



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 449 OF 2013

(Before D.K.N. Marete)

ONESMUS OMWENGA MAROKO.....CLAIMANT

Versus

CO-OPERATIVE BANK OF KENYA LTD.....RESPONDENT

JUDGEMENT

This matter came to court vide a Memorandum of Claim dated the 2nd April, 2013 and filed on 4th instant. The issues in dispute are therein cited as;

- i. Unlawful/unfair termination of services**
- ii. Non-payment of terminal dues**

The respondent vide a Respondent's Reply to the Claimant's Memorandum of Claim: Reply to Introduction dated 22nd May, 2013 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times to this claim and more specifically the period commencing 11th July, 2007 and 24th February, 2007 he was employed by the respondent as an Graduate Clerk. He performed these duties until 1st July, 2009 when he was promoted to the position of Section Head and transferred to the department of Mobile Banking on 10th January, 2011.

On or around 11th February, 2011, fraudsters purged into the bank's M'Pesa system and stole Ksh.11 Million (Kshs.11,000,000.00). The claimant discovered that the fraudsters had stolen Ksh.48 Million (Ksh.48,000,000.00) but he was able to recover Ksh.37 Million (Ksh.37,000,000.00) of the lost amount on his own efforts.

The respondent subsequently on 24th February, 2011 suspended the claimants services vide a letter of the same date pending investigations. He was also on 19th March, 2011 charged with the offence of stealing by servant at Makadara Law Courts but was subsequently discharged under S.87(a) of the Criminal Procedure Code. It is the claimant's case that the respondent failed and or refused by design to avail the alleged evidence with a view to frustrating the claimant's effort to clear his name.

The respondent has also withheld an amount of Ksh.300,000.00 due to the claimant from the Co-operative Insurance Company being compensation for personal accident occasioned by an attack at his home. He also faults the respondent's on payment of terminal dues and also deems the termination unlawful, unfair and incompetent.

The claimant prays for;

- a. 1 year of salary in lieu of termination notice **Kshs.1,054,524.00/=**
- b. Gratuity of termination @ 30 days per 1 year worked totaling to **Kshs.351,508/=**
- c. The respondent compensates the claimant 1 month's wages as compensatory damages for unfair and/or unlawful termination totaling to **Ksh.87,877/=**
- d. 5 months balance of ½ salary totaling to **Kshs.219,692.50/=**
- e. The Respondent be compelled to release the cheque by the claimants Insurer of **Ksh.300,000/=** and/or facilitate payment directly to the Claimant.
- f. Unutilized leave days (42) totaling to **Kshs.175,754/=**
- g. The respondent be ordered to meet the cost of this claim.

The respondent on the other hand admits the descriptions of the terms of employment as presented by the claimant but submits that the claimant was summarily dismissed for approving a fraudulent M-pesa transaction at the clearing operating unit. The bank lost Ksh.11 Million thereby necessitating the suspension and dismissal which were all lawful. The respondent investigated the matter and found the claimant culpable and therefore the discharge from the criminal prosecution for lack of witnesses did not absolve him.

The respondent further denies holding the claimant's insurance dues and posits that this claim was made when the claimant was no longer an employee and had ceased to be a member of the Employment Scheme. She denies that the claimant is entitled to the relief sought and prays that the claim be dismissed with costs.

The matter came for hearing severally until the 17th March, 2014 when the parties agreed on a disposal of the same by way of written submissions.

In his written submissions the claimant reiterates his claim. He submits that his suspension and subsequent dismissal were unlawful, unfair and inhuman for want of conforming to due process as provided for by the Employment Act. The respondent failed to pursue the laid down disciplinary proceedings and contravened S.41, Employment Act, 2007 and the Collective Bargaining Agreement both of which provided for a fair hearing. His services were terminated and a letter issued without being invited to a respondent/management/disciplinary meeting to ventilate his case. He also submits that there was overwhelming evidence from the respondent's ICT officer in the CM's Criminal Court and this exonerated him from involvement in any wrong. The respondent even frustrated this case by not providing witness so as to disenable the claimant to come clean of the matter.

The respondent does not offer written submissions but denies the claim and avers that the claimant was suspended and dismissed legally, him having been suspected of fraud and this having been proven after investigations into the matter.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this case?

The 1st issue for determination is whether termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant in his submissions narrates the events of loss at his workplace leading to a loss of Ksh.48 Million, Ksh.37 Million of which he was able to recover, leaving a balance of Kshs.11 Million out there. It is for this reason that his services were terminated.

The claimant cites lack of due process in his termination and therefore its illegality. He was issued with a termination letter without being afforded an opportunity to explain himself through a disciplinary process. And this renders the termination unlawful, unfair and inhuman.

The respondent does not file written submissions on the subject. The court is therefore forced to rely on the defence in support of the case.

In defence, the respondent justifies the claimant's suspension and posits that this was effectively communicated vide a letter dated 14th October, 2011. She also avers that the investigations led to an implication of the claimant to the loss of Ksh.11 Million and therefore the termination. His discharge at the criminal proceedings is not an indicator of innocence.

I have examined the position of the parties to this cause and find that it all tilts in favour of the claimant. This is because whereas the claimant brings out an elaborate case of termination without due regard to process, the respondent does not get out of his way to rebut or contradict the same. The claimant's case is not controverted by the respondent, or at all. Again, the respondent's contention and submission of the legality of the termination of employment of the claimant is bereft of an explanation or analysis of why due process was not pursued. Besides, the letter of suspension and dismissal which are not contested by the parties, the respondent does not controvert the evidence of lack of due process. She does not offer evidence of the investigation or the report thereof and or any other evidence in support of a justifiable termination of the claimant's employment.

The law on termination of employment is clearly spelt out under Section 45 of the Employment Act, 2007 as follows;

45.(1) *No employee shall terminate the employment of an employee unfairly.*

(2) *A termination of employment by an employer is unfair if the employer fails to prove-*

- a. *that the reason for the termination is valid;*
- b. *that the reason for the termination is a fair reason-*
 - i. *related to the employees conduct, capacity or compatibility; or*
 - ii. *based on the operational requirements of the employer; and*

(c) *that the employment was terminated in accordance with fair procedure.*

(3) *An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.*

(4) *A termination of employment shall be unfair for the purposes of this Part where-*

a. *the termination is for one of the reasons specified in section 46; or*

(b) *it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.*

(5) *In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider-*

a. *the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;*

(b) *the conduct and capability of the employee up to the date of termination;*

(c) *the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;*

- d. *the previous practice of the employer in dealing with the type of circumstances which led to the termination; and*
- e. *the existence of any previous warning letters issued to the employee.*

The process of termination should in law be after notification and hearing in terms of Section 41 of the Employment Act as follows;

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.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

Summary dismissal as was in the instant case is provided for under Section 44 of the employment Act, 2007. It is as follows;

44.(1) Summary dismissal shall take place when an employer terminated the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contractual of service.

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

- a. *without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;*
- b. *during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;*
- c. *an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;*
- d. *an employee uses abusive or insulting language, or behaves in a manner insulting; to his employer or to a person placed in authority over him by his employer;*
- e. *an employee knowingly fails, or refused, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.*

- f. *in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty; or*
- g. *an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.*

It is apparent from the record of court that the respondent did not employ the relevant provisions of the law and procedure as espoused above in terminating employment of the claimant. I therefore find that the termination was wrongful, unfair and unlawful.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is. Having proved a case of unlawful termination, the claimant is entitled to relief.

However, the claimant throughout his claim does not tender evidence of his emoluments at the time of termination of employment. A determination of relief payable to an aggrieved employee is in law based on his salary as at the date of termination. Even the documentation on pay (pay slips) annexed to the claim and cited as No. 1 on the claimant's List of documents are all for the month of October, 2008 and totally illegible. The amount of Kshs.87,877.00 cited in the claim and submissions as one month's salary in lieu of notice is not supported by any documents presented by the claimant. This frustrates the court's ability to assess and award relief as is duty and expectation. I therefore leave it open for the parties to deal with the issue quantum of relief as they deem appropriate.

The last issue for consideration is as to who bears the cost of the claim. The claimant has had the day. He is therefore entitled to costs. I therefore order that the cost of this claim shall be borne by the respondent.

Delivered, dated and signed the 30th day of June, 2014.

D.K. Njagi Marete

JUDGE

Appearances:

1. Mr. Kariuki instructed by P.K. Njiiri & Company Advocates for the Claimant.
2. Mr. Lusi instructed by Sichangi & Partners for the Respondent.