



IN THE COURT OF APPEAL

AT NAKURU

(CORAM: MURGOR, SICHALE & KANTAI, J.J.A.)

CIVIL APPEAL NO. 36 OF 2017

BETWEEN

BARCLAYS BANK OF KENYA LIMITED.....APPELLANT

AND

MICHAEL MURIITHI MAINA.....RESPONDENT

(An appeal from the Judgment of the Employment & Labour Relations Court

at Nakuru (Radido, J.) delivered on 11th December, 2015

in Cause No. 168 of 2014)

JUDGMENT OF THE COURT

The respondent, **MICHAEL MURIITHI MAINA**, was employed by the appellant, **Barclays Bank of Kenya Limited**, by a letter dated 18th January, 2005 as a Customer Advisor on terms and conditions set out in the letter of employment of the said date and other terms contained in documents furnished by the appellant to the respondent. The respondent rose through the ranks, but because some complaints arose in the course of his performance of duty he was suspended from employment and finally, by a letter of 12th July, 2012 his services were terminated. The termination letter stated amongst other things that the respondent had been involved in a fraudulent loan application for Kshs.500,000/= by a customer of the appellant and also that the respondent's personal cheque had been retrieved from a person who was arrested after he was involved in fraudulent activities against the appellant.

The record shows that before the said termination of employment the appellant was invited by letter dated 8th June, 2012 to a disciplinary hearing and in the invitation letter he was advised that he could be accompanied by a colleague or a union official. A disciplinary hearing took place on 15th June, 2012; and it was recommended by the disciplinary panel that the respondent's services be terminated; that the appellant through a letter of 15th July, 2012 appealed against termination. Another panel that was constituted on 7th August, 2012 heard the appellant's appeal, following which, the appellant's appeal was unsuccessful and the termination stood.

That is the background that led to the respondent filing an action at the then Industrial Court of Kenya at Nakuru (today called "**Employment and Labour Relations Court**") where it was claimed that the respondent had served the appellant with diligence; that his services had been terminated without just cause; that his appeal had failed; that the termination was unfair; that the respondent had taken various loans with the appellant which he was unable to service due to termination of employment; that the respondent was no longer able to secure proper employment after termination; that the termination was contrary to the Employment Act and for all that it was prayed that the court finds that the termination of his employment was unfair and unlawful; that the court award the respondent damages for unfair labour practices; that the respondent also be awarded damages for unfair termination of employment or in the alternative that the court declares the termination to be unfair and unlawful and order the appellant to reinstate the respondent back to employment.

The appellant filed a defence where it denied that the termination was unlawful. The appellant further stated in the defence that it had carried out investigations which revealed that there was a syndicate in the area where the respondent was employed where the appellant's staff were colluding with outsiders to defraud the appellant bank of money. It was further stated that evidence had been obtained from persons who were arrested by police which implicated the respondent as having colluded with outsiders to defraud the appellant bank. Further that the respondent had used his position at the bank to enable fraudsters to open accounts using fake documents and that such accounts were used to apply for loans from the appellant which the fraudsters did not intend to repay leading to the appellant losing money. Persons were named in the defence who had been arrested and who had implicated the respondent in the frauds alleged by the appellant. It was further stated that

when one fraudster was arrested by police a post dated cheque issued by the respondent had been retrieved from the fraudster and that this was contrary to a Code of Conduct issued by the appellant to its employees where they were not allowed to issue post dated cheques or otherwise deal with third parties in a way that would compromise the employees' employment with the appellant. It was finally stated that the appellant had followed processes that were required in law and having found that the respondent was culpable in fraud the appellant had decided to terminate his employment.

The matter was heard by **Radido, J.** who in a judgment delivered on 11th December, 2015 found that although the appellant had followed all necessary steps to terminate the employment of the respondent the appellant had breached principles of substantive fairness in terminating the employment of the respondent. The Judge therefore found the appellant liable and awarded the respondent eight month's gross wages as compensation for unfair termination of employment. Those orders provoked this appeal.

In a Memorandum of Appeal drawn for the appellant by its advocates four grounds are set out. It is said that the learned Judge erred in law and fact by not appreciating the evidence of the appellant and arriving at a wrong decision. It is also said that the learned Judge considered extraneous circumstances and facts that were not pleaded; that the learned Judge disregarded evidence on record which showed that the respondent had admitted issuing a post dated cheque contrary to a Code of Conduct governing his employment. The last ground stated:

“THAT this Court in the matter of Kenya Revenue Authority v Menginya Salim Murigani Civil Appeal No. 108 (sic) restated the law that “Firstly, as regards the terms of a contract of service or any other contract, it is not the business or function of a court of law to rewrite a contract for the parties by prescribing how the organs entrusted with disciplinary matters in a contract must operate or to introduce terms and conditions extraneous to the contract. Secondly, it is for the parties to provide in the contract how such organs should operate and how the hearings, if any are to be conducted. A court of law cannot in our view import into a written contract of service rules of natural justice and the constitutional provisions relating to right of hearing”.

We are therefore asked to allow the appeal.

The appeal came up before us for hearing on 18th July, 2018 when **Mr. George Masese Mabeya**, advocate, appeared for the appellant while **Ms. Jacinta Moenga** appeared for the respondent. Both parties had filed written submissions and in a highlight Mr. Mabeya submitted that reasons for dismissal had been set out in the letter of termination where it was stated that the respondent had flouted procedure in opening of an account for a customer and also breached a Code of Conduct in issuing a post dated cheque to a third party. Learned counsel faulted the learned Judge for finding that the Code of Conduct was unconstitutional when there was no evidence produced to that effect.

Ms. Moenga was satisfied with what was stated in written submissions and had nothing to add to the same.

This is a first appeal and it is our duty to re-examine the evidence and come to our own conclusions on the issues raised. We should respect the findings of the trial court that has had the benefit of seeing and hearing the witnesses but we are free to depart from those findings if they are not based on the evidence or have been reached in a way that a reasonable tribunal properly exercising its mind would not reach – see the oft cited case of **Selle v Associated Motor Boat Company Ltd & Others [1968] EA 123.**

The only issue for our determination is whether the finding by the learned Judge that there was breach of some process in terminating the respondent's employment was proper.

It was the case before the learned Judge that there was a procedure for opening of a bank account by a customer who approached the appellant where officers of the appellant, like the respondent, were to verify various documents to ensure that the prospective customer was not a fraudster but a genuine customer who desired to do business with the appellant.

Mr. Mark Ochieng Ouma who was the appellant's Branch Manager in Gilgil testified that the respondent had opened an account for a customer where statements required for opening of such an account did not cover twelve months as required. It was his further evidence that the account was opened without a business visit report being made and that provision of a 12 months bank statement was mandatory, but that the respondent had opened the account without following these procedures. On the issue of retrieval of a post dated cheque issued by the respondent to a third party it was the testimony of the witness that it was against the respondent's Code of Conduct for an employer to issue a post dated cheque to any party.

Ibrahim Kosgei was the Forensic Investigator employed by the appellant. He testified that the documentation used by the respondent to open an account for a customer were incomplete and some were counterfeit and fake. Business accounts used to open the accounts were also fake as were identity cards.

When the fraud was discovered the appellant was suspended from employment and was summoned to a disciplinary hearing which took place on 16th June, 2012. In the invitation letter the respondent was advised that he could be accompanied by a colleague or by a union official. He chose to attend on his own. The letter set out the allegations made against the respondent which he was required to answer.

The minutes of that disciplinary hearing were produced before the said Judge and they run into five typed pages. A reading of the same shows that the respondent was accorded an opportunity to present his case on allegations made against him that had led to suspension from employment. The panel was not satisfied with the respondent's explanation and recommended that his services be terminated. The respondent appealed against that decision and he was accorded a hearing where a different panel convened on 7th August, 2012 where again in the invitation letter the respondent was advised that he could be accompanied to the meeting by a colleague or a union representative. Minutes of that panel hearing on the appeal were produced before the judge and they run into eight typed pages. The respondent was again given an opportunity to give further explanations on the allegations made.

The appeal panel was not satisfied with the explanations given by the respondent and it recommended that his services be terminated. The

learned Judge at paragraphs 22 and 23 of the judgment found:

“22.In the instant case, the claimant knew of the allegations to confront in advance. He was accorded an opportunity to make representations and to be accompanied during the disciplinary hearing. He was also afforded an opportunity to appeal, which he did.

23.Considering the sequence of events as narrated and evidenced by the documentation produced, the court is satisfied that the process taken by the respondent met the statutory test for procedural fairness.”

The learned Judge went on to consider what he called substantive fairness and found that substantive fairness was lacking in the process undertaken by the appellant in terminating the services of the respondent. The appellant faults the learned Judge for that finding. We find merit in the complaint. The employment of the respondent by the appellant was governed by a letter of employment which was not in breach of the Employment Act or any other law and also by a Code of Conduct which stipulated conduct expected of an employee like the respondent while employed by the appellant. That Code of Conduct did not contain any provision which was against the law in any way at all. The respondent admitted that he had in his possession that Code of Conduct which had been availed to him when he accepted employment with the appellant. The respondent also admitted that he was familiar with processes in opening of accounts for customers. Evidence was produced before the learned Judge that the respondent, through negligence or otherwise, accepted fraudulent documents from customers to open accounts which were then used to defraud the appellant of substantial sums of money. This was in breach of the respondent’s terms of service. It was also proved before the learned Judge that employees like the respondent were, through a Code of Conduct not allowed to issue post dated cheques to third parties. The respondent admitted that he had issued such a cheque contrary to the Code of Conduct. The cheque was retrieved by police from a person who was arrested for defrauding the appellant bank. Retrieval of the cheque from the fraudster was clear evidence that the respondent was dealing with a person or persons who were defrauding the appellant bank leading to loss of money. He was in effect misusing his position of trust as an employee of the appellant, and this conduct could not be allowed to continue.

The appellant followed the law in every respect in terminating the services of the respondent. The respondent was accorded every opportunity required in law to explain his conduct where he had acted with negligence leading to the appellant losing money and he had also involved himself with a person or persons who were defrauding the appellant leading to loss of money. He attended a disciplinary meeting which was properly called and conducted and he also was taken through an appeal process where he was unable to give a satisfactory explanation on his conduct. The appellant followed all procedure expected in the circumstances and the learned Judge was wrong to reach the finding that he did. This appeal has merit and we allow it. We set aside the judgment of the lower court and substitute thereof an order dismissing the award with costs. We also award the costs of this appeal to the appellant.

Dated and Delivered at Nakuru this 26th day of September, 2018.

A. K. MURGOR

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JUDGE OF APPEAL

F. SICHALE

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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.

DEPUTY REGISTRAR