



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

CAUSE NUMBER 354 OF 2010

BETWEEN

BANKING INSURANCE AND

FINANCE UNION (K).....
CLAIMANT

VERSUS

KIRINYAGA DISTRICT FARMERS

SACCO SOCIETY LTD
RESPONDENT

Rika J

CC. Leah Muthaka

Mr. Isaiah Munoru Claimant's Economist, instructed by the Claimant Union

Mr. Mugo & Mr. Wanga Advocates for the Respondent

AWARD

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

1. This claim was filed by the Claimant Union on 9th April 2010. It is presented on behalf of two Claimant Union Members Benson Gitari Ngigi and Nicholas Kiragu Ngacha, who are former Employees of the Respondent Co-operative Society Limited, (hereinafter called Grievants).
2. The Respondent filed a statement of Reply on 13th July 2010, Amended Statement of Reply on 18th February 2011 and Supplementary list of Documents on 20th April 2011. The dispute was heard before the Hon. Justice Paul Kosgei. The proceedings closed on 8th December 2011. Parties confirmed filing of their submissions and were informed by the Court on 8th December 2011, that Award would be delivered on notice.
3. Unfortunately the Hon. Trial Judge left the Industrial Court before he could deliver the Award. The dispute was on 8th April 2013 referred to this Court by the Hon. Principal Judge Mathews Nderi Nduma, with instructions that the Court delivers its decision on a priority basis.

The dispute was last mentioned before the Court on 2nd May, 2013 when the Court informed the parties Award would be read on notice as soon as practicable.

4. The Grievants testified on 28th August 2011. The Respondent testified through its General Manager Anorld Kimotho Njeru on 28th August 2011, and through its Human Resource Manager Julius Githinji who testified on 14th November 2011.

5. The 1st Grievant Benson Gitari Ngigi was employed by the Respondent as a Teller on 1st October 1998. He was confirmed on permanent and pensionable terms on 21st October 1999. He was in 2004 appointed as Senior Cashier, and in 2007 as the Control Manual Clerk.

6. Ngigi was suspended alongside other 8 employees on 6th September 2008, on the allegations that he was implicated in fraudulent withdrawal of money from a customer's account at Kianyaga Branch. He was called upon to explain himself by the respondent. He wrote on 17th November 2008 explaining the circumstances under which the customer withdrew the money. The respondent surcharged the 1st Grievant the sum of kshs 73,040, which amount was to be paid by 31st January 2009. The 1st Grievant informed his employer in a letter dated 16th January 2009 that he would not honour the surcharge, as he was not responsible for the loss of money. His suspension was lifted on 19th January 2009. The 1st Grievant resumed work. He nevertheless received a letter of termination on 6th February 2009. The letter was backdated to 2nd February 2009. The reason given to him by the respondent justifying the decision was that "*the Sacco no longer requires your services.*"

7. The 1st Grievant stated he was victimized for exercising his role as a shop steward. The Police arrested the person behind the fraud, one Rosemary Wamaitha Mwangi and charged her in Court for the offence. Termination of the 1stGrievants' employment was without justification, contrary to the law and the CBA. He had carefully scrutinized the withdrawal voucher and found the customer details to match the customer's passbook and specimen signature card. There was no ground to surcharge Ngigi, and the surcharge amount of Kshs. 73,040 was not broken down to him. Four reports were variously prepared by the Internal Auditor, Supervisory Committee, Anti-Banking Fraud Unit and the District Co-operative Officer none of which implicated the 1st Grievant. He was not charged with any offence. The 1st Grievant prays the Court to order that he is reinstated to his previous job without loss of benefits, security and salaries.

8. On cross-examination the 1st Grievant testified that the investigation carried out by the District Co-operative Officer did not implicate him. He conceded he was mentioned in the report at page 37. His suspension was on the ground that money was fraudulently withdrawn from a customer's account. He appeared before the Committee tasked with the investigations by the Ministry of Co-operatives. He was accorded a hearing by this Committee. The report did not mention that the 1st Grievant was victimized. He was paid terminal dues at Kshs. 288,647.80, and received the certificate of service. He seeks reinstatement. In re-examination, he stated that page 36 - 38 of the report did not show his involvement in the alleged fraud. If the Court does not find it proper to grant the 1st Grievant an order for re-instatement, he prays he is paid terminal benefits, including all the arrears of salary and allowances.

