



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & KANTAL, JJA)

CIVIL APPEAL NO. 70 OF 2016

BETWEEN

ABRAHAM NYAMBANE ASIAGO.....APPELLANT

AND

BARCLAYS BANK OF KENYA LIMITED .....RESPONDENT

*(Being an appeal from the judgment of the Employment and Labour Relations Court at Nairobi (L. Ndolo, J.) dated 17<sup>th</sup> April 2015*

in

ELRC No 149 of 2013)

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. The brief facts surrounding this appeal are that **Abraham Nyambane Asiango (appellant)** was employed by **Barclays Bank of Kenya Ltd (respondent)** as a temporary commission staff on 9<sup>th</sup> May, 2007. Subsequently vide a letter of appointment dated 3<sup>rd</sup> February, 2010 he was offered a permanent position in the bank as a customer advisor. It was while performing his duties in this position that allegations arose that the appellant had forged a customer's signature on a loan application and that he had engaged in external borrowing from a bank customer, both of which were considered as serious breaches of the Bank's Compliance Code of Conduct and Regulations.

2. Following the said allegations, the appellant was issued with a suspension letter dated 30<sup>th</sup> April, 2012 requiring him to step aside to allow disciplinary investigations to take place. This was followed by a culpability hearing that was held on 14<sup>th</sup> June, 2012 which culminated with a decision to terminate the appellant's employment. The appellant's employment was thus terminated vide a letter dated 25<sup>th</sup> June, 2012. The appellant being aggrieved by the said decision contested the termination and an appeal hearing was held on 16<sup>th</sup> August, 2012. The appeal session interrogated further the allegations of misconduct made against the appellant and his defence but it upheld the decision to terminate his employment.

3. That is how the appellant moved to the Employment and Labour Relations Court by filing **Employment and Labour Cause No 149 of 2013** claiming unlawful termination and seeking *inter alia*; a declaration that the termination was unlawful, an order of reinstatement, terminal dues, certificate of service and costs of the suit. After evaluating the evidence which basically consisted of the disciplinary proceedings undertaken against the appellant, the learned Judge identified the following issues for her determination;

**(a) Whether the respondent had a valid reason for terminating the claimant's employment;**

**(b) Whether in effecting the termination, the respondent observed due procedure; and**

**(c) Whether the claimant was entitled to the remedies sought.**

4. After weighing all the evidence for and against the claim and while applying the principle of balance of probabilities, the learned Judge held that the respondent had not proved the allegations of forgery of the customer's signature. However, regarding the allegations of unauthorized financial dealings with a bank customer, the Judge found it was a breach of the appellant's contract and employer's Code of Conduct, and was a valid reason for the respondent to terminate the appellant's employment. Nonetheless in regard to the termination procedure adopted by the respondent, the trial court stated as follows;

***“I have examined the disciplinary procedure adopted by the Respondent in light of the law as well as the applicable CBA and the claimant’s terms and conditions of employment. From the record, it appears that the claimant was taken through the motions of Section 41 of the Employment Act 2007. However, the termination letter issued to him was unsigned.***

***Charles Mburu who was the claimant’s line manager and would ordinarily sign and issue the termination letter told the court that the unsigned termination letter did not originate from him. The respondent’s Employee Relations Manager, Odhiambo Ooko also testified that it was unusual for an employee to be issued with an unsigned termination letter. He admitted in cross-examination that an unsigned letter was not valid.***

***Clause A5(d) of the Collective Bargaining Agreement provides for a written termination notice of one month. In similar fashion, Clause 10 of the terms and conditions of service issued to the claimant by the respondent bank requires service of termination notice on the affected employee by an authorized officer of the bank.***

***The court was unable to understand why the respondent, a well resourced bank of many years standing with networks across the globe would issue an unsigned termination letter to an employee. To my mind, issuing an unsigned letter amounts to verbal termination of employment contrary to the law and any known human resource practice.***

***Even worse, the respondent contravened its own internal terms and conditions of service as well as the applicable CBA. For this reason, I find the termination of the claimant’s employment unfair for want of due procedure.”***

Consequently, the Judge refused to order reinstatement but awarded the appellant an equivalent of six (6) month’s salary in compensation for unfair termination, one (1) month’s salary in lieu of notice and withheld salary during suspension, amounting to Ksh 803,363.

5. The appellant lodged this appeal on the grounds that the trial Judge had failed to properly analyze the evidence concerning the allegations of financial misconduct and this was principally the gravamen in this appeal.

6. During the plenary hearing of the appeal, **Mr. Cohen** learned Counsel for the appellant, submitted that the trial court failed to consider the evidence that supported the appellant’s case as to the allegations of misconduct; that **Mr. Peter Waweru** had sworn an affidavit retracting his earlier statement that he and the appellant had any financial dealings; and that the respondent’s witness **Mr. Odhiambo Ooko** admitted that they had not filed evidence of the *Mpesa* transactions before the court. **Mr. Cohen** further insisted that the process of termination had been invalid and therefore the appellant should be reinstated. To buttress his argument counsel referred to the cases of **Mwangi vs. Wambugu [1984] KLR 453** and **Mercy Kirito Mutegi vs. Beatrice Nkatha Nyaga & 2 others [2013] eKLR**, that this Court has the power to interfere with a finding of fact where the trial court has misapprehended the facts or acted on the wrong principles. The appellant’s prayer was for the appeal to be allowed and for the orders of the trial Judge to be set aside, revised, varied or quashed.

7. In response, **Miss. Kanyiri** learned Counsel for the respondent, submitted that the evidence of financial misconduct was presented in the investigative report; that there were valid reasons for the respondent to terminate the appellant’s employment; that the appellant had been accorded a fair hearing; and that the awarded amount was sufficient for the claim of unlawful termination.

8. We have considered the record of appeal, and deliberated on the rival submissions by respective counsel and the relevant law. As the 1<sup>st</sup> appellate court, it is our duty to analyze and re-assess the evidence on record and reach our own conclusion in the matter. In particular, we are not bound to follow the trial Judge’s findings unless they are based on no evidence, or on a misapprehension of the evidence, or the Judge acted on wrong principles in reaching the findings. (**Selle vs. Associated Motor Boat Co. [1968] EA 123**)

9. The determination of the appellant’s claim by the learned Judge called for the interrogation of two issues; (a) the *process* leading to the termination of the appellant’s employment with a view to determining the procedural fairness, reasonableness and legality of the respondent’s actions; and (b) the merits of the allegations made against the appellant and if established whether the same justified the appellant’s termination. What we have to determine is whether in the examination of those issues, the Judge erred in the conclusions arrived at.

10. Wrongful dismissal occurs most commonly where an employer dismisses an employee without notice or with insufficient notice under his or her contract of employment or without any justification. The right not to be dismissed unfairly, on the other hand, is a statutory rather than a contractual right. The determination of whether a dismissal is fair or unfair depends on; first, the employer’s reason for dismissal (and whether or not it was one of the potentially fair reasons listed in **section 44** of the **Employment Act 2007**); second, whether or not the employer acted reasonably in treating the reasons for termination as sufficient to justify dismissing the employee; and whether or not it followed a fair procedure.

11. That said, we now turn to the merits of the findings by the trial court that the appellant was guilty of gross misconduct and that the respondent was justified in dismissing him. This is what the learned Judge posited in a pertinent paragraph of the impugned judgment;

***“In Jessy Olututukei vs. Feed the Children Kenya & another [2014] eKLR this Court held that the burden placed on an employer under section 43 of the Employment Act 2007 is to demonstrate a valid reason that would cause a reasonable employer to terminate the employment of an employee. The burden of proof in such a case is always on a balance of probability and not beyond reasonable doubt. There lies the major difference between internal disciplinary proceedings and a criminal trial.***

***I have examined the claimant’s case against this standard. With regard to the first charge of forging a customer’s signature, the court observed that neither the investigation team nor the disciplinary panel made any conclusive findings against the claimant. This charge was therefore not proved and could not have been the basis for termination of the claimant’s***

employment.

*I will now consider the second charge of borrowing from a customer. In the course of investigations on this charge, the claimant denied having any financial dealings with the complainant customer, Peter Nganga Waweru. However, when confronted with evidence of Mpesa transactions between himself and the customer, he stated that the customer had done some paid work for him. At the disciplinary hearing, the claimant stated that the customer had delivered building posts to his construction site.*

*In light of these contradictions, the court rejects the claimant's account of his dealings with Peter Nganga Waweru and adopts the Respondent's evidence that he in fact engaged in unauthorized financial dealings with the customer of the Bank.*

*Banks operate in an environment in which utmost trust and good faith are crucial. Their employees must therefore be held to these very virtues. As held in Moses Chavani vs. Barclays Bank of Kenya Ltd (Cause No 694 of 2010) and Banking Insurance & Finance Union vs. Post Bank Ltd [2013] eKLR the relationship between bankers and their employees is premised on a high degree of honesty and integrity and where these are put into question, then the employment relationship becomes untenable. This is as it should be since banks are held to the same values by their customers who hold the lifeline in banking business. This court must uphold those principles.*

*That said, and in view of my conclusion that the claimant equivocated on his relationship with Peter Nganga Waweru who was the respondent's customer, the court finds that the Respondent had a valid reason for terminating the claimant's employment."*

12. Turning on the evidence, the learned Judge who heard and saw the witnesses testify made the above conclusion that the appellant's personal financial dealings with a bank customer was dishonest and therefore undermined the respondent's integrity as a bank and the laid down staff regulations. We would point out that when a court or a tribunal is assessing an allegation of dishonesty, it is worthwhile to borrow some guidance that were offered by Lord Hughes in Ivey vs. Genting Casinos (UK) Ltd [2017] UKSC 67; [2018] A.C. 391, at [74]:

*"When dishonesty is in question, the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards dishonest."*

13. The burden of proving the allegations of fraud/dishonesty lies on the employer. **Section 43** of the **Employment Act** provides that;

**"(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.**

**(2)The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.**

Section 45 (2) of the Act further provides that:

**(2) A termination of employment by an employer is unfair if the employer fails to prove-**

**(a) that the reason for the termination is valid;**

**(b) that the reason for the termination is a fair reason-**

**(i) related to the employee's conduct, capacity or compatibility; or**

**(ii) based on the operational requirements of the employer; and**

**(c) that the employment was terminated in accordance with fair procedure."**

14. It is borne in evidence that the appellant's strong contention was that he was a model employee as evidenced by the certificates of appreciation and recognition awarded to him in 2009 and 2010 for excellence in sales. He insisted that the only reason he was terminated was because the Branch Manager **Mr. Charles Mburu**, had ill feelings against him because he was a whistleblower. In their memorandum of defence dated 6<sup>th</sup> March, 2013, the respondent strongly denied that the appellant was being victimized for any personal reasons other than for his poor performance and gross misconduct. The respondent cites an instance when the appellant was invited to a disciplinary meeting held on 6<sup>th</sup> April, 2009 to explain the perpetual nonpayment of his credit cards and overdrawing of his account which is contrary to the respondent's policy and code of conduct. He was officially reprimanded vide letter dated 7<sup>th</sup> May, 2009 for persistent financial misconduct and was warned against such violations of bank regulations. Despite acknowledging that he was aware of the issues regarding his performance, the appellant did not take the necessary steps to mend his conduct.

15. We have also taken note of the allegations of unauthorized financial dealings, which were contained in the complaint dated 28<sup>th</sup> February, 2012. The complainant, one **Mr. Peter Nganga** stated that the appellant assisted him to open an account, then later approached him for a soft loan of Ksh. 150,000 in exchange for assistance for the complainant to acquire a loan of 1 million shillings from the Bank. The appellant is said to have approached **Mr. Nganga** a second time for another soft loan of Ksh. 150,000 totaling to Ksh. 300,000 but subsequently defaulted in paying the sum resulting in the complaint. An investigation report dated 23<sup>rd</sup> May, 2012 indicated that the complainant produced a record of *Mpesa* transactions between himself and the appellant which gave credence to the allegations.

16. All these are actions in direct contravention of the appellant's terms of service as set out in his employment contract. Clause 11 of the contract states as follows;

***“a. You will devote the whole of your time and attention to the business of the Bank and you will not engage in any other profession, trade or business, either directly or indirectly, as principal or agent, whether of profit or otherwise unless special permission is first obtained from the Bank;***

***b. You will not engage in any activity which is or may be construed to be in conflict with the business of the Bank;***

***c. You will be expected to conduct yourself with dignity during official hours and outside the Bank and shall not at any time be guilty of any act which may place you or the Bank in disrepute;***

***d. You will be expected to arrange your expenditure within your emoluments and you will not be permitted to borrow money from, or lend money to any other member of staff, or to borrow from moneylenders, or to engage in betting, gambling and speculative transactions;***

***e. If you become involved in financial difficulties from whatever cause arising, you will immediately report the matter to your Manager.***

***f. ....”***

Similarly, **Clause A5** of the CBA provides as follows;

***“Any of the following acts on the part of the employee shall constitute gross misconduct and/or serious neglect and shall justify instant dismissal:***

***i) If he/she is guilty of misappropriating any funds or property belonging to the employer or belonging to any person having business dealings with the employer...”***

17. **Section 44(4)** of the **Employment Act** sets out the conduct on the part of the employee, which amounts to gross misconduct so as to justify summary dismissal. Pertinent to this appeal is **Section 44 (4)(c)**, which recognizes as gross misconduct the willful neglect by the employee to perform any work which it is his/her duty to perform or if he/she carelessly and improperly performs any work, which from its nature it was his/her duty to perform carefully and properly. (See **Cooperative Bank of Kenya Ltd vs. Banking Insurance & Finance Union [2016] eKLR**)

18. From our re- evaluation of the evidence and documents adduced thereto we find the issue of the appellant's misconduct was documented in various correspondences, transcripts of disciplinary proceedings, and the investigative report. We find that the trial court carefully considered the facts presented before it including the appellant's previous record of good performance, and rightly concluded that the appellant had engaged in financial misconduct as alleged; and that the respondent had discharged the burden of proof on a balance of probabilities.

19. With regard to the legality of the disciplinary proceedings, those are anchored on the contractual relationship and must comply with the provisions of **Section 41** of the **Employment Act** which provides as follows;

***“(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.***

***(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.***

20. It was common ground that the appellant was taken through various forms of disciplinary procedures. By the time the appellant was notified of his suspension on 30<sup>th</sup> April, 2012 he had been invited to attend a culpability hearing on 24<sup>th</sup> May, 2012 and was issued a warning letter dated 25<sup>th</sup> June, 2012 indicating that his performance and conduct for the year 2011 were below expectation. According to the respondent, that was sufficient to satisfy the conditions for procedural fairness which includes informing the employee of specific grounds of dismissal in writing and giving the employee reasonable opportunity to defend himself. However, the learned Judge found that the termination of employment had failed the fairness test by the respondent issuing the appellant an unsigned termination letter in breach of statutory law.

21. For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. In this case, the failure to sign the letter of dismissal appears to be an oversight that had serious repercussions for the respondent, entitling the appellant to make a claim under **section 47** of the **Employment Act**. On the award of damages, the appellant sought orders for reinstatement, plus maximum compensation for unlawful dismissal and maximum compensation for loss of employment before retirement age. Damages awarded for wrongful dismissal usually equate to the value of the employee's pay and benefits during the period of notice that the employee would have been given, had the contract been terminated lawfully. Nonetheless, the trial court's finding was that this was a matter of unfair dismissal for which compensation is made up of an award.

22. **Section 49** of the **Employment Act** provides in the event of an unjustified summary dismissal or termination of contract of employment, the employer may be ordered to pay the employee the wages he would have earned had he been given the notice period prescribed by the Act or the contract of service or pay the employee's salary or wages up to a maximum of twelve (12) months. By dint of **section 49(3)** of the Act, where the summary dismissal or termination of the employee is unfair, he may be reinstated and treated in all respects as if the employment had never been terminated, or he may be re-engaged in work comparable to his work prior to the dismissal, or other reasonably suitable work, at the same wage.

23. It is now trite law that the prescribed remedies, including reinstatement are discretionary rather than mandatory remedies, to be granted on the basis of the peculiar facts of each case. This is made absolutely clear by the use of the word "**may**", which in the context of the provision imports a discretionary rather than a mandatory meaning. That the remedies, including reinstatement are not mandatory remedies, is made even clearer by **section 49(4)** which sets out some thirteen (13) considerations which the court must take into account before determining what remedy is most appropriate in each case. Those considerations include *inter alia*, the circumstances of the termination and the extent to which the employee caused or contributed to it and the practicability of reinstatement or re-engagement. This means that before exercising the discretion to determine which remedy to award, the court must be guided by the comprehensive list of considerations. Some have been stated by this Court in **Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**.

24. We have also considered the established rule of the thumb that an award of maximum compensation must always satisfy stringent conditions that demonstrate gross abuse of procedure or extreme cruelty on the part of the employer. Thus in the case of; **OIpejeta Ranching Limited vs. David Wanjau Muhoro [2017] e KLR** this Court expressed itself thus:

***"The compensation awarded to the respondent under this head was the maximum awardable, that is to say, 12 month's pay. The trial Judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention."***

25. Regarding the prayer for reinstatement the learned Judge made reference to the appellant's negative employment record and also drew from the dicta in the case of; **Dr. Maingi Maitha vs. The Permanent Secretary Medical Services & another [2015] eKLR** and declined to order reinstatement. Instead, the learned Judge ordered the equivalent of six (6) month's salary in compensation for unfair termination taking into account the appellant's length of service as well as the respondent's conduct in the disciplinary process. She further awarded the appellant one (1) month's salary in lieu of notice as well as salary withheld during the suspension period. The additional claim for compensation for loss of employment before retirement was denied.

26. On our own re-evaluation of the facts and the law, we come to the conclusion that the trial Judge was correct in finding as she did. To summarize it, the respondent sufficiently proved that the appellant had behaved improperly despite several warnings to correct his conduct and he knowingly engaged in unauthorized financial dealings with a bank customer contrary to his terms of contract as well the bank's code of regulations. Just like the trial court, we find this was sufficient justification to terminate his employment. With regard to the procedural aspects of the dismissal, we agree with the learned Judge, that failure by the respondent to sign the termination letter was a violation of the principles of fair labour practices and this rendered the appellant's termination unfair termination for which the appellant has been adequately compensated by the award of six (6) months' salary.

27. In the upshot, and in view of the foregoing, we find no merit in any of the grounds of appeal and dismiss the same with costs to the respondent.

**Dated and delivered at Nairobi this 27<sup>th</sup> day of September, 2019.**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original.

**DEPUTYR EGISTRAR**