



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 174 OF 2012

DANSON MWASHAKO MWAKUWONACLAIMANT

VERSUS

C F C STANBIC BANK LTDRESPONDENT

J U D G M E N T

The claimant has brought this suit against the respondent seeking declaration that his summary dismissal from employment on 21/10/2011 was unfair and prays for damages amounting to ksh.2,372, 962.50.

In response the respondent has denied liability and maintained that the dismissal was based on a justifiable reason and reached after due process. The case was heard on 20/3/2013, 10/4/2013 and 7/5/2013 when the claimant testified as CW1 and Mr. Dickson Nyambori represented the respondent as RW1.

CW1 told the court that he was employed by the respondent on 1/12/2009 as an Accounts Analyst based at Digo Road Branch ion Mombasa. His gross salary was Ksh.135000/- per month. That his duties were in the commercial banking and dealt with credit appraisal and also customer enquiries.

That he was dismissed by letter dated 21/10/2011 for the reason that he has committed gross negligence. That the genesis of his trouble was a phone call from his colleague Elsie Karanja requesting him to give an account balance to a customer MarTona Tours and Assistants ltd (hereinafter mar Tours). She forwarded the customers email request and warned the claimant that the Director was very temperamental and would easily be offended if the request delayed.

That he acted on the request trusting his colleague Elsie Karanja who was dealing with Directors of MarTona in their personal capacity in the personal banking section where she was working. That in the response to the customer the claimant copied the email to his boss Elizabeth Wasuma. That later the customer acknowledge claimants email and requested for a transfer of funds by an email addressed to Elsie Karanja/Eric which he forwarded to Patrick Mukhongo of Operations Department whose duty was to handle money transferred. That he copied the forwarded mail to his boss Elizabeth Wasuna and the Operations Supervisor Juliet Winja.

That Mr. Mukhongo was the one to verify the instruction through a call back to the customer. He referred the Court to the Operational Procedures for the respondent in page 29-35 of the memorandum of Claim. According to the claimant, the verification of instruction is confirmed by the signature stamping by Mr. Mukhongo and other supervisors in their Department which must be at least three.

He denied being privy to the transfer of the money because it was under operations Department through the outward payment process procedure which is outside his job description.

That after learning that the transfer was fraudulent from Jane Mwendu of Kenya Commercial Bank, he called the customer to verify the alleged fraud. He was able to verify that the Directors of the customer was away abroad and had even written to the Operations Department of the respondent to alert them of this absence from Kenya. The claimant then called KCB and was able to stop the release of the money to the fraudsters and indeed restored it to the customers account.

That a week later he was called to record a statement with Mr. Ombewa which he did on 16/9/2011. On 1/10/2011 he received an invitation for a disciplinary inquiry on 3/10/2011 in Nairobi. The issue under inquiry was the transfer of USD35000/ from for MarTona. He was allowed to call a colleague from work as his witness and bring any evidence. The condition for the foregoing entitlement was that he was required to give particulars by 5pm on 30/9/2011 one day before he received the letter. He claimed that the notice was too short but he still attended the inquiry.

He further maintained that the respondent disciplinary process and procedure in the HR Manual was violated as the panel was not properly constituted.

He explained that under the HR Manual, the Chair of the panel is the HR Officer which the accuser is the Manager of the accused employee or his Departmental officer to provide evidence of facts of the alleged misconduct. In his view Elizabeth Wasuma should have been the accuser because she was his manager or at least her representative from the Commercial Banking Department.

About the hearing, the claimant observed that he was not accused of anything at the inquiry but only asked questions by all the panelist about the transaction and to which he maintained the answer that he was not involved in the transaction because it was done outside the scope of his work. He went on to say that the panelist seemed not to know his job description as they were not from his Department.

He told the court that he could not call witnesses because the notice given was too short and could not comply with the condition given. That after the inquiry, the claimant said he went for his leave and while there he received a letter for summary dismissal from Head office through his branch office. The reason for the dismissal was "*gross negligence and breach of Bank Policy 5 Section 3 as contained in the HR Manual*". The letter went on to say that the transaction of 7/9/2011 was processed contrary to the Bank "approval operational procedures". The claimant maintained that he had no role in the said procedures which involves the Front Service Officer after instructions are received. That the only other person involved in the process are the FJRO and IBCO (team leader) all of whom are based in the Head office at Nairobi. The team leader is the one who ultimately authorizes the outward payment.

He explained that call-back procedure is done depending on the sum involved and is done at the branch by the Operations Department and at the Head Office and the same is verified by the signature and stamp of the caller.

In response to the minutes of the inquiry (C.1), the claimant maintained that the decision therein was never communicated to him and that the said decision was different from the dismissal letter. He denied knowledge of the reasons for the decision. He however acknowledged that he was the contact person between the bank and customers in business accounts but Elsie was the contact person dealing with the Directors in their personal capacity. That upon receipt of communication from a customer his duty was just to initial it to confirm receipt and then hand it over to FSO to deal with the transaction. He denied any obligation to verify the authenticity of the source because the FSO and other person in the processor chain of payment out had the responsibility over the transaction.

He denies even being called by David Ombewa to assist in reaching the customers because he had difficulties contacting him. That he in this case, the said Ombewa called Patrick Mukhongo according to Exhibit C.1. Still referring to the C.1, the claimant said that Partrick Mukhongo admitted that his core duty was to verify authenticity and validity of instructions but in the transaction in issue he did not verify

because he trusted the claimant.

The claimant however was not accorded an opportunity to cross examine Patrick Mukhongo during the inquiry. He further told the Court that Elsie and Patrick Mukhongo are still working for the respondent. He also said that he had no record of indiscipline since employment and that he was the best performer in the bank with a score of 9.56 out of 10 that year, that rated him at B+ in his appraisal.

That after dismissal, he was never given certificate of service and it became difficult to get another job in the banking sector. That even where he is working presently he was still on probation. He prayed for month notice salary in lieu of notice, 12 month salary for unfair termination, additional interest on loan, certificate of service and costs.

On cross examination, the witness confirmed that he handled inquiries by customers in the Business Banking Department. That on the material date, Elsie of the personal Banking forwarded an email from client enquiry on account balance. He gave the information because of the KYC concept whereby he trusted Elsie knew that the email was from the correct person. That he never suspected any fraud.

On further questioning, he confirmed that before the material day MarTona had not dealt with him using a yahoo address. He confirmed that he unknowingly acted on instructions from fraudsters. That he did not verify because he did not suspect any fraud. That a call back is only required when an instruction looks suspicious in case of outward payment process.

He confirmed that he received the instructions to transfer USD 35000 to a KCB Account. That When Patrick Mukhongo asked the claimant whether the signature was complete, the claimant told him to confirm because there was a time the client had changed his signature.

He denied that his initialing of "ok for process" meant he had authenticated but only meant that the document was presented for processing. The authentication was to be done by Patrick Mukhongo by comparing with specimen signature.

On disciplinary hearing, the claimant confirmed that he was heard on 3/0/2011 when opportunity was given to him to present his case. That he was allowed to call witnesses of choice. That he did not protest about the short notice or the composition of the panel. He however maintained that the panel was not properly constituted and that no one was from Department and indeed his manger Wasuna never recorded any statement on the fraud.

He confirmed that he was allowed to appeal which but it was dismissed by the Managing Director. That in his appeal he stated that he should been more diligent.

RW1 said is a Senior HR Officer and therefore familiar with the facts in the dispute. He confirmed that claimant was then working as Account Analyst for the respondent since 1/12/2009. That he was attached to the Corporate Section and his duties were spelt out in the employment letter. That could also be terminated without notice in case of gross misconduct. He told the Court on 7/9/2011 the claimant acted on an email instruction forwarded to him by Elsie karanja a colleague at work. That the claimant was the Account Analyst responsible for the account related to the request for bank balance. That he was bound to verify the authenticity of the email because MarTona did not have email and fax identity with the respondent. That he should have checked the original source document to confirm whether the instructions came from the customer. That after giving the bank balance though the requesting address, the claimant received a request for transfer of USD 35000 to a KCB account. That said instructions were not accompanied by a cheque but the claimant transferred the money by stamping "ok to process". The "ok to process" means that he has verified the authenticity and has no doubt in his mind.

That Patrick Mukhongo raised an issue with the signature and the claimant alleged the the customer had changed signature. The RW1 confirmed that the money was eventually transferred but returned after MarTonas was called by KCB and denied issuing instruction for the transfer of the USD 35000. the

witness blamed the claimant for problem due to his lack of due diligence.

According to him Mr. Kiarie of financial control Department did the investigations which revealed misconduct by 3 employees including the claimant, Patrick Mokongo and David Ombewa. That the claimant was taken through the disciplinary process on 3/10/2011 at Nairobi head office. The Notice of the hearing cited the charge of transfer of money and allowed them to call an employee of their choice to accompany them during the hearing. That the claimant never raised any objection during the hearing in relation to the length of the notice or composition of the disciplinary committee.

The claimant presented his case after Mr. Kiarie presented his investigation report. The claimant manager was not present to prosecute the case. The claimant admitted wrong doing and the committee recommended summary dismissal for gross negligence.

That he appealed on 24/10/2011 asking for leniency but the appeal was dismissed on 25/11/2011. That the other two employees charged with the claimant were either dismissed or given final warning. He concluded by saying that the respondent gives her staff members loans at lower rates but she has the discretion to charge commercial rates. On cross examination RW1 admitted that he did not know the claimant except through the case. That he joined the respondent on 28/1/2013 long after the dismissal of the claimant. He also admitted that he had not prior banking experience as he was previously working with Essar Telcoms. He further told the court that the claimant was the acting Relations manager for the respondent Mombasa Branch though he could not produce any letter of appointment for the claimant or evidence to show that the Relations Manager Elizabeth Wasuna was on leave.

He confirmed that the account processing is done by the operations Department in accordance with the CFC Stanbic bank Kenya specific procedure. That the person involved was the branch FSO Patrick Mukhongo and FTRO Mr. David Ombewa. That had the two done their duty as expected, no problem would have arisen at all.

Referencing to annexure C1, the statement by David Ombewa, the witness confirmed that, the duty for Mr. Ombewa included verifying authenticity and validity of the instructions given. He confirmed that the HR manual for the respondent required that the employees manager of a Departmental officer was to provide evidence on the facts of the alleged misconduct. That none of the Departmental officers in the claimants Department attended the hearing.

He also confirmed that the claimant was not allowed to be present at the hearing when Patrick Mukhongo accused him of authenticating the customers instructions nor was he allowed to respond thereto. He also admitted that although the claimant had cleared with the respondent, he was not given a certificate of service.

After the close of the hearing the parties filed written submissions asking me to find in their favour. I have carefully read through the pleadings and the submissions filed. I have also carefully considered the evidence adduced by the two witnesses as above. It is not disputed that the court has the necessary jurisdiction to entertain the dispute herein. It is also not in dispute that the parties were in an employer-employee relationship.

The issues for determination are:

- 1. Whether the dismissal of the claimant from employment by the respondent was unfair**
- 2. whether the reliefs sought ought to issue.**

I have considered Section 41, 43,45 and 47 of the Employment Act (*herein called "the Act"*). Section 47(5) of the Act burdens the claimant with a duty prove that he was unfairly terminated or wrongfully dismissed. On the other hand the respondent has the burden of justifying the grounds for termination of employment or wrongful dismissal. The burden is to be discharged by reference to the said Section 41,43 and 45 of the Act.

Section 41 requires that before an employer terminates the employment of an employee on ground of gross misconduct under Section 44 of the Act, he must first explain to the employee in a language he understands the reason for which he intends to terminate the employment and then give him an opportunity to make his representations. The employee must also be afforded any opportunity to be accompanied by a workmate or shop floor representative of his choice whose representations must also be considered before the termination of the employment.

Section 45 of the Act then bars any employer from terminating employment of an employee unfairly that is to say if the employer cannot prove:

(a) that the reason for termination was valid.

(b) that the reason for termination is related to the employees capacity or compatibility or based on operational requirements and

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

Section 43(1) of the Act then puts a burden of the employer in case of a claim like the present one to prove the reason or reasons for the termination and where it fails, the termination to be deemed unfair within the meaning of Section 45.

The reason or reasons for termination are the matters that the employer genuinely believes to exist at the time of termination of the employment and which causes the employer to terminate the services of the employee according to Section 45(2).

The questions that arise in my mind are whether the parties have discharged their respective burdens of proof under Section 47 of the Act.

The claimant's case is that he acted with due diligence in relation to the transaction which led to his dismissal and that it was for the officers in the Operations Department who failed to exercise due diligence. That his request for leniency and acknowledgement that he should have done better was in no way admission of the charge of gross negligence.

According to him his stamping "ok for processing" did not absorb the responsibility of Operations Department to authenticate the instructions through call back on the customer as per the operations payment procedures. According to him the reason for dismissal was not valid as the duty to authenticate instructions laid not on him but elsewhere in the Operational Department.

As regards the procedure, the claimant faulted the disciplinary process on the ground of the composition of the disciplinary committee, the short notice given to attend hearing and the denial of an opportunity to challenge the evidence of Patrick Mukhongo who gave prejudicial evidence in the claimant absence.

According to him the HR manual provides for the presence of the employees line manager or Departmental officer who should provide the charges and evidence of the misconduct. In this case, he contents that the charges and investigation report by Kiarie who was not from the Business banking Department was not valid and it lacked a statement from Elizabeth Wasuna the Relations manager or any other officer in the Department.

On the issue of inability to challenge the evidence given by Mukhongo, the claimant believes that he was prejudiced and the dismissal on the ground of gross negligence was not justified.

With respect to the respondent, the only testimony given was from a person who did not participate in the disciplinary hearing. He only relied on documents he came across in the course of his employment. In as much as he tried to blame the claimant for initiating a process of transfer of money

without the diligence, he did not prove that the Operation Department was justified to act negligently. In fact during cross examination the RW1 confirmed that if the operations Department acted diligently as expected, there would never have been any problem.

The foregoing not only proved that the buck stopped with the operations Department, but also absorbed the claimant from any liability of gross negligence. It meant that even if the claimant did not authenticate the address or signature of the customer, the operations Department was duty bound to authenticate the validity of the instructions through a call back to the customer.

In addition to the foregoing, the court notes with interest the allegation that a letter had been served on the Operations Department to notify it of the absence from the country of the director of MarTona . Was that letter a good reason to alert the Operations Department to act more diligently not to allow transactions carelessly? In my view the answer to the issue is in the affirmative.

Consequently, it is my finding that the claimant has discharged his burden of proof under Section 47(5) of the Act. I believe his evidence that the duty to authenticate instructions before payment of a customer account was on the Operations Department and specifically Mr. Patrick Mukhongo and David Ombewa. These two were duty bound to verify the instructions from the customer before paying out such big sum of money from a customer account who had notified them of his absence from the country and more so where there was no cheque in support. I am also convinced that the failure to involve the Departmental manager or an officer from the claimants Department was fatal in favour of the claimant because it meant there was no evidence from that Department to prove negligence against him. The notice was also short and prejudicial in terms of the condition given for calling witnesses.

The end result is that the respondent has not proved the reason for dismissing the claimant. She did not prove that the claimant transferred the USD 35000 from MarTona account to another account in KCB. She also failed to prove that if at all any money was transferred, the same was due to the gross negligence of the claimant.

As regards Section 43(2) of the Act, the evidence of RW1 was not sufficient to prove that at the time of deciding to dismiss the claimant the respondent had genuinely believed that the claimant acted in gross negligence. In his evidence RW1 admitted that he had not even joined the respondent during the time when the decision to dismiss claimant was reached. In my view another officer involved in the proceedings was best suited to testify instead of the RW1.

As regards the procedure followed for termination, my earlier finding notwithstanding I am satisfied that it was fair within the contemplation of Section 45 of the Act. Even if there were instances of not cross examining witnesses, I believe that did not vitiate the process. In my view a disciplinary enquiry should not take the form of court proceedings. It is enough for the procedure laid down by the contract of employment and the law to have been followed even if not in the form of court proceedings. The question to answer is whether the claimant was informed of the reason for which he stood to be dismissed and whether or not he was given the opportunity to defend himself as per the contract of employment and the law. If there is an iota of such proceedings, a party should not be entertained to allege that the procedure was unfair just because it was not a kin to court proceedings.

Never the less and in view of my earlier observation above it is my finding that the dismissal of the claimant was not founded on valid and justifiable reason. It was not valid because the duty to authenticate instructions before debiting customers account was not within the scope of the claimants employment. The charge facing him was one of transferring money from a clients account to another bank which was in the province of the operations Department.

As regards the last issue of the relief sought, my duty is only to assess the damages payable to the claimant. The claimant prays for one month salary in lieu of notice of Ksh.135000/-, I will award the same in view of my finding that summary dismissal was unfair.

I will also award him Ksh.617,962.50/- being the extra expense incurred by the claimant in form of

interest on his staff loan as consequence of the unfair termination. I agree with the claimant evidence and submission that the respondent should bear the responsibility for his unlawful conduct. The foregoing holding is based on Section 49(4)(1) of the Act which allows the Court to consider expenses incurred by the employee as consequence of the termination while assessing compensation for unfair termination. In addition **Chitty on Contracts 26th edition, paragraph 4015 on page 866** argues that compensatory awards concern among other things loss of rights based on continuity of service and pecuniary loss attributable to the manner of dismissal.

I will also award the claimant the maximum 12 month salary for unfair termination being Ksh.1,620,000/-. The reason for the award is because the reason for dismissal was not valid and the fact that the dismissal was discriminatory. Firstly, he was not in the Department of operations which handled the fraudulent transaction negligently. Secondly, Elsie karanja who initiated the process of the fraudulent transaction went scott free and continues to work for the respondent. Thirdly, the FSO Mr. Patrick Mukhongo who handled the transfer of money without due diligence was only given a warning and continues to work for the respondent.

The prayer for general damages for unfair dismissal is dismissed as it amounts to double benefit in view of the award made above. The claimant will also get Certificate of Service since the law provides for it and that the RW1 admitted during trial that the same was available for collection.

In summary therefore, I enter judgment for the claimant against the respondent as follows:

1. **The summary dismissal of the claimant from employment by the respondent on 21/10/2011 is hereby declared unfair.**
2. **The respondent is ordered to pay the claimant**

(a) **one month salary in lieu of notice135,000**

(b) **loss incurred due to change of interest in**

staff mortgage617,926.50

(c) **12 month salary for unfair termination.....1,620,000.00**

2,372,962.50

(3) **The respondent to issue the claimant with a certificate of service.**

(4) **Costs and interest**

orders accordingly

dated signed and delivered this 28th day of June 2013

ONESMUS MAKAU

JUDGE