



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 78 OF 2014

JUSTUS WAMBUA KAVYU.....APPELLANT

AND

KENYA COMMERCIAL BANK LTD.....RESPONDENT

***(Appeal from the judgment and decree of the Employment & Labour Relations Court at Nairobi,
(Mbaru, J.) dated 17th June 2013 in***

ELRCC NO. 194 OF 2012)

JUDGMENT OF THE COURT

The respondent, *Kenya Commercial Bank Ltd* employed the appellant, *Justus Wambua Kavyu* on 2nd October 1985 as a subordinate staff. Over time, the appellant rose in rank and on 17th May 2004, he was confirmed as a clerk with effect from 1st March 2004. His monthly salary then was Kshs.26,086/-. Under the contract of employment, either party could terminate the employment by giving the other a month's written notice or in lieu thereof paying one month's salary.

All appears to have been well until 15th June 2010 when the appellant was serving as a bank teller at the respondent's branch at Tala. According to him, a customer appeared wishing to withdraw from his account Kshs.35,000/- but he had no identification documents. His profile in the respondent's computer system did not have an image. The appellant asked the customer to get an employee of the respondent who was known to him to serve as his guarantor. Although the customer claimed to know one employee, he was not able to get him and returned to the appellant, this time with the request to withdraw a lesser amount of Kshs.6,000/- to address a pressing need. The appellant paid the customer that amount without any form of identification but debited his account with Kshs.35,000/-, which he intended to hold, he claims, until the customer's guarantor arrived. By closing time the guarantor had not turned up and the customer had left. The appellant recorded Kshs.39,600/- as overage (excess), which he claims was confirmed by his immediate supervisor. The additional Kshs.4,600/-, he explained, belonged to a different customer who had left the money with the appellant to get change.

The next morning, the customer did not appear and the appellant credited his account with Kshs.35,000/-, noting the transaction as an error correction. The customer ultimately appeared at about 3.30 pm with proper identification documents after which the appellant duly paid him and again debited his account with Kshs.35,000/-.

The respondent's version of the events, after carrying out a forensic audit, was that the customer appeared on 15th June 2010 at 11.24 a.m. and withdrew Kshs.6,000/- from his account. At 4.04 pm the same day, the appellant debited the customer's account with Kshs.35,000/-. An examination of the signature authorizing the transaction and purporting to be that of the customer showed that it was completely different from the customer's signature in the system and was instead substantially similar to the appellant's own signature. The appellant too did not bring to his supervisor's notice an overage on 15th June 2010 as he had claimed.

On 25th June 2010 the respondent issued the appellant with a written notice to show cause. He was requested to explain the above transaction and to show cause why disciplinary action should not be taken against him for failure to properly discharge his duties. On 29th June 2010, the appellant submitted a written explanation along the lines we have set out above.

By a further letter dated 5th July 2010, the respondent asked the appellant to explain why he had not sought guidance from his supervisor and why instead of reversing the entry the same day, he chose to keep the money until the next day. Again he was asked to show cause why disciplinary action should not be taken against him for those lapses. The appellant's response, dated 7th July 2010 was essentially that he had acted in good faith to assist a customer.

Still, the respondent was not satisfied and on 12th July 2010 it sought from the appellant further explanation why he had paid

Kshs.6,000/- to the customer without any form of identification or guarantee; why he debited the customer's account with Kshs.35,000/- before the customer had been identified by the guarantor; why he did not inform his supervisor about the Kshs.4,600/- that was allegedly left with him by a different customer; the identity of that customer; and the particulars of the member of staff who was to serve as the guarantor. The appellant responded on the same day reiterating what he had previously stated and added that the person whose money he held for change was not a customer of the respondent and that he was not sure who was to be the guarantor.

To make good the customer's loss, on 28th September 2010 the respondent debited the appellant's account with Kshs.35,000/- and credited the customer's account with the same amount. The next day the respondent suspended the appellant from employment. The reason for the suspension was stated to be the manner in which he handled the transaction on 15th June 2010. By a further letter dated 18th February 2011, the respondent terminated the appellant's employment for gross misconduct. As of the date of termination, the appellant was earning a gross salary of Kshs.98, 616.30/-. Because the question whether the appellant was given reasons for his termination is a contested issue in this appeal, it is apposite to set out the relevant part of the letter of termination, which stated as follows:

"Termination of Employment

This has reference to various correspondence exchanged with you and the discussions held with you on your acts of gross misconduct. We advise that it has been established that you committed acts of gross misconduct, details of which are well within your knowledge."

On 28th February 2011, the appellant appealed to the respondent against termination, explaining once again the incident on 15th June 2010 and insinuating that he was setup by the management because of a grudge against him. He attended an appeals hearing on 24th March 2011 but the appeal was not successful. Before then, on 9th February 2012, the appellant had lodged a claim in the ***Employment and Labour Relations Court***, claiming that his termination was wrongful and unfair; that the acts of gross misconduct for which he was terminated were never disclosed in his termination letter; that he was not given a fair hearing contrary to section 41 of the Employment Act; that there were no valid grounds for his termination; and that the termination was harsh and uncalled for. He accordingly prayed for an order of reinstatement or in the alternative payment of ***Kshs.2,882,622.30/-*** made up of one month's salary in lieu of notice, February 2011 salary, 21 days leave, service gratuity and 12 months' salary as compensation for wrongful termination of employment.

By its rather lengthy memorandum of defence dated 4th October 2012, the respondent denied that the appellant's termination was unfair or wrongful. It added that the customer had withdrawn only Kshs.6,000/- on 15th June 2010; that the authorizing signature in respect of the purported withdrawal of Kshs.35,000/- was different from the customer's signature with the bank and was substantially similar to the appellant's signature; that the appellant had deliberately misrepresented the entry on 16th June 2010 relating to the customer's account as an error correction; and that the appellant had stolen Kshs.35,000 from the customer's account. On that basis, the respondent averred that the appellant was properly dismissed for fraud, gross misconduct and performing his duties contrary to the respondent's guidelines and that he was fully aware of the reasons for his termination.

Mbaru, J. heard the claim, with the appellant and one witness for the respondent testifying, and by a judgment dated 17th June 2013 held that the appellant's termination was substantially fair, but the failure to give him reasons for the termination rendered the same procedurally unfair. She accordingly awarded him Kshs.345,157, made up of Kshs.89,616.30 as one month's salary compensation and Kshs.246,540.75 being pay for the duration of the suspension. The learned judge further ordered the respondent to pay the appellant within 14 days one month's salary in lieu notice of notice, which was not disputed. As regards the claim for leave days, the same was found unproven, while gratuity was found not to be payable. The appellant was not happy and he lodged this appeal.

In his appeal, as prosecuted by his learned counsel, **Mr. Nyabena Nyakundi**, the appellant raised four grounds of appeal, faulting the trial judge for finding that the appellant's termination was substantially fair but procedurally unfair; for declining to order reinstatement of the appellant; for awarding him compensation of only one month's salary; and for failure to appreciate the evidence that was adduced.

As regards the first ground, counsel submitted that the findings of the learned judge were mutually contradictory. He submitted that to the extent that the appellant was not afforded a hearing before termination, the judge erred by concluding that the termination was substantially fair. Counsel further submitted that the appellant had prayed for reinstatement, which was denied without any reasons. As for compensation, it was contended that the trial court was in error in awarding only one month's salary as compensation instead of the maximum of 12 months' salary. Counsel submitted that the trial court did not consider the relevant factors in determining the compensation to award, such as the 25 years of service that the appellant had rendered to the respondent without any warning and the chances of the appellant getting alternative employment. In the circumstances it was contended that the court failed to properly exercise its discretion. As regards failure to evaluate the evidence, it was submitted that there was no evidence that the appellant had committed any wrongful acts to warrant his termination.

Ms. Oyombe, learned counsel representing the respondent opposed the appeal as meritless and supported the conclusions of the trial court. She submitted that there was nothing contradictory in the judgement. In her view the evidence was overwhelming that the appellant had made payments contrary to the respondent's regulations and had not declared the overage as he claimed. In addition he kept the Kshs.35,000, which he had irregularly withdrawn from the customer's account overnight before dishonestly marking it as an error correction the next day.

It was further urged that the appellant had worked for a long period for the respondent and was well conversant with the applicable procedures; that he was perfectly aware the reasons for his termination; that the trial court explained the reason why it awarded compensation of one month's salary and that in the circumstances of the case the compensation was proper and justified. Relying on judgments of this court the respondent submitted that the appellant had a duty to mitigate his losses (**Hema Hospital v. Dr. Wilson Nakongo Marwa, CA No. 72 of 2014 (Kisumu)**); that the courts are slow to impose an employee who has fallen out of favour on a reluctant employer (**Dalmas B. Ogoye v. KNTC Ltd, CA No. 125 of 1996**); and that banks, by virtue of their sensitivity, operate on a high level of trust and honesty (**Banking, Insurance & Finance Union of Kenya v. Kenya Commercial Bank Ltd, Industrial Court Cause No. 295 of 2010**).

Insurance & Finance Union of Kenya v. Kenya Commercial Bank Ltd, Industrial Court Cause No. 295 of 2010.

This is a first appeal, which by virtue of **section 17** of the Employment and Labour Relations Act is on

both facts and law. In such an appeal this Court is obliged to reconsider the evidence, assess it and make its own independent conclusions. The Court must however bear in mind that it does not have the advantage of the trial court, which saw and heard the witnesses as they testified. Consequently, it will not interfere with the trial court's findings of fact, unless the findings are not based on evidence or taken as a whole, the conclusions of the trial judge are demonstrated to have been founded on wrong principle. (See ***Selle & Another v. Associated Motor Boat Co. Ltd. & Others [1968] EA 123***).

Section 41 of the Employment Act entitles an employee to a hearing before termination of employment on grounds of misconduct. It requires the employer, before terminating an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language he or she understands the reasons for termination and the employee is entitled to have a shop steward or a fellow employee of his choice present during the explanation. Before terminating the employee, summarily or otherwise, the employer is obliged to hear and consider any representation by the employee or his or her representative.

In the present appeal, the trial court concluded that the appellant's termination was substantively fair. We are satisfied that there was objective and compelling evidence proving that, on a balance of probabilities, the appellant had acted contrary to the respondent's regulations and had severely undermined honesty and trust, basic tenets in his kind of work. As the Labour Court of South Africa stated in

Standard Bank of South Africa Ltd v CCMA & Others [1998] 6 BLLR, 622 dishonest conduct breaches the trust that an employer places on an employee and in turn it destroys the employment relationship. (See also ***Superstar Herbs v Director, CCMA & Others, Case No P123/98***, Labour Court of South Africa).

The appellant had paid out Kshs.6,000/- to a person whose identity he could not verify. He held overnight money that was not supposed to be in his possession. When he reversed the transaction the next day, he was not honest enough to explain the real reason for the reversal, but merely recorded it as an error correction. He did not refer to his supervisor for guidance, if indeed there was a genuine mistake. He had worked as a teller for 8 months and was not as new to the work as he claimed.

As regards whether he was given a fair hearing, it is to be noted that by the letter of 25th June 2010, the respondent brought to the attention of the appellant the specifics of the complaint against him. The particulars of the bank account in question were given; the issue was set out as the debiting and crediting of the account with Kshs.35,000/-; the dates when the incidents took place were specified; and lastly the appellant was requested to give an explanation and show cause why disciplinary action should not be taken against him.

The appellant took up the opportunity and gave a detailed response on 29th June 2010. Again on 5th July 2010, arising from the appellant's explanation, the respondent sought more specific answers as to why he did not seek guidance from his supervisor and why he did not reverse the transaction the same day but held the cash overnight. The appellant gave a written response on 7th July 2010. On 12th July 2010, the respondent yet again asked the appellant to clarify further aspects of his explanation, which he did on the same day. When his employment was ultimately terminated, the appellant lodged an appeal and he was afforded an oral hearing.

In the above circumstances, we do not find any basis for holding that the appellant was denied the right to be heard. He knew the specific allegations against him and addressed them squarely, though ultimately the respondent was not satisfied with the explanation. But as the Labour Appeal Court of South Africa stated in ***Nampak Corrugated Wadeville v. Khoza [1998] ZALAC 24***:

“A court should, therefore not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable.”

Although his appeal was conducted through oral hearing, there is no evidence that prior to that the

appellant requested an oral hearing, which the respondent denied.

The trial court found that the appellant's dismissal was procedurally unfair because the respondent did not give him the reasons for his dismissal. The letter of dismissal referred to the correspondence we have set out above between the appellant and the respondent pertaining to the events of 15th and 16th June 2010. In the particular circumstances of this appeal, it would be stretching imagination beyond reasonable limit to claim that the appellant did not know why his employment was terminated. Be that as it may, since there is no cross-appeal, we shall let the issue lie.

What we have stated above regarding the substantive and procedural fairness of the dismissal disposes of the argument that the trial court erred in awarding the appellant one month's salary as compensation. In our view, in the circumstances of this appeal, the termination of employment was fully justified. However, as we have already stated, in the absence of a cross appeal, there is no basis for interfering with the award of compensation of one month's salary by the trial court.

We do not find any merit in the last issue regarding reinstatement of the appellant. Even if we were satisfied that there were grounds for such reinstatement, which we are not, we would not have ordered reinstatement as the appellant asked us to do, because he was dismissed more than 5 years ago, thus raising doubts about the practicality of that remedy. In addition, although the appellant had worked for the respondent for a long period of time, he was solely responsible for his predicament by engaging in conduct, which hacked at the very root of honesty, trust and confidence, the mainstay of a banker's career. Though under section 49 of the Employment Act reinstatement may be ordered depending on the circumstances of the case, it is important to remember that it is an exceptional remedy. In ***Perkins v. Graceworldwide (Aus) (Pty) Ltd, NI 2230 of 1996***, the Industrial Relations Court of Australia stated thus regarding reinstatement as a remedy:

“Trust and confidence is a necessary ingredient in any employment relationship. That is why the law imports into employment contracts an implied promise by the employer not to damage or destroy the relationship of trust and confidence between the parties, without reasonable cause... The implication is not confined to employers, it extends to employees... So we accept that the question whether there has been a loss of trust and confidence is a relevant consideration in determining whether reinstatement is impracticable, provided that such loss of trust and confidence is soundly and rationally based.”

We come to the conclusion that this appeal is bereft of merit. The same is hereby dismissed. Each party shall bear their own costs. It is so ordered.

Dated and delivered at Nairobi this 4th day of November, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR