



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NYERI**

**CAUSE NO.29 OF 2014**

**BANKING INSURANCE & FINANCE UNION (KENYA).....CLAIMANT**

**-VERSUS-**

**NAWIRI SACCO SOCIETY LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 14<sup>th</sup> November, 2014)

**JUDGMENT**

The claimant trade union filed the memorandum of claim on 11.02.2014 on behalf of its member Pius Mutugi Kariuki (grievant). The claimant prayed for:

1. A declaration that the dismissal of the grievant was unfair, unlawful and double punishment.
2. Reinstatement of the grievant to his former position without loss of employment benefits or seniority in service.
3. The grievant to be paid all pecuniary gains lost due to the wrongful dismissal.
4. Costs of the suit.

The respondent filed the memorandum of response on 28.02.2014 through Njeru Ithiga & Company Advocates. The respondent prayed for:

1. A declaration that the summary dismissal of the claimant by the respondent was procedural and lawful.
2. A declaration that the claimant is not entitled to be reinstated to his former position with full benefits.
3. A declaration that the claimant is not entitled to any damages or gains for wrongful dismissal.
4. The claimant's claim to be dismissed with costs.

The grievant testified that he was employed by the respondent from 7.06.2006 to 08.07.2013. The grievant was initially employed as a messenger and cleaner and later promoted to the position of savings clerk. The grievant was last deployed at the respondent's Kiritiri Branch and his assignments involved working with groups being the respondent's customers. The grievant testified that the respondent's branch manager at Kiritiri sometimes verbally assigned the grievant to perform duties of a teller and despite the verbal complains by the grievant against such assignment, the grievant performed the duties as assigned for fear of being sacked as was threatened by the branch manager. The evidence on record and in particular the collective agreement showed that the position of a teller was senior to that of a savings clerk and the duties were therefore different.

On 4.07.2013 the branch manager assigned the grievant to attend to 3 micro-finance groups. The grievant proceeded to the field as assigned and collected the groups' savings and deposited them with the

respondent at the branch. On that date, the grievant performed the field job as assigned and it was his testimony that he did not perform the teller's duties on that material date. It was the grievant's evidence that on that date, the head teller and supervisor at the branch known as Patrick Ndwiga performed the teller's job. However, upon reporting back from the field, the grievant testified that the said Ndwiga requested him to assist in preparing the day's journal, essentially a duty to be performed by Ndwiga who had performed the day's duties as a teller. The cash collected on the day was not counted to confirm that it balanced with the journal entries of the day's transactions. The grievant testified that it was agreed, between him and Ndwiga, that the counting would be carried out the following morning.

On 5.07.2013 the grievant reported at work early in the morning and found the branch manager already at work. The branch manager was holding a cell phone dedicated to M-Pesa money transfer transactions and usually stored in a lockable safe at end of every day's business. The grievant therefore noted that the branch manager had already opened the safe in absence of the supervisor and the grievant. The branch manager then instructed that an ad hoc cash check (an abrupt reconciliation of cash in cash boxes assigned to tellers against previous day's journal entries) be undertaken. The grievant testified that the manager took the grievant's cash box, asked the grievant to open it, and the manager proceeded to mix the cash in the grievant's cash box with the money which was in a paper bag and collected the previous day by the supervisor, Ndwiga. The supervisor and the manager counted the money and mixed it with the money at the safe and whose key was in the custody of the manager and the supervisor. The grievant testified that the supervisor and the manager locked themselves in the safe-room to count all the money as mixed and their report was that Kshs. 22, 469.00 was missing. The grievant testified that the branch manager then ordered him to refund the missing Kshs. 22, 469.00 within 18 hours as per exhibit 5 on the claim bundle being the letter dated 5.07.2013 addressed to the grievant by the branch manager Derrick Kivuti.

On 6.07.2013 and in an effort to protect his employment but without having been liable for the loss of the money, the grievant testified that he reported at work with the Kshs. 22, 469.00 as demanded and he paid it to the respondent. The branch manager then ordered the grievant to go home so as to meet the general manager the next Monday. The grievant met the general manager as scheduled and was given a suspension letter dated 8.07.2013 on allegations of giving false information and poor standard of performance in view of the events of 5.07.2013 resulting in shortage of Kshs.22, 469.00. The grievant later appeared in person and alone before the respondent's executive committee and Board. Later he received the letter of summary dismissal dated 30.07.2013. The grievant was dismissed on account of the shortage of the Kshs. 22, 469.00 and which had not been reported at all.

The claimant invoked the statutory conciliation proceedings, the respondent failed to attend, and therefore the proceedings did not culminate into an amicable resolution of the dispute. It is not disputed that the parties are in valid recognition and collective agreements and the grievant is a member of the claimant.

The respondent's 1<sup>st</sup> witness was its chief executive officer one Joseph Njeru Mugoh (RW1). It was his testimony that the grievant was dismissed due to wrong denominations in the teller's report and in view of the criminal offence involved in the allegations, the respondent's board decided to summarily dismiss the grievant. RW1 admitted that the collective agreement between the parties classified savings clerk and teller as separate offices with the office of teller being higher in the ranking. RW1 further testified that the branch manager verbally reported the shortage to RW1 on 8.07.2013. RW1 testified that the branch manager lacked disciplinary powers. RW1 further stated that the branch manager had imposed the punishment to recover the Kshs. 22, 469.00 without jurisdiction to undertake the disciplinary measures. RW1 further testified that he could not tell the person who may have taken the missing money prior to the ad hoc "cash check" or cash verification on the morning of 5.07.2013. RW1 further testified that he was not privy to the mixing of the money by the supervisor and manager on the morning of 5.07.2013 and as testified by the grievant.

The respondent's 2<sup>nd</sup> witness was Patrick Ndwiga Mwaniki, (RW2), the head teller at the respondent's Kiritiri branch at all the material time. RW2 testified that on 4.07.2013 the grievant served as a teller briefly and the branch manager then assigned him field duties to collect savings from some 3 groups. The grievant handed over the teller's duties to RW2 and the grievant proceeded to the field as assigned. RW2

testified that the grievant and RW2 prepared separate teller's reports for the day. He checked the grievant's report against the journal but failed to verify it against the cash in the grievant's cash box at close of business on 4.07.2013; and, RW2 admitted to have failed on his duty to do so. RW2 testified that the manager Derrick signed to confirm RW2's teller's report but there was no testimony that the branch manager in so signing had also verified the report against the cash in RW2's cash box and journal entries. RW2 confirmed that he could not confirm the number of journal transactions he undertook and those undertaken by the grievant but wherever he ticked on the journal, it meant that the grievant had made the right entries. RW2 confirmed that the grievant prepared the journal entries after 5.00pm on 4.07.2013. RW2 further submitted that teller's report of 05.07.2013 showed Kshs. 22,469.00 as petty cash and it was the branch manager who instructed the money to be entered as petty cash. RW2 confirmed that he was the officer responsible for handling petty cash and Kshs. 22, 469.00 was the money the grievant paid in that day. RW2 testified that on 4.07.2013 the grievant did not falsify anything and the teller's report was true and he could not tell whatever may have happened in the absence of the grievant and RW2 between close of business on 4.07.2013 and at time of cash verification on 5.07.2013. RW2 further testified that the person to be trusted was the grievant because the grievant's records were truthful and the respondent's demand of Kshs. 22, 469.00 from the grievant was a false claim. RW2 testified that he and the branch manager must take the liability for the erroneous entry of the Kshs. 22, 469.00 as petty cash but it was the branch manager who specifically made that entry on exhibit NSS-F.

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

The **1<sup>st</sup> issue** for determination is whether the summary dismissal was unfair. The evidence is clear. There is no evidence to show that the grievant was responsible for the loss of Kshs. 22, 467.00. The evidence shows that Kshs. 22, 467.00 was in fact petty cash and the grievant was not involved in the keeping of petty cash. The evidence shows that the branch manager Derrick usurped and vested upon himself disciplinary powers, generated a fictitious claim against the grievant about a shortage of Kshs. 22, 467.00, unfairly imposed the punishment to recover the money from the grievant, and in fear to protect his job the grievant proceeded to pay the fictitious refund as demanded. The court finds that the letter by the grievant dated 6.07.2013 being exhibit NSS-D was not an admission of liability because it clearly states that the shortage was mysterious as it was not in existence before the stock taking and it was necessary that whatever went wrong got established. The court finds that the imposition of the refund by the branch manager as testified by RW1 was without jurisdiction and therefore, the court finds the same was null and void. The court finds that the grievant would be entitled to a refund of the Kshs. 22, 467.00.

To answer the **1<sup>st</sup> issue** for determination, the court finds that the termination was unfair because the respondent has failed to establish that the reason for termination was valid. In particular, RW2 testified that the grievant did not falsify the records as alleged. The court finds that the termination was unfair as provided under section 43 of the Employment Act, 2007 because as at the time of termination, the reason for the termination was not genuine. Further, the respondent did not comply with the procedure in section 41 of the Employment Act, 2007 which entitled the grievant to attend the disciplinary hearing in company of a union representative.

The **2<sup>nd</sup> issue** for determination is whether the grievant is entitled to the remedies as prayed for. The respondent has not advanced any reason why the grievant should not be reinstated. The grievant was a good worker as testified by RW1, the respondent's chief executive officer. In the circumstances, the court finds that he is entitled to reinstatement and all the benefits from 8.07.2013, the date of the unfair termination, will be paid. Consequential to the reinstatement, the grievant is entitled to all monthly salaries and allowances from the date of termination being 8.07.2013 and to continue in employment unless lawfully terminated.

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

- 1. The declaration that the dismissal of the grievant Pius Mutugi Kariuki by the respondent was unfair, unlawful and is hereby set aside effective 8.07.2013.**
- 2. The grievant Pius Mutugi Kariuki is reinstated to his former position as a savings clerk with**

- effect from 8.07.2013 without loss of employment benefits or seniority in service.
3. The grievant Pius Mutugi Kariuki to be paid by the respondent all salaries and allowances being for 18 months(July 2013 to November 2014) times monthly salary and allowances the claimant earned as at end of June 2013.
  4. The respondent to pay the sum of money in order 3 by 15.12.2014 in default interest to be payable from the date of this judgment till full payment.
  5. The grievant Pius Mutugi Kariuki to report to the respondent's chief executive officer on Monday 17.11.2014 for deployment as a savings clerk and the grievant to remain in employment unless otherwise lawfully terminated.
  6. The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at Nyeri this Friday, 14<sup>th</sup> November, 2014.

**BYRAM ONGAYA**

**JUDGE**