



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NUMBER 2156 OF 2014

VERONICA OTERI.....CLAIMANT

VERSUS

BARCLAYS BANK OF KENYA.....RESPONDENT

RULING

1. The claimant herein pleaded that on October, 2007 she was employed as a cashier cum custodian at a salary of Kshs 33,000/= per month. Owing to her insight she was promoted to act as chief custodian on 4th November, 2011 upto 3rd December, 2011.
2. The respondent further assigned the claimant duties to serve as a retail support from 28th December, 2011 to January, 2012. The respondent from 11th March, 2013 to June 2013 through to October, 2013 was further assigned as retail support officer. According to the claimant despite serving the respondent in acting capacity as outlined for more than 6 months, the respondent never confirmed the claimant as stipulated under the CBA.
3. The claimant further pleaded that all went well until sometime in October, 2013 when the respondent without any justifiable reason allegedly claimed that the claimant was involved in the loss of some funds at the respondent's place of work. According to the claimant, she continued to serve the respondent with loyalty and diligence until 18th February, 2014 when the respondent wrongfully and unfairly terminated her services.
4. The claimant averred that the disciplinary hearing was unfair, unprocedural, contrary to the disciplinary capability and grievance tool kit. She complained she was never given an opportunity to know the charges levelled against her to state her case nor call witnesses of her own choice. The claimant further averred that upon her termination the respondent unilaterally increased her loan repayment rate from 7% to 24% with accruing interest at commercial rate well knowing the respondent had terminated her services and that the claimant was unable to pay such an exorbitant and oppressive rate.
5. The respondent on its part pleaded that the claimant was on 30th October, 2007 employed as a clerk in retail banking and was a unionisable employee whose terms and conditions of service were governed by a CBA. As at the time of termination on 18th February 2014 the claimant's tasks included authorization roles as a custodian and issuing of card and pin at respondent's Market Branch earning a monthly pay of Kshs 85,236/= and a house allowance of Kshs 6,700/=.
6. The respondent further pleaded that between 9th September and 28th October, 2013 there occurred two fraudulent withdrawals amounting to Kshs 950,000/= from two related accounts namely account number 0751876955 in the name of Kuka Investments and account number 0751882165 in the name of Kunste Limited both of which were disputed by the account signatory. The fraudulent transactions were discovered when a B1 cashier Alloys Ochieng disallowed a transaction for Kshs 200,000/= to be processed from his PC at the time when he was away from it. The matter was escalated through the Branch Manager to investigations department.
7. According to the respondent, the CCTV camera footages showed a cashier by the name Kevin Nyakundi posting three transactions totaling to Kshs 300,000/= by accessing Alloys Ochieng's PC using his LAN and FCR credentials. Mr Nyakundi was found in possession of deposit slips for his Post Bank account made around the time of the disputed withdrawals leading to his subsequent arrest. On 9th October, 2013 when the disputed withdrawals were made, call over for one of the cashiers Charles Mulinga was suspiciously never done despite the fact that the call over allocation log for the day was signed by both the claimant and Branch Operations Officer.
8. During these occurrences the claimant was the acting B2 custodian at the Branch and had authorized three fund transfers from Kevin Nyakundi saving account number 2022161876 to the Ngong Parish account number 0654505950 without verifying the actual vouchers as required by the respondent's rules and procedures. The respondent further averred that during these occurrences the claimant was with Alloys Ochieng in the back office as he opened the mail bags, task the claimant had assigned him and was therefore in a position to know where he

was when the fraudulent transfers were made and could therefore not have conducted the transactions.

9. The respondent further pleaded that investigations were launched and all involved and suspected persons were required to hand in their written statements within five days. The claimant complied and provided a written statement dated 1st November, 2013. According to the respondent, the claimant admitted responsibility over the other staff including assigning cashiers other duties and even elaborated on Mr Alloys Ochieng's duties at the time of the fraudulent transfers and further admitted that Mr Ochieng was the one who brought the fraudulent activities to her attention whereas it was her duty to interrogate and view the vouchers for are transfers before authorizing them.

10. The respondent further averred that the claimant was on 23rd January, 2014 invited to a disciplinary hearing scheduled for 31st January, 2014. The reason for invitation having been provided as "authorizing of three fraudulent fund transfers from Account 202216876 INo Kevin Nyakundi to Account 0654505930 INo Ngong Paris totaling to Kshs 50,000/= and failure to adhere to call over of cashier vouchers". The respondent further pleaded that the disciplinary committee proceeded to analyze the report on the claimant's involvement in the disputed counter withdrawals and ultimately made its recommendations regarding the claimant's involvement and negligence of duty while serving as a custodian. The claimant was thereafter on 15th February, 2014 terminated in accordance with provision of clause A5 (d) of the parties CBA.

11. The respondent further averred that in terminating the claimant, the respondent was satisfied that the claimant had contravened clause A5 (a) (i) of the CBA and actually deserved summarily dismissal but nonetheless exercise leniency and proceeded to terminate her services under clause A5(d). The respondent further averred that upon termination the claimant was paid all her terminal dues less loan repayments as agreed.

12. In the evidence in court the claimant additionally stated that on 1st February 2014 she was called back by the manager and told that her employment had been terminated because of an incident of fraud which had taken place in October, 2013. She was the custodian then. According to her, the termination was without notice and further that she was not given the outcome and further never given a chance to defend herself.

13. The claimant further stated that she was invited to a disciplinary hearing on 23rd January, 2014 and the hearing took place on 31st January, 2014 and the hearing took place on 31st January, 2014. At the hearing, she was asked to explain the fraudulent transactions and that at the hearing they dwelt on different transactions from the ones mentioned in the invitation letter. According to her, she was questioned on the Kunste and Kuka Investment accounts only.

14. Mr Oteri further informed the court that a cashier named Ochieng to him, a fraudulent transaction had been done using his system for Kshs 200,000/= she confirmed this and reported the matter to her supervisor Ms Jael. They reviewed the cctv footage and noticed a cashier by the name Kevin access Ochieng's system. The matter was reported to the Branch manager for further investigation. According to the claimant the report concluded that Kevin was involved and that she was not implicated anywhere. She further stated that she was not directly in charge over cashiers.

15. In cross examination she stated that she was responsible for staff under her and that Ochieng was right to report to her. She also stated that Kevin was under her. The claimant further stated that the investigation team discovered other fraudulent transactions by Kevin. Concerning her responsibility as chief custodian, the claimant stated that she was to ensure cashiers have enough cash on their end and that any transactions above the cashier's limit had to be authorized. The claimant further stated that she made a statement with head of investigations and told them what she thought happened. She admitted signing the minutes of the disciplinary hearing.

16. The respondent's witness Mr Gabriel Muthiri testified that he was working for the respondent as a Branch Manager. According to him, the claimant was in charge of cashiers. He informed the court that they reviewed the cctv footage and saw when alloys moved out Kevin came and did some transactions on Alloy's computer, opened Alloy's cash box, took some money and went back to his workstation. It was his evidence that cashiers were never allowed to use another's workstation and that the supervisors were meant to ensure this does not happen.

17. It was Mr Muthiri's further evidence that more withdrawals were discovered going back to the previous month. These were done from alloy's and Kilunga's workstations when they were both away. This meant their credentials were compromised. When these fraudulent transactions were done by Kevin they were authorized by the claimant. According to him, those affected were given a chance to explain. The claimant made a statement and was found to be at fault. She was given a chance to defend herself before an independent panel.

18. In cross-examination he stated that the claimant's letter of invitation referred to two issues and that minutes of the disciplinary hearing was entitled fraudulent fund transfers. In his closing submissions Mr Amutalah for the claimant stated among others that there was no evidence that was tabled before the court to demonstrate that the claimant had wilfully neglected her duties so as to amount to gross misconduct. According to counsel there was no deliberate and intentional wrongdoing on the part of the claimant.

19. Counsel further submitted that the allegations framed against the claimant could not be substantiated as the alleged breached regulations were never tabled before the court for the court to verify the allegations of the RW1. Ms Kanyiri on her part submitted that between the period of 9th September, 2013 and October, 2013 there occurred fraudulent transactions amounting to Kshs 950,000/= from two related accounts. Investigations were conducted and the claimant adversely mentioned in the report.

20. That is to say the claimant and another did not call over all the cash withdrawal vouchers as was their duty to do when the fraudulent transactions took place. The claimant was therefore found to have failed to observe the controls that would have otherwise detected and arrested the fraud. There is no dispute that some fraudulent transactions took place at the respondent Bank. It is further not in dispute that investigations revealed that these transactions were conducted by a Mr Kariri using his colleagues (Alloys) workstation. Kevin was arrested and prosecuted as a result.

21. The claimant herein was Kevin's and Mr Alloy's supervisor she however contended that she was nowhere directly implicated in the fraud hence according to her the termination of her employment on account of this fraud where she was not directly involved was wrongful and unfair.

22. The respondent on the other hand maintained that the claimant being a custodian and a checker was in supervisory position over cashiers and ought to have cashiers and ought to have detected the fraud if she followed the laid down procedures and policies for vouchers approvals. The claimant in her evidence stated that she was invited to a disciplinary hearing over the fraudulent transaction. She however in her evidence and submissions contended that the letter of invitation referred to only on fraudulent transaction involving transfer of funds from an account in the name of Kevin Nyakundi to Ngong Parish Account.

23. The letter of invitation to disciplinary hearing dated 23rd January, 2014 annexed to the respondent's bundle of document's states in part;

“Following investigation report 237/2013 and your written statement regarding authorizing of three fraudulent found transfers from Ac No. 2022161876 INo Kevin Nyakundi to Ac No 0654505950 Ngong Parish totaling Kshs 50,000/= coupled with your failure to adhere to the procedures on call over of cashier vouchers, you are hereby invited to a disciplinary hearing meeting which will be held on Friday, 31st Januar, 2014 a 9.00 a.m.”

24. The handwritten minutes of the disciplinary hearing are attached to the respondent's bundle of documents as appendix 6. In respect of the fraudulent transaction by Kevin, the claimant stated that when authorizing that morning he was doing for Alloys and that these transactions were from Kevin's account to a church account.

25. On the question of checking vouchers, the claimant's notice was drawn to the fact that on 9th Charles Mulinge's call over was not done yet she insisted it was done but there were no records. It was further noted that the claimant did not sign off the call over allocation sheet. She further admitted that when collecting she did not notice that Charles's vouchers were missing.

26. From the foregoing it would seem that the respondent's concern over the claimant was failure to cross check the transactions which turned out to be fraudulent. The respondent does not accuse the claimant of any fraud collusion but of failure to exercise control as a supervisor over the cashiers' under her.

27. Whereas this was sufficient reason for termination of services, the termination letter makes reference to two disputed counter withdrawals amounting to Kshs 950,000/= from two related accounts 07051876955 INO Kuka Investments and 0751882165 INO Kunste Ltd. The letter of invitation for disciplinary hearing made specific reference to fraudulent fund transfers from A/c 2022161876 INO Kevin Nyakundi to A/c 0654505950 Ngong parish. The claimant was further put on notice about her failure to adhere to procedures on call over for cashiers vouchers.

28. The issue of counter withdrawals from Kunste and Kuka Investments account was not mentioned anywhere in the disciplinary hearing proceedings. Further the Investigations report only makes reference to Kevin and Ngong Parish account where three transactions of Kshs 20,000/=, Kshs 20,000/= and Kshs 10,000/= took place. It would therefore seem that claimant was terminated for reasons different from the charges against her at the disciplinary hearing

29. It is contrary to the Employment Act and rules of natural justice to terminate an employee's services for reasons different from the ones such employee was subjected to at a disciplinary hearing and in respect of which such employee never tendered his or her defence. As is evidently clear here the respondent in its termination letter used more serious allegations to terminate the claimant's services without granting her a chance to defend herself against the accusations.

30. In the circumstances, the court hereby finds the termination of the claimant's services unfair in terms of reasons and procedure and hereby awards her twelve months salary as compensation for unfair termination of services. That is to say the sum of Kshs 1,188,594. The claimant shall further have costs of the suit. The decretal sum shall be subject to statutory deductions and taxes. The decretal sum shall further attract interest at court rates from date of judgement.

31. It is so ordered.

Dated at Nairobi this 13th day of July, 2018

Abuodha Jorum Nelson

Judge

Delivered this 13th day of July, 2018

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent