IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), NAMBUYE & M'INOTI, JJ.A)

CIVIL APPEAL NO. 295 OF 2016

BETWEEN

VIOLET KADALA SHITSUKANE.....APPELLANT

AND

KENYA POST SAVINGS BANK..... RESPONDENT

(Being an appeal from the Judgment of the Employment and Labour Relations Court at Nairobi, (N. Makau, J.) dated 20th *January, 2015 in E.L.C Cause No. 115 of 2013)*

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JUDGMENT OF THE COURT

Article 41(1) of the Constitution guarantees every person the right to fair labour practices. Some of those practices require that in terminating the services of or dismissing an employee, the employer must provide reasons for doing so and ensure the process is fair. An employer may terminate employment or dismiss an employee on the grounds of redundancy, misconduct, poor performance or physical incapacity, fundamental breach of obligations, among others.

The appellant, who had worked for the respondent from 12th March, 1992 and risen from a clerical officer to the position of Senior Cashier, was by a notice dated 9th February, 2012 asked by the respondent to show cause why disciplinary process should not be commenced against her on the grounds that she had allowed her password to be used in the removal of a restraint from an account of a deceased's client which, in turn, led to the irregular withdrawal of Kshs. 100,000/= from the said account. The appellant responded to the charges, denying the allegations and blaming another cashier for using her password without her consent or consultation. Her explanation was rejected by the employer and on 23rd February, 2012, she was interdicted from duty, and shortly thereafter, her employment was terminated on grounds of her involvement in an act of operational irregularity. Aggrieved by this, the appellant appealed against the termination to the Managing Director, who rejected the appeal, prompting the action in the court below.

In her claim, the appellant pleaded that the termination of her services was unfair, unlawful and wrongful. As a result, she sought, *inter alia*, reinstatement, damages for unlawful and malicious termination and maximum compensation of 12 months' salary for suffering unfair termination, amounting to Kshs. 778,368/=.

In response, the respondent maintained that the appellant was terminated on reasonable and justifiable grounds; for negligence in her duties as a result of which an irregular and unlawful withdrawal was made from a deceased person's account; that the appellant was lax and casual in the use of her password and failed to safeguard it from unauthorized access. According to the respondent, the appellant was only entitled to notice pay and payment in lieu of leave days earned amounting to Kshs. 241,507.33/=; that after deducting this amount from sums due to the respondent, the appellant would have a balance in excess of Kshs. 600,000/=. However, by an amended response, the respondent sought, by way of a counter-claim, Kshs. 1,151,715.05/= as what the appellant owed the respondent. Regarding this claim, the appellant, though admitting the indebtedness, contended that she only owed the respondent Kshs. 548,891.80/= being the balance of her house loan while the personal car and medical loans recoveries were Kshs. 39,555.20/=.

Nzioki wa Makau, J, found the termination to have been lawful for the reasons that: the appellant was subjected to due process, was heard, accorded a second chance of appeal and notified of the reasons for termination of her services in accordance with **section 43** of the Employment Act. He also found that the appellant's password was used in circumstances that pointed to her negligence, being the sole custodian of it. Her dismissal being warranted, he concluded on the substance of the claim. (This sentence is incomplete).

Having come to that conclusion, and without being prompted, the learned Judge faulted the respondent for its failure to allow the appellant to

have an employee of her choice to be present during the disciplinary hearing. Since the question was not before the Judge, we do not intend to address it, save to state at this point that **section 41** of the Employment Act, upon which this argument is drawn, only entitles an employee at the disciplinary hearing to invite another employee or a shop floor union representative of his or her choice, if he or she wishes. This Court has previously construed this section to impose a duty on the court to hear the employee in the presence of his or her colleagues only when the employee himself or herself wishes them to be present; that it is the employee's duty to avail to the employer the names of those he or she would like to attend the hearing; and that the court cannot impose them on the employee. See **Kenya Ports Authority vs. Fadhil Juma Kisuwa** (2017) eKLR.

Regarding the appellant's dues on the one hand, and the respondent's counter-claim on the other hand, the learned Judge declared that:

> **"…Her dues were not properly calculated in my estimation as the notice period to be given is not split between basic and house allowance. Therefore the payment ought to have included both her basic and house allowance of course excluding the other variable allowances she would earn. The computation of the sums she was entitled to was thus one that requires recalculation and in essence one that will affect the dues she was entitled to.**
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> **21. On the counter-claim, the Bank did not prove the sums due to it under the various heads as no statement was produced. The Claimant however admitted being indebted to the tune of Kshs. 548,891.80/=. If the calculation is redone on the dues to her the sum due will even reduce further.**
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> **…….**
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> **23. I therefore will enter judgment for the Respondent against the Claimant for the admitted sum of KShs. 548,891.80/= less the sums not included being 3 months notice pay on house allowance.**

The Claimant's suit is dismissed but I will make no order as to costs..."

With that, the appellant's suit was dismissed with no orders as to costs, and the counter-claim succeeded to the extent explained above.

The appellant has proffered this appeal on 8 grounds as enumerated in the memorandum of appeal and clustered by Mrs. Guserwa, learned counsel, as follows in the submissions before us; that the learned Judge disregarded the fact that the appellant had worked for the respondent for over 20 years with a clean record which was the reason for her promotion through the ranks; that she was dismissed without proof of valid reasons for the said action as she was not responsible for the fraudulent removal of a restraint order on the account of the deceased customer; that the evidence on record confirmed that a junior employee, one Mr. Philip Okeyo, owned up at the hearing that he stole the appellant's password and effected the fraudulent transaction; that the appellant was not a party to this transaction; that the appellant was dismissed for failure to adhere to "operational procedures" without specifying what those procedures were; and that the appellant was not accused of having been negligent or having been responsible for the said fraudulent transactions.

It was also contended that, contrary to **Article 47** of the Constitution, which provides for fair administrative action and **sections 41** and **43** of the Employment Act, there were no reasons for terminating the appellant's employment and instead, the reasons proffered were mere allegations; that the learned Judge ignored written submissions which were on record and erroneously stated that they had not been filed.

Consequently, it was posited that the learned Judge came to the wrong conclusion and thereby erred in dismissing the appellant's claim.

For these propositions, counsel relied on the following authorities **Stephen S. Pareno vs. Judicial Service Commission**, Civil Appeal No. 120 of 2004; **Doss vs. Bank of America**, Civil Appeal No. 5 D02-3310; **Pravin Bowry vs. Ethics & Anti Corruption Commission**, ELRC Cause No. 1168 of 2012 and **Coca Cola East & Central Africa Ltd vs. Maria Kagai Ligaga**, Civil Appeal No. 20 of 2012.

For the respondent, Mr. Musili, learned counsel, opposed the appeal urging us not to disturb the judgment of the trial court, because, in his view, the termination of the appellant was justified; that the appellant was heard on the charges; that the decision to terminate the appellant's services was justified as her evidence and that of three witnesses of the respondent pointed to negligence on her part, as a result of which her password was used by another employee to remove a restraint from an account of a deceased customer, resulting in the loss of money from the account.

On the failure of the Judge to consider the appellant's submissions, counsel argued that no prejudice was suffered by the appellant over and above the respondent whose submissions were also not considered; that, in fact it was the appellant that did not comply with the directive to file her submissions within 14 days from 24th November, 2014 by filing them late on 15th December, 2014 forcing the respondent to file its submissions on 15th January, 2015; that this was within the 21 days in compliance with the directive; and that written submissions do not amount to evidence and the Judge cannot be faulted, even for not agreeing with submissions of a party to a suit.

In considering these submissions, in a first appeal, we are required to re-evaluate the evidence on record afresh so as to arrive at our own independent conclusions, on that evidence, but bearing in mind that we did not see or hear the witnesses and should make due allowance in that respect. See **Kenya Ports Authority vs. Kuston (Kenya) Limited** (2009) 2 EA 212.

Starting with the last ground, which we think is easier to dispose of, the learned Judge was clearly mistaken to state that there were no submissions on record when they actually were. But nothing really turns on the misdirection, as all the pleadings, the documentary evidence, testimonies of all the witnesses, the proceedings of the disciplinary hearings including the decision of the appellate panel were on record and were all evaluated and considered by the learned Judge, hence, no prejudice was occasioned to the appellant over and above the respondent whose submissions suffered the same fate. This Court came to a similar conclusion in the case of **Daniel Okoth vs. Kenya National Commission of Human Rights,** Civil Appeal No. 79 of 2015.

For that reason, we find no merit on that ground and it must fail.

On the substantive ground of this appeal, dealing with termination of employment, we reiterate what we said at the beginning that no employer is permitted to terminate the employment of an employee unfairly. **Section 45 (2)** of the Employment Act provides that employment will be deemed to be unfair if the employer fails to prove—

> **"a. that the reason for the termination is valid;**
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> **b. that the reason for the termination is a fair reason—**
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> **i. related to the employee's conduct, capacity or compatibility; or**
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> **ii. based on the operational requirements of the employer; and**
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> **c. that the employment was terminated in accordance with fair procedure".**

The courts have generally approached issues of unfair termination of employment in the context of the above provision by asking two related questions; whether the employer, in terminating employment, observed both substantive justice and procedural fairness. In the case of **Kenfreight (E.A.) Limited vs. Benson K. Nguti,** Mombasa Civil Appeal No. 31 of 2015, this Court stated that:

> **"Termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reason or if the reason itself or the procedure of termination are themselves not fair…"**

Starting with substantive justice, the appellant maintained that she was dismissed without proof of any valid reasons. The respondent, for its part, maintained that the appellant was involved in gross violation of operational procedures by engaging in what amounted to operational irregularity.

The letter of termination dated 7th June, 2012 reads in part:

> **"Following your interdiction from duty on 25th February, 2012 for involvement in an act of operational irregularity, Management has reviewed your case and decided that your service be terminated with effect from 6th June, 2012.**
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> **You will recall that on diverse dates while serving as a senior cashier at Kisumu branch, Western Region, you failed to adhere to operational procedures. This act is contrary to the laid down policy and constitutes serious offences which amounts to gross misconduct. These facts were well explained to you on 28th May, 2012 when the intention to terminate your service was communicated to you in the meeting held at the BGM/Western Region Office. On termination you will be paid three (3) months basic salary in lieu of notice and any outstanding leave days…."** (Our Emphasis)

The Act uses the phraseology "operational requirements" of the employer to describe one of the grounds an employer can rely on to justify termination of employee's employment as fair. The respondent did not use the term "operational requirements" nor did it intend the application of its technical meaning. The term has been used mainly in cases of retrenchment or redundancy. See **Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 others** (2014) eKLR. It has no application in dismissals based on incapacity or misconduct. The respondent charged the appellant with **"involvement in an act of operational irregularity"** and that she **"failed to adhere to operational procedures"**. We believe the operational procedures intended here relate to the respondent's processes specific to its own standards for running the business or in relation to regulations applicable in the industry concerned.

The respondent is a banking institution, and at the heart of this dispute was the use of the appellant's password to remove restrictions on an account of a client.

Banks are custodians of their customers' funds and other valuables of a personal nature and operate in a highly sensitive environment and therefore, in order to inculcate and maintain customer confidence, banks and their staff are required to maintain a high degree of integrity, prudence and financial probity. It follows that where a staff's conduct in relation to funds and valuables belonging to customers points to fraud, such a staff risks termination of his or her employment. See **Agnes Murugi Mwangi vs. Barclays Bank of Kenya Limited** (2013) eKLR. See also **Evans Kamadi Misango vs. Barclays Bank of Kenya Limited** (2015) eKLR**.**

A password, especially that which is used to access money is unique to the user. A password protects everything that is personal and sensitive. With the ever-growing threat from cyber criminals, passwords are guarded like princesses: Even a strong password is useless if it is exposed.

The circumstances under which the appellant's password was accessed by her colleague, who ended up removing the restrictions on the account of a deceased customer, leading to the loss of money, can be an act of negligence or dereliction. She cannot be blameless. In those circumstances, the respondent's actions were warranted and justified in law. The respondent had reasonable grounds for dismissing the appellant for failing to adhere to operational procedures contrary to the laid down policy of the respondent. Even though there was no evidence to suggest that she benefited from or participated in the fraud, the fact that her password was used was sufficient for the respondent, in view of its nature of business, to lose faith and trust in the appellant. We emphasize that the standard an employer deploys in dealing with employee fraud and theft is not the criminal standard of proof. In **Judicial Service Commission vs. Gladys Boss Shollei & Another** (2014) eKLR, this principle was stressed by the Court stating that:

> **"In the instant appeal, the disciplinary process against the 1st respondent was not a proceeding before a court of law. It did not relate to a criminal proceeding. It was a civil matter between an employer and an employee ….While criminal proceedings are normally mounted to determine the guilt or innocence of a person in relation to specific criminal offence/s the culpability of which results in punishment as may be provided in a given statute, disciplinary proceedings are of civil nature between an employer and an employee and where the employee is not vindicated, the outcome is normally dismissal from employment…. While the standard of proof in the disciplinary proceedings was not beyond the balance of probabilities, the test in quasi-criminal proceedings is much higher."**

See also **British American Tobacco (K) Ltd vs. Kenyan Union of Commercial Food and Allied Workers (Kucfaw),** Civil Appeal No. 189 of 2013.

The next limb in the appeal is the question whether the appellant's employment was terminated in accordance with fair procedure as stipulated for under **section 45(2)(c)** of the Employment Act. The appellant was notified of the allegations against her by a letter dated 9th February, 2012, to which, she responded. Following her response, she was interdicted on 23rd February 2012 pending further investigations. She replied to this interdiction letter. On record are minutes of the Staff Committee (Disciplinary) Meetings held on 11th, 23rd and 24th of April, 2012 in the Boardroom at Post Bank House.

The minutes show that the appellant was present and made her representations. The findings were that the appellant was negligent and the committee recommended her termination from service. The appellant was then issued with a termination letter on 7th June, 2012 outlining reason for termination and her dues. The appellant lodged an appeal against the decision to terminate her employment. Her appeal was considered and rejected. This series of events show that the appellant was accorded a fair hearing and, with respect, we agree with the Judge in that regard.

We are equally in agreement with the computation by the learned Judge of the appellant's dues based on the appellant's own admission of indebtedness to the respondent in the sum of Kshs. 548,891.80/=. The upshot is that the appeal has no merit and we accordingly dismiss it with no orders as to costs.

Dated and delivered at Nairobi this 24th day of April, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

K. M'INOTI

……

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR