



Nyabera v Kenya Post Savings Bank (Employment and Labour Relations Appeal E009 of 2024) [2024] KEELRC 2594 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2594 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E009 OF 2024**

**JW KELI, J
OCTOBER 24, 2024**

BETWEEN

FRED NYABERA APPELLANT

AND

KENYA POST SAVINGS BANK RESPONDENT

(An Appeal from the Judgment of Hon. A. Odawo (SPM), Kakamega, delivered on 13th March 2024 in Kakamega CMC ELRC No. E198 of 2019)

JUDGMENT

1. The Appellant, being dissatisfied with the Judgment of Hon. A. Odawo (PM), Kakamega, delivered on 13th March 2024 in Kakamega CMC ELRC No. E198 of 2019 between Fred Nyabera and Kenya Post Saving Bank filed a Memorandum of Appeal dated 11th April 2024; the Record of Appeal dated 24th May 2024 and received in Court on the 14th June 2024; and the Supplementary Record of Appeal dated 13th June 2024 and received in court on 14th June 2024, seeking the following orders: -
 - a. This appeal be allowed.
 - b. The Honourable court do set aside lower court judgement and evaluate evidence on record and arrive at its own conclusion as it deems fit.
 - c. Cost of the lower court and of this appeal be awarded to the appellant.
2. The Appeal was premised on the following grounds:-
 1. The learned trial magistrate erred in law and fact by stating that the termination was lawful against the weight of evidence on record thus arrived at wrong conclusion.
 2. The learned trial magistrate erred in law and fact by that it was the appellants responsibility to ensure the attendance of his colleague thus arrived at wrong conclusion.



3. The learned trial magistrate erred in law and fact by observing that the claimant was negligent when he gave out his pass word against the weight of evidence on record thus arrived at wrong conclusion.

(Pg. 1-2 of the record)

3. The Appeal was canvassed by way of written submissions. The Appellant's written submissions drawn by Wamalwa Simiyu & Co. Advocates were dated 13th September 2024 and received in court on 16th September 2024. The Respondent's written submissions drawn by Ochieng' Opiyo & Co. Advocates were dated 2nd September 2024 and received in court on an even date.

Background to the appeal

4. The Appellant filed a suit Kakamega CMELR No. 198 of 2019 against the respondent for unlawful and unfair termination through the Claim dated 15th November 2019 and filed on 22nd November 2019, seeking the following reliefs:-
 - a. A declaration that the purported termination offends *the Constitution* of Kenya 2010 and particularly Articles 40, 47, and 50 thereof, the *Employment Act* 2007, and Fair Labour Practices and consequently wrongful and that the claimant is entitled to the most appropriate redress.
 - b. As prayed for in paragraph 21 of the claim above.
 - c. An order directing the respondent to issue a certificate of service to the respondent.
 - d. Costs and interest.
5. The Statement of Claim was supported by the Verifying Affidavit of 15th November 2019 and accompanied by the Appellant's List of witnesses dated on even date, the Appellant's witness statement dated on even date, his List of Documents of even date, his statement of issue dated 15th November 2019 and his Bundle of Documents (page 3-59 of the record is the Appellant/Claimant's case)
6. The Respondent filed the Response to the Statement of Claim dated 7th March 2023 and received in court on 13th March 2023 pursuant to the leave of trial court granted on 25th January 2023(pg. 60 to 62 of record). The Response to the claim was accompanied by the Respondent's List of witnesses dated 7th March 2023; the Respondent's list of Documents of an even date, the Respondent's bundle of Documents(Pages 63 to 77 of the Record).
7. Subsequently, on the 12th September 2023, the Respondent filed list of witnesses dated 11th September 2023, a further list of documents dated on even date, an additional bundle of documents, the Witness statement of, Josephine Abuya dated 7th September 2023, and the statement of Mary Rono dated 5th September 2023,(Pages. 78-125 of the record).
8. The Appellant filed a reply to response to the statement of claim dated 23rd May 2023 and received in court on 24th May 2023.
9. The hearing of the Claimant's case commenced Exparte before Hon. J.N. Maragia, SRM, on the 2nd of March 2022 with him as the only witness (Pg.158-159 of the Record of Appeal). The Appellant filed submissions dated 14th March 2022 and filed on 15th March 2022 (Pages 126-139 of the Record) which culminated in the Judgment by Hon. J. N. Maragia dated 5th April 2022(Pg. 161 of Record). By Leave granted to the Respondent dated 25th January 2023(pg.188), a stay of execution of the judgement and the incidental taxation proceedings was issued, and the judgment of 5th April 2022 was set aside.



