondent, he progressed through the ranks and was transferred to various branches of the respondent, in 2007 he was at Muthara Branch as a Field Officer, and in 2011 he was taken to Maua Branch as a Loans Clerk. On 11<sup>th</sup> May 2011 the claimant was allocated duties of a Teller against what he was supposed to do being a Loans Clerk. At the close of day during reconciliation of the day work the grievant noticed a shortage of Kshs.10, 000.00 which eh reported to the operations manager and to the custodian of cash who adviced the grievant to raise a voucher of kshs.10, 000.00 to offset the shortage which he did and also sourced for Kshs.10, 000.00 and made a payment to the respondent on 2<sup>nd</sup> June 2011. The grievant applied for annual leave which was granted by the Manager.

3. On 24<sup>th</sup> June 2011 while on leave, the grievant received two letters one, on insubordination and the second, an interdiction. On 18<sup>th</sup> November 2011 the grievant was served with a letter of dismissal. The claimant tried to resolve the matter but failed and thus reported the same to the Labour Office, a conciliator was invited but the respondent failed to appear consequently this case.

4. The claimant is seeking for a reinstatement of the grievant, full compensation for serving the

respondent for 22 years and costs of this suit.

5. To support the claim, the grievant was called in evidence and stated that he was employed by the respondent on 29<sup>th</sup> July 1971 as a temporary staff and on 19<sup>th</sup> December 1991 he was confirmed as permanent staff as Clerk II and became a Teller or a Loans Clerk. He was transferred to various branches, Maua, Lare, Muthara and Mikinduri and then back to Maua. While at Maua he realised a cash shortage of Khs.10, 000.00, he informed the supervisor, they tried to trace the loss but could not find it. The grievant stated that this loss was not the first time as others in his same line of work had such losses and the practice was to raise a voucher and at month end have the same removed from the staff salary. The grievant therefore went and looked for money and paid for the loss of kshs.10, 000.00 so that his work could balance and proceeded to remove the report on the matter from his file record. His books for the day were therefore balanced.

6. After this incident, the grievant proceeded on annual leave after handing over to Doris Kathure a Teller. He went on leave after all books of account were balanced. However after 3 days the manager called him stating that his leave had been revoked. The grievant was shocked as the leave had been approved. Upon report he was sent to Lare branch to relieve another employee who was on off-duty. After 3 days he was served with a letter of interdiction by the manager. He handed over and left the office. After one month he was called by the Board to defend himself in the absence of a union representative. He informed the union which reported to the labour officer but the respondent refused to cooperate.

7. When the grievant was called before the Board, they failed to agree on his case as they found his case as not genuine. The grievant was not the first person to have a shortage and the practice was to raise a voucher and pay later. When one had a case there were 3 warning letters to issue before a summary dismissal or interdiction. The union is also notified by being given a copy of the warnings but this procedure was not followed. The grievant confirmed the claim and is seeking a reinstatement and compensation. He served for 22 years; he is aged and has children in school and not possible to get new employment.

8. On cross-examination, the grievant confirmed that he appeared before the staff disciplinary committee in the absence of the union. He had a record of 46 disciplinary incidents since employment and had been interdicted twice before, once for fighting with a colleague Agnes Kainde and another incident of assault to Robert Mwendwa. He was reinstated after these incidents. That cash losses were common occurrence at the respondent business, this was to be recorded and the affected employee would pay in cash and the receipt attached to confirm. That apart from the duties indicated in the job description of the grievant, the respondent could be allocated other duties. When the grievant had the cash shortage the Manager told him to pay within 2 days, which he paid.

9. The grievant also confirmed that he had served in all the respondent branches and in all he had memos issued to him on disciplinary incidents. One was on insubordination. That despite the 46 incidents on his record, he was lucky as he had not been dismissed as these previous incidents were resolved and is now seeking a reinstatement.

### **Respondent's Case**

10. In defence the respondent stated that they employed the grievant on 12<sup>th</sup> August 1991 as a Temporary Subordinate, he was not confirmed as his performance was found unsatisfactory, he continued under probationary appointment until 22<sup>nd</sup> June 1992 when he was confirmed. By 15<sup>th</sup> March 1993, the grievant had 10 warnings ranging from failure to wear uniform, failure to perform his duties, neglect of duty and failure to provide a medical certificate. On 24<sup>th</sup> June 1993 the grievant was interdicted after fighting with a colleague but was later reinstated. By 31<sup>st</sup> August 2001, the grievant had received 24 warning letters on acts of gross misconduct, absconding duty and violent behaviour causing him an interdiction from 26<sup>th</sup> November 2001.

11. The respondent further states that the grievant was conversant with duties of a teller and when he was allocated these duties he was to discharge them responsibly but he failed to. On 3<sup>rd</sup> December 2004 to 24<sup>th</sup> June 2011 the grievant received 7 warning letters on insubordination, cash shortage, absence from duty, late and incorrect loan reporting, absconding duty and negligence. On 31<sup>st</sup> May 2011 it was discovered during the cash verification exercise that the grievant's daily cash report was not balancing as there was a shortage of Kshs.10, 000.00 but instead of making such declaration, the grievant dishonestly and with intent to deceive was found to have raised an irregular withdrawal voucher for Kshs.10, 000.00 purporting the same to have been a withdrawal from his savings account No. 01-4918-005-00032 so as to cover up the shortage. This was gross misconduct warranting summary dismissal as this was theft of respondent property noting that his account had no money. The grievant account was negative and could therefore not record the dishonest withdrawal. The shortage was therefore not reported by the grievant, it was discovered at the verification stage. He was thus interdicted from duty.

12. The grievant failed to explain the cash shortage but failed to do so and 18<sup>th</sup> November 2011 he was summarily dismissed after investigations were complete. It was also discovered that the grievant had dishonestly received Kshs.3, 000.00 from a customer of the respondent Abdiel Mbaya Magiti for banking but this was never done. On several occasions the respondent was forced to deduct monies from the grievant savings account to pay customers who had been underpaid after making complaints to the respondent that the grievant had underpaid them. The grievant has also failed to clear his loans with the respondent. That this case should be dismissed with costs to the respondent.

13. To support the respondent's case, Caroline Mwathimba gave evidence that she was the Maua branch Manager from 2007 and closely worked with the grievant while at Muthara and later in Maua. She had a nasty time working with him as he was rude and underpaid several clients. Ms Mwathimba severally summoned the grievant after complaints from customers of underpayment and the grievant would be forced to repay these customers from his pocket or have a deduction from his salary. While at Muthara, the grievant was made to pay Kshs.1000.00 to a customer he had underpaid. Another case was a when a customer gave the grievant Kshs.950.00 to bank for him since he was a tout and was in a rush and so left these money with him but there was no deposit. This customer came to the bank after realising the deposit was not done and caused a commotion.

14. Ms Mwathimba further gave evidence that in 2010 she called the grievant and advised him to improve on his work, his reporting on his loans was poor and there were so many customers with complaints against him. He would receive cash and never surrendered it and thus an act of dishonesty. When she was on a routine visit to microfinance groups at Matiandui she found a customer who had defaulted in loan repayment but he insisted that the grievant had been collecting his repayments of Kshs.3000.00 that were never deposited, surrendered or declared to the respondent. These coupled with cases of indiscipline made the witness have a very bad time supervising the grievant. This culminated in the cash shortage on 31<sup>st</sup> May 2011 when the grievant record of cash collection could not balance and he did not submit a report on how the shortage occurred. Fedha Muthoni the Operations manager noted a difference of Kshs.10,000.00 that had no backup ledger or report and when all records were reviewed, it was noted that the grievant had not accounted for this shortage properly and the records were not well organised so as to hide the shortage. The witness talked to the grievant to repay this loss but he never made good the difference. On 15<sup>th</sup> June 2011, she issued a notice to repay in two days or give an explanation on the loss but this was not done. She followed up with notification for insubordination and also referred to the General Manager who recommended an interdiction and eventually after the case was heard by a committee, the grievant was dismissed. There was a notice to the union.

15. The second witness for the respondent was Titus Munjuri the General manager of the respondent for the last 12 years. He was known to the grievant as they worked together. He dealt with several cases against the grievant on indiscipline and in this case on 24<sup>th</sup> June 2011 he received a copy of notice sent to the grievant on the loss of kshs.10, 000.00, noting the complaint he called the Branch Manager for more explanation on the loss since they were all in the same building. He noted the repayment the grievant had been asked to effect on the loss had dragged on for 2 weeks, his personal account was in the negative and noting the terms and conditions of service for the grievant decided to interdict him. He also looked at his

file and noted there were in total 46 previous complaints. Investigations were done and a hearing conducted by the Staff development Committee which recommended summary dismissal that the witness confirmed and gave the grievant the notice. That this was done to protect the interests of the respondent after following due process. The claim that the grievant be reinstated would not be good for the respondent business that is based on customer goodwill and with a previous loss of over 12 million, to keep the grievant who has a questionable character when dealing with customers would jeopardise the business that is struggling considering what the respondent competitors are offering and thus the need to keep professional staff. That in this case the termination of the grievant was lawful.

### **Determination of the issues**

The issues that emerge for determination in this case can be outlined as follows;

Whether the claimant union has any cause against the respondent

Whether the termination of the grievant was unfair

Whether there are any remedies available

16. The enactment of the Employment Act, 2007 brought with it new rights and freedoms to both employers and employees. Unlike the previous labour relations regime, there is now a new dispensation where the role of employer and employee organisations, federations, unions and such conglomerates find a new meaning and place with regard to labour relations. Such formations where they are formed with the purpose of advancing employer or employees' rights find a special place within negotiations, conciliations and judicial proceedings. Where there is a trade dispute at the work place, where an affected employee is unionised, the Recognition Agreement give the union a right and space for the dispute to be addressed as per the terms of a Collective Bargaining Agreement and or in the presence a representative of such a union. In this regard section 2 of the Employment Act defines a union to be;

*“Trade union” means an association of employees whose principal purpose is to regulate relations between employees and employers and includes an employer’s organisation;*

17. Therefore, an employer with knowledge of an existing recognition agreement with a particular union, whenever there are issue with regard to regulation of work relations, the union is to be involved. In the eventuality that an employee is to face summary dismissal or termination, section 41 of the Employment Act now dictates that there must be a hearing to give such an employee an opportunity to defend self. Where such an employee is unionised, this process must be conducted in the presence of the shop floor representative of the union. The section states;

*41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

[Emphasis added].

18. Section 41 of the Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative. The situation is dire where such an employee is terminated after such a flawed process of hearing as such termination is ultimately unfair. The union must be involved at the hearing before an employee is terminated as the union is there to regulate employer and employee relations and to ensure that their member employees get a fair chance to advance their defence with representation by the union.

19. In this case the respondent did not argue or show compliance with the provisions of section 41 of the Employment Act. They have not pleaded to have alerted the claimant union nor have they advanced the argument that they informed the union which failed to attend. There was only a copied notice to the Union. The union was simply ignored. This is not what is envisaged by the law noting the claimant and the respondent had a Recognition Agreement and a CBA. The outcome to terminate the claimant is therefore flawed and unfair.

20. That said, I note the grievant as an employee who had a long history of gross misconduct that should have warranted summary dismissal under the provisions of section 44 of the Employment Act. He had in total a record 46 complaints against him part of which was fighting at the place of work, abusing fellow colleagues while at work, insubordination and dishonest handling of funds the property of the respondent. These were funds and or monies in his care, custody or under his control for and on behalf of the respondent. These cumulatively point to an employee who should have been terminated long before 18<sup>th</sup> November 2011. But he was not. The grievant stated that every time a serious issue was reported against him, he was given a hearing and allowed to go back to work. He was interdicted twice and on both occasions he was reinstated. Even in this regard, he is asking the court to reinstate him and further be paid his compensation since there is a practice by the respondent staff that whenever they have missing funds, the same is deducted from their salary. This is an employee to be kept away from a public office. His attitude to work and his superiors even on the face of very serious cases against him smirk of a person not remorseful and one who is not responsible at all. Unfortunately the respondent allowed the grievant herein to go on and built up a record 46 complaints making him to feel entitled to a reinstatement every time he erred. Sadly though, when the respondent cracked the whip of termination, the same was fraught with the irregularity so crucial, that of failure to involve the union as the claimant was unionised or have him accompanied by a fellow employee of the grievant choice was not done. Despite his bad record, the right to have the union present or a fellow employee at the hearing is a sacrosanct right he should have been made to enjoy. I find this to be an unfair labour practice.

## **Remedies**

21. Under the provisions of section 45 of the Employment Act, on the finding that an employee was unfairly terminated, the remedies available are under section 49. The claimant is seeking that the grievant be reinstated and also compensated. Based on the record of the grievant with the respondent, noting the circumstances in which the termination took place, including the extent the grievant acted, I find he contributed to the termination of his employment and despite his long service with the respondent for 22 years, he is not remorseful and has failed to repay the funds lost in his care, custody or possession being the property of the respondent. Though there is no counter-claim demanding for this lost amounts of the respondent, the grievant insisted that he paid this money but there is no evidence of such payment. A reinstatement would therefore not be an appropriate remedy in this case.

22. This court has powers to make alternative remedies under section 49(4) (m) that of compensation. On the finding that the termination of the grievant was procedurally unfair, and based on the circumstances of this case, I award him compensation equivalent to one month pay.

**In conclusion therefore, judgement is hereby entered for the claimant as against the respondent in the following terms;**

- a. The termination of the grievant was procedurally unfair;**
- b. An award of one month salary as of 18<sup>th</sup> November 2011; and**
- c. Each party to bear their own costs.**

Dated and delivered at Nairobi this 18<sup>th</sup> day of February 2014

**M. Mbaru**

**JUDGE**

In the presence of

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