

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
ELRC CAUSE NO. E001 OF 2021

RICHARD MOSES WAMBUGU.....
CLAIMANT

VERSUS

NCBA BANK KENYA PLC.....
RESPONDENT

JUDGMENT

The Claimant filed suit against the Respondent seeking the following reliefs:-

- (a) A declaration that the Claimant's employment serving with the Respondent were wrongfully and unfairly terminated.
- (b) Compensation for unfair termination
- (c) Aggravated damages
- (d) Cost and interest of the suit

Facts of the case

The Claimant (CW1) testified in chief and adopted a witness statement dated 27th November 2020. CW1 stated that he was employed by the Respondent vide a contract of employment dated 25/5/2016 in the position of Branch Manager in Retail Division job group – 5.

That he had established himself as a reputable banker serving as a college intern at the Bank of Africa in the year 2008 and was retained. Became

Relationship Officer at Housing Finance in the year 2009 and rose to the position of Relationship Manager at the time of departure in the year 2012 upon being head hunted to Chase Bank Ltd.

That he rose to Branch Manager of Chase Bank at Buruburu Branch until 2016 when he was head hunted by the Respondent to serve as the Branch Manager in the Buruburu Branch in 2016.

That he had established and developed the Buruburu Branch in one year into a thriving self-sustaining Branch.

That he had maintained a high level of decorum and had garnered an impeccable reputation in his budding banking career. That he had a maximum staff of three persons to help the Claimant, Paul Githinji, namely Operations Manager and Teresia Mugure the Cashier.

That in line with the Respondent's policy, the operations manager (Paul Githinji) served as the dual custodian of the bank's vault. In this regard, it was mandatory that at any point during the bank working hours, there was presence of two custodians.

That on or about 21st September 2017, the Claimant applied to the Regional Manager for a day off on Saturday the 23rd September 2017 and requested the Regional Manager to allocate a reliever to cover the Claimant's roles so as to maintain the presence of dual custodians to operate the vault.

The leave was approved and an alternative manager Stephen Njiri was subsequently seconded to take over the roles of the Claimant.

The reliever reported for duty on 23rd September 2017 and assumed the role of reliever. By practice the reliever ought to have reported for hand over on Friday 22nd September 2017, however, arising from his absence, the Claimant was forced to report to work on 23rd September 2017 for the purpose of handing over his keys and duties to the reliever. The Claimant did that and proceeded to his leave having been satisfied that the reliever had reported for duty and taken over his roles and duties.

Upon resuming office on Monday 25th September 2017, the Claimant was surprised to learn that although the reliever had reported for hand over, the operations manager had not reported to work hence rendering the operations of the bank impossible as access to the vault could only be done by both custodians. The Claimant immediately informed the designate Regional Manager of the anomaly and upon opening the vault with an extra key, it was established that money was missing from the vault.

Investigations were carried out by the head of security with the involvement of the Banking Fraud Unit through the CCTV footage available and it was established that the operations manager, Paul Githinji had stolen monies amounting to Kshs. 16,964,710.00 from the vault.

The Claimant stated that to his utter shock, he was subsequently placed in custody without proper cause and thereafter arraigned in court on 26th September 2017 and charged with the crime of theft by servant.

The Claimant pleaded not guilty and was granted cash bail.

A disciplinary process was held which the Claimant states was unfair and unprocedural and the Claimant was summarily dismissed on 27th November 2017.

The Claimant prays the court to grant him the reliefs sought.

Defence

The Respondent called RW1, Christine Wahome who testified in chief and adopted a witness statement dated 29/12/2023. RW1 produced exhibits '1' to '3' dated 7/2/2022 which included Respondent's HR policy manual 2016 and the Respondent's policy on handling of keys. RW1 also produced the notice to show cause given to the Claimant and dated 9/10/2017.

RW1 testified that the Claimant was employed by the Respondent as the Branch Manager Point Mall Buruburu Branch, vide a letter of employment dated 26/5/2016.

That rules and instructions that relate to the dual custody of key areas where cash and other valuables are held such as vaults, and strong rooms are available in electronic format to all the Respondent's employees.

That the dual custodianship meant that no single employee should access any of those places on their own. For example, for a safe which had a key and a combination, one employee would have the that combination but

would not have the key, while the other employee would have the key but would not have the combination.

That if a custodian of a key or combination was to be absent for any reason, he would do a proper handing over to the person coming to relieve him. The handing over is expected to be documented.

That the Claimant as the Branch Manager was the first custodian at the Branch. The other custodian was Paul Githinji, the operations manager.

That on 21st September 2017, the Claimant was permitted to be away for a day to attend to his daughter's birthday. He was relieved by Stephen Njiri. From the records, Stephen relieved the Claimant on 23rd September 2017.

On 25th September 2017, the Claimant notified the Respondent's Regional Manager of his inability to open the vault because Paul, who was supposed to be at work had not reported.

The alternative key for the vault was delivered from the Respondent's Recovery centre. Upon opening the vault, it was discovered that a sum of Kshs. 16,964,710.00 in various currencies was missing.

RW1 said, the Respondent carried out internal investigation whose outcome are contained in a report dated 27/9/2017 prepared by Peter W. Osanya.

The Respondent believed that the Claimant's conduct may constitute a criminal offence and a report was made to the Banking Fraud Investigation

Unit which ultimately decided to charge the Claimant with the offence of theft by servant.

RW1 stated that simultaneously, the respondent held the reasonable belief that the Claimant's acts or omissions may constitute a "failure to observe the banks rules and regulations."

The Claimant was by a letter dated 9/10/2017 invited to show cause why disciplinary action should not be taken against him. The Claimant responded by a letter dated 10/10/2017 requesting for copies of nine (9), documents. The Claimant also sought to be accompanied by a representative who was neither a shop steward nor an employee of the Respondent.

The Respondent responded by a letter dated 11/10/2017 explaining that the documents were confidential and therefore could not be reproduced for his use. That he would however peruse them at the disciplinary hearing, if he so wished.

The Claimant was reminded that he was not entitled to bring along a representative who was neither a shop steward nor an employee since the Respondent's HR policy manual did not contemplate that.

The hearing was rescheduled by a letter dated 30th October 2017 to 1st November 2017. By a letter dated 31/10/2017 the Claimant confirmed attendance; reiterated his decision to bring along an outside representative

and agreed to peruse the documents prior to commencement of the hearing.

The documents requested included investigation report, staff manual, emails on his leave request and Claimant's email reporting the issue on 25th September 2017.

RW1 states that however, the Claimant has produced these documents before court as exhibits no. 3, 4, 5 and 6 in his list of documents. That the only document the Claimant has not produced is the staff manual which was available to all employees on soft copy and the Claimant should have long accessed it.

RW1 states that the Claimant therefore had adequate resources in the circumstances of the case to prepare his defence. He was simply trying to create problem, where none existed.

RW1 said that at the hearing, the Claimant brought unauthorized representatives. The issue was dealt with at the preliminary stage and the said persons were excluded from the proceedings. The hearing of 1/11/2017 then proceeded. The Claimant made his presentation. The minutes of the hearing were recorded and circulated. The Claimant signed the minutes on 1/12/2017 and same are before court.

RW1 states that the Claimant conceded that he handed over the vault and branch keys without documenting it.

That the Claimant confirmed that it had been a normal occurrence for him to hand over the vault and safe keys to Paul whenever the Claimant was going out on marketing activities. RW1 said that the said admission by the Claimant defeated the purpose of having dual custodianship. RW1 added that it was that failure to follow simple rules that enabled Paul to access the vault and make a way with a total Kshs. 16,964,710.00.

RW1 concluded that the Claimant's actions amounted to a failure to observe rules and regulations pertaining to dual custodianship leading to financial loss to the Respondent. RW1 said Claimant was lawfully summarily dismissed and the suit be dismissed with costs.

RW1 admitted under cross-examination that she relied only on records availed to her but was not an employee of the Respondent at the material time of the happenings in this suit.

RW1 stated that the Respondent complied with the notice to produce before the court by availing Guidelines to operating safe systems manual and HR manual demanded by the Claimant in a notice to produce before court. That the Respondent also availed to the court following the notice policy on handling keys.

RW1 admitted that the Claimant could not access bank internally after termination. RW1 said that integrity and trust were a crucial aspect of employee relationship in the bank and so Claimant should have been able to trust the two staff he worked with at Buruburu Branch. RW1 said that she was not aware that Buruburu branch had now seven (7) employees arising

from this issue. RW1 admitted that dual custodianship demanded availability of alternative staff/reliever whenever one of the custodians was away on leave or official duty. RW1 said she was not aware that Buruburu was acutely understaffed at the time of the incident. RW1 admitted that the reliever appears to have done his job until the bank closed. RW1 however said she was not aware when the theft occurred and there was no document to confirm that the vault was closed on 23/10/2017. That the duty of the Claimant was to appropriately hand over so as to relieve himself of any responsibility while away but in this case there was no evidence that the Claimant had handed over to the reliever since the handing over is supposed to be documented but it did not happen this time round.

RW1 confirmed that the reliever reported to work on 25/10/2017 to hand over to the Claimant but the operations manager was absent. The reliever was to hand over to the Claimant. That the handing over could not take place because the 2nd custodian, the operations manager did not turn up. That the operations manager held the combination key. RW1 said the key with combination had been locked in the vault. The reliever did not have the key. It was not given to him. RW1 said the reliever and all the staff had been trained on the role including dual custodianship. RW1 said she was not aware if the reliever was disciplined. RW1 admitted that the investigation report was not availed to the Claimant before the hearing. RW1 said Claimant could bring an employee from another branch since his branch had only 3 staff members.

DETERMINATION

The parties filed written submissions which the court has carefully considered together with the evidence by CW1 and RW1. The issues for determination are:-

- (a) Whether the summary dismissal of the Claimant was for a valid reason, established, following a fair procedure.
- (b) Whether the Claimant is entitled to the reliefs sought.

In the case of *Waiyera versus Standard Chartered Bank Kenya Ltd [2024]* the court held:-

“For the termination of an employee’s employment or summary dismissal of an employee, to be considered fair, there must be two statutory aspects present, procedural fairness and substantive justification. Procedural fairness speaks to the process leading to the decision to terminate or dismiss, while substantive fairness to the decision itself.”

In the present case, the court finds that there is sufficient prove that the Claimant physically handed over to a reliever on 23/10/2017 upon being granted leave and the reliever from another Branch sent by his immediate supervisor, a regional manager. That is a fact that was not contradicted by RW1, the witness of the Respondent or by the Respondent at the disciplinary hearing.

The only issue raised by the Respondent against the Claimant was that the Claimant did not document the handing over which handing over is not in dispute.

The Claimant sought to be given access to the investigation report and the Respondent's policy on handling of keys before the disciplinary hearing. This document which guided the handing over of safe areas and strong rooms was key to the defence of the Claimant. RW1 did not even at the hearing demonstrate specific provisions which made it a mortal offence not to document the handing over, even where it was evidently clear that the actual handing over took place. The court finds that this was a case of an outright dishonest act, by an operations manager, who had entered the vault, stole bank money and absconded from office. This incident was according to RW1 well captured on CCTV.

RW1 categorically admitted that the operations manager stole the money and absconded. That did not however prevent the bank from causing the Claimant to be charged with non-existent offence of theft by servant, and hurriedly and without availing essential documents to the Claimant went ahead to conduct a disciplinary hearing and summarily dismissed the Claimant.

The court is satisfied that the Claimant had a stellar career in the banking industry having served Bank of Africa, HFK, Chase Bank and for just a period of one year served as the founder Branch manager of the Buruburu Branch of the Respondent.

It is evidentially established that the Branch had only 3 members of staff being the Branch Manager, the operations manager and the cashier. Clearly the Branch was understaffed especially in that there was only two custodians and the Claimant was doomed if he could not trust his co-

custodian. It is evidently clear from facts not disputed that the operations manager surreptitiously collected money from the bank's vault, left the combination key in the vault and did not return to work.

How the operations manager managed to hood wink the new employee at the bank who had relieved the Claimant is a story which neither the Claimant nor the Respondent unravelled since the reliever did not testify at the disciplinary hearing or before this court to establish any default or negligence on the part of the Claimant.

It is clear however, that the Respondent did not follow any fair procedure in disciplining the Claimant, and by failing to avail the essential documents requested by the Claimant to defend himself, the Respondent violated section 41 of the employment Act, 2007 and so inhibited itself from proving in terms of section 43(1) and (2) that it had a valid reason of summarily dismissing the Claimant following a fair procedure.

Accordingly, the summary dismissal of the Claimant was unlawful and unfair and in violation of section 41, 43 and 45 of the Employment Act 2007.

The Claimant is entitled to compensation in terms of section 49(1) (c) and 4 of the Act.

In this respect, the Claimant had a steller career in the banking industry and with the Respondent as a founder of the Buruburu Branch. The Claimant had very good career prospects which was curtailed largely by

being subjected to an understaffed Branch and provided by the Respondent with a dishonest co-custodian of the safe areas.

The Respondent largely contributed to the mishap that occurred while the relatively young Claimant, a good father, had taken a short leave to celebrate his child's birthday. There is no evidence at all that the Claimant was dishonest in any way and/or colluded with the operations manager to pull out a bold theft by a bank official in respect of which the bank needed not find a scape goat having failed to adequately staff the new Branch.

Strangely, RW1 did not know the fate of the operations manager and/or the reliever who had faithfully come back to the bank on Monday 25th October 2017 to hand back to the Claimant the Branch and the keys to the bank vault unaware of the mischief committed by the operations manager.

The Claimant was acquitted of the undeserved criminal charges instigated by the Respondent against him. The Claimant suffered loss and damage. He had his reputation in the banking industry ruined at an early age. The Claimant did not contribute to the dismissal. He was clearly a victim of an unprepared bank and a dishonest colleague at the Branch he had faithfully founded.

This court finds this to be an appropriate case to award the Claimant the maximum compensation for the unlawful and unfair termination in line with the Appeal court's decision in the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** where it was held that;

'Section 49(1)(c) of the Employment Act, provides for payment of compensation not exceeding an equivalent of twelve months' gross salary as an alternative remedy to reinstatement available to an employee whose services have wrongly been terminated. In considering the quantum of damages in such situation, the relevant factor in that section to be taken into account is the affected employee's chances of securing alternative employment'

The Court finds that the Claimant is entitled to the maximum compensation of the equivalent of 12 months' salary in compensation for the unlawful and unfair termination

In the final analysis judgment is entered in favour of the Claimant against the Respondent as follows:-

- (a) Kshs. (260,000 x 12) 3,120,000.00 in compensation for the unlawful and unfair summary dismissal of the Claimant.
- (b) Interest at court rates from date of judgment till payment in full
- (c) Costs of the suit

Aggravated damages are not warranted in the circumstances of the case in view of the award above

Dated at Nairobi this **23rd Day of October 2025.**

Mathews Nduma
JUDGE

Appearance:

Ms. Koech for Claimant

Ms. Cheruiyot for Respondent

Mr. Kemboi – Court Assistant

ORIGINAL