The Respondent was granted leave to file his response to the claim out of time, subject to payment of thrown-away costs.

10. Hearing resumed on 1st November 2023 before the lower court, when the Claimant's cross-examination proceeded, Mary Rono testified as Defence Witnesses (DW1) and produced Defence Exhibits 1 to 5, and Josephine Abuya testified as DW2 and produced Defence Exh- 6(Pages. 172-176 of Record)(some proceedings missing in the record but available in the lower court file).
11. The parties filed submissions in the lower Court. The Appellant's submissions were dated 14th March 2022 and filed on 15th March 2022 (Pages 126-139 of the Record). The Respondent's undated written submissions were filed on 8th December 2022(pages 140-156 of the Record).
12. The trial Court (Hon. A. Odawa, PM.) delivered its judgment on the 13th of March 2024 (pg. 179-187 of Record) and held that the Claimant's termination was lawful and he was neither entitled to the general damages, one- month salary, the amount in lieu of notice, leave allowance, house allowance nor gratuity. The claim was dismissed in its entirety with costs to the respondent.

Determination

Issues for determination

13. The Appellant in his written submissions identified one issue for determination in the appeal being:- Whether the trial magistrate made the finding against the weight of the evidence on record by the appellant.
14. The Respondent in its submissions identified the following issues for determination in the appeal: -
 - a. Whether the trial magistrate erred in finding the Appellant's termination was unlawful.
 - b. Whether the learned trial magistrate erred in finding that it was the appellant's responsibility to ensure the attendance of his colleague.
 - c. Whether the learned trial magistrate erred in law and fact by observing that the Claimant was negligent when he gave out his password against the weight of evidence on record thus arrived at the wrong conclusion.
15. The court guided by decision in *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1948) EA123 to the effect that the court sitting at first appeal has to re-evaluate the facts and evidence before the trial court while making allowance of not having seen the witnesses to reach own conclusion, finds the issues for determination in the appeal are as stated in the 3 grounds of appeal: -
 - a. Whether the trial magistrate erred in finding the Appellant's termination was based on valid reason hence lawful (ground 1 and 3 of the appeal)
 - b. Whether the learned trial magistrate erred in finding that it was the appellant's responsibility to ensure the attendance of his colleague (ground 2).

Whether the trial magistrate erred in finding the Appellant's termination was based on valid reason hence lawful (ground 1 and 3 of the appeal)

16. Grounds 1 and 3 of the appeal were as follows:-
 - i. The learned trial magistrate erred in law and fact by stating that the termination was lawful against the weight of evidence on record thus arrived at wrong conclusion.



- ii. The learned trial magistrate erred in law and fact by observing that the claimant was negligent when he gave out his pass word against the weight of evidence on record thus arrived at wrong conclusion.
17. In his written submissions the appellant contended that the finding by the Learned Trial Magistrate was based on the presumption that passwords by the respondent were secretive without proof. That the respondent on a balance of preponderance of probability should have shown the court the agreement/ policy signed by the appellant committing that the password/code was secretive and not be shared with fellow staff or even with the immediate supervisor.
18. The appellant contended that he was mindful of the provisions of section 45(2) of the *Employment Act* on termination based on the operational requirements of the employer. That without proof of existence of policies by the respondent on how it operationalised handling of passwords by the staff, on preponderance of probabilities the learned magistrate should not have assumed such.
19. That the dismissal letter dated 26th August 2018 stated at paragraph 1 indicates that the appellant was dismissed following an act of operation irregularity(page 32 of the record.) That no document on the operational requirements by the respondent on the passwords was produced before the trial court.
20. The appellant submits that while the Learned Trial Magistrate relied on the decision in *Violet Kadala Shitsukane v Kenya Post Savings Bank (2020 e KLR)*, he submits that the same case was distinguishable to the appellant's case in the sense that in the said case there was a policy document tendered committing the person on how to go about with the password unlike the appellant's case where no policy was produced.

The respondent's submissions

21. The respondent submits that it led evidence before the trial court vide RW1 Mercy Rono that all the employees of the respondent were issued with log-in credentials that is not to be shared with anyone and if used for illegal purposes then the owner of the password is held liable. From the said testimony the password issued to the appellant was a secret instrument given to him to operate his duties with the respondent. The password was not available to others hence the dismissal based on his own admission during the disciplinary hearing where he admitted to having given his password to Mercy Kasili who he stated had been given management roles and admitted money transfer was initiated using his password.
22. To support the dismissal the respondent relied on the decision of the court in *Nelson Ken Kipkemei v Diamond Trust Bank Kenya Limited(2015)e KLR* paragraph 34 where it was stated:- '34. The claimant in this matter was suspected by the respondent to have been involved in fraudulent transaction which occasioned the respondent financial loss. The grounds for his suspected involvement was that his computer and password was used in some of the impugned transactions. He failed to satisfactorily explain to the respondent how and under what circumstances his password which was supposed to be secret and only known to him became used in the transactions. There was also evidence before the Court that around the time the fraudulent transaction occurred the claimant and Mr. Chirchir were at the claimant's computer where it turned out that a Western Union Certificate belonging to another colleague was installed in the claimant's computer and used to execute what turned out to be a fraudulent transaction. In the Court's view, these were justifiable and valid reasons for claimant's dismissal.'",
23. The respondent submits that the testimony of RW1 before the trial court showed there was a clear policy on the control, operation and access to the Respondent's banking system. That it confirmed the appellant's password was secure and confidential. That the appellant owed the respondent a duty



of care which he failed in exercise of his duty resulting to the respondent's financial loss of Kshs. 1,151,383/- . That they succeeded in establishing the reason of termination was fraud driven by use of the appellant's profile.

Decision on Issue 1

24. The court perused the proceedings before the trial court. During cross-examination, the appellant told the trial court that as he was leaving for lunch one Mercy Kasili, his superior, asked him for his password to continue with teller duties. At the end of the day, the Appellant noted variance and when he reported to the supervisor, she said he had stolen money and reported him to the headquarters and to the police. The said Mercy Kasili as per the defence was the Acting Branch Manager.
25. Further, as per RW1 testimony before the trial court, the appellant was a cashier who using his credentials requested for Kshs. 961,667 on the morning of 9th March 2016 which cash was given to him physically. That the system showed he requested the cash and it was given to him. That Mercy Kasili was the Acting Branch Manager who reported the incident.
26. The Learned Trial Magistrate found that the appellant by the act of giving out his password was negligent and the act amounted to gross misconduct. The Learned Trial Magistrate relied on the provisions of section 45 (2) of the Employment Act and the decision of the court of appeal in Pius Machafu Isindu v Lavington Security Guards limited (2017) e KLR.
27. The Court finds that it was not in dispute that the appellant had been issued with a password to log into systems of the respondents to perform his duties as a cashier. The appellant gave another person his password and that his password credentials were used, leading to loss of monies for the respondent. The appellant raised issue that there was no policy document produced before the trial court that the password could not be shared or disclosed to other staff and his superiors hence the court made assumption of the finding. The dismissal letter accused the appellant of being involved in operational irregularity. The appellant contended that no policy was produced to prove his disclosure of the password to another person and more so his supervisor was irregular (page 32 of the record).
28. The court finds that during the trial the respondent produced its Code of Conduct (page 94-114 of the record). The code entailed, inter alia, provisions for staff relating to customer monies, embezzlement of bank funds, improper payment of funds and the circumstances of staff being responsible for loss of bank funds. The question to be addressed by the Court under the appeal was whether it was an operational requirement under section 45(2) of the Employment Act for the appellant to keep his password secret.
29. It was not in dispute that the appellant had duty of cashier at Kakamega Branch of the Respondent. He was dealing with a system to do his work whose access key was the password. What is the purpose of the password? Password is defined under the Concise Oxford English dictionary as :- ‘ a secret word or phrase used to gain admission or access to something. A string of characters that allows access to a computer , interface or system.’
30. Pursuant to the above definition of the term “password”, the court returns that it was a reasonable expectation that a password is secret otherwise every Tom, Dick and Harry can access the bank system and pay themselves whatever money they wish to the obvious detriment of the bank. There was uncontested evidence before the trial court that money was lost on the material date the appellant admitted to have disclosed his password to a colleague. He admitted there was variance at the end of the day leading to his being reported to the police and ultimately the termination of employment. The court holds that there needed not to be a policy in place against the sharing of passwords by bank employees for the secrecy of passwords to be an operational requirement. By practice of the banking



industry, it is reasonable to expect password secrecy to be an operational requirement. That is why money only got lost after the appellant gave out his password. The appellant knew his password was the key to accessing his profile in the Respondent's bank system to transact.

31. The Court holds that any reasonable employer in the banking industry would have dismissed the Appellant on basis of the same reasons as per the test of a reasonable employer pronounced by Lord Denning in *Britain Leyland UK Ltd V Swift* [1981] IRLR 91 to wit:-“The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view.”
32. I do uphold similar holding in *Nelson Ken Kipkemei v Diamond Trust Bank Kenya Limited*(2015)e KLR (supra)to return that the conclusion of the Learned Trial Magistrate that the appellant was negligent in sharing the password and that the act amounted to gross misconduct was founded on facts before the trial court notwithstanding the lack of policy by the Respondent before the trial court on the secrecy of password. The password by its definition is a secret. The court upholds the holding of the trial court that the termination of the employment was based on the operational requirements of the employer and was lawful.

Whether the learned trial magistrate erred in finding that it was the appellant's responsibility to ensure the attendance of his colleague.(ground 2)

33. This issue was raised as a ground of appeal but in written submissions, the appellant did not submit on this ground.
34. The respondent submitted on the ground contending that the appellant was granted adequate notice to attend the disciplinary hearing accompanied by an employee of his choice. That it was his duty to secure the attendance of Mercy Kasili at his hearing. The letter of invitation dated 25th June 2015 to appear before the staff disciplinary committee was produced by the respondent (page 73 of the record) and inter alia, the letter stated, ‘you may be accompanied by a colleague of your choice to the meeting.’ Similar information appeared in the subsequent notice to appear before the Respondent's staff disciplinary committee of 12th August 2015 (page 75 of the record).
35. The respondent in submissions stated that the appellant failed to utilize the opportunity at the shop floor to call his colleague of choice and thus the employer complied with the provisions of section 41 of the *Employment Act* on procedural fairness as held in various decision of the court namely:- *Peter Njuguna Chege v Tim sales Limited*(2020)e KLR and *Kinoti; v Safaricom PLC* (2023)e KLR.

Decision on Issue 2.

36. The legal requirement to be complied with in respect of an employee facing disciplinary proceedings being accompanied by another employee or shop floor union representative is, ‘the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.’”
37. The court returns procedural fairness before a decision on termination of employment is made as per the provisions of section 41 of the *Employment Act* to wit:- “41. Notification and hearing before termination on grounds of misconduct



(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”(emphasis given)

“(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

38. The Court returns that the obligation of the employer on procedural fairness is met once the employer affords the employee the opportunity to be accompanied by another employee or shop floor union representative of his choice to the meeting. The court finds that the Respondent met the threshold by informing the appellant of that right in the invitation to appear for disciplinary hearing notices(pages 73 and 75 of the record of appeal). The Court returns that the failure of Mercy Kasili to be called as a witness did not taint procedural fairness in any way. It was the obligation of the Appellant once afforded the right to call his employee of choice under section 41 of the *Employment Act* (supra) to call the said Mercy Kasili or any other employee of choice. The Court finds that the employer discharged its obligation by informing the employee of the right to call an employee of his choice under the invitation to the disciplinary hearing letter.

Conclusion

39. In the upshot, the Court finds no merit in the entire appeal and the same is dismissed with costs to the Respondent. The Court upholds the Judgment and Decree of Hon. A. Odawo (PM), Kakamega, delivered on 13th March 2024 in Kakamega CMC ELRC No. E198 of 2019 between Fred Nyabera and Kenya Post Saving Bank.

40. It is so Ordered.

DATED, SIGNED, AND DELIVERED ON THE 24TH DAY OF OCTOBER 2024 IN OPEN COURT AT NAIROBI

JEMIMAH KELI

JUDGE

In the presence of

C/A Caleb

For Appellant: Wamalwa Simiyu

For Respondent: Chasia h/b Ochieng Opiyo