9. The 2nd Grievant Nicholas Kiragu Ngacha testified he was employed by the respondent on 1st October 1998. He worked as a Teller. He was suspended alongside other 8 employees who included the 1st Grievant, on the same allegations, detailed by the 1st Grievant in his evidence. He was suspended on 1st September 2008. He was summoned by the District Co-operative officer on 22nd October 2008. The suspension was extended on 11th November 2008. The 2nd Grievant gave a written response, explaining the circumstances under which the money was withdrawn. On 12th January 2009, the respondent wrote to the 2nd Grievant, surcharging him for the loss of Kshs.

141,940. The sum was to be paid by 31st January 2009. Ngacha denied liability and refused to pay the money. On 18th January 2009, his suspension was lifted and he resumed work. On 6th February 2009, the 2nd Grievant's contract of employment was terminated after 11 years of service. The reason given was that the Respondent no longer required his services. The 2nd Grievant appealed. The Respondent did not give him any response.

10. The 2nd Grievant testified that the abrupt termination of his services was unfair and unlawful. He served the Respondent for 11 years. Suspension was contrary to clause 22 of the CBA, which allowed for a suspension period of only 2 months. Ngacha followed the Procedure Manual in making the payments. The transaction was authorized by the senior Bank Clerk and Branch Manager. Like the 1st Grievant, the 2nd Grievant scrutinized the withdrawal voucher and was satisfied the Account – Holder's details, matched those retained by the Bank in the Pass-book and specimen signature card. There was no basis for surcharging the 2nd Grievant, and it was not shown how the figure of Kshs. 141,940 was arrived at. 4 reports compiled by 4 different Agencies, did not implicate the 2nd Grievant. He was not charged with fraud, and testified the Respondent was involved in witch hunting, discrimination, intimidation, as 7 other employees who were surcharged were relatives of top Management Officials, and were afterwards given back their jobs. The 2nd Grievant feels he was victimized for his role as a shop steward. He prays for reinstatement.

11. On cross-examination, Ngacha testified he was not involved in fraud. He was questioned by investigators from the parent Ministry and his story heard. Page 31 of the investigation report states, the 2nd Grievant did not sign the duty allocation list. He was surcharged Kshs. 141,940, but never paid. He was paid terminal benefits on termination, a net sum of Kshs. 323,199. 25. He received the certificate of service.

12. Amos Kimotho Njiru explained he has been the General Manager of the Respondent since 2006. The two Grievants worked as Bank Clerks. The 1st Grievant later became a Bank Teller. The two served in various Branches. They last worked at Kianyaga Branch.

13. In the year 2000, it came to the knowledge of the respondent that the Respondent had lost money from a Depositor's Account sometime in 2007. The General Manager launched investigations. Kshs.912,830 was missing. The Internal Auditor was called in. It was established the loss at the Branch could not have taken place without the complicity of the Respondent's employees. The matter was reported to the Police. It was difficult to pinpoint the exact employees who were complicit. The police file is still open.

14. The Ministry of Co-operatives initiated its own investigations. 9 employees of the Branch appeared before the committee of the Ministry. They included the Grievants. They explained their position. The exercise resulted in a recommendation that depending on the level of involvement, all those involved be held severally and jointly responsible for the loss of the sum of Kshs. 912,830. The 2 Grievants opted not to pay the surcharge, while their 7 colleagues paid. They were suspended for an initial period of 2 months. This was extended by another 2 months to give room for completion of investigations. It was in accordance with clause 22 of the CBA.

15. There was no malice or ill-will on the part of the Respondent, against the Grievants. Termination was on valid ground. The Grievants had in the past been transferred from the Kagumo Branch on the same ground of fraudulent dealing. They were implicated in loss of Kshs. 482,000 and warned against such conduct in the future. They did not change, and continued to use their positions, to defraud Members and Depositors. The Kianyaga incident was the last stroke. They both received terminal dues, and collected their certificates of service.

16. Njeru stated he is aware one Wamaitha was arrested, but on an issue unrelated to Kianyaga. There was no confirmation with the Police that Wamaitha was involved. The two

Grievants should have assisted the Police with their investigations. The Internal Auditor reported the matter to DCIO Kianyaga who promised to carry out investigations. The file is still open. It was not clear who colluded with the fraudsters. The loss was apportioned to the involved employees. The General Manager could not however, give the criteria used in apportioning the loss. 7 out of 9 employees honoured the surcharge, and went back to work. The 2 Grievants had other issues, and even if they paid the surcharge, would not have been returned to work. At Kagumo, the 2 Grievants were investigated and cleared of the allegation against them. The Tellers had authority to pay Kshs 30,000. Beyond this amount, authority of the Manager was required.

17. Julius Wachira Githinji, the Human Resource Manager confirmed that the 2 Grievants were paid terminal benefits in accordance with the CBA. They received their respective certificates of service. Githinji testified on cross examination that the Board made the decision to terminate the 2 Grievants' contracts of employment in February 2009. The Human Resource Manager received communication of this decision from the Respondent's CEO. The Respondent prays the Court to dismiss the Claim.

The Court Finds and Awards:-

18. It is the common evidence of the Parties that both Grievants were employees of the Respondent. Benson Gitari Ngigi was employed on 1st October, 1998 as a Teller. Nicholas Kiragu Ngacha was employed on the same date as a Clerk. Both employees' contracts of employment were terminated by the Respondent with effect from 2nd February 2009. They dispute the lawfulness and fairness of the decision, and have approached the court, asking for an order of reinstatement, without loss of benefits and/or breaks in their years of service.

19. Was termination based on valid reason or reasons; was it procedurally fair; and are the two Grievants entitled to reinstatement?

20. The Court is satisfied the Respondent's decision on either case, was based on valid reason or reasons. There is no dispute a total of Kshs. 912,830 was lost from the Account Number 0398-01-3494 belonging to one Kanini Ndege. The Account resided at Respondent's Kianyaga Branch where both Grievants worked. The money was withdrawn by fraudsters, over a period of time beginning 15th September 2007. The transactions were processed by different members of staff, among them, the two Grievants.

21. Investigations were carried out by 4 different agencies, among them the District Co-Operative Office. It was confirmed the two Grievants were involved in the processing of the transactions. A total of 9 members of staff were found to have been involved in processing of the transactions. The District Co-operative Officer concluded the vice was made possible through the collaborative work of Respondent's employees and outsiders. There was no employee that was specifically shown to have masterminded the invasion of Kanini Ndege's Account. It was a collective failure, which called for collective remedy.

22. The collective remedy suggested by DCO, was to surcharge all the 9 employees, including the Branch Manager, to repair the injury suffered by Ndege, and the reputational damage suffered by the Respondent. The 1st Grievant's liability was apportioned at a total of Kshs 73,040, while that of the 2nd Grievant was apportioned at Kshs 141,940. The formula used in the surcharge is shown in the DCO's report, with equitable percentages of the total sums lost from the account, on each given day, surcharged to the transacting officers.

23. While 7 employees accepted the surcharge, Ngigi and Ngacha did not agree to repay the money. They were directly involved in paying out a customer's money, to third party identity thieves. They had no reason not to embrace the DCO's recommendation. The Court has noted their respective records were not without blemish. With their kind of employment records, they

should have been slow to give their employer additional material with which to justify termination. In the view of the Court, even ignoring the employment records, the Grievants' role in the loss of money from a customer's account; their failure to honour the recommendation of the DCO as implemented by their employer, were sufficiently valid reasons to justify termination. The employer acted reasonably.

24. There was nothing fundamentally faulty with the procedure. The fraud was well investigated by competent agencies. The Grievants were issued letters to show cause why disciplinary action should not be taken against them. They appeared and were heard before the Board. They had an opportunity to explain themselves before DCO. They were suspended in accordance with clause 22 of the CBA. They acknowledged at the end of it all, they were paid terminal benefits, including service pay. They were issued the certificates of service. They have no legitimate claim to reinstatement. The

termination was substantively justifiable, and procedurally fair. IT IS HEREBY ORDERED:-

- a. **The Claim is dismissed**
- b. **No order on the costs**

Dated and delivered at Nairobi this 9th day of December 2013

James Rika

Judge