



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Civil Case 358 of 2008

ZAHIDA YASIN..... PLAINTIFF
VS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

JUDGMENT

1. At all times material to this suit, the Plaintiff, Zahida Yasin, was an employee of the Defendant, Barclays Bank of Kenya Limited.
2. By a plaint dated 17th June 2008 and filed on 20th June 2008, the plaintiff instituted the suit in this matter against the Defendant triggered by her dismissal from employment on or around 4th December 2002, based on the contention that the dismissal was unfair, wrongful and discriminatory.
3. In the suit, the Plaintiff prays for judgment against the Defendant for the following reliefs:
 - a) The sum of Kshs. 2,751,466.00 being damages for wrongful dismissal;
 - b) The sum of Kshs. 170,806.00 for losses suffered as a result of unlawful bank debits;
 - c) Interest on a) and b) above at 14% per annum from the date of filing of suit until payment in full;
 - d) General damages for discrimination;
 - e) General damages for breach of contract, inducing unlawful arrest, false imprisonment and malicious prosecution;
 - f) Interest on d) and e) at 14% per annum from the date of judgment until payment in full;
 - g) An order for release of motor vehicle registration No. KAL 400J;
 - h) Costs of the suit and interest thereon.
4. The Plaintiff's case is that on or about June 2002, the Defendant suspended and began to investigate

two cashiers who had purportedly engaged in fraud by manipulating bank rates during foreign exchange transactions. The purported fraud took place over a period of two years but had not been discovered by the bank's internal or external audit investigations during that entire period. Following the discovery of the fraud, the Plaintiff recorded a statement as directed by the Defendant. On or about 29th November 2002, the Defendant requested the Plaintiff to appear before the Banking Fraud Investigations Department to make further statements. The Plaintiff claims to be the only suspended staff member who was subjected to this further investigation. On 4th December 2002, the Plaintiff was eventually terminated from employment without notice, without being subjected to the bank's disciplinary procedure and when she was seven months' pregnant. The Plaintiff considers this course of events to have been actuated by malice, discrimination and unlawful motive on the part of the Bank.

5. The Defendant contests the Plaintiff's case through a defence dated 31st July 2008 and filed on 5th August 2008. In the defence, the Defendant avers that the Plaintiff was lawfully dismissed from employment solely on the basis of gross negligence in the performance of her duties on account of having been found to have authorized fraudulent transactions. The Defendant claims that fraudulent transactions that the Plaintiff allegedly authorized through gross negligence cost the Defendant substantial losses to the tune of Kshs 58,000,000/-. The Plaintiff was therefore in breach of the terms of her letter of appointment and the Defendant reserved the right to terminate her employment. The dismissal was done after rigorous investigation process and affected several employees. The claim for discrimination was therefore baseless and unfounded.

6. The Defendant's defence is traversed by the Plaintiff through a reply to defence filed on 13th August 2008 in which the Plaintiff, *inter alia*, denies having authorized the fraudulent transactions and blames the loss on the Defendant's poor computer authorization system; states that there were eight persons whose passwords were used to authorize the fraudulent transactions yet she is the only one whose purported authorisations were done manually suggesting fraudulent use of her password; she was not given adequate time to respond to the allegations leveled against her; the investigations commissioned by the Defendant were arbitrary and targeted at the Plaintiff and that, in any event, no rigorous investigations had been done. The Plaintiff also alleges that the Defendant took the action to summarily dismiss her owing to pressure from its holding company, Barclays Bank Plc.

7. At the hearing of the suit, the Plaintiff testified in support of her case and called one more witness, a Mr. Charles Gichuki, who was a fellow supervisor with the Defendant Bank at the time the alleged fraud took place.

8. The Defendant did not lead any evidence to rebut the Plaintiff's case.

9. In her evidence in chief, the Plaintiff testified that she was employed by the Defendant in the year 1986, served diligently with devotion and earned various promotions rising to the position of Supervisor at Bank's Head Office. The alleged suspect transactions occurred between year 2000 and 2002. The fraud was discovered in June 2002. There were eight authorizers. Upon discovery of the fraud, the Bank carried out investigations but never gave the authorizers a chance to explain what had happened. The authorizers were merely asked to make written explanations. The Plaintiff gave her written explanations upon being shown transactions containing wrong exchange rates but was never interrogated about the fraud. On 29th November 2002, she was referred to the Banking Fraud Investigation Unit (BFIU) by Mr. George Otieno who was the Defendant's Head of Security. She was the only one who recorded a statement. She was asked to return to BFIU on 2nd December 2002 when her finger prints were taken after which she spent the whole day without being interviewed. Two days later she got her dismissal letter from her employer. The dismissal letter shocked her because of the eight authorisers, five had been allowed to proceed on early retirement but her application had been turned down. Further, she had worked diligently for 16 years and had had only one reprimand in her career with the bank.

10. On cross-examination, the Plaintiff agreed with counsel for the Defendant that the Defendant had employed many women and none of these had been discriminated on grounds pregnancy or of having started a family. Before the problem leading to her dismissal, she had two previous disciplinary actions as

a result of which she had been issued with letters of reprimand. The fraud that led to her termination was done by cashiers who were applying a low rate of exchange for sale of dollars. She was changing her password every month and used to memorise her password. She would however have to go to the cashier's booth for manual authorization and therefore it was possible for a cashier to see and learn the password while it was being keyed in. She had raised the concern with management but nothing was done. On the claim for false imprisonment, the Plaintiff stated that she was arrested and charged by banking fraud officers on the instigation of the Defendant's security officer.

11. In re-examination, the Plaintiff explained that the reprimands she had received implied that the breaches complained of were not serious. She claimed that the bank's system of authorization allowed manual authorization which carried the risk of compromising passwords. She could however not be blamed for the flawed system as she was not involved in designing the software entailed. She blamed the requirement that a hard copy of the password was to be kept by the custodians as exposing passwords to leakage. After the fraud, however, the branch changed its procedures. Upon termination of her employment, other staff members were granted early retirement package except her.

12. On his part, Plaintiff Witness Charles Muriithi Gichuki testified that he was also working as a supervisor when the incidences of fraud occurred and was the immediate boss of the two cashiers involved. After the incidences he was shown a report showing that he had authorized fraudulent transactions and was required to give a written statement on the matter. After this, he was not asked anything further until 18th December 2002 when he was summoned to the Manager's Office and was given a termination letter. He did not go through any disciplinary procedures. He was shocked as he had just been promoted to the position of supervisor. Out of the eight authorisers, only he, the Plaintiff and a Mr. Kinga were dismissed. The rest were granted early retirement.

13. On cross-examination, Mr. Gichuki confirmed that after being shown the journals on the fraudulent transactions, it was evident that some fraud had taken place. Banking fraud was therefore justified to inquire into the fraud. Banking fraud was also justified to question the Plaintiff as her password had been used in the fraudulent transactions.

14. On re-examination Mr. Gichuki told the court that the Plaintiff used to be booked in and detained in court cells by BFIU officers. This persisted for a period of three months. The treatment the Plaintiff was taken through was unfair and very different from the rest of the implicated staff members.

15. Counsel for both parties filed written submissions that the court has found to be very useful in compiling this judgment.

16. From the pleadings, evidence and material placed before me, the key issues arising for this court's determination are:

- a) Whether the Plaintiff was wrongfully dismissed from employment;
- b) Whether the Plaintiff was discriminated against;
- c) Whether the Plaintiff was subjected to false imprisonment, wrongful arrest and malicious prosecuted;
- d) Whether irregular debits were made on the Plaintiff's account;
- e) Quantum of damages, if any, payable under a), b), c) and d) above;
- f) Costs

17. On the claim for wrongful dismissal, the Plaintiff's evidence is that termination of her employment was wrongful because she was, *inter alia*, not given notice of termination, was not subjected to the Defendant's disciplinary procedures, did not participate in the fraud, and in any event, was not accorded the opportunity for early retirement like other implicated staff in her category. The defendant countered

this by insisting that the Plaintiff was terminated on grounds of gross negligence and after investigations by the Bank implicating her in the fraud.

18. I have evaluated the evidence tendered in support of the claim. On the contention that no due process was followed in terminating the Plaintiff's employment, my finding is that while the Defendant upon discovery of the fraud notified the Plaintiff of the fraud and requested the Plaintiff to make a written statement on the same, and while the Plaintiff conducted internal investigations on the fraud and even referred the Plaintiff to the Banking Fraud Investigations Unit for further interrogation, the Defendant did not subject the Plaintiff to the disciplinary process stipulated in the Bank's Employee Guide or Code of Conduct. The procedure applicable detailed at page 5 of the Code of Conduct (page 20 of the Plaintiff's list of documents) required at the minimum full investigation of the misconduct complained of and notification to the staff member that the investigations had revealed a case to answer. If there was a case to answer, a formal disciplinary hearing would follow. This would then be addressed through a first warning letter and if misconduct continued a final warning letter. Termination would then follow. The Defendant led no evidence to show that any disciplinary process of this nature was arranged for the Plaintiff.

19. Further, the said Code of Conduct distinguished between general misconduct and gross misconduct. Only gross misconduct entitled the Defendant to terminate employment and even then after a full investigation and disciplinary hearing. In the Plaintiff's case, the investigations conducted by Mr. George Otieno of the Bank's security department as well as those undertaken by BFIU could not, in my view, constitute full investigations within the context of the Staff Code of Conduct.

20. With regard to whether the Plaintiff was indeed involved in the fraud as to merit termination of her employment for gross misconduct of negligence, the evidence tendered by the plaintiff is that the main perpetrators of the fraud were two cashiers, Anastasia Mwangi and Miriam Kiti. The Plaintiff was only involved in so far as her password was implicated in manual approvals of the fraudulent transactions. She blamed the Defendant's computer system and the arrangement of physical password being deposited with custodians as possible grounds that her password was used in the fraud.

21. Given that the Defendant never led any viva voce evidence in these proceedings, I find a report of investigations of the fraud contained in an Internal Memo dated 7th October 2002 from its Assurance Department to the Regional Retail Director (annexed at pages 42 to 48 of the Defendants affidavit as to documents) as providing the closest traversing evidence for the Defendant on whether the Plaintiff took part in the fraud. From this report, a finding at paragraph 1.5 was made as follows:

“There was evidence that this report was signed and actioned by officials as evidence that the exchange received losses debited to the account was correctly applied. Between the month of June 2000 – August 2002, a total of nine different officials actioned the report. None of them raised any queries. The officials were Ms. Charity Maluko, Ms. Zahida Yasin, Mrs. Joyce Nganga, Mrs. Leah Theuri, Ms. Winnie Kiondo, Mr. Charles Gichuru, Mr. Elisha Opere Mrs. Magdalene Mnene and Mrs. Alice Macharia”.

The report then went ahead to make the following observations with regard to authorisations:

“However, due to centralization of back office and the current branch reorganization, the number of authorisers have thinned out yet the information traffic has increased. Perhaps there is a need to do job measurement to ascertain whether the pressure is too much on the authorisers. Our investigations did not come up with any evidence to implicate any of the authorisers with the fraud”.

22. From the foregoing sets of evidence, my considered view is that while the Plaintiff's password may have been used to perpetrate the fraud, investigations carried out by the Defendant's Security and Investigations Department outrightly absolved all the authorisers from any fraud on their part. In the face of these findings, there was no longer any justification to seek to terminate the Plaintiff's employment on grounds of her possible participation in the fraud or indeed on grounds of negligence in not detecting or preventing the fraud. The termination of the Plaintiff based on the fraud was therefore wrongful as

termination was done on 4th December 2002, which was two months after the relevant management office of the Defendant had been notified of the results of internal investigation.

23. The other grounds relied upon by the Plaintiff in support of the contention of wrongful termination of her employment, are lack of notice of termination and failure by the Defendant to accord her an opportunity for early retirement. My evaluation of evidence clearly depicts that no notice of termination was given to the Plaintiff as the termination letter of 4th December 2002 was the first and only letter that alluded to the Defendant's intention to terminate the employer-employee relationship. Similarly, it is fairly straightforward that the Plaintiff was not allowed early retirement package. These two entitlements were trite terms of her contract of employment and the omission by the Defendant constituted breach of that contract.

24. Overall therefore, and for the reasons rendered above, it is my judgment that termination of the Plaintiff's employment by the Defendant was wrongful.

25. With regard to the claim that the Plaintiff was discriminated against, the Plaintiff raised various areas of possible discrimination in the manner in which the Defendant treated her following the discovery of the fraud leading to termination of her employment. These ranged from discrimination on the basis of her sex and pregnancy status to discrimination in the manner in which she was referred to the BFIU in her said state when the Defendant knew or ought to have known the treatment that would be meted upon her.

26. On cross-examination, the Plaintiff was unable to prove any discrimination on the basis of her gender, pregnancy or family status. She confirmed that the Defendant had employed many women and that she did not have any information that any such women had been discriminated upon on the basis of gender or marital status. The other aspects on which the claim to discrimination was based, namely, the selective manner in which she was referred to BFIU for further investigations as well as the Defendant's decline to grant her early retirement package are matters that fall within the claims for malicious prosecution and wrongful dismissal respectively. I do not therefore think that the Plaintiff can sustain a distinct claim for damages based on derogation of her right to equal treatment and freedom from discrimination.

27. The claim for damages on grounds of discrimination therefore fails.

28. On the claim of false imprisonment, wrongful arrest and malicious prosecution, the Plaintiff's case is that she was subjected to wrongful arrest, false imprisonment and malicious prosecution on the instigation of the Defendant. She claims to have been arrested and taken to the BFIU offices where she was detained for 10 hours on 2nd December 2002. She was then taken to the High Court Registry in October 2003 where she was kept in the cells in October 2003 when she was taken to court.

29. On its part, the Defendant made strong submissions that the Plaintiff needed to prove that false imprisonment was the result of a direct act of the defendant or someone for whose act the Defendant was liable (**as per Halbury's Laws of England, 3rd Edition**). The Plaintiff's action lay with the person who caused such imprisonment. The court was urged to apply the following test:

"...whether the Defendant gave information to a prosecuting authority so that what followed was the result of that prosecuting authority or whether the defendants themselves were responsible for the acts that followed"

30. In that regard, the Defendant urged the court to make the finding that the Plaintiff was merely summoned to the BFIU offices as opposed to being arrested. Her compulsion to attend the BFIU offices was also justified under Section 22 of the Police Act which empowers a police officer to require a person to attend before him at a police station or police office for purposes of investigation. It was further submitted for the Defendant that there was no evidence of detention at the High Court as well as no evidence that the Defendant was responsible for the actions of the BFIU, the Plaintiff having failed to call evidence from Inspector Onyancha who was the link person between the Defendant and the BFIU.

31. I have weighed the rival positions on whether or not the Plaintiff was indeed subjected to false imprisonment, wrongful arrest and malicious prosecution. I am entirely persuaded that the referral of the Plaintiff to the BFIU for further interrogation relating to the fraud was well within the powers of the BFIU as the unit mandated to conduct banking fraud in this country. The time spent at BFIU offices is also to me not time spent in detention as the Plaintiff could not direct the pace with which the police were to conduct investigations. It is also natural to me that once the investigations confirmed that there was sufficient evidence upon which to arraign the Plaintiff in court, such arraignment necessitated limited detention at the police cells.

32. However, the question that disturbs this court is whether it was necessary in the first place to subject the Plaintiff to the vagaries of further investigations by the BFIU and possible prosecution for criminal offences associated with the fraud. This question, in my view, must find an answer from the related question of whether or not the internal investigations by the Defendant on the Plaintiff prior to the referral of the matter to BFIU had made a case for such referral. This takes me back to the investigation report discussed in paragraph 21 of this judgment.

33. As already documented in the said paragraph, the Defendant's Head of Security made the observation that their investigations did not come up with any evidence to implicate any of the authorisers with the fraud. The report then went on to make the following recommendations:

i. *Consider barring the facility for cashiers to override preset foreign rate by denying them to quote rates below those set by*

dealers in both cases of selling and buying of foreign currencies;

ii. *The need to train bank officials in their new roles and ensuring they understand their new job roles and responsibilities;*

iii. *There is need to consider whether in-built control systems are adequate...;*

iv. *The acquisition of wealth by Ms. Anastasia Waithera Mwangi within such a short time established beyond doubt that she*

benefited from the fraud; and

v. *Appropriate disciplinary action should also be taken against authorisers and those officials who carried snap checks”.*

34. From the above recommendations, it is crystal clear that the only recommendation impacting on the Plaintiff as an authorizer was the recommendation that she should be subjected to disciplinary action. This action, as it were, was the same disciplinary action prescribed in the Defendant's Staff Code of Conduct alluded to above, and which, from the Plaintiff's evidence, was never implemented. What then followed within several weeks of this report is that not only was the Plaintiff not subjected to disciplinary action but the Defendant went on to prefer police investigations against her contrary to its own findings that no fraud had been established against the Plaintiff. In the premises, I find no evidence on the basis of which to dissuade myself from reaching the deduction that there was simply no necessity to subject the Plaintiff to further investigations, interrogations and eventual attempted prosecution. The effort to prosecute her was in that regard was actuated by ill-motive within the contemplation of the case of **Kateregga vs. Attorney General (1971) EA 287**. This is because the Defendant had no plausible case on the basis of which it was entitled to refer the case to BFIU for further action. That the BFIU decided against pressing charges against the Plaintiff conclusively vindicates the position that there was no incriminating evidence against her.

35. Further, there is little doubt that the malicious prosecution was set in motion by the Defendant through its Head of Security, and therefore the case meets the test laid in **Gitau vs. Attorney General [1990]**

KLR 13.

36. With regard to the Plaintiff's claim that illegal debits were made on her account, the irregular debits amounting to Kshs. 170,806.00 related to recovery of legal fees purportedly for a house loan that had been approved but which was stopped following termination of employment. The Defendant's position on this matter is that under the Sale Agreement dated 30th October 2002 for the purchase of the house, the Plaintiff was obligated under Special Condition E to pay stamp duty, registration fees and other charges. The Plaintiff however maintains that she should not have been subjected to the debits as sale was cancelled upon termination and before completion.

37. I have perused the Sale Agreement and established that the same is executed but I am unable to make out if a charge document had been prepared and stamped before the agreement was cancelled. In that regard I am unable to determine if the fees and charges debited had become due and payable. In that regard, I would exercise my discretion in favour of the Defendant in view of the express terms of the Sale Agreement. This claim therefore fails.

38. The Plaintiff's claim for release of the logbook to motor vehicle Registration Number KAL 400J is not contested. Counsel for Defendant submitted that the Plaintiff had not produced evidence to show that she had demanded release of the logbook. The Defendant stated that that the Plaintiff should follow the established procedure in the pursuit of the logbook. I therefore hold that subject to the Plaintiff following the said procedure and meeting the laid down requirements, the log book should be released to her.

39. Having found for the Plaintiff on the claims under the heads of wrongful dismissal, discrimination and malicious prosecution, the task that remains is to consider what quantum of damages to award on each head so as to recompense the Plaintiff to the extent most commensurate with the damage suffered.

40. With regard to damages for wrongful dismissal, counsel for the Plaintiff has submitted that such damages are the losses that directly arise from the contract of employment including pay for notice period and any other benefits the Plaintiff was entitled to. In computing the quantum of damages payable, he urged the court to be guided by the question, "What monetary compensation will put the Plaintiff back in the position she would have been had the contractual breach not occurred?" He urged the court to adopt the computation done by the Defendant's own employee, a Mr. Oscar Masinde and award the Plaintiff the sum of Kshs. 3,252,480/-.

41. On his part, counsel for the Defendant submitted that the claim, being a claim for special damages must not only be claimed specially but must be proved strictly, as was held in **Hahn vs. Singh Civil Appeal No. 42 of 1983**.

42. I have evaluated the above claim against the evidence available. It is apparent to me that the Plaintiff was ready and willing to take up the early retirement package that the fellow supervisors implicated in the fraud were given. In that regard, the computation done by the Defendant's officer Mr. Masindewhile being a guide is nevertheless unreliable as it is neither dated nor signed and neither does it bear any formal connection with the Defendant. It is therefore not evidence that this court should base its award upon. However, I have also perused the letter dated 13th November 2002 allegedly constituting the benefits paid to Ms. Joyce Ng'ang'a, a fellow supervisor who was implicated in the same fraud as the Plaintiff and noted that the Bank paid her a sum of Kshs. 3,521,125.15 under the Early Leavers' Scheme. This letter is therefore a reliable guide to the court in considering the award for damages for wrongful dismissal in this case.

43. I have further perused the Plaintiff in this matter and the claim for damages for wrongful dismissal is pegged at Kshs 2,751,466.00. This sum is within the claim that the Plaintiff would have been entitled to had she retired under the Defendant's early retirement scheme. I would therefore award damages for wrongful dismissal in the said sum of Kshs. 2,751,466.00 as pleaded in the Plaintiff.

44. With regard to the claim for damages for false imprisonment and malicious prosecution, the Plaintiff did not assist the court with material on the basis of which damages could be assessed. I am however

aware that this court in the case of James NyakundiChege vs. Barclays Bank of Kenya HCCC No. 148 of 2009 (unreported) Hon. Justice Mabeya made an award of damages in the sum of Kshs. 1,000,000/- to a party who had been illegally incarcerated in a bank strong room for three hours and later held overnight in a police station. The circumstances of the present case are somewhat similar in that the Plaintiff was subjected to detention as well as arraignment in court in circumstances that have been shown to have been unjustified. I would therefore award a combined sum of Kshs. 1,500,000/- to the Plaintiff on the claim for false imprisonment, wrongful arrest and malicious prosecution.

45. Accordingly, I hereby enter judgment for the Plaintiff against the Defendant for:

1) The sum of Kshs. 2,751,466.00 being damages for wrongful dismissal together with interest at 14% per annum from the date of filing suit until payment in full.

2) The sum of Kshs. 1,500,000.00 being damages for wrongful arrest, false imprisonment and malicious prosecution with interest at 14% per annum from the date of this judgment until payment in full.

3) An order for the release of log book to Motor Vehicle KAL 400J subject to fulfillment of all attendant requirements.

4) Costs of this suit together with interest thereon at 14% per annum from the date of this judgment until payment in full.

These, then, shall be the orders of this court.

DATED, SIGNED and DELIVERED in Nairobi this 17th day of May 2012.

J. M. MUTAVA

JUDGE