



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 20 of 2011

REBECCA ACHIENGCLAIMANT

VERSUS

NASSEFU CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LTDRESPONDENT

JUDGEMENT

1. This is a claim by Rebecca Achieng dated 7th January 2011 for wrongful interdiction and eventual wrongful terminal or dismissal by the Respondent NASSEFU Co-operative Savings and Credit Society LTD. The Respondent filed their response dated 6th May 2011 admitting the Claimant was their employee but contested that she was not dismissed wrongly rather this was a case for summary dismissal through the application of due process.
2. The Claim is based on the fact that the Claimant was employed by the respondent on 1st July 1996 as a Clerical Officer and was promoted through the ranks to Accounts Assistant in 2005, Front Office Manager in 2006, and Accountant in 2007, and later redeployed to a department called BOSA in 2008. This was until her interdiction and later termination on the 14th July 2009. That before termination the claimant was under interdiction with events starting on the 27th April 2009 where the acting General Manager (GM) wrote and accused her of showing disrespect and incivility towards her while in the officer in the presence of staff and some Board Members and also that she was divulging official information to members of the Sacco with the intention of tainting a negative image of the management and the respondent as a whole. That at this point the Claimant was given a few minutes to defend herself failure to which disciplinary action was to be taken but she proceeded and wrote back denying the accusations but the GM wrote back with more accusations and proceeded to send the Claimant on leave to report back on 4th May 2009. On 28th April the Claimant wrote another reply denying the claims and before her 'leave' was over, on 29th April 2009 she was interdicted and was to appear before the board on 19th May 2009.
3. That on 19th May 2009 the Claimant was before the Executive Committee of the respondent where she denied all the allegations against her and there was no further communication to her until 5th March 2010 when she wrote to the Chairman regarding her interdiction when she got a letter of termination which did not disclose the reasons for the termination prompting her to again write on 8th September 2010 seeking to know the reasons and still no response was made prompting another letter on 5th October 2010 but on 13th October 2010 the Respondent wrote back with a counter-claim over unpaid dues.
4. That in this case the claimant was wrongfully interdicted and dismissed as interdiction was not part of her contract of service, a procedure only used in public bodies where public interest requires that a public officer to exercise their powers and therefore not used in private organisations like the respondent herein. That even where a public officer is interdicted the officer is penalised half the salary without affecting the allowance and in this case by the claimant not being paid her house allowance was unlawful and that the

procedure adopted for her termination was not correct or in compliance with section 45(5) of the Employment Act.

5. The Claimant therefore prays the court to find that her termination was invalid, unfair, unprocedural; unlawful seeks to be reinstated without loss of benefits and in the alternative the Court to order compensation for the maximum period, 3 months' pay in lieu of notice, half salary not paid during the interdiction and refund of her training fees. She also claims to have her Certificate of Service and costs of the suit.

6. The Claimant gave evidence in support of her case that she started work with the Respondent on 1st July 1996, was later confirmed and got promoted after various appraisals and in 2007 she became Accountant in charge of Back Office Operations. That on 27th April 2009 she got a show cause letter for insubordination towards the GM at 12.30pm and was required to respond by 1 pm which she did and denied the allegations but soon after she got another letter accusing her of scolding an intern and was told to proceed on leave until 4th May 2009 but before she could resume, she got another letter of interdiction on the grounds that she had taken official documents and distributed them to respondent members and other staff. That on 24th April 2009 she got her allowances but noted it was on a lower grade unlike other times and wanted to know why but the GM came to her desk about her work duties for the next day and in the process asked the GM what criteria had been used for payment as the right grade was not applied and wanted to know if there was a mistake on which the GM told her she did not deserve the payment and left to her office. Later the GM called the claimant to her office where she found two board members and was warned about her conduct and that she risked being sacked.

7. She further stated that the following day [25th April 2009] was the Annual General Meeting (AGM) where things went well but on Monday the 28th she got the letter about being disrespectful to the GM and that she had circulated confidential documents to members and only learnt of the exact details where she appeared before the disciplinary committee on 19th of May 2009. That the alleged confidential document related to the schedule of staff allowances where she had signed and the same returned to the GM. That she had not scolded the intern as alleged. When the Committee called Robert he confirmed that he saw the claimant and another person's struggling over a document but could not confirm the time he saw this happen and according to the Claimant, the payment schedule was not a confidential document as members are aware of overtime payments during AGM for employees. It was the Claimants contention that in any event, there was nothing to hide as regards the documents alleged to have been shared.

8. Claimant went further to state that after her meeting with the Committee she was advised to proceed home as she was on interdiction. That she did not hear from them again until when her guarantors told her to pay up her loan to avoid deductions against them and on 5th March 2010 she got her termination letter.

9. That she had been promoted over the years since she was a good worker and challenged letters from respondent alleging she was absent from work, she was appraised and found to have several challenges, poor conduct as per respondent's annexures 11 to 15 indicate. That she never received such communication. In annexure 12 she was alleged to have been rude, poor time keeping and poor team spirit but the same appraisal was used to promote her to a senior position. This as a confirmation that she was a good worker and the promotions were well deserved.

10. Therefore her termination was unfair in the circumstances of the case and confirmed her prayers to court.

11. On the other hand it was the Respondent case that on 24th April 2009 the claimant confronted and engaged the GM in a disrespectful manner in the presence of other staff and Board members in the GM's office and before this confrontation she had snatched official confidential document from an intern and later passed the same to members of the respondent attending the annual general meeting. That on 27th April 2009, she was charged with gross misconduct and insubordination on which she replied to and denied such actions but was issued with another letter for creating disharmony among staff after she confronted the intern and scolded her for reporting her to which new accusation she replied to on 28th April 2009 noting this was witch hunt and reiterated her earlier denials.

12. On 29th April 2009, respondent interdicted the claimant on half pay and invited to a disciplinary hearing on 19th May 2009 where she reiterated her written defence of 28th April 2009 but sought more evidence regarding the accusations which prompted the Committee to call a Mr. Robert Barkinyo Kapsowe to give an account of events on the 24th April 2009 where he confirmed that the claimant had complained to him about allowances paid to her and followed to snatch some documents with an intern. That the Committee being satisfied with the proceedings and evidence reached a decision to terminate the claimant on gross misconduct. That on 14th July 2009, the claimant was terminated after a resolution by the respondent's Central Management Committee meeting of 4th July 2009 and a letter sent to her address in Embakasi via EMS on 21st July 2009 but on 5th March 2010 the respondent got a letter from complainant regarding her interdiction and another letter was therefore issued communicating the termination.

13. In evidence the first witness for the respondent was Flora Kimari previously working for the respondent as Finance manager until 2010 and therefore worked with the Claimant at the material time for this case. She stated that on the 24th of April 2009 they were preparing for the AGM scheduled for the following day and had thus prepared a schedule of allowances to be paid to the staff who had contributed to the preparation of the AGM. That she took the payment schedule to the Claimant to sign and also gave her cash but she was upset and followed her to her office and complained that the amount given not as per her job grade though the respondent was not paying as per job grades and that it depended on contribution that is how much time one had put in the preparations. That the claimant was on away on leave for most of April when most of the AGM activities took place and thus the witness explained to the claimant the rationale used.

14. That while this exchange took place in the witness office, there were Board members, that the claimant acted in a confrontational manner, banged the table and said that they were unfair to her for paying that kind of money. At this point the Board members intervened and said that behaviour was unacceptable and the claimant walked out and banged the door and the Board member advised that the matter be reported to the full board. The issue was discussed and a resolution was passed to ask the Claimant to show because why she should not be disciplined.

15. The witness further stated that when the claimant left her office, she followed a member of staff, an intern, with the payment schedule and snatched it, made photocopies and circulated during the AGM. That another notice to show cause was issued after the second incident, that she caused a commotion in the office due to the confrontation with the intern. That as an accountant, the Claimant was reporting to the witness after she became the GM. That the claimant had a poor record in her file over previous issues. That when the claimant appeared before the Committee, she was issued with a letter of termination

16. On cross examination the witness confirmed that the claimant was terminated due to misconduct and in her file there were many letters on various grounds but the final letter was in 2009 on termination. This past record related to absence from work without permission, misconduct while on duty and eventually her termination on 29th August 2009. That all these records are kept in the file even when they expire. That the termination followed a full board meeting and a resolution given in July 2009 and the witness confirmed no reasons were given in the termination as before this termination there was a notice to show cause as to why the claimant should not be disciplined following the confrontation in her office which was uncivil and threatening in front of Board members and later snatched a confidential document from an intern, made copies and share out before the AGM which was gross misconduct. According to her, no document should leave the respondent's offices before board approval. That due to this acts of gross misconduct the claimant was interdicted and invited to defend herself before the Board as outlined in the notice to show cause.

17. That the claimant's terminal benefits were all held in liabilities she had not yet cleared and her pension was being managed by another institution. That the letter from management only addressed the liabilities as her benefits are outlined in terms and conditions of work and how the claimant is entitled to them.

18. The witness further stated that on the issue of claimant seeking to be reinstated, that due to her past record, she is not able to work in a team and the termination was not unfair as due process was followed and the notice pay is not deserved as she was on interdiction before the termination and this was adequate notice and her half pay is not recoverable under the interdiction terms. That the respondent was not aware of training fees and therefore cannot pay and that she never applied for her certificate of service which the respondent is ready to give.

19. The second witness for the respondent was Simon Mzungu the Fingerprint Officer at Malindi NSSF branch and an elected Board member of the respondent. That he was present in the GM's office on 24th April 2009 with another board member Kennedy Ayako. That around 5 pm while they were busy approving loans for members at the boardroom also the GM's office, the GM came in and proceeded to her desk and immediately the claimant followed in holding a handkerchief as if she was crying, sat next to the GM and both were talking in low tones but suddenly the claimant was shouting saying '... *wewe unapenda kunionea*' and pointing a finger at the GM. At this point he intervened together with the other board member and Mr. Ayako told the claimant not to behave in that manner in their presence by pointing fingers at her boss, that the claimant walked out and banged the door.

20. That in the following board meeting the two members reported this incident noting that the two officers could have needed up in fist fights had the two board members not been present. That the claimant was not threatened by the GM and only later did he learn the reasons as to why the confrontation took place. He did not seat at the disciplinary committee hearing the claimant's case.

21. In cross-examination, the witness confirmed that he was seating at the GM's office at all this time of the incident and never went out until the Board meeting was held. That the respondent has a committee that handles staff matters which was tasked to call the claimant and inquire why she behaved in the manner she had and give her a hearing and the witness only reported to the Board. That there was a document on staff allowances that was confidential not for issue to the members, it was the responsibility of the GM to organise how payments were made to the staff who had worked for the AGM. That the following day, some members had this document and asked questions which the Board subdued and it fizzled out.

22. That he witnessed the claimant pointing and shouting at the GM and also banged the door on her exit.

23. The regulation of labour relations in Kenya is well articulated with the enactment of the new labour law regime. With it came into force the Employment Act which has outlined in detail every conceivable claim and the procedure to be adopted in each case scenario. Even in case where an employee has acted in a gross manner and becomes liable to summary dismissal, the law has gone that far. Therefore there is no excuse to any employee acting in a gross manner to claim ignorance of the law and equally no employer can now claim to lack in procedure guidelines on how to conduct themselves even in such a case where the remedy is summary dismissal. This Court will not hesitate to find for an employee dismissed for want of procedure or to confirm the action of an employer upon following due process dismisses the employee.

24. In a case of gross misconduct Section 44(4) of the Employment Act is important to outline:

(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.

Some grounds are outlined as;

1. Absence from work without lawful cause;
2. Being intoxicated while at work;
3. Neglect of duty or carelessness;

4. Use of abusive or insulting language;
5. Disobedience of lawful orders;
6. Arrest for a cognizable offence; and
7. Committing a criminal offence detrimental to employer.

25. Under this section of the law, an employer can further make regulations to expand these grounds as the situation may demand and bring them to the attention of the employees as part of their contract of employment or policy guidelines at the work place. Therefore where an employer's work place manual outline more grounds that qualify for summary dismissal, this Court will take them in equal measure and apply them as intended by the parties. If the added grounds for dismissal are reasonable in regulation of labour relations the Court will confirm them and likewise, if they are unreasonable or illegal or perpetuating an illegality, the Court will not hesitate but declare them to be invalid.

Therefore, an employee who:

(d) ... 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;

[And also]

(e) ... knowingly fails, or refuses, 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.

(Emphasis added)

26. Risks summary dismissal in law and where an employer can prove that indeed the employee acted in this gross manner, such insubordination acts will be taken as gross misconduct. This is further outlined in Sections 45 of the Act.

27. However, Section 41(2) of the Employment Act, 2007 now makes it obligatory for an employer who wishes to terminate the services of an employee to notify such employee and hear any representations which the employee may wish to make before taking the decision to terminate or not to terminate. The obligation to hear the employee is applicable whether the employer intends to make payment in lieu of notice or not. It is even applicable where the employee is accused of gross misconduct.

28. Therefore, whatever administrative action that is taken it must be lawful, reasonable and procedurally fair. The outcome of such administrative decision should be justifiable in relation to the reasons given for it. This is what can be cited as reasonable decision giving effect not only to the constitutional right to fair labour practices but also to the right to administrative action which is lawful, reasonable and procedurally fair.

With regard to this case; was the action taken against the Claimant lawful?

Was it reasonable?

Was it procedurally fair?

29. The evidence was quite elaborate as outlined above. I note that the events of 24th April 2009 gave rise to this claim. From the evidence, the Claimant indicated that she was unhappy with her allowance as given by the GM as the grade used in calculating her allowance was lower than expected. This can be taken as correct since the GM confirmed that the claimant had not given much effort in contribution to organizing the AGM taking place the following day. I find it possible that the claimant was upset by this as she must have had an expectation, and rightly so, as in previous occasions it appears she had received a better allowance. The fact that in this instant case the issuance of less allowance had

not been communicated to her must have caused her to act at the spur of the moment to seek immediate explanation from the GM who was the officer responsible for this decision. It is therefore highly possible that this appeared to be a confrontation as confirmed by the second respondent witness who is also a Board member.

30. This scenario is possible where an employer acts without consultation or sharing information to employees. The issues of salaries, allowances, and or benefits are very emotive issues that need to be handled well by any manager putting due regard to staff dynamic and the possible work place tensions. However, despite the action of the employer, the reasonable thing for an employee to do is to seek for an explanation by use of due process even where one feel aggrieved. Therefore in this case, by the claimant confronting her supervisor, well upset can be taken to be an aggressive act unbecoming of a reasonable person. Even where rightly aggrieved, this is not the way to address any grievance at the work place. This only escalates the situation and can result in summary dismissal.

31. I therefore agree with the respondent witnesses that the Claimant acted in a gross manner in the circumstances of this case. These actions were subject to summary dismissal.

32. That as is may be, whatever sanction that is given to an employee who has acted in a gross manner it must be reasonable. It is not sufficient for an employer to generally state that the employee was aware of the reasons for a particular sanction. The reasons as to why an employer has applied a particular sanction must be clearly stated as by law. This follows the provisions or Sections 45 and 46 of the Employment Act. Where reasons are not outlined, any sanctions given become unfair.

33. I note the evidence of the Respondent first witness the GM who stated that in issuing the termination letter to the claimant, there was no need to write the reasons for the termination as this was already outlined in the notice to show cause and in the disciplinary proceedings. This is not what the law intended and I find such a practice not proper and justifiable in this case and find the same to be unfair.

34. After undertaking the elaborate process of giving notice over the gross acts of misconduct, sending the claimant on leave, the interdiction and the eventual hearing of the matter on 19th May 2009, the respondent ought to have done better while issuing the letter of termination. The least they could do is to write out the reasons for the termination even if this meant restating what had been outlined in the notice to show cause letter. Nothing prevented the respondent from doing so. Otherwise as the termination letter is outlined, the reasons for the termination are not stated.

35. The claimant also stated that she did not get any response to the disciplinary proceedings for over 10 months where she was forced to write to the respondent. I note the letter from the Claimants Advocate dated 8th September 2009, at the third paragraph, she was aware of the termination and therefore must have received the Respondent's letter sent by speed post, and dated 14th July 2009. The claimant does not dispute that she was the resident in Mansionnette No. 177 in Embakasi Nyayo Estate, along Mombasa Road as the delivery note indicate.

36. In pursuance to Section 12 of the Employment Act, I find the terms and conditions of service of the respondent as applicable to the claimant. These are the rules and regulations that further facilitate the interpretation of the conditions of work further to the letters of employment. I note under *Disciplinary Requirements and Procedures*, the respondent has outlined disciplinary procedures and states:

... Where in the opinion of the management an employee commits an offence, the management shall:

- i) Reprimand the employee verbally, then in writing and a copy of which shall be placed as a record in the employee's file.*
- ii) Recommend withholding of salary increment*
- iii) Interdict the employee on half pay*

iv) *Suspend the employee without pay pending further action*

37. It is however not stated the sequence of event or whether these sanctions can be issued in singular or in multiple or why the choice of one as against the other. It seems in the claimant's case, the option taken was that of an interdict on half pay. What I note from the proceedings, the claimant did not challenge the interdict in her defence or subsequent letters to the respondent other than for the reasons for this interdict. This only arose in her claim and the prayers before court. I find the provision for an interdict being part and parcel of the respondent work regulations as under Section 12 of the Employment Act.

38. I find these terms and conditions of service are the ones outlined under the Claimant's Letter of Appointment under part 5 on the terms of employment. The claimant cannot say she was not aware of these conditions and terms of service as made available to her by the respondent.

39. Where reinstatement is claimed Court is guided by Section 49 as read together with section 50 of the Employment Act 2007. It allows the Court to redress summary dismissal or the unjustified termination of a contract of an employee by compensation, reinstatement or re-engagement. In a claim where reinstatement is prayed for, what is paramount is the common law principle that there should be no order for specific performance in a contract of service except in very exceptional circumstances.

40. Though pleaded, I note the claimant was not keen to seek a reinstatement and even if she had, this is only granted in exceptional cases and this did not stand out as one such case and therefore the court will not direct itself in this regard.

41. Having established that the claimant's termination was procedurally unfair and noting the circumstances of this case, I will grant compensation equivalent to one (1) month pay.

42. An interdiction is not equivalent to a notice of intention to terminate an employee. This is a sanction that can be lifted or confirmed whatever the case but the same cannot be construed to mean notice of termination. I note under the terms and conditions of service the respondent has give termination notice of one month or payment in lieu of notice. Since no notice was given to the claimant, I will grant one month pay.

43. Having established that the interdict sanction was lawful, the Claim for half pay during the interdiction is hereby declined.

44. The refund for training fees was not supported at all and its justification was not outlined. I decline this claim.

45. In making payments to any employee, an employer must ensure that all the statutory deductions due are removed from the gross pay. An employer is therefore in law obligated to make a deduction of any amount which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award; this is as under the provisions of Section 19 of the Employment Act.

46. Employees who out of their own free will join employees Sacco do so by virtue of their employment and do authorize the employer to make deductions from their salaries to the Sacco for their welfare and for the collective good of all. An employee is therefore stopped from claiming that once their employment is terminated, they are owed all their savings without taking into consideration the collective agreement under their Sacco and or cooperative society. Where an employee has enjoyed a loan facility from the collective kitty she is equally under a duty to make good any dues where her relationship with the collective is severed by virtue of the termination of her relationship with the principal. I therefore find that the Claimant owed Kshs.211, 285.88. This sum is recoverable from her final dues.

47. However, such dues can be recoverable in this claim if set out as a counter-claim. apart from the general averment and confirmation in submissions, the outstanding amount as against the Claimant

was not counterclaimed in the cause. Nothing stopped the respondent from filing a counter-claim for court assessment.

This Court enters judgement for the Claimant as against the respondent in the following terms;

1. A declaration that the termination of the Claimant was unfair

a. Compensation equivalent to one month pay amounting to Kshs.47,000.00

b. Notice pay of one month amounting to Kshs.47,000.00

All amounting to Kshs.94, 000.00

2. Costs of the suit

3. Certificate of Service be issued to the Claimant

Read in open Court this 10th day of April 2013.

M.W. Mbaru

Judge

Before:

Court Clerk

Claimant

Respondent