



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, OKWENGU & SICHALE, JJ.A)

CIVIL APPEAL NO. 3 OF 2014

BETWEEN

CFC STANBIC BANK LIMITED APPELLANT

AND

DANSON MWASHAKO MWAKUWONA RESPONDENT

(An appeal from the judgment of the Industrial Court of Kenya at Mombasa (Makau, J.) dated 28th June, 2013

in

Industrial Cause No. 174 of 2012)

JUDGMENT OF THE COURT

1. The respondent filed suit against the appellant in the Industrial court seeking *inter alia*:-
 - ***A declaration that the claimant's (respondent's) dismissal and/or termination of employment was unfair and/or discriminatory in the circumstances.***
 - ***Damages for wrongful and/or unfair dismissal.***
 - ***An order compelling the respondent (appellant) to issue a certificate of service to the claimant.***
2. It was the respondent's case that he was employed as an Account Analyst by the appellant on 1st December, 2009. His duties included credit appraisal, customer inquiries and support services to the relations Manager, Elizabeth Wasuna. On 7th September, 2011 the respondent received a call from a colleague by the name Elsie Karanja (Elsie) requesting him to advise the appellant's client, Martona Tours and Assistance Limited, of its balance in its USD account. Elsie forwarded the email which contained the request to the respondent; the respondent then forwarded the account balance via the same e-mail. Thereafter, on 8th September, 2011 the said client via the same e-mail address sent transfer instructions to the respondent addressed to Elsie and Eric Ngeera. The transfer instructions directed the transfer of USD 35000 to an account held by Phaseline Suppliers in Kenya Commercial Bank. It is not in dispute that the respondent endorsed the same for

- processing and forwarded the said instructions to one Patrick Mukhongo (Patrick) for further action as provided for in the appellant's outward payment processing procedure. Patrick was in charge of transfers and was required to verify the authenticity of the instructions. Subsequently, the transfer was effected as per the said instructions.
3. A day later, the respondent received information that the aforementioned transaction was fraudulent. He called the client's accountant who confirmed that the said transfer instructions did not emanate from the said client. Thereafter, the respondent requested Kenya Commercial Bank to block withdrawal of the said funds. Fortunately, the funds were blocked in time and returned eventually to the client's account in the appellant's bank.
 4. On 1st October, 2011 the respondent received an email dated 30th September, 2011 advising him to attend a disciplinary hearing at the appellant's headquarters in Nairobi on 3rd October, 2011. According to the respondent, the disciplinary panel was hurriedly and improperly constituted; he was not given adequate time to prepare for the hearing. After the disciplinary hearing, the respondent went on leave. He was later called to pick up a letter dated 21st October, 2011 dismissing his services. His appeal against the said dismissal was rejected by the appellant vide a letter dated 25th November, 2011.
 5. The respondent maintained that at the material time he acted on the said e-mail instructions because his colleague, Elsie asked him to do so and he trusted her. He never suspected that the transaction was fraudulent; he had no duty or obligation to verify the authenticity of the instructions; other departments and personnel were responsible for ensuring the instructions were authentic before making the said transfer.
 6. It was the respondent's contention that his dismissal was unlawful and/or illegal because no notice as contemplated under the **Employment Act, 2007** was given to him; the termination was without lawful cause or excuse; the termination was discriminatory and/or unfair. He further contended that the appellant had refused and/or neglected to issue him with a certificate of service contrary to the law.
 7. On the other hand, the appellant maintained that the respondent's dismissal was lawful. According to the appellant, Elsie forwarded the e-mail instructions to the respondent because it was his duty to deal with the said client's account. The said client had never issued the appellant with an email or fax identity advice authorizing the appellant to act on email instructions. Despite the foregoing, the respondent, in gross violation of the appellant's regulations, proceeded to supply the account details via e-mail without verifying the source of the e-mail or confirming whether the e-mail had indeed originated from the client. In further breach of the appellant's regulations, the respondent endorsed the transfer transaction for processing without first confirming its authenticity and without receiving a cheque of the said amount from the client. Investigations revealed gross negligence and/or recklessness on the part of the respondent. The appellant maintained that the respondent was not entitled to notice since he was summarily dismissed.
 8. After considering the claim on merit, the learned Judge (Makau, J.) vide a judgment dated 28th June, 2013 found that the dismissal of the respondent was not founded on valid and justifiable reasons. The trial court awarded the respondent :-

- **One month salary in lieu of notice - Kshs. 135,000/=**
 - **Loss incurred due to change in interest in staff mortgage - Kshs. 617,926.50/=**
 - **12 months' salary for unfair termination - Kshs. 1,620,000/=**
- Total - Kshs. 2,372,962.50/=**

The respondent was awarded costs of the suit and interest. The appellant was also directed to issue the respondent with a certificate of service. It is that decision that has instigated this current appeal based on the following grounds:-

- ***The learned Judge erred in failing to evaluate the evidence in its totality and to consider the submissions by the appellant and thereby arrived at the wrong conclusion that the respondent's***

employment was unfairly terminated by the appellant.

- *The learned Judge erred in finding that the claimant (respondent) had discharged the burden of proving that he was unfairly terminated as required under Section 47(5) of the Employment Act, 2007.*
- *The learned Judge erred in finding that the claimant's employment was unfairly terminated when the respondent had demonstrated that it had justifiable causes and/or grounds under the contract of employment and under the Employment Act, 2007 for summarily dismissing the claimant.*
- *The learned Judge erred in finding that the claimant's employment was unfairly terminated when the respondent had demonstrated that the claimant's employment was terminated in accordance with Section 44(4) (c) of the Employment Act, 2007 for willfully neglecting to perform his work and/or carelessly and improperly performing his work.*
- *The learned Judge erred in finding that the respondent's employment was unfairly terminated when the respondent had not demonstrated such unfairness as envisaged under Section 45(2) and 45(4) of the Employment Act, 2007.*
- *The learned Judge erred in finding that the appellant's reasons for terminating the respondent's employment were not valid when the appellant had discharged the burden of proving the contrary under Section 47(5) of the Employment Act, 2007.*
- *The learned Judge erred in finding that the respondent's dismissal was discriminatory when the respondent was not treated differently and his colleagues were subjected to a similar disciplinary process.*
- *The learned Judge erred in finding that the claimant's employment was unfairly terminated when the claimant admitted negligence in discharging his duties, which negligence ultimately led to his dismissal.*
- *The learned Judge erred in completely disregarding the appellant's first ground of summarily dismissing the claimant, to wit, the respondent's negligence in handling the request for the account balance of USD account number 0240031890601 on 7th September, 2011.*
- *The learned Judge erred in finding that the respondent was absolved of negligence when the respondent had supplied confidential customer account information on 7th September, 2011 to a stranger without first verifying the authenticity of the same, such verification being the respondent's responsibility as the account analyst.*
- *The learned Judge erred in finding that the termination of the respondent's employment by the appellant was unfair when the appellant demonstrated that the reasons for the said termination were valid as required by Section 45(2) of the Employment Act, 2007.*
- *The learned Judge erred in finding that the termination of the respondent's employment by the appellant was unfair when in all circumstances of the case, the appellant acted in accordance with justice and equity in terminating the respondent's employment.*
- *The learned Judge erred and misdirected himself by drawing conclusions that were not supported by the evidence on record.*
- *The learned Judge erred in finding that the respondent had proved his case against the appellant.*
- *The learned Judge erred in awarding the claimant 12 months' salary as compensation for*

unfair termination, when all the facts considered, the respondent's termination was fair.

- *The learned Judge erred in awarding the respondent Kshs. 617, 926.50/= allegedly as loss incurred due to change of interest in staff mortgage when the same was not part of the employment contract.*
- *The learned Judge erred in awarding the respondent Kshs. 617, 926.50/= allegedly as loss incurred due to change of interest in staff mortgage when the same, being a special damage was not strictly proved.*
- *The learned Judge erred in law and in fact and misdirected himself by failing to consider the appellant's submissions.*

9. Mr. Kinuthia, learned counsel for the appellant, submitted that the learned Judge (Makau, J.) failed to properly evaluate the evidence before him; if he had done so he would have arrived at a different conclusion. He submitted that the respondent was the contact person between the appellant and the customer; his role was to process enquiries from customers. According to Mr. Kinuthia, the respondent breached the terms of his employment contract by disclosing the client's account balance to a stranger. The respondent's conduct was negligent and warranted his summary dismissal. He argued that the learned Judge never addressed the issue of the respondent's duty of confidentiality to both the appellant and the client. Mr. Kinuthia also faulted the learned Judge for awarding damages which according to him were not proved and were excessively high. He urged this Court to allow the appeal.
10. Mr. Mwakireti, learned counsel for the respondent, in opposing the appeal relied on the respondent's written submissions that were filed at the trial court. He maintained that the trial court's findings were supported by evidence. According to Mr. Mwakireti, the respondent proved that his services were terminated unfairly; the appellant flouted its own disciplinary process. Mr. Mwakireti argued that the disciplinary process was discriminatory because firstly, no action was taken against Elsie who had passed the said instructions to the respondent. Secondly, Patrick was just given a final warning yet it was his duty to verify the transfer instructions.
11. In a brief reply, Mr. Kinuthia pointed out that the trial court found that the disciplinary procedure was fair.
12. We have anxiously considered the record, the grounds of appeal, submissions by counsel and the law. It is imperative at this juncture to consider the parameters of our jurisdiction pertaining to this appeal. **Section 17** of the **Industrial Court Act** provides as follows:-

“17(1) Appeals from this court (Industrial court) shall lie to the Court of Appeal against any judgment, award, order or decree issued by the court in accordance with Article 164(3) of the Constitution.

(2) An appeal from the judgment, award, decision or order of the court shall lie only on matters of law.”

Hence we are restricted to dealing with only matters of law. Therefore, we are bound by the findings of fact by the trial court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion; that the decision is bad in law. Having expressed ourselves as herein above we also bear in mind this Court's decision in ***Bashir Haji Abdullahi –vs- Adan Mohammed Nooru & 3 others- Civil Appeal 300 of 2013*** wherein it was held,

“There is no denying from the cases we have referred to, that in not a few cases the determination of whether a particular complaint on appeal is a question of law or fact is not always a very straight forward one, not least because the determination of whether a lower court drew the correct legal conclusions inevitably entails an examination of the factual basis of the decision.”

13. The respondent's claim was founded on unfair/wrongful termination of his services by the

appellant. In considering whether termination was fair or unfair, the court ought to examine whether the reason (s) for termination was valid and whether the procedure for dismissal was fair. Therefore, in such a case as the one before us the court considers both the procedural and substantive justice. In *Kenya Electrical Traders & Allied Workers Union –vs- Kenya Power & Lighting Co. Ltd- Industrial Cause No. 782 of 2011*, Rika, J. correctly stated as follows:-

“Section 43 and 45 of the Employment Act 2007 requires the Employer to establish valid and fair reason or reasons for termination. Section 41 and 45 requires the decision is made following a fair procedure.”

14. On procedural justice, we cannot help but note from the record, that the respondent was informed of the allegations leveled against him and he was given an opportunity to be heard on the allegations in accordance with **Section 41** of the **Employment Act**. Taking into account the foregoing we concur with the learned trial Judge’s finding that the procedure which was applied by the appellant was fair.
15. The trial court also found that the termination of the respondent was not founded on valid and justifiable reasons hence it was unlawful. **Section 47(5)** of the **Employment Act** provides:-

“47(5). For any complaint of unfair termination of employment or wrongful dismissal, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

In this case, the reasons for the respondent’s termination by the appellant were the irregular and unprocedural transactions /dealings in respect of the appellant’s client’s USD account number 0240031890601. Taking into account the evidence that was tendered and the termination letter dated 21st October, 2011 the transactions that were in issue included both the disclosure of the client’s account balance by the respondent and the transfer of USD 35,000 to an unauthorized person. We note that the trial court only considered the issue of the transfer of USD 35,000 from the client’s account and failed to consider the unauthorized disclosure of the account balance.

16. In determining whether the reasons for the termination by the appellant were valid, it is imperative to consider the terms of the respondent’s contract of employment and his duties/responsibilities as an Account Analyst in the appellant bank. Some of the respondent’s key responsibilities included performing a liaison role between the customer and all other internal support divisions of the Bank; monitoring of daily excess and authority sought requests to ensure that client facilities are managed within the parameters set by credit. The respondent testified that he also dealt with customers inquiries within commercial banking. On cross examination, the respondent admitted that Elsie forwarded the email requesting for the account balance to him because he was handling the said account and it was his responsibility to respond to such queries.
17. Therefore, what was the respondent’s responsibility in respect of the said account balance request? We take judicial notice that the repute of any banking institution largely depends on the observance of confidentiality in respect of its customers’ accounts and dealings. In *Standard Chartered Bank Kenya Ltd. –vs- Intercom Services Ltd. & 4 others – Civil Appeal No. 37 of 2003*, Onyango Otieno, J.A expressed himself as follows:-

“The banks whether collecting banks or paying banks, have a duty to ensure that customers’ account and matters relating to it are kept secret or are made confidential. There is no doubt about that for it is on that understanding that anybody either as individual or as a corporate body would ever think of putting his money in a bank. Further, if the same confidentiality was not assured, many crimes would be committed as a consequence of knowing what one has in his or its account, and further, commercial transactions would not flourish. In the case of Tournier –vs- National Provincial & Union Bank of England Ltd. (1923) ALL ER 550, Banker L.J. sated as follows:-

“The case of the banker and his customer appears to me to be one in which the confidential

relationship between the parties is very marked. The credit of the customer depends largely upon the strict observance of that confidence.”

18. Based on the foregoing it was the respondent's responsibility to maintain confidentiality in respect of the appellant's client's account. We find that the respondent had a responsibility not to disclose the client's account details to third parties. The said duty of confidentiality is further fortified by the terms of the respondent's employment. Clause 11.1 on secrecy and confidentiality in the respondent's contract of employment provided:-

“ You shall not under any circumstances during your employment or after its determination without the prior consent of the Bank in writing divulge or disclose to any person or persons whatsoever any of the secrets, concerns, affairs, figures or accounts of the Bank.”

The respondent in his letter of acceptance of employment dated 4th November, 2009 swore as follows:-

“I further confirm that I will treat all the information that I learn in the course of my employment pertaining to the Bank and its clients with the utmost confidentiality and will not disclose the information to any third party during my employment with the Bank or thereafter.”

19. Did the respondent observe the duty of confidentiality in disclosing the client's account balance to a third party? It is not in dispute that the respondent forwarded the account balance without verifying if the said email address belonged to the appellant's client. In his evidence, the respondent did admit that the email which was used in requesting the account balance was a yahoo email which had never been used by the client before. This fact alone ought to have raised the respondent's suspicion as to the origin of the said email. It was also the appellant's uncontroverted evidence that the said client had never given an email identity authorizing the appellant to act on instructions via email. Based on the foregoing, the respondent ought to have done due diligence by confirming the source of the said email before disclosing the account balance. We are at a loss as to how the fact that the email was forwarded to the respondent by his colleague, Elsie, absolved the respondent from doing due diligence. Why do we say so? This is because firstly, as observed herein above, it was the respondent's duty to answer account balance queries and secondly, Elsie forwarded the said email to the respondent in accordance with the appellant's procedure. We find that the respondent ought to have done a call back confirmation as per the appellant's procedure to confirm the authenticity of the said instruction before disclosing the account balance. We are of the view that the respondent disclosed the appellant's client's account balance to third parties contrary to the terms of his employment. In our view the foregoing by itself amounted to gross misconduct on the part of the respondent as provided under **Section 44(4)** of the **Employment Act** and the contract of employment.

20. On the issue of the transfer of USD 35,000 the trial court found that the same was beyond the scope of the respondent's employment and was the responsibility of other departments and officers of the appellant. We have perused the appellant's outward processing procedure and note that the processing of the transfer passed through various departments and personnel who were required to verify the authenticity of the instructions. In our view the foregoing did not absolve the respondent from exercising to some extent due diligence in respect of the said instructions. Vide an email dated 16th September, 2011 the respondent gave a detailed explanation of what transpired to Mr. Bob Ombewa, the investigating officer. He stated that the transfer instructions were sent to him via email and **he endorsed the said instructions for processing**; he then forwarded the same to Patrick for processing.

21. It was the appellant's uncontroverted evidence that transfer instructions ought to be accompanied by a cheque of equivalent amount drawn by the client. In this case the respondent admitted that **he endorsed the instructions for processing without an accompanying cheque**. We are of the view that the endorsement of the instructions by the respondent was not a mechanical procedure or mere acknowledgment of receipt of the instructions but entailed some kind of due diligence on his part. If the respondent had exercised due diligence he would not have forwarded the transfer instructions for processing without confirming the origin of the instructions and without the

accompanying cheque .

22. We also cannot help but note that the respondent in his appeal against his dismissal admitted that he was not diligent in the above mentioned transactions. We are of the considered view that the reasons for the respondent's dismissal were valid and fair; they warranted summary dismissal of the respondent. *Halsbury's Laws of England, 4th Edition, Vol. 16(1B) para 642* provides:-

"...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted . If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair."

Consequently, we find that the trial court's finding that the termination of the respondent was unfair was not supported by the evidence on record.

23. Lastly, on the issue of the award of Kshs. 617,926.50/= as loss incurred by the respondent as a result of change of the interest rate on mortgage the respondent had taken with the appellant, we find the same amounted to a claim of special damages. It is trite that special damages ought to be specifically pleaded and proved. We are of the view that the said special damages were not proved by the respondent and therefore the trial court erred in granting the same. (See this Court's decision in *Coast Bus Service Ltd. -vs- Sisco Murunga Ndanyi & 3 others- Civil Appeal No. 192 of 1992*)

24. The upshot of the foregoing is that we find that the trial court misdirected itself in evaluating the evidence and arrived at the wrong conclusion. We therefore set aside the judgment dated 28th June, 2013 and dismiss the respondent's suit in the Industrial court. We allow the appeal and direct the appellant to issue the respondent with the certificate of service. We direct that each party bears his/its own costs.

Dated and delivered at Mombasa this 12th day of February, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

FATUMA SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR